Report on Proposals for a New Society Act

A Report prepared for the British Columbia Law Institute by the Members of the Society Act Reform Project Committee

BCLI Report No. 51 **July 2008**

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 strategic mission is to be a leader in law reform by carrying out:

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

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

Library and Archives Canada Cataloguing in Publication

British Columbia Law Institute. Society Act Reform Project Committee
Report on proposals for a new Society Act : a report prepared for the British Columbia Law Institute by the members of the Society Act Reform Project Committee.

(BCLI report no. 51)
"July 2008".
ISBN 978-1-894278-40-9

1. Nonprofit organizations—Law and legislation—British Columbia. 2. Associations, institutions, etc.—Law and legislation—British Columbia. 3. Incorporation—British Columbia. 4. British Columbia. Society Act I. British Columbia Law Institute II. Series

KEB302.B75 2008 346.711′06622 C2008-904146-1
KF1355.B75 2008

INTRODUCTORY NOTE

Report on Proposals for a New Society Act

Over the past generation, the not-for-profit sector has grown in size, scope, and sophistication. The growth of the sector has brought more and more people into contact with the *Society Act*, which is British Columbia's not-for-profit incorporation statute.

Unfortunately, the *Society Act* has not kept pace with this development. Much of the Act is based on the 1973 *Company Act*, which was recently repealed and replaced with a new statute governing for-profit companies. Large parts of the *Society Act* even pre-date the wave of corporate law reforms of the early 1970s. As a result, an unusual situation has developed in British Columbia: societies are governed by a number of out of date and onerous rules that were originally developed for for-profit companies, but that no longer apply to the companies for which they were designed.

This report provides a blueprint for a modern, streamlined incorporation statute. It modernizes the vast majority of the procedural and administrative rules that apply to societies and harmonizes them with the rules in the new *Business Corporations Act*. It also fine-tunes a number of provisions that deal with the core elements of not-for-profit law.

This report is the culmination of a project that has been carried out for the British Columbia Law Institute by a volunteer project committee. The BCLI is grateful to the committee and fully supports the recommendations contained in this report.

Ronald A. Skolrood
Chair,
British Columbia Law Institute

July 2008

Society Act Reform Project Committee

The *Society Act* Reform Project Committee was formed in August 2006. This volunteer project committee has studied the major legal issues related to the Act, examined the leading models for reform, and made recommendations for a new *Society Act*. The members of the committee are:

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

Ken Burnett
(partner, Miller Thomson LLP)

Colleen Kelly
(executive director, Volunteer Vancouver)

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

Mike Mangan
(barrister & solicitor)

Kim Thorau
(principal, Perrin, Thorau & Associates)

Bob Kucheran
(student-at-law & ex-CEO, BC Pharmacy Association)

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

BRITISH COLUMBIA LAW INSTITUTE

SOCIETY ACT Reform Project BCLI

Supported by:

THE LAW FOUNDATION OF BRITISH COLUMBIA

Acknowledgments

The British Columbia Law Institute thanks the members of the *Society Act* Reform Project Committee, who are listed on the preceding page. The members of this volunteer committee freely gave of their time and expertise in a cooperative and constructive spirit. Their efforts contributed greatly to the success of this law reform project.

A special acknowledgement is owed to Margaret Mason, who served as committee chair. This role brought with it additional organizational and promotional duties, which Ms. Mason fulfilled admirably.

The *Society Act* Reform Project was made possible by a grant from the Law Foundation of British Columbia. The BCLI appreciates the support that the Law Foundation has shown for its work.

Law reform is a public process. This project benefited greatly from the individuals and organizations who took the time to respond to the consultation paper. Their thoughtful comments helped to shape this final report. A complete list of the respondents to the consultation paper is set out in Appendix A to the report.

A number of individuals and grassroots organizations with an interest in the not-for-profit sector publicized and re-distributed copies of the consultation paper upon its publication. The BCLI is grateful for these efforts to raise the profile of its work and to involve a large cross-section of the public in the law reform process.

The BCLI thanks the law firm Bull, Housser & Tupper LLP for hosting meetings of the committee.

The teamwork of the staff of the BCLI was instrumental in the successful completion of this project. Former executive director Arthur L. Close, Q.C., was involved in its conception and organization. Current executive director Jim Emmerton, senior staff lawyer Greg Blue, and national director (Canadian Centre for Elder Law) Laura Watts each attended committee meetings and contributed to the drafting of this report. Staff lawyer Kevin Zakreski served as project manager and principal drafter of this report and the consultation paper that preceded it. Finally, the following research lawyers, research assistants, and other staff members assisted with the research, writing, and administration for this project: Mike Barrenger, Christopher Bettencourt, Zachery Froese, Mike Fulton, Lisa Mackie, Andrew McIntosh, David Mount, Anya Paskovic, Marcus Patz, Danica Piche, Elizabeth Pinsent, Leah Sandhu, Brandi Stocks, Heather Tennenhouse, Samantha Weng, and Kirsten Wharton.

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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*. The project had two distinct phases. Over the first phase, the major legal issues relating to the *Society Act* and the leading models for reform were studied. This phase culminated in the publication of a consultation paper, which sought the views of the public on 106 tentative recommendations for reform of the *Society Act*. The second phase built on these tentative recommendations and on the responses to them that we received from the public. The culmination of this phase, and the project as a whole, is the publication of this report. 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 was carried out by a volunteer project committee. The committee was formed shortly after the commencement of the project. The committee 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)

Ken Burnett
(partner, Miller Thomson LLP)

Colleen Kelly
(executive director, Volunteer Vancouver)

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

Mike Mangan
(barrister & solicitor)

Kim Thorau
(principal, Perrin, Thorau & Associates)

Bob Kucheran
(student-at-law & ex-CEO, BC Pharmacy Association)

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

THE STRUCTURE OF THE REPORT

This report 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 report, contains the committee's recommendations for reform. These recommendations are embodied in draft legislation. This draft legisla-

tion is intended to be a comprehensive model of a new *Society Act*. Part Two also contains commentary on each of the provisions of the new *Society Act*. This commentary contains a brief statement of the policy of each provision, a short description of any changes the provision will make to the law, and a summary of how the provision is intended to operate in practice.

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 has enacted a new *Society Act* the size and scope of the legislation has grown 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*, 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.

DRAFT LEGISLATION

The draft of a new *Society Act* preserves and fine-tunes many of the core elements of not-for-profit law within a structure that is modelled on the *Business Corporations Act*. The draft Act contains 14 Parts. It effects major reforms in the following areas.

Incorporation and Naming

The new *Society Act* adopts the streamlined incorporation procedure of the *Business Corporations Act*, making electronic incorporation available to societies. Societies incorporated, converted, amalgamated, or continued into British Columbia under the new Act will have to adopt the word "society" as part of their names as a corporate descriptor. (Existing societies are exempted from this requirement.)

Constitution and Bylaws

Much of the substance of the current law relating to a society's constitution and bylaws is maintained. In terms of form, the new Act provides for a modified version of the notice of articles used by companies as the model for the society constitution. The new Act continues to require societies to file their bylaws with the Registrar of Companies, which will be maintained by the registrar as a public record.

Capacity and Powers

Any existing remnants of the old doctrine of *ultra vires* are abrogated. The new *Society Act* embraces 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* are revamped along the lines of the *Business Corporations Act*. The new *Society Act* contains a stringent procedure for access to a society's list of its members.

Finance

A number of restrictive, and out of date, rules governing how a society conducts its financial affairs have not been carried forward in the new *Society Act*. In particular, a society will no longer be required to obtain a special resolution in order to issue a debenture.

Directors and Officers

The new *Society Act* expands and clarifies the rules relating to directors. 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 are harmonized with similar rules in the *Business Corporations Act*. In addition, the new *Society Act* provides more clarity on the status of officers.

Duties, Liabilities, and Conflicts of Interest

The new *Society Act* contains a modern regime to cover the duties, liabilities, and conflicts of interest of directors and officers. As a result, this area sees a number of major changes to the skeletal and outdated rules that currently apply to societies. Among the provisions in the new *Society Act* are:

- comprehensive conflict of interest rules, modelled on those in the *Business Corporations Act*;
- indemnification provisions that no longer require an application to court for approval;
- limitation on liability when reasonably acting on reports prepared by officers and professionals, a dissent procedure, and relief from personal liability on a case-by-case basis by the court (a statutory immunity from personal liability for directors and officers was studied but rejected); and
- after a two-year transitional period, a prohibition on paid staff members serving on the society's board of directors.

Members

There are few changes regarding members. The most noteworthy is the lowering of the minimum number of members that a society must have to one.

Meetings of Members

The new *Society Act* fills in gaps that have developed in the exiting procedural rules regarding meetings of members. These rules contemplate the use of modern, electronic means of communication.

Members' Remedies

The two major current remedies for aggrieved members—investigation and oppression—are clarified and updated in the new Act. To these remedies the Act adds remedies that have become established across the for-profit and not-for-profit corporate sectors: derivative actions and compliance or restraining orders.

Society Alterations

The new *Society Act* contains modern provisions relating to amalgamations, conversions of cooperative associations into societies, continuation into and out of British Columbia, arrangements, and extraordinary disposals of a society's undertaking.

Liquidation, Dissolution, and Restoration

The new *Society Act* contains a comprehensive regime governing liquidation, dissolution, and restoration. This regime is largely modelled on existing provisions in the *Business Corporations Act*. The new Act does not contain any major departure from the current rules governing the disposal of any remaining assets on a society's dissolution.

Miscellaneous and Transitional

The new *Society Act* does not carry forward the reporting society designation.

Transition to the new Act should be dealt with in a manner similar to the transition from the *Company Act* to the *Business Corporations Act*. Societies should be given a two-year period to make the necessary transitional changes. During this period, they should be given support and assistance from the provincial government.

CONCLUSION

The committee has concluded that the time has come to enact a new *Society Act*, one which better meets the needs of British Columbia not-for-profit organizations and which advances the goal of harmonizing corporate legislation in this province.

ABBREVIATIONS

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*, 2 vols. (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)
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 report 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. Statistics Canada, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* by Michael H. Hall *et al.* (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 report 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 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.

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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 report 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 report refers to as "companies." Societies and companies are species of the genus "corporation." This report 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 Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) and the Mexican Center of Uniform Law. *See*, online: NCCUSL Web <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=255>.

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 was to produce a new *Society Act*, one which will be more in tune with the realities of the not-for-profit sector in contemporary British Columbia.

The project was carried out by a volunteer project committee. Margaret Mason was 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 were 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 editor of the legal textbook *Directors' Liability in Canada*.[17] Mr. Mangan also

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).

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

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, was the project manager.

D. The Consultation Paper

This report was preceded by a consultation paper, which set out in detail the committee's tentative recommendations for reform of the *Society Act*. The consultation paper was issued in August 2007 and it allowed for a period of public comment of just over six months. The consultation paper received wide distribution and attracted a considerable number of responses. (A list of the respondents to the consultation paper is set out in Appendix A to this report.)

The vast majority of the consultation paper's tentative recommendations attracted the respondents' support by a wide margin. A few tentative recommendations provoked an even, or nearly even, split among respondents. In other cases, respondents provided careful analysis of a particular point, which led to some fine-tuning in this report.

Part Two of this report is built on the tentative recommendations from the consultation paper and the responses that we received to those tentative recommendations.

E. The Structure of this Report

This report contains two Parts. The committee's 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 88 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]

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-

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

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].

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 environment. 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

24. *See* British Columbia, Legislative Assembly, "Report of the Deputy Minister of Labour for the Year 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 Cornerstones of Community*, *supra* note 1 at 12.

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]

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.

26. 1920 Act, *supra* note 23, s. 3 (1).
27. 1920 Act, *ibid*., s. 5.
28. 1920 Act, *ibid*., s. 5.
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].

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 unalterable.[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]

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

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.

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]

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,[51] 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.[52] In 1999, several procedural changes, particularly in connection with meetings, were made.[53] And in 2004, a few of the Act's reporting requirements and incorporation procedures were amended.[54]

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

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

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

51. In fact, this figure considerably understates the actual length of the legislation that applies to societies. The *Society Act* incorporates by reference 71 sections from the *Business Corporations Act*, *infra* note 55, and the CA, *supra* note 44. Further, a number of provisions in the *Business Corporations Act* apply to corporations generally, which means that they apply to societies.

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

53. *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.

54. *Society Amendment Act, 2004*, S.B.C. 2004, c. 27; *Finance Statutes Amendment Act, 2004*, S.B.C.

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 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*.[55] 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.[56]

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, removal 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.

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

56. *See*, *e.g.*, John O.E. Lundell *et al*., *British Columbia Business Corporations Act Transition Guide* (Vancouver: The Continuing Legal Education Society of British Columbia, 2003) at § 1.1 ("The *Busi-*

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.[57]

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.[58] 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

ness Corporations Act, which has been 15 years in development, will remedy many of the shortcomings and ambiguities of the *Company Act*. . . .").

57. *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*.").

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

debts of a society on the directors of a society if that society has fewer than three members for more than six months.[59] 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.[60] 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 example, 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 report, which contains the committee's recommendations for reform, cast in the form of a new *Society Act*. This detailed approach was taken in this report 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.[61] This neglect was the result of an attitude detected by the

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

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

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

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."[62]

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 and voluntary organizations report a combined volunteer complement of over 19 million that contributes more than 2 billion hours of volunteer time, or the equivalent of more than 1 million full-time jobs."[63] In 2003, the sector's revenues were $112 billion.[64] Further, the range of activities covered by societies is incredibly diverse, surpassing even the range of companies.[65] 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.[66] By summer 2006, when the British Columbia Law Institute began the *Society Act* Reform Project, that number had grown to 24 421 active societies.[67]

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 or governments.

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

62. 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].

63. *Cornerstones of Community*, *supra* note 1 at 31 [footnotes omitted].

64. *Cornerstones of Community*, *ibid*. at 54.

65. *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").

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

67. 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: The Continuing Legal Education Society of British Columbia, 1999) 1.1 at 1.1.01 (citing a figure of "about 20 000 societies" active in British Columbia).

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.[68]

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:[69]

> 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.[70] 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*,[71] is the most advanced not-for-profit legislation currently in force in Canada. A recent federal report[72] on the not-for-profit sector resulted in a Bill be-

68. *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").

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

70. *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.

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

72. 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).

ing introduced in the last Parliament.[73] 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,[74] 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 the *Canada Business Corporations Act*.[75] In fact, there are reform efforts currently underway in Québec[76] and Ontario.[77]

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[78] and the personal liability of directors and officers.[79] Outside British Columbia, the Alberta Law Reform Insti-

73. 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].

74. 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. This speculation with the introduction of Bill C-62, *An Act respecting not-for-profit corporations and certain other corporations*, 2d Sess., 39th Parl., 2008 (1st reading 13 June 2008). This Bill was introduced just as this report was going to press, which means that the committee was unable to consider it as part of its deliberations.

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

76. *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.

77. *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>; 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. 2)* (August 2007), online: Ministry of Government Services <http://www.gov.on.ca/mgs/graphics/166168.pdf>; 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. 3)* (February 2008), online: Ministry of Government Services <http://www.gov.on.ca/mgs/graphics/198248.pdf>.

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

79. 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].

tute has produced a noteworthy report,[80] which contained draft legislation,[81] and the Ontario Law Reform Commission has also made recommendations for reform in this area of the law.[82] Even further afield, the American Bar Association's Model Nonprofit Corporation Act[83] 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.[84])

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.[85] 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.

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80. ALRI Report, *supra* note 62.

81. 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.

82. 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].

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

84. 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]. As this report was being prepared word came that a new version of the third edition of the Model Nonprofit Corporation Act, which differed significantly from the US 2006 Exposure Draft, had been prepared. Time did not permit the committee to consider this version of the Model Nonprofit Corporation Act.

85. *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>.

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.

IV. Highlights of the Draft Legislation

A. Introduction

The draft legislation that follows in Part Two is intended to be a complete blueprint of a new *Society Act*. As such, it is comprehensive and detailed. Specific issues arising in connection with the provisions of the draft legislation are discussed in the commentary to the provisions. In many cases, this commentary also contains a discussion of the policy goals of the provision and any changes from the position under the current law.

The purpose of the discussion that follows is to provide a brief introduction to the draft legislation in Part Two. The focus of these highlights is on broad themes and reforms. In addition, in a few places a tentative recommendation made in the consultation paper has been refined or has not been carried forward in the report. These instances are noted below.

B. General Principles

The tentative recommendations in the consultation paper opened with a short set of general principles, which would guide the approach to the draft legislation. There was nearly unanimous support from respondents for the proposal to repeal the current *Society Act*. A similar level of support was garnered for the tentative recommendation that a distinct not-for-profit corporate statute is still needed. A number of respondents added a refinement to this proposal, noting that the current approach of the *Society Act*, which relies heavily on incorporating sections by reference from the BCA and the CA, is frustrating for them. In drafting a new *Society Act*, the committee has included all the relevant corporate provisions in one statute and has not relied on provisions incorporated by reference.

There was solid support for harmonizing the *Society Act* with BCA, though a number of respondents did raise objections to this proposal. Some preferred another statute as a model, such as the *Canada Business Corporations Act*[86] or the *Cooperative Association Act*;[87] others wanted a unique approach to be found. There are merits to these ideas, but the committee decided that harmonization with the BCA provides the best approach to

86. *Supra* note 75.

87. S.B.C. 1999, c. 28.

ensuring reform in this area. One of the benefits of harmonization is that it confers some predictability about how these proposed reforms will play out in practice. The BCA has been in force for over four years. The operational knowledge that has been built up in connection with the BCA, and the case law that is beginning to develop under it, will be available to societies. This knowledge should help to smooth the transition to the new Act. As will be seen, harmonization has been pursued with sensitivity to the special features and principles of not-for-profit law.

A few respondents raised the concern that the BCA is too lengthy and complex a model for the *Society Act*. The gist of this concern is that the BCA 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 enabling 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.

There was strong support for simply refining, and not radically overhauling, the core elements of not-for-profit law. There was also strong support for limiting the amount of regulatory requirements in the new *Society Act*.

C. Incorporation, Naming, and Offices

The new *Society Act* adopts the streamlined incorporation procedure of the BCA. This should facilitate electronic incorporation and greatly increase the ease of forming a society in British Columbia. The draft legislation continues to require filing of society bylaws with the Registrar of Companies and continues to require the registrar to make those bylaws available to the public.

Societies will be required to comply with rules on the display of their legal names, with the possibility of personal liability for directors and officers who knowingly cause a society to breach this rule. The corporate identifier "society" will have to be a part of the name of new societies. (Existing society names will not be subject to this requirement.) This requirement is a refinement from the proposal in the consultation paper, which set out a wider range of corporate identifiers. There were concerns about the practical difficulties of implementing this proposal with a wide range of corporate identifiers.

A society under the new Act will have all the powers of a natural person of full capacity. No traces of the cumbersome old legal doctrine of *ultra vires* are carried forward in the new Act.

The draft legislation contains specific and detailed provisions regarding registered and records offices for societies.

D. Directors, Officers, and Members

The draft legislation contains comprehensive and modern provisions on directors' and officers' conflicts of interest, indemnification, and payment of expenses (including advancing defence costs). The new Act also contains provisions on meetings of members that take into account advances in communications technology.

The only tentative recommendations that garnered significant opposition from respondents to the consultation paper were several made in relation to directors and members. Approximately half of the respondents were not in favour of proposals to set the minimum number of directors and members of a society at one. These proposals have remained in the draft legislation, nevertheless, as the committee remains unconvinced of the need for a higher number to prevent harm and to protect the public.

There was even more opposition to a tentative recommendation not to carry forward section 7 (5) of the current *Society Act*, which enables the participation of minors in societies. The draft legislation does contain part of this subsection, confirming that a minor may be member of a society (subject to the bylaws). But the qualifications for directors set the minimum age at 18 years. This rule harmonizes the *Society Act* with most corporate legislation in Canada. In view of the significant legal and financial obligations of directors, it would not be desirable to permit younger individuals to serve on the board.

Paid staff members will not be able to serve on the society's board of directors after the society transitions to the new Act (within the envisioned two-year transitional period).

E. Finance and Audits

The requirement for a society to obtain a special resolution to authorize a debenture has not been carried forward in the new Act. The financial and audit rules are, in the main, harmonized with equivalent rules in the BCA. Societies are not required to have an audit and, in a modification from a proposal in the consultation paper, societies that do engage an auditor are not required to have an audit committee.

Traditional society rules, such as the restrictions on share capital and on distributions to members during the existence of the society have been retained, with some fine-tuning of expression.

F. Members' Remedies

Despite some reservations among respondents to the consultation paper, the new Act has a full complement of members' remedies. The committee believes that the draft legislation strikes an appropriate balance between giving aggrieved members recourse and protecting societies from frivolous or vexatious claims.

As proposed in the consultation paper, the draft legislation does not contain a dissent remedy for members. This remedy is geared almost wholly toward financial issues and is out of step with the not-for-profit character of societies.

G. Fundamental Changes

The draft legislation contains considerably expanded procedures for engaging in fundamental changes to a society, such as an amalgamation or a transfer of incorporation to another jurisdiction. These procedures are largely modelled on their equivalents in the BCA. Although relatively few societies engage in fundamental changes, it is important to have the appropriate statutory machinery in place. Without a comprehensive and legally certain statutory framework, the work and expense that go into structuring fundamental changes can be lost.

One refinement from the consultation paper in this area concerns the filing of special resolutions with the Registrar of Companies. The draft legislation has limited this obligation to filing special resolutions that amend the society bylaws.

H. Liquidation, Dissolution, and Restoration

Respondents to the consultation paper were overwhelmingly in favour of abandoning the outdated CA provisions relating to liquidation, dissolution, and restoration and replacing them with a new model for societies. Given the largely procedural nature of this area of the law, it is sensible to harmonize the provisions of the *Society Act* with those of the BCA.

There has been a refinement to the rules regarding the distribution of any remaining society assets on a liquidation and dissolution of the society. The consultation paper proposed carrying forward the current rules in section 73 of the *Society Act*. The draft legislation contains two reforms: (1) instead of distinguishing between societies with *a* charitable purpose and those without a charitable purpose, the new Act distinguishes between societies with *exclusively* charitable purposes and those without *exclusively* charitable purposes; and (2) the statutory restatement that attempts to define what is a charitable purpose has been repealed. These changes bring the *Society Act* closer into line with the *Income Tax Act*.

I. Transitional, Reporting Societies, and Miscellaneous Issues

The draft legislation adopts the two-year transitional period that was used for transition from the CA to the BCA. Implementing this transition will pose some challenges, but these challenges can be met with an appropriate information and education campaign by the provincial government. A similar transition, but on a much larger scale, was completed for for-profit companies between 2004 and 2006. Given that many British Columbia companies are essentially incorporated small businesses with resources similar to those of a typical society, there is reason to believe that this transition can be successfully managed in the not-for-profit sector as well.

The new legislation does not carry forward the reporting society concept. Similar to the BCA, it does have enabling sections allowing the provincial cabinet to prescribe "Statutory Reporting Society Provisions" by regulation. The content of these provisions should be determined after consultation with currently existing reporting societies.

The draft legislation also does not contain occupational titles protection. This topic merits its own statute, which should be crafted by those who have expertise in this area, after consultation with the affected parties.

The new *Society Act* will require a number of supporting enactments for its full implementation. These supporting enactments include regulations, standard bylaws for adoption by societies, and forms. The creation of such enactments is outside the scope of this project.

V. CONCLUSION

The time has come to reform the *Society Act*. Both the committee and the BCLI recommend enactment of the draft legislation in Part Two of this report as the new *Society Act*.

PART TWO—DRAFT LEGISLATION

SOCIETY ACT

Contents

Section

HER MAJESTY, by and with the consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1 – INTERPRETATION AND APPLICATION

Division 1 – Interpretation

Definitions

1 (1) In this Act:

"activities" includes

(a) any conduct of the society to further its purposes, and

(b) any business carried on by the society;

"affairs" means the relationships between a society, its affiliates and the members, directors and officers of those corporations but does not include the activities carried on by those corporations;

"affidavit", when used in relation to a person, means,

(a) if the person is an individual, an affidavit or statutory declaration of the individual,

(b) if the person is a corporation, an affidavit or statutory declaration of a director or officer of the corporation,

(c) if the person is a partnership, an affidavit or statutory declaration of a partner of the partnership, or

(d) if the person is a limited liability company, an affidavit or statutory declaration of

(i) a manager of the limited liability company, or

(ii) if the limited liability company does not have a manager, any member of the limited liability company with signing authority for it;

"affiliate" means a corporation that is affiliated with another corporation within the meaning of section 2 *[corporate relationships]*;

"agent or employee of the government" includes an independent contractor employed by the government;

"alter" includes create, add to, vary and delete;

"amalgamated society" means the society resulting from an amalgamation of corporations contemplated by section 189 *[amalgamation permitted]*;

"annual reference date" means, for an annual reference period applicable to a society,

(a) the date in that annual reference period on which the society holds its annual general meeting, or,

(b) if the society does not hold an annual general meeting in that annual reference period,

(i) the date, in that annual reference period, selected by the members under section 114 (3) *[annual general meetings]*, or

(ii) if no such date is selected, the last day of that annual reference period,

and includes, for a pre-existing society that has neither held an annual general meeting under this Act nor passed a resolution under section 114 (2) *[annual general meetings]* that complies with section 114 (3) *[annual general meetings]*, the first annual reference date applicable to that society under section 115 *[first annual reference date for pre-existing societies]*;

"annual reference period" means, in relation to a society, the period that

(a) begins on

(i) the date of the recognition of the society, or

(ii) if the society has had one or more annual reference dates, the day following the date of the most recent of those annual reference dates, and

(b) ends on the date by which the society is required, under section 114 (1) *[annual general meetings]* without reference to section 114 (2) to (5) *[annual general meetings]*, to hold the annual general meeting that is to follow the date referred to in paragraph (a) of this definition;

"appoint", in relation to a director of a society, means appoint within the meaning of subsection (3) of this section;

"attorney", except in the first usage of the term in each of paragraphs (a) and (b) of section 338 (1) *[attorney for pre-existing extraprovincial society]*, means, in relation to an extraprovincial society, a person who is an attorney for the extraprovincial society within the meaning of Division 2 of Part 11;

"auditor" includes

(a) a partnership of auditors carrying on the business of an auditor, and

(b) a corporation, or a partnership of corporations, carrying on the business of an auditor;

"beneficially own" includes own through any trustee, personal or other legal representative, agent or other intermediary;

"bylaws" means the record described in section 11 *[bylaws]*, and includes

(a) the bylaws of a pre-existing society,

(b) the bylaws of a society incorporated

(i) under a former *Societies Act*, if that Act did not provide for bylaws, or

(ii) by a special or private Act, and

(c) any other record that under this Act constitutes the bylaws of a society;

"charter", in relation to a corporation, includes

(a) the corporation's pre-existing constitution, constitution, articles, notice of articles or memorandum, regulations, bylaws or agreement or deed of settlement, and

(b) if the corporation was incorporated, continued or converted by or under, or if the corporation resulted from an amalgamation under, an Act, statute, ordinance, letters patent, certificate, declaration or other equivalent instrument or provision of law, that record;

"class meeting" means a meeting of members who belong to a particular class of membership;

"completing party" means

(a) an individual who, in respect of a record that may be submitted to the registrar for filing on a paper form, inserts in the applicable spaces on the paper form information needed to complete the form,

(b) an individual who, in respect of a record that may be submitted to the registrar for filing by any other prescribed method, communicates to the registrar by that prescribed method information needed to complete the record, or

(c) an individual who, in respect of a record that may be submitted to the registrar for filing by an agent or employee of the government, gives to the agent or employee of the government, information needed to complete the record

but does not include an individual who, in that individual's capacity as an agent or employee of the government, inserts or communicates information needed to complete the record;

"consent resolution" means,

(a) in the case of a resolution of members that may be passed as an ordinary resolution, a resolution referred to in paragraph (b) of the definition of "ordinary resolution",

(b) in the case of any other resolution of members, a unanimous resolution, or

(c) in the case of a resolution of directors or a committee of directors, a resolution passed in accordance with section 72 (3) (a) *[proceedings of directors]*;

"corporate register" means the information filed with or recorded by the registrar under this Act or a former *Societies Act*, and includes any corrections made to that information by the registrar under this Act or a former *Societies Act*, but does not include the pre-existing constitution and bylaws for a pre-existing society that has complied with section 271 (1) (a) *[transition – restored pre-existing societies]* or 331 (1) (a) *[transition – pre-existing societies]*;

"corporation" means a company, a body corporate, a body politic and corporate, an incorporated association or a society, however and wherever incorporated, but does not include a municipality or a corporation sole;

"court", except in sections 56 (2) (b) *[persons disqualified as directors]*, 194 (3) (b) (iii) *[amalgamations without court approval]*, and 325 (2) *[remedies preserved]*, means the Supreme Court and, in sections 56 (2) (b) *[persons disqualified as directors]*, 194 (3) (b) (iii) *[amalgamations without court approval]*, and 325 (2) *[remedies preserved]*, includes the Supreme Court;

"debenture" includes 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 in 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 unsecured promissory notes maturing within one year after the date of issue;

"deliver" means physically deliver;

"delivery address" means, for an office, the location of that office identified by an address that describes a unique and identifiable location that

(a) is accessible to the public during statutory business hours for the delivery of records, and

(b) except in the case of the head office of an extraprovincial society, is in British Columbia,

but does not include a post office box;

"director" means,

(a) in relation to a society, an individual who is a member of the board of directors of the society as a result of having been elected or appointed to that position, or

(b) in relation to a corporation other than a society, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

"exceptional resolution" means

(a) a resolution passed at a general meeting under the following circumstances:

(i) notice of the meeting specifying the intention to propose the resolution as an exceptional resolution is sent to all members having the right to vote at general meetings at least the prescribed number of days before the meeting;

(ii) the bylaws provide that, of the votes cast on the resolution by members having the right to vote at general meetings, a specified majority must be cast in favour of the resolution before it can pass as an exceptional resolution;

(iii) the majority of votes specified by the members under subparagraph (ii) is greater than a special majority;

(iv) not less than the majority of votes specified by the bylaws under subparagraph (ii) is cast in favour of the resolution by members having the right to vote at general meetings, or

(b) a resolution passed by being consented to in writing by all of the members having the right to vote at general meetings;

"executive director" means the executive director appointed under section 8 of the *Securities Act*;

"extraprovincial society" means a foreign corporation, registered under section 278 *[registration as an extraprovincial society]* as an extraprovincial society or under section 280 *[amalgamation of extraprovincial society]* as an amalgamated extraprovincial society, and includes a pre-existing extraprovincial society;

"federal corporation" means a corporation to which both of the following apply:

(a) the most recent of the following was effected by or under an Act of Canada:

(i) the incorporation of the corporation;

(ii) a continuation of the corporation or any other transfer by a similar process into the federal jurisdiction;

(iii) an amalgamation or similar process from which the corporation resulted;

(b) the corporation has not, since that incorporation, continuation or amalgamation or similar process, been discontinued by or under an Act of Canada;

"filed", in respect of a record filed with the registrar, means filed in accordance with section 303 (1) *[filing of records]*;

"financial statement" includes any notes to it;

"first director" means an individual designated as a director of a society on the constitution that applies to the society when it is recognized under this Act;

"foreign corporation" means a corporation that

(a) is not a society,

(b) has not issued shares,

(c) is not required under the *Cooperative Association Act* to be registered under that Act, and

(d) was

(i) incorporated otherwise than by or under an Act,

(ii) continued under section 211 *[application for continuation out of British Columbia]* or otherwise transferred by a similar process into a jurisdiction other than British Columbia, or

(iii) the result of an amalgamation under Division 4 of Part 9 or a similar process, or of an amalgamation or similar process in a jurisdiction other than British Columbia,

and includes an extraprovincial corporation within the meaning of the *Financial Institutions Act*;

"foreign corporation's jurisdiction" means, in respect of a foreign corporation,

(a) the jurisdiction in which the corporation was incorporated,

(b) if the corporation resulted from an amalgamation or similar process, the jurisdiction in which the most recent amalgamation or similar process occurred, or

(c) if the corporation has, since the later of its incorporation and any amalgamation or similar process from which the corporation resulted, been continued or otherwise transferred by a process similar to continuation, the jurisdiction into which the corporation was most recently continued or transferred;

"former *Societies Act*" means

(a) the *Societies Act*, S.B.C. 1920, c. 83, including the *Societies Act*, R.S.B.C. 1924, c. 236 and the *Societies Act*, R.S.B.C. 1936, c. 265,

(b) the *Societies Act*, S.B.C. 1947, c. 82, including the *Societies Act*, R.S.B.C. 1948, c. 311 and the *Societies Act*, R.S.B.C. 1960, c. 362, or

(c) the *Societies Act*, S.B.C. 1977, c. 80, including the *Society Act*, R.S.B.C. 1979, c. 390 and the *Society Act*, 1996;

"furnish", in relation to records that must or may be furnished by the registrar, means furnish in accordance with section 6 *[furnishing of records by registrar]*;

"general meeting" means a general meeting of members;

"head office" includes, in the case of a federal corporation, the federal corporation's registered office;

"holding corporation" means the first of the corporations referred to in section 2 (4) *[corporate relationships]*;

"incorporation agreement" means an agreement referred to in section 8 *[formation of society]*;

"incorporator" means each person who, before an incorporation application is submitted to the registrar for filing, signs the incorporation agreement respecting the society under section 8 *[formation of society]*;

"insolvent", except in section 215 *[application of this Part]*, means, in relation to a society, unable to pay the society's debts as they become due in the ordinary course of its activities;

"inspect", if used in relation to a record, means examine and take extracts from that record;

"legal proceeding" includes a civil, criminal, quasi-criminal, administrative or regulatory action or proceeding;

"mail" means mail in accordance with section 4 (1) *[mailing of records]*;

"mailing address" includes the correct postal code or equivalent, if any;

"meeting of members" includes a general meeting, a class meeting and a meeting contemplated by section 191 (6) (a) (ii) *[member adoption of amalgamation agreements]* or 201 (4) (a) (ii) *[amalgamation into foreign jurisdictions]*;

"member" means a person whose name is entered in a register of members of a society as a member of the society or, until such an entry is made for the society,

(a) in the case of a society incorporated before the coming into force of this Act, an applicant for incorporation of the society,

(b) in the case of a society incorporated under this Act, an incorporator, or

(c) in the case of a society that has been recognized within the meaning of section 3 (1) (b) or (d) *[when a society is recognized]*, a person who, immediately before the corporation was recognized as a society, was a member in accordance with the bylaws;

"office", when referring to premises, means premises for which a unique mailing address or delivery address exists;

"ordinary resolution" means a resolution

(a) passed at a general meeting by a simple majority of the votes cast by members having the right to vote at general meetings, or

(b) passed, after being submitted to all of the members having the right to vote at general meetings, by being consented to in writing by members having the right to vote at general meetings who, in the aggregate, have at least a special majority of the votes entitled to be cast on the resolution;

"person who maintains the records office for the society" includes a society that maintains its own records office;

"pre-existing constitution" means, in relation to a pre-existing society, the record that constituted the society's constitution under the *Society Act*, 1996;

"pre-existing society" means a society that was recognized as a society under a former *Societies Act*;

"pre-existing extraprovincial society" means a foreign corporation, registered as an extraprovincial society, that was licensed or registered as an extraprovincial society under a former *Societies Act*;

"pre-existing reporting society" means a corporation that was, immediately before the coming into force of this Act, a reporting society within the meaning of the *Society Act*, 1996;

"proxy" means a record by which a member appoints a person as the nominee of the member to attend and act for and on behalf of the member at a meeting of members;

"publish" means, in relation to a record that is a society's financial statements or an auditor's report on those financial statements,

(a) place the record before the members at an annual general meeting and deposit the record in the society's records office, or

(b) if the society does not hold an annual general meeting within the period required by section 114 (1) *[annual general meetings]*, deposit the record in the society's records office on or before the annual reference date that relates to that annual general meeting;

"qualifying debentureholder" means a person who holds a debenture and who was the holder of that debenture immediately before the coming into force of this Act;

"recognized", in respect of a society, means recognized under section 3 *[when a society is recognized]*;

"registrar" means the person appointed as the Registrar of Companies under the *Business Corporations Act*;

"register of members" means the register maintained under section 128 (1) *[register of members]*;

"Schedule B" means Schedule B to the *Society Act*, 1996;

"Securities Commission" means the British Columbia Securities Commission continued under section 4 of the *Securities Act*;

"security interest" means an interest in or a charge on property, rights or interests of a corporation, to secure payment of a debt or performance of an obligation;

"send" means send in accordance with section 5 *[sending of records]*;

"senior officer" means, in relation to a corporation,

(a) the chair and any vice chair of the board of directors or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis,

(b) the president of the corporation,

(c) any vice president in charge of a division of the corporation, and

(d) any officer of the corporation, whether or not the officer is also a director of the corporation, who performs a policy making function in respect of the corporation and who has the capacity to influence the direction of the corporation;

"separate resolution" means a resolution on which only members of a particular class are entitled to vote;

"serve" means serve in accordance with section 7 *[service of records in legal proceedings]*;

"sign" includes execute;

"special majority" means, in respect of a society,

(a) the majority of votes that the bylaws specify is required for the society to pass a special resolution at a general meeting, if that specified majority is at least 2/3 and not more than 3/4 of the votes cast on the resolution, or

(b) if the bylaws do not contain a provision contemplated by paragraph (a), 2/3 of the votes cast on the resolution or, if the society is a pre-existing society that has not complied with section 271 (1) (a) *[transition – restored pre-existing societies]* or 331 (1) (a) *[transition – pre-existing societies]* 3/4 of the votes cast on the resolution;

"special resolution" means

(a) a resolution passed at a general meeting under the following circumstances:

(i) notice of the meeting specifying the intention to propose the resolution as a special resolution is sent to all members having the right to vote at general meetings at least the prescribed number of days before the meeting;

(ii) the majority of the votes cast by members voting in accordance with their right to vote at general meetings is cast in favour of the resolution;

(iii) the majority of votes cast in favour of the resolution constitutes at least a special majority, or

(b) a resolution passed by being consented to in writing by all of the members having the right to vote at general meetings;

"society" means a corporation, recognized as a society under this Act or a former *Societies Act*, that has not, since its most recent recognition or restoration as a society, ceased to be a society;

"*Society Act*, 1996" means the *Society Act*, R.S.B.C. 1996, c. 433;

"special separate resolution" means

(a) a resolution passed at a class meeting under the following circumstances:

(i) notice of the meeting specifying the intention to propose the resolution as a special separate resolution is sent to all mem-

bers having memberships of that class at least the prescribed number of days before the meeting;

(ii) when voting on the resolution, members having memberships of that class vote in favour of the resolution by at least the following majority:

(A) the majority specified by the pre-existing constitution or bylaws as being required to pass a special separate resolution of those members, or, if no such majority is specified, to pass a separate resolution of those members, if that majority is at least 2/3 and not more than 3/4 of the votes cast on the resolution;

(B) if clause (A) does not apply and the society is a pre-existing society that has not complied with section 271 (1) (a) *[transition – restored pre-existing societies]* or 331 (1) (a) *[transition – pre-existing societies]*, 3/4 of the votes cast on the resolution;

(C) if clauses (A) and (B) do not apply, 2/3 of the votes cast on the resolution, or

(b) a resolution passed by being consented to in writing by all of the members having memberships of the applicable class;

"spouse" means a person who

(a) is married to another person, or

(b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender;

"statutory business hours" means the hours between 9 o'clock in the morning and 4 o'clock in the afternoon, local time, Saturdays and holidays excepted;

"Statutory Reporting Society Provisions" means the provisions prescribed by the Lieutenant Governor in Council under section 329 (1) *[prescribed provisions]*;

"subscriber" means an applicant for incorporation of a society under a former *Societies Act*;

"subsidiary" means a subsidiary within the meaning of section 2 (2) *[corporate relationships]*;

"Table 1" means the set of bylaws prescribed by the Lieutenant Governor in Council under section 180 (1) *[alteration to Table 1 bylaws]*;

"unanimous resolution" means a resolution passed by being consented to in writing by all of the members entitled to vote on the resolution;

"wholly owned subsidiary" means a subsidiary within the meaning of section 2 (5) *[corporate relationships]*.

(2) A reference in the pre-existing constitution or bylaws of a pre-existing society to an "extraordinary resolution" is deemed to be a reference to a special resolution.

(3) An individual is appointed as a director of a society if the individual is

(a) appointed as a director of the society in accordance with

(i) this Act, or

(ii) the pre-existing constitution or bylaws of the society,

(b) designated as a director of the society on the constitution that applies to the society when it is recognized under this Act, or

(c) declared by the court to be a director of the society.

Source: BCA, s. 1; SK Act, s. 2 (1)

Reference: tentative recommendation (4); tentative recommendation (47) (definition of "member"); tentative recommendation (68) (definitions of "ordinary resolution" and "special resolution")

Concordance: *Society Act*, 1996, s. 1

Comment: Section 1 contains the definitions that apply throughout the Act. Many of the concepts contained in this section are familiar from the *Society Act*, 1996, but the defined terms in this section do also introduce a sizable number of new concepts. The vast majority of these definitions come directly from the BCA. A few of them have been altered and a few new definitions have been added. In both cases, these changes were made to track some fundamental differences between societies and companies. Most of the defined terms are integrated into a specific section or Part of the Act and will be discussed as part the commentary on that section or Part. What follows are some brief comments on some significant defined terms.

- **Activities.** Most modern corporate law statutes, including the BCA, contain references to a company's "business." These references are not appropriate in a not-for-profit setting, as operating a business cannot be the primary focus of a society. The equivalent not-for-profit concept is "activities." The term is defined in this Act for greater clarity. The definition is adapted from the SK Act.
- **Affairs.** "Affairs" refers to the internal affairs and governance of a society. It is contrasted with "activities." The word "affairs" is used in the BCA, but it is not defined in that Act. This definition, which is based on a definition in the SK Act, is included here for the sake of clarity.
- **Affidavit.** This definition does not actually define the word "affidavit."[88] Instead, it sets out the individuals who are authorized to swear an affidavit or give a statutory declara-

88. *See Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 (" **'affidavit'** or **'oath'** includes an affirmation, a

tion for certain entities. In an earlier report,[89] the British Columbia Law Institute recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting. The report went on to recommend that these repealed provisions be replaced with a requirement to give an unsworn signed statement in the place of the sworn statement. Among the provisions affected by the report's recommendations are several in the BCA. The report has not yet been implemented. In anticipation of its implementation, some references to "affidavit" in the Act are followed with a bracketed reference to a "signed statement."

- **Affiliate.** This term is used in section 2.
- **Agent or employee of the government.** This phrase is used only once in the Act, in the definition of "completing party." The intent is to ensure that a government employee or an independent contractor engaged by the government is not made subject to the obligations imposed on a completing party.
- **Annual reference date.** In most cases, a society's annual reference date will be the date of its annual general meeting. The unfamiliar terminology is meant to convey that this phrase is defined in broader terms. Under the new *Society Act*, a society will have the choice to pass a resolution, unanimously approved by all its members, which will address the business that has to be carried out at an annual general meeting. The idea of allowing a resolution in lieu of holding an annual general meeting is new for societies, but it is well established for companies. Smaller societies, in particular, may benefit from having an additional choice in how they attend to their annual corporate obligations. The term "annual reference date" is used in connection with (1) holding an annual general meeting (see sections 114–15), (2) the directors' duty to produce and publish financial statements (see sections 116, 133), (3) the appointment and removal of an auditor (see sections 139, 144), and (4) the election of an audit committee (see section 155).
- **Annual reference period.** The annual reference period, in simple terms, is the period in which a society must hold its annual general meeting or pass a unanimous resolution in lieu of holding an annual general meeting.
- **Bylaws.** The new *Society Act* will retain the use of the familiar term "bylaws" to describe the record that contains the major organizational rules for the society.
- **Charter.** A charter is a society's fundamental constating documents. In most cases, a society's charter is its constitution and bylaws. During the society's transitional phase, its pre-existing constitution will also be part of its charter.
- **Completing party.** This definition relates to a new concept for the *Society Act*. A completing party is an individual who fills in the information needed to complete a record (such as a form) that is to be filed with the registrar. The concept underlying this definition is the recognition that societies often engage agents (such as law firms) to attend to their corporate filings. An "agent or employee of the government" (which is also a term defined in this section) cannot be a completing party.
- **Constitution.** The new *Society Act* will retain the use of the familiar term "constitution." The information that societies must have in their constitutions will change. For more details on this point, see section 9.

statutory declaration, or a solemn declaration made under the *Evidence Act,* or under the *Canada Evidence Act;* and the word 'swear' includes solemnly declare or affirm").

89. *Report on Unnecessary Requirements for Sworn Statements* (BCLI Rep. No. 42) (Vancouver: The Institute, 2006).

- **Delivery address.** This definition introduces a new concept for the *Society Act*. In simple terms, a delivery address is an office or business address. Under the new *Society Act*, a society director will be allowed to disclose a delivery address instead of a residential address on corporate filings (such as a notice of directors).
- **Exceptional resolution.** This definition introduces a new concept for the *Society Act*. An exceptional resolution is a resolution of the members passed by a majority that is greater than the majority required to pass a special resolution. A society may want to require certain changes to its charter to be authorized only by an exceptional resolution. For example, changes involving the subjects that were formerly contained in unalterable constitutional provisions could be made to require an exceptional resolution. The mechanics of inserting an exceptional resolution provision in the bylaws are set out in section 183.
- **Incorporation agreement.** An incorporation agreement is a new concept for the *Society Act*. It is the agreement by which one or more persons agree to form a society and to become members of it.
- **Incorporator.** An incorporator is a person who signs an incorporation agreement before it is filed with the registrar. An incorporator is broadly similar to an applicant for incorporation under the *Society Act*, 1996.
- **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 definition in the *Society Act*, 1996, does not provide much certainty when a dispute arises. The committee canvassed a number of options for creating a more concrete definition of member, including the approach commonly seen in American legislation of defining members functionally. Under this approach, a member is a person with the right to elect the directors. The difficulty with bright-line tests, such as this one, is that they may prove overly rigid in practice. The definition of "member" in the new *Society Act* takes a more moderate approach. It draws on an idea in the BCA, which defines the equivalent term "shareholder" by reference to a company's central securities register. Accordingly, a "member" is defined by reference to a society's register of members. While adding this component to the definition of "member" may not clear up all difficulties, it should add an enhanced level of certainty to the definition.
- **Ordinary resolution.** This definition is similar to the definition in the *Society Act*, 1996. The one change is consequential on the change of the definition of "special resolution." Currently, an ordinary resolution may be passed if 75 percent of the members having the right to vote on it at a meeting consent in writing to the resolution. This figure has changed to match the range for passing a special resolution, which is now between 2/3 and 3/4 of the members having the right to vote on the resolution.
- **Pre-existing constitution.** A pre-existing constitution is the constitution of a society incorporated or amalgamated under a former *Societies Act* before it completes its transition under the new Act.
- **Pre-existing society.** A pre-existing society is a society incorporated or amalgamated under a former *Societies Act*.
- **Recognized.** The rules regarding recognition of societies are set out in section 3.
- **Senior officer.** The definition of "senior officer" is primarily used in applying the conflict of interest rules in Part 4, Division 3.

- **Special resolution.** The definition of "special resolution" contains two important requirements for passing special resolutions that differ from the requirements in section 1 of the *Society Act*, 1996. These requirements relate to the notice that must be given to members and the majority needed to pass the resolution. A new *Society Act* will require notice of "at least the prescribed number of days." This number will be prescribed by regulation. The intention is for this regulation to be harmonized with section 3 of the *Business Corporations Regulation*, which establishes the prescribed number of days for companies as (1) the period specified in the company's articles, if that period is at least 10 days or (2) if no period is specified in the articles, then the notice period is set to be at least 21 days. The majority needed to pass a special resolution under a new *Society Act* will be the majority specified in a society's bylaws, so long as that majority falls somewhere between the range of at least 2/3 of the members eligible to vote and 3/4 of the members eligible to vote. If the bylaws do not specify a majority within this range, then the default requirement will apply. There are actually two default settings. For societies incorporated under the new *Society Act*, the default majority requirement will be 2/3 of the members eligible to vote. For societies incorporated under a former *Societies Act*, the default majority requirement will be 3/4 of the members eligible to vote.

Corporate relationships

2 (1) For the purposes of this Act, one corporation is affiliated with another corporation if

(a) one of them is a subsidiary of the other,

(b) both of them are subsidiaries of the same corporation, or

(c) each of them is controlled by the same person.

(2) For the purposes of this Act, a corporation is a subsidiary of another corporation if

(a) it is controlled by

(i) that other corporation,

(ii) that other corporation and one or more corporations controlled by that other corporation, or

(iii) 2 or more corporations controlled by that other corporation, or

(b) it is a subsidiary of a subsidiary of that other corporation.

(3) For the purposes of this section, a corporation is controlled by a person if

(a) shares of the corporation are held, other than by way of security only, by the person, or are beneficially owned, other than by way of security only, by

(i) the person, or

(ii) a corporation controlled by the person, and

(b) the votes carried by the shares mentioned in paragraph (a) are sufficient, if exercised, to elect or appoint a majority of the directors of the corporation.

(4) For the purposes of this Act, a corporation is the holding corporation of a corporation that is its subsidiary.

(5) For the purposes of this Act, a corporation is a wholly owned subsidiary of another corporation if all of the issued shares of the first corporation are held by one or both of

(a) that other corporation, and

(b) a wholly owned subsidiary, or wholly owned subsidiaries, of that other corporation.

Source: BCA, s. 2

Reference: tentative recommendation (4)

Concordance: new

Comment: These affiliation rules, which mirror the rules set out in the BCA, are primarily relevant for the conflict of interest provisions in Part 4, Division 3. They also come into play for indemnification of directors and the independence of auditors and audit committees. In the absence of this concept of corporate affiliation a significant loophole would be opened in the Act's conflict of interest provisions.

When a society is recognized

3 (1) A society is recognized under this Act

(a) when it is incorporated under this Act,

(b) if the society results from the conversion, under this or any other Act, of a corporation into a society after the coming into force of this Act, when the conversion occurs,

(c) if the society results from an amalgamation of corporations under this Act, when the amalgamation occurs, or

(d) if the society results from the continuation into British Columbia of a foreign corporation under this Act, when the continuation occurs.

(2) A society was recognized under a former *Societies Act*

(a) when it was incorporated under that Act, or

(b) if the society resulted from the amalgamation of societies under the former *Societies Act*, when the amalgamation occurred.

Source: BCA, s. 3

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 100

Comment: The concept of "recognition" under the new *Society Act* crops up a number of times later in the Act, primarily in connection with corporate procedures that are used to organize a society. It appears, for example, in connection with section 16 (which establishes the binding contractual effect of a society's constitution or bylaws on its members), section 19 (which requires a society to obtain a name), section 53 (which deals with the first directors of a society), section 114 (which addresses the timing of annual general meetings), and section 133 (which deals with financial statements). These sections all deal with either procedures that must be completed shortly after a new society comes into existence or the timing of procedures in relation to the date on which a new society comes into existence. The key word used in the section—"recognize"—may seem unusual and confusing in this context on first reading. In the vast majority of cases, a society will come into existence on incorporation. But the new *Society Act* contemplates a number of other ways for a society to come within the Act's scope. A society may result from the amalgamation of two or more societies or societies and foreign entities, from the conversion of a qualifying entity (such as a cooperative association), or from the continuation of a foreign not-for-profit corporation into British Columbia. "Recognize" is a generic term that embraces each of these procedures. This section contains two subsections, which distinguish between societies recognized under the new *Society Act* and societies recognized under the *Society Act*, 1996, or an earlier version of the *Society Act*. (These former *Societies Act*s did not allow the conversion of other entities into societies or the continuation of foreign not-for-profit corporations into British Columbia, so a society can only be recognized under a former Act on incorporation or amalgamation.) This distinction is necessary in a number of sections that use the concept of recognition. For example, section 19 speaks of the reservation of a name for a society remaining "in effect at the date of recognition of a society." This makes sense for the societies referred to in subsection (1), which are recognized under the new Act. But it would not make sense to require pre-existing societies, which already have names, to go through the process of reserving a name because they were recognized under the new Act when the legislation came into force. Recognition should not be confused with transition, which is dealt with in Part 14.

Interpretation of "mailing of records"

4 (1) A reference in a provision of this Act to mailing a record is a reference to

(a) mailing the record in the manner provided by the provision, or

(b) if no manner is provided,

(i) mailing the record by ordinary mail or registered mail, or

(ii) providing the record in any other prescribed manner.

(2) Unless this Act provides otherwise, a record referred to in this Act that is mailed to a person by ordinary mail to the applicable address for that person referred to in section 5 (2) *[sending of records]* or 6 (2) *[furnishing of records by the registrar]* is deemed to be received by that person on

(a) the day, Saturdays and holidays excepted, following the date of mailing, or

(b) if the record is mailed by a corporation and the charter of that corporation provides a later deemed receipt date, that later date.

Source: BCA, s. 6

Reference: tentative recommendation (4); tentative recommendation (61) (notice of general meetings)

Concordance: new

Comment: Most societies send notices of meetings and other communications to their members by mail. The *Society Act*, 1996, does not contain any provisions relating to what is meant by mailing a record. ("Record" is a defined term. See section 1, above.) This section is intended to clarify two aspects of mailing a record. Subsection (1) indicates what a reference to "mailing" means in this new Act. It is to be defined by first looking at the immediate context of the reference. If that context does not specify a particular form of mailing, then the record may be mailed by either registered or ordinary mail. In other words, societies are given the choice between the assurances of registered mail and the cost-effectiveness of ordinary mail. Subsection (1) also contains an authorization to add to this list by regulation. There has been no regulation adopted to date under the equivalent section of the BCA. But it is helpful to place such an authorization in the legislation. Advances in communications technology can develop quickly and it is much easier to keep pace with these advances by means of delegated legislation (that is, by regulation) than by requiring an amendment to the statute. Subsection (2) provides a rule for when a record is deemed to be delivered by mail. This rule is important because disputes are liable to arise over the delivery of a record by mail. Having a clear rule in place ensures that such disputes do not take on greater significance than they merit. The default rule provided by subsection (2) is that a record is deemed to be delivered on the next business day after it is sent. This default rule may be displaced by a different rule set out in the corporate charter. Many societies have a deemed delivery rule in their bylaws. Subsection (2) gives those rules statutory support.

This section has been located in Division 1 rather than Division 2 in order to underscore the point that records may be distributed in a variety of ways other than by mail.

Division 2 – Distribution of Records

Sending of records

5 (1) Unless this Act provides otherwise, a record required or permitted by this Act, the regulations or the bylaws of a society to be sent by or to a person may be sent

(a) in the manner agreed to by the sender and the intended recipient,

(b) in any manner required by the pre-existing constitution or bylaws if

(i) paragraph (a) does not apply, and

(ii) the record is being sent by one of the following to any of the following:

(A) the society;

(B) a director of the society;

(C) an officer of the society;

(D) a member of the society, or

(c) if neither paragraph (a) nor paragraph (b) applies, by any one of the following methods:

(i) mail addressed to the person at the applicable address for that person referred to in subsection (2);

(ii) delivery;

(iii) any other prescribed method.

(2) If a provision of this Act requires or permits a record to be sent by mail to a person, the record is deemed to be mailed in compliance with that provision if it is addressed to that person and if it is mailed in accordance with the requirements of that provision, or, in a case to which section 4 (1) (b) (i) *[interpretation of "mailing of records"]* applies,

(a) for a record mailed to a society, if the record is mailed to the mailing address shown for the society's registered office in the corporate register,

(b) for a record mailed to a member, if the record is mailed to the mailing address shown for the member

(i) in the society's register of members, or

(ii) in the case of a pre-existing society that has not complied with section 271 (1) (a) *[transition – restored pre-existing societies]* or 331 (1) (a) *[transition – pre-existing societies]*, in the register of members maintained by the society under the *Society Act*, 1996,

(c) for a record mailed to a director or officer, if the record is mailed to the prescribed address shown for the director or officer in either of the following:

(i) the records kept by the society;

(ii) the corporate register,

(d) for a record mailed to an extraprovincial society, if the record is mailed to the mailing address shown for any of its attorneys in the corporate register or, if it does not have any attorneys, to the mailing address shown for its head office in the corporate register, or

(e) in any other case, if the record is mailed to the mailing address of the intended recipient.

(3) Despite any other provision of this Act, if, on 2 consecutive occasions, a society sends a record to one of its members in accordance with subsection (1) of this section and on each of those occasions the record is returned because the member cannot be located, the society is not required to

send any further records to the member until the member informs the society in writing of the member's new address.

(4) Unless this Act, the regulations or the pre-existing constitution or bylaws of a society provide otherwise, any person who has a right under this Act, the regulations or the pre-existing constitution or bylaws to receive a record may, by providing a written notice to the person from whom the record is to be received,

(a) waive that right, or

(b) extend the time within which the record may be sent, but no extension of time under this paragraph affects the right of the person sending the record to send the record within the time specified by this Act, the regulations or the pre-existing constitution or bylaws, as the case may be.

Source: BCA, s. 7

Reference: tentative recommendation (4); tentative recommendation (61) (notice of general meetings)

Concordance: new

Comment: One area where the *Society Act*, 1996, betrays its roots in the 1970s is in the giving of notices. Although the Act lacks an explicit provision dealing with the sending of records, the strong implication running through the legislation is that notices may only be provided in two ways: by personal service or by mail. These were the two major modes of communication thirty years ago, but they are being increasingly challenged by new technologies. This proposed section is intended to give societies much more flexibility in communicating with members and others. The section addresses the issue in broader terms than the *Society Act*, 1996. The focus here is not only on notices to members, but on sending records generally (which would include giving notices to members). Subsection (1) contains the key rules on sending records. These rules proceed by stages.

(1) The first stage allows the sending of records by any method agreed upon by the sender and the recipient. This rule provides maximum flexibility, as the sender and recipient can agree on a method that makes the most sense to them and that agreement trumps any default statutory method in the new *Society Act*.

(2) If there is no agreement between the sender or the recipient, then the next source of rules is the society's bylaws or its pre-existing constitution. There is one limitation on relying on rules set out in the bylaws or the pre-existing constitution: the record must sent by any of (a) the society, (b) a director, (c) an officer, or (d) a member, to any one or more of the persons described in (a)–(d).

(3) If there is no agreement between the sender and the recipient and the bylaws or the pre-existing constitution are silent or the communication is not between the persons listed in (a)–(d) above, then the Act's default rules apply. These rules allow for records to be sent by mail, delivery (which is similar to personal service), or any other prescribed method. Currently, the *Business Corporations Regulation* prescribes

sending records by facsimile or e-mail.[90] These methods should be adopted in the regulations to the new *Society Act*.

Subsection (2) provides for the deemed delivery of records. It is important to note that these rules apply only when the record is mailed. In practice, many companies have continued to mail many notices in order to benefit from the certainty provided by the equivalent provision in the BCA.

Subsection (3) deals with a situation that arises often in the operation of a society: a member moves and fails to provide the society with his or her new address. Under the *Society Act*, 1996, this creates a dilemma for the society. If it ignores the member, then any notices sent out are vulnerable to being challenged as incomplete. Yet it is not a simple task to locate the member, so the question arises as to how much effort the society must put into this often fruitless task. The new *Society Act* contains a rule instructing societies to send records to the member on two consecutive occasions. If these records are returned, then the onus shifts to the member to notify the society of his or her new address.

Subsection (4) address waiver of notice. Under the *Society Act*, 1996, a notice of general meeting may only be waived by all the members agreeing in writing. The new *Society Act* will have a much broader and more flexible rule. A person may individually waive the right to receive a record or extend the time for receipt, unless the society's bylaws or pre-existing constitution provide otherwise.

Furnishing of records by registrar

6 (1) Unless this Act provides otherwise, if a provision of this Act requires or permits the registrar to furnish a record to a person, the registrar may furnish that record

(a) by mailing the record by ordinary mail or registered mail,

(b) by complying with a request contemplated by subsection (3), or

(c) by any other prescribed method.

(2) For the purposes of subsection (1), a record is furnished to a person by mail when it is addressed to that person and mailed to that person as follows:

(a) for a record furnished to a society, if the record is mailed to the mailing address shown for the society's registered office in the corporate register;

(b) for a record furnished to a director or officer, if the record is mailed to the prescribed address shown for that person in the corporate register;

(c) for a record furnished to an extraprovincial society, if the record is mailed to the mailing address shown for any of its attorneys in the

90. *Business Corporations Regulation*, B.C. Reg. 65/2004, s. 4.

corporate register or, if it does not have any attorneys, to the mailing address shown for its head office in the corporate register;

(d) in any other case, if the record is mailed to the mailing address shown for that person in the corporate register or, if no address is shown for that person in the corporate register, to the most recent address for that person known to the registrar.

(3) If a request is made to the registrar for a record to be mailed by ordinary mail to a specified person at a specified mailing address or for a record to be made available for pick-up at the registrar's office, the registrar may furnish the record by complying with that request.

Source: BCA, s. 8

Reference: tentative recommendation (4)

Concordance: new

Comment: This section deals with the sending of records from the Registrar of Companies to a person. It is included to provide certainty in these circumstances and to harmonize the new *Society Act* with the BCA. Subsection (1) (c) refers to the registrar furnishing records "by any other prescribed method." This reference enables the provincial cabinet to prescribe additional methods by regulation. Regulations are often used to set out procedural and technical requirements. The main reason for using regulations in these areas is that they are simpler to amend than legislation, allowing them better to keep pace with changing practices and technology. The issue addressed by this section provides a good example of how this approach works in practice. Section 5 of the *Business Corporations Regulation* (which applies to for-profit companies) allows the registrar to furnish records by fax or e-mail, to the fax number or e-mail address that the recipient has provided to the registrar for receiving records. Regulations for a new *Society Act* should prescribe a similar rule for societies.

Service of records in legal proceedings

7 (1) Without limiting any other enactment, a record may be served on a society

(a) unless the society's registered office has been eliminated under section 36 *[elimination of a society's registered office by its agent]*, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the registered office of the society in the corporate register,

(b) if the society's registered office has been eliminated under section 36 *[elimination of a society's registered office by its agent]*, in the manner ordered by the court under section 36 (4) (b) *[elimination of a society's registered office by its agent]*, or

(c) in any case, by serving any director, senior officer, liquidator or receiver manager of the society.

(2) Without limiting any other enactment, a record may be served on an extraprovincial society

(a) by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the head office of the extraprovincial society in the corporate register if that head office is in British Columbia, or

(b) by serving any attorney for the extraprovincial society or, without limiting this, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for any attorney for the extraprovincial society in the corporate register.

Source: BCA, s. 9

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 12

Comment: This section contains rules for serving records on a society or an extraprovincial society in a legal proceeding. The section addresses an issue that is not covered in the *Society Act*, 1996. Its rules are harmonized with the rules for service of records on a company in a legal proceeding contained in the BCA.

PART 2 – INCORPORATION

Division 1 – Formation of Societies

Formation of society

8 (1) One or more persons may form a society by

(a) entering into an incorporation agreement,

(b) filing with the registrar an incorporation application, and

(c) complying with this Part.

(2) An incorporation agreement must

(a) contain the agreement of each incorporator to become a member of the society,

(b) for each incorporator,

(i) have a signature line with the full name of that incorporator set out legibly under the signature line, and

(ii) set out legibly opposite the signature line of that incorporator, the date of signing by that incorporator,

(c) be signed on the applicable signature line by each incorporator.

(3) An incorporation application referred to in subsection (1) (b) must

(a) be in the form established by the registrar,

(b) set out the full names and mailing addresses of the incorporators,

(c) set out the name reserved for the society under section 20 *[reservation of name]*, and the reservation number given for it,

(d) contain

(i) a constitution that reflects the information that will apply to the society on its incorporation, and

(ii) subject to section 11 (7) *[bylaws]*, bylaws.

Source: BCA, s. 10

Reference: tentative recommendation (6); tentative recommendation (7); tentative recommendation (10)

Concordance: *Society Act*, 1996, s. 3

Comment: The current procedure for incorporation under the *Society Act*, 1996, has changed very little since the procedure was first established in the 1920 Act. This procedure 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. Incorporation under the *Society Act*, 1996, 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," the current procedure is framed in terms appropriate to paper documents, rather than electronic media.

One of the main departures contained in the new *Society Act* is the creation of a modern, streamlined incorporation procedure. The procedure contained in this section embraces the use of agents in the incorporation process and the online filing of incorporation documents. At the foundation of the procedure is the incorporation agreement. This agreement forms the basis of the society as a matter of legal theory. The agreement may have only one party to it, but the practice in most cases will likely be to have more than one party. Each party to the incorporation agreement agrees to become a member of the society to be formed. The "completing party" referred to in section 12 is the agent of the incorporators. This may be one of the incorporators or it could be a legal professional, such as a lawyer or a notary public. The completing party fills in the spaces on the incorporation application and submits it to the Registrar of Companies. The incorporation application will be a standard form established by the registrar. The completing party must also submit the society's constitution and bylaws.

This procedure for incorporation is based on the procedure used to incorporate a company under the BCA. Like the BCA, the new *Society Act* does not classify societies into different types on incorporation. The committee studied a variety of forms of classification that have been proposed for or used in the not-for-profit sector. These models ranged from the OLRC Report, which recommended implementing a sophisticated five-fold classification scheme for societies, which would

be overseen by a specially designed government regulator,[91] to the SK Act, which 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,[92] number of directors,[93] and dispensing with an auditor.[94] (This list only touches on a few of the sections in the SK Act that make use of this classification scheme.) The committee also examined the US Model Act, which contains a highly influential version of this idea, dividing societies into three classes: public benefit, mutual benefit, and religious.[95]

In the consultation paper, the committee tentatively recommended not including an overarching classification scheme in the new *Society Act*. Rather, distinctions between societies would be drawn where necessary and kept to a minimum. The rationale underlying this tentative recommendation was to avoid the complexity that invariably results from an overarching classification scheme. Some respondents to the consultation paper urged the committee to reconsider this tentative recommendation. The committee gave full consideration to these responses, but decided to adhere to its original position. This position was favoured by the majority of respondents as well.

This section contains one noteworthy change from the equivalent section in the BCA. Under this section, a society is required to file its bylaws with the registrar. This requirement implements a tentative recommendation from the consultation paper. In the consultation paper, it was noted that societies are primarily incorporated to serve public purposes, which raises the possibility that the public may be harmed if a society's bylaws become lost or rendered beyond comprehension. This tentative recommendation commanded broad support among respondents to the consultation paper. If the incorporation application does not contain a set of bylaws, then under section 11 (7) the standard bylaws prescribed by regulation and designated Table 1 become the society's bylaws.

Constitution

9 Unless this Act provides otherwise, the constitution of a society must

(a) be in the form established by the registrar,

(b) set out the name of the society,

(c) set out the full name of, and prescribed address for, each of the directors,

(d) identify the registered office of the society by its mailing address and its delivery address,

(e) identify the records office of the society by its mailing address and its delivery address,

91. OLRC Report, *supra* note 82 at 460, 465–66.

92. SK Act, *supra* note 71, s. 21 (granting broader access to the records of a charitable society).

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

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

95. US Model Act, *supra* note 83, § 2.02 (a) (2).

(f) set out, in the prescribed manner, any translation of the society's name that the society intends to use outside Canada,

(g) describe the purposes of the society, and

(h) set out a statement of the disposition of the society's property on dissolution.

Source: BCA, s. 11

Reference: tentative recommendation (14); tentative recommendation (15)

Concordance: new

Comment: A society's constitution is its fundamental organizational document. Interestingly, the *Society Act*, 1996, does not contain a section that addresses the contents of the constitution. It is understood that a society's constitution must contain its name and a list of its purposes. (This understanding derives from a form that was formerly prescribed under the Act.) Beyond that, a society can theoretically include any other information in its constitution, so long as it indicates whether those added provisions are alterable or unalterable.

This section is intended to spell out definitively the information that a society must have in its constitution. This information is adapted from an equivalent provision in the BCA. In place of information relating to shares that is irrelevant for societies it requires a description of the society's purposes and a statement of the disposition of the society's property on dissolution. Other than these two items, the section is harmonized with the BCA. In addition, this section limits the information that may be contained in a society's constitution to the items set out above. This limitation is intended to streamline the incorporation process.

This section also does away with the distinction between alterable and unalterable provisions that is found in the *Society Act*, 1996. This distinction has caused problems for societies in practice. The new *Society Act* contains other approaches to entrenching important provisions in a society's bylaws, such as requiring an exceptional resolution of the members to amend the provision. (An exceptional resolution is a resolution that requires a majority greater than a special majority to pass. See section 183 for more details.) These approaches strike a better balance between entrenching a provision and avoiding the danger of deadlock. The tentative recommendation that proposed this change was supported by a majority of respondents to the consultation paper.

Incorporation for not-for-profit purposes

10 (1) A society may only carry on a business, trade, industry or profession as an incident to the purposes set out in the society's pre-existing constitution or constitution, as the case may be.

(2) A society must not distribute any of its assets to its 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 this Act or the society's pre-existing constitution or constitution, as the case may be, or its bylaws;

(c) payment of a benefit by a society with insurance purposes;

(d) distributions made pursuant to an order of the court.

Source: *Society Act*, 1996, s. 2 (2); original

Reference: tentative recommendation (9); tentative recommendation (75)

Concordance: *Society Act*, 1996, s. 2

Comment: This section contains two fundamental ideas of not-for-profit corporate law which are often paired together.

Subsection (1) contains a restriction on incorporating a society primarily to pursue commercial purposes. Notice that this subsection does not absolutely prohibit a society from carrying on any commercial activities. Instead, it requires that those activities be incidental to the society's not-for-profit purposes. The language of subsection (1) is modelled on section 2 (2) of the *Society Act*, 1996. It is admittedly somewhat vague, but this vagueness does not appear to have caused many problems in practice. The most recent British Columbia case to give any sustained consideration to when commercial activities are an incidental rather than a primary purpose of a society was decided in 1974. In *Shaw v. Real Estate Board of Greater Vancouver*[96] 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] Another concern is that it is unclear what the consequences of breaching this limitation on commercial activity would be. If this limitation were meant to operate in a manner similar to the *ultra vires* doctrine, 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*,[98] where the court noted that ". . . even if the [disputed share] transfers were in breach of

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."

98. 2004 BCSC 1365, 50 B.L.R. (3d) 141 [*Trident Foreshore* cited to B.L.R.].

section 2 (2), it does not follow that the transactions were void."[99] But the issue was not squarely raised in *Trident Foreshore*, so this conclusion may not conclusively settle the matter.

In view of these concerns, many law reform proposals have considered the balanced approach found in legislation such as the *Society Act*, 1996, 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. It 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.[100] This approach has been implemented in the SK Act[101] and the US Model Act.[102] It was also adopted in Bill C-21.[103]

Although these concerns are real, in the committee's view 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 1977, 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.

Subsection (2) contains a constraint on distributing a society's assets to its members during the existence of the society. The policy of preventing the distribution of a society's assets[104] 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*, 1996, does not spell out any exceptions.[105] 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*, 1996, contains a number of provisions allowing organizations with insurance purposes to operate as societies.[106] These societies tend to be ei-

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

100. ALRI Report, *supra* note 62 at 32–33.

101. *Supra* note 71.

102. *Supra* note 83, § 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 84, § 3.01 (a).

103. *Supra* note 73.

104. 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.

105. 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."

106. *See*, *e.g.*, *Society Act*, *supra* note 7, s. 14. *See also Financial Institutions Act*, R.S.B.C. 1996, c. 141,

ther fraternal societies or mutual benefit societies, both of which offer a limited range of benefits to their members.[107] Another example is a member successfully suing the society and obtaining a monetary award from the court. 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.[108] Expressly setting out these exceptions to the general rule will clarify the legislation.

Bylaws

11 (1) A society must have bylaws that

(a) set rules for its conduct,

(b) are mechanically or electronically produced, and

(c) are divided into consecutively numbered or lettered paragraphs.

(2) The bylaws of a society must

(a) set out every restriction, if any, on

(i) the activities that may be carried on by the society, and

(ii) the powers that the society may exercise,

(b) set out the rights, privileges, restrictions and conditions that apply to the members of each class of membership,

(c) subject to subsection (5),

(i) set out the incorporation number of the society,

(ii) set out the name of the society, and

(iii) set out, in the prescribed manner, any translation of the society's name that the society intends to use outside Canada,

(d) set out the information required by section 130 *[membership fees]*, if applicable, and

(e) set out the information required by section 131 *[discipline or expulsion of members]*.

ss. 190–200.

107. *See* Craig Brown, *Insurance Law in Canada*, looseleaf, vol. 1 (Toronto: Thomson Carswell, 2002) at § 2.3 ("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.

108. *See* OLRC Report, *supra* note 82 at 465; ALRI Report, *supra* note 62 at 26 ("an association established to help refugees should be able to help a refugee who is a member of the association").

(3) Without limiting subsections (1) and (2), the first set of bylaws of a society incorporated under this Act must

(a) have a signature line with the full name of each incorporator set out legibly under the signature line, and

(b) be signed on the applicable signature line by each incorporator.

(4) Without limiting subsections (1) and (2), a society may, in its bylaws, adopt, by reference or by restatement, with or without alteration, all or any of the provisions of Table 1 and, in that case, those adopted provisions form part of the bylaws.

(5) After the recognition of a society, any individual may insert in the society's bylaws, whether or not there has been any resolution to direct or authorize that insertion,

(a) the incorporation number of the society, and

(b) the name and any translation of the name of the society.

(6) Despite any wording to the contrary in a security agreement or other record, a change to a society's bylaws in accordance with subsection (5) does not constitute a breach or contravention of, or a default under, the security agreement or other record, and is deemed for the purposes of the security agreement or other record not to be an alteration to the charter of the society.

(7) On its incorporation a society incorporated under this Act has, as its bylaws, the bylaws that are filed with the registrar as part of the incorporation application but if, despite section 8 (3) (d) (ii) *[formation of society]*, bylaws have not been filed with the registrar as part of the incorporation application to incorporate the society, the society has as its bylaws Table 1.

Source: BCA, ss. 12, 16

Reference: tentative recommendation (16); tentative recommendation (19)

Concordance: *Society Act*, 1996, s. 6

Comment: In addition to the constitution, the other fundamental organizational document that a society must have is a set of bylaws. A society's bylaws are primarily focussed on internal organizational issues and procedural rules.

Subsection (2) requires a society to set out any restrictions on its activities or its powers in its bylaws. This requirement is a departure from the *Society Act*, 1996. It is an open question whether or not the old doctrine of *ultra vires* applies to societies by virtue of the drafting of certain sections of the *Society Act*, 1996. This doctrine is something of a relic in corporate law, which is apt to confuse both lawyers and non-legally-trained participants in the not-for-profit sector. It has not been carried forward in the new *Society Act*. Instead, societies will be free to choose when and how to restrict their activities or corporate powers by including appropriate provisions in their bylaws.

Subsection (4) permits a society to adopt, in whole or in part, a standard set of bylaws. These bylaws should be tailored to the new Act and prescribed by regulation. Their creation should be viewed as a key part of the implementation of a new *Society Act*. The creation of standard bylaws was strongly supported by respondents to the consultation paper.

Subsection (5) authorizes an individual to insert the society's name and incorporation number into the society's bylaws without having to go through the normal procedure for amending bylaws. The name and incorporation number of a society are important identifiers that the new *Society Act* requires to appear on every set of bylaws. Subsection (5) deals with a timing issue: the society's name and incorporation number are only available after incorporation. In the absence of subsection (5), on a literal reading of the legislation, a special resolution to amend the bylaws would be necessary to insert the society's name and incorporation number. Subsection (6) deals with an issue that will only arise infrequently. Lenders will commonly secure their loans by entering into a general security agreement with the borrower. A common term of these general security agreements provides that an amendment to a corporation's charter made without the lender's consent is a breach of the agreement. Subsection (6) is meant to insure that merely complying with subsection (5) cannot be characterized by a lender as a breach of a security agreement. Subsection (7) confirms that bylaws for the society must be filed on incorporation, unless the society is to have the default bylaws designated as Table 1 as its bylaws.

Incorporation

12 (1) A society is incorporated

(a) on the date and time that the incorporation application applicable to it is filed with the registrar, or

(b) subject to sections 13 *[withdrawal of application for incorporation]* and 305 *[limitation on future dated filings]*, if the incorporation application specifies a date, or a date and time, on which the society is to be incorporated that is later than the date and time on which the incorporation application is filed with the registrar,

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

(2) After a society is incorporated under this Part, the registrar must issue a certificate of incorporation for the society and must record in that certificate the name and incorporation number of the society and the date and time of its incorporation.

(3) After a society is incorporated under this Part, the registrar must

(a) furnish to the society

(i) the certificate of incorporation, and

(ii) if requested to do so, a certified copy of the incorporation application and a certified copy of the constitution and bylaws,

(b) furnish a copy of the incorporation application to the completing party, and

(c) publish in the prescribed manner a notice of the incorporation of the society.

Source: BCA, s. 13

Reference: tentative recommendation (6)

Concordance: *Society Act*, 1996, s. 3

Comment: This section sets out when a society is incorporated and contains a number of procedural steps that the Registrar of Companies must complete on incorporation of a society. Subsection (3) (c) refers to publishing a notice of incorporation "in the prescribed manner." On the incorporation of a company, the registrar is authorized by section 6 of the *Business Corporations Regulation* to publish this notice "on a website maintained by or on behalf of the government." This method of publication would also be appropriate for societies and should be adopted in the regulations prescribed under the new *Society Act*.

Withdrawal of application for incorporation

13 At any time after an incorporation application is filed with the registrar and before a society is incorporated in accordance with that incorporation application, an incorporator or any other person who appears to the registrar to be an appropriate person to do so may withdraw the incorporation application by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the incorporation application.

Source: BCA, s. 14

Reference: tentative recommendation (6)

Concordance: new

Comment: The purpose of this section is to make it clear that an application for incorporation of a society may be withdrawn by filing the appropriate form with the Registrar of Companies before the incorporation process is complete.

Effect of incorporation

14 On and after the incorporation of a society, the members of the society are, for so long as they remain members of the society, a society with the name set out in the constitution, capable of exercising the functions of an incorporated society with the powers and with the liability on the part of the members provided in this Act.

Source: BCA, s. 17

Reference: tentative recommendation (6)

Concordance: *Society Act*, 1996, s. 4 (1), 5

Comment: One of the key benefits of incorporation is that it constitutes the incorporated group as an entity, at law, that is separate and distinct from its members. This separate entity has perpetual existence. This means that its existence is not affected by fluctuations in its membership; instead, it continues to exist as a separate entity until it is terminated in accordance with this Act. Another benefit of incorporation is that it confers limited liability on the members of the corporation. Subject to some very limited exceptions, the members of a society are not liable for the debts of the society beyond the extent of any membership fees that they have paid to the society. This section confirms these fundamental principles.

Evidence of incorporation

15 Whether or not the requirements precedent and incidental to incorporation have been complied with, a notation in the corporate register that a society has been incorporated is conclusive evidence for the purposes of this Act and for all other purposes that the society has been duly incorporated on the date shown and the time, if any, shown in the corporate register.

Source: BCA, s. 18

Reference: tentative recommendation (6)

Concordance: new

Comment: "Corporate register" is a defined term that, simply stated, means the public register of information about societies maintained by the Registrar of Companies. See section 1. This section confirms that the corporate register is the definitive source of information about whether or not a body has been incorporated as a society. As a result, people can rely on the corporate register to determine whether or not a society has been incorporated and they do not need to make any independent investigations or seek to look behind the register to find the true state of affairs. This section essentially reinforces the unstated assumption that lawyers and other participants in the not-for-profit sector have regarding the status of the corporate register.

Effect of constitution and bylaws

16 (1) Subject to subsection (2), a society and its members are bound by the society's bylaws and constitution in the manner contemplated by subsection (3) from the time at which the society is recognized.

(2) A pre-existing society and its members are bound, in the manner contemplated by subsection (3),

(a) by the society's constitution, if any,

(b) by the society's bylaws, and

(c) subject to section 274 (3) *[timing and effect of post-restoration transition]* or 334 (3) *[timing and effect of transition]*, as the case may be, by the society's pre-existing constitution.

(3) A society and its members are bound by the society's bylaws and constitution or by its pre-existing constitution and bylaws, as the case may be, and

by any alterations made to those records under this Act or a former *Societies Act*, to the same extent as if those records

(a) had been signed and sealed by the society and by each member, and

(b) contained covenants on the part of each member and the member's successors and personal or other legal representatives to observe the bylaws and constitution or pre-existing constitution and bylaws, as the case may be.

Source: BCA, s. 19

Reference: tentative recommendation (6)

Concordance: new

Comment: There is a fundamental conceptual division between the two major types of corporation statutes found in Canada. This division is clearly explained in the following passage from the *British Columbia Company Law Practice Manual*:[109]

> In Canada, there are, generally speaking, two kinds of corporate statutes (and corporations). One is known as the statutory division of powers model, having its origin in the United States and now epitomized in the *Canada Business Corporations Act*. . . . The other model based on old English company legislation, is the memorandum and articles or contractarian model. The British Columbia *Business Corporations Act* follows the contractarian model. . . .
>
> The CBCA model contains a statutory division of powers and responsibilities among directors, officers and shareholders, with the intent that the CBCA be a complete code on how to conduct the affairs of a CBCA corporation, with little room for modification by corporate documents such as bylaws and unanimous shareholders' agreements.
>
> The *Business Corporations Act*, on the other hand, permits more flexibility because the articles of a company, which form a contract between the shareholders and the company, can be modified extensively. . . .

The *Society Act*, 1996, left this classification issue open. This section confirms that the new *Society Act* belongs to the same conceptual group of statutes that includes the BCA. The distinction between the two types of corporate statutes is primarily of importance for lawyers and board members and executives of larger, sophisticated societies. The most immediate impact that follows from adopting this contractual approach is that many sections that follow in the new *Society Act* are introduced as being "subject to the bylaws." The practical effect of this theoretical decision is that there is greater flexibility in organizing and operating a society under the new *Society Act*.

No share capital

17 A society must not have a capital divided into shares.

Source: *Society Act*, 1996, s. 8

Reference: tentative recommendation (74)

Concordance: *Society Act*, 1996, s. 8

109. John O.E. Lundell *et al.*, eds., *British Columbia Company Law Practice Manual*, looseleaf, 2d ed., vol. 1 (Vancouver: The Continuing Legal Education Society of British Columbia, 2003) at § 1.6.

Comment: This section carries forward a long-standing rule that has been a part of the *Society Act* since its first enactment in 1920. 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. . . ."[110] Seen in this light, the rule against share capital states one of the core principles of not-for-profit law. The rule is not sacred; it has been questioned in previous law reform projects.[111] The committee tentatively recommended retaining this rule in the consultation paper and asked for comment on this proposal. None of the respondents to the consultation paper favoured doing away with this rule.

Pre-incorporation contracts

18 (1) In this section:

"facilitator" means a person referred to in subsection (2) who, before a society is incorporated, purports to enter into a contract in the name of or on behalf of the society;

"new society" means a society incorporated after a pre-incorporation contract is entered into in the society's name or on the society's behalf;

"pre-incorporation contract" means a purported contract referred to in subsection (2).

(2) Subject to subsections (4) (b) and (8), if, before a society is incorporated, a person purports to enter into a contract in the name of or on behalf of the society,

(a) the person is deemed to warrant to the other parties to the purported contract that the society will

(i) come into existence within a reasonable time, and

(ii) adopt, under subsection (3), the purported contract within a reasonable time after the society comes into existence,

(b) the person is liable to the other parties to the purported contract for damages for any breach of that warranty, and

(c) the measure of damages for that breach of warranty is the same as if

(i) the society existed when the purported contract was entered into,

(ii) the person who entered into the purported contract in the name of or on behalf of the society had no authority to do so, and

(iii) the society refused to ratify the purported contract.

110. ALRI Report, *supra* note 62 at 46.

111. *See*, *e.g.*, ALRI Report, *ibid*.

(3) If, after a pre-incorporation contract is entered into, the society in the name of which or on behalf of which the pre-incorporation contract was purportedly entered into by the facilitator is incorporated, the new society may, within a reasonable time after its incorporation, adopt that pre-incorporation contract by any act or conduct signifying its intention to be bound by it.

(4) On the adoption of a pre-incorporation contract under subsection (3),

(a) the new society is bound by and is entitled to the benefits of the pre-incorporation contract as if the new society had been incorporated at the date of the pre-incorporation contract and had been a party to it, and

(b) the facilitator ceases, except as provided in subsections (6) and (7), to be liable under subsection (2) in respect of the pre-incorporation contract.

(5) If the new society does not adopt the pre-incorporation contract under subsection (3) within a reasonable time after the new society is incorporated, the facilitator or any party to that pre-incorporation contract may apply to the court for an order directing the new society to restore to the applicant any benefit received by the new society under the pre-incorporation contract.

(6) Whether or not the new society adopts the pre-incorporation contract under subsection (3), the new society, the facilitator or any party to the pre-incorporation contract may apply to the court for an order

(a) setting the obligations of the new society and the facilitator under the pre-incorporation contract as joint or joint and several, or

(b) apportioning liability between the new society and the facilitator.

(7) On an application under subsection (6), the court may, subject to subsection (8), make any order it considers appropriate.

(8) A facilitator is not liable under subsection (2) in respect of the pre-incorporation contract if the parties to the pre-incorporation contract have, in writing, expressly so agreed.

Source: BCA, s. 20

Reference: tentative recommendation (13)

Concordance: new

Comment: 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 may 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, "[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."[112] The *Society Act*, 1996, does not address pre-incorporation contracts. As a result, incorporators of societies are governed by common law rules developed in nineteenth-century English jurisprudence. Most Canadian for-profit statutes include statutory provisions for pre-incorporation contracts that overrule the common law.

This section reverses the common law rules. A person who, before a society is incorporated, purports to enter into a contract on behalf of the society is deemed to warrant to the other parties that the society will come into existence within a reasonable time and will adopt the contract. If the society 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.[113] 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.

Division 2 – Society Names

Introductory comment: The sections in Division 2 are, in large part, based on the equivalent sections found in Division 2 of Part 2 of the BCA. Section 3 (6) of the *Society Act*, 1996, incorporates by reference these sections of the BCA. So, in theory, this Division of the new *Society Act* does not represent any change in the law. But the bald declaration of section 3 (6) that Division 2 of Part 2 of the BCA "applies in respect of the name of" a society or an extraprovincial society glosses over a number of anomalies that have been worked out in practice through the administration of the Registrar of Companies. This Division of the new *Society Act* restates the rules governing society names and comes to grips with those anomalies.

Name of society

19 (1) A society recognized under this Act has as its name, on its recognition, the name shown for the society on the application filed to effect the recognition of the society if

(a) that name has been reserved for the society, and

(b) that reservation remains in effect at the date of the recognition of the society.

(2) Subsection (1) does not apply to a society that is recognized as a result of an amalgamation to which section 192 (2) (b) (i) (A) *[formalities to amalgamation]* applies.

112. Cumming Report, *supra* note 47, vol. 1 at 16 [citations omitted].

113. *See* Bill C-21, *supra* note 73, s. 15 (example of pre-incorporation contracts provisions included in a proposed not-for-profit statute).

Source: BCA, s. 21

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: The rules on when a society is recognized are set out in section 3. In simple terms, a society is recognized under the new *Society Act* when it (1) incorporates under the new *Society Act*, (2) converts from a qualifying entity (such as a cooperative association) into a society, (3) amalgamates with another society or entity, or (4) continues from a foreign jurisdiction into British Columbia. At these times, a society must go through the process of legally reserving a name for use in British Columbia. Subsection (1) simply confirms that the name that has been reserved and that remains in effect on recognition is the society's name. Subsection (2) contains an exception to the general rule. It applies when two or more amalgamating societies decide that they want to adopt the existing name of one of the amalgamating societies. Since this society would have already completed the name reservation process at some point in the past, there is no need to make it subject again to the general rule stated in subsection (1).

Reservation of name

20 (1) A person wishing to reserve a name for the purposes of this Act must apply to the registrar.

(2) After receiving an application to reserve a name under subsection (1), the registrar may reserve the name for a period of 56 days from the date of reservation or any longer period that the registrar considers appropriate.

(3) After receiving a request for the extension of a reservation of a name, the registrar may, if that request is received before the expiry of that reservation, extend that reservation for the period that the registrar considers appropriate.

(4) The registrar must not reserve a name for the purposes of this section unless that name complies with the prescribed requirements and with the other requirements set out in this Division.

(5) A name that the registrar for good and valid reasons disapproves contravenes the requirements set out in this Division.

Source: BCA, s. 22

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: This section deals with the mechanics of reserving a name. Since it is already incorporated by reference under the *Society Act*, 1996, its restatement in the new *Society Act* does not effect a change in the law and should not effect any change in practice. Many of the practical details applicable to the name reservation process are set out in the *Business Corporations Regulation*. (The "prescribed requirements" referred to in subsection (4) address these practical details.) These regulations should be adopted under the new *Society Act* as well.

Form of name of a society

21 (1) A society recognized under this Act must have the word "Society" or "Société" or the abbreviation "Soc." as part of its name.

(2) For all purposes, the words "Society" or "Société" are interchangeable with the abbreviation "Soc.".

Source: BCA, s. 23

Reference: tentative recommendation (11); tentative recommendation (12)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: Section 23 of the BCA requires companies to use "limited," "incorporated," "corporation," or their abbreviations or French forms as part of their names. In theory, these rules should apply to societies by virtue of section 3 (6) of the *Society Act*, 1996. 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.[114] It would be clearly unacceptable to continue such an anomaly in a new *Society Act*. Nevertheless, resolving this issue poses a number of challenges.

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. For this reason, the consultation paper contained a tentative recommendation to adopt section 23 of the BCA with a list of identifiers commonly used by societies. Respondents were generally in favour of this tentative recommendation, but a few pointed out practical problems that would make it difficult to implement the tentative recommendation as proposed. First, it would be difficult to capture the range of names in use. The list could have easily expanded to embrace 10 or more corporate designations. Second, many of the designations used by societies are also used by unincorporated not-for-profit associations. Reserving these designations to societies alone would create enforcement problems. Third, there would be challenging transitional issues attendant on following the BCA model too closely.

The committee has decided to amend its tentative recommendation to address these concerns. This section only applies to societies recognized under the new *Society Act*. The concept of recognition is explained in section 3. Simply put, a society is recognized when it incorporates, converts, amalgamates, or continues into British Columbia. The effect of this decision is to grandfather in existing society names when the new Act comes into force. This addresses the first and third concerns. The second concern is addressed by limiting the corporate designation for societies recognized under the new Act to "society" or its abbreviation or French form. Unincorporated not-for-profit associations rarely, if ever, use the word "society" as part of their names. (They tend to favour "association" or "club.") So employing "society" as the sole corporate designation for the future should avoid the enforcement problem. Over time, the goal is to have the word "society" broadly understood as an identifier of corporate and not-for-profit status in British Columbia.

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

Restrictions on use of name

22 A person must not use in British Columbia any name of which "Society" or "Société" or the abbreviation "Soc." is a part unless the person is a corporation entitled or required to use the words.

Source: BCA, s. 24

Reference: tentative recommendation (11); tentative recommendation (12)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: This section works in tandem with the previous section. It advances the goal of identifying the word "society" with societies recognized under the new *Society Act* or a former *Societies Act* by restricting the use of that term, in the main, to those societies. A person who contravenes this section commits an offence under section 322 (2). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Multilingual names

23 (1) The name of a society must be in one or both of

(a) an English form, and

(b) a French form.

(2) If the name of a society is in both an English form and a French form, the society may use, and may be legally designated by, either form or a combination of both forms for the purposes of section 25 *[name to be displayed]* or any other purpose.

(3) Subject to section 176 *[pre-existing constitution and bylaws of pre-existing society not to be altered]*, a society may translate its name into any other language and may be designated by that translation of the name outside Canada if the translation of the name is set out in

(a) the pre-existing constitution, or

(b) the constitution in accordance with section 9 (f) *[constitution]* and in the bylaws in accordance with section 11 (2) (c) (iii) *[bylaws]*.

Source: BCA, s. 25

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: This section confirms that a society may use a name in English form or in French form. It may also designate a name in another language for use outside Canada.

Assumed names

24 (1) If the name of a foreign corporation contravenes any of the prescribed requirements or any of the other requirements set out in this Division, the

foreign corporation must, if it wishes to be registered as an extraprovincial society, reserve an assumed name and section 20 *[reservation of name]* applies.

(2) If a foreign corporation reserves an assumed name, the registrar may register the foreign corporation as an extraprovincial society with its own name, if the foreign corporation provides an undertaking to the registrar, in form and content satisfactory to the registrar, that it will carry on all of its activities in British Columbia under that assumed name, and on such registration the extraprovincial society is deemed to have adopted the assumed name.

(3) An extraprovincial society that has adopted an assumed name under this Act

(a) must acquire all property, rights and interests in British Columbia under its assumed name,

(b) is entitled to all property, rights and interests acquired, and is subject to all liabilities incurred, under its assumed name as if the property, rights and interests and the liabilities had been acquired and incurred under its own name, and

(c) may sue or be sued in its own name, its assumed name or both.

(4) No act of an extraprovincial society that has adopted an assumed name under this Act, including a transfer of property, rights or interests to or by it, is invalid merely because the act contravenes subsection (3) (a) of this section.

(5) This section does not apply to a federal corporation.

Source: BCA, s. 26

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: Like the *Society Act*, 1996, the new *Society Act* allows extraprovincial societies to register and operate in British Columbia. A common problem for extraprovincial societies concerns their names. Sometimes an extraprovincial society will find that its name has already been taken by a British Columbia society or that its name would cause confusion with the name of an existing British Columbia society. As a result of being unable to have their names approved, these extraprovincial societies are not able to operate in British Columbia. This section provides a mechanism for these extraprovincial societies to adopt an assumed name for use in British Columbia. This allows these extraprovincial societies to operate in British Columbia under the assumed name. This section does not apply to federal corporations because they are entitled to carry on activities under their names in any province or territory in Canada.

Name to be displayed

25 (1) A society or extraprovincial society must display its name or, in the case of an extraprovincial society that has adopted an assumed name under this Act, its assumed name, in legible English or French characters,

(a) in a conspicuous position at each place in British Columbia at which it carries on activities,

(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 used 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.

(2) If a society has a seal, the society must have its name in legible characters on that seal.

Source: BCA, s. 27

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, ss. 3 (6), 13 (1)

Comment: The committee had concerns about including an obligation to use the society's full legal name at the places and on the documents listed in this section. The primary concern was non-compliance, which, if it is deliberate, can be punished by imposing personal liability on a director or an officer. In the end, the committee decided that including this obligation is justified. A requirement to display the society's name provides an important measure of protection for third parties dealing with the society. These third parties need to know that a limited liability entity is responsible for its acts and omissions. A society is an entity separate and distinct from its members; at law, it is considered a person in its own right. But, of course, it is an artificial person that requires natural persons (that is, human beings) to act on its behalf. There is a danger that third parties may be confused and think that the society's agents are actually responsible for the society's acts and omissions in their own right. A third party must also know a society's correct form of name if that third party wants to search for information about the society on the corporate register or if the third party wants to commence legal proceedings against the society.

For these reasons both the *Society Act*, 1996, and the new *Society Act* require societies to display their legal names at each place where the society carries on activities and on all official notices, correspondence, and other important legal documents. This requirement does not prohibit a society from carrying on its activities under a name that is not its legal name. But if a society does carry on activities under another name, then it must display its legal name along with the other name. To underscore the importance of adhering to the rules governing display of a society's name, section 90 imposes personal liability on any society director or officer who knowingly allows the society to breach these rules.

Subsection (2) does not require a society to have a seal. It is increasingly rare to encounter a requirement for a corporation to execute a document by seal. It would be advisable to eliminate the remaining requirements, if any, imposed by statute, as the use of a seal invariably baffles individuals without legal training.

Registrar may order change of name

26 (1) If, for any reason, the name of a society contravenes any of the prescribed requirements or any of the other requirements set out in this Division, the registrar may, in writing and giving reasons, order the society to change its name, and section 182 *[change of society name]* applies.

(2) If, for any reason, the name or assumed name of an extraprovincial society contravenes any of the prescribed requirements or any of the other requirements set out in this Division, the registrar may, in writing and giving reasons, order the extraprovincial society to change its name or assumed name or to adopt an assumed name, and section 283 *[change of name of extraprovincial societies]* or 284 *[cancellation or change of assumed name of extraprovincial society]*, as the case may be, applies.

(3) This section does not apply to a federal corporation.

Source: BCA, s. 28

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, s. 3 (6)

Comment: Disputes over names are common. This section gives the Registrar of Companies the power to order a society or an extraprovincial society to change its name if that name violates any of the rules contained in this Division or in the regulations that will be prescribed under this Division. The registrar's power does not extend to federal corporations, including federal not-for-profit corporations, because they are entitled to carry on activities in any province or territory in Canada under the name that has been approved by the federal Corporations Directorate.

Division 3 – Capacity and Powers

Capacity and powers of society

27 A society has the capacity and the rights, powers and privileges of an individual of full capacity.

Source: BCA, s. 30

Reference: tentative recommendation (18); tentative recommendation (20)

Concordance: *Society Act*, 1996, s. 4 (1) (d), (2)

Comment: This section clearly states that a society has the same legal capacity and powers as an individual human being. This statement establishes an important principle of modern corporate law and abrogates the *ultra vires* doctrine for societies.

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.[115] The gist of the doctrine is that the powers of a corporation are limited to those expressly set out in its governing statute or 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 corporation by restricting the activities of the corporation and therefore the risks presented by the corporation."[116] 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.[117] Beginning with the major corporate reforms of the 1970s, the doctrine has been abrogated for companies.[118] More recently, proposals for not-for-profit reforms have followed the for-profit statutes by implementing abrogation of the doctrine for societies.[119]

Whether or not this doctrine currently applies to British Columbia societies is open to debate. Commentators who have argued that the *Society Act*, 1996, 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. These commentators have seized on the different wording of the equivalent company law provision[120] and argued that the wording in the *Society Act*, 1996, actually has the effect of preserving the judicial doctrine of *ultra vires*.[121] This argument was made most forcefully

115. *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.

116. OLRC Report, *supra* note 82 at 467.

117. *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 . . .").

118. *See* CA, *supra* note 44, s. 21 (1). *See also* BCA, *supra* note 55, s. 30.

119. *See* Bill C-21, *supra* note 73, s. 16 (1); SK Act, *supra* note 71, s. 15 (1); ALRI Draft Act, *supra* note 81, s. 16 (1).

120. *See* BCA, *supra* note 55, s. 30. *See also* CA, *supra* note 44, s. 21 (1).

121. *See*, *e.g.*, John O.E. Lundell *et al.*, eds., *British Columbia Corporations Law Guide*, looseleaf, vol. 1 (Toronto: CCH Canadian, 1997) ¶ 55,560 ("Unlike 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

by two Vancouver lawyers at a Continuing Legal Education conference,[122] 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."[123] 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 *Society Act*, 1996. 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.

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 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 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 saving provision be enacted which would state that no act is invalid by reason only that it is contrary to a society's purposes.[124] The new *Society Act* adopts something similar to the ALRI recommendations in this section (which sets out the general rule that a society has the powers of an individual of full capacity) and in section 29 (which deals with restricted businesses and powers and also contains a saving provision).

Extraterritorial capacity

28 Unless restricted by its charter or by an Act, each society has the capacity

(a) to carry on its activities, conduct its affairs and exercise its powers in any jurisdiction outside British Columbia, and

(b) to accept from any lawful authority outside British Columbia powers and rights concerning the society's activities and powers.

Source: BCA, s. 32

Reference: tentative recommendation (18)

Concordance: new

Comment: This section simply confirms that a society has the legal capacity to act outside British Columbia. This legal capacity may be restricted by a statute or by the society's corporate charter

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.").

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

123. *Ibid.* at 3.1.08.

124. ALRI Report, *supra* note 62 at 34–35.

(that is, its constitution or bylaws). The *Society Act*, 1996, does not contain an equivalent section, but section 32 of the BCA is framed in broad terms and would apply to a society. A section modelled on section 32 is contained in the new *Society Act* to alert participants in the not-for-profit sector that this legal issue is addressed in the legislation.

Restricted activities and powers

29 (1) A society must not

(a) carry on any activities or exercise any power that it is restricted by its pre-existing constitution or bylaws from carrying on or exercising, or

(b) exercise any of its powers in a manner inconsistent with those restrictions in its pre-existing constitution or bylaws.

(2) No act of a society, including a transfer of property, rights or interests to or by the society, is invalid merely because the act contravenes subsection (1).

Source: BCA, s. 33

Reference: tentative recommendation (19)

Concordance: new

Comment: A society may wish to restrict its activities or powers. Restrictions are occasionally imposed as a sort of guarantee that future society executives will continue to focus efforts on the society's purposes. If those restrictions are set out in the society's bylaws or its pre-existing constitution, then they are binding on the society. If they are breached, then this breach may be remedied by the members' remedies set out in Part 8, including a compliance or restraining order.

The pre-existing constitution of a society ceases to have any force or effect after transition. During the transition process, societies with restrictions on their activities and powers would have to move these restrictions to their bylaws.

Subsection (2) is intended to promote certainty in dealings involving societies and to provide protection to innocent third parties, who may in good faith enter into transactions with the society that contravene subsection (1).

Division 4 – Society Offices

Registered and records offices

30 (1) Subject to section 36 *[elimination of a society's records office by its agent]*, a society must maintain a registered office and a records office in British Columbia.

(2) The registered office and the records office may be located at the same place.

(3) A society recognized under this Act or a society that has complied with section 271 *[transition – restored pre-existing societies]* or 331 *[transition*

– *pre-existing societies]* has as the mailing address and delivery address of its first registered office and the mailing address and delivery address of its first records office the mailing addresses and delivery addresses respectively shown for those offices on the constitution that applies to the society on its recognition or compliance with section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]*.

Source: BCA, s. 34

Reference: tentative recommendation (21)

Concordance: *Society Act*, 1996, ss. 10, 11

Comment: 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 society is a legal construct—an artificial person. Unlike a natural person (a human being), a society 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 on activities). This dual nature can lead to problems both for persons who want to serve a legal notice on a society and for the society'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 society to overcome these problems. The records office is meant to be a place where a society's records are kept and made available for inspection. (For rules on serving records on a society in a legal proceeding, which is an important subset of the broader issue of service and notice, see section 7.)

The *Society Act*, 1996, 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.

This section adopts the terminology used in modern corporate statutes, such as the BCA. The transition process will deem the address for service for a pre-existing society to be the mailing and deliver address of its registered and records offices (see section 335). Both offices may be in the same location, as subsection (2) makes clear, but they do not have to be. The new *Society Act* affords societies more flexibility than the *Society Act*, 1996, in maintaining their registered and records offices at different locations. Given the different roles played by the registered office and the records office, some societies may want to have them in different locations.

Subsection (3) is included for greater certainty. It simply declares where a society's first registered office and first records office are located upon recognition of the society. Recognition is a technical concept that is explained in section 3. In brief, a society is recognized under the new *Society Act* upon incorporation, conversion, amalgamation, or continuation into British Columbia. So, in general, subsection (3) relates to the organization of a new society.

Subsection (3) refers to the "mailing address" and the "delivery address" of each of the two offices. The concept of a mailing address is familiar to anyone who has sent a letter. It should be kept in mind, though, that the term is defined in section 1 to include the postal code. So, in

completing the mailing addresses for the registered and records offices that are to be inserted in the constitution, the postal code must be included. A delivery address is a more unfamiliar concept. It is defined in section 1 as being, for an office, "the location of that office identified by an address that describes a unique and identifiable location that (a) is accessible to the public during statutory business hours for the delivery of records, and (b) except in the case of the head office of an extraprovincial company, is in British Columbia." The definition of "delivery address" also makes it clear that a post office box cannot be a delivery address. The reasons for requiring a delivery address become clear when the functions of the two offices are recalled. The registered office is the location where legal process and other important notices may be effectively served or sent. The records office is the place where records are kept and made available for inspection. Thus, the emphasis in the definition on an actual physical location in British Columbia and on that location being accessible during the statutory business hours, which are 9:00 a.m. to 4:00 p.m. on any working day.

Unless the society's records office has been eliminated in accordance with the procedure in section 36, a society must have a registered office and a records office at all times. A society that breaches section 30 (1) commits an offence. For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Change of registered or records office

31 (1) Subject to section 30 (1) *[registered and records offices]*, a society that has been authorized to do so under subsection (2) of this section may change one or both of the mailing address and delivery address of one or both of its registered office and records office by filing with the registrar a notice of change of address in the form established by the registrar.

(2) A society is authorized to file a notice of change of address with the registrar if the change of address reflected in the notice has been authorized

(a) in any manner required or permitted by the bylaws, or

(b) if the bylaws are silent as to the manner in which a change of address is to be authorized, by a directors' resolution.

(3) A change of address reflected in a notice of change of address filed with the registrar under this section takes effect under section 33 *[completion of change of address]* whether or not the change of address has been authorized in accordance with subsection (2).

Source: BCA, s. 35

Reference: tentative recommendation (21)

Concordance: *Society Act*, 1996, s. 10 (1) (b)

Comment: As the *Society Act*, 1996, permits a society to change its address for service, so the new *Society Act* allows a society to change the mailing address or the delivery address of its registered or records office. Unlike the *Society Act*, 1996, the new *Society Act* provides some guidance on what internal steps are needed to effect a change of address. Under subsection (2), the society's bylaws determine how a change of address should be authorized. If the bylaws are silent, then the default rule applies, requiring authorization by a directors' resolution. The require-

ment to file a form notifying the Registrar of Companies of the change of address is unchanged. But subsection (3) makes it clear that if a society files the necessary form with the registrar, then that form will be effective to change the society's address regardless of whether the necessary steps have been taken to authorize the change. This rule supports the policy that the corporate register should be determinative; that is, people should be able to rely on the information they obtain from this public registry without having to make any further inquiries as to its accuracy. Of course, if a change of address form has been filed in the absence of proper authorization or even an actual change of address, then the society should take steps to correct the record.

How to change an agent's office address

32 (1) A person who maintains the registered office or records office of one or more societies at the person's place of business or residence may, if there is to be a change to one or both of the mailing address and the delivery address of that place of business or residence, before that change occurs, file with the registrar a notice of change of address in the form established by the registrar.

(2) A person referred to in subsection (1) must, if there is a change to one or both of the mailing address and the delivery address of the place of business or residence at which the person maintains the registered office or records office and if a notice of change of address reflecting that change was not filed under subsection (1) before that change occurred, promptly after that change occurs, file with the registrar a notice of change of address in the form established by the registrar.

(3) If the person referred to in subsection (1) or (2) is not the only director of a society for which the person maintains a registered office or records office, the person must, before or promptly after filing a notice of change of address under this section, send a copy of that notice to a director of that society who is not that person.

Source: BCA, s. 36

Reference: tentative recommendation (21)

Concordance: new

Comment: One of the out of date features of the *Society Act*, 1996, is its failure to accommodate the reality that agents often serve as the address for service and repository of its documents. The new *Society Act* integrates these practical arrangements into its rules governing registered and records offices. An agent may change its address for business reasons, and this change will have the effect of changing the address of the registered and records offices of each society for which the agent acts. This section allows an agent in these circumstances to file one change of address form with the Registrar of Companies. This spares the agent of the burden of filing multiple change of registered and records office forms (one for each society for which the agent acts) and it spares the affected societies of the burden of obtaining the necessary internal authorizations for a change of address of registered and records offices. The term "agent" is capable of a very broad interpretation. In practice, in most cases an agent that maintains a society's registered or records office will be a law firm, but the agent may be a society director or a private company or

an individual who offers record keeping services. The change of agent's address form should be filed before the actual change takes place, but if it is not, then under subsection (2) it may be filed promptly after the change occurs.

Completion of change of address

33 (1) A change of address reflected in a notice of change of address filed with the registrar under section 31 *[change of registered or records office]* or 32 *[how to change agent's office address]* takes effect

(a) subject to section 34 *[withdrawal of notice of change of address]*, at the beginning of the day following the date on which the notice of change of address is filed with the registrar, or

(b) subject to sections 34 *[withdrawal of notice of change of address]* and 305 *[limitation on future dated filings]*, if the notice of change of address specifies a date on which the notice of change of address is to take effect that is later than the day following the date on which the notice of change of address is filed with the registrar, at the beginning of the specified date.

(2) At the time that a change of address under section 31 *[change of registered or records office]* or 32 *[how to change agent's office address]* takes effect in relation to a society that has a constitution, the society's constitution is altered to reflect that change.

(3) After a change of address under section 31 *[change of registered or records office]* or 32 *[how to change agent's office address]* takes effect, the registrar must, if requested to do so, furnish to the society,

(a) if the society has a constitution, a certified copy of the constitution as altered, or

(b) in any other case, confirmation of the change of address.

Source: BCA, s. 37

Reference: tentative recommendation (21)

Concordance: *Society Act*, 1996, s. 10 (2)

Comment: This section carries forward the requirement to file a notice of change of address with the Registrar of Companies. A similar requirement is imposed by section 10 of the *Society Act*, 1996. This section also addresses some of the mechanics of filing with the registrar.

Withdrawal of notice of change of address

34 At any time after a notice of change of address is filed with the registrar under section 31 *[change of registered or records office]* or 32 *[how to change agent's office address]* and before the change of address takes effect, the society in respect of which the filing was made or any other person who appears to

the registrar to be an appropriate person to do so may withdraw the notice of change of address by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of change of address.

Source: BCA, s. 38

Reference: tentative recommendation (21)

Concordance: new

Comment: This section simply confirms that a notice of change of address can be withdrawn at any time after it is filed with the Registrar of Companies and before it takes effect, by filing the appropriate form with the registrar.

Transfer of a society's registered office by its agent

35 (1) In this section, "**applicant agent"** means a person

(a) who is not a director or officer of the society, and

(b) who is authorized by the society to maintain the registered office of the society.

(2) An applicant agent who maintains the registered office of a society may apply to the registrar, in an application to transfer registered office in the form established by the registrar, to transfer the location of the registered office to the British Columbia residence of a director or officer of the society.

(3) At least 21 days before submitting an application under subsection (2) to the registrar for filing, the applicant agent must, subject to subsection (5), provide to the director or officer referred to in subsection (2) a notice in writing

(a) advising that the applicant agent will make an application under this section unless, within 21 days after the date of the notice, the society files with the registrar a notice of change of address under section 31 *[change of registered or records office]* to transfer the location of its registered office, and

(b) specifying the British Columbia residence address of the director or officer as the address to which the location of the registered office is to be transferred by the application.

(4) An applicant agent must provide to the registrar, concurrently with submitting the application to the registrar for filing, an affidavit *[a signed statement]* of the applicant agent

(a) confirming that subsection (3) has been complied with,

(b) proposing that the registered office be located at the residence address specified, under subsection (3) (b), in the notice referred to in that subsection,

(c) describing that residence address as a mailing address and as a delivery address,

(d) providing the reasons for the applicant agent's belief that the proposed location, as described, is the residence of the director or officer referred to in the application, and

(e) providing proof

(i) that the director or officer referred to in the application received the notice referred to in subsection (3), or

(ii) in a case to which subsection (5) applies, that the applicant agent complied with the court order made under that subsection.

(5) An applicant agent who is unable to ensure receipt by the director or officer of the notice referred to in subsection (3) may apply to the court for an order of substituted service of that notice and may serve that notice in accordance with any order made in response to that application.

(6) A director or officer who receives the notice referred to in subsection (3) may apply to the court for an order that the location of the registered office not be transferred to the residence of the director or officer.

(7) The registered office of the society is transferred to the residence address specified in the application under subsection (2) at the beginning of the day following the date on which the application is filed with the registrar.

(8) If a society to which subsection (7) applies has a constitution, the society's constitution is, at the time that its registered office is transferred, altered to reflect that transfer.

(9) After the registered office of a society is transferred under this section, the registrar must

(a) furnish to the society,

(i) if the society has a constitution, a certified copy of the constitution as altered, or

(ii) in any other case, confirmation of the transfer of the registered office, and

(b) furnish a copy of the constitution or the confirmation, as the case may be, to the applicant agent.

Source: BCA, s. 39

Reference: tentative recommendation (21)

Concordance: new

Comment: Many societies rely on agents to maintain their records and to act as their current equivalent to a registered office—the "address for service." The *Society Act*, 1996, takes little to no account of the practicalities of these arrangements. One of the consequences that may occur is a dispute between the society and the agent. These disputes are usually not marked by active antagonism. Instead, the society executive and the agent will simply fall out of contact. This may occur for a variety of reasons, such as a change of executive or a declining interest in maintaining the society and pursuing its purposes. Inevitably, the agent finds itself unable to obtain proper instructions from the society and is faced with expenses and, if court process or official notices go unanswered, possible legal concerns. This section provides a mechanism for the agent who is not a society insider (that is, not a director or officer of the society) to transfer the registered office to a society director or officer.

The length and complexity of this section results from the fact that several interests must be balanced in it. First, there is the need to give the agent a remedy. Second, the society director or officer who is affected by the proposed transfer must be given proper notice. Finally, the interests of the general public must be taken into account. The public has an interest in knowing where the society's registered office is located, as the registered office is the place where court process and other official notices may be served on the society. In this section, the public's interest is safeguarded by the oversight of the Registrar of Companies.

The bracketed reference to a "signed statement" in subsection (4) relates to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

Subsection (6) gives affected society directors or officers an avenue of appeal to the court. This option is an important bulwark against the section working any unfairness. The court is always in a position to sanction frivolous or vexatious applications, for example, by ordering a society director or officer to pay the litigation costs of the agent.

Elimination of a society's registered office by its agent

36 (1) In this section, "**applicant agent"** has the same meaning as in section 35 (1) *[transfer of a society's registered office by its agent]*.

(2) If an applicant agent for a society is unable to locate any of the directors or officers of the society, the applicant agent may apply to the court to eliminate the registered office of the society.

(3) An application under subsection (2) must be accompanied by an affidavit of the applicant agent as to the steps taken to locate the directors and officers of the society.

(4) On an application under subsection (2), the court

(a) may, if satisfied that no director or officer can, after reasonable efforts, be located, make the order it considers appropriate, including an order that the registered office of the society be eliminated on the terms and conditions that the court considers appropriate, and

(b) must, if the court makes an order that the registered office of the society be eliminated under paragraph (a) of this subsection, set out, by order, the manner in which records may be served on, and mailed, delivered, sent, provided and furnished to, the society.

(5) If the court orders that the registered office be eliminated under subsection (4), the applicant agent must promptly file with the registrar a notice of elimination of registered office in the form established by the registrar and a copy of the entered order.

(6) The registered office of a society is eliminated at the beginning of the day following the date on which the notice of elimination of registered office is filed with the registrar.

(7) If a society to which subsection (6) applies has a constitution, the society's constitution is, at the time that its registered office is eliminated, altered to reflect that elimination.

(8) After the registered office of a society is eliminated, the registrar must furnish to the society,

(a) if the society has a constitution, a certified copy of the constitution as altered, or

(b) in any other case, confirmation of the elimination of the registered office.

(9) The service of records on and the mailing, delivering, sending, providing or furnishing of records to a society that has had its registered office eliminated under this section may be effected in the manner ordered by the court under subsection (4) (b), and any reference in this Act to serving a record on, or mailing, by ordinary or registered mail, delivering, sending, providing or furnishing a record to, the registered office of a society is, if that society has had its registered office eliminated under this section, deemed to be a reference to the manner ordered by the court under subsection (4) (b).

Source: BCA, s. 40

Reference: tentative recommendation (21)

Concordance: new

Comment: This section addresses a somewhat more drastic version of the problem dealt with in the previous section. In this case, an agent who is not a society insider is given a mechanism to eliminate the society's registered office. The agent may only take this step if no society director or officer can be located, despite reasonable efforts to locate one. The procedure set out in this section is similar to the procedure established in the previous section. One key difference between the two sections is that this section requires an application to court. Eliminating a registered office is a more extreme action than transferring the registered office. Court oversight is meant to protect the public interest. Any court order obtained under this section must set out "the manner in which records may be served on, and mailed, delivered, sent, provided and furnished to, the society." This ensures that the public continues to have a means to serve notices and other documents on the society, even after its registered office is eliminated.

Transfer of a society's records office by its agent

37 (1) In this section, **"applicant agent"** means a person

(a) who is not a director or officer of the society, and

(b) who is authorized by the society to maintain the records office of the society.

(2) An applicant agent who maintains the records office of a society may apply to the court to transfer the location of the records office to the British Columbia residence of a director or officer of the society if, at least 21 days before filing the application with the court, the applicant agent provides to that director or officer a notice in writing

(a) advising that the applicant agent will make an application under this section unless, within 21 days after the date of the notice, the society files with the registrar a notice of change of address under section 31 *[change of registered or records office]* to transfer the location of its records office, and

(b) specifying the British Columbia residence address of the director or officer as the address to which the location of the records office is to be transferred by the application.

(3) Unless, within 21 days after the date of the notice referred to in subsection (2) of this section, the society files with the registrar a notice of change of address under section 31 *[change of registered or records office]* to transfer the location of its records office, the applicant agent may apply to the court to transfer the location of the records office to the residence of the director or officer of the society to whom the notice referred to in subsection (2) of this section was provided.

(4) An application under subsection (3) must be accompanied by an affidavit of the applicant agent

(a) confirming that subsection (2) has been complied with,

(b) proposing that the records office be located at the residence address specified, under subsection (2) (b), in the notice referred to in that subsection,

(c) describing that residence address as a mailing address and as a delivery address,

(d) providing the reasons for the applicant agent's belief that the proposed location, as described, is the residence of the director or officer referred to in the application, and

(e) providing proof that the director or officer referred to in the application received the notice referred to in subsection (2).

(5) A director or officer who receives the notice referred to in subsection (2) may apply to the court for an order that the location of the records office not be transferred to the residence of the director or officer.

(6) If, on an application under subsection (3), the court orders that the records office be transferred, the applicant agent must promptly submit to the registrar for filing,

(a) a notice of transfer of records in the form established by the registrar to confirm that the records kept at the society's records office have been physically transferred to the new location of the records office ordered by the court, and

(b) a copy of the entered order.

(7) A transfer of the records office of a society under this section takes effect when the notice of transfer of records referred to in subsection (6) is filed with the registrar.

(8) If the society to which subsection (7) applies has a constitution, the society's constitution is, at the time that the transfer of its records office takes effect, altered to reflect that transfer.

(9) After the records office of a society is transferred under this section, the registrar must furnish to the society,

(a) if the society has a constitution, a certified copy of the constitution as altered, or

(b) in any other case, confirmation of the transfer of the records office.

Source: BCA, s. 41

Reference: tentative recommendation (21)

Concordance: new

Comment: The final provision in this group provides a mechanism for agents who are not society insiders to transfer a society's records office. The procedure in this section is similar to the procedure in the previous sections. As in the elimination of a registered office, an application to court is required to transfer a records office. It is also noteworthy that, unlike the case for an application to transfer a registered office, there is no authorization in this section for an applicant agent to obtain an order for substituted service from the court. This means that the applicant agent must ensure that the society director or officer whose residence will become the society records office must receive a notice of the agent's application under this section.

Division 5 – Society Records

Records office records

38 (1) Subject to section 39 *[records may be kept at other locations]*, a society must keep the following records at its records office:

(a) its certificate of incorporation, certificate of conversion, certificate of amalgamation or certificate of continuation, as the case may be, any certificate of change of name and any certificate of restoration applicable to the society;

(b) a copy of each of the following:

(i) each entered order of the court made in respect of the society under this Act;

(ii) each order of the registrar made in respect of the society;

(iii) each affidavit *[signed statement]* deposited in the society's records office under section 194 (1) *[amalgamations without court approval]*, 201 (7) (a) *[amalgamations into foreign jurisdictions]* or 218 (1) (a) *[application for voluntary dissolution]*;

(c) its register of members unless, under section 128 (4) *[register of members]*, the directors designate a different location, in which case the society must

(i) keep the register of members at that designated location, and

(ii) keep at its records office a notice identifying the mailing address and delivery address of the location at which that register is available for inspection and copying in accordance with section 128 (4) or (5) *[register of members]*, as the case may be;

(d) its register of directors;

(e) a copy of each consent to act as a director received by the society;

(f) a copy of each written resignation referred to in section 61 *[when directors cease to hold office]*;

(g) a copy of any report sent to the society under section 173 (1) *[reports of inspector]*;

(h) the minutes of every meeting of members;

(i) a copy of each consent resolution of members and each consent under section 229 (1) *[qualifications of liquidators]*, and, if the consents of the members are expressed on more than one record, a copy of each of those records;

(j) unless contained in the minutes of the applicable meeting or in a consent resolution,

(i) the complete text of any resolution passed at a meeting of members, and

(ii) a copy of each written record referred to in section 80 (3) or (4) *[obligation to account for profits]* or 85 *[disclosure of conflict of office or property]* that records a disclosure made to the members under Division 3 of Part 4 by a current director or a current senior officer;

(k) the minutes of every meeting of directors or of a committee of directors, and, unless contained in the minutes of the applicable meeting, a list of every director present at the meeting;

(l) a copy of each consent resolution of the directors or of a committee of directors, and, if the consents of the directors are expressed on more than one record, a copy of each of those records;

(m) unless contained in the minutes of the applicable meeting or in a consent resolution,

(i) the complete text of any resolution passed at a meeting of directors or of a committee of directors, and

(ii) a copy of each written record referred to in section 80 (3) or (4) *[obligation to account for profits]* or 85 *[disclosure of conflict of office or property]* that records a disclosure made to the directors under Division 3 of Part 4 by a current director or a current senior officer,

(n) a copy of each written dissent received under section 86 (5) or (8) *[directors' liability]*;

(o) a copy of

(i) each of the audited financial statements of the society and its subsidiaries, whether or not consolidated with the financial

statements of the society, including the auditor's reports prepared in relation to those financial statements, and

(ii) unless kept under subparagraph (i) of this paragraph, the financial statements referred to in section 116 (1) *[information for members]* that were prepared in relation to the most recently completed financial year;

(p) a copy of any representations sent to the society under section 144 (5) *[removal of auditor during term]* and any response sent to the society under section 144 (6) *[removal of auditor during term]*;

(q) if the society is an amalgamated society, copies of the records described in the following paragraphs of this subsection for each amalgamating society:

(i) paragraphs (a) to (g);

(ii) paragraphs (h) to (j);

(iii) paragraphs (k) to (n);

(iv) paragraphs (o) and (p).

(2) In addition to the records referred to in subsection (1), a society must keep the following records at its records office:

(a) in relation to its bylaws,

(i) subject to subparagraphs (ii) and (iii) of this paragraph,

(A) the set of bylaws referred to in section 11 (7) *[bylaws]*, 187 *[bylaws on conversion]*, 199 (1) (c) *[effect of amalgamation]* or 210 *[bylaws for a continued society]*, as the case may be, that apply to the society on its recognition, or

(B) in the case of a pre-existing society, a copy of the set of society that apply to the society on its compliance with section 271 (1) (a) and (b) *[transition – restored pre-existing societies]* or 331 (1) (a) and (b) *[transition – pre-existing societies]*, as the case may be,

(ii) in the case of a society that has, by operation of this Act, or has adopted, by reference, any or all of Table 1 or Schedule B as or in its bylaws,

(A) a copy of that table or, if a copy of that table is otherwise available at that office and is, in relation to the society, available there for inspection and copying in accordance

with sections 42 *[inspection of records]* and 44 *[list of members]*, a record confirming that that table is available at that office for inspection and copying in accordance with sections 42 *[inspection of records]* and 44 *[list of members]*, and

(B) that part, if any, of its bylaws that is not included in that table,

(iii) in the case of a society that has wholly replaced its bylaws,

(A) the replacement set of bylaws, and

(B) a copy of the set of bylaws that the society has wholly replaced, and

(iv) a copy of every resolution or other record altering or replacing the bylaws, which copy must, in the case of records retained under subparagraph (i), (ii) (B) or (iii) of this paragraph, as the case may be, be attached to those records;

(b) if the society was incorporated under this Act, the signed copy of the incorporation agreement;

(c) if the society resulted from the continuation of a foreign corporation into British Columbia under this Act, the records, relating to the period before the continuation of the society, that the foreign corporation was required to keep by the corporate legislation of the foreign corporation's jurisdiction;

(d) if the society resulted from an amalgamation of one or more foreign corporations with one or more societies, the records, relating to the period before the amalgamation, that each of the foreign corporations was, before the amalgamation, required to keep by the corporate legislation of the foreign corporation's jurisdiction;

(e) if the society is a pre-existing society,

(i) copies of the pre-existing constitution and bylaws that applied to the society on the coming into force of this Act, altered as necessary to reflect the information, if any, added under section 330 (1) (a) *[obligations of pre-existing reporting societies]*,

(ii) subject to subsection (3) of this section and unless kept elsewhere in the manner provided by section 11 of the *Society Act*, 1996, each of the following, if and to the extent that it relates to the period before the coming into force of this Act:

(A) its pre-existing register of members;

(B) its register of indebtedness; and

(iii) any records, not otherwise retained by the society under this section, that the society was required to keep under the *Society Act*, 1996 that relate to the period before the coming into force of this Act;

(f) if the society is an amalgamated society, copies of the records described in the following paragraphs of this subsection for each amalgamating society:

(i) paragraphs (a) and (b);

(ii) paragraph (c);

(iii) paragraph (d);

(iv) paragraph (e) (i);

(v) paragraph (e) (ii);

(vi) paragraph (e) (iii).

(3) A pre-existing society need not keep its pre-existing register of members under subsection (2) (e) (ii) or (f) (v) of this section if the whole of the information that was, under section 70 respectively of the *Society Act*, 1996, required to be kept in that register is included in the society's register of members.

Source: BCA, s. 42

Reference: tentative recommendation (22)

Concordance: *Society Act*, 1996, s. 11 (1)

Comment: Record keeping issues do not go to the heart of not-for-profit activity. Provisions imposing record keeping requirements should emphasize modern practices and procedures. Harmonization with the province's for-profit corporate statute is also a concern. 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 of organizational trouble: that trouble can quickly accelerate and result in much heavier consequences for the society.[125]

125. *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).

The *Society Act*, 1996, deals with record keeping in a short section that simply says that "[t]he directors of a society must ensure that all documents of a society including its financial records are kept at the address of the society." The key word in this provision is "documents." The *Society Act*, 1996, defines the word "document" in an expansive fashion to mean "a written instrument, including a notice, order, certificate, register, letter, report, return, account, summons or legal process." 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:[126]

> . . . 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 new *Society Act* follows the modern approach to corporate record keeping and sets out a detailed list of records that the society must maintain at its records office. The intent of this section is not to impose a new record keeping burden on societies; rather, the goal is to clarify the exact types of records that a society must maintain at its records office. The main advantage of setting out an exhaustive list of records that must be retained by a society in the statute is that it provides certainty to society executives or to agents who maintain the society's records office. It is clear under this section exactly which types of records must be maintained in a minute book. A secondary advantage of this approach is that it lends clarity to the question of access to records, as will be seen in the sections that follow.

A breach of this section is an offence under section 322. For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

The bracketed reference to a "signed statement" in subsection (1) (b) relates to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

Records may be kept at other locations

39 (1) Despite section 38 *[records office records]* but without limiting subsection (2) of this section, records referred to in section 38 (1) (h), (i), (j), (k), (l), (m), (n), (o), (p) or (q) (ii), (iii) or (iv) or (2) (c), (d), (e) (ii) or (iii) or

126. *British Columbia Corporations Law Guide*, *supra* note 121, vol. 1 ¶ 56,640.

(f) (ii), (iii), (v) or (vi) *[records office records]* may, after 7 years from the date on which they were received for deposit at the records office, be kept by the society at a location other than the records office so long as those records can be produced from that other location by the person who maintains the records office for the society on 48 hours' notice, not including Saturdays and holidays.

(2) Despite section 38 *[records office records]* but subject to section 128 (3) to (5) *[register of members]*, a society may keep all or any of the records referred to in section 38 (1) and (2) *[records office records]* at a location other than the records office so long as those records are available for inspection and copying in accordance with sections 42 *[inspection of records]* and 44 *[list of members]* at the records office by means of a computer terminal or other electronic technology.

Source: BCA, s. 43

Reference: tentative recommendation (22)

Concordance: new

Comment: Maintaining corporate records undeniably takes up office space and can generate costs for societies or their agents. This section attempts to lessen that burden in two ways. Subsection (1) permits a society to maintain the bulk of its historical corporate records at a place other the society's records office. A record becomes a historical record for the purposes of subsection (1) seven years after it has been received at the records office. This rule is meant to facilitate the use of relatively inexpensive off-site storage for historical records, which is a common practice in record keeping generally. Accessibility to these records is preserved by requiring them to be available on two business days' notice. Subsection (2) permits a society to maintain any of its corporate records, other than its register of members, at a location other than its records office, so long as those records may be made available through a computer link or other electronic technology. Neither of these two provisions is found in the *Society Act*, 1996.

Maintenance of records

40 (1) Any record that a society is required to keep at its records office under section 38 *[records office records]* must be deposited in that office promptly after the society's preparation or receipt, as the case may be, of the record.

(2) Records that are required by this Act to be prepared or kept by or on behalf of a society must be kept, entered or recorded in any other manner that will allow them to be inspected and copied in accordance with this Act.

(3) A society, the person who maintains the records office for the society and any other agent of the society who has a duty to prepare or keep any of the records required by this Act must take adequate precautions in preparing and keeping those records so as to

(a) keep those records in a complete state,

(b) avoid loss, mutilation and destruction,

(c) avoid falsification of entries, and

(d) provide simple, reliable and prompt access.

Source: BCA, s. 44

Reference: tentative recommendation (22)

Concordance: new

Comment: If there is to be meaningful access to corporate records, then certain standards of record keeping and maintenance must be followed. This section contains a set of rules for organizing and maintaining records. Many of these rules are simply common sense, such as keeping corporate records in a minute book.

This section differs from its equivalent in the BCA in two ways. First, subsection (2) simply sets out a broad standard that societies must meeting in maintaining their records. The BCA, on the other hand, goes into considerable more detail and contemplates further detail in the regulations. Second, the requirement to note the time and date on certain records upon their receipt at the records office that is set out in section 44 (3) of the BCA is not carried forward in this Act. The level of precision and detail required in implementing these two sections is not needed for societies. Enacting these provisions would raise concerns about compliance.

Missing records

41 (1) If the court is satisfied that a record that was or that should have been deposited in the records office of a society has been destroyed or is lost, the court may, on the application of an interested person, make the order it considers appropriate and may, without limitation,

(a) make a declaration as to what was contained in the record,

(b) declare the record to have existed with full legal effect from the date and time that the society was recognized or from any other date and time that the court may order, and

(c) if a declaration is made under paragraph (a) in respect of the contents of a record, order that some or all of those contents

(i) apply to a person or to an event, or

(ii) do not apply to a person or to an event, whether or not those contents would have applied to the person or the event on or after the date ordered by the court under paragraph (b).

(2) If an order is made under subsection (1) in respect of a record, the provisions of this Division that are applicable to that record apply to a copy of the entered order.

Source: BCA, s. 45

Reference: tentative recommendation (22)

Concordance: new

Comment: Even the best record keeping practices cannot guarantee that records will never go missing. Under the new *Society Act* the court has a power to make certain orders if a record is destroyed or goes missing. These orders include declaring what the content of the missing record is and that the record existed with full legal effect from a date in the past. This section provides societies with a flexible remedy in certain cases where there have been failings in record keeping.

Inspection of records

42 (1) The following persons may, without charge, inspect all of the records that a society is required to keep under section 38 *[records office records]*:

(a) a current director of the society;

(b) if and to the extent permitted by the bylaws,

(i) a member of the society, or

(ii) any other person.

(2) A former director of a society and, if and to the extent permitted by the by-laws that were in effect immediately before the person ceased to be a member, a former member of a society may, without charge, inspect all of the records that the society is required to keep under section 38 *[records office records]* that relate to the period when that person was a director or member, as the case may be.

(3) The following persons may, without charge, inspect all of the records that a society is required to keep under section 38 *[records office records]*, other than the records referred to in section 38 (1) (c), (k) to (n) and (q) (iii) *[records office records]*:

(a) a member or qualifying debentureholder of the society;

(b) a former member of the society to the extent that those records relate to the period when that person was a member.

(4) Any person may, without charge, inspect all of the records that a society is required to keep under section 38 *[records office records]*, other than the records referred to in section 38 (1) (c), (k) to (n) and (q) (iii) *[records office records]*, if the society is a pre-existing reporting society.

(5) In the case of a society that is not one referred to in subsection (4) of this section, on payment, to the person who maintains the records office for the society, of the inspection fee, if any, set by that person or by the society, which fee must not exceed the prescribed fee, any person may inspect all of the records that the society is required to keep under section 38 *[records*

office records], other than the records referred to in section 38 (1) (c), (e) to (p) and (q) (ii) to (iv) *[records office records]*.

(6) Despite subsections (1) to (5) of this section but without limiting any obligation to pay the fee, if any, required under this section, a person may inspect a record kept by a society under section 38 (2) (c), (d), (e) (ii) or (iii) or (f) (ii), (iii), (v) or (vi) *[records office records]* only if and to the extent that,

(a) in the case of a record kept under section 38 (2) (c) or (f) (ii) *[records office records]*, the person was entitled to do so under the corporate legislation of the jurisdiction that, before the continuation, was the foreign corporation's jurisdiction,

(b) in the case of a record kept in the records office of an amalgamated society under section 38 (2) (d) or (f) (iii) *[records office records]* in relation to an amalgamating foreign corporation, the person was entitled to do so under the corporate legislation of the jurisdiction that, before the amalgamation, was the foreign corporation's jurisdiction, or

(c) in the case of a record kept under section 38 (2) (e) (ii) or (iii) or (f) (v) or (vi) *[records office records]*, the person was entitled to do so under the *Society Act*, 1996.

(7) Subject to subsection (8) of this section, an inspection of a society's records that is authorized by this section may be conducted during statutory business hours.

(8) A society may, by an ordinary resolution, impose restrictions on the times during which a person, other than a current director, may inspect the society's records under this section, but those restrictions must permit inspection of those records during the times set out in the regulations.

Source: BCA, s. 46

Reference: tentative recommendation (24); tentative recommendation (25)

Concordance: *Society Act*, 1996, ss. 37, 95

Comment: The eccentricity of the record keeping rules in the *Society Act*, 1996, spills over into that Act's 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 of the *Society Act*, 1996, 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*[127] contain detailed rules governing the exercise of this default right.

127. B.C. Reg. 4/78.

This right is qualified by the opening words of section 37—"unless otherwise provided in the bylaws."[128] 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.[129] 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." Some societies may have included expansive access rights in their bylaws in the belief that this approach complies with the *Society Act*, 1996. Those societies may wish to review their bylaws in light of the changes brought about by this section.

The *Society Act*'s approach to this issue is at odds with the approach taken in most for-profit legislation[130] and not-for-profit proposals for reform.[131] Instead of default open access to an expansively defined category of "documents," the more common approach is to 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.

This section of the new *Society Act* establishes a statutory right to access to records. The right varies depending on the role a person plays vis-à-vis the society. Directors have access to all the records that a society must maintain in its records office. This rule is justified in view of the statutory duty that directors have to manage or supervise the management of the society's activities and affairs. This rule also does not represent a change from the *Society Act*, 1996. A society also has the power under the new *Society Act* to grant open access to its corporate records to a member or any other person by including a provision to that effect in its bylaws.

A former director, and a former member who was granted full access under the bylaws, continues to have open access to the corporate records from the period when the person was a director or member.

Members' rights are set out in subsection (3). Under the new *Society Act*, a member has access to all the records that a society is required to maintain in its records office, except for (1) minutes of directors meetings, (2) consent resolutions of directors, (3) any other resolutions of directors

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

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

130. *See*, *e.g.*, BCA, *supra* note 55, s. 46.

131. *See* Bill C-21, *supra* note 73, s. 22; SK Act, *supra* note 71, s. 21.

and committees of the board of directors, and (4) written dissents of directors. A member also does not have access to a society's register of members by virtue of this section. Member access to the register of members is governed by section 44, below.

Subsection (5) sets out the rights of the general public. The exceptions that apply to members also apply to the general public. In addition, the general public does not have a right to inspect the minutes of members' meetings or resolutions of the members. Finally, in a change from the *Society Act*, 1996, the general public does not have a right to inspect a society's financial statements.[132]

Subsection (8) allows a society to impose restrictions on the times during which records may be inspected. For companies, the *Business Corporations Regulation* requires that records be available for inspection for at least two consecutive hours during the statutory business hours (that is between 9:00 a.m. and 4:00 p.m. on any day that is not a Saturday or a holiday). A similar rule should be prescribed for societies.

Copies

43 (1) If a person who is entitled under section 42 *[inspection of records]* to inspect a record requests a copy of that record and pays, to the person having custody or control of that record, the copying fee, if any, set by that person or by the society, which fee must not exceed the prescribed fee, the person who has custody or control of that record must provide, in accordance with subsection (3) of this section, a copy of that record to the requesting person

(a) promptly after receipt of the request and payment, or

(b) in the case of a record that is, under section 39 (1) *[records may be kept at other locations]*, kept at a location other than the records office, within 48 hours, not including Saturdays and holidays, after the request and payment are received.

(2) Despite subsection (1) of this section, a member of a society is entitled on request and without charge to receive from the person who maintains the records office for the society a copy of

(a) the constitution or pre-existing constitution, as the case may be, and

(b) the bylaws.

(3) A copy of a record referred to in subsection (1) or (2) must be provided in the manner agreed to by the person who has custody or control of the record and the person seeking to obtain the copy or, in the absence of such an agreement,

132. This does not mean that financial information for all societies will no longer be available to the public. The Canada Revenue Agency makes public the financial statements of those societies that obtain registered charity status.

(a) must, if the person seeking to obtain the copy so requests, be provided by mailing it to that person, or

(b) may, in any other case, be provided to the person seeking to obtain the copy by making it available for pick-up at the office at which the record is kept.

Source: BCA, s. 48

Reference: tentative recommendation (24); tentative recommendation (25)

Concordance: *Society Act*, 1996, ss. 69, 95

Comment: The right to copy records is a corollary of the right of access to records. This section contains rules governing the right to copy records. The prescribed fee referred to in subsection (1) is, for companies, set in the *Business Corporations Regulation* at $0.50 per page. The right of a member to a copy of the constitution, pre-existing constitution, or bylaws free of charge is maintained by subsection (2).

List of members

44 (1) A member of a society may apply to the society, or to the person who has custody or control of its register of members, for a list setting out the names and last known addresses of the members.

(2) An application under subsection (1) must be in writing and must include

(a) an affidavit *[a signed statement]* of the person seeking the list

(i) stating the name and mailing address of the applicant or, if the applicant is a corporation, its name and the mailing address, and, if different, the delivery address, of its registered office or equivalent, and

(ii) stating that the list will not be used except as permitted under subsection (3), and

(b) payment of the fee charged under subsection (7).

(3) A person must not use a list obtained under this section except in connection with an effort to

(a) influence the voting of members of the society at any meeting of society, or

(b) call a meeting under section 100 (8) *[requisitions for general meetings]* or 224 (4) *[resignation and removal of liquidators in voluntary liquidations]*.

(4) Promptly after receipt of the application referred to in subsection (1) of this section, the society or the person who has custody or control of its register of members must provide to the applicant the requested list made up to and

including a date, specified in the list, that is not more than 14 days before the date on which the application was received.

(5) If the applicant so requests in the application, the society or the person who has custody or control of its register of members must, promptly after receipt of the application, provide to the applicant supplemental lists that meet the requirements of subsection (6).

(6) Supplemental lists under subsection (5) must

(a) be prepared for the period beginning on the date following the date specified in the basic list provided under subsection (4) and ending on the date on which the application under subsection (1) is received, and

(b) for each day in that period on which there is a change to the information contained in the basic list, set out the changes that occurred to the information in the basic list on that day.

(7) The society or the person who has custody or control of its register of members may charge a reasonable fee for any basic list provided under subsection (4), and a reasonable fee for any supplemental list provided under subsection (5).

(8) A list referred to in subsection (4) or (5) must be provided in the manner agreed to by the member or the person who has custody or control of its register of members and the applicant or, in the absence of such an agreement,

(a) must, if the applicant so requests, be provided by mailing it to that applicant, or

(b) may, in any other case, be provided to the applicant by making it available for pick-up at the office at which the register of members is available for inspection and copying in accordance with section 128 (4) or (5) *[register of members]*, as the case may be.

Source: BCA, s. 49

Reference: tentative recommendation (26)

Concordance: new

Comment: One area where the default open-access regime of the *Society Act*, 1996, is particularly problematic is in relation to access to membership lists. 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. Concerns about privacy and third-party access to personal information have grown significantly in re-

cent years, giving rise to such legislation as the *Freedom of Information and Protection of Privacy Act*[133] and the *Personal Information Protection Act*.[134]

The *Society Act*, 1996, 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. Many societies do not appreciate the seriousness of this issue until they are faced with a request for access to the register of members. At that point it is too late to put in place appropriate safeguards in the society's bylaws.

This section follows the trend in modern corporate legislation and creates a comprehensive statutory regime for access to a society's register of members. Under this section, access to the register of members may only be granted for limited purposes related to the calling and conduct of meetings. The person seeking access must give the society an affidavit that states that the membership list will not be used for any unpermitted purpose. A breach of this affidavit would expose the person to prosecution. This could be a prosecution for perjury under the *Criminal Code*, if the facts indicate that this crime has been committed. Or it could be a prosecution under the offence created in section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below. This section further limits access by restricting access to the register of members to members of the society. This is consistent with the purposes for which a list of members may be used. The general public would not have an interest in the calling of a members' meeting or in voting at a members' meeting.

The bracketed reference to a "signed statement" in subsection (2) (a) relates to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

Remedies on denial of access or copies

45 (1) A person who claims to be entitled under section 42 *[inspection of records]*, 43 *[copies]* or 44 *[list of members]* to obtain a list, to inspect a record or to receive a copy of a record, may apply in writing to the registrar for an order under subsection (2) of this section if that person is not provided with the list, given access to the record or provided with a copy of the record.

(2) If, on the application of a person referred to in subsection (1), it appears to the registrar that the society, the person who maintains the records office

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

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

for the society or the person who has custody or control of its register of members has, contrary to this Division, failed to provide a list to the applicant, give the applicant access to a record or provide the applicant with a copy of a record, the registrar may order the society to provide to the registrar whichever of the following the society considers appropriate:

(a) the list or a certified copy of the record;

(b) an affidavit *[a signed statement]* of a director or officer of the society setting out why the applicant is not entitled to obtain

(i) the list, or

(ii) access to or a copy of the record.

(3) The registrar must

(a) set out in any order made under subsection (2) an explanation of the basis on which the applicant claims to be entitled to obtain the list, access to the record or a copy of the record, and

(b) furnish a copy of that order to the society and the applicant.

(4) The society referred to in an order made under subsection (2) must comply with that order within 15 days after the date of the order.

(5) If the society provides a list or a certified copy of a record to the registrar under subsection (2) (a), the registrar must furnish the list or the certified copy of the record to the applicant.

(6) If the society provides an affidavit *[a signed statement]* of a director or officer to the registrar under subsection (2) (b), the registrar must furnish the affidavit *[signed statement]* to the applicant.

(7) An applicant under subsection (1) may, on notice to the society, apply to the court for an order that the applicant be provided with a list, access to a record or a copy of a record, if

(a) an affidavit *[a signed statement]* respecting the list or record is furnished to the applicant by the registrar under subsection (6), or

(b) the society fails to comply with subsection (4).

(8) Without limiting the power of the registrar under section 318 (1) (c) *[dissolutions and cancellations of registration by registrar]*, the court may, on an application under subsection (7) of this section, make the order it considers appropriate and may, without limitation, do one or more of the following:

(a) make an order that a list or access to a record be provided to the applicant, or that a certified copy of a record be provided to the applicant, within the time specified by the order;

(b) make an order directing the society to do one or both of the following:

(i) change the location of the records office of the society to a location that the court considers appropriate;

(ii) replace the person who maintains the records office for the society or who has custody or control of its register of members;

(c) order the society to pay to the applicant damages in an amount that the court considers appropriate;

(d) order the society, the person who maintains the records office for the society or the person who has custody or control of its register of members or some or all of them to pay to the applicant the applicant's costs of and related to the application.

(9) An order may be made under subsection (8) in addition to a legal proceeding, conviction or penalty for an offence under Division 4 of Part 12.

Source: BCA, s. 50

Reference: tentative recommendation (24); tentative recommendation (25)

Concordance: *Society Act*, 1996, s. 95.1

Comment: This section carries forward the remedies for denial of a person's right of access to corporate records or to copies of those records which is currently found in the *Society Act*, 1996. It is axiomatic that granting a legal right without providing remedies for infringement of that right makes the right hollow at best. This section relies first on the Registrar of Companies to resolve disputes, with recourse ultimately to the courts.

The bracketed reference to a "signed statement" in subsection (2) (b) relates to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

Society to file annual report

46 Subject to sections 232 (1) (k) *[duties of liquidators]* and 306 (2) *[societies and extraprovincial societies in default of filing]*, a society must annually, within 2 months after each anniversary of the date on which the society was recognized,

file with the registrar an annual report in the form established by the registrar containing information that is current to the most recent anniversary.

Source: BCA, s. 51

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 68

Comment: This section essentially carries forward the existing requirement for societies to file annual reports with the Registrar of Companies. The one change from the *Society Act*, 1996, concerns the timing of this filing requirement. Under the *Society Act*, 1996, annual reports must be filed within "30 days after each annual general meeting." Under the new *Society Act*, each annual report must be filed "within 2 months after each anniversary of the date on which the society was recognized." In basic terms, a society is recognized under the new *Society Act* on its date of incorporation, conversion, amalgamation, or continuation into British Columbia and a society is recognized under a former *Society Act* on its date of incorporation or amalgamation. (A detailed explanation of the rules on recognition is found in the commentary to section 3, above.) For most societies, this means that the annual report will be due each year within two months of the anniversary of the society's incorporation. This may result in administrative changes for some pre-existing societies.

PART 3 – FINANCE

Introductory comment: Since societies are not permitted to issue share capital, extensive rules governing financial issues are not necessary. This Part contains a number of provisions that are primarily aimed at clarifying the law and at overriding several old judge-made rules.

Division 1 – Debentures

Introductory comment: The word "debenture" is given an expansive definition, embracing both secured and unsecured instruments, in section 1. In simple terms, a debenture is an instrument issued in a debt-financing transaction. In practice, very few societies issue debentures. Indeed, the number of for-profit companies that issue debentures has been declining since the advent of the *Personal Property Security Act*.[135] The sections that follow are intended to ensure that archaic common law and equitable rules will not apply in those few instances when a society issues a debenture.

Validity of perpetual debenture

47 Despite any rule of equity to the contrary, no condition contained in a debenture, or in a deed for securing a debenture, is invalid merely because the debenture is made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.

Source: BCA, s. 102

Reference: tentative recommendation (79)

135. R.S.B.C. 1996, c. 359.

Concordance: *Society Act*, 1996, s. 35 (1)

Comment: This section reverses an old equitable rule—based on the rule against perpetuities—that invalidated a perpetual debenture.

Enforcement of contract to take debentures

48 Every contract with a society to take up and pay for a debenture of the society may be enforced by a court order for specific performance.

Source: BCA, s. 103

Reference: tentative recommendation (79)

Concordance: *Society Act*, 1996, s. 35 (1)

Comment: This section is intended to reverse a common law rule that held that corporation only had a remedy in damages when a person agreed with the corporation to take up and pay for a debenture. In these circumstances, damages were often an inadequate remedy for the corporation. A previous court decision tried to remedy this problem by finding "an equitable right" to the debenture.[136] This section simply enables a society to enforce this right by seeking an order for specific performance from the court.

Issue of redeemed debenture

49 (1) If a society redeems a debenture that was previously issued as one of a series, the society has, and is deemed always to have had, power to reissue the debenture, either by reissuing the same debenture or by issuing another debenture in its place, unless

(a) an express or implied provision to the contrary is contained in the debenture, the bylaws or a contract entered into by the society, or

(b) the society has, by a resolution of the members, manifested its intention that the debenture be cancelled.

(2) On the reissue of a debenture under subsection (1), the person entitled to the debenture has, and is deemed always to have had, the same priority as if the debenture had never been redeemed if

(a) the debenture so states, or

(b) the debenture was first issued before January 1, 1977.

(3) If a society redeems a debenture and has the power to reissue that debenture, particulars of that debenture must be included in the balance sheet of the society.

(4) If a society has issued or deposited a debenture created by the society to secure advances on current account or otherwise, the debenture is not

136. *Re Capitan Scotts Fish & Chips (1978) Ltd.* (1979), 11 B.C.L.R. 185 at 188 (S.C.), Taylor J.

deemed to have been redeemed merely because any of the advances are repaid, or the account of the society ceases to be in debit, while the debenture remains issued or deposited.

(5) The reissue of a debenture or the issue of another debenture in its place under this section is deemed not to be the issue of a new debenture for the purpose of a provision limiting the amount or number of debentures to be issued.

Source: BCA, s. 104

Reference: tentative recommendation (79)

Concordance: *Society Act*, 1996, s. 35 (1)

Comment: This section reverses an old common law rule that required a redeemed debenture to be cancelled. Under this section, a society may reissue a redeemed debenture.

Division 2 – Receivers and Receiver Managers

Powers of directors and officers

50 If a receiver manager is appointed by the court or under an instrument over some or all of the undertaking of a society, the powers of the directors and officers of the society cease with respect to that part of the undertaking for which the appointment is made until the receiver manager is discharged.

Source: BCA, s. 105

Reference: tentative recommendation (79)

Concordance: *Society Act*, 1996, s. 35 (1)

Comment: A receiver manager may be appointed by court order or under the terms of an instrument (which will typically be a debt-financing agreement between the society and a lender). A receiver-manager would be brought in if a society is in financial difficulty. The concern is that the society would be unable to pay its creditors. The receiver manager operates the society and protects the interests of the creditors. This section simply confirms that a receiver manager in these circumstances has managerial authority over the society, and the powers of the society's directors and officers are accordingly suspended.

Duties of receiver and receiver manager

51 A receiver or receiver manager must,

(a) within 7 days after being appointed, file with the registrar a notice of appointment of receiver or receiver manager in the form established by the registrar,

(b) within 7 days after any change in any address shown for the receiver or receiver manager in the corporate register, file with the registrar a

notice of change of address of receiver or receiver manager in the form established by the registrar, and

(c) within 7 days after ceasing to act as receiver or receiver manager, file with the registrar a notice of ceasing to act as receiver or receiver manager in the form established by the registrar.

Source: BCA, s. 106

Reference: tentative recommendation (79)

Concordance: *Society Act*, 1996, s. 35 (1)

Comment: This section merely contains a list of filing requirements that must be met when a receiver or a receiver manager is appointed.

PART 4 – MANAGEMENT

Division 1 – Directors

Introductory comment: The *Society Act*, 1996, 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 these provisions are based on provisions in the CA. The main theme of the sections that follow is harmonization with the BCA.

Number of directors

52 A society must have at least one director.

Source: BCA, s. 120

Reference: tentative recommendation (27)

Concordance: *Society Act*, 1996, s. 24 (4)

Comment: This section does not require a society to have one director. Rather, its intent is to set the minimum number of directors that a society may have. The *Society Act*, 1996, currently requires a society to have at least three directors.

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, 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."[137]

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

137. OLRC Report, *supra* note 82 at 480.

a minimum of three directors in all cases. . . ."[138] 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 of one director.[139] 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.[140]

For-profit statutes tend to require only one director. This is the rule for most companies under the BCA.[141]

As a default rule, the committee noted in the consultation paper that it favoured 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.

A bare majority of respondents to the consultation paper disagreed with this tentative recommendation. Most of the disagreeing respondents favoured the minimum to be set at three or an even higher number (in some cases, there was a sense that the respondent wanted the typical practice of a type of society to be reflected in the legislation). The committee gave careful consideration to these comments, but decided that its tentative recommendation still represented the best rule, for the reasons expressed in the consultation paper.

First directors

53 (1) Subject to subsection (2), the first directors of a society hold office as directors from the recognition of the society until they cease to hold office under section 61 (1) *[when directors cease to hold office]*.

(2) No designation of an individual as a first director of a society is valid unless,

(a) in the case of a society incorporated under this Act, the designated individual

(i) is an incorporator who has signed the bylaws, or

138. OLRC Report, *ibid*. at 494. *See also* US Model Act, *supra* note 83, § 8.03; US 2006 Exposure Draft, *supra* note 84, § 8.03 (both requiring no fewer than three directors).

139. *See* Bill C-21, *supra* note 73, s. 126; SK Act, *supra* note 71, s. 89; ALRI Draft Act, *supra* note 81, s. 41.

140. *See* QC Consultation Paper, *supra* note 76 at 26.

141. *See* BCA, *supra* note 55, 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, s. 120.

(ii) consents in accordance with section 55 *[consent]* to be a director of the society,

(b) in the case of a society recognized under this Act in the manner contemplated by section 3 (1) (c) *[when a society is recognized]*, the designated individual

(i) has signed the bylaws for the amalgamated society, or

(ii) consents in accordance with section 55 *[consent]* to be a director of the amalgamated society, or

(c) in the case of a society recognized under this Act in the manner contemplated by section 3 (1) (b) or (d) *[when a society is recognized]*, the designated individual

(i) was, immediately before the recognition of the society, a director of the corporation or of the foreign corporation, as the case may be, or

(ii) consents in accordance with section 55 *[consent]* to be a director of the society.

Source: BCA, s. 121

Reference: tentative recommendation (28)

Concordance: *Society Act*, 1996, s. 24 (6)

Comment: Under the *Society Act*, 1996, the first directors of a society are those individuals named on a form filed with the Registrar of Companies during incorporation. As the new *Society Act* changes the procedure to incorporate a society to harmonize it with the procedure in the BCA, so the new Act also modifies the procedure for identifying the first directors of a society. This section is tied into the concept of "recognition," which is explained in detail in section 3. In simple terms, "recognition" occurs when a society becomes subject to this Act. This may happen in one of four ways: (1) by incorporation (which will be by far the most common method); (2) by conversion; (3) by amalgamation; or (4) by continuation into British Columbia. Subsection (2) sets out special rules for designating the first directors for each of these methods of recognition. The important point of subsection (2) is that, in each of these cases, the society must obtain the individual's consent to act as a director. This rule is a departure from the *Society Act*, 1996. For further discussion of the mechanics of consenting to act as a director, see the commentary to section 55.

Succeeding directors

54 (1) Directors, other than the first directors of a society who are in their first term of office, must be elected or appointed in accordance with this Act and with the bylaws of the society.

(2) If the bylaws so provide, the directors may, subject to subsection (3), appoint one or more additional directors.

(3) Despite any provision to the contrary in the bylaws, the number of additional directors appointed under subsection (2) must not at any time exceed

(a) 1/3 of the number of first directors, if, at the time of the appointments under subsection (2), one or more of the first directors have not yet completed their first term of office, or

(b) in any other case, 1/3 of the number of the current directors who were elected or appointed as directors other than under subsection (2).

(4) No election or appointment of an individual as a director under this section is valid unless

(a) the individual consents in accordance with section 55 *[consent]* to be a director of the society, or

(b) the election or appointment is made at a meeting at which the individual is present and the individual does not refuse, at the meeting, to be a director.

Source: BCA, s. 122

Reference: tentative recommendation (28)

Concordance: *Society Act*, 1996, s. 24 (1)

Comment: The *Society Act*, 1996, contains a skeletal provision that declares that "[t]he members of a society may, in accordance with the bylaws, nominate, elect or appoint directors." In practice, some of the methods employed include 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. At first glance, some of these methods seem to be outside the scope of the statutory provision, which places its emphasis on the members nominating, electing, or appointing directors. This section of the new *Society Act* is broader on its face, as subsection (1) simply provides that directors must be elected or appointed in accordance with the Act or the society's bylaws. It should encompass all of the typical forms of selecting directors used by societies today.

Subsection (2) is an enabling provision. It confirms that any power conferred on the directors in a society's bylaws to appoint additional directors is effective in practice. Such a power may often be useful, as some of the methods of selecting directors may from time to time prove to be unresponsive to changes in circumstances. This power to appoint additional directors must be distinguished from the power under section 63 to appoint directors if there is a vacancy on the board. Subsection (3) places a limit on the exercise of such a power. It effectively limits directors appointed under subsection (2) to a maximum of 1/3 of the board. Subsection (3) provides some protection against loss of control for the members.

Under subsection (4) an individual must consent to act as a director or that individual's election or appointment is not valid. This consent may be made in accordance with section 55 or, if the individual is appointed or elected at a meeting at which the individual is present, may be inferred if the individual does not refuse to become a director of the society.

Consent

55 (1) An individual from whom a consent is required under section 53 *[first directors]* or 54 *[succeeding directors]* may consent

(a) by providing a written consent, before or after the individual's designation, election or appointment,

(i) in the case of a director referred to in section 53 (2) (a) (ii) *[first directors]* or 54 (4) (a) *[succeeding directors]*, to the society,

(ii) in the case of a director referred to in section 53 (2) (b) (iv) *[first directors]*, to one of the amalgamating societies or to the amalgamated society, or

(iii) in the case of a director referred to in section 53 (2) (c) (ii) *[first directors]*, to the corporation or foreign corporation, as the case may be, or to the society, or

(b) by performing functions of, or realizing benefits exclusively available to, a director of the society,

(i) in the case of a director referred to in section 53 *[first directors]*, after the individual knew or ought to have known of the individual's designation as a director, or

(ii) in the case of a director referred to in section 54 (4) (a) *[succeeding directors]*, after the individual knew or ought to have known of the individual's election or appointment as a director

(2) After an individual from whom a consent is required under section 53 *[first directors]* or 54 *[succeeding directors]* and who has been otherwise validly appointed or elected as a director consents in accordance with subsection (1) of this section,

(a) the designation, election or appointment, as the case may be, of the director is valid, and

(b) the director is deemed to have been a director for all purposes from the date of that designation, election or appointment.

(3) A consent to be a director is effective until

(a) the consent is revoked by the director,

(b) the term of office of the director expires without the director being promptly reappointed or re-elected,

(c) the director resigns, or

(d) the director is removed in accordance with section 61 (3) or (4) *[when directors cease to hold office]*.

Source: BCA, s. 123

Reference: tentative recommendation (28)

Concordance: new

Comment: There is no requirement under the *Society Act*, 1996, for an individual to consent to act as a director. Nevertheless, prudent societies invariably do obtain a consent from an individual when that individual's first term as a director begins. The new *Society Act* builds the obtaining of a consent into the act of selecting first or succeeding directors. This section sets out the mechanics of obtaining the now-required consent. The most common method to obtain an individual's consent to act as a directors is by a signed document. But, an individual may also be deemed to have consented in certain circumstances. This deemed consent applies if an individual performs the functions of a director or realizes a benefit exclusively available to a director at any time after the individual reasonably ought to have known of the individual's designation, election, or appointment as a director.

Persons disqualified as directors

56 (1) A person must not become or act as a director of a society that has complied with section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]* unless that person is an individual who is qualified to do so.

(2) An individual is not qualified to become or act as a director of a society if that individual is

(a) under the age of 18 years,

(b) found by a court, in Canada or elsewhere, to be incapable of managing the individual's own affairs,

(c) an undischarged bankrupt, or

(d) convicted in or out of British Columbia of an offence in connection with the promotion, formation or management of a corporation or unincorporated business, or of an offence involving fraud, unless

(i) the court orders otherwise,

(ii) 5 years have elapsed since the last to occur of

(A) the expiration of the period set for suspension of the passing of sentence without a sentence having been passed,

(B) the imposition of a fine,

(C) the conclusion of the term of any imprisonment, and

(D) the conclusion of the term of any probation imposed, or

(iii) a pardon was granted or issued under the *Criminal Records Act* (Canada).

(3) A director who ceases to be qualified to act as a director of a society must promptly resign.

Source: BCA, s. 124

Reference: tentative recommendation (30)

Concordance: new

Comment: The *Society Act*, 1996, 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 disqualify a person from being a director.[142] Society directors, like company directors, have significant managerial and financial duties. There is a public interest in ensuring that society directors meet a basic level of competence.

This section is intended to fill in the gap in the *Society Act*, 1996. Its standards are not particularly onerous. An individual is disqualified to serve as a society director due to (a) youth, (b) mental incompetence, certified by a court, (c) bankruptcy, which has not been discharged, and (d) certain criminal convictions. The relevant criminal convictions under paragraph (d) form a very limited class. They are offences related to the promotion, formation, or management of a corporation or unincorporated business or offences involving fraud. These offences undermine public confidence in the individual's managerial or financial competence or personal integrity. None of these disqualified individuals are necessarily barred permanently from acting a society director: youths become eligible upon reaching 18 years of age; individuals who have lost competence may regain it; bankrupts become eligible upon becoming a discharged bankrupt; and convicted criminals become eligible by court order, the passage of time, or the issuance of a pardon.

The requirements of this section take effect after a society has transitioned to the new Act. After that time, a disqualified individual will be under a statutory obligation to resign as a director. A disqualified individual who fails to resign will be liable to prosecution under section 322 (3) and, if convicted, to pay a fine. For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

This section also touches on two other issues raised in the consultation paper.

The first issue is participation by minors in a society. Currently, the *Society Act*, 1996, says that a person under 19 years of age "may be appointed to an office in the society." The consultation paper proposed ending this and other special provisions enabling the participation of minors in societies. This tentative recommendation was strongly opposed by a number of respondents. So far as participation on the board of directors goes, this section should meet some of these respondents' concerns by allowing those individuals who are 18 years of age or older to serve on the

142. *See* Bill C-21, *supra* note 73, s. 127; SK Act, *supra* note 71, s. 92.

board. This rule opens the door to participation in society governance to older teenagers and also harmonizes the *Society Act* with the BCA.[143]

The second issue concerns residency requirements for directors. The *Society Act*, 1996, requires that at least one of a given society's directors be ordinarily resident in British Columbia. This rule is 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 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.[144] The BCA did away with these requirements. In a similar vein, the residency requirements in the *Canada Business Corporations Act*[145] 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.[146] 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 new *Society Act* does not contain any residency requirements for society directors.

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143. 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 18 years was selected instead of 19 years for the purposes of this rule is not clear (though it is likely related to harmonization with federal and other provincial corporate legislation), 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.

144. CA, *ibid.*, s. 109.

145. *Canada Business Corporations Act*, *supra* note 75, s. 105 (3).

146. *See also* ALRI Report, *supra* note 62 at 50–51.

Paid staff member not to serve as a director

57 (1) In this section, **"paid staff member"** means an individual who, whether or not employed under a contract of employment, receives or is entitled to wages for work or services provided to the society or an affiliate of the society.

(2) If a society has complied with section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]*, a paid staff member of the society must not be a director of the society.

Source: original

Reference: tentative recommendation (46)

Concordance: new

Comment: The *Society Act*, 1996, has no provisions dealing with a paid staff member 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[147] that preceded the LRCBC Report proposed "prohibiting these arrangements"[148] for this reason. This proposal garnered some support,[149] 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 staff member. A tentative recommendation was included in the consultation paper. It received widespread support from respondents.

This section begins by defining "paid staff member." This expression is used instead of employee because many societies engage their staff under contracts for personal services. These arrangements are functionally very similar to employment relationships. The intent of this definition is to ensure that the formal characterization of the relationship does not affect the application of this provision. The key to the definition of "paid staff member" is that the individual is receiving or is entitled to wages for work or services. This language imports the notion that the individual is receiving a periodic payment. Providing services under a one-time or sporadic contract should not bring the individual within the scope of this section. The general conflict of interest rules would cover that situation.

147. 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>.

148. LRCBC Report, *supra* note 78, vol. 1 at 34.

149. LRCBC Report, *ibid*.

There is a transitional period for this section. It applies to societies that have transitioned under the new Act. This period for transitioning should be two years from the coming into force of the new Act.

A paid staff member of a society who serves as a director of the society after the transitional period commits an offence under section 322 (3). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Membership qualification

58 Unless the bylaws provide otherwise, a director of a society is not required to be a member of the society.

Source: BCA, s. 125

Reference: tentative recommendation (28)

Concordance: new

Comment: This section confirms that a director is not required to be a member of a society. Nothing in this section necessarily prevents a society from setting up a contrary rule, requiring its directors to be members. This section merely states a default rule, which can be overridden by a society's bylaws.

Register of directors

59 A society that has complied with section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]* must keep a register of its directors and enter in that register

(a) the full name and prescribed address for each of the directors,

(b) the date on which each current director became a director,

(c) the date on which each former director became a director and the date on which he or she ceased to be a director, and

(d) the name of any office in the society held by a director, the date of the director's appointment to the office and the date, if any, on which the director ceased to hold the office.

Source: BCA, s. 126

Reference: tentative recommendation (31)

Concordance: new

Comment: The *Society Act*, 1996, does not require a society to maintain a register of directors. This section imposes a small new record keeping requirement on societies. The rationale for this new obligation is that, given the high turnover of directors (and members) at many societies, this register could play a useful, if small, role in preserving organizational history. In addition, it would harmonize the *Society Act* on this point with the BCA. In fact, those societies that engage law firms to maintain their corporate records likely already have a register of directors in the form

required by this section. This requirement only comes into effect after a society has transitioned to the new Act.

Societies to file notices as to directors

60 (1) A society must, within 15 days after a change in its directors or in the prescribed address of any of its directors, complete and file with the registrar a notice of change of directors in the form established by the registrar.

(2) At the time that a notice of change of directors is filed with the registrar under this section in relation to a society that has a constitution, the constitution is altered to reflect that change.

(3) After the notice of change of directors is filed with the registrar under this section, the registrar must, if requested to do so, furnish to the society,

(a) if the society has a constitution, a certified copy of the constitution as altered, or

(b) in any other case, confirmation of the change of directors.

Source: BCA, s. 127

Reference: tentative recommendation (28)

Concordance: *Society Act*, 1996, s. 24 (7)

Comment: This section carries forward a filing requirement that is already found in the *Society Act*, 1996. Since there is a public interest in knowing the identity of the directors of a society, a change of directors or a change of a director's prescribed address must be filed with the Registrar of Companies. Subsection (2) deals with an issue raised by the new form of constitution for societies. Since the constitution will, under the new *Society Act*, contain the names and prescribed addresses of directors, subsection (2) authorizes a change to the constitution to reflect changes in the directors or their addresses. Subsection (3) requires the registrar, on request, to furnish the society with a certified copy of the society's constitution or, if the society has not transitioned to the new Act, with confirmation of the change of directors.

A society that contravenes subsection (1) commits an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

When directors cease to hold office

61 (1) A director ceases to hold office when

(a) the term of office of that director expires in accordance with

(i) this Act or the bylaws, or

(ii) the terms of his or her election or appointment,

(b) the director dies or resigns, or

(c) the director is removed in accordance with subsection (3) or (4).

(2) A resignation of a director takes effect on the later of

(a) the time that the director's written resignation is provided to the society or to a lawyer for the society, and

(b) if the written resignation specifies that the resignation is to take effect at a specified date, on a specified date and time or on the occurrence of a specified event,

(i) if a date is specified, the beginning of the specified date,

(ii) if a date and time is specified, the date and time specified, or

(iii) if an event is specified, the occurrence of the event.

(3) Subject to subsection (4), a society may remove a director before the expiration of the director's term of office

(a) by a special resolution, or

(b) if the bylaws provide that a director may be removed by a resolution of the members entitled to vote at general meetings passed by less than a special majority or may be removed by some other method, by the resolution or method specified.

(4) If the members having the exclusive right to elect or appoint one or more directors, a director so elected or appointed may only be removed

(a) by a special separate resolution of those members, or

(b) if the bylaws provide that such a director may be removed by a separate resolution of those members passed by a majority of votes that is less than the majority of votes required to pass a special separate resolution or may be removed by some other method, by the resolution or method specified.

Source: BCA, s. 128

Reference: tentative recommendation (33)

Concordance: *Society Act*, 1996, s. 31

Comment: This section addresses two issues. First, it is intended to provide some certainty around when a director ceases to hold office. The *Society Act*, 1996, does not address this issue. Subsection (1) of this section lists the events that cause a director to cease to hold office: (1) expiry of the director's term; (2) death; (3) resignation; or (4) removal. Subsection (2) contains some rules regarding resignation. They are focussed on when a resignation takes effect, which is often an important factual question in disputes.

The second issue addressed in this section is removal of a director. The *Society Act*, 1996, 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. Under the new *Society Act*, subsection (3) provides that a director may be removed by a special resolution. But this rule is a default rule that may be varied

by a society's bylaws. Subsection (4) contains a similar default rule for directors elected or appointed by a class of members.

Application to remove self as director or officer

62 (1) In this section, **"recorded individual"** means an individual who is recorded as a director or officer of a society in a record filed with the registrar or kept at the records office of the society.

(2) A recorded individual, or any other person whom the court considers to be an appropriate person to bring an application under this section, may, on notice to the society, make application to the court for an order under subsection (3).

(3) If an application is brought under subsection (2) and if the court is satisfied as to the matters set out in subsection (4), the court may do one or more of the following:

(a) order that the recorded individual

(i) is not a director or officer, as the case may be, and has not been a director or officer, as the case may be, from a date specified by the order, or

(ii) was not a director or officer, as the case may be, within the period specified by the order;

(b) order that any or all of the references to the recorded individual in the records kept at the records office of the society that record the recorded individual as a director or officer, as the case may be, be removed from those records as of the date or in relation to the period specified by the order;

(c) direct that the society pay some or all of the costs of the application.

(4) The court may make an order under subsection (3) if,

(a) in the case of an individual who has been recorded as a director,

(i) the designation, election or appointment, as the case may be, of the individual was never valid within the meaning of section 53 (2) *[first directors]* or 54 (4) *[succeeding directors]*, as the case may be, or

(ii) the individual was never designated, elected or appointed to the office in relation to which the order is sought under this section or, if designated, elected or appointed, held office as a director for a period other than the period in relation to which the order is sought, or

(b) in the case of an individual who has been recorded as an officer, the individual

(i) was never appointed to the office in relation to which the order is sought under this section,

(ii) if appointed to that office, refused the appointment and never held that office, or

(iii) held that office for a period other than the period in relation to which the order is sought.

(5) After an order is made under subsection (3) of this section,

(a) the recorded individual must provide to the society a copy of the entered order promptly after it is entered unless the society has otherwise received a copy of that order, and

(b) the society must promptly

(i) alter its records in accordance with the order, and

(ii) provide all of the information to, and make all of the filings with, the registrar that are necessary to alter the corporate register in accordance with the order.

Source: BCA, s. 129

Reference: tentative recommendation (33)

Concordance: new

Comment: This section is meant to address a practical problem that crops up from time to time. An individual who has taken the appropriate steps to resign as a director of a society may still be listed as a director in the society's filings with the Registrar of Companies or in the society's records. This may be due to simple inadvertence, but it can occur in the context of a wider dispute. The misrepresentation of the individual as a society director may cause considerable anxiety, in view of the significant managerial responsibilities and potential liabilities that directors are subject to. This section is intended to give such individuals a mechanism to correct the record. The procedure involves an application to court, which is the appropriate forum to adjudicate the issues that may arise in the course of such a dispute.

Bylaws may apply to vacancies among directors

63 A vacancy that occurs among the directors may be filled in accordance with sections 64 *[vacancies among directors]* to 68 *[if no directors in office]* unless the bylaws provide otherwise.

Source: BCA, s. 130

Reference: tentative recommendation (32)

Concordance: new

Comment: Vacancies among the board of directors are a common occurrence. The *Society Act*, 1996, has little to say on the subject. It is left to a society's bylaws. The new *Society Act* continues to allow societies to craft procedures for dealing with vacancies on their boards in their bylaws. But it also contains extensive default provisions, which apply if a society does not have any rules in its bylaws.

Vacancies among directors

64 Subject to sections 65 *[vacancies among class directors]* and 66 *[end of term of replacement director]*, a vacancy that occurs among the directors

(a) may, if the vacancy occurs as a result of the removal of a director under section 61 (3) *[when directors cease to hold office]*, be filled

(i) by the members at the members' meeting, if any, at which the director is removed, or

(ii) if not filled in the manner contemplated by subparagraph (i) of this paragraph, by the members or by the remaining directors, or

(b) may, in the case of a casual vacancy, be filled by the remaining directors.

Source: BCA, s. 131

Reference: tentative recommendation (32)

Concordance: new

Comment: This section contains two default rules for dealing with vacancies on the board of directors. The first rule applies if the vacancy is the result of a director being removed. In this situation, the members may replace the director at the meeting in which the director was removed. If this does not occur, then the members or the remaining directors are authorized to fill the vacancy. This default rule is adapted from a similar rule in the BCA. It provides maximum flexibility, but there may be some concern about the absence of a clear hierarchy of decision-making authority resulting in conflicts between the members and the directors. The second rule applies to casual vacancies, which are much more common than removals. The expression "casual vacancy" is not defined in the Act. A causal vacancy is a vacancy that occurs for any reason between a society's annual general meetings. The default rule in these cases is to allow the remaining directors to fill the casual vacancy.

Vacancies among class directors

65 (1) Subject to section 66 *[end of term of replacement director]*, if the members of a class have the exclusive right to elect or appoint one or more directors, a vacancy that occurs among those directors may, if the vacancy occurs as a result of the removal of a director under section 61 (4) *[when directors cease to hold office]*, be filled

(a) by those members at the members' meeting, if any, at which the director is removed, or

(b) if not filled in the manner contemplated by paragraph (a) of this subsection, by those members or by the remaining directors elected or appointed by those members.

(2) In the case of a casual vacancy that occurs among the directors referred to in subsection (1),

(a) the vacancy may be filled by the remaining directors elected or appointed by those members, or

(b) if there are no remaining directors elected or appointed by those members, the other directors must, unless the vacancy is filled by a unanimous resolution of those members, promptly call a class meeting, as the case may be, of those members to fill the vacancy.

Source: BCA, s. 132

Reference: tentative recommendation (32)

Concordance: new

Comment: This section applies the same default rules as the previous section, but in the context of replacing a vacancy among directors elected or appointment by a class of members, rather than by the membership as a whole.

End of term of replacement director

66 An individual appointed or elected as director under section 64 *[vacancies among directors]* or 65 *[vacancies among class directors]* ceases to be a director on the earlier of

(a) the end of the unexpired portion of the term of office of the individual whose departure from office created the vacancy, and

(b) the date on which the individual ceases to hold office under section 61 (1) *[when directors cease to hold office]*.

Source: BCA, s. 133

Reference: tentative recommendation (32)

Concordance: new

Comment: A replacement director serves out the remainder of the term of the individual whose departure from the board created the vacancy, unless the replacement director's term ends earlier due to resignation, death, or removal.

Loss of quorum

67 (1) If, as a result of one or more vacancies that occur among the directors, the number of directors in office falls below the number required for a quorum, the remaining directors may do one or both of the following:

(a) appoint as directors the number of individuals that, when added to the number of remaining directors, will constitute a quorum;

(b) call a members' meeting to fill any or all vacancies among the directors and to conduct such other business, if any, that may be dealt with at that meeting;

but must not take any other action until a quorum is obtained.

(2) A person appointed as a director under subsection (1) (a) holds office until there is a sufficient number of directors, elected or appointed in any of the following ways, to constitute a quorum:

(a) under the pre-existing constitution or bylaws;

(b) by the members under section 64 (a) *[vacancies among directors]* or subsection (1) (b) of this section;

(c) in any manner contemplated by section 65 *[vacancies among class directors]*.

Source: BCA, s. 134

Reference: tentative recommendation (32)

Concordance: new

Comment: When the number of directors falls below the number of their quorum (that is, the number required by the bylaws to hold a valid meeting), those remaining directors are caught in an unfortunate position. They are unable to hold a meeting to take action on the issue of the needed replacement directors. This section provides directors in these circumstances with a procedure to tide the board over until it has sufficient members to achieve its quorum.

If no directors in office

68 (1) If there are no directors in office,

(a) an individual may be empowered by the members, incorporators or subscribers, as the case may be, under subsection (2), to

(i) call a meeting of the members, incorporators or subscribers, as the case may be, for the election or appointment of directors, and

(ii) appoint as directors, to hold office until the vacancies are filled at that meeting, the number of individuals that will constitute a quorum, or

(b) there may be appointed, in the manner referred to in subsection (3), not more than the number of directors who, under the bylaws, may be elected or appointed at an annual general meeting.

(2) An individual may be empowered under subsection (1) (a) by an instrument in writing

(a) signed by members who, in the aggregate, have more than 1/2 of the votes that may be cast in an election or appointment of directors at a general meeting,

(b) if there are no members who have the right to vote in an election or appointment of directors at a general meeting, signed by more than 1/2 of the members, or

(c) if no memberships have been issued, signed by more than 1/2 of the incorporators or, in the case of a pre-existing society, by more than 1/2 of the subscribers.

(3) An appointment under subsection (1) (b) may be effected by

(a) a unanimous resolution of the members who have the right to vote in an election or appointment of directors at a general meeting,

(b) if there are no members who have the right to vote in an election or appointment of directors at a general meeting, by a unanimous resolution of all of the members, or

(c) if no memberships have been issued, by an instrument in writing signed by all of the incorporators or, in the case of a pre-existing society, by all of the subscribers.

Source: BCA, s. 135

Reference: tentative recommendation (32)

Concordance: new

Comment: This section sets out a procedure for appointing directors in circumstances where no directors are in office. The section allows an individual to seek authority from the members, incorporators, or subscribers to call a meeting and to appoint directors to serve in the interim. The reference to incorporators or subscribers is a recognition that this issue may crop up shortly after incorporation of the society. "Incorporator" and "subscriber" are both defined in section 1. In brief, an incorporator is a person who signed the incorporation agreement and a subscriber is a person who was an applicant for incorporation of a pre-existing society under a former *Societies Act*.

Division 2 – Powers and Duties of Directors, Officers, Attorneys, Representatives and Agents

Powers and functions of directors

69 (1) The directors of a society must, subject to this Act, the regulations and the bylaws of the society, manage or supervise the management of the activities and affairs of the society.

(2) Without limiting section 78 *[persons may rely on authority of societies and their directors, officers and agents]*, a limitation or restriction on the powers or functions of the directors is not effective against a person who does not have knowledge of the limitation or restriction.

Source: BCA, s. 136

Reference: tentative recommendation (36)

Concordance: *Society Act*, 1996, s. 24 (2)–(3)

Comment: This section contains a traditional statement of the directors' powers and functions. It is similar to the equivalent section in the *Society Act*, 1996. It simply confirms that the directors are ultimately responsible for managing the activities and affairs of a society or, if the active management of the society is being carried out be someone else (such as officers, employees, or volunteers), for supervising that management.

Subsection (2) restates a rule commonly called the "indoor management rule." There is further discussion of the indoor management rule in the commentary to section 78.

Application of this Act to persons performing functions of a director

70 (1) Subject to subsection (2), if a person who is not a director of a society performs functions of a director of the society, sections 74 *[duties of directors and officers]*, 162 *[enforcement of duty to file records]*, 165 *[relief in legal proceedings]*, 171 *[powers of inspectors]*, 237 *[recovery of property by liquidators]*, 248 *[liabilities survive]* and 255 *[definitions and interpretation]* and Divisions 3 to 5 of this Part apply to that person

(a) as if that person were a director of the society, and

(b) in relation to, and only to the extent of, those functions.

(2) Subsection (1) of this section does not apply to a person who is not a director of a society and who participates in the management of the society if

(a) the person participates in the management under the direction or control of a member, director or senior officer of the society,

(b) the person is a lawyer, accountant or other professional whose primary participation in the management of the society is the provision of professional services to the society,

(c) the society is bankrupt and the person is a trustee in bankruptcy who participates in the management of the society or exercises control over its property, rights and interests primarily for the purposes of the administration of the bankrupt's estate, or

(d) the person is a receiver, receiver manager or creditor who participates in the management of the society or exercises control over any

of its property, rights and interests primarily for the purposes of enforcing a debt obligation of the society.

Source: BCA, s. 138

Reference: tentative recommendation (36); tentative recommendation (38)

Concordance: new

Comment: The new *Society Act* defines "director" in section 1 by reference to election or appointment to a society's board. In some cases, a person may act as a director of a society without being formally appointed or elected to the society's board. Subsection (1) extends certain duties that the Act imposes on directors to these persons who are, in fact, performing the functions of a director without formally occupying that office. In effect, subsection (1) is intended to close a loophole that would exist if persons could purport to take on the powers and functions of a director and to evade the duties that the Act imposes on directors. Of particular note in the list set out in subsection (1), is that the conflict of interest provisions of the Act are made applicable to these persons who are performing the functions of a director.

Subsection (2) is a saving provision for certain persons who would otherwise be caught be subsection (1). Paragraph (a) exempts persons who are ultimately accountable to a member, director, or senior officer of the society. In this case, there is no gap in accountability. Paragraphs (b)–(d) exempt certain professions from the scope of subsection (1). In these cases, any managerial or other functions performed by these persons are incidental to their professional duties.

Revocation of resolutions

71 The directors may

(a) revoke a special resolution before it is acted on if the directors are authorized to do so by that special resolution or by another special resolution,

(b) revoke a special separate resolution passed by members of a class of memberships before it is acted on if the directors are authorized to do so by that special separate resolution or by another special separate resolution passed by members of that class, or

(c) revoke an ordinary resolution before it is acted on if the directors are authorized to do so by that ordinary resolution or by another ordinary resolution.

Source: BCA, s. 139

Reference: tentative recommendation (36)

Concordance: new

Comment: This section is intended to confirm that the directors may revoke members' resolutions, so long as they are authorized to do so in the resolution or by a subsequent resolution. This practice is rather common. This section removes any doubt about its validity.

Proceedings of directors

72 (1) A director who is entitled to participate in, including vote at, a meeting of directors or of a committee of directors may participate

(a) in person, or

(b) unless the bylaws provide otherwise, by telephone or other communications medium if all directors participating in the meeting, whether by telephone, by other communications medium or in person, are able to communicate with each other.

(2) A director who participates in a meeting in a manner contemplated by subsection (1) (b) is deemed, for all purposes of this Act and of the bylaws of the society, to be present at the meeting.

(3) A resolution of the directors or of any committee of the directors

(a) may be passed without a meeting in any of the following circumstances:

(i) in the case of a resolution to approve a contract or transaction in respect of which a director has disclosed that he or she has or may have a disclosable interest, within the meaning of Division 3, if each of the other directors who have not made such a disclosure in respect of the contract or transaction and who are entitled to vote on the resolution consents in writing to the resolution;

(ii) in the case of a resolution not referred to in subparagraph (i), if each of the directors entitled to vote on the resolution consents to it in writing;

(iii) whether or not the resolution is one referred to in subparagraph (i), in any other manner permitted under this Act or under the bylaws of the society, and

(b) is, if the resolution is passed in accordance with paragraph (a), deemed

(i) to be a proceeding at a meeting of directors or of a committee of directors, and

(ii) to be as valid and effective as if it had been passed at a meeting of directors or of a committee of directors that satisfies all the requirements of this Act, and all the requirements of the bylaws of the society, relating to meetings of directors or of a committee of directors.

(4) If a society has only one director, that director may constitute a meeting.

(5) A resolution passed at a meeting of directors or of a committee of directors is, for all purposes, deemed to have been passed on the date and time on which it is in fact passed despite the fact that the meeting at which the resolution is passed is a continuation of an adjourned meeting.

(6) Minutes must be kept of all proceedings at meetings of directors or of committees of directors and section 111 (2) and (3) *[minutes]* applies to those minutes.

Source: BCA, s. 140

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 25.1

Comment: Directors' meetings have historically not been subject to the level of formality that is required of members' meetings. This section contains a basic framework for the proceedings of directors that preserves this flexibility and provides some assistance with specific problems that have arisen in practice.

Subsections (1) and (2) confirm that directors may participate in meetings by telephone or other communications media, unless the bylaws expressly provide otherwise. A similar provision appears in the *Society Act*, 1996. The remaining subsections contain new provisions.

Subsection (3) addresses the intersection of the conflict of interest rules with the common practice of directors' conducting business by signing a consent resolution in lieu of holding a meeting. This intersection sets up a catch-22: the conflict of interest rules require a director to abstain from voting on a resolution, but, in order for a consent resolution to be valid, it must be signed by all of the directors. The *Society Act*, 1996, and the CA have no provisions to address this catch-22. There is case law interpreting the CA that holds that at a conflicted director cannot comply with the director's obligations under the conflict of interest rules and sign a consent resolution.[150] This means that society directors in these circumstances would have to forego the more efficient and inexpensive option of proceeding by consent resolution. Subsection (3) enables society directors to choose the consent resolution option in the listed circumstances. This enabling provision should be of some help to societies in streamlining their operations in practice.

Subsection (4) reverses a common law rule that held that one person could not constitute a directors' meeting.[151] This subsection works in tandem with section 52, which allows a society to have one director. In the absence of this subsection, section 52 would be ineffective.

Subsection (5) clarifies that a directors' resolution that is passed at an adjourned meeting is considered to be passed on the date and time when it was passed in fact, and not on the date and time of the original meeting.

150. *See Western Canadian Coal Corp. v. Fawcett*, 2006 BCSC 463, [2006] B.C.J. No. 643 at para. 30 (S.C.) (QL), Tysoe J. ("There can only be a consent resolution if all directors consent to the resolution. If the directors having an interest in the proposed contract or transaction consent to the resolution, they cannot be considered to have abstained from voting. In my view, it is not possible to consent to a resolution under s. 125 (3) [of the CA] while at the same time purporting to abstain from voting for the purpose of s. 121 (1) [of the CA].").

151. *See*, *e.g.*, *Re Primary Distributers Ltd.*, [1954] 2 D.L.R. 438 (B.C.S.C.).

Subsection (6) requires that minutes be kept of all directors' meetings and meetings of committees of directors. The reference to section 111 (2) and (3) deals with the effect of the Chair signing the minutes. If the Chair signs the minutes at the meeting or at the next directors' meeting, then those minutes are conclusive evidence of the proceedings taken in the meeting.

Officers

73 (1) Subject to subsection (3) and to the bylaws of a society, the directors may appoint officers and may specify their duties.

(2) Unless the bylaws provide otherwise,

(a) any individual, including a director, may be appointed to any office of the society, and

(b) 2 or more offices of the society may be held by the same individual.

(3) An individual who is not qualified under section 56 *[persons disqualified as directors]* to become or act as a director of a society is not qualified to become or act as an officer of the society.

(4) Unless the bylaws provide otherwise, the directors may remove any officer.

(5) The removal of an officer is without prejudice to the officer's contractual rights or rights under law, but the appointment of an officer does not of itself create any contractual rights.

Source: BCA, s. 141

Reference: tentative recommendation (35)

Concordance: new

Comment: A society is not required to have officers under the *Society Act*, 1996, and this will not change under the new *Society Act*. But, in fact, many societies do choose to have officers, such as a president, vice-president, secretary, or treasurer. In many societies, these offices are filled by directors, but, absent a requirement in the bylaws, there is nothing that compels a society to choose its officers from among its directors. In fact, orthodox corporate theory draws a sharp distinction between directors and officers. Under this theory, 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. This theory still holds sway over corporate law, but it is losing some of its force as a greater recognition of the actual functions of directors, officers, and others comes to the fore.

The *Society Act*, 1996, has nothing to say about several basic issues involving officers. This section of the new *Society Act* sets out a legal framework for officers by establishing rules for the following issues: (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 default rules for items (1) and (3) may be varied by a society's bylaws.

An individual who is not qualified to be a society officer under subsection (3) commits an offence if that individual does in fact serve as an officer. For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Duties of directors and officers

74 (1) A director or officer of a society, when exercising the powers and performing the functions of a director or officer of the society, as the case may be, must

(a) act honestly and in good faith with a view to the best interests of the society,

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

(c) act in accordance with this Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the pre-existing constitution or bylaws of the society.

(2) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a society.

(3) No provision in a contract or the pre-existing constitution or bylaws relieves a director or officer from

(a) the duty to act in accordance with this Act and the regulations, or

(b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the society.

Source: BCA, s. 142

Reference: tentative recommendation (36)

Concordance: *Society Act*, 1996, ss. 25, 26

Comment: Since at least *Re City Equitable Fire Insurance Co.*[152] 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 illustrat-

152. (1924), [1925] Ch. 407.

ing the fiduciary principles governing the position of directors"[153] and ". . . to give statutory support to principles that are as difficult to apply as they are well understood."[154]

There is little change in this section from the *Society Act*, 1996. There are two additions in subsection (1), expressly requiring directors and officers to comply with the Act, regulations, pre-existing constitution, and bylaws. An argument could be made that these added requirements merely state positions that were already implicit under the *Society Act*, 1996.

Subsection (2) indicates that this section is not a complete statement of the duties of directors and officers. Other duties may be imposed by other enactments or by decisions of the courts.

Subsection (3) carries forward a longstanding rule in Canadian corporate law, forbidding directors and officers from contracting out of their duties under this section.

Validity of acts of directors and officers

75 An act of a director or officer is not invalid merely because of an irregularity in the election or appointment or a defect in the qualification of that director or officer.

Source: BCA, s. 143

Reference: tentative recommendation (36)

Concordance: new

Comment: This section confirms that an irregularity in the election or appointment of a director or officer or a defect in the qualifications of a director or officer does not, in and of itself, affect the validity of any act of the director or officer. This rule lends certainty to acts and transactions involving the society and provides some protection for third parties dealing with the society.

Societies may grant power of attorney in writing

76 (1) A society may, in writing, designate a person as its attorney and empower that attorney, either generally or in respect of specified matters, to sign deeds, instruments or other records on its behalf.

(2) Every deed, instrument or other record signed by an attorney on behalf of a society, so far as it is within the attorney's authority, binds the society.

Source: BCA, s. 144

Reference: tentative recommendation (4)

Concordance: new

Comment: This section confirms that a society has the authority to grant a power of attorney. Section 6 of the *Power of Attorney Act*[155] also authorizes a corporation (which would include a so-

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

154. Dickerson Report, *ibid*.

155. R.S.B.C. 1996, c. 370.

ciety) to grant a power of attorney. Section 6 contains different formal requirements than this section and its equivalent in the BCA. It may no longer be needed in light of these two sections.

This section and the next section have been restated in the new *Society Act* even though they are framed in broad terms as embracing societies in the BCA. During the consultation period that preceded the publication of this report, the committee heard from a number of respondents who were frustrated with the practice of incorporating certain rules by reference from the BCA or by applying certain rules to societies by using the broadly defined term "corporation" in the BCA. Their view was that the law was made much less accessible, particularly to those individuals without legal training, by this practice.

Society representatives

77 (1) A society may, by a resolution of its directors or other governing body, authorize a person to act as the representative of the society,

(a) if the society is a member of or holds shares of another corporation, wherever incorporated, at a meeting of some or all of the members or holders of shares of that other corporation, and

(b) if the society is a creditor of another corporation, wherever incorporated, at a meeting of creditors of that other corporation.

(2) A person authorized under subsection (1) is entitled to exercise the same powers on behalf of the society that the person represents as that society could exercise if it were an individual who holds shares of the other corporation or is a creditor of the other corporation, as the case may be.

Source: BCA, s. 145

Reference: tentative recommendation (4)

Concordance: new

Comment: A society may be a member of another society or a shareholder of a corporation. Since a society is an artificial person, it can only act through its agents. This section confirms that a society may authorize any person to act as its agent—or representative—at a meeting of members, shareholders, or creditors. A representative is not a proxy, so representatives are not bound by rules governing the timing of deposit of proxies.

Persons may rely on authority of societies and their directors, officers and agents

78 (1) Subject to subsection (2), a society, a guarantor of an obligation of a society or a person claiming through a society may not assert against a person dealing with the society, or dealing with any person who has acquired rights from the society, that

(a) the society's pre-existing constitution or constitution, as the case may be, or bylaws have not been complied with,

(b) the individuals who are shown as directors in the corporate register are not the directors of the society,

(c) a person held out by the society as a director, officer or agent

(i) is not, in fact, a director, officer or agent of the society, as the case may be, or

(ii) has no authority to exercise the powers and perform the duties that are customary in the activities or affairs of the society or usual for such director, officer or agent,

(d) a record issued by any director, officer or agent of the society with actual or usual authority to issue the record is not valid or genuine, or

(e) a record kept by or for the society under section 38 *[records office records]* is not accurate or complete.

(2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the society, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

Source: BCA, s. 146

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is a restatement of the common law indoor management rule.[156] This rule is an exception to general agency principles applied by the law of contract. It developed in connection with English business corporations in the nineteenth century. The courts of that time began to draw a distinction between transactions with patent defects, because, for example, they were in breach of a corporation's charter documents, and transactions with latent defects, because, for example, some condition or procedural requirement set out in the charter had not been complied with. The courts appreciated that it would be difficult for a third party to verify that the corporation had complied with its own internal procedures, but the law of the time (particularly the doctrine of constructive notice) effectively compelled third parties to do just that. So, the courts developed this exception to constructive notice.[157] (The rule does not extend to cases where the third party has actual notice of the limitation or where the third party ought to have notice by virtue of the third party's relationship with the society.) The policy underlying the rule is explained in this passage from a corporate law textbook:[158]

> Two explanations have been advanced for the indoor management rule. The first is that since no outsider has the right to insist on proof by the directors that the articles [or constitution] or by-laws have been satisfied, the outsider cannot therefore be deemed to have notice of any failure to satisfy those requirements. The second is that the imposition of such a burden upon outsiders would impose an intolerable burden on the business community.

156. *See Royal British Bank v. Turquand* (1855), 5 El. & Bl. 248, 119 E.R. 886, *aff'd*, 6 El. & Bl. 327, 25 L.J.Q.B. 317.

157. *See* Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 2d ed. (Markham, ON: LexisNexis Canada, 2007) at 314–15.

158. *Ibid.* at 316 [footnotes omitted].

This section should be read in tandem with section 69 (2).

Division 3 – Conflicts of Interest

Introductory comment: 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."[159] 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."[160]

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. The *Society Act*, 1996, requires a director of a society who is, directly or indirectly, interested in a proposed contract or transaction with the society to disclose fully 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.[161]

Since 1977, the importance of rules relating to conflicts of interest has only increased. One of the main complaints levelled against the *Society Act*, 1996, is that its conflict of interest provisions are out of date and fail to give much helpful guidance to society directors and (especially) society officers. The new *Society Act* contains an amplified set of conflict of interest rules, modelled on those in place under the BCA.

Disclosable interests

79 (1) For the purposes of this Division, a director or senior officer of a society holds a disclosable interest in a contract or transaction if

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

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

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

(a) the contract or transaction is material to the society,

(b) the society has entered, or proposes to enter, into the contract or transaction, and

(c) either of the following applies to the director or senior officer:

(i) the director or senior officer has a material interest in the contract or transaction;

(ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.

(2) For the purposes of subsection (1) and this Division, a director or senior officer of a society does not hold a disclosable interest in a contract or transaction if

(a) the situation that would otherwise constitute a disclosable interest under subsection (1) arose before the coming into force of this Act or, if the society was recognized under this Act, before that recognition, and was disclosed and approved under, or was not required to be disclosed under, the legislation that

(i) applied to the corporation on or after the date on which the situation arose, and

(ii) is comparable in scope and intent to the provisions of this Division, or

(b) the other party to the contract or transaction is a wholly owned subsidiary of the society.

(3) In subsection (2), **"other party"** means a person of which the director or senior officer is a director or senior officer or in which the director or senior officer has a material interest.

(4) For the purposes of subsection (1) and this Division, a director or senior officer of a society does not hold a disclosable interest in a contract or transaction merely because

(a) the contract or transaction is an arrangement by way of security granted by the society for money loaned to, or obligations undertaken by, the director or senior officer, or a person in whom the director or senior officer has a material interest, for the benefit of the society or an affiliate of the society,

(b) the contract or transaction relates to an indemnity or insurance under Division 5,

(c) the contract or transaction relates to the remuneration of the director or senior officer in that person's capacity as director, officer, employee or agent of the society or of an affiliate of the society,

(d) the contract or transaction relates to a loan to the society, and the director or senior officer, or a person in whom the director or senior officer has a material interest, is or is to be a guarantor of some or all of the loan, or

(e) the contract or transaction has been or will be made with or for the benefit of a corporation that is affiliated with the society and the director or senior officer is also a director or senior officer of that corporation or an affiliate of that corporation.

Source: BCA, s. 147

Reference: tentative recommendation (38)

Concordance: *Society Act*, 1996, s. 27

Comment: Knowing when to disclose an interest in a transaction is a key issue for directors. Requiring disclosure of all conflicts or potential conflicts would be unworkable. The management of the society would rapidly grind to a halt under such a system. Subsection (1) sets out 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 society. "Material" is not defined, but the concept is a familiar one, particularly in the commercial world. A material interest is an interest that is not passing or trivial. Since so much depends on context and surrounding circumstances, a specific definition of this key term might actually be less useful in practice. Subsections (2)–(4) list a number of specific situations where a director or a senior officer is deemed not to have a material interest requiring disclosure under this Division.

Unlike the *Society Act*, 1996, the conflict of interest rules in the new *Society Act* apply both to directors and to senior officers. The term "senior officer" is defined in section 1.

Obligation to account for profits

80 (1) Subject to subsection (2) and unless the court orders otherwise under section 82 (1) (a) *[powers of court]*, a director or senior officer of a society is liable to account to the society for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

(2) A director or senior officer of a society is not liable to account for and may retain the profit referred to in subsection (1) of this section in any of the following circumstances:

(a) the disclosable interest was disclosed before the coming into force of this Act under *Society Act*, 1996, and, after that disclosure, the contract or transaction is approved in accordance with section 81 *[ap-*

proval of contracts and transactions] of this Act, other than section 81 (3) *[approval of contracts and transactions]*;

(b) the contract or transaction is approved by the directors in accordance with section 81 *[approval of contracts and transactions]*, other than section 81 (3) *[approval of contracts and transactions]*, after the nature and extent of the disclosable interest has been disclosed to the directors;

(c) the contract or transaction is approved by a special resolution in accordance with section 81 *[approval of contracts and transactions]*, after the nature and extent of the disclosable interest has been disclosed to the members entitled to vote on that resolution;

(d) whether or not the contract or transaction is approved in accordance with section 81 *[approval of contracts and transactions]*,

(i) the society entered into the contract or transaction before the director or senior officer became a director or senior officer of the society,

(ii) the disclosable interest is disclosed to the directors or the members, and

(iii) the director or senior officer does not participate in, and, in the case of a director, does not vote as a director on, any decision or resolution touching on the contract or transaction.

(3) The disclosure referred to in subsection (2) (b), (c) or (d) of this section must be evidenced in a consent resolution, the minutes of a meeting or any other record deposited in the society's records office.

(4) A general statement in writing provided to a society by a director or senior officer of the society is a sufficient disclosure of a disclosable interest for the purpose of this Division in relation to any contract or transaction that the society has entered into or proposes to enter into with a person if the statement declares that the director or senior officer is a director or senior officer of, or has a material interest in, the person with whom the society has entered, or proposes to enter, into the contract or transaction.

(5) In addition to the records that a member of the society may inspect under section 42 *[inspection of records]*, that member may, without charge, inspect

(a) the portions of any minutes of meetings of directors, or of any consent resolutions of directors, that contain disclosures under this section, and

(b) the portions of any other records that contain those disclosures.

(6) In addition to the records a former member of the society may inspect under section 42 *[inspection of records]*, that former member may, without charge, inspect the records referred to in subsection (5) (a) and (b) of this section that are kept under section 38 *[records office records]* and that relate to the period when that person was a member.

(7) Sections 42 (7) and (8) *[inspection of records]*, 44 (1) and (3) *[list of members]* and 45 *[remedies on denial of access or copies]* apply to the portions of minutes, resolutions and records referred to in subsections (5) and (6) of this section.

Source: BCA, s. 148

Reference: tentative recommendation (38)

Concordance: *Society Act*, 1996, s. 28

Comment: Subsection (1) sets out the penalty for breaching the conflict of interest rules. It is the same penalty that applies under the *Society Act*, 1996: the director or senior officer is obliged to account for profits. In other words, the director or senior officers who is in breach of this Division must pay over to the society (the technical term is "disgorge") any profits made on the contract or transaction. This remedy is different conceptually from the contractual remedy of damages. The purpose of an account is not necessarily to compensate the injured party for its loss. Rather, it is intended to ensure that the defaulting director or senior officer does not obtain any benefit from breaching the conflict of interest rules. This standard is deliberately set high, as a way to encourage directors and senior officers to comply with their duties under this Division.[162]

Subsection (2) lists the circumstances when a society director or officer is not obligated to account for profits. In simple terms they are: (a) disclosure was made under the *Society Act*, 1996; (b) after disclosure, the contract or transaction is approved by the board of directors in accordance with this Division; (c) after disclosure, the contract or transaction is approved by a special resolution of the members in accordance with this Division; (d) the society entered into the contract or transaction before the individual became a director or senior officer and the director or senior officer disclosed the interest to the directors or members and did not participate in any decision or actions concerning the contract or transaction.

Subsections (3) to (7) primarily relate to record keeping matters involving the disclosure of interest. The disclosure must be evidenced in a consent resolution, minutes of a meeting, or another record deposited in the society's records office and must be available for inspection and copying by the members.

Approval of contracts and transactions

81 (1) A contract or transaction in respect of which disclosure has been made in accordance with section 80 *[obligation to account for profits]* may be approved by the directors or by a special resolution.

162. *See* David J. Hayton, ed., *Hayton and Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies*, 11th ed. (London: Sweet & Maxwell, 2001) at 589.

(2) Subject to subsection (3), a director who has a disclosable interest in a contract or transaction is not entitled to vote on any directors' resolution referred to in subsection (1) to approve that contract or transaction.

(3) If all of the directors have a disclosable interest in a contract or transaction, any or all of those directors may vote on a directors' resolution to approve the contract or transaction.

(4) Unless the bylaws provide otherwise, a director who has a disclosable interest in a contract or transaction and who is present at the meeting of directors at which the contract or transaction is considered for approval may be counted in the quorum at the meeting whether or not the director votes on any or all of the resolutions considered at the meeting.

Source: BCA, s. 149

Reference: tentative recommendation (38)

Concordance: *Society Act*, 1996, s. 28

Comment: The major difference between this section and its equivalent in the *Society Act*, 1996, is that an approval of a contract or transaction by the society's directors or members no longer requires a determination that the contract or transaction was reasonable and fair to the society at the time it was entered into. These qualities may still be part of the directors' or members' analysis, but it is no longer mandated by statute.

Subsections (2) to (4) address some practical problems that are not covered by the *Society Act*, 1996. Subsection (2) sets out the basic proposition that an interested director is not entitled to vote on any directors' resolution approving a contract or transaction in which the director has a material interest. Subsection (3) contains an exception to the general rule. If all the directors are interested in the contract or transaction, then any or all may vote on a directors' resolution approving it. This solves a potential conflict between subsection (1), which allows a society to approve such a contract or transaction by directors' resolution, and subsection (2), which prevents a director voting on a resolution to approve a contract or transaction in which the director is interested. Subsection (4) clarifies that an interested director may be counted in the quorum of a directors' meeting to consider the contract or transaction in which the director is interested. This rule is a default rule, which may be overridden by the society's bylaws.

Powers of court

82 (1) On an application by a society or by a director, senior officer or member, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the society,

(a) order that the director or senior officer is not liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction, and

(b) make any other order that the court considers appropriate.

(2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 80 (2) *[obligation to account for profits]*, the court may, on an application by the society or by a director, senior officer or member, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the society:

(a) enjoin the society from entering into the proposed contract or transaction;

(b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;

(c) make any other order that the court considers appropriate.

Source: BCA, s. 150

Reference: tentative recommendation (38)

Concordance: *Society Act*, 1996, s. 29

Comment: Subsection (1) allows a director, senior officer, or member to apply to court for an order concerning a contract or transaction in which a director or senior officer has a disclosable interest. This subsection effectively creates another route for the approval of such contracts or transactions. The court must, under this subsection, determine whether the contract or transaction was fair and reasonable to the society. There is no equivalent provision in the *Society Act*, 1996.

Subsection (2) is similar to a provision in the *Society Act*, 1996. Its purpose is to list some of the orders that may be made if the court determines that a contract or transaction is not fair and reasonable to the society.

Validity of contracts and transactions

83 A contract or transaction with a society is not invalid merely because

(a) a director or senior officer of the society has an interest, direct or indirect, in the contract or transaction,

(b) a director or senior officer of the society has not disclosed an interest he or she has in the contract or transaction, or

(c) the directors or members of the society have not approved the contract or transaction in which a director or senior officer of the society has an interest.

Source: BCA, s. 151

Reference: tentative recommendation (38)

Concordance: *Society Act*, 1996, s. 29

Comment: This section provides that a contract or a transaction between a society and a third party is not invalid for the sole reason that there may have been a breach of this Division of the Act in one of the ways mentioned in paragraphs (a) to (c). This rule is meant to protect third parties who transact with a society.

Limitation of obligations of directors and senior officers

84 Except as is provided in this Division, a director or senior officer of a society has no obligation to

(a) disclose any direct or indirect interest that the director or senior officer has in a contract or transaction, or

(b) account for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer has a disclosable interest.

Source: BCA, s. 152

Reference: tentative recommendation (38)

Concordance: new

Comment: A director or senior officer has no obligation to disclose interests in a contract or a transaction other than as provided for in this Division. This section is intended to remove any doubts that may exist about that point.

Disclosure of conflict of office or property

85 (1) If a director or senior officer of a society holds any office or possesses any property, right or interest that could result, directly or indirectly, in the creation of a duty or interest that materially conflicts with that individual's duty or interest as a director or senior officer of the society, the director or senior officer must disclose, in accordance with this section, the nature and extent of the conflict.

(2) The disclosure required from a director or senior officer under subsection (1)

(a) must be made to the directors promptly

(i) after that individual becomes a director or senior officer of the society, or

(ii) if that individual is already a director or senior officer of the society, after that individual begins to hold the office or possess the property, right or interest for which disclosure is required, and

(b) must be evidenced in one of the ways referred to in section 80 (3) *[obligation to account for profits]*.

Source: BCA, s. 153

Reference: tentative recommendation (38)

Concordance: new

Comment: This section expands the reach of the conflict of interest rules by recognizing that a director or senior officer who holds an office in another organization or who possesses certain property, rights, or interests may be in a material conflict for the purposes of this Division. A director or senior officer who is subject to this section must disclose the nature and extent of the conflict either promptly after becoming a director or senior officer or promptly after holding the office in the other organization or possessing the property, right, or interest. This disclosure must be evidenced in the minutes of a directors' meeting, in a directors' consent resolution, or in a record deposited at the society's records office.

Division 4 – Liability of Directors

Introductory comment: Issues of the liability of directors and providing a general statutory immunity from personal liability for directors and officers have generated a great deal of discussion in recent years.[163] Like most Canadian not-for-profit statutes, the *Society Act*, 1996, does not provide directors and officers with immunity from personal liability. The question of whether a new *Society Act* should provide such immunity for directors and officers was posed in the consultation paper. Two examples of immunity were examined in the consultation paper: a section in the SK Act geared strictly to directors and officers[164] and Nova Scotia's *Volunteer Protection Act*,[165] a more broadly based immunity for unpaid volunteers of not-for-profit organizations, which was modelled on American precedents.[166]

The consultation paper also reviewed the leading arguments for and against granting society directors and officers immunity from liability.

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.[167] If a significant drop in the number of individu-

163. *See*, *e.g.*, BCLI Study Paper, *supra* note 79; 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.

164. SK Act, *supra* note 71, s. 112.1. This section applies both to unpaid directors and officers and to directors and officers who receive remuneration.

165. S.N.S. 2002, c. 14.

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

167. *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

als 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 consultation paper contained a tentative recommendation not to include a provision granting society directors and officers immunity from liability. Although a number of respondents were strongly opposed to this tentative recommendation, most of the respondents were in favour of this proposal. The new *Society Act* implements this tentative recommendation by not including a provision granting society directors and officers immunity from personal liability. The new Act does take a more definite and explicit position on when directors and officers will be liable than is found in the *Society Act*, 1996. It also provides directors and officers with a number of tools to help them to avoid entanglement in situations that could lead to personal liability. Finally, this Division does not carry forward the imposition of personal liability on the directors of a society that carries on activities with fewer than three members.

Directors' liability

86 (1) Subject to section 89 *[limitations on liability]*, directors of a society who vote for or consent to a resolution that authorizes the society to do any of the following are jointly and severally liable to restore to the society any amount paid or distributed as a result and not otherwise recovered by the society:

(a) to make a payment to a member, director or officer contrary to this Act;

(b) to provide a loan, guarantee or other financial assistance contrary to section 121 *[financial assistance restricted]* or 123 *[financial assistance to directors prohibited]*;

(c) to make a payment contrary to section 158 *[complaints by member]*;

(d) to make a payment or give an indemnity contrary to section 95 *[indemnification prohibited]*.

generated consternation and anxiety among society directors and officers. *See Report on the Liability of Directors and Officers of Not-Profit Organizations*, *supra* note 163.

(2) The liability imposed by subsection (1) of this section is in addition to and not in derogation of any liability imposed on a director by this Act or any other enactment or by any rule of law or equity.

(3) For the purposes of this section, a director of a society who is present at a meeting of the directors or of a committee of directors is deemed to have consented to a resolution referred to in subsection (1) of this section that is passed at the meeting unless that director's dissent

(a) is recorded in the minutes of the meeting,

(b) is put in writing by the director and is provided to the secretary of the meeting before the end of the meeting, or

(c) is, promptly after the end of the meeting, put in writing and delivered to the delivery address of, or mailed by registered mail to the mailing address of, the society's registered office.

(4) A director who votes in favour of a resolution referred to in subsection (1) is not entitled to dissent under subsection (3).

(5) Subject to subsection (6), a director who is not present at a meeting of the directors or of a committee of directors at which a resolution referred to in subsection (1) is passed is deemed to have consented to the resolution if,

(a) in the case of a resolution passed at a directors' meeting, the individual was a director at the time of the meeting, or

(b) in the case of a resolution passed at a meeting of a committee of directors, the individual was a member of that committee at the time of the meeting.

(6) Subsection (5) does not apply to a director who, within 7 days after becoming aware of the passing of a resolution referred to in subsection (1), delivers to the delivery address of, or mails by registered mail to the mailing address of, the society's registered office, a written dissent.

(7) A legal proceeding to enforce a liability imposed by this section may not be commenced more than 2 years after the date of the applicable resolution.

Source: BCA, s. 154; Bill C-21, ss. 146, 148; SK Act, s. 105

Reference: tentative recommendation (44)

Concordance: new

Comment: The *Society Act*, 1996, does not have an express provision assigning personal liability to directors for misconduct. Instead, the common law governs. Liability may flow from certain decisions of the board at common law, but one of the quirks of the common law is that liability only attaches to those directors who actively participate in the decision. 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.[168] 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 law should favour active, engaged directors over passive directors.

This section in the new *Society Act* has two purposes. First, it lists the sources of liability for directors' decisions. Second, it establishes a dissent procedure for directors. The section is largely modelled on an equivalent provision in the BCA, except for subsection (1), which lists the acts that will result in liability. The list in the BCA is appropriate for directors of for-profit companies; the list used here focuses on concerns in the not-for-profit sector. It is more closely related to similar provisions in Bill C-21 and the SK Act.

The actions that attract liability for directors by virtue of subsection (1) each relate to financial misconduct. Subsection (2) confirms that directors may face liability for other types of misconduct. This provision is important because no statute could comprehensively list all the possible actions that should result in liability. Subsection (2) preserves the jurisdiction of the courts to respond to the multitude of situations that may arise in practice.

Subsection (3) sets out the mechanics of the dissent procedure. The first point to notice is that a director is considered to have consented to a resolution of the type listed in subsection (1) if the director is present at the meeting in which it was passed and the director does not dissent. Mere passivity will no longer be an effective shield against personal liability. Second, the dissent procedure only relates to a limited range of resolutions—those that are listed in subsection (1). The more typical sorts of disagreements that may crop up on boards are not affected by the dissent procedure. Dissents should be a relatively rare occurrence in the life of a society. A director should only need to contemplate dissenting when a resolution would result in serious financial misconduct, of the sort listed in subsection (1). Third, a dissent is a formal act. A director must vote against the resolution. Then, the director must ensure that the dissent is noted in the society's records in one of the ways listed in paragraphs (a) to (c).

Subsection (4) confirms that a director who votes in favour of a resolution cannot turn around and dissent from it.

Subsections (5) and (6) deal with directors who were absent from a meeting at which a resolution referred to in subsection (1) was passed. Mere absence from a meeting, like mere passivity, is not a shield against liability. Instead, the director must mail or deliver a written dissent to the society's registered office within seven days of the director becoming aware of the resolution.

Subsection (7) creates a two-year limitation period for actions to enforce liability founded on a resolution referred to in subsection (1).

Finally, it should be noted that a director is not liable under this section if the director can show that the director did not know and could not reasonably have known that an act or resolution was contrary to the Act. This defence is set out in section 89 (2).

168. *See Re Dominion Trust Co. and Machray* (1916), 23 B.C.R. 401, *varied* (*sub nom. Re Dominion Trust Co. (Directors' Case)*) (1916), 32 D.L.R. 63 (C.A.). *See also* MacRae & Bromley, *supra* note 122 at 3.1.03.

Dissent procedure by societies

87 The society must, on receipt of a written dissent referred to in section 88 (3) (c) or (6) *[legal proceedings on liability]*, and the secretary of the meeting referred to in section 88 (3) *[legal proceedings on liability]* must, on receipt of a written dissent referred to in section 88 (3) (b) *[legal proceedings on liability]*, certify on the written dissent the date and time it is received.

Source: BCA, s. 155

Reference: tentative recommendation (44)

Concordance: new

Comment: The timing of a dissent may be significant in any dispute over liability. This section imposes an obligation on the society or on the secretary of a meeting, as the case may be, to certify the date and time on the written dissent itself.

Legal proceedings on liability

88 (1) Without limiting any other rights a director has at law, a director who has satisfied a liability arising under section 86 *[directors' liability]* is entitled to contribution from the other directors who voted for or consented to the resolution that gave rise to the liability.

(2) In a legal proceeding under section 86 *[directors' liability]*, the court may, on the application of a society or of a director of a society,

(a) order a member of the society or any other person to deliver to the director or the society any property, rights and interests that the court considers were improperly paid or distributed to that member or person under this Act,

(b) join a director, member or other person as a party to the legal proceeding, and

(c) make any other order the court considers appropriate.

Source: BCA, s. 156

Reference: tentative recommendation (44)

Concordance: new

Comment: Under section 86, the directors are considered jointly and severally liable. Subsection (1) of this section confirms the basic rule that a director who satisfies a liability arising under section 86 will be entitled to a contribution from the other directors. Subsection (2) lists, for greater certainty, a number of orders that a court may make in proceedings involving directors' liability.

Limitations on liability

89 (1) A director of a society is not liable under section 86 *[directors' liability]* and a director or officer has complied with his or her duties under sec-

tion 74 (1) *[duties of directors and officers]* if the director or officer relied, in good faith, on

(a) financial statements of the society represented to the director or officer by an officer of the society or in a written report of the auditor of the society to fairly reflect the financial position of the society,

(b) a written report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by that person,

(c) a statement of fact represented to the director by an officer of the society to be correct, or

(d) any record, information or representation that the court considers provides reasonable grounds for the actions of the director or officer, whether or not

(i) the record was forged, fraudulently made or inaccurate, or

(ii) the information or representation was fraudulently made or inaccurate.

(2) A director of a society is not liable under section 86 *[directors' liability]* if the director did not know and could not reasonably have known that the act done by the director or authorized by the resolution voted for or consented to by the director was contrary to this Act.

Source: BCA, s. 157

Reference: tentative recommendation (37)

Concordance: new

Comment: The *Society Act*, 1996, does not contain these express limitations on a director's liability, but 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.[169] Expressly stating certain limitations 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. 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.[170]

169. *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.).

170. *See* SK Act, *supra* note 71, s. 109 (4) (extending this safe harbour to officers).

Subsection (1) specifically provides that a director or an officer has complied with the director's or officer's statutory duties if the director or officer has relied in good faith on (1) certain financial statements and written reports, (2) reports of certain professionals, (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 or officer. Subsection (2) confirms that a director will not be held liable under section 86 if the director did not know and could not reasonably have known that an act or resolution was contrary to the Act.

Liability if society's name not displayed

90 (1) A director or officer of a society who knowingly permits the society to contravene section 25 (1) (a), (b) or (c) or (2) *[name to be displayed]* is personally liable to indemnify any of the following persons who suffer loss or damage as a result of being misled by that contravention:

(a) a purchaser of goods or services from the society;

(b) a supplier of goods or services to the society;

(c) a person holding a security of the society.

(2) A director or officer of a society who issues or authorizes the issue of any instrument referred to in section 25 (1) (d) *[name to be displayed]* that does not display the name of the society is personally liable to the person holding that instrument for the amount of it, unless it is duly paid by the society.

Source: BCA, s. 158

Reference: tentative recommendation (11)

Concordance: new

Comment: Section 25 requires a society to display its full legal name at its main place of activities and on correspondence and certain legal instruments. This section plays an important role in encouraging compliance with that obligation by imposing personal liability on a director or officer who knowingly permits a society to contravene section 25. Under subsection (1), a director or officer is liable to indemnify a person who suffers a loss due to the failure to display the society's name at a place where it carries on activities, on notices or official publications, on correspondence, contracts, and other legal documents, or on its seal. Note that the director or officer will not face liability unless the director or officer *knowingly* permit the society to contravene section 25. Under subsection (2), a different standard applies. A director or officer who authorizes the issue of a bill of exchange, cheque, promissory note, or other instrument listed in section 25 (1) (d) will be personally liable to a person holding the instrument, unless the society pays the debt.

Division 5 – Indemnification of Directors and Officers and Payment of Expenses

Introductory comment: A director or officer will sometimes face personal liability or will be named personally in a lawsuit as a result of carrying out the functions of a director or officer. In view of the risks directors and officers may face, many corporations agree to indemnify (reimburse them for any losses suffered personally due to their offices in litigation) their directors and

officers. A corporation is permitted at common law to indemnify its directors or officers. The common law rules on indemnification were shaped by general agency principles.[171] Beginning in the 1920s, provisions modifying those principles began to appear in for-profit corporate statutes. At present, the vast majority of for-profit and not-for-profit corporate statutes contain detailed rules governing indemnification. The *Society Act*, 1996, contains an indemnification provision that dates from 1977. The purpose of this Division is to modernize the rules governing indemnification of society directors and officers and to address issues that have increased in importance since 1977.

Definitions

91 In this Division:

"associated corporation" means a corporation or entity referred to in paragraph (b) or (c) of the definition of "eligible party";

"eligible party", in relation to a society, means an individual who

(a) is or was a director or officer of the society,

(b) is or was a director or officer of another corporation

(i) at a time when the corporation is or was an affiliate of the society, or

(ii) at the request of the society, or

(c) at the request of the society, is or was, or holds or held a position equivalent to that of, a director or officer of a partnership, trust, joint venture or other unincorporated entity,

and includes, except in the definition of "eligible proceeding" and except in sections 95 (1) (c) and (d) *[indemnification prohibited]* and 97 *[insurance]*, the heirs and personal or other legal representatives of that individual;

"eligible penalty" means a judgment, penalty or fine awarded or imposed in, or an amount paid in settlement of, an eligible proceeding;

"eligible proceeding" means a proceeding in which an eligible party or any of the heirs and personal or other legal representatives of the eligible party, by reason of the eligible party being or having been a director or officer of, or holding or having held a position equivalent to that of a director or officer of, the society or an associated corporation

(a) is or may be joined as a party, or

(b) is or may be liable for or in respect of a judgment, penalty or fine in, or expenses related to, the proceeding;

171. *See* McGuinness, *supra* note 157 at 828–29.

"expenses" includes costs, charges and expenses, including legal and other fees, but does not include judgments, penalties, fines or amounts paid in settlement of a proceeding;

"proceeding" includes any legal proceeding or investigative action, whether current, threatened, pending or completed.

Source: BCA, s. 159

Reference: tentative recommendation (39)

Concordance: new

Comment: This section contains definitions that apply in this Division of the Act. The key definitions to notice are "eligible party" and "eligible proceeding." These terms effectively define the scope of this Division.

An eligible party will be, in most cases, a society director or officer. Former directors or officers of the society are also included in the term. This is a common feature of indemnification provisions, which recognizes that the potential for personal liability due to a person serving as a director or an officer may follow the person even after leaving that office. An eligible party also includes a person who was a director or an officer of a corporation affiliated with the society. (The rules on affiliation of corporations are set out in section 2.) Finally, an eligible party may also be a person who serves as a director or an officer of another corporation, or in an equivalent office of another entity, at the request of the society. This may not occur frequently in practice, but it is worthwhile for the Act to have the flexibility to allow a society to indemnify such a person.

The main difference between the *Society Act*, 1996, and the new *Society Act* in this area is that the *Society Act*, 1996, is apparently limited to directors and former directors. Given the open-ended definition of "directors" in the *Society Act*, 1996, an argument could be made that its 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. Officers have been included under this Division of the new *Society Act* because they face largely the same issues as directors in this area.

An eligible proceeding is a proceeding (in court or otherwise) for which a society may indemnify an eligible party. The definition of eligible proceeding embraces a wide variety of proceedings for which an eligible party may be personally liable by virtue of being or having been a director or an officer of a society or an associated corporation. Note that indemnification is prohibited in certain circumstances by section 95.

Indemnification and payment permitted

92 Subject to section 95 *[indemnification prohibited]*, a society may do one or both of the following:

(a) indemnify an eligible party against all eligible penalties to which the eligible party is or may be liable;

(b) after the final disposition of an eligible proceeding, pay the expenses actually and reasonably incurred by an eligible party in respect of that proceeding.

Source: BCA, s. 160

Reference: tentative recommendation (39)

Concordance: *Society Act*, 1996, s. 30

Comment: This section is the key enabling provision in this Division. It clearly states that a society may (a) indemnify an eligible party against all eligible penalties under this Division, (b) after the completion of an eligible proceeding, pay expenses actually and reasonably incurred by the eligible party, or (c) do both (a) and (b). The major difference between the new *Society Act* and the *Society Act*, 1996, is that the new *Society Act* does not require an application to court to approve any payment of an indemnity agreement from a society to a director or officer. 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. Court approval is not a feature of many modern not-for-profit statutes or models for reform of the sector.[172]

Mandatory payment of expenses

93 Subject to section 95 *[indemnification prohibited]*, a society must, after the final disposition of an eligible proceeding, pay the expenses actually and reasonably incurred by the eligible party in respect of that proceeding if the eligible party

(a) has not been reimbursed for those expenses, and

(b) is wholly successful, on the merits or otherwise, in the outcome of the proceeding or is substantially successful on the merits in the outcome of the proceeding.

Source: BCA, s. 161

Reference: tentative recommendation (39)

Concordance: new

Comment: "Expenses" is defined as including costs and charges, including legal fees, but not as including any amount paid as a result of a judgment, penalty, or fine or an amount paid to settle a proceeding. This section requires a society to reimburse a director or an officer for any expenses that are actually and reasonably incurred if the director or officer is wholly or substantially successful in the proceeding and if the director or officer has not otherwise been reimbursed. This provision is an important part of the protection provided by this Division for directors and officers.

Authority to advance expenses

94 (1) Subject to section 95 *[indemnification prohibited]* and subsection (2) of this section, a society may pay, as they are incurred in advance of the final disposition of an eligible proceeding, the expenses actually and reasonably incurred by an eligible party in respect of that proceeding.

172. *See*, *e.g.*, Bill C-21, *supra* note 73, s. 152; SK Act, *supra* note 71, s. 111; ALRI Draft Act, *supra* note 81, s. 50; US Model Act, *supra* note 83, § 8.51; US 2006 Exposure Draft, *supra* note 84, § 8.51.

(2) A society must not make the payments referred to in subsection (1) unless the society first receives from the eligible party a written undertaking that, if it is ultimately determined that the payment of expenses is prohibited by section 95 *[indemnification prohibited]*, the eligible party will repay the amounts advanced.

Source: BCA, s. 162

Reference: tentative recommendation (39)

Concordance: new

Comment: One of the realities of contemporary litigation is that it is expensive. The cost of litigation has been exploited—especially in the for-profit sector, but also in the not-for-profit sector—as a tactic in proceedings involving a corporation. The tactic involves pressuring directors or officers by naming them personally in the proceedings, in the hopes that a settlement will be forced when the individuals involved come to appreciate the cost of defending the proceeding.[173]

This section provides important protection for society directors or officers in this position, or, indeed, in any proceeding. It allows the society to advance expenses to the director or officer before the outcome of the proceeding. Subsection (2) requires the director or officer who receives such an advance to undertake in writing to repay the advances if it is determined in the end that the proceeding falls into the category of proceedings for which indemnification is prohibited under the Act.

Indemnification prohibited

95 (1) A society must not indemnify an eligible party under section 92 (a) *[indemnification and payment permitted]* or pay the expenses of an eligible party under section 92 (b) *[indemnification and payment permitted]*, 93 *[mandatory payment of expenses]* or 94 *[authority to advance expenses]* if any of the following circumstances apply:

(a) if the indemnity or payment is made under an earlier agreement to indemnify or pay expenses and, at the time that the agreement to indemnify or pay expenses was made, the society was prohibited from giving the indemnity or paying the expenses by its pre-existing constitution or bylaws;

(b) if the indemnity or payment is made otherwise than under an earlier agreement to indemnify or pay expenses and, at the time that the indemnity or payment is made, the society is prohibited from giving the indemnity or paying the expenses by its pre-existing constitution or bylaws;

173. *See*, *e.g.*, John J. Chapman, "Joinder of Corporate Directors, Officers and Employees" (2001) 80 Can. Bar Rev. 857.

(c) if, in relation to the subject matter of the eligible proceeding, the eligible party did not act honestly and in good faith with a view to the best interests of the society or the associated corporation, as the case may be;

(d) in the case of an eligible proceeding other than a civil proceeding, if the eligible party did not have reasonable grounds for believing that the eligible party's conduct in respect of which the proceeding was brought was lawful.

(2) If an eligible proceeding is brought against an eligible party by or on behalf of the society or by or on behalf of an associated corporation, the society must not do either of the following:

(a) indemnify the eligible party under section 92 (a) *[indemnification and payment permitted]* in respect of the proceeding;

(b) pay the expenses of the eligible party under section 92 (b) *[indemnification and payment permitted]*, 93 *[mandatory payment of expenses]* or 94 *[authority to advance expenses]* in respect of the proceeding.

Source: BCA, s. 163

Reference: tentative recommendation (39)

Concordance: *Society Act*, 1996, s. 30

Comment: This section lists the circumstances when indemnification by a society is prohibited. Paragraphs (c) and (d) of subsection (1) are similar to the prohibitions currently found in the *Society Act*, 1996. A director or an officer should not expect reimbursement if the director or officer did not act honestly, in good faith, and with a view to the society's best interests. Similarly, if the proceeding is a criminal or an administrative proceeding, the director or officer should not be reimbursed for conduct that the director or officer had no reasonable grounds for believing to be lawful. Paragraphs (a) and (b) are intended to cover situations where an indemnity is contrary to the rules of the society's charter documents in force at the time the indemnity is paid. Subsection (2) prohibits the payment of an indemnity or the advancement of expenses if the proceeding has been brought by or on behalf of the society.

Court ordered indemnification

96 Despite any other provision of this Division and whether or not payment of expenses or indemnification has been sought, authorized or declined under this Division, on the application of a society or an eligible party, the court may do one or more of the following:

(a) order a society to indemnify an eligible party against any liability incurred by the eligible party in respect of an eligible proceeding;

(b) order a society to pay some or all of the expenses incurred by an eligible party in respect of an eligible proceeding;

(c) order the enforcement of, or any payment under, an agreement of indemnification entered into by a society;

(d) order a society to pay some or all of the expenses actually and reasonably incurred by any person in obtaining an order under this section;

(e) make any other order the court considers appropriate.

Source: BCA, s. 164

Reference: tentative recommendation (39)

Concordance: *Society Act*, 1996, s. 30

Comment: This section provides the court with the ultimate authority over indemnification under this Division. It recognizes that situations may occur that are beyond the contemplation of the statutory text, but that may merit indemnification.

Insurance

97 A society may purchase and maintain insurance for the benefit of an eligible party or the heirs and personal or other legal representatives of the eligible party against any liability that may be incurred by reason of the eligible party being or having been a director or officer of, or holding or having held a position equivalent to that of a director or officer of, the society or an associated corporation.

Source: BCA, s. 165

Reference: tentative recommendation (39)

Concordance: *Society Act*, 1996, s. 30 (5)

Comment: When provisions allowing a not-for-profit corporation to purchase insurance for its directors and officers were first proposed they were considered controversial and were strongly resisted in some quarters.[174] The fear was that directors and officers would engage in misconduct, secure in the knowledge that insurance would provide financial cover. This fear has proved ill-founded. Directors and officers insurance is now a familiar part of the not-for-profit landscape. The *Society Act*, 1996, has a provision authorizing a society to purchase and maintain insurance for its directors; this section in the new *Society Act* expands the scope of the authorization to include all eligible parties, as defined in this Division.

Remuneration of directors restricted

98 Except as permitted in this Division or unless the bylaws of the society otherwise provide, a director of a society must not receive remuneration for service to a society in his or her capacity as director.

Source: original

174. *See* Cumming Report, *supra* note 47, vol. 1 at 53.

Reference: tentative recommendation (45)

Concordance: *Society Act*, 1996, s. 6 (1) (e)

Comment: Under the *Society Act*, 1996, a society's bylaws must contain provisions relating to the remuneration of directors. 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.[175]

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

Division 6 – Meetings of Members

Introductory comment: These provisions relating to members' meetings are largely procedural in nature. The goal of this Division is to modernize the procedures relating to members' meetings, particularly to allow societies to take advantage of advances in technology. Another goal is to provide societies with greater flexibility in organizing their members' meetings. Finally, this area was identified in the consultation paper as one where harmonization with the BCA would be beneficial to societies, so most of the provisions that follow are modelled on their equivalents in the BCA.

Location of general meetings

99 A general meeting of a society,

(a) subject to paragraph (b), must be held in British Columbia, or

(b) may be held at a location outside British Columbia if

(i) the location is provided for in the bylaws,

(ii) the bylaws do not restrict the society from approving a location outside of British Columbia for the holding of the general meeting and the location for the meeting is

(A) approved by the resolution required by the bylaws for that purpose, or

(B) if no resolution is required for that purpose by the bylaws, approved by ordinary resolution, or

(iii) the location for the meeting is approved in writing by the registrar before the meeting is held.

175. Bill C-21, *supra* note 73, s. 144; SK Act, *supra* note 71, s. 112.

Source: BCA, s. 166

Reference: tentative recommendation (62)

Concordance: *Society Act*, 1996, s. 57

Comment: This section provides societies with greater flexibility in choosing the location of their members' meetings. Under the *Society Act,* 1996, a society is required to hold a general meeting in British Columbia, unless the society obtained the approval of the Registrar of Companies for a meeting to be held outside British Columbia. This older provision was intended in part to encourage participation at meetings of members, but its utility has now been diminished by advances in technology.

Under the new *Society Act*, the default position is that a general meeting must be held in British Columbia. But a society may hold a general meeting outside the province if the bylaws so provide, or if the bylaws do not restrict a society from holding a general meeting outside British Columbia and the location of the meeting is approved by the resolution required in the bylaws. The registrar still retains the authority in all cases to approve the holding of a meeting outside British Columbia.

Requisitions for general meetings

100 (1) Members referred to in subsection (2) may requisition a general meeting for the purpose of transacting any business that may be transacted at a general meeting.

(2) A requisition under this section may be made by members who, at the date on which the requisition is received by the society, hold in the aggregate at least 1/20 of the rights to vote at a general meeting.

(3) A requisition under this section

(a) must, in 1 000 words or less, state the business to be transacted at the meeting, including any special resolution or exceptional resolution to be submitted to the meeting,

(b) must be signed by, and include the names and mailing addresses of, all of the requisitioning members,

(c) may be made in a single record or may consist of several records, in similar form and content, each of which is signed by one or more of the requisitioning members, and

(d) must be delivered to the delivery address of, or mailed by registered mail to the mailing address of, the registered office of the society.

(4) If a requisition under this section consists of more than one record, the requisition is received by the society on the first date by which the society has received requisition records that comply with subsection (3) from members who, in the aggregate, hold at least the number of rights to vote necessary to qualify under subsection (2).

(5) On receiving a requisition that complies with subsections (2) and (3), the directors must, regardless of the bylaws, call a general meeting to be held not more than 4 months after the date on which the requisition is received by the society to transact the business stated in the requisition and must, subject to subsection (7),

(a) send notice of the date, time and location of that meeting at least the prescribed number of days, but not more than 4 months, before the meeting

(i) to each member entitled to attend the meeting, and

(ii) to each director, and

(b) send, in accordance with subsection (6), to the persons entitled to notice of the meeting, the text of the requisition referred to in subsection (3) (a).

(6) The text referred to in subsection (5) (b) must be sent in, or within the time set for the sending of, the notice of the requisitioned meeting.

(7) The directors need not comply with subsection (5) if

(a) the directors have called a general meeting to be held after the date on which the requisition is received by the society and have sent notice of that meeting in accordance with section 102 *[notice of general meetings]*,

(b) substantially the same business was submitted to members to be transacted at a general meeting that was held not more than the prescribed period before the receipt of the requisition, and any resolution to transact that business at that earlier meeting did not receive the prescribed amount of support,

(c) it clearly appears that the business stated in the requisition does not relate in a significant way to the activities or affairs of the society,

(d) it clearly appears that the primary purpose for the requisition is

(i) securing publicity, or

(ii) enforcing a personal claim or redressing a personal grievance against the society or any of its directors, officers or security holders,

(e) the business stated in the requisition has already been substantially implemented,

(f) the business stated in the requisition, if implemented, would cause the society to commit an offence, or

(g) the requisition deals with matters beyond the society's power to implement.

(8) If the directors do not, within 21 days after the date on which the requisition is received by the society, send notice of a general meeting in accordance with subsection (5) of this section, the requisitioning members, or any one or more of them holding, in the aggregate, more than 1/40 of the rights to vote at general meetings, may send notice of a general meeting to be held to transact the business stated in the requisition.

(9) A general meeting called, under subsection (8), by the requisitioning members must

(a) be called in accordance with subsection (5),

(b) be held within 4 months after the date on which the requisition is received by the members, and

(c) as nearly as possible, be conducted in the same manner as a general meeting called by the directors.

(10) Unless the members resolve otherwise by an ordinary resolution at the general meeting called, under subsection (8), by the requisitioning members, the society must reimburse the requisitioning members for the expenses actually and reasonably incurred by them in requisitioning, calling and holding that meeting.

Source: BCA, s. 167; SK Act, s. 133

Reference: tentative recommendation (71)

Concordance: *Society Act*, 1996, s. 58

Comment: The directors of a corporation exercise considerable control over the timing and content of members' meetings. As a counterbalance to that control, most corporate law statutes allow members who band together to form a group that exceeds a certain threshold level to require the directors to call a meeting of members to consider specific issues brought forward by this group of members. This process is referred to as requisitioning a meeting.

The *Society Act*, 1996, contains a provision authorizing the requisition of meetings. This provision has a number of defects, including the following: (1) it does not contain clear criteria for dealing with frivolous or vexatious requisitions—in particular, the directors are not authorized to refuse to comply these types of requisitions; (2) its procedural directions are somewhat wanting; and (3) its threshold requirement that at least 10 percent of the members form the requisitioning group is out of step with the threshold level of five percent contained in the vast majority of Canadian corporate statutes, including the BCA.

This section in the new *Society Act* is closely modelled on the requisition provision found in the BCA. The one main difference between the two is that the language relating to voting shares has not been carried into the *Society Act*; instead, language closer to that of the SK Act has been used.

Subsection (2) contains the threshold for requisitioning a meeting. Under this provision, the threshold is set at members holding in the aggregate at least 1/20 of the rights to vote at a general meeting. This threshold is lower than the current threshold in the *Society Act*, 1996, but it is consistent with the threshold in the vast majority of for-profit corporate statutes in Canada, including the BCA, and in modern not-for-profit legislation, including the SK Act. In addition to the benefits of harmonization, lowering the threshold is desirable because it makes this provision more accessible to minority groups with legitimate concerns. Frivolous or vexatious requisitions are specifically dealt with in subsequent provisions. It is preferable to address those concerns directly, rather than with the indirect method of a higher threshold.

Subsections (3)–(6) contain detailed requirements for making and processing a requisition for a meeting. These rules should streamline the process by giving explicit guidance to members and directors.

Subsection (7) is an important provision that authorizes the directors to disregard a requisition in certain circumstances. The list set out in subsection (7) covers a range of situations, from requisitions that will soon be overtaken by a regularly called members' meeting, to those that seek to repeat business that has already been conclusively dealt with, and those that would divert the society into areas far removed from its purposes. Subsection (7) (b) refers to resolutions that failed to receive the prescribed amount of support at a previous meeting. For for-profit companies, section 16 of the *Business Corporations Regulation* sets a period of five years for the purpose of determining whether substantially the same business was submitted to the shareholders and prescribes the levels of support as (a) three percent of the total number of shares voted on the resolution if the resolution was introduced at only one of the general meetings of shareholders held within the five-year period, (b) six percent of the total number of shares voted on the resolution at its last submission to shareholders if the requisition was introduced at two general meetings of shareholders held within the five-year period, and (c) 10 percent of the total number of shares voted on the resolution at its last submission to shareholders if the requisition was introduced at three or more general meetings of shareholders held within the five-year period. Similar figures would also be appropriate for societies.

Subsections (8) and (9) contain a procedure that allows the members to carry on with a requisition that the directors have disregarded. The key practical point in this situation is that these members will initially be out-of-pocket for the costs of the meeting. Subsection (10) sets out a default rule that these members will be reimbursed by the society, but that rule may be overridden by an ordinary resolution of the members at the requisitioned meeting.

No liability

101 No society or person acting on behalf of a society incurs any liability merely because the society or person complies with section 100 (5) (b) or (6) *[requisitions for general meetings]*.

Source: BCA, s. 168

Reference: tentative recommendation (71)

Concordance: new

Comment: This is simply a saving provision, which is largely self-explanatory. One concern that should be noted is that there is a potential for the material that directors are required to send out

under the previous section to contain defamatory statements. This section allays any concerns that the directors may have over being ensnared in legal proceedings as a result. The directors should not have to fear litigation solely as a result of their compliance with the legislation.

Notice of general meetings

102 (1) Subject to sections 100 *[requisitions of general meetings]*, 103 *[waiver of notice]* and 153 *[right and obligation of auditors to attend meetings]*, a society must send notice of the date, time and location of a general meeting of the society at least the prescribed number of days but not more than 2 months before the meeting,

(a) to each member entitled to attend the meeting, and

(b) to each director.

(2) The accidental omission to send notice of any general meeting to, or the non-receipt of any notice by, any of the persons entitled to notice does not invalidate any proceedings at that meeting.

Source: BCA, s. 169

Reference: tentative recommendation (61)

Concordance: *Society Act*, 1996, s. 60

Comment: The *Society Act*, 1996, contains a simple rule that provides for not less than 14 days' written notice of a members' meeting. This rule appears to have been based on an equivalent provision in the CA. 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 new *Society Act* contains a more sophisticated set of rules for giving notice of members' meetings. The reference to "the prescribed number of days" in subsection (1) is a reference to a number that will be prescribed by regulation. It is appropriate to take this approach as this issue is purely procedural. In addition, regulations give the government greater flexibility to respond to changing circumstances. Unlike amendments to legislation, amendments to regulations do not require the scrutiny of the Legislature. Ease of amendment is an important consideration for provisions such as this one. The appropriate amount of notice can change over time, especially as advances in technology may change the speed of communication. The prescribed number of days under the BCA is at least 10 days.[176] The expression "at least" is given a technical meaning by the *Interpretation Act*.[177] It means that, in counting the days required to give notice, the first and last days are excluded. This is sometimes referred to as "clear days" notice. The upper limit of the range is two months.

Subsection (1) must also be read in tandem with section 5, which governs the sending of records generally. Section 5, and the regulations it enables, set out a number of ways of sending records, including by mail, by physical delivery, by facsimile, or by e-mail. These general standards apply to the specific issue of giving notice of a general meeting. By combining these two sections, and

176. *See Business Corporations Regulation*, *supra* note 90, s. 3 (1).

177. *Supra* note 88, s. 25 (4).

their regulations, societies are given a greater range of options for giving notice of a members' meeting.

Subsection (2) is a saving provision, intended to clarify the consequences of an accidental omission to give notice or a failure by a member to receive notice. The rule is that these accidental omissions or failures do not invalidate the meeting. Since the society has not acted maliciously to deprive a member of notice in these cases, the balance of convenience favours this approach.

Waiver of notice

103 (1) Despite any other provision of this Act, a member and any other person entitled to notice of a meeting of members may waive that entitlement or may agree to reduce the period of that notice.

(2) Despite section 5 (4) *[sending of records]*, the right of a person to waive the entitlement to notice or to reduce the period of notice under subsection (1) of this section need not be exercised in writing.

(3) Without limiting subsection (2), attendance of a person at a meeting of members is a waiver of entitlement to notice of the meeting, unless that person attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

Source: BCA, s. 170

Reference: tentative recommendation (61)

Concordance: *Society Act*, 1996, s. 60

Comment: Under the *Society Act,* 1996, all of the members entitled to receive notice have to consent in writing to waive or abridge the notice period. The provisions in the new *Society Act* are wider in that any person entitled to receive notice may agree to waive or abridge the notice period and this can be done either in writing or orally.

Setting record dates

104 (1) The directors may set a date as the record date under this section for any purpose, including for the purpose of determining members

(a) entitled to notice of a meeting of members, or

(b) entitled to vote at a meeting of members.

(2) A record date set under subsection (1) must not

(a) precede by more than 2 months, or, in the case of a meeting referred to in section 100 *[requisitions of general meetings]*, 4 months, or by fewer than the prescribed number of days the date on which the meeting referred to in subsection (1) (a) of this section is to be held, or

(b) precede by more than 2 months, or, in the case of a meeting referred to in section 100 *[requisitions of general meetings]*, 4 months, the date on which the meeting referred to in subsection (1) (b) of this section is to be held.

(3) If no record date is set under this section,

(a) the record date for determining the members who are entitled to notice of, or to vote at, a meeting of members is

(i) 5 p.m. on the day immediately preceding the first date on which notice is sent, or

(ii) if no notice is sent, the beginning of the meeting, and

(b) the record date for determining members for any other purpose is 5 p.m. on the date on which the directors pass the resolution relating to the matter for which the record date is required.

Source: BCA, s. 171

Reference: tentative recommendation (4); tentative recommendation (57)

Concordance: *Society Act*, 1996, s. 62

Comment: A record date is essentially a cut-off date for various purposes, including for the purpose of determining which members are entitled to notice of a meeting of members and which members are entitled to vote at a meeting of members. Subsection (1) is an enabling provision, allowing the directors of a society to set a record date for these purposes. Subsection (2) sets out the time limits for record dates. A record date may not be set more than two months before a meeting, or more than four months if the meeting is a requisitioned meeting. For the purpose of notices of meetings, the record date may not be set at fewer than the prescribed number of days for giving notice of a meeting. The reference to a prescribed number is a reference to regulations. For companies, the prescribed number is 10 days. This number should also be adopted by the regulations for societies. Subsection (3) sets out the default rules, which apply if the directors do not set a record date.

The setting of record dates should assist societies in clarifying issues surrounding voting at meetings. The *Society Act*, 1996, instead simply relies on the concept of "good standing" to determine entitlement to vote at a members' meeting. The concept is not one that is in common use in modern not-for-profit corporate legislation. As a result, "good standing" is poorly understood in practice and creates confusion in application.

Quorum for members' meetings

105 (1) The quorum for the transaction of business at a meeting of members of a society is

(a) the quorum established by the bylaws,

(b) if no quorum is established by the bylaws, 2 members entitled to vote at the meeting whether present in person or by proxy, or

(c) if the number of members entitled to vote at the meeting is less than the quorum applicable to the society under paragraph (a) or (b), all of the members entitled to vote at the meeting whether present in person or by proxy.

(2) Unless the bylaws provide otherwise, if a quorum is not present at the opening of a meeting of members, the members entitled to vote at the meeting who are present in person or by proxy at the meeting may adjourn the meeting to a set time and place but may not transact any other business.

(3) If a quorum is present at the opening of a meeting of members, the members present may, unless the bylaws otherwise provide, proceed with the business of the meeting, despite that a quorum is not present throughout the meeting.

(4) If the society has only one member entitled to vote at a meeting of members, one person who is, or who represents by proxy, that member may constitute that meeting.

Source: BCA, s. 172; SK Act, s. 129

Reference: tentative recommendation (63)

Concordance: *Society Act*, 1996, s. 61

Comment: The purpose underlying a statutory quorum requirement is to ensure that a baseline level of membership is present at a meeting, in order to prevent any action being taken without the approval of only a small minority of members. The challenge is to articulate a number or formula that works for the broad spectrum of societies.

The *Society Act*, 1996, provides that a quorum of three members was required for transaction of business at a general meeting, unless the bylaws provided for a higher number. This rule follows the common approach of setting a low statutory number and allowing individual societies to increase it if that serves their goals. The main issue with the approach of the *Society Act*, 1996, is that it is too simplistic.

The new *Society Act* mirrors the provisions in the BCA and provides that the quorum for a general meeting is (1) the quorum established by the bylaws, (2) if the bylaws are silent, two members 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 members entitled to vote at the meeting, whether present in person or by proxy.

Subsection (2) of the new *Society Act* also contains a useful provision that was not found in the *Society Act*, 1996, but is contained within the BCA and other more up to date corporate statutes. It provides that if a quorum is not present at the opening of a meeting of members, then the members entitled to vote at the meeting who are present, or by proxy, may adjourn the meeting to a set time and place but may not transact any other business. The underlying rationale for this provision is as noted in the Cumming Report, 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."[178] It is important to note however that subsection (2) is a default rule and a society may override this rule in its bylaws.[179]

The rationale for subsection (3) 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.[180]

Subsection (4) is intended to overcome a common law rule that holds that one person cannot constitute a meeting.

Voting

106 (1) Subject to subsection (7) (a) of this section and unless the bylaws provide otherwise, a member has one vote and is entitled to vote in person.

(2) Unless the bylaws provide otherwise, a member is not entitled to vote by proxy.

(3) Unless the bylaws provide otherwise, voting at a meeting of members must,

(a) if one or more members vote at the meeting in a manner contemplated by section 107 (1) *[participation at meetings of members]*, be by poll or be conducted in any other manner that adequately discloses the intentions of the members,

(b) if a poll is demanded by a member or proxy holder entitled to vote at the meeting or is directed by the chair, be by poll, or

(c) in any other case, be by show of hands.

(4) At any meeting of members at which a resolution is submitted, a declaration of the chair that the resolution is carried by the necessary majority or is defeated is, unless a poll is required or demanded under subsection (2) or (4) of this section or is directed by the chair, conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

178. Cumming Report, *supra* note 47, vol. 1 at 58–59.

179. And, in practice, many companies and societies do choose to override this rule. *See British Columbia Company Law Practice Manual*, *supra* note 109 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.").

180. *See* Cumming Report, *supra* note 47, vol. 1 at 59.

(5) At any meeting of members at which a resolution is submitted, a member or proxy holder entitled to vote at the meeting may, before or promptly after the declaration of the results of a vote taken by a show of hands, demand a poll.

(6) Unless otherwise provided under this Act or in the bylaws, any action that must or may be taken or authorized by the members under this Act may be taken or authorized by an ordinary resolution.

(7) If a member who is not otherwise entitled to vote is, by this Act, given the right to vote on a matter,

(a) the member has, on that matter, one vote, and

(b) the provisions of the bylaws or this Division, as the case may be, that apply in relation to the exercise of voting rights held by members who have the right to vote at general meetings also apply in relation to the exercise by that member of the voting rights given by this Act on that matter.

Source: BCA, s. 173 (except for subs. (2))

Reference: tentative recommendation (53); tentative recommendation (65); tentative recommendation (66); tentative recommendation (67)

Concordance: *Society Act*, 1996, ss. 7 (1), 61

Comment: This section sets out a basic framework for voting at members' meetings. This topic is often fraught with confusion in practice. The *Society Act*, 1996, provides societies with little guidance on the subject. The intent of this section is to set out a flexible group of default rules that may assist those societies without extensive voting provisions in their bylaws.

Subsection (1) varies a bedrock voting principle in the *Society Act*, 1996. Under the *Society Act*, 1996, a voting member only has one vote and this right to vote may not be restricted in any way. This mandatory provision has been changed into a default provision in the new *Society Act*. 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*, 1996, has caused difficulties in practice. Some societies have attempted to put in place complex provisions in their bylaws to work around this provision. The policy of the new *Society Act* is to enable societies to establish voting rules that make sense for them.

Subsection (2) sets out a default rule restricting the use of proxies. A proxy is a record by which a member of a society appoints a person as the nominee of the member to attend and act for the member at a meeting. 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. In view of the provisions in the new Act facilitating participation in meetings by modern communications technology, they are rapidly becoming functionally obsolete. A society that wishes to enable the use of proxies will require specific language to that effect in its bylaws. Unlike the *Society Act*, 1996, the new *Society Act* contains no prohibitions on the use of permanent or continuing proxies.

Subsections (3) to (5) deal with a specific aspect of the mechanics of voting. They deal with when a poll will be required. A poll is a formal method of voting by written ballot. The ordinary rule is that voting is done by show of hands.

Subsection (6) is simply meant to clarify that the members may resolve any issue by ordinary resolution, unless the Act or the bylaws require a different type of approval (for example, approval by special resolution).

Subsection (7) applies these voting rules to members who ordinarily do not have the right to vote. Some major transactions allow members who do not ordinarily have voting rights to vote on whether or not to approve the transaction. These transactions tend to be of a type that result in a fundamental transformation of the society, such as, for example, an amalgamation.

Participation at meetings of members

107 (1) Unless the bylaws provide otherwise, a member or proxy holder who is entitled to participate in, including vote at, a meeting of members may do so by telephone or other communications medium if all members and proxy holders participating in the meeting, whether by telephone, by other communications medium or in person, are able to communicate with each other.

(2) Nothing in subsection (1) obligates a society to take any action or provide any facility to permit or facilitate the use of any communications medium at a meeting of members.

(3) If one or more members or proxy holders participate in a meeting of members in a manner contemplated by subsection (1),

(a) each such member or proxy holder is deemed, for the purposes of this Act and of the bylaws of the society, to be present at the meeting, and

(b) the meeting is deemed to be held at the location specified in the notice of the meeting.

Source: BCA, s. 174

Reference: tentative recommendation (64)

Concordance: new

Comment: The *Society Act,* 1996, has no specific provisions relating to the participation of members at meetings. The implication of this silence was that the legislation only contemplated one model of members' meetings, an in-person face to face meeting. Obviously, technology and social attitudes have moved on considerably in the last 30 years and legislation should recognize other ways of holding a meeting which would make it easier and more efficient for societies to conduct their activities. The new *Society Act* therefore contains provisions enabling members or proxy holders to participate in meetings by telephone or other communications media provided all of the members or proxy holders are able to communicate with each other. This rule is subject to the society's bylaws.

Pooling agreements

108 Two or more members may, in a written agreement, agree that when exercising their voting rights, they will vote in accordance with the terms of the agreement.

Source: BCA, s. 175

Reference: tentative recommendation (67)

Concordance: new

Comment: A pooling agreement is a type of agreement in which the parties agree to vote together on certain issues arising at a members' meeting. Although pooling agreements are unlikely to arise that often among members of a society, it is helpful to have the flexibility to enter into such agreements should this be desired. In fact, these types of agreements have not been controversial at common law, so long as they only extend to issues that members would typically vote on at a members' meeting and do not purport to fetter the discretion of the directors.[181] This section essentially confirms the common law and is included for the sake of clarity.

Date of resolution

109 A resolution passed at a meeting of members is, for all purposes, deemed to have been passed on the date and time on which it is in fact passed despite the fact that the meeting at which the resolution is passed is a continuation of an adjourned meeting.

Source: BCA, s. 176

Reference: tentative recommendation (4)

Concordance: new

Comment: This section parallels a similar rule for directors' meetings. (See section 72 (5).) It is intended to clarify that a resolution that is passed at an adjourned members' meeting is considered to be passed on the date and time when it was passed in fact, and not on the date and time of the original meeting.

Election of chair

110 Unless the bylaws of a society provide otherwise, the members who are present in person or by proxy at a meeting of members and who are entitled to vote at the meeting may elect as the chair of the meeting any member or proxy holder who is entitled to vote at the meeting.

Source: BCA, s. 178

Reference: tentative recommendation (4)

Concordance: new

181. *See* Dickerson Report, *supra* note 46, vol. 1 at 99.

Comment: This provision contains a default rule allowing the members and proxy holders (if applicable) present at a members' meeting to elect the Chair. The rule is subject to the society's bylaws.

Minutes

111 (1) A society must ensure that minutes are kept of all proceedings at meetings of members.

(2) The minutes of a meeting referred to in subsection (1), if purported to be signed by the chair of the meeting or by the chair of the next succeeding meeting, are evidence of the proceedings.

(3) Until the contrary is proved, if minutes of a meeting have been signed in accordance with this section,

(a) the meeting is deemed to have been duly held and convened,

(b) all proceedings at the meeting are deemed to have been duly taken, and

(c) all elections and appointments of directors, officers, auditors or liquidators made at the meeting are deemed to be valid.

Source: BCA, s. 179

Reference: tentative recommendation (4)

Concordance: new

Comment: This section requires a society to maintain minutes of its members' meetings. The *Society Act*, 1996, does not contain such a requirement, but most societies, in practice, have kept minutes of their members' meetings. It is a basic administrative requirement and it is crucial to have a record of decisions and actions that affect the governance of the society. Subsections (2) and (3) deal with the effect of the Chair signing the minutes. If the Chair signs the minutes at the meeting or at the next succeeding meeting, then those minutes are evidence of the matters set out in subsection (3).

Consent resolutions of members

112 A consent resolution of members is deemed

(a) to be a proceeding at a meeting of those members, and

(b) to be as valid and effective as if it had been passed at a meeting of members that satisfies all the requirements of this Act and the regulations, and all the requirements of the bylaws of the society, relating to meetings of members.

Source: BCA, s. 180

Reference: tentative recommendation (73)

Concordance: new

Comment: This section clarifies that a consent resolution of the members is as effective as a resolution passed at a face to face meeting. A consent resolution must be in writing and it must be signed by all the members having the right to vote at a general meeting (if it is intended to take effect as a special resolution) or by a special majority (which is set by the bylaws at a number between 2/3 and 3/4 of the voting members) of the members having the right to vote at a general meeting (if it is to take effect as an ordinary resolution).

Rules applicable to general meetings apply to other members' meetings

113 To the extent that this Act or the regulations or the bylaws of a society do not make provision for any particular meeting of members, the provisions of this Act, the regulations and the bylaws relating to the call, holding and conduct of general meetings apply, with the necessary changes and so far as they are applicable, to that meeting of members.

Source: BCA, s. 181

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is included for the sake of clarity. It confirms that the rules applicable to general meetings apply to any other type of members' meeting (for example, a meeting of a class of members).

Annual general meetings

114 (1) Subject to subsections (2) to (5), a society must hold an annual general meeting,

(a) for the first time, not more than 18 months after the date on which it was recognized, and

(b) after its first annual reference date, at least once in each calendar year and not more than 15 months after the annual reference date for the preceding calendar year.

(2) Subject to subsection (3), all of the members entitled to vote at an annual general meeting of a society may,

(a) by a unanimous resolution passed on or before the date by which that annual general meeting is required to be held under this section, defer the holding of that annual general meeting to a date that is later than the date by which the meeting is required to be held under subsection (1),

(b) by a unanimous resolution, consent to all of the business required to be transacted at that annual general meeting, or

(c) by a unanimous resolution, waive the holding of

(i) that annual general meeting,

(ii) the previous annual general meeting, or

(iii) any earlier annual general meeting that the society had been obliged to hold.

(3) The members must, in any unanimous resolution passed under subsection (2) (a), (b) or (c) (i) or (ii), select, as the society's annual reference date, a date that would, under subsection (1), be appropriate for the holding of the applicable annual general meeting.

(4) If a unanimous resolution is not passed under subsection (2) with respect to an annual general meeting of a society, on the application of the society, the registrar may, if satisfied that it is appropriate to do so and on the terms and conditions the registrar considers appropriate, allow the society to hold that annual general meeting on a date that is later than the date by which the meeting is required to be held under subsection (1).

(5) If a unanimous resolution is passed in relation to an annual general meeting under subsection (2) (b) or (c), the society need not hold that annual general meeting.

Source: BCA, s. 182

Reference: tentative recommendation (60)

Concordance: *Society Act*, 1996, s. 56

Comment: This section deals with two main issues: the timing of a society's annual general meeting and passing a consent resolution in lieu of holding an annual general meeting.

Subsection (1) contains two rules for the timing of an annual general meeting. A society's first annual general meeting must be held not more than 18 months after the society is recognized. A society is recognized under the new *Society Act* upon (1) incorporation, (2) conversion, (3) amalgamation, or (4) continuation into British Columbia. (The recognition rules are explained in detail in section 3.) For the vast majority of societies, recognition will occur on incorporation. A society's second and subsequent annual general meetings must be held at least once in a calendar year and not more than 15 months after its annual reference date. The expression "annual reference date" is defined in section 1. In simple terms, it is the date of the preceding year's annual general meeting or of the consent resolution passed in lieu of a meeting. So, boiled down, a society has 18 months to hold its first annual general meeting and 15 months to hold each subsequent meeting. This compares favourably with the rule in the *Society Act*, 1996, which requires annual general meetings to be held every 15 months. In fact, many societies will appreciate the additional three months in which to hold the first annual general meeting.

Subsection (2) gives the members some new flexibility in controlling the timing and form of an annual general meeting. The members are authorized to extend the date by which an annual general meeting must be held. They are also given the authority to pass a consent resolution in lieu of holding the current, or any previously required, annual general meeting. The *Society Act*, 1996, appears to require the members to hold at least one yearly face to face meeting. (It is not explicit on this point.) Most societies will want to hold such a meeting, but some would prefer the flexibility of simply dispensing with the business that must be attended to at an annual general meeting by

passing a consent resolution. This provision is intended to allow societies to make this choice. It also allows societies to rectify a failure to hold an annual general meeting in the past. The resolutions referred to in subsection (2) must be unanimous resolutions. The expression "unanimous resolution" is defined in section 1. It means a resolution consented to in writing by all the members of the society entitled to vote at a general meeting.

Subsection (4) preserves the discretion of the Registrar of Companies, on an application of a society, to extend the time within which a society is required to hold an annual general meeting.

First annual reference date for pre-existing societies

115 For the purposes of section 114 (1) (b) *[annual general meetings]*, a pre-existing society that has neither held an annual general meeting under this Act nor passed a resolution under section 114 (2) *[annual general meetings]* has, as its first annual reference date,

(a) if the society was recognized not more than 18 months before the coming into force of this Act, the earlier of

(i) the date of the society's first annual general meeting, if any, that was held, or was deemed to have been held, under the *Society Act*, 1996, and

(ii) the date that is 18 months after the recognition of the society, or

(b) if the society was recognized more than 18 months before the coming into force of this Act, the later of

(i) the date that is 13 months after the date of the society's most recent annual general meeting, if any, that was held, or was deemed to have been held, under the *Society Act*, 1996, and

(ii) the date that is 6 months before the day on which this Act comes into force.

Source: BCA, s. 183

Reference: tentative recommendation (60)

Concordance: new

Comment: This section is a transitional provision, defining for the purposes of section 114 (1) (b) of the new *Society Act,* the first annual reference date for those pre-existing societies that have neither held an annual general meeting under the new *Society Act* nor passed a resolution under section 114 (2).

Information for members

116 (1) The directors of a society that holds an annual general meeting must place the following before that meeting:

(a) the financial statements, if any, that the directors are, under section 133 (2) *[financial statements]* of this Act, required to produce and publish on or before the annual reference date that relates to that annual general meeting;

(b) any auditor's report made under section 146 (1) (a) *[auditor's duty to examine and report]* on those financial statements.

(2) The directors of a society who are required under subsection (1) of this section to place financial statements before an annual general meeting must, on the request of any member or proxy holder present at that meeting, provide a copy of those financial statements and of any auditor's report made under section 146 (1) (a) *[auditor's duty to examine and report]* on those financial statements to that member or proxy holder.

(3) If, within 6 months after an annual reference date, a member of the society requests a copy of the society's financial statements referred to in subsection (1) (a), (b) or (c) of this section, the directors must promptly send to that member a copy of those financial statements and of any auditor's report made under section 146 (1) (a) *[auditor's duty to examine and report]* on those financial statements.

Source: BCA, s. 185

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, ss. 64, 65

Comment: The section requires the directors of a society that holds an annual general meeting to place the society's financial statements and (if applicable) auditor's report before the meeting. A similar requirement is found in the *Society Act*, 1996.

Powers of court

117 (1) The court may, on its own motion or on the application of the society, the application of a director or the application of a member entitled to vote at the meeting,

(a) order that a meeting of members be called, held and conducted in the manner the court considers appropriate, and

(b) give directions it considers necessary as to the call, holding and conduct of the meeting.

(2) The court may make an order under subsection (1)

(a) if it is impracticable for any reason for the society to call or conduct a meeting of members in the manner required by this Act, the regulations or the bylaws,

(b) if the society fails to hold a meeting of members in accordance with this Act or the regulations or its bylaws, or

(c) for any other reason the court considers appropriate.

(3) Without limiting subsection (1), the court may order that the quorum or notice required by the bylaws or this Act or the regulations be varied or dispensed with in respect of a meeting.

Source: BCA, s. 186

Reference: tentative recommendation (72)

Concordance: *Society Act*, 1996, s. 59

Comment: This section provides a more flexible and compendious procedure for the court than under the *Society Act*, 1996. The court may grant an order on the application of a director, a member entitled to vote, or of its own motion rather than simply on the application of a voting member. The powers of the court are framed more broadly so that it may order that a meeting "be called, held and conducted in the manner the court considers appropriate." These changes are desirable, as this section likely will only be relied on in cases where the conduct of the society's affairs have become deadlocked.

Division 7 – Member Proposals

Member proposal

118 (1) A member entitled to vote at a meeting of members may

(a) submit to the society notice of any matter that he or she proposes to raise at the meeting, referred to in this section as a "proposal", and

(b) discuss at the meeting any matter with respect to which he or she would have been entitled to submit a proposal.

(2) A society that sends to members the notice required by section 102 *[notice of general meetings]* must set out the proposal in the notice or publication or, where the proposal is sent, attach the proposal to the notice.

(3) If requested by the member, the society that sends to members any notice required by section 102 *[notice of general meetings]* must include in the notice or attach to it a statement by the member of not more than 250 words in support of the proposal, and the name and address of the member.

(4) The proposal and the statement referred to in subsection (3), if any, must not exceed 1 000 words in length.

(5) The member who submitted the proposal must pay the cost of sending the proposal and any statement with the notice of the meeting at which the proposal is to be presented, unless the members resolve otherwise by ordinary resolution at the meeting at which the proposal is presented.

(6) A proposal may include nominations for the election of directors if the proposal is signed by not less than 1/20 of the members of a class of members of the society entitled to vote at the meeting at which the proposal is to be presented or any lesser number of members as provided in the by-laws, but this subsection does not preclude nominations made at a meeting of members.

(7) A society is not required to comply with subsections (2) and (3) where:

(a) the directors have called an annual general meeting to be held after the date on which the proposal is received by the society and have sent notice of that meeting in accordance with section 102 *[notice of general meetings]*;

(b) the proposal exceeds the maximum length established by subsection (3);

(c) it clearly appears that the proposal does not relate in a significant way to the activities or affairs of the society;

(d) it clearly appears that the primary purpose for the proposal is

(i) securing publicity, or

(ii) enforcing a personal claim or redressing a personal grievance against the society or any of its directors, officers or security holders;

(e) the proposal has already been substantially implemented;

(f) the proposal, if implemented, would cause the society to commit an offence;

(g) the proposal deals with matters beyond the society's power to implement.

(8) No society or person acting on its behalf incurs any liability by reason only of circulating a proposal or statement in compliance with this section.

(9) If a society refuses to include a proposal in a notice of a meeting, the society, within 10 days after receiving the proposal, must notify the member submitting the proposal of its intention to omit the proposal from the notice of meeting and send to him or her a statement of the reasons for the refusal.

(10) On the application of a member claiming to be aggrieved by a society's refusal pursuant to subsection (9), the court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it considers appropriate.

(11) The society or any person claiming to be aggrieved by a proposal may apply to the court for an order permitting the society to omit the proposal from the notice of meeting, and the court, if it is satisfied that subsection (7) applies, may make any order it considers appropriate.

(12) An applicant pursuant to subsection (10) or (11) must give the registrar notice of the application, and the registrar is entitled to appear and be heard.

Source: SK Act, s. 127; Bill C-21, s. 163; BCA, s. 189 (5)

Reference: tentative recommendation (70)

Concordance: new

Comment: 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:[182]

> 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 requisition a meeting with other like-minded shareholders or members. In many cases, this hurdle may be very difficult to clear.

The *Society Act*, 1996, does not contain any provisions allowing members to make proposals at meetings and, as a result, deprives the members of a useful tool to hold management accountable. This was felt to be out of step with modern corporate legislation and accordingly the new *Society Act* contains provisions enabling members to make proposals at a general meeting of members. These provisions are modeled on those in Bill C-21 and on the SK Act, as well as the provisions in the BCA. The result is a provision that balances the rights of members with appropriate safeguards against frivolous or vexatious proposals.

Division 8 – General

Form and effect of contracts

119 (1) A contract that, if made between individuals, would, by law, be required to be in writing and under seal, may be made for a society in writing and under seal and may, in the same manner, be varied or discharged.

(2) A contract that, if made between individuals, would, by law, be required to be in writing and signed by the parties to be charged, may be made for a society in writing signed by a person acting under the express or implied authority of the society and may, in the same manner, be varied or discharged.

182. Cumming Report, *supra* note 47, vol. 1 at 57 [citation omitted].

(3) A contract that, if made between individuals, would, by law, be valid although made orally and not reduced to writing, may be made in like manner for a society by a person acting under the express or implied authority of the society and may, in the same manner, be varied or discharged.

(4) A contract made according to this section is effectual in law and binds the society and all other parties to it.

(5) A bill of exchange or promissory note is deemed to have been made, accepted or endorsed on behalf of a society if made, accepted or endorsed in the name of, by, on behalf of or on account of the society by a person acting under its authority.

Source: BCA, s. 193

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 16

Comment: These self-explanatory provisions are more or less identical to the provisions regarding the form and effect of contracts in the *Society Act,* 1996. They are included to ensure that older legal doctrines may not be used to undercut the general principle in the Act to treat a society as having the powers and capacity of an individual of full capacity.

Authentication or certification of records

120 (1) A record that requires authentication or certification by a society may be authenticated or certified by a director or officer of the society or by a lawyer for the society and need not be under the society's seal.

(2) Any certified record referred to in subsection (1), if introduced as evidence in any legal proceeding, is evidence of the contents of the record without proof of the signature or official capacity of the person appearing to have signed the record.

(3) An entry in a register of members of a society is evidence that the person in whose name the membership is registered is a member of the society.

(4) Without limiting subsection (3), a register of members prepared under a former *Societies Act* is evidence of any matters directed or authorized by that Act to be inserted in it.

Source: BCA, s. 194

Reference: tentative recommendation (4)

Concordance: new

Comment: This section contains rules on authenticating or certifying corporate records. Subsection (1) makes it clear that affixing the society's corporate seal is not required. Subsection (2) contains an evidentiary rule for the use of certified records in court. Subsections (3) and (4) deal with the conclusiveness of a society's register of members.

Financial assistance restricted

121 A society 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 society or in accordance with its purposes.

Source: *School Act*, s. 95.412

Reference: tentative recommendation (82)

Concordance: new

Comment: The issue of a society providing financial assistance to certain individuals such as directors, officers, or members, is not specifically addressed in the *Society Act*, 1996. 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. While there are common law rules that apply in the absence of a statutory provision, these rules are vague and ill-defined. (They appear to involve subjecting the transaction to a best interests test.) The uncertainty of these common law rules and the absence of statutory provision has meant that there is a lack of clarity and guidance for societies on this subject.

In simple terms, 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 effectively be 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 when speculators in the United Kingdom caused great 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 be more restrictive 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.

These provisions in the CA caused great consternation among corporate lawyers and the business community because it is rather difficult to prove a negative (that is, that a given transaction can go ahead without contravening the financial assistance rules because the transaction will not render the company insolvent). These 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 attractions of the BCA was that it did away with the restrictions on financial assistance imposed in the CA and instead made a clean break with the traditional approach in Canada to this issue, by expressly allowing companies to give financial assistance in all circumstances. The BCA only requires that a company disclose such a transaction, usually by depositing a description of it in the company's records office, where it may be inspected by shareholders or former shareholders. The thinking seems to be that shareholders, creditors, and others can take the necessary steps to protect their interests, as long as they have the knowledge of financial assistance transactions involving company insiders.

Other British Columbia statutes, such as the *School Act*, which contains provisions relating to companies formed by school boards, have adopted a more restrictive regime for financial assistance, but provide clearer rules with the aim of trying to avoid the previous problems in the CA.

Having considered the various approaches that have been adopted on this issue, it was felt that the best solution to what is a difficult problem, was for the new *Society Act* to contain some general provisions restricting financial assistance, based on the provisions in the *School Act*. The one alteration is to include an express authorization for providing financial assistance in accordance with the society's purposes. This language may provide some comfort for certain types of societies, particularly charitable societies.

Having some express rules should bring some certainty to this area of the law. While the BCA approach appears to have generally been well received it was not ultimately considered suitable for the not-for-profit realm. Adopting the BCA provisions could have been seen as courting greater commercialization for the not-for-profit sector. Expressly allowing financial assistance transactions could also have undermined the not-for-profit character of societies.

When loans and guarantees prohibited

122 (1) Without limiting section 121 *[financial assistance restricted]*, a society 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 society is insolvent, or

(b) in the case of a loan, the giving of the loan would render the society insolvent.

(2) The court, on the application of a director of a society, may declare that, in view of all the circumstances, the society is insolvent, or that the proposed giving of financial assistance would render the society insolvent.

Source: *School Act*, s. 95.413

Reference: tentative recommendation (82)

Concordance: new

Comment: This section contains the second limb of the restriction on financial assistance. It restricts a society from giving financial assistance to anyone if the society is insolvent or, if the financial assistance is in the form of a loan, if the loan would make the society insolvent. Financial

assistance is restricted in these circumstances because it would be unfair to the society's creditors. In some circumstances, it may also be unfair to others who rely on the society, for example, to provide services.

The basic understanding of insolvency is that it means the society would be unable to pay its debts as they come due. Sometimes, determining whether or not a society is insolvent is not clear cut. Subsection (2) allows the society's directors to apply to court for a declaration that the society is insolvent or that the giving of financial assistance would make the society insolvent.

Financial assistance to directors prohibited

123 Subject to Division 5 of this Part, a society must not give financial assistance to a director of the society, directly or indirectly, by way of loan, guarantee, the provision of security, or otherwise.

Source: original

Reference: tentative recommendation (83)

Concordance: new

Comment: Given the power that directors have to manage or supervise the management of a society, and the duties that come with that power, the committee concluded that financial assistance to directors cannot be justified in any context and that a mandatory rule was needed to ensure that it does not take place. The one exception to this rule is indemnification of a director by a society, in accordance with Division 5 of this Part.

Contract enforceable

124 Despite a contract to which a society is a party being made in contravention of section 121 *[financial assistance restricted]*, 122 *[when loans and guarantees prohibited]* or 123 *[financial assistance to directors prohibited]*, a good faith lender for value without notice, or the society, may enforce the contract.

Source: *School Act*, s. 95.414

Reference: tentative recommendation (82)

Concordance: new

Comment: This provision simply provides confirmation that a contract can be enforced by a good faith lender for value without notice, or a society, even if the contract has been entered into by the society in contravention of the financial assistance rules. It is consistent with the idea that a third party is not well placed to determine whether or not the society's management has complied with its obligations and should not be forced to make inquiries about or suffer prejudice due to any failings of the society's management.

PART 5 – MEMBERS

Number of members

125 A society must have at least one member.

Source: original

Reference: tentative recommendation (48)

Concordance: new

Comment: The *Society Act*, 1996, does not contain a provision that directly imposes a requirement to have a minimum number of members. While a society has to begin its existence with at least five members, as five persons are required to sign the application to incorporate and to become the society's initial members, there is no continuing requirement to have at least five members at all times. But two other sections of the *Society Act*, 1996, 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 would 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 continued to have fewer than three members. Furthermore, under section 61, three members is set as the requirement for a quorum at a general meeting.

Minimum shareholder requirements are now uncommon in the for-profit legislation, but their equivalent does still exist in the not-for-profit realm. Most Canadian not-for-profit statutes require at least three or five members although there are three jurisdictions, including Saskatchewan (which has the most recently amended legislation in Canada) that do now only require one member.

The rationale for imposing a certain minimum number of members on a society is to encourage greater accountability and responsibility. This view was considered by the committee, who came to the conclusion that there was no evidence that requiring at least three or five members results in any greater protection for the public than only requiring one. This conclusion was set out as a tentative recommendation in the consultation paper and it generated a nearly equal division between respondents in favour and respondents opposed.

There is a certain amount of arbitrariness to the minimum membership requirement. In practice, the vast majority of societies will exceed the minimum number set out in the legislation. This point militates in favour of setting the number as low as possible, to give societies the maximum flexibility in structuring their membership. Those opposed to the tentative recommendation did not, in the committee's view, provide convincing evidence that allowing a society to carry on with one member would create a mischief that could be avoided by requiring a society to have, for instance, three or five members. Further, finding an appropriate enforcement mechanism for a higher minimum membership rule remains problematic.

It should be emphasized that the provision in the new Act is only a minimum requirement. Many societies will no doubt continue to stipulate in their bylaws that there has be more than one member. Many more will have more than one member in practice. This section does nothing to prevent a society from following either course.

Classes of membership

126 (1) The bylaws of a society may provide for more than one class of membership and, if they do, the bylaws must include the rights, privileges, restrictions and conditions that apply to the members of each class.

(2) The bylaws of a society must provide for at least one class of membership that entitles the members of that class to vote at all meetings of members.

Source: SK Act, s. 113 (1)–(2)

Reference: tentative recommendation (51); tentative recommendation (52); tentative recommendation (54)

Concordance: new

Comment: In practical terms, it would be difficult to define and fully set out the rights and obligations of typical classes of members in the new *Society Act*. This provision has however been included to provide a degree of certainty regarding a society's classes of members by requiring societies that have classes of members to define the terms and conditions of each class in their bylaws.

Subsection (2) requires a society's bylaws to provide for at least one class of membership that has the right to vote at all members' meetings. The *Society Act*, 1996, permits a society to have non-voting members, provided that their number does not exceed the number of voting members.[183] This rule first appeared in the *Society Act* in 1961.[184] It was enacted ". . . to prevent a situation arising where a small number of persons, by gaining status as voting members, control a society having a relatively large number of non-voting members."[185] This requirement does not seem to have any contemporary relevance. The explanatory note to the 1961 amendment implies that a society would only have a small group of voting members and a large group of non-voting 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 also considered the question of whether the new Act should contain provisions enabling the creation of honorary or life memberships, but came to the conclusion that this type of membership could also be dealt with in the same manner as any other class of membership. As a result, there are no special provisions creating a statutory class of honorary or life members for all societies. Instead, societies that want these types of members may create them in their bylaws.

Admission to membership

127 (1) The bylaws of a society must set out

(a) the qualifications for admission to the membership of a society, and

(b) the procedure for admitting members to the society.

(2) Subject to the bylaws, a person under the age of 19 years

(a) may be admitted as a member of a society, and

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

184. *See Societies Act Amendment Act, 1961*, S.B.C. 1961, c. 57, s. 4.

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

(b) is liable for the payment of membership fees as if the person were of full age.

Source: original

Reference: tentative recommendation (49)

Concordance: *Society Act*, 1996, ss. 6 (1) (a), 7 (5) (a), (c)

Comment: Subsection (1) of this section follows the existing approach of the *Society Act*, 1996, by requiring the bylaws to address the issue of admission to membership. The other options would have been to include provisions in the Act, which, no matter how detailed, would 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.

Subsection (2) carries forward most of an existing provision from the *Society Act*, 1996, regarding the admission of minors as members of a society. In the consultation paper, the committee proposed dropping this section. While the effect of making this move would not be so dramatic as to prohibit minors from becoming members of a society,[186] many respondents pointed out that it would introduce ambiguity on this point. That ambiguity could cause confusion and uncertainty among societies about the status of their minor members. A further point was made by several individuals who had been active in university student societies. These societies are obligated by other legislation to take on all students at a university as members. A significant portion of these students is below the age of majority. If this provision will promote clarity and give societies some comfort in their existing practices, then the bulk of it is worth preserving.

This subsection does not contain the paragraph in the *Society Act*, 1996, which provides that a minor "may be appointed to an office in the society." This provision would contradict section 71, which sets out the qualifications of directors. Under that section, a director of a society must be 18 years of age or older. As directors have important governance obligations under the Act, a minimum age requirement is justified for them.

Register of members

128 (1) A society must maintain a register of members in which it registers

(a) the memberships issued by the society, or transferred, after the coming into force of this Act, and

(b) with respect to those memberships,

(i) the name and last known address of each person to whom those memberships have been issued or transferred after the coming into force of this Act,

(ii) the class of those memberships,

186. *See* R. Jane Burke-Robertson & Arthur B.C. Drache, *Non-Share Capital Corporations*, looseleaf (Toronto: Thomson Carswell, 2004) at § 4.2 (a) ("It is also of note that there is no restriction on admitting minors as members of a non-share capital corporation and some jurisdictions such as Alberta, British Columbia and Nova Scotia specifically provide for the admission of minors as members." [footnotes omitted]).

(iii) in the case of memberships issued after the coming into force of this Act, the date and particulars of each such issue, and

(iv) in the case of memberships transferred after the coming into force of this Act, the date and particulars of each such transfer.

(2) A society may appoint agents to maintain the register of members.

(3) A society must maintain its register of members at its records office or at any other location inside or outside British Columbia designated by the directors.

(4) If, under subsection (3), the directors designate a location outside British Columbia as the location at which the society maintains its register of members, the register of members must be available for inspection and copying in accordance with section 44 *[list of members]* at a location inside British Columbia by means of a computer terminal or other electronic technology.

(5) If, under subsection (3), the directors designate a location inside British Columbia as the location at which the society maintains its register of members, the register of members must be available for inspection and copying in accordance with section 44 *[list of members]* at

(a) that designated location, or

(b) another location inside British Columbia by means of a computer terminal or other electronic technology.

Source: BCA, s. 111

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 70

Comment: The register of members is a key record for societies. The *Society Act*, 1996, contains a requirement to maintain a register of members which is similar to subsection (1). One point of contrast is worthy of notice. This subsection requires that a register of members contain the member's "last known address"; the *Society Act*, 1996, required the member's "resident address."

Subsections (2)–(5) are new provisions. They provide societies with some flexibility in meeting their obligation to maintain a register of members. Subsection (2) allows a society to appoint agents to maintain its register of members. Several responses to the consultation paper emphasized the challenges some societies face in complying with their statutory obligations with respect to the register of members. In particular, university student societies are required to admit all students at a particular university as members. Their register of members is, in effect, the enrollment information held by the university administration. It may be useful for them to enter into an agency arrangement under subsection (2). Subsections (4) and (5) deal with access to the register of members. It should be noted here that section 44 limits access to a society's register of members to specific limited purposes.

Under the *Society Act*, 1996, failure to maintain a register of members was an offence. Under the new *Society Act*, this failure continues to be an offence, but it is embodied within a broader requirement to maintain specific records at the society's records office under section 38 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Transfer of membership

129 Unless the bylaws of a society provide otherwise, a membership in a society is not transferable and is terminated when

(a) the member dies or resigns,

(b) the member is expelled or his or her membership is otherwise terminated in accordance with the bylaws,

(c) the member's term of membership expires, or

(d) the society is liquidated and dissolved under Part 10.

Source: SK Act, s. 116

Reference: tentative recommendation (56)

Concordance: *Society Act*, 1996, ss. 6 (1) (b), 9

Comment: The opening stem of this section carries forward the position taken under the *Society Act*, 1996, which is that membership in a society is not transferable unless provided in the bylaws. 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.

Paragraphs (a)–(d) set out a default framework for determining when a membership is terminated, which is new to the *Society Act*. The *Society Act*, 1996, simply leaves this issue to a society's bylaws. The new *Society Act* contains the list in paragraphs (a)–(d) primarily for greater certainty. A society is free to modify or add to this list in its bylaws.

Membership fees

130 (1) A society may impose membership fees on its members.

(2) The bylaws of a society that has complied with section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]* and that imposes membership fees on its members must set out all of the following:

(a) the purpose of the membership fees;

(b) how notification of the amount of membership fees is to be effected;

(c) the method of determining 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.

Source: *Strata Property Act*, s. 108 (3)

Reference: tentative recommendation (55)

Concordance: new

Comment: Disputes over what the *Society Act*, 1996, calls dues and subscriptions are commonplace. One reason why these disputes recur is the vagueness and uncertainty that surround the concept in the *Society Act*, 1996, and in society bylaws. The *Society Act*, 1996, contains a few references to dues and subscriptions without ever addressing the issue directly.

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. This section in the new *Society Act* is intended to provide societies with some guidance as to the issues that should be addressed in their bylaws. It also adopts consistent terminology—"membership fees"—for a concept that is variously addressed as "dues," "subscriptions," or "fees" in the *Society Act*, 1996.

Discipline or expulsion of members

131 The bylaws of a society must contain provisions addressing the discipline or expulsion of a member.

Source: original

Reference: tentative recommendation (58)

Concordance: *Society Act*, 1996, s. 6 (1) (b)

Comment: Disputes concerning the expulsion of members are among the most contentious disputes involving societies. The *Society Act*, 1996, takes a hands-off approach to this issue with the only provision in the legislation being that societies address the issue in their bylaws.

There is a large body of case law,[187] stretching back to the nineteenth century, in which the courts have shown a degree of restraint in dealing with cases relating to the expulsion of members. The courts have focussed almost entirely on procedure. The main principles of this jurisprudence are 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.

187. *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.

Some law reform proposals have attempted to codify these common law rules or to move beyond procedure and grant members substantive rights. The attraction of these types of reforms is that they would provide a degree of certainty to an area of the law that is in continual development. The danger is twofold. First, there is a risk that the statute would freeze the development of the law at a certain level. Second, there is a risk that the statute would force people into association. Taking these risks into account the committee felt the current approach of the *Society Act*, 1996, to this issue, should continue.

PART 6 – FINANCIAL RECORDS

Division 1 – Accounting Records

Accounting records required

132 (1) A society must keep adequate accounting records for each of its financial years and must retain the accounting records kept for a financial year for the prescribed period.

(2) A society must retain its accounting records at a place determined by the directors.

(3) A society must make its accounting records available for inspection by any director during statutory business hours and must, on request, provide to the director a copy of any of those records.

(4) Members may inspect and obtain a copy of those of the accounting records of a society that the bylaws allow and, in that event, the members may inspect and obtain a copy of those records at the times and places, in the manner and subject to the terms and conditions set out in the bylaws.

(5) Members may inspect and obtain a copy of accounting records not referred to in subsection (4) if the members are authorized to do so by the directors and, in that event, the members may inspect and obtain a copy of those records at the times and places, in the manner and subject to the terms and conditions determined by the directors.

Source: BCA, s. 196

Reference: tentative recommendation (23)

Concordance: *Society Act*, 1996, s. 36

Comment: "Accounting records" is not a defined term under the Act. The ordinary meaning of the term embraces all types of records that are relevant to finances of the society. Of course, accounting standards—such as generally accepted accounting principles—are also relevant to determining the meaning of accounting records. A society is required to maintain "adequate" accounting records for each financial year. This standard is flexible, reflecting the diversity of societies and their different needs for financial record keeping. This part of subsection (1) is similar to the equivalent provision in the *Society Act*, 1996; the remainder of this section contains new information.

Accounting records must be kept for the prescribed period. This period has been set by regulation at seven years for companies. Seven years would also be an appropriate period for societies.

Accounting records need not be maintained at a society's records office, as subsection (2) makes clear. They may be kept there, of course, or at another location determined by the directors, such as an accountant's office.

Subsections (3) to (5) contain the rules for access to a society's accounting records. Directors have a statutory right to inspect a society's accounting records during statutory business hours (which should be set at 9:00 a.m. to 4:00 p.m. on any day that is not a Saturday or a holiday). A statutory right of access is appropriate for directors, given their managerial duties under the Act. Members have access to the accounting records mandated by the society's bylaws. If the bylaws do not grant the members access, then the directors may authorize it on a one-time basis.

A society that fails to keep adequate accounting records commits an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

It is important to note that this section does not exhaust a society's obligations concerning financial or accounting records. Other statutes—notably the *Income Tax Act*—may also be relevant here.

Division 2 – Financial Statements

Financial statements

133 (1) In this section, **"first financial year"** means,

(a) in the case of a society referred to in section 3 (1) (a) or (c) or (2) *[when a society is recognized]*, the period beginning on the date on which the society was recognized and ending on the date immediately preceding the date on which the society's next financial year begins, or

(b) in the case of a society referred to in section 3 (1) (b) or (d) *[when a society is recognized]*, the financial year that includes the date on which the society was recognized and that ends on the date immediately preceding the date on which the society's next financial year begins.

(2) Subject to section 134 *[approval for publication]* and subsection (3) of this section, unless relieved under section 135 *[waiver of financial statements]* from their obligation to do so, the directors of a society must, on or before each annual reference date, produce and publish, in accordance with subsection (4) of this section,

(a) financial statements in respect of the latest completed financial year of the society, even if that financial year is the society's first financial year, and

(b) if the date on which the financial statements referred to in paragraph (a) are published is more than 6 months after the beginning of the society's current financial year, financial statements for the period that began at the beginning of the society's current financial year and ended on a date that is not more than 6 months before the date on which the financial statements referred to in paragraph (a) are published.

(3) Subsection (2) does not apply to a society in respect of an annual reference date that occurs before the end of the society's first financial year.

(4) Financial statements required under this Division must be prepared as prescribed by regulation.

Source: BCA, s. 198

Reference: tentative recommendation (76)

Concordance: *Society Act*, 1996, ss. 64, 65

Comment: This section is broadly similar to the provisions of the *Society Act*, 1996, requiring the directors to produce financial statements for the society's annual general meeting, but there are a number of differences in detail.

The effect of subsection (1) is to make the first financial year of a society incorporated or amalgamated under the new *Society Act* or a former *Society Act* begin on the date of incorporation or amalgamation. If the society is converted or continued into British Columbia under the new Act, then its financial year begins on the same date as under its previously governing legislation. This is consistent with the idea that a conversion or a continuance essentially rolls over the organization into a new form or jurisdiction.

Subsection (2) contains the obligation on the directors to produce and publish financial statements. "Publish" is defined in section 1. Its definition includes placing the financial statements before the members at the society's annual general meeting. "Annual reference date" is also defined in subsection (1). In most cases, a society's annual reference date is the date of its annual general meeting. (There is some flexibility in the term, which is explained more fully in the commentary to section 1.)

Subsection (3) sets out an exception for the directors, which applies when the society's annual reference date (most likely, its annual general meeting) occurs before the end of the society's first financial year.

Subsection (4) provides that the financial statements that a society must prepare are to be prescribed by regulation. The regulation should simply carry forward the requirements currently found in section 64 (3) of the *Society Act*, 1996.

Approval for publication

134 (1) The directors of a society must ensure that, before financial statements referred to in section 133 *[financial statements]* are published, the financial statements are

(a) approved by the directors, and

(b) signed by one or more directors to confirm that the approval required by paragraph (a) of this subsection was obtained.

(2) The directors must ensure that financial statements published under section 133 *[financial statements]*

(a) have attached any auditor's report made under section 146 (1) (a) *[auditor's duty to examine and report]* on those financial statements, and

(b) do not purport to be audited unless those financial statements have, in fact, been audited and an auditor's report has been made.

Source: BCA, s. 199

Reference: tentative recommendation (76)

Concordance: *Society Act*, 1996, s. 40

Comment: This section is similar to its equivalent in the *Society Act*, 1996. The main difference is that, under the new *Society Act*, the directors' approval of the society's financial statements need only be evidenced by the signature of one director, rather than two. A society that publishes its financial statements without obtaining the approval required by this section commits an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below. Note that "publish" is defined under section 1. The word includes placing the financial statements before the members at an annual general meeting and depositing the financial statements at the society's records office.

Waiver of financial statements

135 (1) Directors are relieved from their obligation under section 133 *[financial statements]* to produce and publish financial statements

(a) if all of the members of the society, whether or not they have the right to vote, resolve by a unanimous resolution to waive the production and publication of the financial statements, or

(b) if and to the extent provided by a court order waiving the production and publication of some or all of the financial statements and on any terms the court considers appropriate.

(2) A waiver referred to in subsection (1) of this section may be given before, on or after the date on which financial statements are, under this Division,

required to be produced and published and is effective for those financial statements only.

Source: BCA, s. 200

Reference: tentative recommendation (76)

Concordance: new

Comment: This section has no equivalent in the *Society Act*, 1996. Allowing a society's members to waive the production of financial statements gives societies greater flexibility and the potential to save some administrative costs. In order for the waiver to be effective, all the members of the society, including those who do not ordinarily have the right to vote, must unanimously consent. The court can also order a waiver. A waiver is only effective for one financial year and it may be given at any time. Note that this section only allows the members to waive the directors' obligations to produce and publish financial statements for the purpose of this Act. Other legislation, or other obligations of the society, may still require the production of financial statements.

Financial statements for qualifying debentureholders

136 A society must, promptly after demand by a qualifying debentureholder of the society, send to that qualifying debentureholder

(a) a copy of the society's most recently published financial statements required under section 133 *[financial statements]*, and

(b) a copy of any auditor's report made under section 146 (1) (a) *[auditor's duty to examine and report]* on those financial statements.

Source: BCA, s. 201

Reference: tentative recommendation (76)

Concordance: *Society Act*, 1996, s. 39 (2), (3)

Comment: This provision carries forward the position under the *Society Act*, 1996, although societies now have an obligation to provide the financial statements promptly after receiving a demand. "Qualifying debentureholder" is a defined term under section 1. It means a person who held a debenture of the society on the date that the new *Society Act* comes into force.

PART 7 – AUDITS

Division 1 – Definitions and Application

Definitions

137 In this Part:

"authorized person" means a person who is authorized under section 140 *[persons authorized to act as auditors]* to act as an auditor of a society;

"society" means a society that decides to have an auditor.

Source: BCA, s. 202

Reference: tentative recommendation (85)

Concordance: new

Comment: This section contains the definitions that apply in this Part.

Application of this Part

138 (1) A society may have an auditor.

(2) A society that decides to have an auditor must comply with this Part.

Source: original

Reference: tentative recommendation (84); tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 41 (1)

Comment: The *Society Act*, 1996, provides that only a reporting society must have an auditor. A non-reporting society could choose whether or not to have an auditor. The new Act has not carried forward the reporting society concept.

This section provides that there is no requirement under the new Act for a society to appoint an auditor. The BCA, by contrast, stipulates as a starting position that companies must have an auditor although this can be waived by passing an unanimous resolution. Other corporate statutes provide a more flexible approach to the waiver requirement. The committee did consider whether the new Act should follow the approach of the corporate legislation by requiring a society to appoint an auditor, but came to the conclusion that such a requirement may well end up saddling many societies with unnecessary, expensive, and time-consuming new obligations.

It is important to note that the *Society Act* is not the only potential source of an obligation for a society to have an auditor. Increasingly, funding bodies are including this obligation as a condition of funding.

Subsection (2) is intended to make it clear that a society that does have an auditor must meet all the standards set out in this Part. The *Society Act*, 1996, makes most of its provisions regarding auditors applicable only to reporting societies. The implication appears to be that all societies should follow these standards, but it is not made clear in the legislation.

Division 2 – Appointment and Removal of Auditors

Appointment of auditors

139 (1) The directors of a society must appoint an authorized person as the first auditor of the society to hold office until the annual reference date following the recognition of the society.

(2) On or before the annual reference date referred to in subsection (1) and on or before each subsequent annual reference date, the members of a society must, by an ordinary resolution, appoint an authorized person as auditor to

hold office from that annual reference date until the next annual reference date.

(3) If an auditor is not appointed when required under subsection (2), the auditor in office continues as auditor until a successor is appointed.

(4) The directors may fill any casual vacancy in the office of auditor.

(5) If for any reason a society does not have an auditor, the court may, on the application of a member or creditor of the society made on notice to the society,

(a) appoint an authorized person as auditor to hold office until the next annual reference date, and

(b) set the remuneration to be paid by the society to the auditor.

(6) Promptly after an auditor is appointed, the society must provide written notice to the auditor of the appointment.

Source: BCA, s. 204

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 41

Comment: This section deals with the procedural rules for appointing a first auditor and a subsequent auditor each year. The directors appoint the first auditor after recognition; thereafter, the members appoint an auditor by ordinary resolution. Recognition is a technical term embracing incorporation, conversion, amalgamation, or continuation into British Columbia. The concept is explained in greater detail in section 3. "Annual reference date" is defined in section 1. In most cases, a society's annual reference date will be the date of its annual general meeting.

This section also deals with casual vacancies in the officer of auditor. There is also a provision giving the court power to appoint an auditor upon the application of a member or creditor of a society, in the event that an auditor has not been appointed when required.

The rules in this section are comparable to the rules currently found in the *Society Act*, 1996.

Persons authorized to act as auditors

140 A person is authorized to act as an auditor of a society if

(a) the person is a member, or is a partnership whose partners are members, of

(i) a Provincial or Territorial Institute/Ordre of Chartered Accountants within Canada, or

(ii) The Certified General Accountants Association of British Columbia, or

(b) the person is certified by the Auditor Certification Board under the *Business Corporations Act*.

Source: BCA, s. 205

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 42

Comment: This section sets out who is qualified to be appointed as an auditor of a society.

Independence of auditors

141 (1) For the purposes of subsection (3):

"immediate family", when used in reference to a person referred to in that subsection, means any of the following who resides with that person:

(i) the spouse of that person;

(ii) a parent or child of that person;

(iii) any relative of that person or of that person's spouse;

"partner", when used in reference to a person referred to in that subsection, means any person with whom the person referred to in that subsection carries on in partnership the profession of public accounting.

(2) A person who is not independent of a society, its affiliates or its directors and officers must not act as the auditor of the society.

(3) For the purposes of this section, independence is a question of fact, but a person is not independent if

(a) the person is a director, officer or employee of the society or of an affiliate of the society, or is a partner, employer, employee or member of the immediate family of such a director, officer or employee,

(b) the person, a member of the person's immediate family, a partner of the person or a member of the immediate family of a partner of the person, beneficially owns or controls, directly or indirectly, any material interest in a security of the society or of any of its affiliates, or

(c) the person is appointed a trustee of the estate of the society under the *Bankruptcy and Insolvency Act* (Canada) or is a partner, employer, employee or member of the immediate family of that trustee.

(4) Membership in a society must not be taken into consideration in determining whether an auditor is independent.

Source: BCA, s. 206

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 43 (1)–(3)

Comment: Auditors perform an important role in reassuring third parties about the financial integrity of a society. This section contains the basic proposition that an auditor may only hold that office if the auditor is independent of the society. Independence is a question of fact, but the section contains several specific rules covering situations when a person will not be considered to be independent.

This section is comparable to the existing rules regarding independence in the *Society Act*, 1996.

Remuneration of auditors

142 (1) Subject to subsection (2), the members of a society must, by an ordinary resolution, set the remuneration of the auditor.

(2) The directors may set the remuneration of the auditor if

(a) the members so resolve by an ordinary resolution,

(b) the bylaws so provide, or

(c) the auditor is appointed by the directors.

Source: BCA, s. 207

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 44

Comment: This section provides that the members of a society must set the remuneration of an auditor by an ordinary resolution. The directors can set the remuneration if the members have approved this arrangement by ordinary resolution, the bylaws so provide, or the auditor is appointed by the directors.

This section provides somewhat more flexibility than the *Society Act*, 1996, on the issue of allowing the directors to set the auditor's remuneration. Under the *Society Act*, 1996, a society's bylaws cannot authorize the directors to set the auditor's remuneration.

Capacity to act as auditor

143 (1) An auditor of a society who is not, or who ceases to be, an authorized person must, promptly after becoming aware of that fact,

(a) become an authorized person, or

(b) resign as auditor.

(2) An auditor of a society who is not, or who ceases to be, independent within the meaning of section 141 *[independence of auditors]* must, promptly after becoming aware of that fact,

(a) eliminate the circumstances that resulted in the auditor not being independent, or

(b) resign as auditor for that society.

(3) An interested person may apply to the court for an order that an auditor of a society referred to in subsection (1) or (2) of this section be removed on terms and conditions the court considers appropriate.

(4) An interested person may apply to the court for an order exempting an auditor from the prohibition imposed by section 141 *[independence of auditors]* and the court may, if it is satisfied that an exemption would not unfairly prejudice the members, make an exemption order on the terms it considers appropriate.

Source: BCA, s. 208

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 43 (4)–(5)

Comment: These procedural rules are similar to those found in the *Society Act*, 1996. There are two main additions to the rules here. First, the new Act now expressly provides that a person who is not, or who ceases to be, an authorized person (as defined in section 140) must either resign or become an authorized person. Second, subsection (4) contains a provision enabling an interested person to apply to the court for an order exempting an auditor from compliance with the independence requirement.

Removal of auditor during term

144 (1) A society

(a) may remove its auditor before the expiration of the auditor's term of office by

(i) an ordinary resolution passed at a general meeting, or

(ii) a unanimous resolution of the members who have the right to vote at general meetings, and

(b) must appoint, for the remainder of that term of office, an authorized person as auditor to replace the auditor removed under paragraph (a).

(2) Before calling a general meeting for the purpose specified by subsection (1) (a) (i), a society must send to the auditor

(a) written notice of the intention to call the meeting, specifying the date on which the notice of the meeting is proposed to be sent, and

(b) a copy of all material proposed to be sent to members in connection with the meeting.

(3) The society must send the records required by subsection (2) to the auditor at least 14 days before the date on which the notice of the meeting is proposed to be sent.

(4) An auditor may send written representations to the society respecting that person's proposed removal as auditor under subsection (1) (a) (i) and, if those written representations are received by the society at least 5 days, not including Saturdays and holidays, before the date on which the notice of the meeting is proposed to be sent, the society, at its expense, must send a copy of those representations with the notice of the meeting to each member entitled to that notice.

(5) If an auditor is removed from office by a unanimous resolution under subsection (1) (a) (ii) or resigns, the auditor may send the society written representations respecting that removal or resignation, and, if those written representations are received by the society within one month after the auditor's removal or resignation, the society must provide a copy of those representations to the members, on or before the first annual reference date to follow the removal or resignation of the auditor, in one of the following manners:

(a) by making those representations available to the members at the annual general meeting held on that date;

(b) if no annual general meeting is held on that date, by depositing a copy of those representations in the records office of the society on or before that date.

(6) If an auditor who sent written representations has been replaced, the replacement auditor may send to the society a written response to those representations and, if such a response is sent, the society must send it to the members promptly after receipt.

(7) No society or person acting on behalf of a society incurs any liability merely because the society or person complies with subsection (4), (5) or (6).

Source: BCA, s. 209

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 46

Comment: This section embraces all the provisions regarding removal of auditors in the *Society Act*, 1996, and adds a few refinements.

Subsection (1) permits a society to remove its auditor by ordinary resolution at a general meeting of members, as under the *Society Act*, 1996. The new Act adds a second procedure for removing an auditor: by unanimous resolution of voting members. This method may be used if a society does not want to convene a face-to-face meeting over the issue.

Subsections (2)–(6) deal with the auditor's rights to notice and to make representations. It is basic fairness to extend these rights to auditors. In addition, it may be important for members to have the auditor's views on the reasons for proposed removal. This information may help to avert mis-

conduct by the society's management. These provisions contemplate both procedures for removal: at a general meeting or by unanimous resolution.

The purpose of subsection (7) is to ensure that the society or anyone acting on its behalf is not put in a position of being liable for conduct that is mandated under the Act.

Replacement auditor must receive representations

145 (1) A person must not accept appointment as auditor of a society if the person is replacing an auditor who has resigned, who has been removed or whose term of office has expired or is about to expire until the person has requested and received from the auditor a written statement of the circumstances and the reasons why, in the auditor's opinion, the auditor was, or is to be, replaced.

(2) Despite subsection (1), an authorized person who is independent from a society within the meaning of section 142 *[independence of auditors]* may accept appointment as auditor of the society if, within 15 days after making the request referred to in subsection (1) of this section to the auditor who is to be replaced, the person does not receive a reply.

Source: BCA, s. 211

Reference: tentative recommendation (85)

Concordance: new

Comment: The requirement in this section is intended as a safeguard against misconduct by the society's management.

Division 3 – Duties and Rights of Auditors

Auditor's duty to examine and report

146 (1) An auditor of a society must

(a) report in the prescribed manner on the financial statements of the society referred to in section 116 (1) (a) *[information for members]*, other than any financial statements of the society referred to in section 133 (2) (b) *[financial statements]*, and

(b) make the examinations that are, in the auditor's opinion, necessary to enable the auditor to make the report required by paragraph (a) of this subsection.

(2) In making the report required by subsection (1) (a) on financial statements of a society, the auditor of the society may rely on the report of an auditor of a corporation or an unincorporated entity

(a) if the accounts of that corporation or entity are included in whole or in part in the financial statements of the society, and

(b) whether or not the financial statements of the society reported on by the auditor are in consolidated form.

Source: BCA, s. 212

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 47 (1), (2)

Comment: Subsection (1) establishes the auditor's basic duty to examine the society's financial statements and report on them. Detailed requirements for the auditor's report will be set out in the regulations.

Subsection (2) confirms that an auditor may rely on the report of another auditor on any accounts of another corporation or unincorporated entity included in the society's financial statements.

Qualifications on auditor's opinion

147 If an opinion given by an auditor in a report required by section 146 (1) (a) *[auditor's duty to examine and report]* is subject to qualification, the auditor must state, in the report, the reasons for that qualification.

Source: BCA, s. 213

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 47 (3)

Comment: An auditor is required to state expressly in the report any qualifications on it as a safeguard for the members of the society. The *Society Act*, 1996, contains a similar provision.

Members may require auditor's attendance at general meetings

148 (1) If financial statements of a society are to be placed before a general meeting, a member who is entitled to attend the meeting may provide to the society written notice requiring the attendance at the meeting of the auditor who reported on those financial statements.

(2) If the auditor of a society is to be removed at a general meeting, a member who is entitled to attend the meeting may provide to the society written notice requiring the attendance at the meeting of the auditor who is to be removed.

(3) If a member provides written notice under subsection (1) or (2) to the society at least 5 days before the general meeting, the auditor must attend the meeting and the society must pay the expenses of that attendance.

Source: BCA, s. 214

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 48

Comment: These provisions on a member's right to require an auditor's attendance at a members' meeting are broadly similar to the equivalent provisions in the *Society Act*, 1996. There are two small differences: under the *Society Act*, 1996, the right extends to members who do not have the right to vote at a members' meeting, but under the new Act, only members who have a right to attend a members' meeting have rights under this section; and, under the *Society Act*, 1996, a member may require the attendance of an auditor at a meeting to appoint or to remove the auditor, but under this section in the new Act, a member may only require the auditor's attendance at a meeting to remove the auditor.

Auditor's information to be presented at general meetings

149 (1) If the auditor is present at an annual general meeting, the auditor must answer questions concerning

(a) the society's financial statements being placed before that meeting under section 116 (1) *[information for members]*, and

(b) the auditor's opinion on those financial statements as expressed in the report made under section 146 (1) (a) *[auditor's duty to examine and report]*.

(2) At the request of any member attending an annual general meeting, there must be read to the meeting the report of the auditor on those financial statements.

Source: BCA, s. 215

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, ss. 49, 50

Comment: This section sets out the duties and obligations of an auditor who attends an annual general meeting. They are broadly similar to equivalent provisions in the *Society Act*, 1996.

Amendment of financial statements and auditor's report

150 (1) The directors or officers of a society must communicate to the auditor who reported on financial statements under section 146 (1) (a) *[auditor's duty to examine and report]* any facts that come to their attention that

(a) could reasonably have been determined before the date on which the financial statements were published, and

(b) if known before that date, would have required a material adjustment to those financial statements.

(2) The directors must promptly amend the financial statements to reflect the facts referred to in subsection (1) of this section and must provide the amended financial statements to the auditor.

(3) If the auditor is notified or becomes aware, otherwise than under subsection (1), of an error or misstatement in financial statements on which the auditor has reported, the auditor must, if, in the auditor's opinion, correction of the error or misstatement requires a material adjustment to those financial statements, inform each director accordingly.

(4) If the auditor informs the directors of an error or misstatement under subsection (3), the directors must promptly amend the financial statements to correct the error or misstatement and must provide the amended financial statements to the auditor.

(5) If amended financial statements are provided to the auditor under subsection (2) or (4),

(a) the auditor must promptly

(i) amend the report referred to in section 146 (1) (a) *[auditor's duty to examine and report]* in respect of those financial statements, and

(ii) provide the amended report to the directors, and

(b) the directors must, promptly after their receipt of an amended auditor's report under paragraph (a) of this subsection, send to the members a copy of the amended report and a statement explaining the effect of the amendment on the financial position and results of the operations of the society.

Source: BCA, s. 216

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 51

Comment: This section sets out the basic obligations of directors and auditors where they become aware of any information that would require a material adjustment to published financial statements. It is broadly similar to the equivalent section in the *Society Act*, 1996.

Subsection (1) deals with the circumstances when the directors or officers must disclose information to the auditor. Subsection (2) sets out the requirement promptly to amend the financial statements and provide copies to the auditor. Subsection (3) sets out the responsibilities of the auditor when they become aware of an error or misstatement. Subsection (4) sets out the directors' duties where they are informed of an error or misstatement in the financial statements by the auditor. Subsection (5) contains a new requirement to amend the auditor's report and provide copies to the directors and members.

A breach of subsection (2) or (4) constitutes an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Access to records

151 (1) A person who is or who has been a director, officer, employee or agent of a society or of a society's subsidiary must, to the extent that the person is reasonably able to do so, comply with any demand of the auditor of the society to do the following:

(a) provide to the auditor all of the information and explanations that the auditor considers necessary for the purpose of any examination or report that the auditor is required or permitted to make under this Act;

(b) allow the auditor access to all of the society's records, all of the records of the society's subsidiaries, if any, that the auditor may require for the purpose of an examination or report referred to in paragraph (a) and provide to the auditor copies of those records if and as required by the auditor.

(2) An oral or written statement made to the auditor under subsection (1) (a) has qualified privilege.

Source: BCA, s. 217

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 52

Comment: An auditor requires access to the society's records in order to carry out the auditor's duties under the Act. This section sets out that right of access. It is largely similar to an equivalent section in the *Society Act*, 1996. There are two small differences: first, this section extends to former directors, officers, employees, or agents of a society, whereas under the *Society Act*, 1996, the obligation only relates to existing directors, officers, employees, or agents; second, subsection (2) is a new provision that confirms that statements made to an auditor pursuant to subsection (1) (a) are subject to qualified privilege. This qualified privilege protects the individual against liability for any defamatory statements that may be made, so long as the individual gave the statement without malice. The reason why this protection is extended is to encourage open and frank communication between the society's management and its auditor. Section 154 grants qualified privilege to an oral or written statement or report of an auditor.

A person who contravenes this section commits an offence. For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Information as to foreign subsidiaries

152 If a subsidiary of a society is a corporation to which this Act does not apply, the society must make available to the society's auditor the records of that subsidiary and must require the directors, officers, employees and agents of that subsidiary to make available to the auditor of the society the information, explanations and copies required by section 151 *[access to records]*.

Source: BCA, s. 218

Reference: tentative recommendation (85)

Concordance: new

Comment: More and more, societies are operating on a scale that transcends British Columbia's boundaries. If a society has a subsidiary to which the new *Society Act* does not apply, then this provision requires that society to provide access to the subsidiary's records. This access is important if the auditor is to have a complete financial picture of the society.

Right and obligation of auditors to attend meetings

153 (1) The auditor of a society is entitled, in respect of a general meeting,

(a) to attend the meeting,

(b) to each notice and other communication, relating to the meeting, to which a member is entitled, and

(c) to be heard at the meeting on any part of the business of the meeting that deals with matters with respect to which the auditor has a duty or function or has made a report.

(2) The auditor must appear at a meeting of the directors when requested to do so by the directors and after being given reasonable notice to do so.

Source: BCA, s. 219

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 54

Comment: Subsection (1) contains a statement of an auditor's right to attend a members' meeting that is substantially similar to an equivalent provision in the *Society Act*, 1996. Subsection (2) contains a new obligation on an auditor to attend a directors' meeting when requested on reasonable notice.

Qualified privilege

154 An oral or written statement or report made under this Act by the auditor or a former auditor of a society has qualified privilege.

Source: BCA, s. 220

Reference: tentative recommendation (85)

Concordance: *Society Act*, 1996, s. 55

Comment: Qualified privilege is a partial shield against liability for defamatory statements. Its salient features are explained in the following passage from a leading textbook on the law of defamation:[188]

188. Raymond E. Brown, *The Law of Defamation in Canada*, looseleaf, 2d ed., vol. 2 (Toronto: Carswell, 1994) at § 13.2 (1) [footnotes omitted].

> There are occasions where the interest sought to be protected is not so compelling and important as to warrant an absolute privilege, but is important enough to justify a limited immunity from actions for libel and slander for defamatory publications. On these limited occasions, the law permits a person to publish false defamatory statements about another with impunity. These occasions are regarded as privileged. . . . This privilege is referred to as "defeasible," "qualified" or "conditional." . . . It enables a person to make defamatory and untrue statements about another without incurring legal liability, so long as he or she acts honestly, in good faith and without malice.

The purpose of extending this protection to auditors is to encourage open and frank communication about the financial state of the society. This section essentially represents a policy choice that the benefits afforded by such communication outweigh the danger posed by a defamatory statement. The *Society Act*, 1996, contains a similar provision.

Division 4 – Audit Committee

Appointment and procedures of audit committee

155 (1) The directors of a society may, at their first meeting held on or after each annual reference date, elect from among their number a committee, to be known as the audit committee, to hold office until the next annual reference date.

(2) An audit committee must be composed of at least 3 directors, and a majority of the members of the committee must not be officers of the society or officers or employees of an affiliate of the society.

(3) The quorum for a meeting of the audit committee is a majority of the members of the committee who are not officers of the society or officers or employees of an affiliate of the society.

(4) The members of the audit committee must elect a chair from among their number and, subject to subsection (3), may determine their own procedures.

(5) The auditor of a society must be given reasonable notice of, and has the right to appear before and to be heard at, each meeting of the society's audit committee, and must appear before the audit committee when requested to do so by the committee and after being given reasonable notice to do so.

(6) On the request of the auditor, the chair of the audit committee must convene a meeting of the audit committee to consider any matter that the auditor believes should be brought to the attention of the directors or society.

Source: BCA, s. 224

Reference: tentative recommendation (86)

Concordance: new

Comment: There is a trend in corporate legislation to require companies to have independent audit committees, as a means to give some additional protection to shareholders. The BCA re-

quires all public companies to have an audit committee. In the not-for-profit sector, best practices in the area of audits recommend the use of an audit committee.[189] The committee favours enshrining this principle in legislation, both to harmonize the new *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 one key change from the consultation paper is that the committee has decided to make the constitution of an audit committee optional, rather than mandatory. Although a majority of respondents to the consultation paper favoured the original proposal, on further reflection it was felt that a mandatory requirement to have an audit committee could be onerous in some cases. Some small societies are effectively required to have an auditor as a condition of their funding. These societies could struggle with having to meet the requirements of this section.

Subsection (1) is an enabling provision for directors of societies that choose to have an auditor to elect an audit committee from among their numbers at their first meeting after the society's annual reference date. (This term is defined in section 1; for most societies it is the date of the annual general meeting.) The remainder of this section is intended to provide some guidance on the constitution and operation of the audit committee. Under subsection (2), an audit committee must have at least three members. A majority of the committee must be made up of directors who are not officers of the society or officers or employees of an affiliate of the society. (The rules on affiliation are set out in section 2.) This requirement ensures that the audit committee has some critical distance from the society's management. The remainder of this section concerns procedural rules, primarily aimed at the conduct of meetings of audit committees.

Duties of audit committee

156 The audit committee must, in addition to or as part of any responsibilities assigned to it under this Act, review and report to the directors on the following before they are published:

(a) the financial statements of the society, referred to in section 116 (1) (a) *[information for members]*, other than any financial statements of the society referred to in section 133 (2) (b) *[financial statements]*;

(b) the auditor's report, if any, prepared in relation to those financial statements.

Source: BCA, s. 225

Reference: tentative recommendation (86)

Concordance: new

Comment: This section sets out the basic duty of the audit committee, which is to review the society's financial statements and auditor's report thereon and report on these matters to the board of directors. The benefits of entrusting this duty to a properly constituted audit committee flow from the committee's expertise in financial matters and its distance from the centre of the society's management. An audit committee may be assigned other duties under the Act or by the society's bylaws or directors.

189. *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.

Provision of financial statements to audit committee

157 The directors must provide to the audit committee the financial statements and auditor's report referred to in section 156 *[duties of audit committee]* in sufficient time to allow the committee to review and report on those financial statements and auditor's report as required under that section.

Source: BCA, s. 226

Reference: tentative recommendation (86)

Concordance: new

Comment: This section is self-explanatory.

PART 8 – PROCEEDINGS

Division 1 – Court Proceedings

Complaints by member

158 (1) For the purposes of this section, "member" has the same meaning as in section 1 (1) *[definitions]* and includes any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A member may apply to the court for an order under this section on the ground

(a) that the affairs of the society are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the members, including the applicant, or

(b) that some act of the society has been done or is threatened, or that some resolution of the members or of the members of a particular class has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including the applicant.

(3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

(a) directing or prohibiting any act,

(b) regulating the conduct of the society's affairs,

(c) appointing a receiver or receiver manager,

(d) appointing directors in place of or in addition to all or any of the directors then in office,

(e) removing any director,

(f) varying or setting aside a transaction to which the society is a party and directing any party to the transaction to compensate any other party to the transaction,

(g) varying or setting aside a resolution,

(h) requiring the society, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(i) directing the society, subject to subsections (5) and (6), to compensate an aggrieved person,

(j) directing correction of the registers or other records of the society,

(k) directing that the society be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(l) directing that an investigation be made under Division 2 of this Part,

(m) requiring the trial of any issue, or

(n) authorizing or directing that legal proceedings be commenced in the name of the society against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the member in a timely manner.

(5) If an order is made under subsection (3) (i), the society must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that

(a) the society is insolvent, or

(b) the payment would render the society insolvent.

(6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,

(a) the society is prohibited from paying the person the full amount of money to which the person is entitled,

(b) the society must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and

(c) the society must pay the balance of the amount as soon as the society is able to do so without causing a circumstance set out in subsection (5) to occur.

(7) If an order is made under subsection (3) (k), Part 10 *[liquidation, dissolution and restoration]* applies.

Source: BCA, s. 227

Reference: tentative recommendation (90)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: One of the few remedies available to members under the *Society Act*, 1996, is the oppression remedy. This may not be apparent on the face of the *Society Act*, 1996. The remedy is actually made available by following a tortuous path through the Act's dissolution provision to the CA.[190] Society members have access to the CA's oppression remedy, even though that Act has been repealed and replaced by new legislation for companies.

The purpose of this section of the new *Society Act* is to give society members access to a modern oppression remedy provision, harmonized with the equivalent provision in the BCA. Although some law reform bodies have decided that this type of remedy is more appropriate in the for-profit than the not-for-profit sector,[191] the committee has concluded that society members should have access to sophisticated remedies of a type represented by this section. Retaining the CA version of the oppression remedy makes little sense after the advent of the BCA; repealing the oppression remedy after extending it to society members for 30 years would be felt as a step backward.

Under this section, a member (or any other person who the court considers to be an appropriate applicant) may apply to court if (1) the affairs of the society 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 members or (2) some act of the society has been done or is threatened to be done, or some resolution of the members has been passed or is proposed, that is *unfairly prejudicial* to one or more of the members. 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 considering the equivalent for-profit provision 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.[192] So, it is still only extreme conduct that will result in a remedy for an aggrieved member. The courts have even pointed out that "prejudicial" conduct is acceptable, since the section requires an additional

190. *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.").

191. *See*, *e.g.*, ALRI Report, *supra* note 62 at 63–64.

192. *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: The Continuing Legal Education Society of British Columbia, 2006) 2.1 at 2.1.5–2.1.6.

element of "unfairness."[193] The main advance over the common law is in terms of remedies. The court is no longer limited to ordering the dissolution of the society. Under subsection (3), the court now has a wide jurisdiction to "make any interim or final order it considers appropriate." For good measure, the provision goes on to list 14 examples of the types of orders that may be made.

Compliance or restraining orders

159 (1) In this section, **"complainant"** means, in relation to a society referred to in subsection (2), a member of the society or any other person whom the court considers to be an appropriate person to make an application under this section.

(2) If a society or any director, officer, member, employee, agent, auditor, trustee, receiver, receiver manager or liquidator of a society contravenes or is about to contravene a provision of this Act or the regulations or of the pre-existing constitution, constitution or bylaws of the society, a complainant may, in addition to any other rights that that person might have, apply to the court for an order that the person who has contravened or is about to contravene the provision comply with or refrain from contravening the provision.

(3) On an application under this section, the court may make any order it considers appropriate, including an order

(a) directing a person referred to in subsection (2) to comply with or to refrain from contravening a provision referred to in that subsection,

(b) enjoining the society from selling or otherwise disposing of property, rights or interests, or from receiving property, rights or interests, or

(c) requiring, in respect of a contract made contrary to section 29 (1) *[restricted activities and powers]*, that compensation be paid to the society or to any other party to the contract.

Source: BCA, s. 228

Reference: tentative recommendation (89)

Concordance: new

Comment: This section adapts a provision from the BCA, creating a new remedy for society members. 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. Section 85 of the *Society Act*, 1996, contains some of the elements of this remedy, but it does not go nearly far enough.

Under this section, if a society or any director, officer, member, employee, agent, auditor, trustee, receiver, receiver manager, or liquidator contravenes or is about to contravene a provision of the

193. *Ibid.* at 2.1.6.

Act or its regulations or the society's pre-existing constitution, constitution, or bylaws, 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 society from disposing of or receiving property, rights, or interests, or (3) requiring compensation be paid to the society 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.

This type of provision is found in Bill C-21, the SK Act, and the ALRI Draft Act as well as in the BCA.[194] Although it is relatively common in both the for-profit and not-for-profit corporate worlds, there is not a large body of case law yet that interprets and applies this provision. But the remedy appears to have great potential for many types of disputes that involve noncompliance with a fundamental corporate document, such as the constitution or bylaws, but that do not sink to the level of oppression of or unfair prejudice toward a member or a group of members.

Remedying corporate mistakes

160 (1) In this section, **"corporate mistake"** means an omission, defect, error or irregularity that has occurred in the conduct of the activities or affairs of a society as a result of which

(a) a breach of a provision of this Act, a former *Societies Act* or the regulations under any of them has occurred,

(b) there has been default in compliance with the pre-existing constitution, constitution or bylaws of the society,

(c) proceedings at or in connection with any of the following have been rendered ineffective:

(i) a meeting of members;

(ii) a meeting of the directors or of a committee of directors;

(iii) any assembly purporting to be a meeting referred to in subparagraph (i) or (ii), or

(d) a consent resolution or records purporting to be a consent resolution have been rendered ineffective.

(2) Despite any other provision of this Act, the court, either on its own motion or on the application of any interested person, may make an order to correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake, and may give ancillary or consequential directions it considers necessary.

194. Bill C-21, *supra* note 73, s. 257; SK Act, *supra* note 71, s. 231; ALRI Draft Act, *supra* note 81, s. 133. *See also Strata Property Act*, S.B.C. 1998, c. 43, s. 165.

(3) The court must, before making an order under this section, consider the effect that the order might have on the society and on its directors, officers, creditors and members.

(4) Unless the court orders otherwise, an order made under subsection (2) does not prejudice the rights of any third party who acquired those rights

(a) for valuable consideration, and

(b) without notice of the corporate mistake that is the subject of the order.

Source: BCA, s. 229

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 85

Comment: This section substantially carries forward section 85 of the *Society Act*, 1996, which gives the court broad jurisdiction to remedy all sorts of corporate mistakes. That term is defined broadly to include all sorts of omissions or errors that may involve a breach of the Act, a former Act, the regulations, or the society's charter. It also embraces proceedings of members or directors. The intent of this provision is to give those involved in societies a mechanism to overcome the sorts of errors or omissions that may commonly arise in as complex and technical a field as corporate law.

Applications to court to correct records

161 (1) In this section, **"basic records"** means, in relation to a society,

(a) its bylaws,

(b) its constitution or pre-existing constitution, as the case may be,

(c) the minutes of any meeting of members or directors,

(d) any resolution passed by members or directors, if not included in the records referred to in paragraph (c),

(e) its register of directors, and

(f) its register of members and any other register created by the society under a former *Societies Act*.

(2) If information, other than information in respect of which a court application may be made under section 62 *[application to remove self as director or officer]*, is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, a society's basic records, the society, a member of the society or any aggrieved person may apply to the court for an order that the basic records be corrected.

(3) In connection with an application under this section, the court may make any order it considers appropriate, including

(a) an order requiring the society to correct one or more of its basic records,

(b) an order restraining the society from calling or holding a meeting of members before the correction is made,

(c) an order determining the right of a party to the application to have his or her name entered or retained in, or deleted or omitted from, basic records of the society, whether or not the issue arises between 2 or more members or alleged members, or between the society and any members or alleged members, and

(d) an order compensating a party who has incurred a loss as a result of a matter referred to in subsection (2).

Source: BCA, s. 230

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is a new provision that extends the theme of the previous section. It is essentially a saving provision that grants the court broad jurisdiction to correct errors or omissions involving key society records and to deal with the consequences of such errors or omissions.

Enforcement of duty to file records

162 (1) If a society or its receiver, receiver manager or liquidator has failed to file with the registrar any record required to be filed with the registrar under this Act, any director, member or creditor of the society may provide, to the person required to submit the record to the registrar for filing, notice requiring that person to file the record with the registrar.

(2) If the person required to file a record with the registrar under subsection (1) fails to file the record with the registrar within 14 days after receiving the notice referred to in subsection (1), the court may, on the application of any director, member or creditor of the society,

(a) order the person to file the record with the registrar within the time the court directs, and

(b) direct that the costs of and incidental to the application be paid by the society, by any director or officer of the society or by any other person the court considers appropriate.

(3) Neither the making of an order by the court under this section nor compliance with such an order relieves a person from any other liability.

Source: BCA, s. 231

Reference: tentative recommendation (4)

Concordance: new

Comment: In the consultation carried out as part of this project, a number of respondents noted that a refusal to file records with the Registrar of Companies is often a feature of societies in which a dispute over management has taken hold. This section creates a procedure for enforcing the obligation to file records with the registrar. A director, member, or creditor of the society may give the society's management a 14-day notice to file the records. If the notice is not complied with, then the court may order compliance. This section is in addition to any other penalties or liabilities that may be imposed due to such misconduct.

Derivative actions

163 (1) In this section and section 164 *[powers of court in relation to derivative actions]*,

"complainant" means, in relation to a society, a member or director of the society;

"member" has the same meaning as in section 1 (1) and includes any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a society

(a) to enforce a right, duty or obligation owed to the society that could be enforced by the society itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a society, defend a legal proceeding brought against the society.

Source: BCA, s. 232

Reference: tentative recommendation (88)

Concordance: new

Comment: 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.

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,[195] 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.[196]

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.[197] In response to this concern, the courts have carved out a number of exceptions to the rule. Since the *Society Act*, 1996, does not contain a statutory derivative action, the common law and its complex exceptions currently apply to societies.

Practitioners and academics have harshly criticized both the rule in *Foss v. Harbottle* and the exceptions to the rule.[198] 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 or a member'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 navigating the outdated and convoluted common law rules on this point.

This section and the following section authorize society members and directors to sustain a derivative action. They follow the approach of the BCA, and other modern corporate statutes and reform proposals,[199] by preserving 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 streamlining the procedure that a shareholder or member must employ to commence and sustain an action on behalf of the corporation.

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195. (1843), 2 Hare 461, 67 E.R. 189 (Ch.).

196. *See Hamilton v. Bell*, 2006 BCCA 243, [2006] 6 W.W.R. 1 at para. 11.

197. And, it should also be pointed out, the rule is not restricted to claims involving mismanagement. It applies equally to claims against third parties.

198. *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").

199. *See* Bill C-21, *supra* note 73, s. 244; SK Act, *supra* note 71, ss. 223–24; ALRI Draft Act, *supra* note 81, ss. 125–26; US Model Act, *supra* note 83, § 6.30; US 2006 Exposure Draft, *supra* note 84, §§ 7.40–7.48.

Powers of court in relation to derivative actions

164 (1) The court may grant leave under section 163 (2) or (4) *[derivative actions]*, on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the society to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the society and to any other person the court may order,

(c) the complainant is acting in good faith, and

(d) it appears to the court that it is in the best interests of the society for the legal proceeding to be prosecuted or defended.

(2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

(3) While a legal proceeding prosecuted or defended under this section is pending, the court may,

(a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

(b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the society pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.

(4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that

(a) a person to whom costs are paid under subsection (3) (b) repay to the society some or all of those costs,

(b) the society or any other party to the legal proceeding indemnify

(i) the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or

(ii) the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or

(c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the society, a director of the

society and an officer of the society for expenses, including legal costs, that they incurred as a result of the legal proceeding.

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

(6) No application made or legal proceeding prosecuted or defended under section 163 *[derivative actions]* or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the society has been or might be approved by the members of the society, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 163 *[derivative actions]* or this section.

Source: BCA, s. 233

Reference: tentative recommendation (88)

Concordance: new

Comment: This section creates the legal framework for derivative proceedings. The key part is found in subsection (1). Under this provision, a member or director still has to apply to court for leave to sue in the name of the society. 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 member or director made reasonable efforts to get the directors to commence or defend the proceeding, (2) notice has been given to the society and any other affected person, (3) the member or director is acting in good faith, and (4) it is in the best interests of the society for the proceeding to be commenced or defended. If the member 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 society, that is, it has been commenced to enforce a right, duty, or obligation owed to the society or to obtain damages for a breach of a right, duty, or obligation owed to the society. The member or director who has actual carriage of the action does not receive damages or any other remedy personally if the action is successful. Subsections (2)–(6) address a number of procedural and other issues related to the conduct of litigation under this and the preceding section.

Relief in legal proceedings

165 If, in a legal proceeding against a director, officer, receiver, receiver manager or liquidator of a society, the court finds that that person is or may be liable in respect of negligence, default, breach of duty or breach of trust, the court must take into consideration all of the circumstances of the case, including those circumstances connected with the person's election or appointment, and may relieve the person, either wholly or partly, from liability, on the terms the court considers necessary, if it appears to the court that, despite the finding of liability, the person has acted honestly and reasonably and ought fairly to be excused.

Source: BCA, s. 234

Reference: tentative recommendation (41)

Concordance: new

Comment: Unlike certain statutes and reform proposals, the new *Society Act* does not contain a provision granting society directors and officers immunity from liability. Although the committee has concluded that blanket immunity is not appropriate, the Act does include a limited power for the court to relieve against specific instances where personal liability of a director, officer, receiver, receiver manager, or liquidator is at issue.

The roots of this section go back to a longstanding provision in the *Trustee Act*[200] which grants the court jurisdiction to relieve a trustee from personal liability.[201] A similar provision has been included in the BCA, and that BCA provision is the model for this section. The key to the section is the three-fold test set out in its last line: the person must have "acted honestly and reasonably and ought fairly to be excused." The leading British Columbia case interpreting the equivalent provision for for-profit companies has endorsed the following principles for determining whether the court should grant relief:[202]

> (1) That three separate questions are to be asked under this section: firstly, whether the applicants have acted honestly, secondly, whether they have acted reasonably, and thirdly, whether they ought fairly to be excused for their default. It is not enough to find that the directors acted honestly or even reasonably; there must also be some reason why, having regard to all the circumstances, they ought to be excused;
>
> (2) That, in general, a director ought fairly to be excused from liability if his default results from a mere technical defect which, in ordinary circumstances, would not have caused any loss to the company;
>
> (3) That two factors are to be taken into account in deciding whether a director ought reasonably to be excused are whether the director obtained legal advice and whether the shareholders opposed the application for relief.

These principles recognize that against a director, officer, receiver, receiver manager, or liquidator of a society may sometimes face a heightened risk of personal liability due to statutory obligations and managerial duties. The court has a relatively narrow and focussed jurisdiction to grant relief in certain cases that come within the principles set out above.

This jurisdiction does not extend nearly as far as a blanket immunity provision. 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.

Applications to court under this Act

166 (1) Subject to subsection (2), an application to the court under this Act may be brought without notice unless notice is specifically required under subsection (2) or otherwise under this Act.

(2) The court may direct that notice of any application under this Act be served on those persons the court requires.

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

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

202. *Doncaster v. Smith* (1987), 40 D.L.R. (4th) 746, 15 B.C.L.R. (2d) 58 at 66–67 (C.A.), Hinkson J.A. (for the court). *See also Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 2002 BCSC 1236, [2002] B.C.J. No. 1957 at paras. 179–80.

Source: BCA, s. 235

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is self-explanatory.

Court may order security for costs

167 If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

Source: BCA, s. 236

Reference: tentative recommendation (4)

Concordance: new

Comment: A long-established rule of litigation in Canada is that the loser in a court proceeding must pay the winner's court costs. This section is meant to support that principle by giving the court the power to order security for costs from a corporation that appears to be financially unable to pay those costs at the end of the proceeding.

Division 2 – Investigations

Appointment of inspector by court

168 (1) Subject to subsection (3), on the application of one or more members or the registrar the court may

(a) appoint an inspector to conduct an investigation of the society, and

(b) determine the manner and extent of the investigation.

(2) An inspector appointed under this section has the powers set out in section 171 *[powers of inspectors]* and any additional powers provided by the order by which the inspector is appointed.

(3) The court may make an order under this section if it appears to the court that there are reasonable grounds for believing that

(a) the affairs of the society are being or have been conducted, or the powers of the directors are being or have been exercised, in a manner that is oppressive or unfairly prejudicial to one or more members, within the meaning of section 158 (1) *[complaints by member]*, including the applicant,

(b) the activities of the society are being or has been carried on with intent to defraud any person,

(c) the society was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose, or

(d) persons concerned with the formation, activities or affairs of the society have, in connection with it, acted fraudulently or dishonestly.

Source: BCA, s. 248; SK Act, s. 214; Bill C-21, s. 240

Reference: tentative recommendation (87)

Concordance: *Society Act*, 1996, s. 84

Comment: The *Society Act*, 1996, contains a provision governing investigations of a society that has changed little since it was first enacted in 1947. One of the noteworthy features of this provision is that, upon the report of the Registrar of Companies, the Minister of Finance is authorized to appoint an inspector of a society. This adds a political dimension to the use of this procedure.

The Cumming Report contains a helpful description of the policy goals that this type of legislation 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. . . ."[203]

This section of the new *Society Act* is meant to provide an improved procedure for investigations, in order to meet these policy goals. The key change is that the court, rather than the Minister of Finance, is authorized to appoint an inspector. The court is much better placed than the ministry to engage in the sort of decision making that this type of provision requires.

Under subsection (1) either a member (or a group of members) or the registrar is authorized to apply to court for an order appointing an inspector. It is important to extend this power to the registrar, for the following reasons pointed out in the Cumming Report:[204]

> 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.

Subsection (3) sets out the circumstances in which an inspector may be appointed. This subsection is broader and more specific than the equivalent subsection in the *Society Act*, 1996.

Conditions applicable to court appointed inspectors

169 (1) The applicant for an order under section 168 *[appointment of inspector by court]* must give notice of the application to the society.

203. Cumming Report, *supra* note 47, vol. 1 at 84.

204. *Ibid*.

(2) If the court appoints an inspector under section 168 *[appointment of inspector by court]*, the inspector must promptly provide to the society a copy of the entered order of appointment.

(3) The court may, before appointing an inspector under section 168 *[appointment of inspector by court]*, require the applicant to give security for the payment of the costs and expenses of the investigation and may, at any time,

(a) set the amount of the costs and expenses, and

(b) order by whom and in what proportion those costs and expenses are to be paid.

Source: BCA, s. 249

Reference: tentative recommendation (87)

Concordance: new

Comment: This section sets out notice requirements and other basic safeguards for a society that is subject to an order appointing an inspector.

Appointment of inspector by society

170 A society may, by a special resolution, appoint an inspector to investigate the affairs and management of the society, and to report in the manner and to the persons the resolution directs.

Source: BCA, s. 250

Reference: tentative recommendation (87)

Concordance: new

Comment: A society may want to have a neutral third party inquire into its affairs. This section enables a society to appoint an inspector by a special resolution of the members.

Powers of inspectors

171 (1) A person who is or was a director, receiver, receiver manager, officer, employee, banker, auditor or agent of the society or any of its affiliates must, on the request of an inspector appointed under this Division,

(a) produce, for the examination of the inspector, each accounting record and each other record relating to the society or any of its affiliates that is in the custody or control of that person, and

(b) give to the inspector every assistance in connection with the investigation that that person is reasonably able to give.

(2) The inspector may examine under oath any person who is or was a director, receiver, receiver manager, officer, employee, banker, auditor or agent

of the society or any of its affiliates in relation to the affairs, management, accounts and records of or relating to the society being investigated, and the inspector may administer the oath, and the person examined must answer any question within the scope of the investigation put to that person by the inspector.

(3) A person giving evidence in an investigation under this Division may be represented by a lawyer.

Source: BCA, s. 251

Reference: tentative recommendation (87)

Concordance: *Society Act*, 1996, s. 84 (2)

Comment: This section gives inspectors a number of rights and powers which are necessary to carry out an effective investigation of the society's affairs. Anyone who fails to comply with this section by, for example, destroying or altering records or by refusing to answer questions under oath, commits an offence under section 322 (1) (d). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Exemption from disclosure to inspectors

172 An inspector appointed under this Division must not require a lawyer to disclose any privileged communication made to the lawyer in that capacity, except regarding the name and address of his or her clients.

Source: BCA, s. 252

Reference: tentative recommendation (87)

Concordance: new

Comment: This section confirms that solicitor–client privilege, one of the bedrock principles of the Canadian legal system, is not compromised by any of the inspector's statutory rights and powers.

Reports of inspector

173 (1) An inspector appointed under section 168 *[appointment of inspector by court]* must, on the conclusion of the investigation, make a report to the court and send a copy of that report to

(a) the society, and

(b) any other person the court orders.

(2) An inspector appointed under section 170 *[appointment of inspector by society]* must, on the conclusion of the investigation, report to the society in the manner directed by the resolution under which the inspector was appointed.

Source: BCA, s. 253

Reference: tentative recommendation (87)

Concordance: new

Comment: This section is self-explanatory.

Inspectors' reports as evidence in legal proceedings

174 A copy of the report of an inspector appointed under this Division, signed by the inspector, is admissible in any legal proceeding as evidence of the opinion of the inspector.

Source: BCA, s. 254

Reference: tentative recommendation (87)

Concordance: new

Comment: This section contains an evidentiary rule, governing the use of the inspector's report in subsequent legal proceedings.

Immunities during investigations

175 An oral or written statement or report made by an inspector or any other person in an investigation under this Division has qualified privilege.

Source: BCA, s. 255

Reference: tentative recommendation (87)

Concordance: new

Comment: This section extends qualified privilege over certain communications made in the course of an investigation. Qualified privilege is a partial immunity from liability for defamatory statements. The privilege only covers statements made without malice; for this reason it is described as "qualified" (as opposed to "absolute"). The purpose of this section is to encourage open and frank communication during an investigation.

PART 9 – SOCIETY ALTERATIONS

Introductory comment: A society alteration is a major transaction that fundamentally alters the character of the society. This Part covers the following types of society alterations: changes to the pre-existing constitution, constitution, or bylaws; conversion; amalgamation; disposal of all or substantially all of the society's undertaking; and transfer of incorporation. (The Part also contains a division that creates a legal framework for society branches.) Many of these transactions are not addressed by the *Society Act*, 1996; others (such as amalgamation) are addressed by that Act in a wholly inadequate fashion. The purpose of this Part of the new *Society Act* is to provide a comprehensive and modern framework for society alterations. The provisions that follow are often complex, but that nature is a reflection of the fact that these transactions are themselves highly complex. Many of these transactions are entirely the creation of statute. If the statute shortchanges them in an attempt to achieve simplicity, then the result will be that societies are effectively unable to engage in such transactions. In addition, it is highly unlikely (and certainly not advisable) that societies will attempt most of these transactions without legal representation.

One type of fundamental change that is addressed in the BCA was not adopted in the new *Society Act*. This is arrangement, which is, in simple terms, a procedure involving an application to court to effect fundamental changes (such as alterations of the constitution or bylaws, or amalgamation) under court supervision. The committee studied these provisions and concluded that they were unnecessary in the not-for-profit sector.

Division 1 – Pre-existing Constitution, Constitution and Bylaws

Pre-existing constitution and bylaws of pre-existing society not to be altered

176 (1) A pre-existing society must not alter its pre-existing constitution or bylaws.

(2) Despite subsection (1), a pre-existing society may

(a) alter its pre-existing constitution or bylaws,

(i) under section 265 (2) *[effect of restoration of society]*,

(ii) under section 267 *[name on restoration]*, or

(iii) under section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]*, as the case may be,

(b) alter its bylaws or constitution at any time after it has complied with section 271 (1) (a) and (b) *[transition – restored pre-existing societies]* or 331 (1) (a) and (b) *[transition – pre-existing societies]*, and

(c) change its bylaws in accordance with section 11 (5) *[bylaws]*, 273 (4) *[alteration to bylaws of restored society]*, 330 (1) (a) *[obligations of pre-existing reporting societies]* or 333 (4) *[alteration to bylaws]*.

Source: BCA, s. 255

Reference: tentative recommendation (4)

Concordance: new

Comment: The purpose of this section is primarily to prevent a pre-existing society from making changes to its corporate charter before it has completed the transition requirement set out in the new *Society Act*. Subsection (1) implements this policy. Subsection (2) sets out the exceptions to this rule. They are very narrow exceptions. The one noteworthy exception is in subsection (2) (a) (iii), which allows a society to make changes to its charter required as part of its transition.

Alteration to constitution

177 (1) This section does not apply to an alteration to a constitution if the alteration is made, is required to be made or otherwise occurs under Division 4 of Part 2 or under section 60 *[societies to file notices as to directors]*.

(2) A society must not alter its constitution unless

(a) the society does so in the manner required or permitted by this Act, and

(b) subject to subsection (3) of this section, the society has been authorized to make the alteration by a court order or, if the alteration is not authorized by a court order,

(i) by the type of resolution specified by this Act,

(ii) if this Act does not specify the type of resolution, by the type of resolution specified by the bylaws, or

(iii) if neither this Act nor the bylaws specify the type of resolution, by a special resolution.

(3) If the alteration relates to the information required by section 9 (b), (g) or (h) *[constitution]*, then the type of resolution specified by the bylaws under subsection (2) (b) (ii) must be a special resolution, an exceptional resolution or a unanimous resolution.

(4) In order to alter its constitution under this section, a society must file with the registrar a notice of alteration in the form established by the registrar describing the alteration.

(5) Whether or not an alteration to the constitution has been effected and authorized in accordance with subsection (2),

(a) the alteration takes effect on the date and time that the notice of alteration is filed with the registrar, or

(b) subject to sections 178 *[alteration to bylaws]* and 305 *[limitation on future dated filings]*, if the notice of alteration specifies a date, or a date and time, on which the alteration is to take effect that is later than the date and time on which the notice of alteration is filed with the registrar, the alteration takes effect

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

(6) After an alteration to the constitution takes effect under subsection (5) of this section, the registrar must, if requested to do so, furnish to the society a certified copy of the constitution as altered.

Source: BCA, s. 257

Reference: tentative recommendation (14)

Concordance: *Society Act*, 1996, s. 20

Comment: The constitution under the new *Society Act* differs in its content from the constitution under the *Society Act*, 1996. As a result, this provision dealing with alterations to the constitution

differs significantly from its equivalent in the *Society Act*, 1996. Note that "alter" is defined in section 1 as including "create, add to, vary, and delete."

One of these differences is broached in subsection (1). Under the new *Society Act*, the constitution contains information about the society's offices and directors. The purpose of subsection (1) is to exempt changes to this factual information from being subject to the strictures that apply to other constitutional alterations. The committee has been advised that the requirement to amend the constitution on every change of directors has brought about some record keeping difficulties. As harmonization with the BCA is an important goal for this provision, the committee is not recommending any changes to address this matter for the *Society Act*. But, this problem may require a global change to all corporate statutes in the province.

Subsection (2) contains directions on the type of resolution required to alter the constitution, in situations where the alteration is not authorized by court order. The default resolution required is a special resolution. This default requirement may be replaced by the Act or by the bylaws. Section 182 (2), which deals with a change to a translation of a society's name, is an example of the Act mandating the type of resolution required in certain circumstances. A society is not required to set out in its bylaws what resolution is required for every conceivable constitutional alteration, but some societies may want to address the resolution required for specific alterations.

Subsection (3) is meant to ensure that any change of the society's name, purposes, or statement of distribution of property on dissolution must be authorized by at least a special resolution of the members.

Subsections (4)–(6) deal with the filing requirements of the Registrar of Companies.

Alteration to bylaws

178 (1) A society may resolve to alter its bylaws

(a) by the type of resolution specified by this Act, or

(b) if this Act does not specify the type of resolution, by a special resolution.

(2) A society may alter its bylaws to specify or change the majority of votes that is required to pass a special resolution, which majority must be at least 2/3 and not more than 3/4 of the votes cast on the resolution, if the members resolve, by a special resolution, to make the alteration.

(3) A society may alter its bylaws to specify or change the majority of votes that is required for members of a particular class to pass a special separate resolution, which majority must be at least 2/3 and not more than 3/4 of the votes cast on the resolution, if

(a) the members resolve, by a special resolution, to make the alteration, and

(b) the members of that class consent by a special separate resolution of those members.

(4) In order to alter its bylaws under this section, a society must file with the registrar a notice of alteration in the form established by the registrar describing the alteration.

(5) An alteration to the bylaws that is not an alteration referred to in subsection (3) takes effect

(a) on the date and time that the notice of alteration is filed with the registrar, or

(b) subject to sections 179 *[withdrawal of notice of alteration]* and 305 *[limitation on future dated filings]*, if the notice of alteration specifies a date, or a date and time, on which the alteration is to take effect that is later than the date and time on which the notice of alteration is filed with the registrar, the alteration takes effect

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

(6) This section does not apply to a change of name or to an adoption or change of any translation of name.

(7) Nothing in subsection (4) or (5) prevents an alteration to the bylaws made by a court order from taking effect in accordance with that order.

(8) After an alteration to the bylaws takes effect under subsection (5) of this section, the registrar must, if requested to do so, furnish to the society a certified copy of the bylaws as altered.

Source: BCA, ss. 257, 259

Reference: tentative recommendation (17)

Concordance: *Society Act*, 1996, s. 23

Comment: Under subsection (1), the default resolution required to alter a society's bylaws is a special resolution. This default resolution may only be displaced by a provision of the Act. "Alter" is defined in section 1.

Subsections (2) and (3) deal with the issue of setting the special majority required to pass a special resolution. Under the new *Society Act*, the special majority required to pass a special resolution may be set out in the bylaws at any level between at least 2/3 and not more than 3/4 of the votes cast on the resolution. In order to do this, the bylaws must be amended by a special resolution.

Subsections (4) and (5) set out filing requirements for bylaw alterations. As with constitutional changes, bylaw alterations must be filed with the Registrar of Companies. The registrar is required to keep a public record of society bylaws, so the form of alteration established by the registrar will have to include a requirement to file the full text of the alteration.

Subsections (6), (7), and (8) are self-explanatory.

Withdrawal of notice of alteration

179 At any time after a notice of alteration is filed with the registrar under section 178 (4) *[alteration to bylaws]* and before the alteration to the constitution or bylaws takes effect, the society in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of alteration by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of alteration.

Source: BCA, s. 258

Reference: tentative recommendation (4)

Concordance: new

Comment: This section simply authorizes an appropriate person to withdraw a notice of alteration from the Registrar of Companies at any time before the alteration takes effect.

Alteration to Table 1 bylaws

180 (1) The Lieutenant Governor in Council may, by regulation, prescribe a set of bylaws, and designate that set of bylaws as "Table 1".

(2) Unless the bylaws provide otherwise, if a society has Table 1 as its bylaws as a result of the operation of this Act or if a provision of Table 1 is adopted by reference in the bylaws of a society, any regulation that amends Table 1 or that provision, as the case may be, will, at the time that the amendment comes into force, effect a corresponding alteration to the society's bylaws, without the necessity for the society to pass a resolution to make that alteration.

(3) Nothing in this section prevents a society from altering a provision in its bylaws referred to in subsection (2) in the manner provided by section 178 *[alteration to bylaws]*.

(4) Subsection (2) of this section does not apply to a provision that has been altered under subsection (3).

Source: BCA, s. 261

Reference: tentative recommendation (16)

Concordance: new

Comment: This section authorizes the creation of a set of standard bylaws—to be called Table 1 bylaws—by regulation. The need for standard bylaws was emphasized over and over again by respondents to the consultation paper. Having a set of default bylaws that societies can adopt, in whole or in part, is a crucial part of streamlining the incorporation process and making the society form accessible to all who wish to adopt it. Of course, given the changes brought about by the new *Society Act*, a new set of standard bylaws will have to be created.

Subsection (2) confirms that a society will get the benefit of any changes made to the standard bylaws by regulation, without any further action on the society's part. Subsections (3) and (4) confirm that societies that have adopted all or part of the standard bylaws are free to alter them in the same manner as if the bylaws were custom-drafted for the society.

Bylaws issued by society must reflect alterations

181 After an alteration to the bylaws of a society takes effect, the society must not issue a copy of the bylaws unless

(a) the copy of the bylaws reflects the alteration, or

(b) there is attached, to the copy of the bylaws, a copy of each resolution, court order or other record by which the bylaws being issued were altered.

Source: BCA, s. 261

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is intended to support the accuracy and integrity of a society's bylaws by imposing an obligation on societies to ensure that any copy of the bylaws issued by the society reflects all alterations made to them. A society that contravenes this section commits an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Part 12, Division 4, below.

Change of society name

182 (1) In order to change its name or adopt or change any translation of that name, a society must alter its constitution in accordance with section 177 *[alteration to constitution]*.

(2) A society may, by a directors' resolution or an ordinary resolution, authorize an alteration to its constitution to adopt or change a translation of its name.

(3) A resolution under section 177 (2) (b) *[alteration to constitution]* may authorize a change of the society's name to

(a) a name, referred to in the resolution, that is reserved or is to be reserved under section 20 *[reservation of name]*,

(b) a name that is to be chosen by the directors and then reserved under section 20 *[reservation of name]*, or

(4) If a notice of alteration filed with the registrar under section 177 (4) *[alteration to constitution]* reflects a change of name referred to in subsection (3) (a) or (b) of this section and no reservation of that name is in effect

when the alterations contemplated by the notice of alteration are to take effect, the notice of alteration is

(a) deemed to be withdrawn when the alterations contemplated by the notice of alteration are to take effect, and

(b) deemed not to have effected any of the alterations to the constitution contemplated by that notice of alteration.

(5) After an alteration to the constitution has taken effect under section 177 (5) *[alteration to constitution]* to change the name of a society,

(a) the registrar must

(i) issue and furnish to the society a certificate of change of name showing the change of name and the date and time the change took effect,

(ii) furnish to the society, if requested to do so, a certified copy of the constitution as altered, and

(iii) publish in the prescribed manner a notice of the change of name, and

(b) the society must promptly alter its bylaws to reflect that change of name and any translation of that name.

(6) After an alteration to the constitution has taken effect under section 177 (5) *[alteration to constitution]* to adopt a translation of the name of a society, or change any translation of the name of a society other than to reflect a change of the name of the society,

(a) the registrar must, if requested to do so, furnish to the society a certified copy of the constitution as altered, and

(b) the society must promptly alter its bylaws to reflect that translation or the change of the translation of that name.

(7) A society may alter its bylaws for the purposes of subsection (5) (b) or (6) (b) of this section without obtaining any resolution to direct or authorize that alteration.

(8) No change of the name or translated name of a society affects any of its rights or obligations, or renders defective any legal proceedings by or against it, and any legal proceedings that may have been continued or commenced by or against it under its former name or translated name may be continued or commenced by or against it under its new name or translated name.

Source: BCA, s. 263

Reference: tentative recommendation (11)

Concordance: *Society Act*, 1996, ss. 20, 21

Comment: Changing a society's name requires altering its constitution. Under subsection (1), a society that wishes to change its name must comply with the rules for altering its constitution. This requires, first and foremost, that it obtain the resolution required under its bylaws. If the bylaws do not specify a resolution, then a special resolution is required. A change of name also requires complying with the name reservation procedure set out in section 20 and with the filing requirement contained in subsection (4). Subsection (8) confirms that a change of name will not affect any of the society's legal rights, obligations, or liabilities.

Exceptional resolutions and resolutions respecting unalterable provisions

183 (1) By a provision in its bylaws, in this section called an exceptional resolution provision, a society may specify that

(a) a provision of its constitution may not be altered unless the resolution to authorize the alteration to the constitution is passed as an exceptional resolution,

(b) a provision of its bylaws may not be altered unless the resolution to alter the society's bylaws is passed as an exceptional resolution, or

(c) an action may not be taken by the society or the directors unless the resolution to authorize or effect the taking of the action is passed as an exceptional resolution.

(2) A society may not vary or delete an exceptional resolution provision unless the variation or deletion is authorized by an exceptional resolution.

(3) Despite any other provision of this Act, if the bylaws of a pre-existing society that has complied with section 271 (1) (a) and (b) *[transition – restored pre-existing societies]* or 331 (1) (a) and (b) *[transition – pre-existing societies]* include a provision that was not capable of alteration under the *Society Act*, 1996, the society must not alter that provision unless the alteration is

(a) ordered by the court, or

(b) authorized by a unanimous resolution.

(4) Each member of the society has the right to vote on a resolution referred to in subsection (3) (b) of this section, whether or not that member otherwise has the right to vote.

Source: BCA, s. 264

Reference: tentative recommendation (15)

Concordance: *Society Act*, 1996, s. 22

Comment: The *Society Act*, 1996, requires that any provision in a society's constitution, other than its name and purposes, must be declared alterable or unalterable. This distinction is not carried forward in the new *Society Act*. Instead of declaring a provision to be unalterable, this section allows a society to designate in its bylaws that provisions in the society's constitution or bylaws, or certain actions taken by the society, may only be effected by an exceptional resolution. "Exceptional resolution" is defined in section 1. The key points from its definition are the notice requirement and the supermajority requirement. On the latter point, an exceptional resolution must be passed by a majority that is greater than the majority required to pass a special resolution. (The new *Society Act* allows each society to set this figure for itself, within a range of 2/3 to 3/4 of the votes cast at a meeting.) In this way, the new Act allows for societies to take steps to safeguard certain key provisions and principles, without having to set them in stone irreversibly, as is the case under the *Society Act*, 1996.

Subsections (3) and (4) address transitional issues for provisions that are currently declared unalterable under the *Society Act*, 1996.

Resolution must be passed by greatest majority

184 If a society is required or permitted under its bylaws or this Act to pass a resolution and if there is a conflict between the bylaws and this Act regarding the majority of votes that is required to pass the resolution, the society must, in order to pass the resolution, obtain the greater of

(a) the majority of votes required by the bylaws, and

(b) the majority of votes required by this Act.

Source: BCA, s. 265

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is included to resolve any conflicts that may arise in practice over the type of resolution required to take some action.

Division 2 – Conversion

Introductory comment: Under the *Society Act*, 1996, a society may apply to the Registrar of Companies to be converted into a (for-profit) company, so long as the society does not have a charitable purpose. This represents something of a middle position between a liberal conversion policy, which would allow all types of societies to convert into companies or other corporate entities, and a restrictive policy, which would not allow any societies to convert into other types of corporate entities. This Division maintains that middle position, with a significant difference. It only authorizes the conversion of not-for-profit entities into societies. The committee has concluded that 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. This proposal was set out in the consultation paper, where it attracted widespread support.

This Division is concerned with the conversion of other not-for-profit entities into societies. In order to allow for societies to convert themselves into other not-for-profit entities, reciprocal provisions would have to be enacted in the governing legislation for those entities.

Definition

185 In this Division, **"qualifying entity"** means

(a) a cooperative association, or

(b) any other prescribed entity.

Source: original

Reference: tentative recommendation (94)

Concordance: new

Comment: Apart from societies, the other major corporate vehicle for not-for-profit organizations in British Columbia is the cooperative association. They are automatically included in this Division. This section defines the scope of this Division more broadly, by including a reference to other prescribed entities. The future may see changes to the not-for-profit landscape. If other entities are created by statute, then they may simply be added to this definition by regulation. Cooperative associations and these potential other entities are grouped together under the umbrella term "qualifying entity."

Conversion of qualifying entities

186 (1) Unless the Act by which it was incorporated provides otherwise, a qualifying entity may apply to convert itself into a society under this Act if it has the consent of the minister to do so, and if it is authorized to do so by a special resolution that

(a) adopts, in substitution for the charter of the qualifying entity,

(i) a constitution that reflects the information that will apply to the converted society on its recognition, and

(ii) subject to subsection (2) and section 187 *[bylaws on conversion]*, bylaws that comply with section 11 (1) and (2) *[bylaws]*, and

(b) authorizes one or more of the directors of the qualifying entity to sign the bylaws and to file the conversion application referred to in subsection (3) (a) of this section with the registrar.

(2) If the qualifying entity seeks to convert itself into a society,

(a) one or more of the directors of the qualifying entity must sign the bylaws referred to in subsection (1) (a) (ii), and

(b) if the qualifying entity is a reporting association, the qualifying entity must include, in those bylaws, the Statutory Reporting Society Provisions.

(3) A qualifying entity that has been authorized to do so under subsection (1) of this section must, in order to apply for conversion under this Division, submit to the registrar for filing

(a) a conversion application, and

(b) the minister's written consent to the conversion.

(4) A conversion application must

(a) be in the form established by the registrar,

(b) set out the name reserved for the society under section 20 *[reservation of name]*, and the reservation number given for it,

(c) contain the constitution referred to in subsection (1) (a) (i) of this section, and

(d) subject to section 187 *[bylaws on conversion]*, contain the bylaws referred to in subsection (1) (a) (ii).

(5) A qualifying entity is converted into a society under this section

(a) on the date and time that a conversion application is filed with the registrar, or

(b) subject to subsection (6) and section 305 *[limitation on future dated filings]*, if the conversion application specifies a date, or a date and time, on which the conversion is to take effect that is later than the date and time on which the conversion application is filed with the registrar,

(i) on the specified date and time, or,

(ii) if no time is specified, at the beginning of the specified date.

(6) At any time after a conversion application is filed with the registrar under this section and before the qualifying entity is converted, the minister may withdraw the conversion application by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the conversion application.

(7) After a qualifying entity is converted into a society, the registrar must

(a) issue a certificate of conversion showing the name of the converted society and the date and time of its conversion,

(b) furnish to the converted society

(i) the certificate of conversion, and

(ii) if requested to do so, a certified copy of the conversion application and a certified copy of the constitution, and

(c) publish in the prescribed manner a notice of the conversion.

(8) Without limiting section 128 (1) *[register of members]*, after a qualifying entity is converted into a society, the converted society must register in its register of members the members of the qualifying entity immediately before its conversion, and, with respect to those members, must register the name and last known address of each of those members.

Source: BCA, s. 266

Reference: tentative recommendation (94)

Concordance: *Society Act*, s. 74

Comment: This section sets out the procedure for a qualifying entity to follow in order to convert itself into a society. Under subsection (1), a special resolution and the consent of the *[minister/registrar]* is required. The application for conversion must be in the standard form established by the registrar. The qualifying entity must also convert its corporate charter to a constitution and bylaws that comply with the new *Society Act*. Under subsection (8), after the converted qualifying entity becomes a society, it must enter the names and last known addresses of its members on its register of members.

Bylaws on conversion

187 At the time that a qualifying entity is converted into a society under section 186 (5) *[conversion of qualifying entities]*, the converted society has, as its bylaws, the bylaws that have been filed with the registrar as part of the conversion application or, if, despite section 186 (4) (d) *[conversion of qualifying entities]*, bylaws have not been filed for the converted society, the converted society has, as its bylaws,

(a) Table 1, or

(b) if the converted society is a reporting association,

(i) Table 1, and

(ii) the Statutory Reporting Society Provisions.

Source: BCA, s. 267

Reference: tentative recommendation (94)

Concordance: new

Comment: This section simply confirms that the converted society will have the bylaws included in its conversion application as its bylaws on conversion. If no bylaws were filed, then the converted society either has the Table 1 (standard) bylaws as its bylaws or, if it was a reporting co-

operative association before conversion, has the Table 1 bylaws and the Statutory Reporting Society Provisions as its bylaws.

Effect of conversion

188 (1) At the time that qualifying entity is converted into a society under section 186 (5) *[conversion of qualifying entities]*,

(a) this Act, the constitution referred to in section 186 (4) (c) *[conversion of qualifying entities]* and the bylaws referred to in section 187 *[bylaws on conversion]*, apply to the converted society in the same manner as if it were a society incorporated under this Act with that constitution and those bylaws, and the former charter of the qualifying entity ceases to apply,

(b) the property, rights and interests of the qualifying entity continue to be the property, rights and interests of the converted society,

(c) the converted society continues to be liable for the obligations of the qualifying entity,

(d) an existing cause of action, claim or liability to prosecution is unaffected,

(e) a legal proceeding being prosecuted or pending by or against the qualifying entity may be prosecuted, or its prosecution may be continued, as the case may be, by or against the converted society, and

(f) a conviction against, or a ruling, order or judgment in favour of or against, the qualifying entity may be enforced by or against the converted society.

(2) Whether or not the requirements precedent and incidental to conversion have been complied with, a notation in the corporate register that a qualifying entity has been converted into a society is conclusive evidence for the purposes of this Act and for all other purposes that the qualifying entity has been duly converted into a society on the date shown and the time, if any, shown in the corporate register.

Source: BCA, s. 268

Reference: tentative recommendation (94)

Concordance: new

Comment: There are several policy goals underlying statutory conversion provisions. They allow for the seamless transfer from one form of legal entity to another. They provide for a rollover of property, rights, obligations, and liabilities from the former entity to the new entity. And they contain protections for third parties, to ensure that neither they nor the public interest are prejudiced by the conversion of an organization from one entity to another. In spelling out the effect of conversion, this section touches on all of these themes.

Division 3 – Amalgamation

Introductory comment: The rules governing amalgamation under the *Society Act*, 1996, are very old. A section governing amalgamation has been a feature of the legislation since the original Act.[205] Remarkably, the section has changed little in substance 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.[206] As a result of its advanced age, amalgamation under the *Society Act*, 1996, is badly out of step with the corporate mainstream and in dire need of reform.

Amalgamation under Canadian law has been described as "a legal means of achieving an economic end."[207] Amalgamating corporations desire to fuse together or "create a homogeneous whole" without terminating "the continued existence of the constituent [corporations]."[208]

Some commentators have asked the basic question of whether procedures governing amalgamation are necessary in the not-for-profit setting. 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."[209] In a similar vein, the ALRI Report took the initial position that ". . . amalgamation machinery was unnecessary."[210] 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.[211]

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 *Society*

205. 1920 Act, *supra* note 23, s. 37.

206. *See Companies Act Amendment Act, 1960*, S.B.C. 1960, c. 8, s. 14.

207. *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.].

208. *Black & Decker*, *ibid*. at 421.

209. Burke-Robertson & Drache, *supra* note 186 at § 7.2 (a).

210. ALRI Report, *supra* note 62 at 59.

211. In its final recommendations, the ALRI Report, *ibid*., concluded (at 59) that amalgamation procedures were required. Burke-Robertson & Drache, *supra* note 186 at § 7.2 (a), also endorsed using statutory amalgamation procedures over informal methods of combination.

Act, 1996, 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:[212]

> 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.

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.[213]

The amalgamation provision in the *Society Act*, 1996, 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.[214] The purpose of this Division is to provide societies with modern amalgamation machinery, which will produce legally certain results in practice.

Amalgamation permitted

189 The following corporations may amalgamate and continue as one society:

(a) a society with one or more other societies;

(b) one or more societies with one or more foreign corporations.

Source: BCA, s. 269

Reference: tentative recommendation (92)

Concordance: *Society Act*, 1996, s. 17

212. *Black & Decker*, *supra* note 207 at 422.

213. *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."

214. 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.

Comment: This section is a statutory authorization for amalgamation. Amalgamations involving British Columbia societies are governed by this Division; amalgamations involving British Columbia societies and foreign corporations (which, for the purposes of this Part, include societies incorporated in other Canadian jurisdictions) are covered partly in this Division and partly in the next Division.

Amalgamation agreements

190 (1) In order for a society to amalgamate with one or more other corporations under section 189 (a) or (b) *[amalgamation permitted]*, it must,

(a) enter into an amalgamation agreement with the other amalgamating corporations, and

(b) have the amalgamation agreement adopted by the society's members under section 191 *[member adoption of amalgamation agreements]*.

(2) An amalgamation agreement referred to in subsection (1) of this section must set out the terms and conditions of the amalgamation and must, in particular,

(a) set out the full name of each of the individuals who are to be the directors of the amalgamated society, and the prescribed address for each of those individuals,

(b) set out any other details necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated society, and

(c) have attached to it

(i) a copy of the constitution and bylaws that the amalgamated society will have after the amalgamation, which bylaws must comply with section 11 (1) and (2) *[bylaws]* and be signed by one or more of the individuals referred to in paragraph (a) of this subsection, and

(ii) a form of amalgamation application that contains the information that is to be included in the amalgamation application that will be filed with the registrar under section 192 (1) (a) *[formalities to amalgamation]*.

Source: BCA, s. 270

Reference: tentative recommendation (92)

Concordance: new

Comment: Amalgamation agreements are a common part of most amalgamations. Most Canadian corporate statutes now require them. The *Society Act*, 1996, makes no mention of amalgamation agreements. This section contains a requirement for amalgamating societies and amal-

gamating societies and foreign corporations to enter into an amalgamation agreement. The amalgamation agreement must contain the names and prescribed addresses of the individuals who will be the directors of the amalgamated society, the bylaws of the amalgamated society, and an amalgamation application. The amalgamation agreement must also contain terms, conditions, and other details necessary to complete the amalgamation.

Member adoption of amalgamation agreements

191 (1) An amalgamation agreement is adopted by the members of an amalgamating society if

(a) all of the members, whether or not they have the right to vote, adopt the amalgamation agreement by a unanimous resolution, or

(b) the amalgamation agreement is adopted by the members in accordance with subsection (6).

(2) If the amalgamation agreement is to be submitted for adoption at a meeting under subsection (6), the amalgamating society must send a notice of the meeting to each member of the amalgamating society at least the prescribed number of days before the date of the proposed meeting.

(3) A notice of meeting sent under subsection (2) must be accompanied by

(a) a copy of the amalgamation agreement,

(b) a summary of the amalgamation agreement in sufficient detail to permit the members to form a reasoned judgment concerning the matter, or

(c) a notification that each member may, on request, obtain a copy of the amalgamation agreement before the meeting.

(4) A society that has included in a notice of meeting referred to in subsection (3) a notification referred to in subsection (3) (c) must, unless the court orders otherwise, send, promptly and without charge, a copy of the amalgamation agreement to each member who requests a copy.

(5) Section 45 *[remedies on denial of access or copies]* applies if a person does not receive the copy of the amalgamation agreement to which the person is entitled.

(6) An amalgamation agreement is adopted by the members of an amalgamating society for the purposes of subsection (1) (b) of this section when

(a) the members approve adoption of the amalgamation agreement

(i) by a special resolution, or

(ii) if any of the members who under subsection (7) are entitled to vote on the resolution to approve the adoption do not otherwise have the right to vote, by a resolution of the society's members

passed by at least a special majority of the votes cast by the society's members, and

(b) the members of each class that would be prejudiced or interfered with by the adoption of the amalgamation agreement approve adoption of the amalgamation agreement by a special separate resolution of those members.

(7) Each member of an amalgamating society has the right to vote in respect of a resolution referred to in subsection (6) (a) (ii) whether or not that member otherwise has the right to vote.

Source: BCA, s. 271

Reference: tentative recommendation (92)

Concordance: *Society Act*, 1996, s. 17

Comment: The *Society Act*, 1996, simply requires a special resolution of the members to authorize an amalgamation. This section of the new Act contains a much more sophisticated approval procedure, which is designed to give greater protection to minority interests among the amalgamating societies' members. Under this section, an amalgamation agreement may be approved by a unanimous resolution. This term is defined in section 1. Under that definition, a unanimous resolution is passed when all the members of the society who have the right to vote on the resolution consent to it in writing. Under this section, every member of the society is considered to have the right to vote on the resolution, regardless of whether the member is ordinarily a voting or a non-voting member.

The section contains another procedure, which is likely to be used by all but the smallest societies. Under this procedure, the amalgamation agreement must be approved by a resolution passed by a special majority of all of the society's members, both voting and non-voting. ("Special majority" defined in section 1. The definition contemplates societies selecting the level that will constitute a special majority in their bylaws, between a range of not less than 2/3 and not more than 3/4 of the votes cast on the resolution at a meeting.) This section also contains a number of notice requirements. Finally, if a class of society members may be prejudiced or interfered with by the amalgamation, then the amalgamation agreement must also be authorized by a special separate resolution of the members of that class.

Formalities to amalgamation

192 (1) In order to effect an amalgamation under this Division,

(a) there must be filed with the registrar, on behalf of the amalgamating corporations, an amalgamation application that complies with this section, and

(b) if any of the amalgamating corporations are foreign corporations, there must be provided to the registrar the records and information the registrar may require, including, without limitation, any proof required by the registrar regarding the standing of the foreign corporation in the foreign corporation's jurisdiction, and there must be filed

with the registrar any records the registrar may require, including, without limitation, an authorization for the amalgamation from the foreign corporation's jurisdiction.

(2) An amalgamation application must

(a) contain whichever of the following statements is applicable:

(i) if the amalgamation has been approved by the court, that a copy of an entered court order approving the amalgamation has been obtained under section 193 *[amalgamations with court approval]* or 195 (3) (b) (ii) *[notice to creditors in relation to an amalgamation without court approval]* and has been deposited in the records office of each of the amalgamating societies;

(ii) if the amalgamation is to be effected without court approval, that all of the required affidavits *[signed statements]* under section 194 (1) *[amalgamations without court approval]* have been obtained and that the affidavit *[signed statement]* obtained from each amalgamating society has been deposited in that society's records office,

(b) be in the form established by the registrar and

(i) set out

(A) if the amalgamated society is to adopt as its name the name of one of the amalgamating societies, the name to be adopted as the name of the amalgamated society, or

(B) if clause (A) does not apply, the name reserved for the amalgamated society under section 20 *[name reservation]*, and the reservation number given for it,

(ii) contain a constitution that reflects the information that will apply to the amalgamated society on its recognition and that was attached to the amalgamation agreement under section 190 (2) (c) (i) *[amalgamation agreements]*, and

(iii) subject to section 199 (1) (c) (ii) *[effect of amalgamation]*, contain the bylaws that were attached to the amalgamation agreement under section 190 (2) (c) (i) *[amalgamation agreements]*.

(3) An amalgamation application must not be submitted to the registrar for filing under subsection (1) (a) of this section unless the amalgamation agreement has been adopted by each of the amalgamating societies shown as parties to it.

Source: BCA, s. 275

Reference: tentative recommendation (92)

Concordance: *Society Act*, 1996, s. 17

Comment: This section is largely self-explanatory. The key change from the *Society Act*, 1996, is that this section contains a set of formalities that are tailored to amalgamations. The *Society Act*, 1996, instead relies on the general formalities for incorporation.

The bracketed references to a "signed statement" in subsection (2) relate to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

Amalgamations with court approval

193 (1) An amalgamation may be effected under section 192 *[formalities to amalgamation]* with court approval, and, for that purpose, a court order approving the amalgamation must be obtained and a copy of that entered order must be deposited in the records office of each of the amalgamating societies.

(2) In order to obtain the court order required under subsection (1) of this section, an application for the order must be filed with the court at least 6 days after but not more than 2 months after the date on which the last of the amalgamating societies to adopt the amalgamation agreement does so under section 191 (1) *[member adoption of amalgamation agreement]*.

(3) An amalgamating society must give to a creditor or member of the amalgamating society at least 14 days' notice of the date, time and place of the hearing of an application under subsection (2) of this section if

(a) the creditor or member, by written notice, requires the society to give the creditor or member notice of the application, and

(b) the written notice referred to in paragraph (a) is sent to the registered office of the amalgamating society so that it is received at that office before the hearing of the application and not later than 5 weeks after the date on which the last of the amalgamating societies to adopt the amalgamation agreement does so under section 191 (1) *[member adoption of amalgamation agreement]*.

(4) On an application for an order to approve an amalgamation under subsection (2) of this section,

(a) a creditor or member of any of the amalgamating corporations is entitled to be heard,

(b) the court must have regard to the rights and interests of each person affected by the amalgamation, and

(c) the court may

(i) approve the amalgamation on the terms presented or substantially on those terms, or

(ii) dismiss the application.

Source: BCA, s. 276

Reference: tentative recommendation (92)

Concordance: new

Comment: The new *Society Act* contains two models for approval of an amalgamation: with court approval; and without court approval. Although the latter model is likely to be preferred, as it should in most cases be less expensive and less time-consuming, there may still be circumstances where court approval for an amalgamation may be desirable. This section sets out the basic procedural requirement for an application for court approval of an amalgamation. It should be noted that the section contains protections for the interests of members (this may be important for members in a minority position) and the interests of creditors.

Amalgamations without court approval

194 (1) An amalgamation may be effected under section 192 *[formalities to amalgamation]* without court approval, and, for that purpose, there must be obtained from each amalgamating society, and deposited in that society's records office, an affidavit *[a signed statement]* of a director or officer of that society that complies with subsection (2) of this section.

(2) The affidavit *[signed statement]* referred to in subsection (1) must

(a) state that the society has entered into an amalgamation agreement with the other amalgamating corporations and that amalgamation agreement:

(i) complies with section 190 *[amalgamation agreements]*, and

(ii) has been adopted in accordance with section 191 *[member adoption of amalgamation agreements]*, and

(b) include whichever of the statements under subsection (3) is applicable.

(3) The affidavit *[signed statement]* referred to in subsection (1) must

(a) state that the director or officer believes and has reasonable grounds for believing that no creditor of the society will be materially prejudiced by the amalgamation, or

(b) state

(i) that the society has complied with section 195 *[notice to creditors in relation to an amalgamation without court approval]*, giving particulars of the time and manner in which the required notices were sent, published or provided, as the case may be,

(ii) that the only objections in writing to the amalgamation received by the society fall into one or more of the following categories:

(A) objections on grounds that are frivolous or vexatious;

(B) objections by creditors who received a written notice under section 195 (3) (a) *[notice to creditors in relation to an amalgamation without court approval]* and who did not, within 15 days after the date of that notice, make application to the court for an order that the amalgamation not proceed;

(C) objections that have been dismissed by the court or withdrawn by the creditor, and

(iii) that the director or officer is not aware of there being any court order, or any application for a court order, that the amalgamation not proceed.

Source: BCA, s. 277

Reference: tentative recommendation (92)

Concordance: *Society Act*, 1996, s. 17

Comment: The *Society Act*, 1996, only provides for amalgamation without court approval and it contains no provisions to protect the rights of creditors and scant protection for the rights of members. In contrast, this section of the new *Society Act* contains a detailed procedure for amalgamation without court approval. The sophisticated nature of the procedure is intended to provide additional protection for member and third-party interests. The heart of this section is the requirement that a director or officer of each amalgamating society provide an affidavit. (If the British Columbia Law Institute's *Report on Unnecessary Requirements for Sworn Statements* is implemented in the time between publication of this report and enactment of a new *Society Act*, then this requirement will be reframed as a requirement to provide a signed statement.) The director or officer must attest that the amalgamating society has entered into an amalgamation agreement that complies with the Act and that the agreement has been approved in accordance with the Act. In addition, the director or officer must also attest either to a belief on reasonable grounds that no creditor will be materially prejudiced by the society or that the society has complied with the statutory provisions on notice to creditors and has received no objections to the merger or only objections of a

kind described in subsection (3) (b). Providing a false affidavit would expose the director or officer to criminal liability. (If the legislation adopts the requirement to provide a signed statement, then providing a false signed statement would expose the director or officer to quasi-criminal liability under a provincial offence provision.)

Notice to creditors in relation to an amalgamation without court approval

195 (1) Before an affidavit *[a signed statement]* containing the statements referred to in section 194 (3) (b) *[amalgamations without court approval]* is sworn *[made]*, an amalgamating society must

(a) send to each known creditor of the society having a claim against the society that exceeds the prescribed amount, a written notice that complies with subsection (2) of this section, and

(b) publish in a newspaper that is distributed generally in the place where the society has its registered office a notice that complies with subsection (2).

(2) Each notice sent in respect of an amalgamating society under subsection (1) (a) and each notice published under subsection (1) (b) must

(a) declare the society's intention to amalgamate and specify the amalgamating corporations,

(b) include a statement by a director or officer of the society indicating that the director or officer believes and has reasonable grounds for believing that the amalgamated society will be, or will not be, as the case may be, insolvent when the amalgamation takes effect, and

(c) state that a creditor of the society who intends to object to the amalgamation must provide to the society a written notice of objection within 15 days after the sending or publication of the notice, as the case may be.

(3) If a creditor provides to the amalgamating society, in accordance with subsection (2) (c), a notice of objection, other than in respect of an objection that is frivolous or vexatious, the society must, if it intends to proceed with the amalgamation,

(a) provide to that creditor a written notice stating that the society intends to proceed with the amalgamation unless, within 15 days after the date of the notice, the court orders that the amalgamation must not proceed, or

(b) obtain whichever of the following court orders the society requires:

(i) an order, on notice to that creditor, dismissing the objection of that creditor;

(ii) an order, on notice to all creditors who have provided a notice of objection in accordance with subsection (2) (c), approving the amalgamation.

(4) Section 193 *[amalgamations with court approval]* does not apply in respect of court orders referred to in subsection (3) (b) of this section.

(5) An amalgamation application affecting the amalgamating society must not be submitted to the registrar for filing until after the 15 day period referred to in subsection (2) (c) of this section, and, if applicable, the 15 day period referred to in subsection (3) (a), have expired.

(6) A creditor having a claim against the amalgamating society may, whether or not that creditor receives a notice under subsection (1) (a) or (3) (a), apply to the court for an order that the proposed amalgamation not proceed.

(7) An application under subsection (6) must be made on such notice to the amalgamating society as the court may order.

Source: BCA, s. 278

Reference: tentative recommendation (92)

Concordance: new

Comment: This section deals with the mechanics of giving notice to creditors. Under subsection (1) (a), only a creditor with a claim exceeding the prescribed amount is entitled to notice. This amount will be set by regulation. For companies, the prescribed amount is $1000.[215] This figure would be appropriate for societies too. Under subsection (1), notice must be sent to each creditor and given by way of publication. The contents of the notice are described in subsection (2). Subsection (3) authorizes a creditor to give a notice of objection to the proposed amalgamation to the society. If this occurs, the society may give a notice that it intends to proceed with the amalgamation within 15 days, unless the creditor obtains a court order against the amalgamation. As an alternative, the society may apply to court for its own order in the face of the creditor's objection.

See the comments to the previous two sections for a discussion of the bracketed reference to a "signed statement" in subsection (1).

Amalgamation

196 Amalgamating corporations are amalgamated and continue as an amalgamated society under this Division

(a) on the date and time that the amalgamation application referred to in section 192 (1) (a) *[formalities to amalgamation]* is filed with the registrar, or

(b) subject to sections 197 *[withdrawal of amalgamation application]* and 305 *[limitation on future dated filings]*, and unless the court or-

215. *Business Corporations Regulation*, *supra* note 90, s. 23.

ders otherwise in an entered order of which a copy has been filed with the registrar, if the amalgamation application specifies a date, or a date and time, on which the amalgamation is to take effect that is later than the date and time the amalgamation application is filed with the registrar,

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

Source: BCA, s. 279

Reference: tentative recommendation (92)

Concordance: new

Comment: This section confirms the timing of when an amalgamation takes place. It occurs on the date and time of filing the amalgamation application with the Registrar of Companies, unless the application states that it is to take effect on some future date.

Withdrawal of amalgamation application

197 At any time after an amalgamation application is filed with the registrar under section 192 (1) (a) *[formalities to amalgamation]* and before the amalgamating corporations are amalgamated, an amalgamating corporation or any other person who appears to the registrar to be an appropriate person to do so may withdraw the amalgamation application by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the amalgamation application.

Source: BCA, s. 280

Reference: tentative recommendation (92)

Concordance: new

Comment: This section simply confirms the right to withdraw the amalgamation application from the office of the Registrar of Companies at any time after filing and before approval.

Registrar's duties on amalgamation

198 After amalgamating corporations are amalgamated as an amalgamated society under this Division, the registrar must

(a) issue a certificate of amalgamation showing

(i) the name of the amalgamated society and the date and time of the amalgamation,

(ii) the names of the amalgamating corporations, and

(iii) for each amalgamating corporation that is a foreign corporation, the foreign corporation's jurisdiction,

(b) furnish to the amalgamated society

(i) the certificate of amalgamation, and

(ii) if requested to do so, a certified copy of the amalgamation application and a certified copy of the constitution and bylaws of the amalgamated society, and

(c) publish in the prescribed manner a notice of the amalgamation.

Source: BCA, s. 281

Reference: tentative recommendation (92)

Concordance: new

Comment: This section is self-explanatory.

Effect of amalgamation

199 (1) At the time that amalgamating corporations are amalgamated as an amalgamated society under this Division,

(a) the amalgamation of the amalgamating corporations and their continuation as one society becomes irrevocable,

(b) the amalgamated society has, as its constitution the constitution contained in the amalgamation application,

(c) the amalgamated society has, as its bylaws,

(i) the bylaws attached to the amalgamation agreement under section 190 (2) (c) (i) *[amalgamation agreements]* if those bylaws have been filed as part of the amalgamation application under section 192 (2) (b) (iii) *[formalities to amalgamation]*, or

(ii) if bylaws are not attached to the amalgamation agreement, or the attached bylaws were not filed as part of the amalgamation application under section 192 (2) (b) (iii) *[formalities to amalgamation]*, Table 1, or, if any of the amalgamating corporations is a pre-existing reporting society,

(A) Table 1, and

(B) the Statutory Reporting Society Provisions,

(d) the amalgamated society becomes capable immediately of exercising the functions of an incorporated society,

(e) the members of the amalgamated society have the powers and the liability provided in this Act,

(f) each member of each amalgamating corporation is bound by the amalgamation agreement, if any,

(g) the property, rights and interests of each amalgamating corporation continue to be the property, rights and interests of the amalgamated society,

(h) the amalgamated society continues to be liable for the obligations of each amalgamating corporation,

(i) an existing cause of action, claim or liability to prosecution is unaffected,

(j) a legal proceeding being prosecuted or pending by or against an amalgamating corporation may be prosecuted, or its prosecution may be continued, as the case may be, by or against the amalgamated society, and

(k) a conviction against, or a ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated society.

(2) An amalgamation does not constitute an assignment by operation of law, a transfer or any other disposition of the property, rights and interests of an amalgamating corporation to the amalgamated society.

(3) Whether or not the requirements precedent and incidental to amalgamation have been complied with, a notation in the corporate register that corporations have been amalgamated as an amalgamated society is conclusive evidence for the purposes of this Act and for all other purposes that the corporations have been duly amalgamated on the date shown and the time, if any, shown in the corporate register.

Source: BCA, s. 282

Reference: tentative recommendation (92)

Concordance: *Society Act*, 1996, s. 17 (4)

Comment: This section provides a detailed description of the effect of amalgamation that is consistent with Canadian jurisprudence on the subject. Paragraph (a) contains a key conceptual shift from the equivalent provision in the *Society Act*, 1996. Under that statute, amalgamating societies *form a new society*; under paragraph (a) it is clear that amalgamating societies *continue* as one society. This language is consistent with the leading Canadian authorities on amalgamation.[216] The remaining provisions are included for greater certainty.

216. *Black & Decker*, *supra* note 207; *Witco Chemical Co. v. Oakville (Town of)* (1974), [1975] 1 S.C.R. 273.

Division 4 – Amalgamation into a Foreign Jurisdiction

Introductory comment: This Division enables societies to amalgamate with foreign corporations and become amalgamated foreign corporations subject to the laws of a foreign jurisdiction. ("Foreign" in this context embraces international jurisdictions and other jurisdictions within Canada.) This type of transaction could possibly be achieved at present by a series of transactions. The intent of this Division is to streamline the process, reducing that series of transactions to one comprehensive transaction. Realistically, the amalgamations contemplated by this Division would require reciprocal enabling provisions to be in place in the laws of the foreign jurisdiction. In other Canadian jurisdictions, these reciprocal provisions do not exist at present. Reforms to the not-for-profit sector may see them enacted in the future, but until such reforms are made, this Division will only likely hold out promise for future use.

Definitions

200 In this Division:

"amalgamation" includes any procedure that results in or that creates an amalgamated foreign corporation;

"amalgamated foreign corporation" means a foreign corporation that results from an amalgamation involving a society.

Source: BCA, s. 283

Reference: tentative recommendation (92)

Concordance: new

Comment: This section contains the definitions that apply in this Division. "Foreign corporation" is defined in section 1.

Amalgamations into foreign jurisdictions

201 (1) Subject to section 202 *[when amalgamation under this Division prohibited]*, one or more societies and one or more foreign corporations may amalgamate to form an amalgamated foreign corporation if

(a) the laws of each of the amalgamating foreign corporations' jurisdictions allow the amalgamation,

(b) each amalgamating foreign corporation obtains the approval to the amalgamation required by its charter and otherwise complies with the laws of the foreign corporation's jurisdiction with respect to the amalgamation, and

(c) each amalgamating society is authorized by its members and by the registrar in accordance with this section to enter into the amalgamation.

(2) For the purposes of subsection (1) (c) of this section, an amalgamating society is authorized by its members to enter into the amalgamation when

(a) all of the members, whether or not they otherwise have the right to vote, approve the amalgamation by a unanimous resolution, or

(b) the amalgamation is approved by the members in accordance with subsection (4).

(3) If the amalgamation is to be approved at a meeting under subsection (4), the amalgamating society must send a notice of the meeting to each member of the society at least the prescribed number of days before the date of the proposed meeting.

(4) An amalgamation is approved by the members of an amalgamating society for the purposes of subsection (2) (b) when

(a) the members approve the amalgamation

(i) by a special resolution, or

(ii) if any of the members who under subsection (5) are entitled to vote on the resolution to approve the amalgamation do not otherwise have the right to vote, by a resolution of the society's members passed by at least a special majority of the votes cast by the society's members, and

(b) the members of each class that would be prejudiced or interfered with by the amalgamation approve the amalgamation by a special separate resolution of those members.

(5) Each member of a society has the right to vote in respect of a resolution referred to in subsection (4) (a) (ii) whether or not that member otherwise has the right to vote.

(6) A society seeking, under subsection (1) of this section, to amalgamate with one or more foreign corporations to form an amalgamated foreign corporation must, before entering into the amalgamation,

(a) obtain and deposit in its records office an affidavit *[a signed statement]* of one of its directors or officers that complies with section 193 (2) (b) *[amalgamations without court approval]* and that states that the authorization to the amalgamation required under subsection (2) of this section has been obtained, and

(b) file with the registrar an application for authorization for amalgamation in the form established by the registrar containing a statement that the affidavit *[signed statement]* required under paragraph (a) has been obtained and deposited in the society's records office.

(7) Section 195 *[notice to creditors in relation to an amalgamation without court approval]* applies to an amalgamation proposed under this section.

(8) Unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, the registrar must authorize a society to amalgamate with one or more foreign corporations to form an amalgamated foreign corporation if the registrar is satisfied that each amalgamating society has filed with the registrar all of the records that the society is required to file with the registrar under this Act.

(9) The authorization given by the registrar under subsection (8) of this section expires 6 months after the date on which that authorization was given.

Source: BCA, s. 284

Reference: tentative recommendation (92)

Concordance: new

Comment: This section contains a detailed procedure to follow in order to effect a foreign amalgamation. The requirements for amalgamating societies are similar to the requirements set out in the preceding Division, with one key difference. A society that contravenes the filing requirement in subsection (6) (b) commits an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12, below.

The requirements for the foreign corporation are those established by that corporation's governing law.

The bracketed reference to a "signed statement" in subsection (6) relates to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

When amalgamation under this Division prohibited

202 A society must not amalgamate with a foreign corporation to form an amalgamated foreign corporation unless the laws of the foreign corporation's jurisdiction to which the amalgamated foreign corporation will be subject provide, in effect, that

(a) the property, rights and interests of the amalgamating society continue to be the property, rights and interests of the amalgamated foreign corporation,

(b) the amalgamated foreign corporation continues to be liable for the obligations of the amalgamating society,

(c) an existing cause of action, claim or liability to prosecution is unaffected,

(d) a legal proceeding being prosecuted or pending by or against the amalgamating society may be prosecuted or its prosecution may be continued, as the case may be, by or against the amalgamated foreign corporation, and

(e) a conviction against, or a ruling, order or judgment in favour of or against, the amalgamating society may be enforced by or against the amalgamated foreign corporation.

Source: BCA, s. 285

Reference: tentative recommendation (92)

Concordance: new

Comment: This section provides some important protection for members and third parties. It restricts foreign amalgamations to those that will at least meet the baseline requirements of this section. These requirements are meant to ensure that the effect of amalgamation in the foreign jurisdiction is broadly similar to the effect of amalgamation in British Columbia.

After amalgamation

203 (1) If a society has amalgamated with one or more foreign corporations to form an amalgamated foreign corporation, the amalgamated foreign corporation must promptly file with the registrar a copy of any record issued to the amalgamated foreign corporation by the amalgamated foreign corporation's jurisdiction to effect or confirm the amalgamation.

(2) After a record referred to in subsection (1) is filed, the registrar must publish in the prescribed manner a notice that the society in respect of which the record was filed has amalgamated with one or more foreign corporations to form an amalgamated foreign corporation.

(3) The society ceases to be a society within the meaning of this Act when the society is amalgamated with one or more foreign corporations to form an amalgamated foreign corporation.

Source: BCA, s. 286

Reference: tentative recommendation (92)

Concordance: new

Comment: This section contains the filing requirements (in British Columbia) upon completion of a foreign amalgamation.

Division 5 – Disposal of Undertaking

Power to dispose of undertaking

204 (1) A society must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless

(a) it does so in the ordinary course of its activities, or

(b) it has been authorized to do so by a special resolution.

(2) If the society contravenes subsection (1) in respect of a disposition of all or substantially all of a society's undertaking, the court, on the application of any member, director or creditor of the society, may, unless subsection (3) applies, do one or more of the following:

(a) enjoin the proposed disposition;

(b) set aside the disposition;

(c) make any other order the court considers appropriate.

(3) A disposition of all or substantially all of the undertaking of a society is not invalid merely because the society contravenes subsection (1), if the disposition is

(a) for valuable consideration to a person who is dealing with the society in good faith, or

(b) ratified by a special resolution.

(4) Despite the passing of a special resolution under subsection (1) (b) or (3) (b) to authorize or ratify a disposition of all or substantially all of the undertaking of a society, the directors may abandon the disposition without further action by the members.

(5) The prohibition in subsection (1) does not apply to a disposition of all or substantially all of the undertaking of the society

(a) by way of security interest, or

(b) by a lease if

(i) the term of the lease, at its beginning, does not exceed 3 years, and

(ii) any option or covenant for renewal included in the lease is not capable of extending the total lease periods beyond 3 years.

Source: BCA, s. 301

Reference: tentative recommendation (96)

Concordance: new

Comment: A "disposal of the undertaking" of a corporation is the sale, lease (with a term of three years or greater), exchange, or disposal by any other means of all or substantially all of the society's property. The *Society Act*, 1996, 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."[217]

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 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. This section in the new *Society Act* brings the law in British Columbia into line with other corporate statutes on this point.

Subsection (1) contains the basic rule, requiring a society to obtain a special resolution of its members if it intends to dispose of all or substantially all of its property and if this disposition is not in the ordinary course of its activities. Subsection (2) authorizes a member, director, or creditor of a society that breaches subsection (1) to apply to court for relief. Subsection (3) provides some protection for a third party that has dealt with the society in good faith and allows a society's members to ratify (after the fact) a disposition of all or substantially all of the society's undertaking. Subsections (4) and (5) are self-explanatory.

Division 6 – Branch Societies

Branches

205 (1) A society may

(a) establish a branch or branches of the society,

(b) provide for membership of a branch,

(c) delegate to the members of a branch power to manage a branch and to appoint officers and revoke a power so delegated,

(d) delegate to a branch powers and responsibilities with respect to the society's activities or part of them, and revoke a power or responsibility so delegated, and

(e) terminate the existence of a branch.

217. Cumming Report, *supra* note 47, vol. 1 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.).

(2) A branch established under this section is not a separate corporation or entity.

Source: ALRI Draft Act, s. 91

Reference: tentative recommendation (103)

Concordance: *Society Act*, 1996, ss. 18, 19

Comment: Under section 18 of the *Society Act*, 1996, 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, 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 of the *Society Act*, 1996, 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 any" of the society that established it, consenting to 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.

Strictly speaking, it is not necessary to have legislation authorizing the use of the branch form of organization. That said, such legislation is unlikely to do any harm and may provide some guidance in practice. The new *Society Act* confirms that branches are available for use by societies. It also contains a set of declarations that are intended to clarify the legal status of a branch. The new *Society Act* does not carry forward the procedural and filing requirements set out in the *Society Act*, 1996. These requirements simply add costs and delays for societies that wish to use the branch form and they provide little meaningful protection for the general public.

Division 7 – Transfer of Incorporation

Introductory comment: Transfer of incorporation, which is a step beyond mere extraprovincial registration, 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*, 1996, does not permit continuations.

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.[218] 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.[219] 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[220] and not-for-profit,[221] contain provisions enabling the transfer of incorporation. The purpose of this Division is to create a modern framework for continuation of foreign not-for-profit corporations into British Columbia and for continuation of British Columbia societies into foreign jurisdictions having reciprocal provisions in their legislation.

Application for continuation into British Columbia

206 (1) If a foreign corporation seeks to be continued into British Columbia as a society, whether or not the foreign corporation is registered as an extraprovincial society,

(a) the foreign corporation must file with the registrar a continuation application,

(b) the foreign corporation must provide to the registrar the records and information the registrar may require, including, without limitation, any proof required by the registrar regarding the standing of the foreign corporation in the foreign corporation's jurisdiction, and must file with the registrar any records the registrar may require, includ-

218. *See British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 11.104.

219. 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.

220. *See* BCA, *supra* note 55, ss. 302–11.

221. *See* SK Act, *supra* note 71, ss. 174–75. *See also* Bill C-21, *supra* note 73, ss. 209–11; ALRI Draft Act, *supra* note 81, ss. 58–59.

ing, without limitation, an authorization for the continuation from the foreign corporation's jurisdiction, and

(c) one or more of the directors of the foreign corporation must sign the bylaws that the foreign corporation will have once it is continued into British Columbia as a society, which bylaws must comply with section 11 (1) and (2) *[bylaws]*.

(2) A continuation application under subsection (1) (a) of this section must

(a) be in the form established by the registrar,

(b) set out the name reserved for the continued society under section 20 *[reservation of name]*, and the reservation number given for it,

(c) contain a constitution that reflects the information that will apply to the continued society on its recognition,

(d) subject to section 210 *[bylaws for a continued society[*, include the bylaws referred to in subsection (1) (c).

(3) A foreign corporation seeking to be continued into British Columbia as a society may, by one or both of the bylaws referred to in subsection (1) (c) of this section and the constitution referred to in subsection (2) (c), effect any amendment to its charter if the amendment is an amendment that a society may make to its charter under this Act.

Source: BCA, s. 302

Reference: tentative recommendation (97)

Concordance: new

Comment: This section authorizes a foreign corporation to apply to be continued under the laws of British Columbia. The expression "foreign corporation" is defined in section 1. For the purposes of this definition, "foreign" corporations include not-for-profit corporations incorporated in another Canadian jurisdiction.

Subsections (1) and (2) set out the procedural requirements for the application. Subsection (3) confirms that a foreign corporation continued into British Columbia may amend its charter in the same manner as a society.

Continuation

207 (1) A foreign corporation is continued into British Columbia as a society

(a) on the date and time that the continuation application referred to in section 206 (1) (a) *[application for continuation into British Columbia]* is filed with the registrar, or

(b) subject to sections 208 *[withdrawal of continuation application]* and 305 *[limitation on future dated filings]*, if the continuation applica-

tion specifies a date, or a date and time, on which the continuation is to take effect that is later than the date and time on which the continuation application is filed with the registrar,

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

(2) After a foreign corporation is continued into British Columbia as a society, the registrar must

(a) issue a certificate of continuation showing the name of the continued society and the date and time on which it was continued into British Columbia as a society,

(b) furnish to the continued society

(i) the certificate of continuation, and

(ii) if requested to do so, a certified copy of the continuation application and a certified copy of the continued society constitution and bylaws, and

(c) publish in the prescribed manner a notice of the continuation.

(3) Without limiting section 128 (1) *[register of members]*, after a foreign corporation is continued into British Columbia as a society, the continued society must register in its register of members the individuals that were members of the corporation immediately before its continuation, and, with respect to those members, must register

(a) the name and last known address of each of those members, and

(b) the class of membership.

Source: BCA, s. 303

Reference: tentative recommendation (97)

Concordance: new

Comment: This section sets out the mechanics of continuation into British Columbia. Subsection (1) contains the rules for determining when the continuation will take effect. Subsection (2) sets out the obligations of the Registrar of Companies. Subsection (3) contains a requirement for the continued society to create a register of members in accordance with this Act.

Withdrawal of continuation application

208 At any time after a continuation application is filed with the registrar under section 206 (1) (a) *[application for continuation into British Columbia]* and before a foreign corporation is continued into British Columbia as a society, the foreign corporation or any other person who appears to the registrar to be an ap-

propriate person to do so may withdraw the continuation application by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the continuation application.

Source: BCA, s. 304

Reference: tentative recommendation (97)

Concordance: new

Comment: This section confirms that an appropriate person may withdraw a foreign corporation's continuation application at any time after filing with the Registrar of Companies and before completion of the continuation.

Effect of continuation

209 (1) At the time that a foreign corporation is continued into British Columbia as a society under this Division,

(a) this Act applies to the continued society to the same extent as if the society had been incorporated under this Act,

(b) the continued society has, as its constitution, the constitution contained in the continuation application,

(c) the property, rights and interests of the foreign corporation continue to be the property, rights and interests of the society,

(d) the society continues to be liable for the obligations of the foreign corporation,

(e) an existing cause of action, claim or liability to prosecution is unaffected,

(f) a legal proceeding being prosecuted or pending by or against the foreign corporation may be prosecuted or its prosecution may be continued, as the case may be, by or against the society, and

(g) a conviction against, or a ruling, order or judgment in favour of or against, the foreign corporation may be enforced by or against the society.

(2) Whether or not the requirements precedent and incidental to continuation have been complied with, a notation in the corporate register that a foreign corporation has been continued into British Columbia as a society is conclusive evidence for the purposes of this Act and for all other purposes that the foreign corporation has been duly continued into British Columbia as a society on the date shown and the time, if any, shown in the corporate register.

Source: BCA, s. 305

Reference: tentative recommendation (97)

Concordance: new

Comment: This list setting out the effects of continuation is meant to provide certainty about the outcome of continuation into British Columbia. It also provides protection for third parties. Continuation is not intended as a means for a foreign corporation to outrun any problems it may have encountered in its original jurisdiction.

Bylaws for a continued society

210 When a foreign corporation is continued into British Columbia as a society, the continued society has, as its bylaws,

(a) if bylaws have been filed for the continued society in accordance with section 206 (2) (d) *[application for continuation into British Columbia]*, those bylaws, or

(b) in any other case, Table 1.

Source: BCA, s. 306

Reference: tentative recommendation (97)

Concordance: new

Comment: This section simply confirms that the continued society will have, as its bylaws, the bylaws that it filed with the Registrar of Companies as part of its continuation application. If no bylaws are filed as part of the continuation application, then by default the continued society's bylaws are the standard bylaws prescribed by regulation and designated Table 1.

Application for continuation out of British Columbia

211 (1) Subject to section 212 *[when continuation out of British Columbia prohibited]*, a society may, if it is authorized by the members and by the registrar in accordance with this section, make an application to the appropriate official or public body of another jurisdiction requesting that the society be continued into that other jurisdiction as if the society had been incorporated under the laws of that other jurisdiction.

(2) A society is authorized by the members to apply for continuation into a jurisdiction other than British Columbia when the members authorize the continuation by a special resolution.

(3) A society seeking, under subsection (1) of this section, to be continued into a foreign jurisdiction must, before applying to that foreign jurisdiction for continuation into that jurisdiction, apply to the registrar for an authorization under subsection (4).

(4) The registrar must authorize the society to continue into the foreign jurisdiction if the registrar is satisfied that the society has filed with the regis-

trar all of the records that the society is required to file with the registrar under this Act.

(5) The authorization given by the registrar under subsection (4) of this section expires 6 months after the date on which that authorization was given.

Source: BCA, s. 308

Reference: tentative recommendation (97)

Concordance: new

Comment: This section deals with the procedural requirements for a society to be continued out of British Columbia to become a not-for-profit corporation under the laws of a different jurisdiction. Under subsection (1), such a society must obtain the authorization of both its members and of the Registrar of Companies. Subsection (2) provides that the members' authorization of a continuation out of British Columbia must be by special resolution. Subsections (3)–(5) deal with the registrar's authorization. The key provision is in subsection (4). It provides that a society must be up to date with its filing requirements under this Act (*e.g.*, filing its annual reports, notices of change of directors, and the like) in order to obtain the registrar's authorization. A society that attempts to transfer its incorporation out of British Columbia without applying to the registrar contravenes subsection (3) and commits an offence under section 322 (1). For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12.

When continuation out of British Columbia prohibited

212 A society must not apply to be continued into another jurisdiction unless the laws of that other jurisdiction provide, in effect, that, after continuation,

(a) the property, rights and interests of the society continue to be the property, rights and interests of the continued corporation,

(b) the continued corporation continues to be liable for the obligations of the society,

(c) an existing cause of action, claim or liability to prosecution is unaffected,

(d) a legal proceeding being prosecuted or pending by or against the society may be prosecuted or its prosecution may be continued, as the case may be, by or against the continued corporation, and

(e) a conviction against, or a ruling, order or judgment in favour of or against, the society may be enforced by or against the continued corporation.

Source: BCA, s. 310

Reference: tentative recommendation (97)

Concordance: new

Comment: This section sets out the standards that a continuation out of British Columbia must meet in order to be permissible under this Act. Most of these standards involve protection for third-party interests. They are meant to ensure that continuation is not used a vehicle for fraudulent or abusive practices.

After continuation

213 (1) Promptly after the date on which a society is continued into another jurisdiction, the continued corporation must file with the registrar a copy of any record issued to it by the other jurisdiction to effect or confirm the continuation.

(2) After a record referred to in subsection (1) is filed, the registrar must publish in the prescribed manner a notice that the society in respect of which the record was filed has been continued into that other jurisdiction.

(3) The society ceases to be a society within the meaning of this Act when the society is continued into the other jurisdiction.

Source: BCA, s. 311

Reference: tentative recommendation (97)

Concordance: new

Comment: After continuation out of British Columbia, the continued corporation has one more filing requirement in British Columbia, which is set out in subsection (1). Upon filing a confirmation of its continuation into another jurisdiction, the continued corporation ceases to be a British Columbia society.

PART 10 – LIQUIDATION, DISSOLUTION AND RESTORATION

Introductory comment: This Part largely concerns procedural matters that are far removed from the core not-for-profit concerns of societies. The *Society Act*, 1996, contains no procedural provisions relating to liquidation, restoration, and dissolution. Instead, it incorporates by reference the procedural provisions that were set out in the CA, as if that Act had not been repealed. This approach raises a number of concerns.

First, this style of incorporating large parts of another Act does not make the law as open and accessible as possible. This concern is deepened by the fact that the CA has been repealed and is therefore no longer publicly available for free on the Queen's Printer's website. In addition, the CA contains terms that relate to companies and those terms have to be converted by readers to terms appropriate for societies. A number of respondents to the consultation paper related their frustration with this approach to crafting the governing legislation for societies. They were strongly of the view that the *Society Act* should contain all the relevant provisions for societies. The new *Society Act* remedies this concern by setting out comprehensive liquidation, dissolution, and restoration provisions.

Second, the CA provisions are out of date on a number of key issues. As a result, societies are saddled with some comparatively onerous procedures that were originally intended for companies but no longer apply to companies. There is no reason for allowing this state of affairs to continue.

This Part of the new *Society Act* is modelled on the equivalent Part of the BCA. The BCA provisions appear to have been well received by practitioners familiar with this area of the law.[222]

Liquidation and dissolution are usually paired together in statutes and they can be carried out in conjunction in practice, but they are analytically distinct. It is possible to dissolve a society without liquidation of its assets (because it has no assets). In practice, dissolution often takes place without liquidation. This passage from a practice guide for companies contains a helpful articulation of the distinction between the two concepts:[223]

> The final act—the end of the company's existence—is dissolution. . . . Dissolution may occur without a prior liquidation if the company has already distributed its assets and discharged or made adequate provision for its liabilities.
>
> The process which may precede dissolution, through which the assets and liabilities of an active company are dealt with by a liquidator appointed for that purpose, is liquidation.

Division 1 – Definitions and Application

Definitions

214 In this Part:

"commencement of the liquidation" means,

(a) for a voluntary liquidation commenced under Division 3, the date and time on which the special resolution referred to in section 221 (1) *[authorization for liquidation]* is passed or if the special resolution specifies a date, or a date and time, for the commencement of the liquidation that is later than the date and time on which the special resolution is passed, the specified date and time or, if no time is specified, the beginning of the specified date, or

(b) for a liquidation commenced by court order,

(i) the date of the making of the order, or

(ii) if the order specifies a date, or a date and time, for the commencement of the liquidation that is later than the date of the making of the order, the specified date and time or, if no time is specified, the beginning of the specified date;

"liquidation records office" means the office referred to in section 235 *[liquidation records office]*;

"property" includes records.

Source: BCA, s. 312

222. *See* Andrew J. McLeod & Ian N. MacIntosh, *British Columbia Business Corporations Act & Commentary* (Markham, ON: LexisNexis Butterworths, 2006) at 48.

223. *British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 12.1.

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section contains the definitions that apply in this Part. The liquidation records office is a new concept, which will be explained in the comment to section 235.

Application of this Part

215 Any proceedings taken under this Act to dissolve, or to liquidate and dissolve, a society must be stayed if the society is at any time found, in a proceeding under the *Bankruptcy and Insolvency Act* (Canada), to be insolvent within the meaning of that Act.

Source: BCA, s. 313

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: Under constitutional law, bankruptcy and insolvency is a matter within the jurisdiction of the federal Parliament. There is federal legislation that covers this field.[224] The purpose of this section is to confirm that provincial legislation (the new *Society Act*) does not intrude into this area of federal jurisdiction.

Division 2 – Voluntary Dissolution without Liquidation

Authorization for voluntary dissolution

216 (1) A society may apply to be dissolved under this Division if

(a) it is authorized to do so by an ordinary resolution,

(b) it has no assets, and

(c) it

(i) has no liabilities, as a result of section 217 (7) *[provision for unpaid debts and undeliverable assets]* or otherwise, or

(ii) has made adequate provision for the payment of each of its liabilities.

(2) Despite subsection (1) (a) of this section, a society referred to in subsection (1) (b) and (c) that has not issued any memberships may apply to be dissolved under this Division if it is authorized to do so by a directors' resolution.

Source: BCA, s. 314

Reference: tentative recommendation (98)

224. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 258

Comment: This particular section is analogous to the dissolution by request provisions in the CA. It applies to a society that is no longer carrying on activities, has no assets, and has no outstanding debts or liabilities.

The problem with the old voluntary dissolution by request procedure under the CA was that in order to make an application, an affidavit had to be sworn by two or more directors, confirming that a society had no debts or liabilities. This presented directors with a practical problem, insofar as it was sometimes very difficult to make such a bold statement under oath as there was always a possibility that a liability might arise in the future. There could, for example, be an outstanding liability that only comes to light months after the dissolution or there might be a contingent liability lurking. Directors would also face a similar problem where a creditor or member could not be located prior to the application for dissolution. Unless the society could trace the creditor or the member and pay off the debt, or deliver the non-cash assets, the directors could not on the face of it make the affidavit to support the application. Many societies were therefore reluctant or unwilling to use this voluntary dissolution option and ended up using one of the other procedures under the CA, which were often inappropriate and more expensive and time consuming.

The new *Society Act* overcomes this problem in subparagraphs (c) (i) and (ii). Subparagraph (c) (i) deals with the problem of unpaid debts and delivery of non-cash assets where a creditor or member cannot be located. The procedure that a society would have to follow is set out in the next section. Subparagraph (c) (ii) is intended to cover the problem of liabilities arising in the future, with the main reform being captured in the phrase "made adequate provision for its liabilities." Both these concepts are considerably less onerous than having to confirm under oath that there are no debts and liabilities and should therefore provide some additional comfort and protection for directors who have to swear the affidavit in support of the application.

Provision for unpaid debts and undelivered assets

217 (1) In this section, "administrator" has the same meaning as in the *Unclaimed Property Act*.

(2) If the whereabouts of a creditor of a society that intends to apply for dissolution under this Division is unknown, the society must, before submitting an application for dissolution to the registrar for filing, make payment, in accordance with subsection (3), of the amount of the liability that the society has, in good faith, determined is due to that creditor.

(3) A society referred to in subsection (2) must, after making reasonable efforts to determine the whereabouts of the creditor,

(a) pay, in accordance with an order of the court, the amount of the liability that the society has, in good faith, determined is due to the creditor, or

(b) if no court order has been made and the liability has remained unpaid for at least 6 months after the date it became payable, pay the amount of the liability to the administrator, and include a statement showing,

(i) to the fullest extent known to the society, the name of the creditor, and

(ii) the last known address of the creditor.

(4) If the whereabouts of a member of a society that intends to apply for dissolution under this Division is unknown, the society must, before submitting an application for dissolution to the registrar for filing,

(a) make payment, in accordance with subsection (5), of the money that the society has, in good faith, determined is due to that member, or

(b) deliver, in accordance with subsection (5), any other assets that the society has, in good faith, determined are due to that member.

(5) A society referred to in subsection (4) must, after making reasonable efforts to determine the whereabouts of the member,

(a) pay or deliver, in accordance with an order of the court, the money or other assets that the society has, in good faith, determined are due to the member, or

(b) if no court order has been made and the money or other assets have remained unclaimed or undistributed for at least 6 months after the date the money or assets became payable or deliverable, pay the money or deliver the assets to the administrator, and include a statement showing,

(i) to the fullest extent known to the society, the name of the member, and

(ii) the last known address of the member.

(6) The administrator must, after receipt of the money or other assets referred to in this section, send a receipt to the society.

(7) A society that has complied with subsection (3) (a) or (5) (a) or that has been sent a receipt under subsection (6) is discharged from

(a) any liability for the money or other assets so paid or delivered, and

(b) any claims in respect of the money or other assets so paid or delivered that might be made by or on behalf of the persons entitled to the money or other assets.

(8) The administrator may realize any assets delivered to the administrator under this section and any money received or realized under this section is deemed to be an unclaimed money deposit under the *Unclaimed Property Act*.

Source: BCA, s. 315

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 258

Comment: This section should be read in tandem with section 216 (1) (c) (i). It sets out the procedure that a society has to follow when it intends to apply for voluntary dissolution by request and there are creditors or members who cannot be located. (Note that, for most societies, a member has no interest in the society's property on dissolution. A few societies reverse this common practice, so the legislation must contain provisions that apply to those cases.)

The procedure requires that a society must first make reasonable efforts to determine the whereabouts of the creditor or member. Once this has been done, the society must either pay the relevant amounts to the creditor or member, or deliver the non-cash assets, in accordance with a court order. If no court order governing payment has been made and six months have elapsed from the date when the payment was due, or the assets have remained unclaimed or undistributed, a society can make payment of the amount due or deliver the assets to the administrator appointed under the *Unclaimed Property Act*, together with certain additional information. Provided this procedure is followed, a society is then discharged from any liability or claims for the money or other assets sent to the administrator. Thus, the society may proceed with dissolution under this streamlined procedure without concern about a lurking liability coming back to derail the process.

Application for voluntary dissolution

218 (1) In order to apply for dissolution under this Division, a society must

(a) obtain and deposit in its records office an affidavit *[a signed statement]* that is sworn *[provided]* by a director of the society and that complies with subsection (2), and

(b) file with the registrar an application for dissolution in the form established by the registrar containing a statement that the affidavit *[signed statement]* required under paragraph (a) of this subsection has been obtained and deposited in the society's records office.

(2) An affidavit *[a signed statement]* referred to in subsection (1) (a) must state

(a) that the society's dissolution has been duly authorized in accordance with section 216 (1) (a) or (2) *[authorization for voluntary dissolution]*, as the case may be,

(b) that the society has no assets, and

(c) that the society

(i) has no liabilities, as a result of section 217 (7) *[provision for unpaid debts and undelivered assets]* or otherwise, or

(ii) has made adequate provision for the payment of each of its liabilities.

Source: BCA, s. 316

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 258

Comment: There are a few differences in this section from the procedure under the CA which should be noted. The new *Society Act* requires only one director to swear the affidavit required on application, whereas the CA required two. The affidavit is filed with society's records office, rather than with the Registrar of Companies. And, of course, the significance of allowing the director to swear that adequate provision for payment of the society's liabilities has been discussed above.

The bracketed references to a "signed statement" in this section relate to an earlier BCLI report entitled a *Report on Unnecessary Requirements for Sworn Statements*. In that report, the BCLI recommended repealing a large number of legislative provisions requiring an individual to swear an affidavit or give a statutory declaration in an out-of-court setting, including certain provisions in the BCA. The report has not yet been implemented, so the equivalent provisions in the new *Society Act* retain the references to affidavits, for the sake of harmonization with the BCA. But, in anticipation of the implementation of this earlier report, bracketed references to "signed statements" have been included in the places identified in the earlier report as being ripe for this change.

Date of dissolution

219 A society is dissolved under this Division

(a) on the date and time that the application for dissolution referred to in section 216 (1) (b) *[application for voluntary dissolution]* is filed with the registrar, or

(b) subject to sections 220 *[withdrawal of application for dissolution]* and 305 *[limitation on future dated filings]*, if the application for dissolution specifies a date, or a date and time, on which the dissolution is to take effect that is later than the date and time on which the application for dissolution is filed with the registrar,

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

Source: BCA, s. 317

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 258

Comment: This section provides a degree of certainty and also some flexibility regarding the date of the dissolution. The default position is the date on which the application is filed with the Registrar of Companies, but provision is made to allow a society to specify a later date and time if required.

Withdrawal of application for dissolution

220 At any time after an application for dissolution referred to in section 218 (1) (b) *[application for voluntary dissolution]* is filed with the registrar and before the

society referred to in the application is dissolved under this Division, the society or any other person who appears to the registrar to be an appropriate person to do so may withdraw the application for dissolution by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the application for dissolution.

Source: BCA, s. 318

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section should be read in tandem with paragraph (b) of the above section. It simply permits an appropriate person to withdraw their application for dissolution at any time after it has been filed with the Registrar of Companies and before the date when the society is due to be dissolved.

Division 3 – Voluntary Liquidation

Authorization for liquidation

221 (1) A society may liquidate under this Division if it has been authorized to do so by a special resolution.

(2) At the time that the special resolution referred to in subsection (1) is passed, the society, by an ordinary resolution,

(a) must appoint as liquidator one or more persons qualified under section 229 *[qualifications of liquidators]*, and

(b) may set, or may authorize the directors to set, each liquidator's remuneration.

(3) An appointment of a liquidator under this section takes effect on the commencement of the liquidation.

(4) A liquidator appointed under this section may apply to the court to set or review that liquidator's remuneration if

(a) that remuneration is not set within 2 months after the liquidator's appointment under subsection (2) (a), or

(b) the liquidator is dissatisfied with the amount of the remuneration set under subsection (2) (b).

Source: BCA, s. 319

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 267, 270, 279

Comment: The voluntary liquidation procedure is used to terminate a society that is still active and has outstanding debts and liabilities. This section is procedural in nature and deals with the

requirements for obtaining authorization from the society for liquidation, the appointment of a third party to act as a liquidator, and the remuneration to be paid to the liquidator. The new *Society Act* streamlines the authorization procedure by removing the obligation in the CA (which the *Society Act*, 1996, incorporates by reference) for a majority of the directors of the society to make an affidavit, before calling the general meeting to propose the liquidation, confirming that they have investigated the affairs of the society and that they are of the opinion that it will be able to pay its debts within 12 months from the commencement of the liquidation.

Limits on liquidator

222 (1) Subject to subsection (2), in a voluntary liquidation, the society, by an ordinary resolution, may direct the liquidator not to do certain specified things without the approval of a general meeting of the society or without the written consent of certain specified members, or of a certain specified number of members.

(2) No direction under subsection (1) relieves a liquidator from the duty to act in accordance with this Act and the regulations.

Source: BCA, s. 320

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 288 (2)

Comment: This section allows a society to impose some degree of control over the activities of the liquidator, subject to the requirement of the liquidator to act in accordance with Act and any regulations that are to be prescribed. The limits on the liquidator must be set by an ordinary resolution of the members.

Statement of intent to liquidate

223 (1) A society must, promptly after the resolutions referred to in section 221 (1) and (2) (a) *[authorization for liquidation]* are passed, file a statement of intent to liquidate with the registrar.

(2) The statement of intent to liquidate must

(a) be in the form established by the registrar,

(b) set out the commencement of the liquidation,

(c) set out the full name of each liquidator,

(d) set out the mailing address and the delivery address of each liquidator, and

(e) set out the mailing address and the delivery address of the liquidation records office.

(3) After a statement of intent to liquidate is filed with the registrar, the registrar must furnish to the society a certified copy of the statement of intent to liquidate.

Source: BCA, s. 321

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: The requirement for a society to file with the Registrar of Companies a statement of intent to liquidate after the resolution has been passed authorizing the liquidation does not appear in the CA and is taken from the BCA. The intent is to create a public record that a society plans to use this procedure to liquidate. This section sets out the information that must be included with the statement of intent to liquidate.

Resignation and removal of liquidators in voluntary liquidations

224 (1) A liquidator appointed under this Division may

(a) resign as liquidator, or

(b) be removed as liquidator by a special resolution passed at a general meeting, notice of which meeting has been sent to the liquidators and to each creditor who has an unpaid claim against the society that exceeds the prescribed amount.

(2) Unless the court orders otherwise under section 227 *[court orders respecting liquidations]*, if, in a liquidation under this Division, a vacancy occurs in the office of liquidator,

(a) if one or more liquidators remain in office despite the vacancy, the society may fill the vacancy, or

(b) in any other case, the society must fill the vacancy.

(3) A vacancy referred to in subsection (2) of this section may be filled by the society by

(a) an ordinary resolution, or

(b) the directors if they are authorized by an ordinary resolution to do so.

(4) A general meeting may be called, for the purpose of passing either of the ordinary resolutions referred to in subsection (3),

(a) by any member entitled to vote at general meetings,

(b) if one or more liquidators remain in office, by any member entitled to vote at general meetings or by any of the remaining liquidators, or

(c) in any other manner contemplated by the bylaws.

(5) The society may, by an ordinary resolution, set, or authorize the directors to set, the remuneration for each liquidator appointed under this section.

(6) Section 221 (4) *[authorization for liquidation]* applies to a liquidator appointed under this section.

Source: BCA, s. 322

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 276, 278

Comment: These procedural provisions covering the resignation and removal of a liquidator, and the appointment of a new liquidator to fill a vacancy, are in broad terms very similar to the requirements that currently apply to societies. Subsection (1) confirms that a liquidator may resign or may be removed by the members of a society. In order to remove a liquidator, the members must pass a special resolution. Notice of a meeting of the members to consider such a special resolution must be sent to the liquidator and to every creditor of the society that has an unpaid claim over an amount prescribed by regulation. Under the BCA, this amount is $1000.[225] The remaining subsections of this section relate to filling vacancies in the office of liquidator.

Withdrawal of statement of intent to liquidate

225 (1) At any time after a statement of intent to liquidate is filed with the registrar under section 223 *[statement of intent to liquidate]* and before the society in respect of which the statement was filed is dissolved within the meaning of section 244 *[application for dissolution]*, the society or any other person who appears to the registrar to be an appropriate person to do so may withdraw the statement of intent to liquidate by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the statement of intent to liquidate.

(2) If a statement of intent to liquidate is withdrawn under subsection (1) of this section,

(a) each liquidator appointed under section 221 (2) (a) *[authorization for liquidation]* or 224 (3) *[resignation and removal of liquidators in voluntary liquidations]* is removed,

(b) the society must remove the copy of the statement of intent to liquidate from its records office,

(c) the liquidator must send to the society all of the records retained by the liquidator under section 235 (1) *[liquidation records office]* and must return to the society any other property of the society in the possession of the liquidator,

(d) the society may carry on its activities,

(e) the directors and officers of the society regain any powers to manage or supervise the management of the activities and affairs of the soci-

225. *Business Corporations Regulation*, *supra* note 90, s. 24.

ety that they had before those powers vested in the liquidator under section 236 (1) (a) *[powers of liquidators]*, and

(f) any application for dissolution filed with the registrar in relation to the society under section 244 *[application for dissolution]* is deemed to be withdrawn.

Source: BCA, s. 323

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section authorizes the society or an appropriate person on the society's behalf to withdraw the notice of intent to liquidate at any time after it is filed with the Registrar of Companies and before the society is dissolved. The implications of withdrawing the notice of intent to liquidate are set out in subsection (2).

Division 4 – Powers and Duties of the Court

Court may order society be liquidated and dissolved

226 (1) On an application made in respect of a society by the society, a member of the society, a director of the society or any other person, including a creditor of the society, whom the court considers to be an appropriate person to make the application, the court may order that the society be liquidated and dissolved if

(a) an event occurs on the occurrence of which the pre-existing constitution or the bylaws of the society provide that the society is to be liquidated and dissolved, or

(b) the court otherwise considers it just and equitable to do so.

(2) Nothing in subsection (1) prevents the court from requiring that security for costs be provided by a person bringing an application under that subsection.

(3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the society or under section 158 *[complaints by member]*, the court may do one of the following:

(a) make an order that the society be liquidated and dissolved;

(b) make any order under section 158 (3) *[complaints by member]* it considers appropriate.

(4) If the court orders under this Act that a society be liquidated and dissolved, the court must, in its order, appoint one or more liquidators.

(5) An appointment of a liquidator under subsection (4) takes effect on the commencement of the liquidation.

Source: BCA, s. 324

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 271, 272, 274

Comment: This section permits an application to the court for a society to be liquidated and dissolved on one of two grounds. The first ground in subsection (1) (a) arises where the pre-existing constitution or bylaws of a society provide that the society will be liquidated and dissolved on a certain date or event and following the occurrence of that date or event, the liquidation has not taken place. A society may, for example, have been set up for a specific purpose such as a sporting event with the intention being that once the purpose had been achieved, the society would then be liquidated and dissolved.

The second ground for an application is where the court considers it "just and equitable to do so." The "just and equitable" remedy arose primarily out of the deficiencies in the English common law in providing a form of redress against companies for disgruntled shareholders. The remedy has existed in English company law since the first major Act, the *Companies Act* of 1862 and, in fact, a similar provision first appeared in the *Winding-up Act* of 1848.

The various legislative enactments of the "just and equitable" remedy do not include any statutory guidelines as to how this broad phrase should be interpreted, but consideration of the common law jurisprudence does reveal some generally recognized circumstances that may justify liquidation as "just and equitable": dishonest conduct; irretrievable breakdown in relations that results in deadlock; failure of substratum (this is the inability of a corporation to achieve its purposes due to a financial or other catastrophe); breach of settled practice; and the "quasi-partnership" scenario (this is effectively a partnership in the guise of a company, where a order for liquidation and dissolution may be made if such facts are shown as could justify a dissolution of the partnership).[226]

The "just and equitable" remedy is more commonly used in the for-profit sector, particularly by shareholders who are seeking to protect their investment. But, as noted in the Cumming Report, the concept may be applied to societies in at least two types of situations: (1) where there is a deadlock in voting power leaving the court no option but to dissolve the society; and (2) where there has been overreaching by directors or members to such an extent that it almost amounts to fraud.[227]

In order to deter vexatious applications, subsection (2) gives the court the power to make a security for costs order against the person bringing the proceedings.

If a court does find that it is "just and equitable" to grant an order for the liquidation and dissolution of the society, subsection (3) (b) permits the court as an alternative to make any of the orders available under the oppression remedy in section 158 (3) of the new *Society Act*. The significance of this is that the court in theory is able to make such orders without having to find conduct that is oppressive or unfairly prejudicial. The "just and equitable" test is a broader one, which allows the

226. *See* McGuinness, *supra* note 157 at 1546–63 (further discussion of the history and jurisprudence).

227. *Supra* note 47, vol. 1 at 81.

court to consider equitable principles such as fairness and honesty when looking at the affairs of a society.

Court orders respecting liquidations

227 (1) An application to the court in respect of a society in liquidation may be made under this section by the society, a member of the society, a director of the society or any other person, including a creditor or liquidator of the society, whom the court considers to be an appropriate person to make the application.

(2) Nothing in subsection (1) prevents the court from requiring that security for costs be provided by a person bringing an application under that subsection.

(3) On an application made in respect of a society in liquidation, the court may, in respect of that society, make any order it considers appropriate, including any of the following orders:

(a) an order appointing one or more liquidators, with or without security;

(b) an order setting the remuneration of a liquidator;

(c) an order replacing or removing a liquidator;

(d) an order appointing auditors or inspectors for any purpose, including for the purpose of auditing or examining those of the records of the liquidator, and those of the records in the custody or control of the liquidator, that the court considers appropriate;

(e) an order specifying the powers of, setting the remuneration of and removing or replacing auditors or inspectors;

(f) an order determining the notice to be given to any interested person, or dispensing with notice to any person, in relation to any application to court under this section;

(g) an order that a meeting of some or all of the members or creditors of the society be called, held and conducted in the manner and for the purposes the court considers appropriate;

(h) an order determining the validity of any claims made against the society;

(i) an order restraining the directors and officers of the society from doing any or all of the following except as permitted by the court:

(i) exercising any or all of their powers;

(ii) collecting or receiving any debt owed to the society or any other assets of the society;

(iii) paying out or transferring any money or other assets of the society;

(j) an order determining and enforcing the duty or liability of any past or present director, officer, receiver, receiver manager, liquidator or member of the society

(i) to the society, or

(ii) for an obligation of the society;

(k) an order that there be an examination into the conduct of any person who has taken part in the formation or promotion of the society, or of any past or present director, officer, receiver, receiver manager, liquidator or member of the society, if it appears that that person has misapplied, retained or become liable or accountable for any property, rights or interests of, or has been guilty of any breach of trust in relation to, the society;

(l) an order that a person referred to in paragraph (k) of this subsection do one or both of the following, whether or not the conduct complained of is conduct for which the person may be liable to prosecution:

(i) repay or restore all or any part of the property, rights and interests that the person misapplied or retained, or for which the person is liable or accountable, with interest at the rate the court considers appropriate;

(ii) contribute the sum that the court considers appropriate to the assets of the society by way of compensation for the conduct complained of;

(m) an order

(i) approving the payment, satisfaction or compromise of any or all of the liabilities of the society and the retention of assets for that purpose, or

(ii) determining the adequacy of provisions for the payment or discharge of the liabilities of the society;

(n) an order permitting the disposal or destruction of

(i) records of the society, or

(ii) records retained by the liquidator under section 235 (1) *[liquidation records office]*;

(o) an order giving directions on any matter arising in a liquidation;

(p) an order to confirm, reverse or modify any act or decision of a liquidator;

(q) if it appears to the court that a liquidator has not faithfully performed the liquidator's duties, an order requiring that whatever action the court considers appropriate be taken;

(r) despite any other provision of this Part, an order imposing restrictions on the rights, powers and duties of a liquidator, either generally or with respect to certain matters;

(s) an order discharging, on terms and conditions the court considers appropriate, a liquidator who has resigned or has been removed as liquidator;

(t) subject to the obligation of the liquidator under section 232 (1) (n) *[duties of liquidators]* to pay or provide for the society's liabilities and the costs, charges and expenses incurred in the liquidation, an order approving any proposed interim or final distribution in money or other assets in accordance with section 232 *[duties of liquidators]*;

(u) an order respecting liabilities due to creditors of the society, or money or other assets due to members of the society, whose whereabouts are unknown;

(v) an order, on the terms and conditions the court considers appropriate, continuing, or staying or discontinuing, the liquidation;

(w) if an order is made staying or discontinuing the liquidation under paragraph (v) of this subsection, an order that the liquidator restore to the society all of the society's remaining property, rights and interests;

(x) an order determining whether the society's purposes are exclusively charitable.

(4) If an order is made under subsection (3) (v), the liquidator must file with the registrar a copy of the entered order promptly after the making of the order.

Source: BCA, s. 325

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 278, 279, 288, 290

Comment: This section provides a non-exhaustive list of the different orders that may be applied for in respect of a society in liquidation. The types of orders available are very similar to those in the CA (which the *Society Act*, 1996, incorporates by reference) and include wide-ranging provisions relating to liquidators, auditors, limiting directors' powers, and discharging liabilities of the society. One new addition is listing that the court may make an order to determine whether or not

a society's purposes are exclusively charitable. This issue is significant for the rules relating to the distribution of the society's remaining assets, which are set out in section 232.

Remuneration of liquidator appointed by court

228 The court must set the remuneration of any liquidator it appoints.

Source: BCA, s. 326

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 279 (1)

Comment: This section is self-explanatory.

Division 5 – Liquidators

Qualifications of liquidators

229 (1) A person not qualified to act as a receiver or receiver manager under section 64 (2) of the *Personal Property Security Act* is not qualified to become or act as a liquidator, except that, with the consent in writing of all the members of a society, a person referred to in section 64 (2) (e) of the *Personal Property Security Act* who is licensed as a trustee under the *Bankruptcy and Insolvency Act* (Canada) is qualified to become and act as a liquidator for the society.

(2) A person who has been appointed as a liquidator under this Act and who is not, or who ceases to be, qualified to act as a liquidator must,

(a) in a voluntary liquidation under Division 3, promptly resign as liquidator, or

(b) in a liquidation by court order under this Act, seek directions from the court on notice to the person on whose application the liquidator was appointed.

Source: BCA, s. 327

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 275

Comment: These provisions are almost identical to those in the CA, which are incorporated by reference by the *Society Act*, 1996. There is a subtle change in subsection (2) (a), which stipulates that a liquidator appointed in a voluntary liquidation must promptly resign if the liquidator is not, or ceases to be, qualified to act as a liquidator; the CA required the liquidator in these circumstances to call a general meeting in order to replace him or her. Section 64 (2) (e) of the *Personal Property Security Act*[228] provides that an insider of the society, an insider of an affiliate of the society, or an auditor of the society is not qualified to act as a receiver of the society. By virtue

228. R.S.B.C. 1996, c. 359.

of subsection (1), such a person may become the society's liquidator if all the members consent in writing and if the person is a licensed bankruptcy trustee.

Anyone who breaches subsection (2) commits an offence. For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12.

Validity of acts of liquidators

230 No act of a person who is appointed as a liquidator under this Act is invalid merely because of a defect in the liquidator's appointment or qualifications.

Source: BCA, s. 328

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 280

Comment: This section confirms that the validity of the acts taken by a liquidator will not be affected by a defect in the liquidator's appointment. This rule is primarily intended to protect third parties, who may rely on the acts of a liquidator and may not be in a position to investigate the circumstances of the liquidator's appointment.

Filing of notices

231 (1) A liquidator appointed under this Act must file with the registrar,

(a) within 10 days after the commencement of the liquidation, if the liquidator's appointment is not reflected in a statement of intent to liquidate filed with the registrar under section 223 *[statement of intent to liquidate]*, a notice of appointment of liquidator in the form established by the registrar,

(b) in the case of a liquidator who is appointed after the commencement of the liquidation, promptly after being appointed, a notice of appointment of liquidator in the form established by the registrar,

(c) within 7 days after any change in the mailing address or delivery address of the liquidator or the liquidation records office, a notice of change of address of liquidator in the form established by the registrar, and

(d) within 7 days after resigning, being removed as liquidator or ceasing to act for any other reason, a notice of ceasing to act as liquidator in the form established by the registrar.

(2) A notice of appointment of liquidator filed with the registrar under subsection (1) (a) or (b) of this section must include

(a) the full name, the mailing address and the delivery address of the liquidator, and

(b) the mailing address and the delivery address of the liquidation records office.

Source: BCA, s. 329

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 277, 283

Comment: This is simply a procedural section that sets out a liquidator's duty to file a notice with the Registrar of Companies following appointment, resignation, removal, or change of address.

Duties of liquidators

232 (1) A liquidator must

(a) promptly after the commencement of the liquidation, comply with section 233 *[notice to creditors]*,

(b) take into the liquidator's custody or control the property, rights and interests of the society, including, without limitation,

(i) the records that the society is required to keep under section 38 *[records office records]*, and

(ii) the other records of the society,

(c) ensure that the records referred to in paragraph (b) (i) of this subsection are maintained and made available in accordance with Division 5 of Part 2,

(d) without limiting paragraph (c), if the records that the society is required to keep at its records office have been physically transferred to a new location, promptly after that change occurs, file with the registrar a notice of change of address, in the form established by the registrar, to transfer the location of the records office to that new location, and section 31 (3) *[change of registered or records office]* applies,

(e) subject to this Part, use the liquidator's own discretion in realizing the assets of the society or distributing those assets in accordance with this section,

(f) keep proper records of all matters relating to the liquidation, including accounts of the money of the society received and paid out by the liquidator,

(g) include, on each invoice, order for goods and business letter issued by or on behalf of the liquidator or on which the name of the society appears, a statement that the society is in liquidation,

(h) use the designation of liquidator of the society on any record issued by or on behalf of the liquidator in relation to the society and on which the name of the liquidator appears,

(i) until money held by the liquidator is required for distribution to creditors and members, invest that money as permitted under the provisions of the *Trustee Act* respecting the investment of trust property by a trustee, or place that money on deposit in an interest bearing account with any savings institution, and add to the assets of the society any dividends or interest received from that money,

(j) if at any time the liquidator determines that the society is unable to pay or provide for the discharge of its liabilities, promptly apply to the court to

(i) stay any proceedings taken under this Part, and

(ii) seek directions,

(k) if the activities of the society are carried on under section 236 (1) (c) (iii) *[powers of liquidators]* or 241 (2) *[capacity of societies in liquidation]*, produce at least once in every 12 month period after the liquidator's appointment, or more or less often as the court may order, financial statements of the society in the form required by the court or, if and to the extent that there are no court requirements, financial statements considered by the liquidator to be appropriate,

(l) annually, within 2 months after each anniversary of the date of the recognition of the society, file with the registrar, instead of an annual report for the society under section 46 *[society to file annual report]*, a liquidation report in the form established by the registrar containing information that is current to the most recent anniversary,

(m) dispose of the assets of the society, other than assets that are to be distributed under paragraph (n), and pay or make provision for all of the society's liabilities, and

(n) after publishing and sending the notices required under section 233 *[notice to creditors]*, and after paying or providing for, in the manner contemplated by this Part, all of the society's liabilities, including the remuneration, if any, of the liquidator and all of the other costs, charges and expenses properly incurred and to be incurred in relation to the liquidation, distribute the society's remaining assets, either in money or in kind, as follows:

(i) if the society has exclusively charitable purposes, unless the constitution or pre-existing constitution, as the case may be, bylaws or an ordinary resolution provides for the payment,

transfer and delivery of the assets remaining to a charitable institution or to trustees on trust for a charitable purpose, the assets remaining must be paid, transferred or delivered to the Minister of Finance;

(ii) if the society does not have exclusively charitable purposes, unless the constitution or pre-existing constitution, as the case may be, bylaws or an ordinary resolution provides otherwise, the assets remaining must be paid, transferred or delivered to the Minister of Finance.

(2) Despite any other provision of this Act, on the liquidation of a society with exclusively charitable purposes, the assets must not be distributed among the members.

Source: BCA, s. 330; *Society Act*, 1996, s. 73

Reference: tentative recommendation (98); tentative recommendation (99); tentative recommendation (100)

Concordance: *Society Act*, 1996, ss. 71 (1), 73: CA, ss. 282–84, 286, 288

Comment: The purpose of this section is to define the various duties of the liquidator during the dissolution and liquidation process. These duties are largely self-explanatory, but subsection (1) (n) dealing with the disposal of any assets remaining after payment of a society's debts are particularly worthy of additional comment here.

The consultation paper tentatively recommended following the approach taken in the *Society Act*, 1996, by differentiating between two types of society, those that have a charitable purpose and those that do not. This proposal received several thoughtful comments from a number of individuals and organizations, including the Charities Directorate of the Canada Revenue Agency. Upon further consideration, the committee has made two noteworthy changes from the position of the *Society Act*, 1996.

First, the new *Society Act* distinguishes between societies that have *exclusively* charitable proposes and societies that do not have exclusively charitable purposes. The *Society Act*, 1996, distinguishes between societies that have *a* charitable purpose and societies that do not have a charitable purpose. This change in language should result in a clearer and fairer division of societies. It also brings the *Society Act* closer to the standards applied by the Canada Revenue Agency under the *Income Tax Act*.

Second, the new *Society Act* does not carry forward the definition of "charitable purpose" that is found in the *Society Act*, 1996. This definition appears to be intended as a restatement of the traditional charitable purposes that have been recognized by the English courts since the seventeenth century. The problem with it is that it does not explicitly make that purpose clear. As the Charities Directorate pointed out in its response, an identical section in an Ontario statute[229] has been interpreted as expanding the common law definition of "charity" to encompass amateur sport

229. *Charities Accounting Act*, R.S.O. 1990, c. C.10, s. 7.

organizations that promote physical fitness.[230] As a consequence, many amateur sports organizations would be required on dissolution, to transfer their assets to a charitable institution or a qualifying donee. As it is not the intent of the new *Society Act* to effect reforms to the definition of "charity," the committee has decided simply not to carry forward this provision. As a result, the common law definition will apply. This approach is also consistent with current practice under the *Income Tax Act*.

So, in the case of a society with exclusively charitable purposes, subsection (1) (n) (i) provides that unless the society's constitution or pre-existing constitution (as the case may be), bylaws, or an ordinary resolution of the members provides that the remaining assets are to be transferred to another charitable institution or on trust for a charitable purpose, then the remaining assets must be transferred to the British Columbia Minster of Finance. In the case of a society that does not have exclusively charitable purposes, subsection (1) (n) (ii) provides that the constitution or pre-existing constitution (as the case may be), bylaws, or an ordinary resolution may provide for the disposition of the remaining assets to the members or another destination. If no provision has been made then the default position is again that the remaining assets must be transferred to the British Columbia Minister of Finance. In practice, the default is rarely relied on. These provisions are a fundamental part of not-for-profit corporate law making up a large part of the not-for-profit identity, which is why they have been retained in the new *Society Act*.

Notice to creditors

233 (1) A liquidator must

(a) publish a notice that complies with subsection (2) in

(i) the Gazette, and

(ii) a newspaper that is distributed generally in the place where the society has its registered office, and

(b) promptly after that, send a notice that complies with subsection (3) to the last known address of each creditor known to the liquidator.

(2) The notice published under subsection (1) (a) must disclose that the society is in liquidation and must require

(a) any person indebted to the society to render an account of the amount owing and to pay that amount to the liquidator at the time and place specified by the notice,

(b) any person having custody or control of any property, rights or interests of the society to

(i) notify the liquidator of that custody or control in the manner and at the time and place specified by the notice, and

(ii) deliver the property, rights or interests to the liquidator, or provide control to the liquidator over the property, rights or inter-

230. *Re Laidlaw Foundation* (1983), 48 O.R. (2d) 549 at 552, 13 D.L.R. (4th) 491 at 494 (Surr. Ct.), *aff'd* (1984), 48 O.R. (2d) 549 at 574, 13 D.L.R. (4th) 491 at 517 (Div. Ct.).

ests, in the manner and at the time and place specified or to be specified by the liquidator, and

(c) any person having a claim against the society to provide particulars of the claim in writing to the liquidator within 2 months after the date of publication of the notice in the Gazette.

(3) Each notice sent under subsection (1) (b) must disclose that the society is in liquidation and must include

(a) a statement that the liquidator will, on request and without charge, send to the person to whom the notice is sent, a list of all of the society's known creditors and the amounts that the liquidator has accepted as the amounts that are owed by the society to each of those creditors,

(b) a statement of the amount, if any, that the liquidator, in good faith, accepts is owing by the society to the person to whom the notice is sent,

(c) the date on which the notice referred to in subsection (1) (a) (i) was published in the Gazette, and

(d) a statement that the person to whom the notice is sent may not pursue any claim for any money owed by the society that is in excess of the amount referred to in paragraph (b) of this subsection unless, within 4 months after the date on which the notice referred to in subsection (1) (a) (i) was published in the Gazette, that person

(i) satisfies the liquidator that a greater amount is owing, or

(ii) disputes the amount referred to in paragraph (b) of this subsection in accordance with section 234 (2) (a) (ii) *[limitations on claimants]* or otherwise satisfies the court that a greater amount is owing.

(4) If, within 2 months after the date on which the notice referred to in subsection (1) (a) (i) of this section was published in the Gazette, the liquidator receives written notice of a person's claim against the society or otherwise becomes aware of a claim in respect of which the liquidator has not sent a notice under subsection (1) (b), the liquidator must promptly send to the creditor a notice that complies with subsection (3).

Source: BCA, s. 331

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, 283, 284

Comment: The purpose of this section is to define the liquidator's obligations for giving notice of the liquidation to creditors and debtors. The principal difference from the equivalent provision of the CA (which the *Society Act*, 1996, incorporates by reference) is that there is no longer a requirement to call a creditors' meeting. Under the new *Society Act* there are two different notices that must be given by the liquidator. Subsection (1) (a) provides that a notice must be published in the British Columbia Gazette (which is an official government publication published weekly that contains, among other things, legal notices) and a local newspaper. Subsection (2) sets out the requirements for the notice. Subsection 1 (b) stipulates that after the notice in subsection (1) (a) has been published, the liquidator must then promptly send another notice, in accordance with subsection (3) to the last known address of each creditor.

Limitations on claimants

234 (1) A person must not, before or after the dissolution of a society that is in liquidation, claim against the society or against its liquidator unless

(a) the liquidator sends a notice to that person under section 233 (1) (b) or (4) *[notice to creditors]*,

(b) the person, within 2 months after the date on which the notice referred to in section 233 (1) (a) (i) *[notice to creditors]* was published in the Gazette, provides written notice to the liquidator of the person's claim against the society, and the liquidator refuses or neglects to send to the person a notice in accordance with section 233 (4) *[notice to creditors]*,

(c) the liquidator knows or ought to know that the person is a person to whom a notice ought to have been sent under section 233 (1) (b) or (4) *[notice to creditors]* and the liquidator refuses or neglects to send the person that notice, or

(d) the court orders otherwise.

(2) A person to whom the liquidator sends a notice under section 233 (1) (b) or (4) *[notice to creditors]* must not, before or after the dissolution of the society in liquidation, claim against the society or its liquidator an amount greater than the amount specified by the notice unless

(a) within 4 months after the date on which the notice referred to in section 233 (1) (a) (i) *[notice to creditors]* was published in the Gazette,

(i) the person satisfies the liquidator that a greater amount is owing, or

(ii) the person brings a legal proceeding to dispute the specified amount, or

(b) the court orders otherwise.

Source: BCA, s. 332

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 285

Comment: These provisions are intended to provide a degree of control over claims by creditors against a society during the liquidation process by setting certain limitations as to when a claim can be made and the amount of such a claim. The limitations are tied in with the notice requirements in the preceding section.

Liquidation records office

235 (1) A liquidator of a society must establish a liquidation records office at which the liquidator must retain the following records:

(a) a copy of any entered court order, and of any other order or decision made in a legal proceeding, that affects the liquidation or dissolution or the liquidator in the liquidator's capacity as liquidator of the society;

(b) a copy of any notice or report filed with the registrar in relation to the society under section 231 (1) *[filing of notices]* or 232 (1) (k) *[duties of liquidators]*;

(c) all of the financial statements, if any, produced in relation to the society under section 232 (1) (j) *[duties of liquidators]*;

(d) a copy of each notice sent by the liquidator in relation to the society under section 233 (1) (b) or (4) *[notice to creditors]*;

(e) all of the accounts prepared by the liquidator in relation to the society under sections 239 (1) *[obligation to prepare accounts]* and 242 (1) (a) *[completion of liquidation]*.

(2) A liquidator must select as the liquidation records office an office in British Columbia that will permit access to be made to the records retained there during statutory business hours.

(3) Subject to subsection (2) of this section, the liquidator's office, the liquidation records office and the records office of the society being liquidated may, but need not, be located at the same place.

(4) Sections 253 (2) to (4) *[entitlement to inspect records of dissolved societies]* and 254 *[remedies on denial of access to or copies of records of dissolved societies]* apply in relation to the records retained by the liquidator under subsection (1) of this section.

Source: BCA, s. 333

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section sets out the requirement for a liquidator to establish a liquidation records office and details the documents that must be retained. This requirement is intended to allow for access to the certain key records regarding the liquidation of the society. The liquidation records office must be in British Columbia and open during statutory business hours. (This term is defined in section 1; in brief, it means from 9:00 a.m. to 4:00 p.m. on a business day.) There was no requirement to establish a liquidation records office under the CA (which the *Society Act*, 1996, incorporates by reference); there was a requirement under the CA to hold a final meeting of members, which has not been carried forward in this Act or the BCA. Interested members may inspect records pertaining to the liquidation at the liquidation records office. The location of the liquidation records office may be at the liquidator's office, the society's records office, or some other location.

Powers of liquidators

236 (1) Subject to section 222 (1) *[limits on liquidator]*, if a liquidator is appointed under this Act,

(a) the liquidator has the powers to manage or supervise the management of the activities and affairs of the society that were, before the appointment, held by the directors and officers of the society, and the powers of the directors and officers cease, except so far as the liquidator approves the continuation of them,

(b) the liquidator may exercise the powers of the society that are not required by this Act to be exercised by members of the society, and

(c) the liquidator may, without limiting paragraphs (a) and (b) of this subsection,

(i) retain lawyers, accountants, engineers, appraisers and other professional advisers,

(ii) bring, defend or take part in any legal proceeding in the name of and on behalf of the society,

(iii) carry on the activities of the society if and to the extent that the liquidator considers it necessary or advisable to do so for the liquidation,

(iv) sell by public auction or private sale any assets of the society,

(v) do all acts and sign any records in the name of and on behalf of the society,

(vi) borrow money on the security of the assets of the society,

(vii) settle or compromise any claims by or against the society,

(viii) do all other things necessary for the liquidation and distribution of the society's assets, and

(ix) change one or both of the mailing address and delivery address of one or both of the society's registered office and records of-

fice by filing with the registrar a notice of change of address in the form established by the registrar, and section 31 (3) *[change of registered or records office]* applies.

(2) A liquidator has the powers referred to in subsection (1) from the commencement of the liquidation until

(a) the liquidation is stayed or discontinued, or

(b) in the case of a liquidation conducted under Division 3,

(i) the liquidation is stayed or discontinued, or

(ii) the statement of intent to liquidate is withdrawn under section 225 (1) *[withdrawal of statement of intent to liquidate]*.

Source: BCA, s. 334

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 282, 288 (1)

Comment: This section enables the liquidator to step into the shoes of the directors, effectively to manage and run the society during the liquidation process. While the CA (which is incorporated by reference for societies under the *Society Act*, 1996) did essentially give the liquidator the same powers, they are set out here in much greater detail. These powers are generally subject to the authority of the members, conferred by section 222, to restrict the liquidator from doing certain things by passing an ordinary resolution setting out the restrictions.

Recovery of property by liquidators

237 (1) A past or present director, receiver, receiver manager, officer, employee, banker, auditor, member or agent of a society that is in liquidation or of any of its affiliates must, on the request of a liquidator for the society,

(a) provide full disclosure, to the best of that person's knowledge and belief, of all of the property, rights and interests of the society or disposed of by the society, including how, to whom, for what consideration and when the society disposed of any part of the property, rights and interests, except any part disposed of in the ordinary course of the activities of the society, and

(b) deliver to the liquidator, or as the liquidator directs, all of the property, rights and interests of the society that are in that person's custody or control.

(2) If a liquidator believes that a person has property, rights or interests of the society in that person's custody or control, or that a person has concealed, withheld or misappropriated property, rights or interests of the society, the liquidator may apply to the court for an order requiring the person to

(a) restore the property, rights or interests to the society or pay to the liquidator compensation in respect of the concealment, withholding or misappropriation of the property, rights or interests, or

(b) appear before the court to be examined at the time and place designated in the order.

(3) The court may make any order it considers appropriate, including an order that a person restore to the liquidator property, rights or interests, or pay to the liquidator compensation in respect of property, rights or interests,

(a) on an application under subsection (2), or

(b) if an examination is ordered under subsection (2) (b) and that examination discloses that

(i) the person has property, rights or interests of the society in that person's custody or control, or

(ii) the person has concealed, withheld or misappropriated property, rights or interests of the society.

Source: BCA, s. 335

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 291 (1)

Comment: It is very important that liquidators be able to recover all outstanding society property, as societies usually only get to this position when they have outstanding debts to be satisfied. These provisions are more extensive than those found in the CA (which the *Society Act*, 1996, adopts) as they expressly provide in subsection (2) for the liquidator to apply to court for an order if the liquidator believes that property, rights, or interests of the society are being withheld, concealed or misappropriated. Further, anyone who contravenes this section commits an offence under section 322. For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12.

Provision for unpaid debts and undelivered assets

238 (1) In this section, "administrator" has the same meaning as in the *Unclaimed Property Act*.

(2) If the whereabouts of a creditor of a society is unknown, the liquidator of the society must, before making the distribution required by section 232 (1) (n) *[duties of liquidators]*, make payment, in accordance with subsection (3) of this section, of the amount of the liability that the liquidator has, in good faith, determined is due to that creditor.

(3) The liquidator referred to in subsection (2) must, after making reasonable efforts to determine the whereabouts of the creditor,

(a) pay, in accordance with an order of the court under section 227 (3) (u) *[court orders respecting liquidations]*, the amount of the liability that the liquidator has, in good faith, determined is due to the creditor, or

(b) if no order has been made under section 227 (3) (u) *[court orders respecting liquidations]* and the liability has remained unpaid for at least 6 months after the date it became payable, pay the amount of the liability to the administrator, and include a statement showing,

(i) to the fullest extent known to the liquidator, the name of the creditor, and

(ii) the last known address of the creditor.

(4) If the whereabouts of a member of a society is unknown, the liquidator of the society must, before making the distribution required by section 232 (1) (n) *[duties of liquidators]*,

(a) make payment, in accordance with subsection (5) of this section, of the money that the liquidator has, in good faith, determined is due to that member, or

(b) deliver, in accordance with subsection (5), any other assets that the liquidator has, in good faith, determined are due to that member.

(5) The liquidator referred to in subsection (4) must, after making reasonable efforts to determine the whereabouts of the member,

(a) pay or deliver, in accordance with an order of the court under section 227 (3) (u) *[court orders respecting liquidations]*, the money or other assets that the liquidator has, in good faith, determined are due to the member, or

(b) if no order has been made under section 227 (3) (u) *[court orders respecting liquidations]*and the money or other assets have remained unclaimed or undistributed for at least 6 months after the date the money or assets became payable or deliverable, pay the money or deliver the assets to the administrator, and include a statement showing,

(i) to the fullest extent known to the liquidator, the name of the member, and

(ii) the last known address of the member.

(6) The administrator must, after receipt of the money or other assets referred to in this section, send a receipt to the liquidator.

(7) A liquidator who has complied with subsection (3) (a) or (5) (a) or who has been sent a receipt under subsection (6) is discharged from

(a) any liability for the money or other assets so paid or delivered, and

(b) any claims in respect of the money or other assets so paid or delivered that might be made by or on behalf of the persons entitled to the money or other assets.

(8) The administrator may realize any assets delivered to the administrator under this section and any money received or realized under this section is deemed to be an unclaimed money deposit under the *Unclaimed Property Act*.

Source: BCA, s. 337

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 294

Comment: Most of this section is procedural in nature and its purpose is to provide a way for a liquidator to dispose of unpaid debts and undelivered assets when the whereabouts of a creditor or a member of the society are unknown. The procedure and rules are essentially the same as in section 217 of the new *Society Act*, which covers a society that is going through the voluntary dissolution procedure and is unable to pay off its debts or distribute assets due to the whereabouts of a creditor or member not being known.

Obligation to prepare accounts

239 (1) A liquidator must prepare accounts of the liquidation showing how it has been conducted and how the assets of the society have been disposed of, including accounting for the income, payments to creditors, provision for creditors and distributions to members in the period covered by the account,

(a) once in every 12 month period after the liquidator's appointment, but at least one accounting must be made before effecting payment of or making provision for the liabilities referred to in section 232 (1) (n) *[duties of liquidators]*,

(b) promptly after effecting payment of or making provision for the liabilities referred to in section 232 (1) (n) *[duties of liquidators]* but before making the distribution to members required by that section, and

(c) at any other times ordered by the court or, in the case of a liquidation under Division 3, at any other times ordered by the court and at any other times that the members may, by an ordinary resolution, direct.

(2) The accounts prepared under subsection (1) of this section must be deposited in the liquidation records office promptly after their preparation.

Source: BCA, s. 338

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section sets out the liquidator's obligation to file accounts of the liquidation and details when these accounts must be produced. This duty is an important part of the liquidator's obligations during the liquidation process, as it presents the final financial picture of the society before dissolution. It also helps to ensure fairness to creditors, members, and other persons involved in the liquidation.

Limitations on liability

240 A liquidator is not liable in respect of any act done in the administration of the affairs of the society or otherwise done by that person in the person's capacity as liquidator if, in doing the act, the liquidator relies, in good faith, on

(a) financial statements of the society represented to the liquidator by a director or officer of the society or in a written report of the auditor of the society to fairly reflect the financial position of the society,

(b) a written report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by that person,

(c) a statement of fact represented to the liquidator by a director or officer of the society to be correct, or

(d) any record, information or representation that the court considers provides reasonable grounds for the actions of the liquidator, whether or not

(i) the record was forged, fraudulently made or inaccurate, or

(ii) the information or representation was fraudulently made or inaccurate.

Source: BCA, s. 339

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section is intended to provide a degree of comfort to the liquidator by enabling the carrying out of the affairs of the society without fear of incurring liability for any act in which the liquidator relied in good faith on certain information or documentation supplied to the liquidator. This limitation on liability for liquidators parallels a similar limitation for directors and officers, which is found in section 89.

Division 6 – Corporate Status before Dissolution

Capacity of societies in liquidation

241 (1) Subject to subsection (2), until a society in liquidation is dissolved, the corporate status and the powers and capacity of the society continue.

(2) A society in liquidation must, from the commencement of the liquidation, refrain from carrying on its activities except to the extent that the liquidator considers necessary or advisable for the liquidation.

Source: BCA, s. 340

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 282 (a)

Comment: Subsection (1) is intended to confirm the capacity and status of a society prior to dissolution and during the period of liquidation. Subsection (2) is consistent with the transfer of managerial authority from the society's directors and officers to its liquidator. The liquidation process involves the winding down the society's activities in preparation for its dissolution.

Division 7 – Proceedings for Dissolution

Completion of liquidation

242 (1) Within 3 months after making the distribution required by section 232 (1) (n) *[duties of liquidators]*, a liquidator must

(a) prepare the final accounts of the liquidation showing how it has been conducted and how the assets of the society have been disposed of,

(b) deposit those final accounts in the liquidation records office, and

(c) send to each member of the society a notice

(i) setting out the mailing address and the delivery address of the liquidation records office,

(ii) stating that the final accounts have been prepared and deposited in the liquidation records office,

(iii) stating that the final accounts will be open for inspection at the liquidation records office during statutory business hours for a period of at least 3 months after the date of the notice, and

(iv) stating that a member of the society is entitled, on making a request within the 3 month period and without charge, to receive a copy of the final accounts from the liquidator.

(2) A liquidator must ensure that the final accounts referred to in subsection (1) (a) of this section are retained at the liquidation records office for at least 3 months after the date of the notice and must, without charge,

(a) permit each member to inspect the final accounts during statutory business hours within the 3 month period, and

(b) send, to each member who requests it within the 3 month period, promptly after the liquidator's receipt of the request, a copy of the final accounts.

(3) The liquidator must not apply for dissolution of the society under section 244 *[application for dissolution]* until the expiry of the 3 month period referred to in subsection (2) of this section.

Source: BCA, s. 341

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 292, 293 (2)

Comment: This section is largely procedural and imposes on obligation on the liquidator following distribution of the assets of the society to prepare final accounts of the liquidation, deposit them at the liquidation records office, and notify the members that the accounts are available for inspection or for obtaining copies. This procedure represents a change from the procedure used in the CA (and adopted by the *Society Act*, 1996), which required a final meeting of the members. Under this section any interested member may view the final accounts at the liquidation records office for a three-month period. The expression "statutory business hours," used in subsections (1) (c) (iii) and (2) (a), is defined in section 1. In brief, statutory business hours are 9:00 a.m. to 4:00 p.m. on any business day.

Court approval of dissolution in court ordered liquidations

243 (1) In addition to complying with the obligations imposed under section 242 *[completion of liquidation]*, a liquidator appointed by the court must, before applying for dissolution of the society, obtain an order of the court approving that dissolution.

(2) An application to court under subsection (1) of this section for an order approving a dissolution must include the final accounts of the liquidation prepared under section 242 (1) (a) *[completion of liquidation]*.

(3) On an application for an order under subsection (1) of this section, the court may make any order it considers appropriate and may, without limiting this, make an order

(a) approving the dissolution,

(b) respecting the custody or disposal of records referred to in section 252 (1) (a) *[custody of records]*, and

(c) that the liquidator be discharged effective on the dissolution of the society, or at any other time ordered by the court, and, if the liquidator is discharged under this paragraph, section 251 (3) and (4) *[discharge of liquidator by court order]* applies.

Source: BCA, s. 342

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section only applies to a court-ordered liquidation. For this type of liquidation, which will usually occur only in contested circumstances, it makes sense to have the court approve the liquidation.

Application for dissolution

244 (1) Promptly after expiry of the 3 month period referred to in section 242 (2) *[completion of liquidation]*, and, in the case of a liquidator appointed by the court, after complying with section 243 *[court approval of dissolution in court ordered liquidations]*, the liquidator must file with the registrar an application for dissolution, in the form established by the registrar, containing a statement of the liquidator that

(a) the final accounts referred to in section 242 (1) (a) *[completion of liquidation]* have been prepared and have been deposited in the liquidation records office, and

(b) in the case of a liquidator appointed by the court, a copy of the entered order referred to in section 243 (3) (a) *[court approval of dissolution in court ordered liquidations]* has been deposited in the liquidation records office.

(2) Subject to section 225 (1) *[withdrawal of statement of intent to liquidate]*, unless the date of dissolution is deferred under subsection (3) of this section, a society for which a liquidator had been appointed is dissolved,

(a) if the appointment of the liquidator was made by the court, on the date and time that the application for dissolution is filed with the registrar or, subject to section 305 *[limitation on future dated filings]*, if the application for dissolution specifies a date, or a date and time, on which the dissolution is to take effect that is later than the date and time on which the application for dissolution is filed with the registrar, on the specified date and time or, if no time is specified, at the beginning of the specified date, or

(b) in any other case, on the beginning of the day that is one month after the date on which the application for dissolution is filed with the registrar.

(3) Subject to subsection (4) of this section, on the application of the liquidator or any person mentioned in section 226 (1) *[court may order society to be liquidated and dissolved]*, the court may make an order

(a) deferring the date of dissolution to a new date, or

(b) deferring the dissolution generally until a new application for dissolution is filed.

(4) No order made under subsection (3) of this section is effective unless a copy of that entered order is filed with the registrar before the society is dissolved.

(5) If an order is made under subsection (3) (a) and is filed with the registrar before the society is dissolved, the society is dissolved on the beginning of the new date specified by that order.

Source: BCA, s. 343

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 292, 293

Comment: Under the CA (which the *Society Act*, 1996, incorporates by reference), in order to apply for dissolution the liquidator was required to file with the Registrar of Companies a final account and a return in a set form not more than 7 days after the final general meeting. The registrar would then register these documents and three months thereafter the society was dissolved. The procedure in the new Act is slightly different. Under subsection (1) the liquidator must file with the registrar an application for dissolution, which includes various statements. Subsection (2) then goes on to define the date of the dissolution. Subsection (3) permits the court to defer the date of dissolution if such an application has been received. Subsections (4) and (5) are self-explanatory.

Division 8 – Effect of Dissolution

Effect of dissolution

245 (1) Subject to sections 247 *[dissolved societies deemed to continue for litigation purposes]* and 248 *[liabilities survive]*, when a society is dissolved under this Part or under section 318 *[dissolutions and cancellations of registration by registrar]* or 319 *[Lieutenant Governor in Council may cancel incorporation of society]*, the society ceases to exist for any purpose.

(2) If, when a society is dissolved, the society has an asset that has not yet been distributed, the asset vests in the government unless

(a) the asset is one in which the society is a joint tenant, in which case the asset vests in the other joint tenant on dissolution, or

(b) the asset is land located in British Columbia, in which case the asset is, subject to paragraph (a) of this subsection, deemed to escheat to the government under section 4 of the *Escheat Act*.

Source: BCA, s. 344

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: Subsection (1) sets out the fundamental consequence of a dissolution of a society under this Part or under subsequent provisions relating to the administrative dissolution of a society by the Registrar of Companies or the dissolution of a society by order of the Lieutenant Governor in Council (which is, in effect, the cabinet of the provincial government). This consequence is that the society's existence is terminated. There are two qualifications to this basic rule. First, a society's existence continues after dissolution for litigation purposes. Second, the liabilities of a director, officer, member, or liquidator continue after dissolution.

Subsection (2) address one effect of the basic rule stated in subsection (1). If the dissolution process concludes without the distribution of all of the society's property, then that property no longer has an owner when the society is terminated. Subsection (2) confirms the longstanding common law rule that such ownerless property vests in the government. This rule distinguished between personal property (which reverted to the government by virtue of *bona vacantia*) and land (which reverted to the government by escheat). This distinction is preserved in this subsection. The *Escheat Act* authorizes the government to restore land that has escheated to it to legal or moral claimants. Apart from this procedure, any property caught by subsection (2) can only be returned to the society by restoring the society in accordance with Division 11 of this Part.

If the property was held in joint tenancy, then it vests in the surviving joint tenants.

Certificates of dissolution

246 After a society is dissolved under this Part, the registrar must

(a) issue a certificate of dissolution showing the date and time on which the society is dissolved,

(b) furnish a copy of the certificate of dissolution to each liquidator for the society or, if there is no liquidator for the society, furnish a copy of the certificate of dissolution to

(i) the person who, under section 252 *[custody of records]*, is required to retain the records of the society, and

(ii) the person who submitted the application for dissolution on behalf of the society, and

(c) publish in the prescribed manner a notice that the society has been dissolved.

Source: BCA, s. 345

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 261

Comment: This section places an obligation on the registrar to issue a certificate of dissolution and to publish a notice in the prescribed manner that the society has been dissolved. The "prescribed manner" of publication is set out, for companies, in the *Business Corporations Regulation*.[231] It requires publication "on a website maintained by or on behalf of the government." This method of publication would also be appropriate for societies.

Dissolved societies deemed to continue for litigation purposes

247 (1) Despite the dissolution of a society under this Act,

(a) a legal proceeding commenced by or against the society before its dissolution may be continued as if the society had not been dissolved, and

(b) a legal proceeding may be brought against the society within 2 years after its dissolution as if the society had not been dissolved.

(2) Unless the court orders otherwise, records related to a legal proceeding referred to in subsection (1) may be

(a) delivered to the society at its address for delivery in the legal proceeding, or

(b) if the society does not have an address for delivery in the legal proceeding, served on the society

(i) by personal service of those records on any individual who was a director or senior officer of the society immediately before the society was dissolved, or

(ii) in the manner ordered by the court.

Source: BCA, s. 346

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: At common law, the dissolution of a society abruptly terminated its existence.[232] As a consequence, a dissolved society could not sustain proceedings in the courts. British Columbia has long had legislation that dulls, somewhat, the sharpness of this transition from active to dissolved. This legislation has traditionally taken the form of a procedure for restoration of societies and companies, with retroactive effect. (The restoration procedure for the new *Society Act* is found in Division 11 of this Part.) This section, which has no equivalent in the CA (the Act that the *Society Act*, 1996, incorporates by reference to govern dissolution of societies), represents a further step in the blurring of the line between active and dissolved societies.

231. *Supra* note 90, s. 6.

232. *See* McGuinness, *supra* note 157 at 1608 ("At common law a dissolved corporation could not acquire or exercise rights or property and could not sue or be sued." [citation omitted]).

There is little jurisprudence or commentary regarding the equivalent provision in the BCA or similar legislation in force elsewhere in Canada.[233] This type of legislation should have some effect in overcoming practical problems that may arise in litigation involving corporations, but it is difficult to gauge exactly what effect such legislation is having. It is noteworthy that this section applies to any dissolution of a society under this Act, which includes dissolutions by the Registrar of Companies under section 318 for an administrative default (such as failing to file annual reports). There are numerous examples of proceedings being commenced by or against a corporation that the parties fail to realize has been administratively dissolved.[234] Before the first appearance of this section in BCA, the position of the British Columbia courts in these circumstance was that the court could either dismiss the proceedings as an abuse of process or it could grant a stay of proceedings to allow for an application to restore the corporation.[235] This section will allow for such proceedings to continue, if they were commenced before or within two years of the society's dissolution, without the time and expense required to restore the society.

Subsection (2) addresses the practical problem of serving records in a proceeding involving a dissolved society.

Liabilities survive

248 Subject to sections 249 (2) and (4) *[liability of members of dissolved societies]* and 251 (3) *[discharge of liquidator by court order]*, the liability of each director, officer, member and liquidator of a society that is dissolved continues and may be enforced as if the society had not been dissolved.

Source: BCA, s. 347

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 260

Comment: This section is virtually identical to a section of the CA that was incorporated by reference by the *Society Act*, 1996. These liabilities survive, in part, because as one commentator pointed out under Canadian law a dissolved corporation ". . . is not so much a dead [corporation] as one that is in a state of suspended animation since the corporation may be revived with retroactive effect upon its revival."[236] Any liabilities that accrue during this period of suspended animation may be enforced under the previous section or, if that section does not apply, upon the restoration of the society.[237] In view of these continuing liabilities, practice guides often recommend

233. *See*, *e.g.*, *Canada Business Corporations Act*, *supra* note 75, s. 226 (2).

234. *See*, *e.g.*, *Safe Environment Engineering Canada Inc. v. Watson*, 2004 BCSC 288, [2004] B.C.J. No. 408 (QL).

235. *See First Investment Corp. v. Sia* (1995), 43 C.P.C. (3d) 247 (B.C.S.C.); *Zynik Capital Corp. v. Faris*, 2004 BCSC 1032, 41 B.C.L.R. (4th) 190.

236. McGuinness, *supra* note 157 at 1608.

237. *See Canadian Sports Specialist Inc. v. Philippon* (1990), 66 D.L.R. (4th) 188 at 192 (B.C.S.C.), Skipp J. ("The plaintiff company was restored just prior to trial and, in my view, the result of that restoration was that the defendant was rightfully found liable as a director for acts done as such during the struck-off period.").

that society directors and officers resign before dissolution of the society.[238] The continuing liability of members is capped in accordance with the next section.

Liability of members of dissolved societies

249 (1) If it appears to the court in a legal proceeding referred to in section 247 (1) *[dissolved societies deemed to exist for litigation purposes]* that some or all of a society's assets were distributed, in anticipation of, during or as a result of the society's liquidation or dissolution, to one or more persons who were members of the society, the court may, subject to subsections (2) and (4) of this section,

(a) add those persons as parties to the legal proceeding,

(b) determine, for each of those parties, the amount for which that party is liable and the amount that that party must contribute towards satisfaction of the plaintiff's claim, and

(c) direct payment of the amounts so determined.

(2) A member is not liable under subsection (1) unless the member is added as a party within 2 years after the date on which the society is dissolved.

(3) If a judgment is obtained in a legal proceeding against a dissolved society before or after its dissolution and it appears that some or all of the society's assets were distributed, in anticipation of, during or as a result of the society's liquidation or dissolution, to a person who was a member of the society,

(a) the judgment creditor may, within 2 years after the date on which the society is dissolved, bring a legal proceeding against the member to enforce the liability referred to in paragraph (b) of this subsection, and

(b) the member is liable to the judgment creditor if the court is satisfied that

(i) the person was a member of the society at the time of the distribution,

(ii) some or all of the society's assets were distributed to the member in anticipation of, during or as a result of the society's liquidation or dissolution,

(iii) the member has had an opportunity to raise any reasonable defences to the judgment creditor's claim against the society that

238. *See*, *e.g.*, *British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 12.58 ("It is usually advisable for all the directors and officers to resign well in advance of dissolution.").

were not considered in a trial or summary trial in the legal proceeding in which judgment against the society was obtained, and

(iv) the amount is justly due and owing by the society to the judgment creditor.

(4) The liability of a member under subsection (1) or (3) continues despite the dissolution of the society but is limited to the value that the assets received by the member on that distribution had on the date of that distribution.

Source: BCA, s. 348

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: It is uncommon, but not unheard of, for a member to receive any of a society's assets that are left over after paying its debts on dissolution. This section provides for the continuing liability of a society member in these circumstances. It also limits that liability in two ways. First, under subsections (2) and (3), proceedings against the member may only be commenced within two years of the date of the society's dissolution. Second, under subsection (4), the member's liability is limited to the value of the assets that the member receives on the society's dissolution. There is no equivalent to this section in the CA (which the *Society Act*, 1996, incorporates by reference).

Dissolved society's assets available to judgment creditors

250 (1) In this section, **"dissolved society's assets"** means, in respect of a society that has been dissolved, the assets, other than land in British Columbia, that were owned by it before its dissolution, that vested in the government and that were received by the government, and includes

(a) money, and

(b) any money realized by the government from the disposition of those assets.

(2) If a judgment is obtained in a legal proceeding against a dissolved society before or after its dissolution, the person who obtained the judgment may, within 2 years after the date on which the society is dissolved, apply to the minister for recovery against the dissolved society's assets.

(3) If the minister is satisfied that the applicant under subsection (2) is entitled to recover some or all of the dissolved society's assets in satisfaction of a judgment referred to in that subsection, the minister may,

(a) if the dissolved society's assets have not yet been disposed of, provide those assets to the sheriff who may realize on those assets in accordance with the *Court Order Enforcement Act*, or

(b) in any other case, pay out of the consolidated revenue fund, without an appropriation other than this section, the lesser of

(i) the amount of money that the applicant is entitled to recover out of the dissolved society's assets, and

(ii) the amount of money realized by the government from the disposition of those assets less the government's costs of obtaining, maintaining and disposing of those assets.

(4) If assets are provided to the sheriff under subsection (3) (a), the sheriff must apply the money realized from the disposition of those assets firstly in payment of the government's costs of obtaining, maintaining and disposing of those assets, and secondly in accordance with the scheme for payment under the *Court Order Enforcement Act*.

Source: BCA, s. 349

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section addresses a practical issue that may arise when proceeding against a dissolved society, particularly if that society has been dissolved under section 318 due to an administrative default. When this type of dissolution occurs, or if a dissolution under this Part occurs and property is inadvertently not distributed, then the society's remaining property reverts to the government. As a result, a claimant may obtain a judgment against a society under section 248, only to find that the judgment cannot be satisfied because the society legally owns no assets. This section contains a procedure that may be of assistance to judgment creditors of dissolved societies.

Subsection (1) defines the key term of this section—"dissolved society's assets." These assets are limited to personal property of the society (that is, all of its property other than land and interests in land). The dissolved society's land reverts to the government under the *Escheat Act*.[239] This distinction reflects a longstanding distinction in the law between ownerless personal property, which reverts to the government under *bona vacantia* ("vacant goods," or more loosely "goods without an owner"), and ownerless land, which reverts to the government under the doctrine of escheat. The *Escheat Act* contains a procedure for the recovery of land that has reverted to the government due to the dissolution of a corporation.[240] In simple terms, such land may be restored to the corporation if the corporation is revived within two years of the date of its dissolution under this or any other Act. If it is revived after this two-year period, then an order from the Supreme Court is required to restore the land to the corporation.

Subsection (2) allows anyone who has obtained a judgment against a dissolved society to apply, within two years of the date of the society's dissolution, to the Minister of Finance to recover against the dissolved society's personal property. If the minister grants the application, then sub-

239. R.S.B.C. 1996, c. 120.

240. *Ibid.*, s. 4.

sections (3) and (4) provide for the integration of such recovery with the broader structure of the civil enforcement system, particularly the *Court Order Enforcement Act*.[241]

Division 9 – Discharge of Liquidators of Dissolved Societies

Discharge of liquidator by court order

251 (1) After a society has been dissolved, a liquidator for the society who has not been discharged under section 243 (3) (c) *[court approval of dissolution in court ordered liquidations]* may make application to the court to be discharged as liquidator.

(2) An application under subsection (1) of this section must include the final accounts of the liquidation prepared under section 242 (1) (a) *[completion of liquidation]*.

(3) Subject to subsection (4) of this section, an order of the court discharging a liquidator of a society under this section discharges the liquidator from all liability in respect of any act done or default made by the liquidator in the administration of the affairs of the society or otherwise done by that person in the person's capacity as liquidator of the society.

(4) An order discharging a liquidator under this section

(a) does not, except to the extent that the order expressly provides otherwise, relieve the liquidator from any obligation imposed on the liquidator by section 252 *[custody of records]*, and

(b) may be revoked on proof that it was obtained by fraud, or by suppression or concealment of any material fact.

Source: BCA, s. 350

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 290, 296

Comment: This section sets out the requirements for a release and discharge of a liquidator by court order. The section only applies if the liquidator has not previously been discharged from all liabilities, under a court-ordered liquidation. The application must include the liquidator's final accounts. The order does not relieve the liquidator from any obligations with respect to the dissolved society's records (unless it specifically provides for relief on this score). The order may be revoked on proof that it was obtained by fraud.

241. R.S.B.C. 1996, c. 78.

Division 10 – Records of Dissolved Society

Custody of records

252 (1) In this section, **"dissolved society's records"** means, in relation to a society that is dissolved under this Act,

(a) if a liquidator was appointed for the society,

(i) the records that the society was required to keep under section 38 *[records office records]*, and

(ii) the records referred to in section 235 (1) *[liquidation records office]*, and

(b) in any other case, the records that the society was, immediately before its dissolution, required to keep under section 38 *[records office records]*.

(2) The following person must, for the prescribed period or until the expiration of any shorter period that may be ordered by the court, retain in British Columbia and produce, in accordance with this Division, a dissolved society records:

(a) subject to paragraph (c) of this subsection, if a liquidator was not appointed for the society,

(i) the person who was shown in the application for dissolution as having custody of those records, or

(ii) if there was no application for dissolution, the person who had custody of the records at the time of dissolution;

(b) subject to paragraph (c), if one or more liquidators were appointed for the society, the liquidator who was shown in the application for dissolution as having custody of those records;

(c) any other person ordered by the court.

(3) The person who is required under subsection (2) to retain and produce a dissolved society's records must promptly file the following records with the registrar as applicable:

(a) if the location of the dissolved society's records changes, a notice of change respecting dissolved society's records, in the form established by the registrar, setting out the new location of those records;

(b) if, as a result of a court order under subsection (2) (c), the identity of the person having custody of the dissolved society's records changes, a notice of change respecting dissolved society's records in the form

established by the registrar and a copy of the entered order by which that change is effected;

(c) if the period within which the dissolved society's records must be retained is reduced under subsection (2), a notice of change respecting dissolved society's records in the form established by the registrar and a copy of the entered order by which that reduction is effected.

(4) The dissolved society's records must be retained in a prescribed form.

Source: BCA, s. 351

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 295

Comment: These provisions are intended to set out what society records must be retained following dissolution and by whom. The provisions are broadly similar to the requirements in the CA (which the *Society Act*, 1996, adopts for dissolution of societies), but they are more detailed in that they clearly define what records must be maintained. In addition, the CA only imposed the obligation on liquidators, whereas in the new *Society Act* the obligation also includes those persons having custody of the records, if a liquidator has not been appointed or any other person ordered by the court. The records have to be kept for the prescribed period and in a prescribed form. The BCA regulations provide that records must be kept for two years and can be in an electronic form, microfilmed, bound, or looseleaf.[242] Regulations for the new *Society Act* should provide for the same requirements.

Note that it is an offence for the person required under subsection (2) to retain these records to contravene this section or to refuse to allow a person with a right to inspect and copy these records to have access to these records. For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12.

Entitlement to inspect records of dissolved societies

253 (1) Subject to subsection (4), the person who, under section 252 *[custody of records]*, is required to retain and produce the records of a dissolved society that the society was required to keep under section 38 *[records office records]* must, if and to the extent requested to do so by a person who was, before the dissolution, entitled to inspect any of those records, and on payment of the fee, if any, set for that purpose by the person who is required to retain and produce the records, which fee must not exceed the prescribed fee,

(a) allow the requesting person to inspect that record during statutory business hours, and

(b) promptly provide to that person, in accordance with subsection (3) of this section, a copy of that record.

242. *Business Corporations Regulation*, *supra* note 90, ss. 25, 25.1.

(2) Subject to subsection (4), the person who is, under section 252 *[custody of records]*, required to retain and produce the records referred to in section 235 (1) *[liquidation records office]* must, if and to the extent requested to do so by any person, and on payment of the fee, if any, set for that purpose by the person who is required to retain and produce the records, which fee must not exceed the prescribed fee,

(a) allow the requesting person to inspect any of those records during statutory business hours, and

(b) promptly provide to that person, in accordance with subsection (3) of this section, a copy of any of those records.

(3) A copy of a record referred to in subsection (1) (b) or (2) (b) must be provided in the manner agreed by the parties or, in the absence of such an agreement,

(a) must, if the person seeking to obtain the copy so requests, be provided by mailing it to that person, or

(b) may, in any other case, be provided to that person by making it available for pick-up at the office at which the record is kept.

(4) The person who is required to retain and produce the records referred to in subsection (1) or (2) may impose restrictions on the times during which a person may, under this section, inspect those records, but those restrictions must permit inspection of those records during the times set out in the regulations.

Source: BCA, s. 352

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 295

Comment: This section imposes an obligation on the person required to retain and produce the records of a dissolved society to allow inspection of the records by any person who was before the dissolution entitled to inspect them. There is also an obligation to produce the records if requested. The CA (which the *Society Act*, 1996, incorporates by reference) did not contain these obligations.

A fee may be charged for inspection and production, which must not exceed the prescribed fee. The prescribed regulations of the BCA stipulate a fee for inspection of $10 per day and a production fee of $0.50 per page.

If a copy of a record is requested, subsection (3) permits this to be provided in "the manner agreed by the parties," which would allow for electronic delivery. If the manner of delivery is not agreed then the default position is either mail or collection from the office where the record is kept.

Subsection (4) provides that restrictions can be imposed on the times during which records can be inspected but any restrictions must allow inspection during the time set out in the regulations. The BCA regulations require that at least two consecutive hours per day within statutory business hours are made available for inspection. The phrase "statutory business hours" is defined in section 1; in brief, statutory business hours are 9:00 a.m. to 4:00 p.m. on any business day.

Remedies on denial of access to or copies of records of dissolved societies

254 Section 45 *[remedies on denial of access or copies]* applies if a person who is entitled to inspect or receive a copy of a record referred to in this Division is not given access to or provided with a copy of that record, and, for that purpose, a reference in section 45 *[remedies on denial of access or copies]* to a society is deemed to be a reference to the person who, under section 252 (2) *[custody of records]*, is required to retain and produce the records of the dissolved society.

Source: BCA, s. 353

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 295

Comment: This section contains a remedy for a person who is entitled to inspect or receive a copy of a record but is denied access or a copy. Section 45 of the new *Society Act*, which permits an application to be made to the Registrar of Companies for an order to provide the registrar with a copy of the record or an affidavit from a director or officer of a society setting out why the person is not entitled to access or a copy of the record, is incorporated by this section. Given that the society has been dissolved and there will not be any directors or officers to swear an affidavit, presumably the affidavit in these circumstances would have to be made by the person who is required to keep and maintain the records of the dissolved society. If the dispute cannot be resolved by the registrar then a provision is included to permit an application to court.

Division 11 – Restoration

Introductory comment: When a corporation is dissolved, its existence is terminated. This dissolution may take place in an orderly way (for example, in accordance with the procedures set out in the previous Divisions of this Part), 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 *Society Act*, 1996, does not have restoration provisions; instead, it incorporates by reference the provisions that were contained in the CA (as if that Act were still in force). This approach is consistent with the approach of the *Society Act*, 1996, to dissolution and liquidation generally. But, as a result of retaining the CA provisions for societies, restoration is a good deal more complex, time-consuming, and expensive for societies in comparison to companies. Restoration of

companies is governed by the BCA.[243] There are a number of significant differences both in policy and in detail between restoration under the CA[244] and restoration under the BCA. The major differences are concerned with the following three issues.

- **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, in most cases, to apply only to the registrar 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 dissolved 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.

This Division sets out modern restoration provisions for societies, based on the model found in the BCA.

Definitions and interpretation

255 (1) In this Division:

"full restoration" means a restoration of a society, or a restoration of the registration of a foreign corporation as an extraprovincial society, that is not a limited restoration;

"limited restoration" means a restoration of a society, or a restoration of the registration of a foreign corporation as an extraprovincial society, that is for a limited period under section 260 (1) *[limited restoration by registrar]* or 262 (1) *[limited restoration by court]*.

(2) In this Division, a person is related

(a) to a society that has been dissolved, if

(i) the person was, at the time of the dissolution, a director, officer or member of the society,

243. BCA, *supra* note 55, ss. 354–68.

244. CA, *supra* note 44, ss. 262–66.

(ii) the person is the heir or personal or other legal representative of a person who was, at the time of the dissolution, a member of the society, or

(iii) in the case of an application under section 261 (2) (a) *[applications to court for restoration]* or 262 (2) (a) *[limited restoration by court]*, the person is a person referred to in subparagraph (i) or (ii), as the case may be, or is ordered by the court to be an appropriate person to make the application, or

(b) to a foreign corporation that has had its registration as an extraprovincial society cancelled, if, at the time an application is made under this Division for the restoration of that registration or for the conversion of a limited restoration of the registration to a full restoration, the person is,

(i) in the case of any other foreign corporation, the foreign corporation or a director, officer or member of the foreign corporation, or

(ii) in the case of an application under section 261 (2) (a) *[applications to court for restoration]* or 262 (2) (a) *[limited restoration by court]*, the person is a person referred to in subparagraph (i) or is ordered by the court to be an appropriate person to make the application.

Source: BCA, s. 354

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section contains two definitions that apply in this Division. The definitions distinguish between a full restoration and a limited restoration. This distinction was not found in the CA, so, by extension, it is not applicable to societies under the *Society Act*, 1996. A full restoration is the traditional, unlimited restoration. A limited restoration is limited in terms of the time that it will be in effect. In practice, a limited restoration rarely exceeds two years.[245] A related person may apply for a limited restoration or a full restoration. A person who is not related to the society or foreign corporation may only apply for a limited restoration (unless that person obtains a court order authorizing an application for a full restoration). Subsection (2) contains rules for determining whether a person is related to a society or a foreign corporation. A related person is, in the main, a person who was a director, officer, or member of the society or foreign corporation. The major group left out of this list are creditors. Since a creditor's interest in the restoration of a society or foreign corporation is primarily involved in the maintenance of a proceeding or the completion of a transaction, it is appropriate in most cases to limit the effect of a restoration that is driven by a creditor.

245. *See British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 12.63.

Pre-requisites to application

256 (1) If, for any reason, a society has been dissolved or the registration of a foreign corporation as an extraprovincial society has been cancelled, an application for restoration under this Division may be made to the registrar or to the court.

(2) Before submitting an application to the registrar for filing under section 257 *[applications to the registrar for restoration]* or before making an application to the court under section 261 *[applications to court for restoration]*, the applicant must

(a) publish in the Gazette notice of the application,

(b) mail notice of the application as follows:

(i) in the case of a restoration of a society, to the last address shown in the corporate register as the address or mailing address, as the case may be, of the registered office of the society;

(ii) in the case of a restoration of a foreign corporation's registration as an extraprovincial society, to the last address shown in the corporate register as the address or mailing address, as the case may be, for an attorney for the extraprovincial society or, if none, to the address inside British Columbia that was the last address shown in the corporate register as the address or mailing address, as the case may be, for its head office, and

(c) reserve a name or an assumed name under section 20 *[reservation of names]* or 24 *[assumed names]*, as the case may be, for the society or foreign corporation unless the foreign corporation is a federal corporation.

Source: BCA, s. 355

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 262

Comment: Subsection (1) is an enabling provision; it simply provides for an application to be made either to the Registrar of Companies or to the court to restore a dissolved society or the registration of a foreign corporation as an extraprovincial society which has been cancelled. Subsection (2) contains a list of steps that must be taken by the applicant before the application can be submitted to the registrar or the court. The first two steps involve notice. Notice to the general public is given by publication in the British Columbia Gazette; notification to the society or foreign corporation is given by mail to the last known address of the society's registered office or the foreign corporation's attorney or (if it had no attorney) head office. These notice requirements are intended to provide some assurance that the application does not proceed to the prejudice of a creditor or other third party and that the application is not in error. In addition to notice, the appli-

cant must also reserve a name or (if the application concerns a foreign corporation whose name is not available in British Columbia) an assumed name.

Applications to the registrar for restoration

257 (1) A person may apply to the registrar to restore a society or to restore the registration of a foreign corporation as an extraprovincial society.

(2) An application may be made under subsection (1)

(a) for a full restoration, by a related person, or

(b) for a limited restoration, by any person.

(3) In order to apply for restoration under this section, an applicant must provide to the registrar the records and information the registrar may require and must submit to the registrar for filing

(a) a restoration application in the form established by the registrar, and

(b) any other records the registrar may require.

(4) An application to the registrar under subsection (1)

(a) must, if the dissolution of the society or the cancellation of the registration of the foreign corporation occurred before the coming into force of this Act, be made within 10 years after the dissolution or cancellation, or

(b) may, in any other case, be made at any time.

Source: BCA, s. 356

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: Under the new *Society Act* an application for restoration may be made to the Registrar of Companies alone. This represents a streamlining of the process. Under the CA process, which is incorporated into the *Society Act*, 1996, restorations required a court order. This order would only be granted after the registrar had effectively approved the application. So, two levels of review have been combined into one in the new Act. A court application may still be necessary under the new Act if the society held title to land before it was dissolved. Under the *Escheat Act*[246] land that reverts to the government on the dissolution of a corporation must be held by the government for a period of two years, during which time the government is not to make any grant or disposition of the land.[247] If an application is made for restoration of the dissolved corporation after the expiry of this two-year period, then the application must proceed in the Supreme Court (on notice to the government) in order to reacquire title to the land.[248]

246. *Supra* note 239.

247. *Escheat Act*, *ibid.*, s. 4 (3).

248. *Escheat Act*, *ibid.*, s. 4 (5).

This section contains enabling provisions for applications to the registrar. Subsection (1) authorizes the application. Subsection (2) sets out the distinction between full and limited restorations. Only a related person may apply for a full restoration. (The rules on when a person is related to a society are contained in section 255.) A person who is not related to the society may only apply to the registrar for a limited restoration. In practice, the effect of this restoration will not exceed two years. Subsection (3) sets out the filing requirements. Subsection (4) (a) preserves a rule that was in force under the previous legislation, which did not permit a restoration to be granted after 10 years had passed since the dissolution of the society. This rule will gradually be phased out under the new *Society Act*, as fewer and fewer restorations will relate to societies that were dissolved before the coming into force of the new Act.

Contents of application to the registrar for restoration

258 (1) A restoration application under section 257 *[applications to the registrar for restoration]* must contain the following:

(a) the date on which the notice required under section 256 (2) (a) *[prerequisites to application]* was published in the Gazette;

(b) the date on which the notice required under section 256 (2) (b) *[prerequisites to application]* was mailed in accordance with that subsection;

(c) the information required under subsection (2) or (3) of this section, as the case may be.

(2) If the application under section 257 *[applications to the registrar for restoration]* is for the restoration of a society, the restoration application must contain

(a) the name reserved for the society and the reservation number given for it,

(b) any translation of the society's name, set out in the prescribed manner, that the society intends to use outside Canada, and

(c) if the application is for a full restoration of the society,

(i) a statement that the applicant is related to the society and the nature of the person's relationship with the society,

(ii) the mailing address and the delivery address of the office proposed as the registered office of the restored society, and

(iii) for the records office of the restored society, the mailing address and the delivery address of the office at which the dissolved society's records, within the meaning of section 252 *[custody of records]*, are being kept or, if those records are not available, a statement to that effect and the mailing address and

the delivery address of the office proposed as the records office of the restored society.

(3) If the application under section 257 *[applications to the registrar for restoration]* is for the restoration of the registration of a foreign corporation as an extraprovincial society, the restoration application must contain

(a) the name or assumed name, as the case may be, reserved for the foreign corporation and the reservation number given for it, or, in the case of a federal corporation, the name of that corporation, and

(b) if the application is for a full restoration of the registration of a foreign corporation as an extraprovincial society,

(i) a statement that the applicant is related to the foreign corporation and the nature of the person's relationship with the foreign corporation,

(ii) the mailing address and the delivery address for the office that the foreign corporation will have as its head office after its registration as an extraprovincial society is restored, whether or not that head office is in British Columbia, and

(iii) for each of the attorneys, if any, that the foreign corporation will have after its registration as an extraprovincial society is restored, a mailing address and a delivery address that complies with section 287 (3) *[attorneys to be appointed]*.

Source: BCA, s. 357

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section sets out the information that must be filed with the Registrar of Companies on an application to the registrar for the restoration of a society or the registration of a foreign corporation as an extraprovincial society. In the main, the information required is needed to confirm that the prerequisites to the application, which are set out in the preceding section, have been met. Additional information is required if the application is for a full restoration, as only a limited class of related persons may apply for a full restoration.

Registrar must restore

259 (1) Subject to section 264 *[restrictions on restoration]*, unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, after a restoration application under section 257 *[applications to the registrar for restoration]* is filed with the registrar, the registrar must, on any terms and conditions the registrar considers appropriate, restore the society or restore the registration of the foreign corporation as an extraprovincial society.

(2) Subject to section 269 *[corporate assets to be returned to restored society]*, unless the court orders otherwise, a restoration under subsection (1) of this section is without prejudice to the rights acquired by persons before the restoration.

Source: BCA, s. 358

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: The Registrar of Companies does not have the independent discretion to refuse to restore a society or the registration of a foreign corporation as an extraprovincial society. The registrar may refuse only in accordance with a court order that has been filed with the registrar's office. Of course, an application for restoration may be refused if it is not in compliance with the Act. Subsection (1) refers to the restrictions set out in section 264. These restrictions relate to the 21-day notice period for advertising in the Gazette and for notifying the registered office of the society or the attorney (or head office, if applicable) of the foreign corporation and to the reservation of a name (for all but federal corporations). Subsection (2) confirms that the restoration of a society or of the registration of a foreign corporation as an extraprovincial society is not intended to prejudice the rights of any third party.

Limited restoration by registrar

260 (1) Subject to section 262 (2) *[limited restoration by court]* and subsection (2) of this section, if a restoration under section 259 *[registrar must restore]* is for a limited period, the restored society is dissolved or the restored registration of the foreign corporation as an extraprovincial society is cancelled on the expiration of the limited period of restoration.

(2) If a restoration under section 259 *[registrar must restore]* is a limited restoration, the registrar may, on an application filed with the registrar within the limited period of restoration,

(a) if the application is made by a related person, convert the limited restoration into a full restoration, or

(b) on an application made by any person, extend the period to any later date that the registrar considers appropriate, in which case the restored society is dissolved or the restored registration of the foreign corporation as an extraprovincial society is cancelled on the expiration of the extended period.

(3) An applicant under subsection (2) (a) of this section must comply with sections 256 (2) (a) and (b) *[pre-requisites to restoration]*, 257 (3) *[applications to the registrar for restoration]*, 258 (1) (a) and (b) *[contents of application to the registrar for restoration]* and 258 (2) (c) or (3) (b) *[contents of application to the registrar for restoration]*.

(4) After a society is dissolved under this section, or the registration of the foreign corporation as an extraprovincial society is cancelled under this section, the registrar must publish in the prescribed manner notice that the society has been dissolved or the registration has been cancelled.

Source: BCA, s. 359

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: In practice, the restoration of a society or of the registration of a foreign corporation as an extraprovincial society often occurs in order to allow for legal proceedings against the society or extraprovincial society or for the completion of a transaction involving the society or extraprovincial society. Once this purpose has been fulfilled, there is often little interest in continuing the operations of the society or extraprovincial society. But, since a corporation has perpetual existence, terminating the society or extraprovincial society would require dissolution in accordance with this Act (or some administrative default that leads to cancellation). A limited restoration avoids these issues. Under subsection (1), a limited restoration of a society or of the registration of a foreign corporation as an extraprovincial society expires after a set time and the restored society or registration is cancelled. In practice, this limited period of the restoration tends to be for two years or some shorter period.[249] Under subsection (2), the period of a limited restoration may be extended or may be converted to a full restoration (if the applicant is a related person according to the rules set out in section 255). Subsections (3) and (4) are self-explanatory.

Applications to the court for restoration

261 (1) A person may apply to the court to restore a society or to restore the registration of a foreign corporation as an extraprovincial society.

(2) An application may be made under subsection (1)

(a) for a full restoration, by a related person, or

(b) for a limited restoration, by any person.

(3) An applicant must

(a) provide to the registrar notice of the application and a copy of any record filed in the court registry in support of it, and

(b) obtain the registrar's consent to the restoration.

(4) On an application under subsection (1), the applicant must provide to the court

(a) the information required under section 258 *[contents of application to the registrar for restoration]*,

(b) the registrar's consent to the restoration, including any terms and conditions that the registrar considers appropriate, and

249. *See British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 12.63.

(c) any other information and records required by the court.

(5) Subject to subsection (8) of this section, on an application under subsection (1), the court may, if it is satisfied that it is appropriate to restore the society or to restore the registration of the foreign corporation as an extraprovincial society, make an order, on the terms and conditions, if any, the court considers appropriate, that the society be restored or that the registration of the foreign corporation as an extraprovincial society be restored.

(6) Without limiting subsection (5), in an order made under that subsection, the court may give directions and make provisions it considers appropriate for placing the society or extraprovincial society and every other person in the same position, as nearly as may be, as if the society had not been dissolved or the registration of the foreign corporation as an extraprovincial society had not been cancelled.

(7) Subject to section 269 *[corporate assets to be returned to restored society]*, unless the court orders otherwise, an order under subsection (5) of this section is without prejudice to the rights acquired by persons before the restoration.

(8) An order under subsection (5) must reflect any terms and conditions referred to in subsection (4) (b).

Source: BCA, s. 360

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, ss. 262–64

Comment: Under the *Society Act*, 1996, all restorations required an application to court. Under the new *Society Act*, a restoration may be sought from the Registrar of Companies alone. In addition, the new Act preserves the option of applying to court. In view of the added expense and time involved in applying to court, most restorations will likely be approved by the registrar alone. But there may be circumstances when a court application is necessary or desirable. (One example would be when a person who is not related to a society or a foreign corporation wants a full restoration of the society or the registration of the foreign corporation as an extraprovincial society; another example would be where the society held title to land immediately before dissolution and more than two years have elapsed since the date of dissolution.) The court will not restore the society or the registration of the extraprovincial society unless the registrar consents and the prerequisites to the application have been completed.

Limited restoration by court

262 (1) Subject to subsection (2), if a restoration ordered by the court under section 261 (5) *[applications to court for restoration]* is for a limited period, the restored society is dissolved or the restored registration of the foreign corporation as an extraprovincial society is cancelled on the expiration of the limited period of restoration.

(2) If a restoration under section 259 *[registrar must restore]* or 261 (5) *[applications to the court for restoration]* is a limited restoration, the court may, on an application made in accordance with this section within the limited period of restoration,

(a) if the application is made by a related person, convert the limited restoration into a full restoration, or

(b) on an application made by any person, extend the period to any later date that the court considers appropriate, in which case the restored society is dissolved or the restored registration of the foreign corporation as an extraprovincial society is cancelled on the expiration of the extended period.

(3) An applicant under subsection (2) (a) of this section must

(a) comply with section 256 (2) (a) and (b) *[pre-requisites to application]*,

(b) provide to the registrar notice of the application and a copy of any record filed in the court registry in support,

(c) obtain the registrar's consent to the conversion, and

(d) provide to the court

(i) the information required under sections 258 (1) (a) and (b) *[contents of application to the registrar for restoration]* and 258 (2) (c) or (3) (b) *[contents of application to the registrar for restoration]*,

(ii) the registrar's consent to the conversion, including any terms and conditions that the registrar considers appropriate, and

(iii) any other information and records required by the court.

(4) After a society is dissolved under this section, or the registration of the foreign corporation as an extraprovincial society is cancelled under this section, the registrar must publish in the prescribed manner notice that the society has been dissolved or the registration has been cancelled.

Source: BCA, s. 361

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 262 (3)

Comment: This section largely mirrors section 260, which deals with limited restorations by the registrar. One difference to notice is that a conversion of an application for a limited restoration to an application for a full restoration requires the consent of the Registrar of Companies. The reference to publication "in the prescribed manner" in subsection (4) means that publication is to be carried out in accordance with the regulations. The regulations prescribed for the BCA allow for

publication by posting on a website maintained by or for the government. This manner of publication would also be appropriate for the purposes of this section in the new *Society Act*.

Filing of restoration application with the registrar

263 (1) Promptly after an order is made under section 261 *[applications to the court for restoration]* or 262 *[limited restoration by court]*, the applicant must provide to the registrar the records and information the registrar may require and must file with the registrar

(a) a restoration application in the form established by the registrar, containing a statement that a copy of an entered court order has been obtained under section 261 (5) *[applications to the court for restoration]* or 262 (2) (a) or (b) *[limited restoration by court]*, as the case may be, and

(b) any other records the registrar may require.

(2) Subject to section 264 (2) and (3) *[restrictions on restoration]*, unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, the registrar, after a restoration application is filed with the registrar under subsection (1) (a) of this section, must do whichever of the following is applicable:

(a) restore the society or restore the registration of the foreign corporation as an extraprovincial society;

(b) extend the restoration;

(c) convert the limited restoration into a full restoration.

Source: BCA, s. 362

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: This section sets out the filing requirements with the Registrar of Companies attendant on the making of a court order regarding restoration.

Restrictions on restoration

264 (1) If a restoration is as a result of an application to the registrar under section 257 *[applications to the registrar for restoration]*, the registrar must not restore the society, or restore the registration of the foreign corporation as an extraprovincial society, as the case may be, until 21 days after the later of

(a) the date shown in the restoration application as the date on which notice of the application was published in the Gazette in accordance with section 256 (2) (a) *[pre-requisites to application]*, and

(b) the date shown in the restoration application as the date on which the applicant mailed the notice of the application in accordance with section 256 (2) (b) *[pre-requisites to application]*.

(2) The registrar must not, under section 259 (1) *[registrar must restore]* or 263 (2) *[filing of restoration application with the registrar]*, restore the registration of a foreign corporation as an extraprovincial society unless the reservation of the name or assumed name included in the restoration application remains in effect at the date of the restoration.

(3) Subsection (2) of this section does not apply to a federal corporation.

Source: BCA, s. 363

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: The restrictions on restoration set out in this section are intended to preserve the integrity of the advertising and notice requirements, and of the name registration system. As federal corporations are entitled by law to carry on activities across Canada under the name that has been approved by the federal corporations directorate, subsection (2) is not made applicable to them.

Effect of restoration of society

265 (1) A society is restored under section 259 (1) *[registrar must restore]* or 263 (2) *[filing of restoration application with the registrar]* when the registrar alters the corporate register to reflect that restoration and, whether or not the requirements precedent and incidental to restoration have been complied with, a notation in the corporate register that a society has been restored is conclusive evidence for the purposes of this Act and for all other purposes that the society has been duly restored as of the date shown and the time, if any, shown in the corporate register.

(2) Unless the court orders otherwise, if there is a full restoration of a society,

(a) subject to section 267 (1) *[name on restoration]*, subsection (3) of this section and paragraph (b) of this subsection, the society is restored with the bylaws and with the constitution or pre-existing constitution, as the case may be, that it had immediately before its dissolution, but if the information included in the restoration application differs from the information contained in those bylaws or that constitution or pre-existing constitution, those bylaws or that constitution or pre-existing constitution is deemed, on the restoration, to be altered to reflect the new information, and

(b) the mailing addresses and delivery addresses of the registered office and records office for the society are the mailing addresses and de-

livery addresses respectively shown for them on the restoration application.

(3) Despite any other provision of this Division, sections 329 *[prescribed provisions]* and 330 *[obligations of pre-existing reporting societies]* apply to a restored society if

(a) the society was, immediately before its dissolution, a reporting society within the meaning of the *Society Act*, 1996, and was dissolved before the coming into force of this Act, or

(b) the society was a pre-existing reporting society that had not, before its dissolution, complied with section 271 (1) (a) and (b) *[transition – restored pre-existing societies]* or 331 (1) (a) and (b) *[transition – pre-existing societies]*.

(4) A society that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the society had not been dissolved.

Source: BCA, s. 364

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 262 (2)

Comment: One of the goals of restoration provisions is to allow for the seamless revival of a dissolved society as if that dissolution has never occurred. That result is clearly announced in subsection (4). Subsection (1) is intended to confirm that the corporate register is the authoritative source of information about whether and when a society has been restored. Subsection (2) is intended to resolve any conflicts about the contents of a restored society's corporate charter. Subsection (3) relates to the transitional process from the *Society Act*, 1996, to the new *Society Act*.

Effect of restoration of extraprovincial society

266 (1) The registration of a foreign corporation as an extraprovincial society is restored when the registrar alters the corporate register to reflect the restoration and, whether or not the requirements precedent and incidental to restoration have been complied with, a notation in the corporate register that the registration of the foreign corporation as an extraprovincial society has been restored is conclusive evidence for the purposes of this Act and for all other purposes that the registration of the foreign corporation as an extraprovincial society has been duly restored as of the date shown and the time, if any, shown in the corporate register.

(2) If the registration of a foreign corporation as an extraprovincial society is restored by a full restoration, the mailing addresses and the delivery addresses of the head office of the extraprovincial society, whether or not the head office is in British Columbia, and of the attorneys, if any, for the ex-

traprovincial society are the mailing addresses and the delivery addresses respectively shown for them on the restoration application.

(3) If a foreign corporation has its registration as an extraprovincial society restored, the registration is deemed not to have been cancelled, and proceedings may be taken as might have been taken if that registration had not been cancelled.

Source: BCA, s. 365

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 262 (2)

Comment: This section contains provisions analogous to the previous provision for the restoration of an extraprovincial society.

Name on restoration

267 (1) A society that is restored has as its name on its restoration the name shown for the society on the restoration application if a reservation of that name remains in effect at the date of the restoration.

(2) Subject to section 264 (2) *[restrictions on restoration]*, if the registration of a foreign corporation as an extraprovincial society is restored under this Division, the name under which the foreign corporation is registered as an extraprovincial society is the name that is included in the restoration application.

Source: BCA, s. 366

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 264

Comment: This section is self-explanatory.

Registrar's duties after restoration

268 (1) After the restoration of a society, the restoration of the registration of a foreign corporation as an extraprovincial society under this Division or the extension or conversion under section 260 *[limited restoration by registrar]* or 262 *[limited restoration by court]* of a limited restoration, the registrar must

(a) publish in the prescribed manner

(i) notice of the restoration, extension or conversion, and

(ii) notice of the date on which any limited period of restoration expires,

(b) issue a certificate of restoration in accordance with subsection (2) of this section and furnish

(i) the certificate to the society or extraprovincial society, as the case may be, and

(ii) a copy of the certificate to the applicant,

(c) if requested to do so, furnish a certified copy of the restoration application to the society or extraprovincial society, and

(d) if requested to do so, furnish to the society a certified copy of the constitution, if any, and bylaws.

(2) A certificate of restoration must show the name of the society or, in the case of an extraprovincial society, the name and any assumed name for the extraprovincial society, the date and time of the restoration, and,

(a) in the case of a limited restoration or the extension of a limited restoration, include the date on which the limited period of restoration expires, or

(b) in the case of a conversion of a limited restoration to a full restoration, include the date and time of the conversion.

Source: BCA, s. 367

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 265 (3)

Comment: The duties of the Registrar of Companies include publishing notice of the restoration of the society or the registration of the extraprovincial society and issuing officially certified documents relating to the restoration. These documents are the restoration application and the constitution and bylaws.

Corporate assets to be returned to restored society

269 (1) If money or other assets of a society vested in the government as a result of the dissolution of the society, on the restoration of the society,

(a) any of the assets that vested in the government and that have not been disposed of by the government vest in the society without any deed, bill of sale or other record from the government or any action by the government, and

(b) the government must, subject to subsections (3) to (5),

(i) in the case of assets that remain in the government's custody, return each of those assets to the society,

(ii) in the case of assets that have been disposed of by the government, pay to the society, out of the consolidated revenue fund, the amount of money realized by the government from the disposition of those assets, and

(iii) in the case of money vested in the government that has been received by the government, pay to the society, out of the consolidated revenue fund, the amount of that money.

(2) A payment under subsection (1) (b) may be made without any appropriation other than this Act.

(3) The government need not comply with subsection (1) (b) in relation to money or other assets paid or provided by the minister under section 250 *[dissolved society's assets available to judgment creditors]*.

(4) The government need not comply with subsection (1) (b) unless and until it has been reimbursed, out of the money or other assets or otherwise, for its costs of

(a) obtaining, retaining, maintaining and disposing of the money and other assets, and

(b) paying the money, and returning the other assets, in accordance with that subsection.

(5) Subject to subsection (6), title to, or any interest in, land that has escheated to the government under section 4 of the *Escheat Act* is not, except as provided in section 4 of that Act, affected by a restoration of a society.

(6) Title to, or any interest in, water system property that

(a) has escheated to the government under section 4 of the *Escheat Act*, or

(b) has vested in the government under this Act

is not, except as provided in section 4.1 of the *Escheat Act*, affected by a restoration of a society.

Source: BCA, s. 368

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 266

Comment: A major objective of restoration legislation is to restore to the dissolved society any property that it owned on its dissolution and that was forfeited to the government.[250] The main cause of a dissolved society's property ending up vested in the government is dissolution due to

250. Since the cancellation of the registration of a foreign corporation as an extraprovincial society does not affect the existence of the foreign corporation, this section only applies to British Columbia societies.

an administrative default, as provided for in section 318. (The most common administrative default is the failure in two consecutive years to file an annual report with the Registrar of Companies.) Property may vest in the government in one of two ways, depending on the type of property. Personal property vests in the government by virtue of the common law doctrine of *bona vacantia* ("vacant goods," or, more loosely, "goods without an owner"). A dissolved society's land and interests in land may vest in the government by operation of section 4 of the *Escheat Act*.[251] This section provides for the return of personal property, or its value in money, to the restored society. The return of land continues to be governed by section 4 of the *Escheat Act*.[252]

Division 12 – Post-restoration Transition for Pre-existing Societies

Definition

270 In this Division, **"pre-existing society"** means a pre-existing society, within the meaning of section 1 (1), that

(a) had been dissolved,

(b) has been restored by a full restoration within the meaning of Division 11, and

(c) has not, before its dissolution or otherwise, complied with section 271 (1) (a) *[transition – restored pre-existing societies]* or 331 (1) (a) *[transition – pre-existing societies]*.

Source: BCA, s. 369

Reference: tentative recommendation (101)

Concordance: *Society Act*, 1996, s. 71 (1)

Comment: The purpose of this definition is to narrow the focus of this Division to those pre-existing societies that were dissolved and then restored by means of a full restoration and that have not transitioned to the new *Society Act*.

Transition – restored pre-existing societies

271 (1) A pre-existing society must do the following within 12 months after the date of its restoration:

(a) file with the registrar a post-restoration transition application that complies with section 272 (2) *[post-restoration transition application]*;

(b) alter its bylaws if and to the extent necessary to ensure that those bylaws comply with section 273 (3) *[alteration to bylaws of restored society]*;

251. *Supra* note 246.

252. *See also Escheat Act*, *ibid.*, s. 5 (granting the Attorney General the power to restore escheated land to anyone with a legal or a moral claim to the land).

(c) supplement the information registered in its register of members under section 128 (1) *[register of members]* by registering in its register of members

(i) the name, last known address and class of each of member, and

(ii) without limiting subparagraph (i) of this paragraph, if, despite the dissolution of the society, memberships had been issued or transferred after dissolution and before restoration, those members, and, with respect to those members,

(A) the name and last known address of each person to whom those memberships were issued or transferred during that period,

(B) the class of those memberships,

(C) in the case of any of those memberships issued during that period, the date and particulars of each such issue, and

(D) in the case of any of those memberships transferred during that period, the date and particulars of each such transfer.

(2) In addition to any alterations that a pre-existing society is required to make to its bylaws under subsection (1) (b) of this section, the society may, with those alterations, make other alterations to its bylaws, in accordance with section 178 (1) *[alteration to bylaws]*, so long as those other alterations are not inconsistent with the information that, under section 272 (2) (b) *[post-restoration transition application]*, is included in the constitution contained in the post-restoration transition application.

(3) A resolution to make the other alterations referred to in subsection (2) of this section must state that those alterations do not take effect until the constitution contained in the post-restoration transition application takes effect.

Source: BCA, s. 370

Reference: tentative recommendation (101)

Concordance: new

Comment: This section mirrors section 331. Its purpose is to ensure that a restored pre-existing society must meet all the requirements on transition that all other pre-existing societies are required to meet.

Post-restoration transition application

272 (1) A pre-existing society must not submit a post-restoration transition application to the registrar for filing under this Division until

(a) the society has been authorized to do so by a directors' resolution or an ordinary resolution,

(b) if it is necessary to alter the bylaws to ensure that those bylaws comply with section 273 (3) *[alteration to bylaws of restored society]*, the resolution required under section 273 (1) *[alteration to bylaws of restored society]* is received for deposit at the society's records office,

(c) if the society intends to alter its bylaws under section 271 (2) *[transition – restored pre-existing societies]*, the resolution required under section 178 (1) *[alteration to bylaws]* to make those alterations is received for deposit at the society's records office, and

(d) there has been filed with the registrar all records necessary to ensure that the information in the corporate register respecting the directors of the society is, immediately before the post-restoration transition application is submitted to the registrar for filing, correct.

(2) The pre-existing society must ensure that the post-restoration transition application that is filed with the registrar under section 271 (1) (a) *[transition – restored pre-existing societies]*

(a) is in the form established by the registrar,

(b) contains a constitution that

(i) sets out the name and prescribed address of each individual who was, immediately before the time of the filing, a director of the society,

(ii) sets out the mailing address and delivery address of the office that was, immediately before the time of the filing, the registered office of the society,

(iii) sets out the mailing address and delivery address of the office that was, immediately before the time of the filing, the records office of the society,

(iv) sets out, as the name of the society, the name that the society had immediately before the time of the filing, and sets out, in the prescribed manner, any translation of that name that the society intends to use outside Canada,

(v) includes all of the information required to comply with section 9 (g) *[constitution]* that was contained in the society pre-existing constitution or bylaws before the time of the filing, and

(vi) does not contain any other information,

(c) if it is necessary to alter the bylaws to ensure that those bylaws comply with section 273 (3) *[alteration to bylaws of restored society]*, contains the resolution required under section 273 (1) *[alteration to bylaws of restored society]*, including the text of those alterations, and

(d) if the society intends to alter its bylaws under society, contains the resolution required under section 178 (1) *[alteration to bylaws]* to make those alterations, including the text of those alterations.

(3) No post-restoration transition application filed with the registrar under section 271 (1) (a) *[transition – restored pre-existing societies]* is invalid merely because subsection (1) of this section has not been complied with.

(4) After a post-restoration transition application for a pre-existing society is filed with the registrar under section 271 (1) (a) *[transition – restored pre-existing societies]*, the registrar must, if requested to do so, furnish to the society a certified copy of that application and a certified copy of the constitution.

Source: BCA, s. 371

Reference: tentative recommendation (101)

Concordance: new

Comment: This section contains the required steps to be taken and documents to be filed on a post-restoration transition application. It parallels the requirements for all other pre-existing societies, which are set out in section 332.

Alteration to bylaws of restored society

273 (1) Subject to subsection (2), a pre-existing society may alter its bylaws under section 271 (1) (b) *[transition – restored pre-existing societies]* by a directors' resolution or an ordinary resolution.

(2) The resolution referred to in subsection (1) of this section must state that the alteration to the bylaws does not take effect until the constitution contained in the post-restoration transition application takes effect.

(3) For the purposes of section 271 (1) (b) *[transition – restored pre-existing societies]*, the pre-existing society must

(a) alter its bylaws if and to the extent necessary to ensure that those bylaws include each provision, other than prescribed provisions, that was contained, or was deemed under section 266 (2) *[effect of restoration of society]* or under a former *Societies Act* to be contained, in the society's pre-existing constitution immediately before the time of the filing of the post-restoration transition application and that is not included in its constitution under section 272 (2) (b) *[post-restoration transition application]*,

(b) alter its bylaws if and to the extent necessary to remove from them any information that is inconsistent with the information that, under section 272 (2) (b) *[post-restoration transition application]*, is included in the constitution contained in the post-restoration transition application, and

(c) if the society is a society to which section 266 (3) *[effect of restoration of society]* applies, alter its bylaws to include the Statutory Reporting Society Provisions.

(4) In addition to effecting the alterations referred to in subsection (3), the pre-existing society must ensure that its bylaws comply with section 11 (1) (b) and (c) and (2) (c) *[bylaws]* and, for that purpose, any individual may make the changes to the bylaws that are necessary to ensure that those bylaws comply with those provisions, whether or not there has been any resolution to direct or authorize those changes.

Source: BCA, s. 372

Reference: tentative recommendation (101)

Concordance: new

Comment: A pre-existing society may wish to make changes to its bylaws in addition to the changes required as part of the transition to the new Act. This section contains the requirements for those changes. It parallels section 333, which applies to all other pre-existing societies.

Timing and effect of post-restoration transition

274 (1) The constitution contained in the post-restoration transition application and any alteration to the bylaws made under this Division take effect on the date and time that the post-restoration transition application is filed with the registrar.

(2) Despite any wording to the contrary in a security agreement or other record, the filing of a post-restoration transition application in accordance with section 271 (1) (a) *[transition – restored pre-existing societies]*, an alteration to the bylaws in accordance with section 271 (1) (b) *[transition – restored pre-existing societies]* and a change to the bylaws in accordance

with section 273 (4) *[alteration to bylaws of restored society]* do not constitute a breach or contravention of, or a default under, the security agreement or other record, and are deemed for the purposes of the security agreement or other record not to be an alteration to the charter of the pre-existing society.

(3) On compliance by a pre-existing society with section 271 (1) (a) and (b) *[transition – restored pre-existing societies]*, the pre-existing constitution of the society ceases to have any further force or effect.

(4) On the filing of a post-restoration transition application for a pre-existing society under section 271 (1) (a) *[transition – restored pre-existing societies]*, the registrar may treat the society's pre-existing constitution as having no further force or effect.

Source: BCA, s. 373

Reference: tentative recommendation (101)

Concordance: new

Comment: This section mirrors section 334. It puts restored pre-existing societies on the same footing as all other pre-existing societies with respect to the timing and effect of transition to the new *Society Act*.

PART 11 – EXTRAPROVINCIAL SOCIETIES

Introductory comment: 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. In fact, the provisions currently in the *Society Act*, 1996, have changed very little since 1947. This Part comprehensively modernizes the provisions governing extraprovincial societies. It provides up to date statutory guidance on important issues that are not addressed or that are addressed inadequately in the *Society Act*, 1996, including the timing of registration, the meaning of "carry on activities" in British Columbia, the application of these provisions to federal not-for-profit corporations, and the penalties for breach of a provision of this Part.

Division 1 – Registration

Definition

275 In this Part **"director"** has the same meaning as in paragraph (b) of the definition of "director" in section 1 (1).

Source: BCA, s. 374

Reference: tentative recommendation (106)

Concordance: new

Comment: This section limits the definition of "director" that applies in this Part to directors of corporations that are not societies. Given that this Part is concerned with the registration of extra-provincial societies (that is, not-for-profit corporations from outside British Columbia), it is logical to restrict the meaning of "director" to exclude directors of British Columbia societies.

Foreign corporations required to be registered

276 (1) A foreign corporation must register as an extraprovincial society in accordance with this Act within 2 months after the foreign corporation begins to carry on activities in British Columbia.

(2) For the purposes of this Act and subject to subsection (3), a foreign corporation is deemed to carry on activities in British Columbia if

(a) its name, or any name under which it carries on activities, is listed in a telephone directory

(i) for any part of British Columbia, and

(ii) in which an address or telephone number in British Columbia is given for the foreign corporation,

(b) its name, or any name under which it carries on activities, appears or is announced in any advertisement in which an address or telephone number in British Columbia is given for the foreign corporation,

(c) it has, in British Columbia,

(i) a resident agent, or

(ii) a warehouse, office or place of activities, or

(d) it otherwise carries on activities in British Columbia.

(3) A foreign corporation does not carry on activities in British Columbia

(a) if it is a bank,

(b) if its only activities in British Columbia are constructing and operating a railway, or

(c) merely because it has an interest as a limited partner in a limited partnership carrying on activities in British Columbia.

(4) A foreign corporation need not be registered under this Act or comply with this Part other than subsection (5) of this section, and may carry on activities in British Columbia as if it were registered under this Act, if

(a) the principal activities of the foreign corporation consist of the operation of one or more ships, and

(b) the foreign corporation does not maintain in British Columbia a warehouse, office or place of activities under its own control or under the control of a person on behalf of the foreign corporation.

(5) Every person who is a resident agent or representative of a foreign corporation referred to in subsection (4) must file with the registrar

(a) a notice of agency in the form established by the registrar stating

(i) the name of the foreign corporation,

(ii) the chief place of activities of the foreign corporation outside British Columbia, and

(iii) particulars of the person's agency, and

(b) a notice of change of agency in the form established by the registrar identifying any change in that name, chief place of activities or agency.

(6) Sections 25 (1) *[name to be displayed]*, 285 *[liability if name of extraprovincial society not displayed]* and 286 *[enforcement of duty to file records]* apply to a foreign corporation referred to in subsection (4) as if it were an extraprovincial society.

Source: BCA, s. 375

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 75 (2)

Comment: The term "foreign corporation" is defined in section 1. In simple terms, a foreign corporation is a not-for-profit corporation that has been incorporated outside British Columbia. For the purposes of this Part, the word "foreign" includes all Canadian jurisdictions outside British Columbia.

Subsection (1) contains a key change in the law from the *Society Act*, 1996. Under that older legislation, foreign corporations "may" register as extraprovincial societies, if they carry on activities in British Columbia. The *Society Act*, 1996, then goes on to provide that the Registrar of Companies may order a foreign corporation to register as an extraprovincial society. This wording creates the impression that registration is optional, at least until the registrar makes an order. (In fact, the *Society Act*, 1996, contains penalties for foreign corporations that carry on activities and fail to register.) Subsection (1) makes it clear that declining to register is not a choice for a foreign corporation that carries on activities in British Columbia. The foreign corporation has two months from the date it starts carrying on activities in this province to register. A foreign corporation that fails to register as an extraprovincial society commits an offence under this Act and is liable, upon conviction, to be fined. (For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12.) The disabilities that apply to unregistered foreign corporation under the *Society Act*, 1996, have not been carried forward in this Act. So, an

unregistered foreign corporation will be able to maintain a proceeding in the British Columbia courts and to acquire, hold, and register title to land in British Columbia.

The bulk of the remaining subsections tackle a subject that has generated a considerable amount of litigation, especially concerning for-profit companies. This subject is determining when a foreign corporation is carrying on activities (the for-profit equivalent is "carrying on business") in British Columbia and, therefore, must register as an extraprovincial society. Subsection (2) contains a list of circumstances in which a foreign corporation is "deemed" to be carrying on activities in British Columbia. This list is not intended to replace the jurisprudence that is grown up around this issue. Instead, it is meant to provide some certainty to this area of the law, without completely eliminating the flexibility to recognize new circumstances in the courts.

Subsections (3) and (4) list circumstances in which a foreign corporation is deemed not to be carrying on activities in British Columbia or is not required to register under this Act.

Application for registration

277 (1) To apply to register as an extraprovincial society under this Act, a foreign corporation must provide to the registrar the records and information the registrar may require and must

(a) reserve its name or an assumed name under section 20 *[reservation of names]* or 24 *[assumed names]*, as the case may be,

(b) appoint one or more attorneys if required under section 287 *[attorneys to be appointed]*, and

(c) submit to the registrar for filing

(i) a registration statement, and

(ii) any other records the registrar may require.

(2) Subsection (1) (a) of this section does not apply to a federal corporation.

(3) The registration statement referred to in subsection (1) (c) (i) must

(a) be in the form established by the registrar,

(b) set out,

(i) if the foreign corporation is a federal corporation, the name of the federal corporation,

(ii) if the name of the foreign corporation is reserved under section 20 *[reservation of names]*, the reserved name and the reservation number given for it, or

(iii) for a foreign corporation to which section 24 *[assumed names]* applies, the name of the foreign corporation and the assumed name reserved for it under section 24 *[assumed names]* and the reservation number given for it,

(c) set out the foreign corporation's jurisdiction,

(d) set out the most recent of the following dates:

(i) the date on which the foreign corporation was incorporated or organized, as the case may be;

(ii) the date on which the foreign corporation was continued or otherwise transferred by a similar process into a foreign jurisdiction;

(iii) if the foreign corporation resulted from an amalgamation or a similar process, the date of that amalgamation or similar process,

(e) set out any incorporation, continuation, amalgamation or other identifying number or designation given to the foreign corporation by the foreign corporation's jurisdiction,

(f) set out the mailing address and the delivery address of the head office of the foreign corporation, whether or not the head office is in British Columbia, and

(g) set out, for each person, if any, appointed as an attorney by the foreign corporation,

(i) the full name of the attorney, and

(ii) the mailing address and the delivery address of the attorney in accordance with section 287 (3) *[attorneys to be appointed]*.

(4) At any time, before or after a foreign corporation is registered as an extraprovincial society, the registrar may order the foreign corporation to provide to the registrar, within the time required by the registrar, proof satisfactory to the registrar of the foreign corporation's status in the foreign corporation's jurisdiction.

Source: BCA, s. 376

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 75 (2)

Comment: This section sets out the procedure that a foreign corporation must follow to become registered as an extraprovincial society. Subsection (1) requires a foreign corporation to reserve a name, appoint one or more attorneys, and file the appropriate records with the Registrar of Companies. An "attorney" is the extraprovincial society's agent in British Columbia. This role is particularly important for the service of legal process and other documents.

Subsection (2) provides that a federal corporation is not required to reserve a name as part of the registration process. A federal corporation is a corporation incorporated under Part II of the

Canada Corporations Act.[253] There is a well-established body of jurisprudence that provides that a federal corporation is entitled to carry on business or activities throughout Canada under its name.[254] This section provides statutory recognition of that body of case law.

Subsection (3) contains detailed filing requirements. Subsection (4) is a safeguard provided to the Registrar of Companies.

Registration as an extraprovincial society

278 (1) After a foreign corporation complies with section 277 *[application for registration]* to the satisfaction of the registrar, the registrar must, if the foreign corporation is a federal corporation, and may, in any other case,

(a) file the registration statement, and

(b) register the foreign corporation as an extraprovincial society.

(2) After a foreign corporation is registered as an extraprovincial society under subsection (1) of this section, the registrar must

(a) issue a certificate of registration showing

(i) the name and any assumed name for the extraprovincial society,

(ii) its registration number, and

(iii) the date and time of its registration,

(b) furnish to the extraprovincial society that certificate and a copy of the registration statement,

(c) furnish a copy of the registration statement to each attorney referred to in the registration statement who has not been furnished with a copy of that record under paragraph (b), and

(d) publish in the prescribed manner a notice of the registration.

Source: BCA, s. 377

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 76

Comment: This section sets out the actions that the registrar must take after receipt of an application for registration that complies with the requirements set out in the previous section. Subsection (1) distinguishes between a federal corporation and any other type of foreign corporation. The registrar retains a residual discretion to reject the application of the latter, but is not authorized to reject an application for registration from a federal corporation that complies with this Act. This

253. *Supra* note 70.

254. *See*, *e.g.*, *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (U.K.P.C.). *See also* McGuinness, *supra* note 157 at 139–45.

distinction is consistent with the law that has developed in the courts. The reference to publishing a notice "in the prescribed manner" in subsection (2) (d) is a reference to publication in accordance with directions set out in the regulations. Regulations promulgated under the BCA authorize publication of such notices by posting them on a website maintained by or for the provincial government. A similar regulation would be appropriate for societies.

Effect of registration

279 (1) Whether or not the requirements precedent and incidental to registration of a foreign corporation as an extraprovincial society have been complied with, a notation in the corporate register that a foreign corporation has been registered as an extraprovincial society is conclusive evidence for the purposes of this Act and for all other purposes that the foreign corporation has been duly registered as an extraprovincial society on the date shown and the time, if any, shown in the corporate register.

(2) Subject to the provisions of this Act, to the laws of British Columbia and to the laws of any other jurisdiction that are or may be applicable to it, an extraprovincial society may, for the purpose of carrying on activities in British Columbia, exercise in British Columbia the powers contained in or permitted by its charter or similar record.

(3) Registration of a foreign corporation as an extraprovincial society does not entitle the foreign corporation to do either of the following:

(a) carry on any activities or exercise any power that its charter or similar record restricts it from carrying on or exercising;

(b) exercise any of its powers in a manner inconsistent with those restrictions in its charter or similar record.

(4) No act of a foreign corporation that carries on activities in British Columbia, including a transfer of property, rights or interests to it or by it, is invalid merely because

(a) the act contravenes subsection (3), or

(b) the foreign corporation was not, at the time of that act, registered as an extraprovincial society.

Source: BCA, s. 378

Reference: tentative recommendation (106)

Concordance: new

Comment: Subsection (1) is intended to confirm the conclusive nature of the corporate register, which is the public record of corporate information maintained by the Registrar of Companies. The policy is to allow the public to rely on information obtained from the corporate register without the need to confirm that any given corporation has taken all the steps necessary to support the information contained in the corporate register. Subsection (2) puts extraprovincial societies on the

same footing as British Columbia societies. They are subject to the laws of this province, but, within those constraints, may exercise the powers contained in their corporate charter. Subsection (3) is included for clarity. It simply confirms that registration as an extraprovincial society does not authorize a foreign corporation to override any restrictions contained in its charter. Subsection (4) is included for the protection of third parties dealing with the extraprovincial society.

Amalgamation of extraprovincial society

280 (1) If a foreign corporation that is registered as an extraprovincial society is a party to an amalgamation or similar process other than one that results in a society, there must be provided to the registrar the records and information the registrar may require, and there must be filed with the registrar, within 2 months after the effective date of the amalgamation or similar process,

(a) a notice of amalgamation of extraprovincial society that complies with subsection (2), and

(b) any other records the registrar may require.

(2) A notice of amalgamation of extraprovincial society must be in the form established by the registrar and must set out

(a) the name of the amalgamated extraprovincial society if the amalgamated extraprovincial society

(i) has adopted as its name the name of one of the amalgamating extraprovincial societies, or

(ii) is a federal corporation,

(b) if paragraph (a) does not apply, the name reserved for the amalgamated extraprovincial society under section 20 *[reservation of name]* and the reservation number given for it, or

(c) if paragraphs (a) and (b) of this subsection do not apply but section 24 *[assumed names]* applies, the name of the foreign corporation, the assumed name reserved for it under section 24 *[assumed names]* and the reservation number given for that assumed name.

(3) After the notice of amalgamation of extraprovincial society is filed with the registrar, the registrar must

(a) issue a certificate of registration showing

(i) the name and any assumed name for the amalgamated extraprovincial society,

(ii) its registration number and the date and time of its registration, and

(iii) the date, and the time, if any, shown for the amalgamation or similar process on the notice of amalgamation of extraprovincial society,

(b) furnish to the amalgamated extraprovincial society the certificate referred to in paragraph (a) and a copy of the notice of amalgamation of extraprovincial society,

(c) furnish a copy of the notice of amalgamation of extraprovincial society to each attorney of the amalgamated extraprovincial society who has not been furnished with a copy of that record under paragraph (b), and

(d) publish in the prescribed manner a notice of the amalgamation or similar process.

(4) From the time of the amalgamation or similar process, the amalgamated extraprovincial society is seized of and holds and possesses all land of the amalgamating corporations that is located in British Columbia.

(5) At any time, before or after a certificate of registration is issued under subsection (3), the registrar may order the amalgamated foreign corporation to provide to the registrar, within the time required by the registrar, proof satisfactory to the registrar of the foreign corporation's status in the foreign corporation's jurisdiction.

Source: BCA, s. 379

Reference: tentative recommendation (106)

Concordance: new

Comment: A foreign corporation may amalgamate with one or more societies and form an amalgamated British Columbia society under Division 3 of Part 9. This section addresses a different situation: a foreign corporation that is registered as an extraprovincial society in British Columbia amalgamating with one or more other foreign corporations in the foreign jurisdiction. The concern for British Columbia in this situation is that may render the public information on the extraprovincial society out of date. This section contains the filing requirements with the British Columbia Registrar of Companies which must be met by an extraprovincial society that is a party to an amalgamation outside British Columbia. Subsection (1) requires filing a notice of amalgamation (and any other records the registrar may require). Subsection (2) deals with the name of the amalgamated foreign corporation. If its name is the same as the name of one of the amalgamating extraprovincial societies or if the amalgamated extraprovincial society is a federal corporation, then no action other than notice is required. (An existing name has already been approved; a federal corporation is entitled by law to carry on activities in any province or territory in Canada under its federally approved name.) If a new name is to be used, then that name must be reserved in accordance with section 20. If the proposed name is unavailable in British Columbia, then the amalgamated extraprovincial society must use an assumed name. Subsection (3) contains certain publication and certification requirements for the registrar. Subsection (3) (d) refers to publication in the prescribed manner. This reference is intended to direct readers to the regulations. For companies, the prescribed manner of publication is by posting on a website maintained by or for

the government. A similar regulation would be appropriate for societies. Subsection (4) confirms that ownership of land is unaffected by the amalgamation. Subsection (5) is self-explanatory.

Extraprovincial societies to file annual report

281 (1) Subject to section 306 (2) *[societies and extraprovincial societies in default of filing]*, an extraprovincial society must file with the registrar an annual report in the form established by the registrar,

(a) unless another date has been prescribed under paragraph (b) of this section, within 2 months after each anniversary of the date of its registration as an extraprovincial society, or

(b) if another date has been prescribed, within 2 months after each anniversary of that prescribed date.

(2) An annual report filed under subsection (1) must contain information that was correct as of the most recent applicable anniversary.

Source: BCA, s. 380

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 78 (c)

Comment: The intent of this section is to require extraprovincial societies to file annual reports with Registrar of Companies. It is similar to requirement placed on British Columbia societies. Subsection (1) also contains the timing requirement for the filing of that annual report. It must be filed within two months of each anniversary of the date of the extraprovincial society's recognition as an extraprovincial society. Subsection (1) (b) authorizes establishing a new timing requirement by regulation. The BCA contains a similar requirement; to date, no regulations have been prescribed under this section.

Extraprovincial societies to notify registrar of changes

282 (1) An extraprovincial society must file with the registrar a notice of change respecting extraprovincial society in respect of any change that renders incorrect or incomplete any of the information shown in the corporate register with respect to the extraprovincial society.

(2) A notice of change respecting extraprovincial society required by subsection (1) must be

(a) in the form established by the registrar, and

(b) submitted to the registrar for filing promptly after the occurrence of the change in respect of which the notice is filed.

Source: BCA, s. 381

Reference: tentative recommendation (106)

Concordance: new

Comment: This section creates a filing requirement for extraprovincial societies for situations where changes in corporate information render incorrect or incomplete any information regarding the extraprovincial society in the British Columbia corporate register. Some examples of such changes would include a change of address of the extraprovincial society's head office or a change of the jurisdiction of the extraprovincial society.

Change of name of extraprovincial societies

283 (1) If a foreign corporation that is registered as an extraprovincial society changes its name, the extraprovincial society must provide to the registrar the records and information the registrar may require and must

(a) file with the registrar

(i) a notice of change of name of extraprovincial society in the form established by the registrar, and

(ii) any other records the registrar may require, and

(b) before filing those records,

(i) if it wishes to carry on activities in British Columbia under its new name, reserve its new name under section 20 *[reservation of name]*, or

(ii) if its new name contravenes any of the prescribed requirements or any of the other requirements set out in Division 2 of Part 2 and the extraprovincial society does not have an assumed name under which it intends to continue to carry on activities in British Columbia, adopt an assumed name.

(2) If an extraprovincial society wishes to adopt an assumed name under subsection (1) (b) (ii) of this section or in response to an order of the registrar under section 26 (2) *[registrar may order change of name]*, section 24 *[assumed names]* applies.

(3) After the notice of change of name of extraprovincial society is filed with the registrar, the registrar must

(a) issue and furnish to the extraprovincial society a certificate showing

(i) the change of name, and

(ii) the assumed name, if any, under which the extraprovincial society is to carry on activities in British Columbia, and

(b) publish in the prescribed manner a notice of the change of name.

(4) Subsection (1) (b) does not apply to a federal corporation.

(5) At any time, before or after a certificate is issued under subsection (3) (a), the registrar may order the foreign corporation to provide to the registrar,

within the time required by the registrar, proof satisfactory to the registrar of the foreign corporation's status in the foreign corporation's jurisdiction.

Source: BCA, s. 382

Reference: tentative recommendation (106)

Concordance: new

Comment: An extraprovincial society may change its name in its home jurisdiction. If it changes its name, then it must comply with the name reservation and filing requirements that are set out in this section. If an extraprovincial society cannot use its new name in British Columbia, then the Act contains a mechanism for the extraprovincial society to adopt an assumed name. The reference in subsection (3) (b) to the Registrar of Companies publishing notice in the prescribed manner is a reference to the regulations. For companies, the regulations to the BCA authorize publishing this notice by posting it on a website maintained by or for the government. A similar regulation would be appropriate for societies.

Cancellation or change of assumed name of extraprovincial society

284 (1) An extraprovincial society that has adopted an assumed name under this Act may, by providing to the registrar the records and information the registrar may require and by filing with the registrar a notice of change of assumed name in the form established by the registrar and any other records the registrar may require,

(a) if the extraprovincial society reserves its own name under section 20 *[reservation of name]*, cancel its assumed name and carry on activities in British Columbia under its own name, or

(b) change its assumed name and carry on activities in British Columbia under the new assumed name.

(2) If an extraprovincial society wishes to change an assumed name under subsection (1) (b) of this section, section 24 *[assumed names]* applies.

(3) After an extraprovincial society cancels or changes its assumed name in accordance with this section, the registrar must

(a) issue and furnish to the extraprovincial society a certificate showing the cancellation or change of the assumed name, and

(b) publish in the prescribed manner a notice of the cancellation or change of the assumed name.

Source: BCA, s. 383

Reference: tentative recommendation (106)

Concordance: new

Comment: An extraprovincial society may adopt an assumed name for use in British Columbia if it cannot use its legal name (approved in another jurisdiction) in this province. This section con-

tains a procedure for an extraprovincial society that has adopted an assumed name to cancel or change that name. The reference in subsection (3) (b) to the Registrar of Companies publishing notice in the prescribed manner is a reference to the regulations. For companies, the regulations to the BCA authorize publishing this notice by posting it on a website maintained by or for the government. A similar regulation would be appropriate for societies.

Liability if name of extraprovincial society not displayed

285 (1) A director or officer of an extraprovincial society who knowingly permits the extraprovincial society to contravene section 25 (1) (a), (b) or (c) *[name to be displayed]* is personally liable to indemnify any of the following persons who suffer loss or damage as a result of being misled by that contravention:

(a) a purchaser of goods or services from the extraprovincial society;

(b) a supplier of goods or services to the extraprovincial society;

(c) a person holding a security of the extraprovincial society.

(2) A director or officer of an extraprovincial society who issues or authorizes the issue of any instrument referred to in section 25 (1) (d) *[name to be displayed]* that does not display the name or assumed name, as the case may be, of the extraprovincial society is personally liable to the person holding that instrument for the amount of it, unless it is duly paid by the extraprovincial society.

Source: BCA, s. 384

Reference: tentative recommendation (106)

Concordance: new

Comment: Just as a director or officer of a British Columbia faces personal liability for knowingly permitting a society to contravene the name display rules in section 25, so a director or officer of an extraprovincial society may face personal liability in the same circumstances. This section places extraprovincial societies on the same footing as British Columbia societies with respect to this issue.

Enforcement of duty to file records

286 (1) If an extraprovincial society or its receiver, receiver manager or liquidator has failed to file with the registrar any record required to be filed with the registrar under this Act, any director, member or creditor of the extraprovincial society may provide, to the person required to submit the record to the registrar for filing, notice requiring that person to file the record with the registrar.

(2) If the person required to file a record with the registrar under subsection (1) fails to file the record with the registrar within 14 days after receipt

of the notice referred to in subsection (1), the court may, on the application of any director, member or creditor of the extraprovincial society,

(a) order the person to file the record with the registrar within the time the court directs, and

(b) direct that the costs of and incidental to the application be paid by the extraprovincial society, by any director or officer of the extraprovincial society or by any other person the court considers appropriate.

(3) Neither the making of an order by the court under this section nor compliance with such an order relieves a person from any other liability.

Source: BCA, s. 385

Reference: tentative recommendation (106)

Concordance: new

Comment: This section parallels section 162, which applies to British Columbia societies. The purpose of this section is to provide a mechanism for members, or others, to compel the management of an extraprovincial society to ensure that the extraprovincial society meets its filing requirements under this Act.

Division 2 – Attorneys for Extraprovincial Societies

Attorneys to be appointed

287 (1) An extraprovincial society must ensure that

(a) it has one or more attorneys, or

(b) under its charter or similar record, its head office is in British Columbia, in which case it may have one or more attorneys.

(2) For the purposes of this Division, each attorney for an extraprovincial society must be

(a) an individual who is resident in British Columbia, or

(b) a company.

(3) The mailing address and the delivery address of an attorney must be,

(a) in the case of an attorney that is an individual, the mailing address and the delivery address of the office in British Columbia at which the individual can usually be reached during statutory business hours, or

(b) in the case of an attorney that is a company, the mailing address and the delivery address of that company's registered office.

Source: BCA, s. 386

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 77 (1)

Comment: An attorney is, in brief, an extraprovincial society's local agent in British Columbia. The requirement to have an attorney is meant to provide some protection for the public interest, as the main duty of the attorney is to accept service of legal process and to receive notices given to the extraprovincial society. In the absence of an agent within British Columbia, service or delivery of these documents would be more difficult, time-consuming, and expensive.

Subsection (1) requires each extraprovincial society to have one or more attorneys, unless the extraprovincial society's corporate charter provides that the extraprovincial society's head office is to be located in British Columbia. This exception exists to reduce duplication. If the extraprovincial society's head office is located in British Columbia, then an attorney is not strictly necessary, as the extraprovincial society can receive legal process and other notices at its head office. If the exception applies, then it is optional for the extraprovincial society to have an attorney. In most cases, the type of foreign corporation that has its head office in British Columbia will be a federal corporation. A not-for-profit corporation may be incorporated under Part II of the *Canada Corporations Act* and elect to have its head office in British Columbia. This corporation would still have to register extraprovincially in British Columbia, because of its federal incorporation.

Under subsection (2), an attorney may be an individual who resides in British Columbia or a (for-profit) British Columbia company. The key point to bear in mind is that the attorney is located in British Columbia. No legal training or professional designation is necessary to act as the attorney for an extraprovincial society.

Subsection (3) contains rules regarding the attorney's mailing address and delivery address. These terms are defined in section 1. Section 1 also contains a definition of "statutory business hours." In simple terms, statutory business hours are 9:00 a.m. to 4:00 p.m. on any business day.

First attorneys

288 If the registration statement filed with the registrar to register a foreign corporation as an extraprovincial society identifies one or more attorneys, the extraprovincial society has those persons as its first attorneys, and the mailing addresses and delivery addresses for those attorneys are the mailing addresses and delivery addresses respectively set out for those attorneys on the registration statement.

Source: BCA, s. 387

Reference: tentative recommendation (106)

Concordance: new

Comment: This section simply confirms that the person or persons identified as its attorneys in a foreign corporation's registration statement will be the first attorneys of the extraprovincial society. The first attorneys are in office from the date of registration until succeeding attorneys are appointed.

Authorization of attorneys

289 Each attorney for an extraprovincial society is deemed to be authorized by the extraprovincial society

(a) to accept service of process on its behalf in each legal proceeding by or against it in British Columbia, and

(b) to receive each notice to it.

Source: BCA, s. 388

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 77 (1)

Comment: This section confirms that an extraprovincial society's attorneys are authorized to accept service of legal process on and to receive notices given to the extraprovincial society. This is the key function of the attorney under this Act, so a statutory authorization is necessary. The attorney's authority to accept legal process or notices cannot be left to turn on authorization by the extraprovincial society.

Appointment of attorneys

290 (1) An extraprovincial society may, after its registration statement has been filed with the registrar, appoint one or more persons as attorneys and must, after that appointment, file with the registrar a notice of appointment of attorney in the form established by the registrar for each attorney so appointed.

(2) A notice of appointment of attorney filed with the registrar under subsection (1) must set out

(a) the full name of each attorney, and

(b) the mailing address and the delivery address of each attorney in accordance with section 287 (3) *[attorneys to be appointed]*.

(3) A person specified in a notice of appointment of attorney filed with the registrar under subsection (1) of this section becomes an attorney for the appointing extraprovincial society

(a) on the date and time that the notice of appointment of attorney is filed with the registrar, or

(b) subject to sections 291 *[withdrawal of appointment]* and 305 *[limitation on future dated filings]*, if the notice of appointment of attorney specifies a date, or a date and time, on which the appointment of the attorney is to take effect that is later than the date and time on which the notice of appointment of attorney is filed with the registrar,

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

(4) After a person becomes an attorney for an extraprovincial society under subsection (3) of this section, the registrar must furnish to the attorney confirmation of the appointment.

Source: BCA, s. 389

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 77 (2)

Comment: The first attorneys of an extraprovincial society are appointed under its registration statement. If the extraprovincial society wishes to appoint a succeeding attorney, then it must comply with the filing requirements set out in this section.

Withdrawal of appointment

291 At any time after a notice of appointment of attorney is filed with the registrar under section 290 *[appointment of attorneys]* and before the appointment takes effect, the extraprovincial society in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of appointment of attorney by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of appointment of attorney.

Source: BCA, s. 390

Reference: tentative recommendation (106)

Concordance: new

Comment: This section addresses an administrative matter. It confirms that an appropriate person may withdraw a notice of appointment of attorney at any time after filing and before the attorney's appointment takes effect by filing the requisite form with the Registrar of Companies.

Change of address of attorneys

292 (1) If there is to be a change to one or both of the mailing address and the delivery address of an attorney for an extraprovincial society, the extraprovincial society or the attorney may, before that change occurs, file with the registrar a notice of change of address of attorney in the form established by the registrar.

(2) If there is a change to one or both of the mailing address and the delivery address of an attorney for an extraprovincial society and if a notice of change of address reflecting that change was not filed under subsection (1) before that change occurred, promptly after that change occurs, the extraprovincial society or the attorney must file with the registrar a notice of change of address of attorney in the form established by the registrar.

(3) If the notice of change of address of attorney is submitted to the registrar for filing by an attorney, the attorney must mail a copy of the completed notice of change of address of attorney to the head office of the extraprovincial society.

(4) The change of address reflected in the notice of change of address of attorney filed with the registrar under subsection (1) or (2) takes effect,

(a) subject to section 293 *[withdrawal of notice of change of address]*, at the beginning of the day following the date on which the notice of change of address of attorney is filed with the registrar, or

(b) subject to sections 291 *[withdrawal of appointment]* and 305 *[limitation on future dated filings]*, if the notice of change of address of attorney specifies a date on which the change of address is to take effect that is later than the day following the date on which the notice is filed with the registrar, at the beginning of the specified date.

Source: BCA, s. 391

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 77 (5)

Comment: This section contains the filing requirements attended on a change of the attorney's mailing address or delivery address. (These terms are defined in section 1.) The required filing may be done before the change takes effect. If it is not done at that time, then it must be done "promptly" after the change occurs. In addition to filing with the Registrar of Companies, the attorney must also notify the extraprovincial society of a change of address.

Withdrawal of notice of change of address

293 At any time after a notice of change of address of attorney is filed with the registrar under section 292 *[change of address of attorneys]* and before the change of address takes effect, the attorney or extraprovincial society in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of change of address of attorney by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of change of address of attorney.

Source: BCA, s. 392

Reference: tentative recommendation (106)

Concordance: new

Comment: This section addresses an administrative matter. It confirms that an appropriate person may withdraw a notice of change of address of attorney at any time after filing and before the attorney's change of address takes effect by filing the requisite form with the Registrar of Companies.

Revocation of appointments of attorneys

294 (1) Subject to section 287 (1) *[attorneys to be appointed]*, an extraprovincial society may revoke the appointment of an attorney by filing with the registrar a notice of revocation of appointment of attorney in the form established by the registrar.

(2) Subject to subsection (3) of this section, a revocation referred to in a notice of revocation of appointment of attorney takes effect to terminate the appointment of the attorney referred to in that record,

(a) subject to section 291 *[withdrawal of appointment]*, at the beginning of the day following the date on which the notice of revocation of appointment of attorney is filed with the registrar, or

(b) subject to sections 291 *[withdrawal of appointment]* and 305 *[limitation on future dated filings]*, if the notice of revocation of appointment of attorney specifies a date on which the revocation is to take effect that is later than the day following the date on which the notice is filed with the registrar, at the beginning of the specified date.

(3) A revocation of the appointment of an attorney does not take effect unless and until the extraprovincial society complies with section 287 *[attorneys to be appointed]*.

(4) After a revocation of the appointment of an attorney takes effect, the registrar must furnish confirmation of the revocation of appointment to the person whose appointment has been revoked.

Source: BCA, s. 393

Reference: tentative recommendation (106)

Concordance: new

Comment: This section contains the filing requirements that must be fulfilled if an extraprovincial society wishes to revoke the appointment of an attorney. Under subsection (3), an extraprovincial society that revokes the appointment of its sole attorney must appoint a replacement attorney and comply with the filing requirements for the appointment of an attorney.

Withdrawal of revocation of appointment

295 At any time after a notice of revocation of appointment of attorney is filed with the registrar under section 294 *[revocation of appointments of attorneys]* and before the revocation takes effect, the extraprovincial society in respect of which the filing was made or any other person who appears to the registrar to be an appropriate person to do so may withdraw the notice of revocation of appointment of attorney by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the notice of revocation of appointment of attorney.

Source: BCA, s. 394

Reference: tentative recommendation (106)

Concordance: new

Comment: This section merely confirms that an appropriate person may revoke a notice of revocation of appointment of attorney at any time after filing the form with the Registrar of Companies and before the revocation takes effect.

Resignations of attorneys

296 (1) An attorney for an extraprovincial society who intends to resign must

(a) provide a written resignation to the extraprovincial society at its head office at least 2 months before the date on which the resignation is to take effect, and

(b) promptly after complying with paragraph (a), submit to the registrar for filing a notice of resignation of attorney in the form established by the registrar.

(2) After receiving a notice of resignation of attorney under subsection (1) (b), the registrar must file that notice.

(3) An extraprovincial society that receives a resignation under subsection (1) (a) must, within the period of time specified in that resignation, comply with section 287 *[attorneys to be appointed]*.

(4) An attorney who files a notice of resignation of attorney with the registrar under subsection (1) of this section ceases to be an attorney for the extraprovincial society on the later of

(a) the beginning of the day that is 2 months and one day after the date on which the notice of resignation of attorney was filed with the registrar, and

(b) the beginning of the date specified by the notice of resignation of attorney as the effective date for the resignation.

(5) Despite subsection (4), if, under section 294 *[revocation of appointments of attorneys]*, the extraprovincial society revokes the appointment of a person who has filed a notice of resignation of attorney with the registrar and that revocation takes effect before the date on which the resignation would be effective under subsection (4) of this section, the person ceases to be an attorney when the revocation takes effect.

Source: BCA, s. 395

Reference: tentative recommendation (106)

Concordance: new

Comment: An attorney who wishes to resign from that office must fulfill the notice and filing requirements set out in this section. If an attorney resigns, then the extraprovincial society is required by subsection (3) to appoint a replacement attorney and comply with the filing requirements, if the resigning attorney was the extraprovincial society's sole attorney.

Obligation to maintain head office or attorney

297 If an event occurs or any action is taken that results in an extraprovincial society ceasing to comply with section 287 *[attorneys to be appointed]*, the extraprovincial society must, promptly after the event or action, comply with section 287 *[attorneys to be appointed]*.

Source: BCA, s. 396

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 77 (3)

Comment: The purpose of this section is to ensure that if an extraprovincial society no longer has an attorney or a head office in British Columbia, then it must promptly comply with the Act (most likely, by appointing an attorney).

Division 3 – Cancellation of Registration of Extraprovincial Societies

Registrar may cancel registration of defunct extraprovincial societies

298 The registrar must cancel the registration of a foreign corporation as an extraprovincial society if

(a) there is filed with the registrar a notice, from the person in the foreign corporation's jurisdiction whose role in that jurisdiction is similar to the role of the registrar in British Columbia, that the foreign corporation has ceased to exist, or

(b) the foreign corporation files with the registrar a notice of ceasing to carry on activities in British Columbia in the form established by the registrar, stating that the foreign corporation has ceased to carry on activities in British Columbia.

Source: BCA, s. 397

Reference: tentative recommendation (106)

Concordance: *Society Act*, 1996, s. 79

Comment: Under this section, the Registrar of Companies may cancel the extraprovincial registration of a foreign corporation for two reasons: (1) if the equivalent to the Registrar of Companies in the foreign corporation's home jurisdiction certifies that the foreign corporation has ceased to exist in the foreign corporation's home jurisdiction; or (2) if the foreign corporation has filed with the registrar a notice of ceasing to carry on activities in British Columbia.

Lieutenant Governor in Council may cancel registration of extraprovincial societies

299 (1) The Lieutenant Governor in Council may cancel the registration of a foreign corporation as an extraprovincial society.

(2) The Lieutenant Governor in Council may restore the registration of a foreign corporation that has had its registration as an extraprovincial society cancelled.

(3) This section does not apply to a federal corporation.

Source: BCA, s. 398

Reference: tentative recommendation (106)

Concordance: new

Comment: This section is the equivalent of section 319, which provides that the Lieutenant Governor in Council (effectively, the cabinet of the provincial government) may order the dissolution of a British Columbia society. This power has been sparingly (if ever) used in practice.[255] Consistent with the case law on federal paramountcy,[256] the Lieutenant Governor in Council cannot exercise this power with respect to a federal corporation.

This section has been included for harmonization with the BCA. The committee questions whether it is still necessary to give the Lieutenant Governor in Council this power, which appears to be out of step with contemporary thinking about the status and role of corporations.

Registrar's duties on cancellation of registration

300 After a foreign corporation's registration as an extraprovincial society is cancelled under section 298 *[registrar may cancel registration of defunct extraprovincial societies]*, 299 *[Lieutenant Governor in Council may cancel registration of extraprovincial societies]* or 318 *[dissolutions and cancellations by the registrar]*, the registrar must publish in the prescribed manner a notice of the cancellation.

Source: BCA, s. 399

Reference: tentative recommendation (106)

Concordance: new

Comment: Publication in the prescribed manner means, for companies, publication by posting on website maintained by or on behalf of the government.[257] This manner of publication would also be appropriate for societies.

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255. *See British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 12.71 ("Given the other options available, the government is reluctant to take a position on the restoration of an extraprovincial company and to the authors' knowledge has never become so involved.").

256. *Supra* note 254.

257. *Business Corporations Regulation*, *supra* note 90, s. 6.

PART 12 – ADMINISTRATION

Introductory comment: This Part contains a number of miscellaneous administrative provisions. Some of these provisions—such as the powers of dissolution and cancellation contained in Division 3 and the offences and penalties contained in Division 4—are clearly needed as part of a new *Society Act*. Much of Divisions 1 and 2, on the other hand, could have been left out. This material is covered in general terms in the BCA, so an argument could be made that it is unnecessary to replicate it in the *Society Act*. But these provisions do have a bearing on societies, so it was decided to include them. A number of respondents to the consultation paper made the point that relying on general provisions in the BCA or incorporating specific provisions by reference makes the law less accessible to the public. A few sections in the BCA related solely to the constitution of the office of the Registrar of Companies. There is no need to repeat these sections, so they have not been included.

Division 1 – Appeals of Decisions of the Registrar

Appeal to court

301 (1) In this section, **"decision"** means a direction, decision, order, ruling or refusal of the registrar.

(2) A person affected by a decision may appeal the decision to the Supreme Court.

(3) The registrar is a party to an appeal of a decision to the Supreme Court.

(4) An appeal under subsection (2) is an appeal on the record.

(5) For the purposes of subsection (4), the record consists of the following:

(a) the record of oral evidence, if any, before the registrar;

(b) copies or originals of documentary evidence before the registrar;

(c) other things received as evidence by the registrar;

(d) the decision;

(e) the written reasons for the decision, if any.

(6) An appeal under subsection (2) must be commenced not more than 30 days after the earlier of the following:

(a) the furnishing to the appellant of a notice of the decision to be appealed;

(b) actual notice to the appellant of the decision to be appealed.

Source: BCA, s. 406

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 96

Comment: This section allows a person affected by a decision of the Registrar of Companies to appeal to the Supreme Court of British Columbia from a decision made by the registrar under this Act. It corresponds closely to section 96 of the *Society Act*, 1996, which also deals with appeals from decisions of the registrar.

The term "decision" has an extended definition for the purposes of the right of the appeal, covering a "direction, decision, order, ruling or refusal" by the registrar acting under a provision of the new Act.

The registrar is a party to any appeal under this section. This means that the registrar may appear and make submissions to the court at the hearing of the appeal.

The appeal is "on the record." This means that the Supreme Court cannot hear and decide the matter completely anew. It must decide the appeal on the basis of the grounds of appeal raised by the appellant, the proceedings before the registrar, and the registrar's decision. The contents of what constitutes the "record" are set out in subsection (5). Basically, the record is the documentary and oral evidence provided to the registrar, the decision itself, and any written reasons for the decision.

An appeal from a decision of the registrar must be started not more than 30 days after the appellant has been given a notice of the decision, or has actual notice of it, whichever is earlier.

Division 2 – Records Filed with or Issued by the Registrar

Means of filing

302 A record required or permitted, by this Act, to be filed with the registrar

(a) must be submitted to the registrar for filing in the prescribed manner,

(b) must, in the opinion of the registrar, be legible and suitable for photographing or for electronic or digital imaging or storage, and

(c) must be in the English language or be filed with an English translation verified in a manner satisfactory to the registrar.

Source: BCA, s. 407

Reference: tentative recommendation (4)

Concordance: new

Comment: This section sets out requirements that a record called for by this Act must meet in order to be acceptable for filing with the Registrar of Companies. The same requirements that apply to records filed under the BCA should apply under this Act. To be accepted for filing, a record must be submitted in the manner required by the Act or a regulation. It must be both legible and suitable for photographic or electronic or digital imaging and storage. It must also be either in English or accompanied by an English translation, the accuracy of which is verified in a way acceptable to the registrar. The "prescribed manner" of submitting records to the registrar referred to in paragraph (a) is set out for companies in the *Business Corporations Regulation*.[258] Under that

258. *Supra* note 90, s. 30.

regulation, the baseline method of submitting records to the registrar is in paper form. But the provision goes on to provide that a large number of records (from the incorporation application to the annual report and many notices) are to be submitted electronically in a format that is technically compatible with the registrar's requirements. A facility for electronic submission of these records for companies has been in place for several years. It has streamlined administration for both companies and the registrar.

Filing of records

303 (1) Subject to section 402 (3) of the *Business Corporations Act*, a record is filed with the registrar when the registrar

(a) is satisfied that the record and the information contained in it appear to meet the requirements of this Act and the regulations, and

(b) accepts the record and includes in the corporate register the information contained in the record.

(2) Any notice, application or other record that, under this Act, may or must be submitted for filing with the registrar or provided to the registrar must be submitted or provided in a form and with the contents satisfactory to the registrar.

(3) The registrar may establish different forms for use by different classes of corporations.

(4) Despite any other provision of this Act, the registrar may refuse to file a record submitted to the registrar for filing if, in the opinion of the registrar,

(a) the record has not been duly completed by reason of any omission or misdescription,

(b) the record does not comply with the requirements of this Act or the regulations,

(c) the record contains any error, alteration or erasure, or

(d) another record that, under this Act, must be provided to the registrar, or submitted to the registrar for filing, in conjunction with the record submitted for filing has not yet been provided or submitted for filing.

(5) Nothing in this section requires the registrar to ensure that a record filed with the registrar, or the information contained in it, meets the requirements of this Act and the regulations.

Source: BCA, s. 408

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 94.1

Comment: This section specifies when a record can be said to be filed with the Registrar of Companies. Filing occurs when the registrar, being satisfied that the form and content of a record

is in accordance with the Act and regulations, enters the information in the document into the corporate register. (The term "corporate register" is defined in section 1.) A record must be satisfactory to the registrar in terms of its form and content before it can be filed.

Subsection (1) provides that section 402 (3) of the BCA will override this section if it is applicable. Section 402 (3) of the BCA covers cases where registration functions have been suspended, and the registrar later determines that a record would have been received and filed within the suspension period if it had not occurred. In those circumstances the registrar is empowered to back-date the filing to the date and time when it would have been received or filed but for the suspension of activity. The date and time so assigned is deemed for legal purposes to be the date and time of receipt by the registrar or filing, as the case may be.

The registrar may reject a record for reasons of incompleteness or misdescription, or because it contains an error, alteration, or erasure. The registrar may also reject records that do not comply with this Act or regulations under it. An additional reason justifying rejection is that a record that must be submitted in conjunction with the record in question has not been submitted.

While the registrar is empowered to reject records for noncompliance with the Act and regulations, the onus to ensure compliance is on the society or other party filing, not on the registrar. This is also the case with records filed under the BCA, and it is currently the case with records filed under the *Society Act*, 1996.

Subsection (5), which absolves the registrar of the duty to ensure compliance with the Act and regulations, corresponds to section 94.1 of the *Society Act*, 1996. The other parts of this section have no counterparts in the *Society Act*, 1996, but resemble section 408 of the BCA.

Future dated filing of records

304 (1) In this section, **"future dated filing"** means a record, referred to in section 305 (1) (b) *[limitation on future dated filings]*, that specifies a date or a date and time on which the record is to take effect that is later than the date and time on which the record is filed.

(2) Once a future dated filing is made in relation to a corporation, the registrar is not to file any other record in relation to the corporation until that future dated filing has taken effect, except that,

(a) if the record is or includes a copy of an entered court order, the registrar is to withdraw the future dated filing and file the record, or

(b) if the record is a notice of withdrawal of the future dated filing, the registrar may file the notice of withdrawal and withdraw the future dated filing.

(3) Nothing in this section removes from a corporation the obligation to make any filing it is obliged to make with the registrar under this Act.

(4) Despite any other provision of this Act, if, before a future dated filing affecting a society or extraprovincial society takes effect, the society is dissolved or the registration of the extraprovincial society is cancelled, the fu-

ture dated filing is deemed to be withdrawn when the society is dissolved or the extraprovincial society's registration is cancelled.

Source: BCA, s. 409

Reference: tentative recommendation (4)

Concordance: new

Comment: This section applies to records referred to in section 305 (1) (b), namely certain classes of records prescribed by regulation that are permitted to be future dated. "Future dated" in this context means that a record is to take effect later than the date on which it is filed with the Registrar of Companies.

Subsections (1) to (3) use the term "corporation" instead of "society" because the definition of "corporation" in section 1 includes extraprovincial societies and foreign corporations, which may file records under this Act for certain purposes. The administrative machinery relating to records in the corporate registry therefore has to apply to them as well as domestically incorporated societies.

If a future-dated record is filed, nothing more may be filed in relation to the corporation to which it relates except a record that is or includes an "entered" court order or a notice of withdrawal of the future-dated record. An entered court order is a court order that, following its pronouncement, has been formally drawn up by counsel or a party and signed by the judge or master who pronounced it or by the registrar of the court. If an entered court order is filed in relation to the corporation before the future-dated record takes effect, the registrar must remove the future-dated record from the corporate registry.

Under subsection (4), if a society to which a filed future-dated record relates is dissolved or (in the case of an extraprovincial society) has its registration cancelled before a future-dated record takes effect, the future-dated record is automatically deemed to be withdrawn from the corporate registry. Subsection (4) refers to "societies" and "extraprovincial societies" separately, rather than collectively under the inclusive term "corporation," because only a society incorporated under the laws of British Columbia could be dissolved under this Act, while the reference in subsection (4) to cancellation of registration is properly applicable to extraprovincial societies.

Limitation on future dated filings

305 (1) A record submitted for filing to the registrar must not specify a date, or a date and time, on which the record is to take effect that is later than the date and time on which the record is filed with the registrar unless the record is

(a) a notice of resignation of attorney referred to in section 296 *[resignation of attorneys]*, or

(b) a record of a class of records that has been prescribed for that purpose.

(2) A record of a class of records prescribed under subsection (1) (b) must not specify a date or a date and time that is more than 10 days later than the date and time on which the record is filed.

Source: BCA, s. 410

Reference: tentative recommendation (4)

Concordance: new

Comment: This section sets out a basic rule that a record that is intended for filing in relation to a society must not be expressed to take effect later than the date of filing. Exceptions are provided in the case of (a) a notice of resignation of an attorney and (b) a class of records prescribed by regulation. The records prescribed for companies are: (1) incorporation applications; (2) notices of alteration; (3) amalgamation applications; and (4) applications for voluntary dissolution.[259] An equivalent class of records should be prescribed by regulation for societies. Records that come within these two exceptions may be "future dated," that is, may specify that they will take effect later than the date, or date and time, on which they are filed. In the case of the prescribed class of records other than notices of resignation of an attorney, the effective date cannot be more than 10 days later than the date and time of filing.

Societies and extraprovincial societies in default of filing

306 (1) If a record is, under this Act, or was, under a former *Societies Act*, required to be filed with the registrar by or on behalf of a corporation, the registrar may, until that record is filed with the registrar,

(a) refuse to accept any other record submitted to the registrar for filing by or on behalf of the corporation, and

(b) refuse to issue or furnish any certificate or other record to, or to the order of, the corporation.

(2) The registrar may refuse to accept any record submitted to the registrar for filing by or on behalf of a society if

(a) the society has not made the filings, contemplated by section 60 *[societies to file notices as to directors]*, that would confirm that it is in compliance with section 52 *[number of directors]*, or

(b) the society

(i) tendered a cheque in payment of a fee required under section 327 *[fees]* and that cheque failed to clear the savings institution on which it was drawn, or

(ii) otherwise failed to pay a fee required under section 327 *[fees]*.

(3) Despite subsection (2) (a) but without limiting subsections (1) and (2) (b), the registrar must not, in the circumstances referred to in subsection (2) (a), refuse to accept

259. *Business Corporations Regulation*, *ibid.*, s. 31.

(a) a filing contemplated by section 60 *[societies to file notices as to directors]*, or

(b) a filing under section 218 *[application for voluntary dissolution]* or 244 *[application for dissolution]*.

(4) A corporation that has not filed with the registrar one or more annual reports under the *Society Act*, 1996 must remedy that default before filing with the registrar any other annual report under this Act.

(5) Nothing in this section removes from a corporation the obligation to make any filing it is obliged to make with the registrar under this Act.

Source: BCA, s. 411

Reference: tentative recommendation (4)

Concordance: new

Comment: This section enforces filing requirements by empowering the Registrar of Companies to refuse to file records submitted by a society if the society has not filed other records as required. The registrar may also refuse to issue a certificate or other record requested by a society that has outstanding filing requirements. The registrar may take the same steps if a society omits to pay a required fee under the Act or pays with a cheque that is dishonoured by the financial institution on which it is drawn because of insufficient funds standing to the credit of the society.

Subsection (3) provides exceptions: the registrar must accept notices as to directors or applications for dissolution, voluntary or otherwise.

Under subsection (4), an annual report may not be filed until previous annual reports are all filed.

Subsection (5) makes it clear that an exercise of the power under this section to refuse to accept further filings because of defaults, or the exceptions to the registrar's power to refuse records for that reason, do not relieve a society of the obligation to make all required filings.

Maintenance of records filed with the registrar

307 (1) If a record is filed with the registrar under this Act or any other enactment or is otherwise maintained by the registrar, the registrar may have that record photographed, stored in electronic or digital form or reproduced in any other prescribed manner.

(2) If the information contained in a record filed with or otherwise maintained by the registrar in paper form under this Act or any other enactment is converted into another form under subsection (1),

(a) the registrar may destroy the paper form record, and

(b) the photograph, stored record or reproduction is, for all purposes of the corporate register and the office of the registrar, deemed to be the record photographed, stored or reproduced.

(3) If records are filed with or otherwise maintained by the registrar otherwise than in paper form,

(a) any copies of those records that the registrar is required to furnish must be furnished

(i) in paper form,

(ii) by being transmitted, by electronic means, to the recipient, or

(iii) in any other prescribed form, and

(b) any report prepared by the registrar that consists of information reproduced from those records, if that report is certified by the registrar or by a person designated by the registrar as a signing officer, is admissible in evidence in place of and to the same extent as the original records.

Source: BCA, s. 412

Reference: tentative recommendation (4)

Concordance: new

Comment: This section enables the Registrar of Companies to maintain records filed under this Act in digital form or through any medium prescribed by regulation. Subsection (1) is the basic enabling provision, authorizing digital or photographic reproduction of original records. Subsection (2) provides that information converted from an original paper record into another form is deemed to be the record for all purposes connected with the corporate registry and the registrar's office, and authorizes destruction of the paper original. Subsection (3) authorizes the registrar to provide information from the records in the registry in paper or electronic form, or any form that may be prescribed. A report containing information extracted from records held by the corporate registry in other than paper form, certified by the registrar or a signing officer designated by the registrar, is admissible in evidence on the same basis as the original records could have been admitted.

Deficient filings

308 If a record in respect of which this Act imposes certain requirements is filed with the registrar in relation to a corporation and that record does not meet all of those requirements,

(a) the record takes effect in accordance with its terms as if it did meet all of those requirements, and

(b) the corporation, on receiving an order of the registrar to do so, must

(i) file with the registrar any records necessary to rectify or replace the deficient filing, and

(ii) return any records required by the registrar that were furnished to the corporation by the registrar in relation to the deficient filing.

Source: BCA, s. 413

Reference: tentative recommendation (4)

Concordance: new

Comment: If a deficient record is filed, the record will take effect as if it did meet all requirements, but the society must comply with an order by the Registrar of Companies to rectify or replace the defective record. The society must also return any records provided by the registrar as a result of the filing of the defective record.

Correction of registers

309 (1) The registrar may correct an error or omission in the corporate register or in any other register kept by the registrar if

(a) the registrar is satisfied that an error or omission exists, and

(b) the registrar is satisfied as to the true facts that ought to have been incorporated into the register.

(2) Subsection (1) applies whether or not the error or omission was made by

(a) a person who submitted a record to the registrar for filing, or

(b) the registrar.

(3) Any correction made by the registrar under this section

(a) must be shown in the register as a correction, with the date and time of the correction noted by the registrar, and

(b) if the correction is made to a record filed with the registrar in paper form, must be initialled by the registrar, with the date and time of the correction noted.

Source: BCA, s. 414

Reference: tentative recommendation (4)

Concordance: new

Comment: Under this section, the Registrar of Companies is empowered to correct errors in the corporate register relating to a society to the same extent and in the same manner that errors arising from corporate filings are corrected under the BCA. It is immaterial whether the error is that of the registrar or the party who filed the record requiring correction. Corrections must be shown as such in the corporate register, together with the date and time they were made. In addition, corrections on paper records must be initialled by the registrar.

Validity of corporate register

310 The legal effect of information in the corporate register is not affected merely because the registrar has received information indicating that there is an error or omission in the corporate register.

Source: BCA, s. 415

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is intended to support the integrity of the corporate register, which is British Columbia's public repository of information about corporations. It is important that the general public be able to rely on information it obtains from the corporate register and not be put to the time and expense of making further inquiries to ensure the accuracy of that information.

Beginning of date

311 A reference in the corporate register, or on any record issued under this Act by the registrar, to a time of 12:01 a.m. on any date is for all purposes deemed to be a reference to the beginning of that date.

Source: BCA, s. 415.1

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is included in order that the same conventions used in relation to recording time in the electronic corporate register will apply to documents filed under this Act.

Inspection and copies of records

312 Any person may, in the manner and to the extent permitted by the registrar,

(a) conduct a search of the corporate register according to

(i) the name, translated name or incorporation number of a society,

(ii) the name or assumed name of an extraprovincial society, or its registration number, or

(iii) any other prescribed criteria,

(b) inspect a record filed with the registrar,

(c) obtain a copy of all or any part of a record filed with the registrar, and

(d) require that a copy of all or any part of a record filed with the registrar be certified in accordance with section 314 *[registrar may issue records]*.

Source: BCA, s. 416

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 95 (1)

Comment: This section defines what rights the public has to inspect and copy records relating to a society that are required by this Act to be filed with the Registrar of Companies. Those rights correspond to public rights of access to records filed under the *Society Act*, 1996. See section 38 and the accompanying commentary regarding access rights in relation to documents that a society is required to keep at its records office, and the changes in this regard from the *Society Act*, 1996.

Lost or destroyed records

313 If, under this Act or any other enactment, the registrar is required to provide a record on request and if, after such request, the registrar is unable to provide the record as a result of its having been lost, mislaid or destroyed, the registrar

(a) must furnish to the person making the request, a record to that effect, and

(b) may produce, instead of the lost, mislaid or destroyed record, whatever evidence relating to the record is available to the registrar.

Source: BCA, s. 417

Reference: tentative recommendation (4)

Concordance: new

Comment: If records that the Registrar of Companies is required to maintain become lost or destroyed, then, on a request for records that are lost or destroyed, the registrar must inform the requester of this fact. The registrar may also give the requester any evidence relating to the lost or destroyed record that is available to the registrar.

Registrar may issue records

314 (1) The following records may be issued by the registrar:

(a) a certificate or any other certified record;

(b) a search result;

(c) a certified copy of a record filed with the registrar;

(d) any other record the registrar considers appropriate.

(2) A record referred to in subsection (1) (c) must be certified, in the prescribed manner, to be a true copy.

(3) The registrar or a person designated as a signing officer by the registrar may sign a record referred to in this section, and that signature may be produced by any means, whether graphic, electronic, digital, mechanical or otherwise.

(4) If, under this Act, a decision, notice or response of the registrar is required to be in writing, the decision, notice or response may be recorded or otherwise furnished by the registrar

(a) on paper,

(b) by being transmitted, by electronic means, directly to the computer of the recipient, or

(c) by any other prescribed method.

Source: BCA, s. 418

Reference: tentative recommendation (4)

Concordance: new

Comment: The powers that the Registrar of Companies has to issue various types of records under the BCA are replicated here in regard to records relating to societies.

The combined effect of subsections (1) (c) and (2) is that copies of records filed with the registrar may only be issued if they are certified as true copies. The registrar has no power to issue an uncertified copy of a filed record.

Subsections (3) and (4) accommodate the volume of document traffic to and from the corporate registry and the generally increasing degree of digitalization of communications. Subsection (3) permits the registrar's or other signing officer's signature to be affixed by electronic, digital, graphic, or mechanical means. Subsection (4) allows decisions, notices or responses by the registrar to be issued electronically directly to a recipient (*e.g.*, by e-mail) or by any other prescribed method as well as on paper.

Effect of records issued by registrar

315 (1) A record issued under section 314 (1) *[registrar may issue records]* is evidence of any of the matters stated in the record that relate to the corporate register.

(2) If a record is filed with the registrar under this Act, a copy of that record, certified by the registrar under section 314 (2) *[registrar may issue records]*, is admissible in evidence in place of and to the same extent as the original record.

(3) A record purporting to be issued under section 314 *[registrar may issue records]* may be received in evidence and, unless the contrary is shown, is deemed to have been issued by the registrar without the necessity of proving any signature or official position of the registrar or person designated as a signing officer by the registrar.

Source: BCA, s. 419

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 95 (2)

Comment: This section deals with the evidentiary effect of records issued by the Registrar of Companies under the preceding section in legal proceedings subject to provincial legislative jurisdiction. Subsection (1) provides that a record issued by the registrar under the preceding section

serves as proof of matters stated in it having to do with the corporate register. This means that the facts stated in the record do not need to be proved separately by other evidence. Subsection (2) makes certified copies of records filed in the corporate register under this Act admissible in evidence in place of the original. Subsection (3) dispenses with the need to prove the authenticity of signatures or the official status of the signer when a record issued by the registrar under the preceding section is offered in evidence in a legal proceeding.

This section corresponds to section 419 of the BCA and puts records issued by the registrar relating to societies on the same footing, in terms of their evidentiary effect, as those issued in relation to companies. While section 95 (2) of the *Society Act*, 1996, is similar in effect, subsection (1) goes further in deeming a record emanating from the registrar to be evidence of the state of the register reflected in it.

Correction of certificates and other certified records

316 (1) If a record issued by the registrar under section 314 (1) (a) *[registrar may issue records]* contains an error, the person to whom the record is issued must, promptly after the written request of the registrar, and in any event no later than 21 days after that request, return the record containing the error to the registrar.

(2) Whether or not the record referred to in subsection (1) of this section is returned to the registrar, the registrar may issue a corrected record, and a record corrected under this section must set out the date of issue of the record it replaces.

Source: BCA, s. 420

Reference: tentative recommendation (4)

Concordance: new

Comment: Subsection (1) requires the return, on the written request of the Registrar of Companies, of a record issued by the registrar under section 314 (1) that contains an error. Subsection (2) empowers the registrar to issue a corrected record, referencing by date of issuance the record it replaces.

No constructive notice

317 No person is affected by or is deemed to have notice or knowledge of the contents of a record concerning a corporation merely because the record has been filed with the registrar or is available for examination at an office of the corporation.

Source: BCA, s. 421

Reference: tentative recommendation (4)

Concordance: new

Comment: The purpose of this section is to make it clear that filing a record about a corporation in the corporate registry does not amount to “constructive notice” to all other persons of the con-

tents of the record. In other words, no one is deemed to be aware of the contents of a record merely because a record is filed there.

This section refers to records "concerning a *corporation*" (italics added) instead of a society, because the term "society" as used in this Act does not extend to an extraprovincial society. The term "corporation" includes extraprovincial societies and foreign corporations. (See the definition of "corporation" in section 1.) Extraprovincial societies are required to register with the Registrar of Companies of British Columbia and make certain filings in order to be able to carry on their activities here legally.

Division 3 – Powers of Dissolution and Cancellation

Dissolutions and cancellations of registration by registrar

318 (1) The registrar may, in accordance with this section, dissolve a society or cancel the registration of a foreign corporation as an extraprovincial society if the society or extraprovincial society

(a) fails, in each of 2 consecutive years, to file with the registrar an annual report required by this Act or a former *Societies Act* to be filed,

(b) has, for a period of at least 2 years, failed to file with the registrar a record required by this Act or a former *Societies Act* to be filed, other than an annual report,

(c) fails to comply with an order of the registrar, including an order to change its name or assumed name,

(d) fails, without reasonable excuse, to return a record to the registrar within 21 days after the date of a request furnished by the registrar under section 316 (1) *[correction of certificates and other certified records]*,

(e) tenders a cheque in payment of a fee required under section 327 *[fees]*, which cheque fails to clear the savings institution on which it is drawn, or otherwise fails to pay a fee required under section 327 *[fees]*,

(f) in the case of a pre-existing society, fails to comply with section 271 *[transition – restored pre-existing societies]* or 331 *[transition – pre-existing societies]*, as the case may be, or

(g) in the case of an extraprovincial society, fails to comply with section 287 *[attorneys to be appointed]* or breaches an undertaking given under section 24 (2) *[assumed names]*.

(2) If the registrar has reasonable cause for believing that one or more of the paragraphs of subsection (1) of this section apply to a society or an extraprovincial society, the registrar may furnish to the society or extraprovin-

cial society a letter informing it of its default and of the powers of the registrar under this section.

(3) The registrar may publish in the prescribed manner a notice that complies with subsection (4) unless, within one month after the date of the letter referred to in subsection (2),

(a) the default identified in the letter is remedied, or

(b) the registrar receives a response to the letter

(i) that satisfies the registrar that reasonable steps are being taken to remedy the default, or

(ii) that is otherwise satisfactory to the registrar.

(4) A notice published by the registrar under subsection (3) must

(a) identify the society or extraprovincial society to which the letter referred to in subsection (2) was furnished, and

(b) state that the society may be dissolved or that the registration of the foreign corporation as an extraprovincial society may be cancelled unless, within one month after the date of the publication of the notice under subsection (3),

(i) cause to the contrary is shown,

(ii) the society or extraprovincial society satisfies the registrar that it is not in default, that the default has been remedied or that reasonable steps are being taken to remedy the default, or

(iii) a copy of an entered court order to the contrary is filed with the registrar.

(5) At any time after one month after the date of publication of the notice under subsection (3), the registrar may dissolve the society or cancel the registration of the foreign corporation as an extraprovincial society unless

(a) cause to the contrary is shown,

(b) the society or extraprovincial society has satisfied the registrar in accordance with subsection (4) (b) (ii), or

(c) a copy of an entered court order to the contrary is filed with the registrar.

(6) A society is dissolved under this section, or the registration of a foreign corporation as an extraprovincial society is cancelled under this section, on the date and time recorded in the corporate register as the date and time of dissolution or cancellation.

Source: BCA, s. 422

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 257

Comment: This section enables the Registrar of Companies to enforce various regulatory requirements of this Act by the ultimate penalties of dissolution and cancellation of registration.

Subsection (1) sets out the grounds on which the registrar may take steps to dissolve a society or, in the case of an extraprovincial society, cancel its registration. They include failure to file an annual report or make other required filings in each of two consecutive years, or failure to comply with an order of the registrar.

Subsections (2) and (3) require that before invoking the power to dissolve or de-register a society or extraprovincial society, the registrar must send a letter informing it of the default and indicating the nature of the powers the registrar may exercise under this section unless the default is remedied. Unless the registrar receives a response within a month after the letter is sent that satisfies him or her that the default has been corrected, that reasonable steps are being taken to correct it, or that is otherwise satisfactory, the registrar may publish a notice conforming to subsection (4). The reference to publishing this notice in the prescribed manner is a reference to the manner prescribed by regulation. For companies, the regulations provide for publication by posting the notice on a website maintained by or for the government. A similar regulation would be appropriate for societies. The notice will state that the society or extraprovincial society may be dissolved or de-registered, as the case may be, unless sufficient cause otherwise is shown, or that the society or extraprovincial society has remedied or has taken reasonable steps to remedy the default, or an entered court order is filed preventing the dissolution or de-registration. If none of these things occur, the registrar is empowered under subsection (5) to dissolve the society or de-register the extraprovincial society, as the case may be. Under subsection (6), the dissolution or de-registration takes effect at the date and time it is recorded in the corporate registry.

Lieutenant Governor in Council may cancel incorporation of society

319 The Lieutenant Governor in Council may cancel the incorporation of a society and declare it to be dissolved.

Source: BCA, s. 423

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 256 (1)

Comment: This section allows for dissolution of a society and cancellation of its incorporation by the Lieutenant Governor in Council (in practice, the provincial Cabinet). Unlike the power of dissolution given to the Registrar of Companies by the preceding section, such a step by the Lieutenant Governor in Council need not be based on a contravention of this Act by the society and there are no procedural requirements such as notice of the intention to take action under this section, or a grace period to allow the society to remedy any default. This power has been very sparingly exercised.[260]

260. *See British Columbia Company Law Practice Manual*, *supra* note 109, vol. 1 at § 12.3 ("The powers have apparently never been used in an involuntary situation with respect to a company under the Act or any predecessor act (although they have been under an analogous provision of the *Society Act*).").

This section has been included for harmonization with the BCA. The committee questions whether it is still necessary to give the Lieutenant Governor in Council this power, which appears to be out of step with contemporary thinking about the status and role of corporations.

Publication of notice of dissolution

320 If a society is dissolved under section 318 *[dissolutions and cancellations of registration by the registrar]* or 319 *[Lieutenant Governor in Council may cancel incorporation of society]*, the registrar must publish in the prescribed manner a notice of the dissolution.

Source: BCA, s. 424

Reference: tentative recommendation (98)

Concordance: *Society Act*, 1996, s. 71 (1): CA, s. 256 (2)

Comment: This section requires that a notice of any dissolution of a society by the Registrar of Companies or the Lieutenant Governor in Council under the two preceding sections be published. Publication in the "prescribed manner" means publication in accordance with the regulations. For the BCA, the relevant regulation requires publication "on a website maintained by or on behalf of the government."[261] When regulations are prescribed for the new *Society Act*, a similar rule should be adopted.

Division 4 – Offences and Penalties

Introductory comment: This Division posed a number of difficult challenges for the committee. It is understandable to want to avoid imposing penalties on societies for breaches of the Act. In many cases, such breaches are inadvertent. In addition, money paid in fines to government deprives the society of money that could be expended on its not-for-profit purposes. For these and other reasons, a policy of treating societies differently than companies could be justified. But, in the end, the committee rejected this approach. The Act sets out a number of requirements. If the Act did not also provide the government with a means to enforce them, then those requirements would be undercut and there could be reduced compliance with the Act as a whole.

The *Society Act*, 1996, contains a number of specific offences, scattered throughout the Act. A few of these offences are carried forward in the new Act, such as those relating to the publication of financial statements that have not been approved by the board of directors and noncompliance with the orders of an investigator. Other offences, such as those dealing with the maintenance of a register of indebtedness, have not been carried forward.

The new *Society Act* takes a more organized approach to offences. All offences, and their corresponding penalties, are gathered together in this Division. This approach is broadly harmonized with the approach of the BCA, but there are some differences in detail, which are noted in the comments to specific sections in this Division.

It should also be noted that offences are only one method to tackle noncompliance with the Act. The new *Society Act* also contains an expanded set of members' remedies. Of particular note is

261. *Business Corporations Regulation*, *supra* note 90, s. 6.

the ability of a member (or other appropriate person) to obtain under section 159 an order from the court to comply with the Act, the regulations, the society's constitution, or its bylaws.

Offence Act

321 Sections 4 and 5 of the *Offence Act* do not apply to this Act or the regulations.

Source: BCA, s. 425

Reference: tentative recommendation (4)

Concordance: new

Comment: Sections 4 and 5 of the *Offence Act*[262] are the general offence and general penalty provisions. The general offence created by section 5 provides that "a person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment." The general penalty for anyone convicted of an offence is liability "to a fine of not more than $2 000 or to imprisonment for not more than 6 months, or to both." These general provisions may be made inapplicable by a specific section in an enactment, such as this section. It is very common for them to be made inapplicable if the enactment provides for its own specific offences and penalties, as is done in this Division of the new *Society Act*.

Offences

322 (1) A person commits an offence who

(a) contravenes section 30 (1) *[registered and records offices]*, 38 *[records office records]*, 44 (3) *[list of members]*, 60 (1) *[societies to file notices as to directors]*, 132 *[accounting records required]*, 134 *[approval for publication]*, 150 (2) or (4) *[amendment of financial statements and auditor's report]*, 151 *[access to records]*, 181 *[bylaws issued by society must reflect alterations]*, 201 (6) (b) *[amalgamations into foreign jurisdictions]*, 211 (3) *[application for continuation out of British Columbia]*, 229 (2) *[qualifications of liquidators]*, 237 *[recovery of property by liquidators]* or 330 (1) *[obligations of pre-existing reporting societies]*,

(b) contravenes section 276 (1) *[foreign corporations required to be registered]*,

(c) publishes financial statements required under this Act that do not comply with the regulations, or

(d) fails to comply with section 171 *[powers of inspectors]* in any way, including

(i) by destroying, altering or refusing to produce any accounting record or other record required under that section,

262. R.S.B.C. 1996, c. 338.

(ii) by refusing to fully answer any question asked under section 171 (2) *[powers of inspectors]* or otherwise failing to give any information required under section 171 *[powers of inspectors]*, or

(iii) by, in giving the information required by that section, making a statement that the person knows or ought reasonably to know is false in a material particular, or recklessly making a statement that is false in a material particular.

(2) A person who contravenes section 22 *[restrictions on use of name]* commits an offence.

(3) An individual who acts as a director of a society and who, under section 56 (2) *[persons disqualified as directors]* or 57 (2) *[paid staff member not to serve as director]*, is not qualified to act as a director of a society commits an offence.

(4) An individual who acts as an officer of a society and who, under section 73 (3) *[officers]*, is not qualified to act as an officer of a society commits an offence.

(5) It is an offence for a person who maintains the records office for the society or, in the case of a register of members that is kept at a location other than the society's records office, for the person who has custody or control of the society's register of members, to refuse, without reasonable excuse,

(a) to permit a person to inspect any record that the person is entitled to inspect and for which the appropriate fee, if any, has been tendered, or

(b) to provide, within the meaning of section 43 (3) *[copies]*, to a person a copy of any record that the person is entitled to receive a copy of and for which the appropriate fee, if any, has been tendered.

(6) It is an offence for a society or for a person who has custody or control of a register of members to refuse, without reasonable excuse, to provide, within the meaning of section 44 (8) *[list of members]*, to a person who has submitted the appropriate records and fee, if any, under section 44 *[list of members]* the list or lists requested by that person.

(7) It is an offence for a person who is required, under section 252 (2) *[custody of records]*, to retain and produce the records of a society to

(a) contravene section 252 *[custody of records]* without reasonable excuse, or

(b) refuse, without reasonable excuse, to

(i) permit a person to inspect any record that the person is entitled to inspect and for which the appropriate fee, if any, has been tendered, or

(ii) to provide, within the meaning of section 253 (3) *[entitlement to inspect records of dissolved society]*, to a person a copy of any record that the person is entitled to receive a copy of and for which the appropriate fee, if any, has been tendered.

(8) In any prosecution under subsection (1) (b) of this section, the onus is on the accused to prove that a foreign corporation

(a) is registered as an extraprovincial society, or

(b) is not required to be registered as an extraprovincial society.

Source: BCA, s. 426

Reference: tentative recommendation (4)

Concordance: new

Comment: This section contains all the offences that are created for breaches of various sections of the Act. The bulk of these offences are created in subsection (1), where they fall into several broad categories: offences related to records and denial of access to records; offences related to financial statements and audits; offences concerning applications to the Registrar of Companies; and offences related to investigations. Subsection (2) creates an offence for using the word "society" in a name if the person is not a society under this Act. Subsections (3) and (4) relate to qualifications to be a director or an officer of a society. Subsections (5), (6), and (7) all relate to access to records. Note that a person who wishes to obtain a membership list from a society must be a society member and must provide (at present) an affidavit confirming that use of the membership list will fall within the tightly limited categories of the Act. Making a false statement in an affidavit is a crime.[263] Subsection (8) is a reverse-onus provision.

Misleading statements an offence

323 (1) Subject to subsection (3), a person who makes or assists in making a statement that is included in a record that is required or permitted to be made by or for the purposes of this Act or the regulations commits an offence if the statement

(a) is, at the time and in the light of the circumstances under which it is made, false or misleading in respect of any material fact, or

(b) omits any material fact, the omission of which makes the statement false or misleading.

(2) If a corporation commits an offence under subsection (1), any director or officer of the corporation who knowingly authorized, permitted or acqui-

263. *See Criminal Code*, R.S.C. 1985, c. C-46, s. 131 (perjury).

esced in the commission of the offence is a party to and guilty of the offence, and is liable on summary conviction to a fine of not more than $10 000, whether or not the corporation has been prosecuted or convicted.

(3) No person is guilty of an offence under this section if that person

(a) did not know that the statement was false or misleading, and

(b) with the exercise of reasonable diligence, could not have known that the statement was false or misleading.

Source: BCA, s. 427

Reference: tentative recommendation (4)

Concordance: new

Comment: This section creates a generalized offence of making misleading statements in a record. The *Society Act*, 1996, did not contain such an offence, but provisions like this section have begun to appear in more recently enacted legislation, particularly if the statute contains extensive obligations to file records with a public official.[264] Although not defined in this Act, "record" is commonly understood in British Columbia to have a very broad meaning, which includes all types of written documents in print or electronic format. The offence itself is created in subsection (1); the penalty appears in subsection (2). Subsection (3) contains a due diligence defence.

Penalties

324 (1) A person who commits an offence under section 322 (1) (a), (c) or (d), (2), (5), (6), (7) *[offences]* is liable,

(a) in the case of a person other than an individual, to a fine of not more than $5 000, or

(b) in the case of an individual, to a fine of not more than $2 000.

(2) A person who commits an offence under section 323 (1) *[misleading statements an offence]* is liable,

(a) in the case of a person other than an individual, to a fine of not more than $25 000, or

(b) in the case of an individual, to a fine of not more than $10 000.

(3) A foreign corporation that commits an offence under section 322 (1) (b) *[offences]* is liable to a fine of not more than $5 000.

(4) An individual who commits an offence under section 322 (3) or (4) *[offences]* is liable to a fine of not more than $2 000.

Source: BCA, s. 428

264. *See*, *e.g.*, *Election Act*, R.S.B.C. 1996, c. 106, s. 266; *Partnership Act*, R.S.B.C. 1996, c. 348, s. 90.4.

Reference: tentative recommendation (4)

Concordance: new

Comment: The penalties for the offences created in section 322 are contained in this section. The dollar figures for the fines are taken from the BCA. It is appropriate to harmonize the *Society Act* and the BCA on this point. But this section contains a departure from the BCA approach. Under the BCA, the penalties applied for convictions of two offences accrue from day to day. The two offences relate to the failure of a foreign entity carrying on business in British Columbia to register as an extraprovincial company and the contravention of the rules regarding restrictions on the use of corporate identifiers in a name. The BCA provides that a person convicted of either offence is liable for the payment of a fine in the prescribed amount for each day of the contravention. (The current prescribed amounts are $100[265] for failure to register and $50 for use of an improper name.[266]) This section of the new *Society Act* does not adopt the BCA approach for these two offences, because the risk of a society or other not-for-profit group inadvertently running up a large fine was considered to be too great. The underlying provisions that support these two offences are new to the *Society Act*. While the committee believes that they should be complied with, it does not want to expose societies and other participants in the not-for-profit sector to something that comes close to being an open-ended liability. The penalties for these two offences are instead brought into line with the penalties for the other offences in section 322.

Remedies preserved

325 (1) A legal proceeding, conviction or penalty for an offence under this Act does not relieve a person from any other liability.

(2) Without limiting subsection (1), if a person is convicted of an offence under this Act, the court may, in addition to any penalty the court may impose for the offence, order the person to comply with the provisions of this Act.

Source: BCA, s. 429

Reference: tentative recommendation (4)

Concordance: new

Comment: This section makes it clear that a prosecution and conviction under this Division of the Act does not exhaust a person's liability. In some circumstances, a person may also be exposed to, for example, damages in civil proceedings. Subsection (2) sets out an important (though not the only) consequence of the general rule in subsection (1). A conviction under this Division does not prevent the court from making an order requiring compliance with the Act or a specific provision of the Act.

Limitation period

326 (1) A legal proceeding for an offence under this Act may not be commenced more than 3 years after the commission of the offence.

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265. *Business Corporations Regulation*, *supra* note 90, s. 35.

266. *Business Corporations Regulation*, *ibid.*, s. 36.

(2) An information must not be laid in respect of an offence if

(a) the offence is committed by the failure to file, or to file within a required period, a record with the registrar, and

(b) before the laying of the information, the appropriate record is filed with the registrar.

Source: BCA, s. 430

Reference: tentative recommendation (4)

Concordance: new

Comment: The general limitation period for a prosecution under this Division is three years. Subsection (2) further provides that the provincial government must not commence a prosecution in respect of an offence involving a failure to file a record with the Registrar of Companies within a specific period if, before the prosecution is commenced, the person files the record with the registrar.

Division 5 – Fees and Regulations

Fees

327 There must be paid to the registrar, in respect of each matter set out in Column 1 of the Schedule to this Act, the fee set out opposite that matter in Column 2 of that schedule and payment of the applicable fee is a condition precedent to the registrar filing any record and taking any other action under this Act.

Source: BCA, s. 431

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 98

Comment: Fees payable to the Registrar of Companies for various filings and services described in Column 1 of the Schedule are set out in Column 2 opposite the item to which each fee relates. (A schedule will be prepared prior to enactment.) The section makes prior payment of the appropriate fee a condition precedent (mandatory precondition) to any filing or other step that the registrar is requested to take.

Power to make regulations

328 (1) The Lieutenant Governor in Council may make regulations as referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1) of this section, the Lieutenant Governor in Council may make regulations as follows:

(a) respecting the services or functions to be provided by the registrar;

(b) respecting the location and business hours for the office of the registrar;

(c) respecting the form of the corporate register and the manner in which it is kept;

(d) respecting the manner and form in which, and the method by which, records and information may be provided or submitted to, or furnished or certified by, the registrar;

(e) prescribing records and information that must be provided or submitted to the registrar in, or in conjunction with, any record or information provided to the registrar or submitted to the registrar for filing, with power to prescribe different records and information for different situations;

(f) respecting the manner in which, and the method by which, records and information may be mailed, sent, furnished or provided, and the requirements that a person must meet to mail, send, furnish, provide or receive records or information in an electronic or other format for the purposes of this Act, with power to prescribe different manners, methods and requirements for different records, information and situations;

(g) respecting the manner and form in which and the time period within which records that are required or permitted to be prepared or kept under this Act must be prepared or kept, with power to prescribe different manners and forms for different records and situations;

(h) respecting prescribed addresses;

(i) respecting the form and content of the information to be included in any address required or permitted under this Act;

(j) respecting what must be included in a constitution, including amending, adding to or removing any of the requirements established under this Act;

(k) prescribing the manner in which the bylaws, constitution or restoration application of a society must set out any translation of the society's name that the society proposes to use outside Canada;

(l) prescribing a period and an amount of support for the purposes of section 100 (7) (b) *[requisitions for general meetings]*;

(m) prescribing numbers of days for the purposes of one or more of

(i) paragraph (a) (i) of the definition of "exceptional resolution" in section 1 (1) *[definitions]*,

(ii) paragraph (a) (i) of the definition of "special resolution" in section 1 (1) *[definitions]*,

(iii) paragraph (a) (i) of the definition of "special separate resolution" in section 1 (1) *[definitions]*,

(iv) section 100 (5) (a) *[requisitions for general meetings]*,

(v) section 102 (1) *[notice of general meetings]*,

(vi) section 104 (2) (a) *[setting record dates]*,

(vii) section 191 (2) *[member adoption of amalgamation agreements]*, and

(viii) section 201 (3) *[amalgamations into foreign jurisdictions]*,

including prescribing different numbers of days for different resolutions, meetings, situations and classes of societies;

(n) respecting auditors and audit committees;

(o) prescribing qualifying entities for the purposes of section 185 *[definition]*;

(p) prescribing the amounts of claims for the purposes of sections 195 (1) (a) *[notice to creditors in relation to an amalgamation without court approval]* and 224 (1) (b) *[resignation and removal of liquidators in voluntary liquidations]*;

(q) prescribing the date in reference to which an extraprovincial society is required to file its annual report with the registrar under section 281 (1) (b) *[extraprovincial societies to file annual report]*;

(r) respecting

(i) the completion of proxies, and

(ii) the information that is to be contained in proxies;

(s) prescribing, for the purposes of section 305 (1) (b) *[limitation on future dated filings]*, which records may specify a date or a date and time on which the record is to take effect that is later than the filing of the record with the registrar;

(t) creating offences and prescribing penalties for the breach of any regulations made under this section;

(u) respecting fees or charges payable under this Act;

(v) respecting the amount of any fines payable under this Act;

(w) respecting rates of interest payable under this Act;

(x) prescribing a set of provisions, and designating those provisions as the "Statutory Reporting Society Provisions";

(y) prescribing a set of bylaws, and designating those bylaws as "Table 1";

(z) respecting any rules, orders, forms and directions that may be desirable for carrying out the provisions of this Act or for regulating procedure or establishing practice under this Act;

(aa) respecting any matter the registrar considers necessary for carrying out the purposes of this Act, including matters in respect of which no express or only partial or imperfect provision has been made;

(bb) defining any word or expression used but not defined in this Act;

(cc) for meeting or removing any difficulty arising out of the transition to this Act from the *Society Act*, 1996, and for that purpose disapplying or varying any provision of this Act.

(3) Regulations that may be made under subsection (2) (a) of this section include the following:

(a) requiring or permitting the registrar to furnish notices to confirm

(i) the receipt of records or information provided or submitted to the registrar, or

(ii) the filing of records or information with the registrar;

(b) respecting the retention, reproduction, disposition, return and destruction of records filed with or maintained by the registrar;

(c) respecting searches of the corporate register, including

(i) search requests, and

(ii) search results;

(d) respecting access to records or information filed with the registrar or maintained by the registrar in an electronic or other format;

(e) respecting the methods by which a decision, notice or response of the registrar may be recorded or furnished;

(f) respecting the verification of information contained in the corporate register or of records filed with the registrar under this Act;

(g) respecting names, assumed names and translations of names and prescribing the requirements names, assumed names or translations of names must meet before being available for reservation or use under this Act;

(h) respecting the reservation of names and assumed names;

(i) authorizing the registrar to return any or all of the records filed by or on behalf of a society or an extraprovincial society to the society or extraprovincial society or to any other person the Lieutenant Governor in Council may prescribe;

(j) respecting the retention, use and disclosure of records returned under paragraph (i) of this subsection;

(k) respecting if and to what extent the registrar must retain copies of records returned under paragraph (i) and, if copies are to be retained, respecting the retention, use and disclosure by the registrar of those copies;

(l) respecting the manner in which the registrar is to publish notices that the registrar is required or permitted to publish under this Act, including prescribing different manners of publication for different notices;

(m) respecting the manner in which records may be certified under section 314 *[registrar may issue records]*.

(4) Regulations that may be made under subsection (2) (c) include the following:

(a) respecting the computerization of the corporate register;

(b) respecting the manner in which the registrar may record, photograph, store, maintain or reproduce a record or information filed with or provided to the registrar;

(c) authorizing the establishment of databases in an electronic or other format for records or information required or permitted to be filed with or maintained by the registrar under this Act;

(d) providing for the maintenance of, access to and use of the databases established under this Act;

(e) providing to the registrar the authority to enter into agreements for access to the computer database of the corporate register;

(f) respecting the authority provided to the registrar under paragraph (e) of this subsection.

(5) Regulations that may be made under subsection (2) (d) include the following:

(a) respecting the manner in which or the method by which records and information may be submitted to the registrar for filing under this Act, including prescribing different manners or methods for different

records, information and situations, including regulations requiring or permitting records and information that, under this Act, are required or permitted to be provided to the registrar or submitted to the registrar for filing

(i) to be provided, or submitted to the registrar for filing, in an electronic or other format or in a combination of formats, or

(ii) to be transmitted, either electronically or by another method, to an electronic or other database;

(b) requiring or permitting a record that, under this Act, is required or permitted to be provided to the registrar or submitted to the registrar for filing as a signed record

(i) to be signed by an electronic signature or to be identified by a prescribed method, or

(ii) to be submitted to the registrar for filing without signatures;

(c) providing that the electronic signature or other method of identification referred to in paragraph (b) (i) of this subsection has the same effect for all purposes as a signature, and providing that a record referred to in paragraph (b) (ii) has the same effect for all purposes as if it had the signatures that would otherwise have been required.

(6) A regulation under subsection (2) (d) may prescribe different forms for use by, different information to be provided by and different manners or methods of submitting records and information to the registrar for filing by corporations or by different classes of corporations including classes based on one or more of the following:

(a) the nature of the corporation;

(b) the jurisdiction in which the corporation was incorporated;

(c) if the corporation has, since its incorporation, been continued or otherwise transferred by a process similar to continuation, the jurisdiction into which the corporation was most recently continued or transferred;

(d) if the corporation resulted from an amalgamation or a similar process, the jurisdiction in which the most recent of those events occurred.

(7) Regulations that may be made under subsection (2) (g) include the following:

(a) respecting the form and manner in which financial statements required under this Act must be produced;

(b) respecting data processing or information retrieval systems in which may be entered or recorded any record that any person is required by this Act to prepare or keep;

(c) respecting the form, content and use of any record or class of records, any statement or class of statements or any information or class of information that is required or permitted to be prepared, issued, sent, filed, given or provided under this Act;

(d) prescribing the times during which records may be inspected under section 42 (8) *[inspection of records]* or 253 (4) *[entitlement to inspect records of dissolved societies]*;

(e) prescribing the information respecting the addresses of directors and officers that must be recorded or otherwise kept by any person under this Act, and prescribing the persons or classes of persons to whom the residential address of a director or officer may be, or is not to be, disclosed in a search of that information.

(8) Regulations that may be made under subsection (2) (h) of this section include the following:

(a) prescribing the criteria that must apply to an address before it can be used as a prescribed address for the purposes of this Act;

(b) prescribing information that must or may be filed with or provided to the registrar by or in respect of a person in relation to whom a prescribed address is or is to be included in any record filed with or provided to the registrar, and the manner in which or the method by which and the time within which that information must or may be filed or provided;

(c) prescribing the information respecting the addresses of directors and officers that may be provided in response to search requests or otherwise, and prescribing the persons or classes of persons to whom the residential address of a director or officer may be, or is not to be, disclosed in a search of the corporate register or otherwise.

(9) Regulations that may be made under subsection (2) (n) include the following:

(a) respecting information that must be provided by the directors of a society to the society's auditor;

(b) prescribing the form and manner in which auditors' reports must be prepared;

(c) assigning responsibilities to audit committees.

(10) The Lieutenant Governor in Council may, under this section, make different regulations for computerized and non-computerized records and information.

Source: BCA, s. 432

Reference: tentative recommendation (4)

Concordance: *Society Act*, 1996, s. 99

Comment: The regulation-making powers conferred by this section are more detailed and extensive than those currently provided by section 99 of the *Society Act*, 1996. They are similar to those conferred by section 432 of the BCA.

Subsection (1) is a standard provision in British Columbia statutes that authorize the making of regulations. It incorporates by reference the principles and constraints on the exercise of regulation-making powers that are set out in section 41 (1) of the *Interpretation Act*.[267] Most important of these is the principle, expressed in section 41 (1) (a), that a regulation-making power under an Act must be interpreted so as to authorize the making of regulations for the purpose of carrying out the Act according to its intent, and that are considered necessary or ancillary to it, and are not inconsistent with it. The power must also be interpreted as allowing for regulations providing for matters of procedure or administration that are not covered in the Act or only partially covered. These include regulations prescribing the amounts of fees for various governmental services. Regulations that an Act authorizes the Lieutenant Governor in Council to make may also provide that breaches of an Act are an offence and prescribe penalties not in excess of those in the *Offence Act*.[268]

Subsection (1) also imports the effect of section 41 (2) of the *Interpretation Act*, which states that a regulation made under the authority of an enactment has the force of law.

Subsection (2) specifies many purposes contemplated by this Act for which regulations may be made. These include prescribing model bylaws ("Table 1") that a society may adopt and meeting any difficulty created by transition from the *Society Act*, 1996, to this Act.

Subsections (3) to (9) clarify the extent of the regulation-making powers conferred by subsection (2) by giving specific examples of how they can be used, without limiting them.

Subsections (3) to (7) concern regulations dealing with the operation of the corporate registry in relation to societies. Subsection (8) deals with prescribed addresses. Subsection (9) covers auditors and audit committees.

PART 13 – REPORTING SOCIETIES

Introductory comment: The concept of a "reporting society" is defined in section 1 of the *Society Act,* 1996. 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 have chosen to be reporting societies, and some societies are reporting societies because the Registrar of Companies

267. *Supra* note 85.

268. *Supra* note 262.

has ordered them to be reporting societies. The reporting society concept was introduced into the legislation in order to impose additional requirements regarding auditors, financial record keeping, and public disclosure on large societies. 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 citied 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."[269]

The reporting society concept is based on the reporting company concept in the CA, which has not been carried forward in the BCA because securities legislation was by and large able to provide an adequate regulatory framework that would ensure that the goals of the reporting company rules would continue to be met. While the requirements imposed on reporting societies are not as extensive as those that were imposed on reporting companies under the CA, there is no one statute or body of law that could play the role of for reporting societies that securities legislation played for reporting companies. The same principle could however still be applied for reporting societies through amendments to legislation governing specific subjects.

The *Society Act* Reform Project Committee considered this issue and came to the conclusion that the new Act should not maintain the reporting society concept. This view was based in part on a desire for harmonization with the BCA, but also on the fact that the government could, as in the case of the BCA, impose the relevant obligations through other means. It was also noted that there are very few societies in British Columbia that are reporting societies and those reporting societies that do exist tend to be the largest societies in the province, receiving all or most of their funding from government in the form of grants; in reality these societies will already be subject to additional reporting requirements as part of their grant conditions. The committee's tentative recommendation received broad approval when it was put out for consultation as part of the consultation paper.

In light of the decision not to carry forward the reporting concept in the new *Society Act*, the provisions below have been included simply as enabling provisions should the government wish to impose some form of regulations under the new *Society Act* covering the reporting society concept. They are modelled on similar provisions in the BCA.

Prescribed provisions

329 (1) The Lieutenant Governor in Council may, by regulation, prescribe a set of provisions, and designate those provisions as the "Statutory Reporting Society Provisions".

(2) The Statutory Reporting Society Provisions apply to each pre-existing reporting society until the alteration to the bylaws referred to in section 273 (3) (d) *[alteration to bylaws of restored society]* or 333 (3) (d) *[alteration to bylaws]*, as the case may be, takes effect to include the Statutory Reporting Society Provisions in the society's bylaws.

Source: BCA, s. 433

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

Reference: tentative recommendation (104)

Concordance: new

Comment: This section authorizes the Lieutenant Governor in Council to prescribe by regulation a set of provisions designated as the "Statutory Reporting Society Provisions." These provisions will apply to pre-existing reporting societies, a term that is defined in section 1. A pre-existing reporting society is a society that was a reporting society immediately before the coming into force of the new *Society Act*.

The draft legislation in this report does not contain the regulations that will be prescribed to implement this section. Given that reporting societies and reporting companies were subject to different obligations, it will not be possible simply to adapt the existing Statutory Reporting Company Provisions. A new regulation will have to be drafted, preferably after consultation with existing reporting societies.

Obligations of pre-existing reporting societies

330 (1) A pre-existing reporting society

(a) must promptly after the coming into force of this Act insert in the set of bylaws retained at its records office a statement, in the prescribed form, advising that the Statutory Reporting Society Provisions apply to the society,

(b) must ensure that that statement remains in its bylaws until the alteration to the bylaws referred to in section 273 (3) (d) *[alteration to bylaws of restored society]* or 333 (3) (d) *[alteration to bylaws]*, as the case may be, takes effect to include the Statutory Reporting Society Provisions in the society's bylaws, and

(c) must not, during the period within which it is required to retain that statement in its bylaws, issue a copy of the bylaws that does not contain that statement.

(2) Any individual may insert the statement referred to in subsection (1) (a) of this section in the set of bylaws referred to in subsection (1) (a), whether or not there has been any resolution to direct or authorize that insertion.

(3) Despite any wording to the contrary in a security agreement or other record, the insertion made under subsection (1) (a) does not constitute a breach or contravention of, or a default under, the security agreement or other record, and is deemed for the purposes of the security agreement or other record not to be an alteration to the charter of the pre-existing reporting society.

Source: BCA, s. 434

Reference: tentative recommendation (104)

Concordance: new

Comment: This section places an obligation on pre-existing reporting societies to promptly insert a statement into their bylaws in the prescribed form advising that the Statutory Reporting Society Provisions apply to the society. (The prescribed statement for pre-existing reporting companies simply says "the Statutory Reporting Company Provisions prescribed in Table 2 of the *Business Corporations Regulation* apply to this company."[270]) The purpose of this statement is to provide notice to anyone who receives a copy of the society's bylaws that those bylaws are supplemented by the prescribed Statutory Reporting Society Provisions. These prescribed provisions are intended to apply to pre-existing reporting societies from the date that the new *Society Act* comes into force. The goal is for a seamless transition without a gap in pre-existing reporting societies' obligations. A regulation is needed to fill the gap that would result if the new *Society Act* came into force with the existing reporting society provisions.

The final goal of this section is to have pre-existing reporting societies adopt the Statutory Reporting Society Provisions as part of their bylaws. This will be done during the two-year transitional period. As a result, the Act itself will be simplified and streamlined, by removing repeated references to reporting societies and special provisions for reporting societies.

Subsection (2) is an enabling provision. Subsection (3) is intended to overcome a problem that may arise in practice. Loan agreements and some other types of contracts often have provisions that deem an amendment to a society's constitution or bylaws to be a default under the agreement, unless the society first obtains the lender's consent to the amendment. Since this amendment is imposed on pre-existing reporting societies by operation of law, it would not be fair to ask them to obtain any such consents before the amendment comes into force. Subsection (3) will spare pre-existing societies from the costs associated with obtaining such consents and from the risk that consent may be denied (which would place the pre-existing reporting society in the awkward position of defaulting under an agreement simply because it complied with the law).

A society that does not comply with subsection (1) commits an offence. For more information on offences and penalties under the new *Society Act*, see the commentary to Division 4 of Part 12, above.

PART 14 – TRANSITIONAL, REPEALS AND COMMENCEMENT

Introductory comment: A transitional period is necessary for pre-existing societies primarily because the new *Society Act* contemplates changes to the structure of the constitution. Unlike the *Society Act*, 1996, the new *Society Act* is very specific on the type of information that can be contained in a society's constitution. (The rules governing the information to be set out in the constitution are contained in section 9.) The new *Society Act* does not permit extraneous information in a society's constitution. While this restructuring of the constitution will streamline incorporation of new societies, it poses an issue for pre-existing societies that have such extraneous material in their constitutions. Pre-existing societies will need to add some information to their constitutions (this will be existing information regarding offices and directors) and, possibly, move some information from the constitution to the bylaws. A similar process unfolded for companies upon the coming into force of the BCA in 2004. That process was successfully completed in two years. A two-year transitional period should be appropriate for the comparatively much smaller number[271]

270. *Business Corporations Regulation*, *supra* note 90, s. 44.

271. *See*, online Corporate Registry <http://www.fin.gov.bc.ca/registries/corppg/default.htm> ("The Corporate Registry administers all matters related to approximately 285,000 active domestic corporations; 24,000 not-for-profit societies. . . .").

of societies required to transition to the new Act. But government officials should bear in mind that many pre-existing societies will undertake the transition without the benefit of legal advice and should accordingly provide appropriate assistance.

Division 1 – Charter Transition

Transition – pre-existing societies

331 (1) A pre-existing society must do the following within 2 years after the coming into force of this Act:

(a) file with the registrar a transition application that complies with section 332 (2) *[transition application]*;

(b) alter its bylaws if and to the extent necessary to ensure that those bylaws comply with section 333 (3) *[alteration to bylaws]*.

(2) In addition to any alterations that a pre-existing society is required to make to its bylaws under subsection (1) (b) of this section, the society may, with those alterations, make other alterations to its bylaws, in accordance with section 178 (1) *[alteration to bylaws]*, so long as those other alterations are not inconsistent with the information that, under section 332 (2) (b) *[transition application]*, is included in the constitution contained in the transition application.

(3) A resolution to make the other alterations referred to in subsection (2) of this section must state that those alterations do not take effect until the constitution contained in the transition application takes effect.

Source: BCA, s. 436

Reference: tentative recommendation (4)

Concordance: new

Comment: This section sets out the transition requirements for pre-existing societies. Within the two-year transitional period, a pre-existing society must file the transition application and alter its bylaws to the extent required. A pre-existing society may also take the opportunity afforded by the transition period and the changes brought in by the new Act to make other changes to its bylaws. For example, a pre-existing society may wish to change the percentage of votes required to pass a special resolution, in accordance with the definition of "special majority" contained in section 1. These types of optional bylaw changes must be made in accordance with the general requirements of the Act for bylaw alterations and they must not take effect until the new constitution contained in the transition application takes effect.

Transition application

332 (1) A pre-existing society must not submit a transition application to the registrar for filing under this Division until

(a) the society has been authorized to do so by a directors' resolution or an ordinary resolution,

(b) if it is necessary to alter the bylaws to ensure that those bylaws comply with section 333 (3) *[alteration to bylaws]*, the resolution required under section 333 (1) *[alteration to bylaws]* is received for deposit at the society's records office,

(c) if the society intends to alter its bylaws under section 331 (2) *[transition – pre-existing societies]*, the resolution required under section 178 (1) *[alteration to bylaws]* to make those alterations is received for deposit at the society's records office, and

(d) there has been filed with the registrar all records necessary to ensure that the information in the corporate register respecting the directors of the society is, immediately before the transition application is submitted to the registrar for filing, correct.

(2) The pre-existing society must ensure that the transition application that is filed with the registrar under section 333 (1) (a) *[transition – pre-existing societies]*

(a) is in the form established by the registrar, and

(b) contains a constitution that

(i) sets out the name and prescribed address of each individual who was, immediately before the time of the filing, a director of the society,

(ii) sets, as the society's registered office, out the mailing address and delivery address of the location that was, immediately before the time of the filing, the address of the society,

(iii) sets out, as the society's records office, the mailing address and delivery address of the location that was, immediately before the time of the filing, the location of the documents of the society,

(iv) sets out, as the name of the society, the name that the society had immediately before the time of the filing, and sets out, in the prescribed manner, any translation of that name that the society intends to use outside Canada,

(v) includes all of the information required to comply with section 9 (g) *[constitution]* that was contained in the society's pre-existing constitution immediately before the time of the filing,

(vi) includes all of the information required to comply with section 9 (h) *[constitution]*,

(vii) does not contain any other information,

(c) if it is necessary to alter the bylaws to ensure that those bylaws comply with section 333 (3) *[alteration to bylaws]*, contains the resolution required under section 333 (1) *[alteration to bylaws]*, including the text of those alterations, and

(d) if the society intends to alter its bylaws under society, contains the resolution required under section 178 (1) *[alteration to bylaws]* to make those alterations, including the text of those alterations.

(3) No transition application filed with the registrar under section 331 (1) (a) *[transition – pre-existing societies]* is invalid merely because subsection (1) of this section has not been complied with.

(4) After a transition application for a pre-existing society is filed with the registrar under section 331 (1) (a) *[transition – pre-existing societies]* the registrar must, if requested to do so, furnish to the society a certified copy of that application and a certified copy of the constitution and bylaws.

Source: BCA, s. 437

Reference: tentative recommendation (4)

Concordance: new

Comment: Subsection (1) sets out the steps that a pre-existing society must take before transitioning to the new Act. The filing of the transition application must be authorized by either a directors' resolution or an ordinary resolution of the members. Any necessary bylaw changes must be made (by directors' resolution or ordinary resolution) and deposited at the society's records office. Any additional alterations to the bylaws must be properly authorized and deposited with the society's records office. Subsection (2) contains the filing requirement with the Registrar of Companies. The application must include a constitution that complies with this Act and all bylaw alterations made as part of the transitional process.

Alteration to bylaws

333 (1) Subject to subsection (2), a pre-existing society may alter its bylaws under section 331 (1) (b) *[transition – pre-existing societies]* by a directors' resolution or an ordinary resolution.

(2) The resolution referred to in subsection (1) of this section must state that the alteration to the bylaws does not take effect until the constitution contained in the transition application takes effect.

(3) For the purposes of section 331 (1) (b) *[transition – pre-existing societies]*, the pre-existing society must

(a) alter its bylaws if and to the extent necessary to ensure that those bylaws include each provision, other than prescribed provisions, that was contained, or was deemed under a former *Societies Act* to be contained, in the society's pre-existing constitution immediately before the time of the filing of the transition application and that is not included in its constitution under section 332 (2) (b) *[transition application]*,

(b) alter its bylaws if and to the extent necessary to remove from them any information that is inconsistent with the information that, under section 332 (2) (b) *[transition application]*, is included in the constitution contained in the transition application, and

(c) if the society is a pre-existing reporting society, alter its bylaws to include the Statutory Reporting Society Provisions.

(4) In addition to effecting the alterations referred to in subsection (3), the pre-existing society must ensure that its bylaws comply with section 11 (1) (b) and (c) and (2) (c) *[bylaws]* and, for that purpose, any individual may make the changes to the bylaws that are necessary to ensure that those bylaws comply with those provisions, whether or not there has been any resolution to direct or authorize those changes.

(5) The bylaws as altered under this section must be included in the society's transition application that is filed with the registrar under section 331 (1) (a) *[transition – pre-existing societies]*.

Source: BCA, s. 438

Reference: tentative recommendation (4)

Concordance: new

Comment: The key to this section is subsection (3), which requires a pre-existing society to alter its bylaws to contain any information that was part of its pre-existing constitution but that cannot be included in its constitution under this Act. If there is information in the bylaws that is inconsistent with the society's constitution after transition, then that information must also be altered. Under subsection (1), these changes to the society's bylaws must be authorized by either a directors' resolution or an ordinary resolution of the members. Under subsection (2), the changes to the bylaws do not take effect until the society's new constitution takes effect. Subsection (4) authorizes any individual to make what are essentially cosmetic changes to the bylaws to ensure that they are mechanically or electronically reproduced, divided into consecutively numbered or lettered paragraphs, set out the society's incorporation number, and set out the society's name and any translation of the society's name that it intends to use outside Canada. Subsection (5) reinforces the filing requirement for society bylaws.

Timing and effect of transition

334 (1) The constitution contained in the transition application and any alteration to the bylaws made under this Division take effect on the date and time that the transition application is filed with the registrar.

(2) Despite any wording to the contrary in a security agreement or other record, the filing of a transition application in accordance with section 331 (1) (a) *[transition – pre-existing societies]*, an alteration to the bylaws in accordance with section 331 (1) (b) *[transition – pre-existing societies]* and a change to the bylaws in accordance with section 333 (4) *[alteration to bylaws]* do not constitute a breach or contravention of, or a default under, the security agreement or other record, and are deemed for the purposes of the security agreement or other record not to be an alteration to the charter of the pre-existing society.

(3) On compliance by a pre-existing society with section 331 (1) (a) and (b) *[transition – pre-existing societies]* the pre-existing constitution of the society ceases to have any further force or effect.

(4) On the filing of a transition application for a pre-existing society under section 331 (1) (a) *[transition – pre-existing societies]*, the registrar may treat the society's pre-existing constitution as having no further force or effect.

Source: BCA, s. 439

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is included for greater certainty. Subsection (1) clarifies when the changes to a pre-existing society's constitution and bylaws take effect. Subsection (2) is intended to give comfort to societies that have borrowed funds and granted a security interest in society property as collateral. A common term in security agreements treats any change to the society's charter documents that has not been approved in advance by the lender as a default under the agreement, which would allow the lender to realize on its security. This subsection makes it clear that societies in these circumstances will not be in default of their obligations merely by complying with the requirements of the Act. Subsections (3) and (4) make it clear that a society's pre-existing constitution no longer has any legal effect after the transitional process is complete.

Division 2 – Society Transition

Registered and records office of pre-existing society

335 On the coming into force of this Act, each of the registered office and the records office of a pre-existing society has as its mailing address and its delivery address the address that was shown as the society's address for service in the corporate register immediately before the coming into force of this Act.

Source: BCA, s. 440

Reference: tentative recommendation (4)

Concordance: new

Comment: This section provides that the address of the society's address for service under the *Society Act*, 1996, simply rolls over to become the mailing and delivery addresses of the society's registered and records offices on the coming into force of the new *Society Act*.

Prescribed address

336 On the coming into force of this Act, each director or officer of a pre-existing society has as his or her prescribed address the address that, immediately before the coming into force of this Act, was shown in the corporate register as that individual's residential address.

Source: BCA, s. 441

Reference: tentative recommendation (4)

Concordance: new

Comment: Under the *Society Act*, 1996, a director is required to use the director's residential address on filings with the Registrar of Companies. Under the new Act, a director may use a prescribed address. The meaning of "prescribed address" will be set out in the regulations. The BCA uses an equivalent concept for company directors or officers. It is defined in the regulations as follows: "For the purposes of the Act, the prescribed address for a director or officer of a company must be whichever of the following is selected by the director or officer: (a) the delivery address and, if different, the mailing address for the office at which the individual can usually be served with records during statutory business hours; (b) the delivery address and, if different, the mailing address of the individual's residence."[272] (Both "office" and "statutory business hours" are defined in section 1.) The goal of this change is to give society directors and officers the same option as company directors and officers to use an office address for the purpose of filings with the registrar and the society's register of directors.

This section is a deeming provision. It provides that the initial prescribed addresses for society directors and officers are the same as their addresses recorded on the corporate register maintained by the Registrar of Companies. This is a reasonable starting point. Society directors and officers will be able to change their address (if they wish) as part of the transition to the new Act.

A few respondents to the consultation paper made the point that the existing requirement under the *Society Act*, 1996, to provide a director's residential address is at odds with contemporary privacy concerns. One respondent also noted that making residential addresses of directors publicly available through the corporate register may also raise safety concerns in some cases. Allowing directors to use a prescribed address should go a long way toward allaying these concerns.

272. *Business Corporations Regulation*, *supra* note 90, s. 2 (2).

Division 3 – Extraprovincial Society Transition

Head office of pre-existing extraprovincial society

337 On the coming into force of this Act, the head office of a pre-existing extraprovincial society has as its mailing address and its delivery address,

(a) in the case of a pre-existing extraprovincial society for which no attorney was shown on the corporate register immediately before the coming into force of this Act, the address within British Columbia that, immediately before the coming into force of this Act, was shown in the corporate register as the extraprovincial society's head office, or

(b) in any other case, the address outside British Columbia or, if none, the address inside British Columbia, that, immediately before the coming into force of this Act, was shown in the corporate register as the address for the head office of the extraprovincial society.

Source: BCA, s. 443

Reference: tentative recommendation (4)

Concordance: new

Comment: This provision is simply meant to ensure that the address for the head office of an extraprovincial society under the *Society Act*, 1996, rolls over and continues in effect upon the coming into force of the new *Society Act*.

Attorney for pre-existing extraprovincial society

338 (1) On the coming into force of this Act,

(a) a person who was an attorney for a pre-existing extraprovincial society immediately before the coming into force of this Act is an attorney for the extraprovincial society, and

(b) the address that was shown for that attorney in the corporate register immediately before the coming into force of this Act is the mailing address and the delivery address of that attorney.

(2) A pre-existing extraprovincial society to which subsection (1) applies and the extraprovincial society's attorney must, promptly after the coming into force of this Act, ensure that the mailing address and delivery address of the attorney comply with section 287 (3) *[attorneys to by appointed]*.

Source: BCA, s. 444

Reference: tentative recommendation (4)

Concordance: new

Comment: This section is simply meant to ensure that the identity and address of an extraprovincial society's attorney under the *Society Act*, 1996, simply rolls over and continues in effect upon the coming into force of the new *Society Act*.

Division 4 – General

Repeals

339 The *Society Act*, R.S.B.C. 1996, c. 433, is repealed.

Source: BCA, s. 445

Reference: tentative recommendation (2)

Concordance: new

Comment: This section is self-explanatory.

Portions of this Part repealed

340 Divisions 1 to 3 of this Part may be repealed by regulation of the Lieutenant Governor in Council made after the second anniversary of the coming into force of this Act.

Source: BCA, s. 446

Reference: tentative recommendation (4)

Concordance: new

Comment: This section deals with a housekeeping matter. It allows for the repeal by regulation of the Divisions in this Part that are concerned with transitional matters after the transitional period is over. Ordinarily, legislation may only be repealed by subsequent legislation. This section provides for a more expeditious means of removing provisions from the Act after their purpose is spent.

Commencement

341 This Act comes into force by regulation of the Lieutenant Governor in Council.

Source: BCA, s. 447

Reference: tentative recommendation (4)

Concordance: new

Comment: Acts may come into force in a variety of ways. The most common method is the one adopted in this section. Providing that the Act comes into force by regulation allows for greater control over the timing of the change-over from the *Society Act*, 1996, to the new *Society Act*.

The *Society Act* will require consequential amendments when it is passed by the Legislature. Consequential amendments are amendments to other statutes that are affected by the passage of a new Act. (A typical example of a consequential amendment occurs when the title of an Act is changed. All the references to the old Act in other statutes must be struck out and replaced with references to the new Act.) The draft legislation in this report does not include consequential amendments because they can be rather lengthy and they are of a technical rather than substan-

tive nature. Consequential amendments can be prepared as the draft legislation is nearer to introduction in the Legislature.

APPENDIX A

Respondents to the Consultation Paper

Note: If the name of an organization follows the name of an individual, it is provided for purposes of identification only. Responses received from organizations are listed by the organization name alone.

Larry Achtemichuk,
Past President
North Shore Artists Guild

Arrow Lakes Historical Society

Benefic Group

BC Recreation and Parks Association

British Columbia Real Estate Association

Canadian Society of Association Executives

Certified Management Accountants of British Columbia

Charities Directorate, Canada Revenue Agency

Leon Getz, Q.C.,
Barrister & Solicitor
Getz Prince Wells LLP

Glacier View Lodge

Greater Victoria Performing Arts Festival Association

Titus Gregory,
Policy Analyst
Kwantlen University College Student Association

John B. Holdstock,
Past President
BC Wildlife Federation

John Leech,
Executive Director and Registrar
Applied Science Technologists and Technicians of BC

Michael Letourneau,
Chair of the Graduate Council
The Graduate Student Society at Simon Fraser University

North West Cruise Ship Association

Anders I. Ourom,
Barrister & Solicitor

Pacific Centre Family Services Association

Robert W. Pakrul,
Barrister & Solicitor
Alexander Holburn Beaudin & Lang LLP

Gavin Perryman

Powell River Sunshine Coast Real Estate Board

Myrna Reid,
Chair
Vancouver Museum Association

Lyman R. Robinson, Q.C.,
Barrister & Solicitor (retired)

Patricia L. Schmit, Q.C.,
Barrister & Solicitor
Chudiak, Schmit & Co.

Peter D. Shrimpton
Barrister & Solicitor
Shrimpton & Company

Skate Canada,
British Columbia/ Yukon Section

St. Joseph's General Hospital Foundation

Sunshine Coast Botanical Garden Society

Vancouver Island Libertarian Association

Scott Vannatter,
Chair, Bylaw Committee
British Columbia Golf Association

Niall Williams

APPENDIX B

Tables of Concordance

New *Society Act*	*Society Act*, 1996
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Society Act, 1996	New *Society Act*

New *Society Act*	*Society Act*, 1996
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Society Act, 1996	New *Society Act*

New *Society Act*	*Society Act*, 1996
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Society Act, 1996	New *Society Act*

New *Society Act*	*Society Act*, 1996
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Society Act, 1996	New *Society Act*

PRINCIPAL FUNDERS IN 2007

The British Columbia Law Institute expresses its thanks to its principal funders in the past year:

- The Law Foundation of British Columbia;
- Ministry of Attorney General for British Columbia;
- Notary Foundation of British Columbia;
- British Columbia Real Estate Association; and
- Real Estate Foundation of British Columbia.

The Institute also reiterates its thanks to all those individuals and firms who have provided financial support for its present and past activities.