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Backgrounder

Consultation Paper on Proposals for a New Society Act

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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 has two distinct phases. Over the first phase, the major legal issues related to the *Society Act* and the leading models for reform were studied. In August 2007, this phase culminated in the publication of a consultation paper, which seeks the views of the public on our tentative recommendations for a new *Society Act*. The second phase will build on these tentative recommendations and on the responses that we receive from the public. This phase will conclude with the publication of the final report for the project, in July 2008. This project has been made possible by a grant from the Law Foundation of British Columbia.

THE SOCIETY ACT REFORM PROJECT COMMITTEE

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

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

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 CONSULTATION PAPER

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

BACKGROUND

The Scope of the Project

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outcomes; fundraising; the definition of charity under federal tax legislation; financial reporting and management; and outdated organizational laws.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

What Are Societies?

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

Brief History of the Society Act

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

Reasons Why Reform of the Society Act is Needed Now

There are three main reasons why a new *Society Act* is needed now. First, the current *Society Act* was largely based on the 1973 *Company Act*, which was the organizational statute for for-profit companies. In 2004, the *Company Act* was repealed and replaced with the *Business Corporations Act*, which now provides a streamlined and modern legal framework for companies in this province. As a result of the repeal of the *Company Act*, not-for-profit societies are now saddled with some rather onerous provisions that no longer apply to the for-profit companies for which they were originally designed. Second, the not-for-profit sector has grown and developed in ways that could not have been foreseen in 1977. New legislation is needed to establish an adequate legal framework for this increasingly important and sophisticated sector. Third, reform initiatives are underway or have recently been completed in other jurisdictions. This development gives British Columbia an opportunity to enact both modern and harmonized legislation.

TENTATIVE RECOMMENDATIONS

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

General Principles

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

Incorporation and Naming

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

Constitution and Bylaws

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

Capacity and Powers

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

Offices and Records

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

Directors and Officers

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

Duties, Liabilities, and Conflicts of Interest

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

Members

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

Meetings of Members

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

Financial

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

Audits

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

Members' Remedies

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

Society Alterations

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

Liquidation, Dissolution, and Restoration

The *Society Act* currently adopts its procedures for liquidation, dissolution, and restoration from the *Company Act*. The committee tentatively recommends harmonizing these procedural rules with the *Business Corporations Act*. On the important question of disposal of a society's assets on dissolution, the committee is not tentatively recommending a major departure from the current system.

Miscellaneous

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

CONCLUSION

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