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**Study Paper  
on**

**The Personal  
Liability of  
Society  
Directors and  
Officers**

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

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

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

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### I. INTRODUCTION

#### A. Background

Nonprofit organizations and their volunteers play an important role in society. In recent years their prominence has been increasing, as they take on more activities and responsibilities. Many vital services that were at one time provided by governments are now being delivered by nonprofit organizations and their volunteers. Some nonprofit organizations are also showing an entrepreneurial bent. They are now active in almost all areas of the economy.

The increased activities of nonprofit organizations have brought more people into contact with the nonprofit sector, both as volunteers and as recipients of services. The greater demands that have been placed on nonprofit organizations have heightened concerns about the consequences of nonprofit organizations and their volunteers causing harm. There is increased anxiety over lawsuits. Greater activity has led also to greater risks. In a recent Report, the Law Reform Commission of Saskatchewan observed that “. . . the climate in which the not-for-profit sector operates is changing. There is increasing concern about liability of board members, and what was once perceived as a minimal risk is now serious enough that it can no longer be ignored.”<sup>1</sup>

Concerns about the liability of volunteers and nonprofit organizations have begun to impress themselves upon the law. In *Bazely v. Curry*<sup>2</sup> the Supreme Court of Canada considered, and rejected, an argument that nonprofit organizations should be granted immunity at common law from tort claims based on vicarious liability.<sup>3</sup> After coming to its conclusions on the common law, the court suggested that the legislature, rather than the courts, should take the lead in determining whether such an immunity is warranted.<sup>4</sup> Although no provincial legislature has addressed the question that was at issue in *Bazely*, two provinces have limited the exposure to personal liability of people who are active in the nonprofit sector. Nova Scotia has enacted legislation that shields volunteers generally from personal

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1. Law Reform Commission of Saskatchewan, *Report on Liability of Directors and Officers of Not-For-Profit Organizations* (2003) at para. 1, online: The Law Reform Commission of Saskatchewan <<http://www7.quantumlynx.com/sasklawreform/directorsfinal.htm>> [Saskatchewan Report].

2. [1999] 2 S.C.R. 534, 174 D.L.R. (4<sup>th</sup>) 45, (*sub nom. B. (P.A.) v. Curry*), 62 B.C.L.R. (3d) 173 [*Bazely* cited to S.C.R.].

3. *Ibid.* at paras. 47–56, McLachlin J. (for the court). For a general discussion of the concept of “charitable immunity” at common law see David R. Wingfield, “The Short Life and Long After Life of Charitable Immunity in the Common Law” (2003) 82 Can. Bar Rev. 315.

4. *Bazely, ibid.* at para. 56.

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liability.<sup>5</sup> Saskatchewan has amended its legislation governing incorporated nonprofit organizations<sup>6</sup> to provide directors and officers with immunity from personal liability.<sup>7</sup>

In *Bazely* the defendant nonprofit organizations advanced three arguments in favour a policy of immunity from liability in the nonprofit sector.<sup>8</sup> Two of these arguments related to the inherent unfairness in finding a person or organization who performs valuable public services as a volunteer to be liable. The third argument pointed to the possibility that these valuable services may be withdrawn in the face of increasing liability. To these arguments another may be added: recruitment of people to serve as directors, officers, and volunteers of nonprofit organizations may suffer if those people are anxious about personal liability. Though these arguments failed in *Bazely*, the court implied that they may stimulate legislative reforms.<sup>9</sup> This Study Paper will weigh those arguments against the competing policy goal that the nonprofit sector should be accountable to those harmed by its actions as a means of approaching a decision on whether this province should take a new position on personal liability in the nonprofit sector.

### B. The Scope of this Study Paper

This Study Paper is concerned with examining legislative options to reform the law in ways that will alleviate some of the problems caused by fears about increasing liability in the nonprofit sector. Anxieties about liability affect four distinct groups in the nonprofit sector, each in different ways. These groups are: the nonprofit organizations themselves; their members; their nonmember volunteers and staff; and their management. This Study Paper will not attempt to examine how liability affects each group. Instead, it will focus on the personal liability of directors and officers, the management of incorporated nonprofit organizations.<sup>10</sup>

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5. *Volunteer Protection Act*, S.N.S. 2002, c. 14.

6. *The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2.

7. *The Non-profit Corporations Amendment Act, 2003*, S.S. 2003, c. 33.

8. *Bazely*, *supra* note 2 at para. 48.

9. *Ibid.* at para. 56.

10. Nonprofit organizations are not required to incorporate; indeed, many operate as unincorporated associations. A review of the issues facing unincorporated associations is outside the scope of the Study Paper. For a general discussion of the personal liability of the members of unincorporated nonprofit associations, see Robert Flannigan, "The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments" (1998) 77 Can. Bar Rev. 73 ["Liability Structure"]; and Robert Flannigan, "Contractual Responsibility in Non-profit Associations" (1998) 18 O.J.L.S. 631.

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The focus of this Study Paper has been placed on directors and officers because the management of nonprofit associations faces several unique and difficult issues. The nonprofit sector is currently confronted with a climate of rapid and unprecedented change. Directors and officers are responsible for guiding their organizations through that change. However, when directors and officers look to the law that regulates their conduct, they often find a static and outmoded set of rules. This body of law can also be confusing and difficult. These two factors contribute directly to anxieties about personal liability.

Chapter II of this Study Paper will illustrate the changes in the nonprofit sector that have been brought about by the increasing range of activities undertaken by nonprofit organizations. Chapter III will survey the legal rules that constitute the sources of personal liability for directors and officers. These chapters will form the necessary background for Chapter IV, which will discuss the leading options for reform of the law which have been enacted in jurisdictions outside British Columbia or recommended by law reform bodies.

The goal of this Study Paper is not to make explicit or implicit recommendations for reform of the law of British Columbia. Rather, it is to provide information and analysis of approaches to reform that have been attempted elsewhere, with a view to seeing which approaches are most in harmony with the needs of British Columbia's nonprofit sector.

### C. Terms Used in this Study Paper

Nonprofit organizations may take on many forms. They may be corporations, trusts, or unincorporated associations. In this Study Paper, an incorporated nonprofit organization will be referred to as a "society." This term is taken from the British Columbia statute that governs incorporated nonprofit organizations, the *Society Act*.<sup>11</sup>

In places it will be necessary to draw a distinction between societies and corporations that carry on business with a view to profit. An incorporated for-profit organization will be referred to as a "corporation." This term also has a legislative source: the British Columbia statute governing for-profit corporations is called the *Business Corporations Act*.<sup>12</sup> The major differences between British Columbia societies and corporations are that societies must not be incorporated for the purpose of carrying on a business, trade, industry, or

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11. R.S.B.C. 1996, c. 433. A nonprofit organization may incorporate as a corporation without share capital under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32, but it is far more common to incorporate federally only in cases where the nonprofit organization will be active in two or more provinces. Although the provisions of the *Society Act* and the *Canada Corporations Act* ultimately derive from the same body of corporate law, there may be considerable differences both in detail and in underlying policy between the two statutes. Since this Study Paper is primarily concerned with British Columbia law it will focus on the *Society Act* and it will not discuss any differences that may exist under the *Canada Corporations Act*.

12. S.B.C. 2002, c. 57, as am. by S.B.C. 2003, c. 70 and S.B.C. 2003, c. 71.

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profession for profit or gain, must not distribute any gain, profit, or dividend or otherwise dispose of their assets to a member, and must not have capital divided into shares.<sup>13</sup>

Becoming classed as a “charity” is an important goal for many—but not all—societies. A discussion of the legal definition of charity is beyond the scope of this Study Paper. In brief, the concept of a charity has its roots in the preamble to the Elizabethan *Statute of Charitable Uses*,<sup>14</sup> which recognized four charitable purposes: (1) the relief of poverty; (2) the advancement of education; (3) the advancement of religion; and (4) any other purpose that is beneficial to the community and does not fall within (1), (2), or (3).

The law’s understanding of what constitutes a charity has, until very recently, largely been developed—and limited—by the courts.<sup>15</sup> Now, however, certain tax advantages associated with charitable status are of great importance.<sup>16</sup> This development gives the Canada Revenue Agency considerable power in determining which entities will have all the benefits of charitable status that the law offers. For the purposes of this Study Paper, the key points are that some (but not all) societies will have to comply with special rules in order to maintain their charitable status,<sup>17</sup> and that some (but not all) societies (and their directors and officers) will sometimes have favourable treatment under the law based on that status.

The words “director” and “officer” have specific meanings in corporate law, even though neither word is conclusively defined in the *Society Act*.<sup>18</sup> Both terms may be understood

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13. See *Society Act*, *supra* note 11, sections 2 (1) (f) and (2) and 8. The provisions of the *Society Act* discussed in this Study Paper are reproduced in Appendix A, *infra* at 36ff.

14. 43 Eliz. I, c. 4 (1601).

15. The leading decisions are *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531, [1891–94] All E.R. Rep. 28 (U.K.H.L.) and *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, 169 D.L.R. (4<sup>th</sup>) 34.

16. It is possible to be a charity without being a “registered” charity for income tax purposes. However, registration is particularly desirable because it exempts charities from the requirement to file corporate income tax returns and it permits them to issue receipts, which allow their donors to claim tax credits. See *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c. 1, sections 110.1, 118.1, 149.1, and 150 (1.1).

17. A registered charity that is judged to have lost that status faces severe consequences in the form of a punitive “revocation” tax: see *Income Tax Act*, *ibid.*, section 188.

18. *Society Act*, *supra* note 11, section 1 contains an inclusive, and rather circular, definition of “director” that does not advance an understanding of the term very far. The definition of “director,” however, does include an “officer,” a fact which appears to render the legal, if not the functional, distinction between directors and officers under the *Society Act* to be irrelevant. The *Society Act* does not contain an independent definition of “officer.”

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functionally, by reference to the tasks that directors and officers are required to perform or do in fact perform.

Directors are, subject to defined exceptions, elected by the members of a society.<sup>19</sup> By law, a society must have at least three directors.<sup>20</sup> Directors are under a statutory obligation to manage, or to supervise the management of, the society; in order to enable them to meet this obligation, directors have the authority to exercise all the powers of the society.<sup>21</sup> Directors act collectively, as a group or “board.” The tasks commonly performed by directors include the following:<sup>22</sup>

. . . developing and following through on the organizations’ [sic] mission statement, and strategic planning; developing appropriate administrative structures; ensuring that there are job descriptions for all executive members of the Board; appointing and evaluating senior management; communicating to members and the public; ensuring that there are appropriate internal controls; ensuring that there is provision for a timely succession to the Board.

Directors are expressly subject to a large number of specific duties and liabilities, and administrative and reporting requirements, under the *Society Act*.

In contrast to its detailed treatment of directors, the *Society Act* rarely mentions officers. This lack of attention in the statute may be due to the fact that societies are not required to have officers. Nevertheless, the bylaws of most societies provide for the creation of such offices as president, vice president, secretary, and treasurer. The directors of a society are responsible for the appointment of individuals to those offices. Officers are appointed in most cases to provide for the more efficient conduct of the affairs of a society. There is a practical division of labour among management: the board of directors sets the society’s broad overall direction and goals; and the society’s officers implement those policies and carry out—or hire employees or engage volunteers to carry out—the day-to-day operations needed to meet those goals. In many (but not all) societies, however, the same people will act both as directors and officers.

Since directors and officers, for most societies, share managerial responsibilities they may usefully be discussed together in this Study Paper. However, it should be borne in mind that some statutes treat directors and officers differently. Further proposals for reform may

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19. *Society Act, ibid.*, section 24 (1).

20. *Society Act, ibid.*, section 24 (4).

21. *Society Act, ibid.*, section 24 (2).

22. Doug Sabourin, “Advising Charities and Non-profits in a Rapidly Changing Environment,” in *Charities and Not-for-Profit Organizations: The Fundamentals* (Vancouver: The Continuing Legal Education Society of British Columbia, 1999) 4.3.01 at 4.3.02.

wish to take the functional differences between directors and officers into account and allow for different treatment.

### II. THE RANGE OF ACTIVITIES UNDERTAKEN BY SOCIETIES

A society must be incorporated for a specific purpose or purposes. A society's purposes must be listed in its constitution. The *Society Act* limits the range of acceptable purposes for societies. Section 2 (1) provides illustrations of acceptable, or "lawful," purposes, "such as national, patriotic, religious, philanthropic, charitable, provident, scientific, fraternal, benevolent, artistic, educational, social, professional, agricultural, sporting or other useful purposes."

There is some overlap among these purposes; however, the list section 2 (1) is framed in such a way as to leave open the categories of acceptable purposes. The real limitations on the activities of societies come in the paragraphs that follow. Among these paragraphs, the most important is paragraph (f), which prohibits a society from incorporating for "the purpose of carrying on a business, trade, industry or profession for profit or gain."

On the face of the governing legislation, then, it would appear that societies play a more limited role both in the economy and in general than corporations, which are not bound by a similar statutory restriction. However, some commentators have argued that the opposite is true, that in fact ". . . the uses to which not-for-profit corporations as a group are being put are considerably more varied than the uses for business corporations."<sup>23</sup> This point is supported by a commentator with experience in British Columbia's nonprofit sector:<sup>24</sup>

There are about 20,000 societies registered and in good standing with the B.C. Registrar of Societies. . . . The many NFPOs [*i.e.* not-for-profit organizations] now operating in B.C. reflect the complexity and diversity of modern society and its resources. NFPOs have an amazing variety of members, purposes, structures, financing, and governance.

Reports on the activities of societies tend to rely on impressions and anecdotes. Many commentators remark that there is a lack of reliable empirical evidence to analyze and base

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23. Peter A. Cumming, "Corporate Law Reform and Canadian Not-for-Profit Corporations" (1974) 1.3 *Philanthrop.* 10 at 20. *See also* James J. Fishman, "Standards of Conduct for Directors of Nonprofit Corporations" (1987) 7 *Pace L. Rev.* 389 at 395 ("Nonprofit organizations have become increasingly complex and diverse in their activities. The number of matters that a board of directors might address could be extraordinarily large." [footnote omitted]).

24. Anders I. Ourom, "Introduction, Overview of the Broadbent Commission" *Charities, Cooperatives, and Not-for-Profits—2000 Update* (Vancouver: The Continuing Legal Education Society of British Columbia, 2000) [2000 Update] 1.1.01 at 1.1.03–1.1.04. The figure cited in the quotation is current to December 1998.

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conclusions on.<sup>25</sup> However, the impressions and anecdotes indicate that societies are active in a wide range of areas. These areas certainly include small-scale mutual benefit and public service organizations, which may be described as “traditional” societies. In addition to traditional societies, many large, sophisticated, and well-established cultural, educational, and health care organizations are societies. As well, societies may even engage in entrepreneurial activity. A society may carry on a business as an “incident” to its purposes without infringing the prohibition set out in section 2 (1) (f) of the *Society Act*.<sup>26</sup> These incidental commercial activities may generate substantial revenues and require the engagement of a large staff of volunteers or employees.

The challenges of acting in untraditional areas go beyond the delivery of new types of services and the search for new sources of funding; as one commentator has noticed, change is overtaking some of the fundamental values of the nonprofit sector:<sup>27</sup>

The non-profit sector has historically been rooted in the language of collaboration and cooperation. What is emerging are more formal partnerships and increased competition, including more competition with private sector businesses.

The boundary lines between the private, public, quasi-public, and non-profit sectors are becoming more porous and ambiguous. There are considerable implications for the legal structures of non-profits, and for the roles of Boards.

None of this background is meant to imply that there are widespread breaches of the letter or the spirit of section 2 of the *Society Act*. Instead, the relevance of this information lies in two points. First, directors and officers of societies face situations as complex and demand-

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25. See e.g. Edwin A.J. Dreessen, *What Do We Know About the Voluntary Sector? An Overview* (Ottawa: Statistics Canada, 2000) at 1 (“There are very few hard data on nonprofit organizations that are not registered charities: how many there are, what they do, or what their economic or social impact is. What little we do know does clearly suggest that they are by no means a negligible phenomenon.”) and at 6–7 and 11–13; David Sharpe, “The Canadian Charitable Sector: An Overview” in Jim Phillips, Bruce Chapman, & David Stevens, eds. *Between State and Market: Essays on Charity Law and Policy in Canada* (Montréal & Kingston, ON: McGill-Queen’s University Press, 2001) 13 at 13 (“Indeed, beyond the realm of registered charities, there is a whole world of organized non-profit activity in Canada about which we know very little. . . . Estimates of the number of non-charitable non-profit organizations in Canada range as high as 100,000.” [footnote omitted]).

26. See *Society Act*, *supra* note 11, section 2 (2). There are no cases that consider the meaning of this provision. There are, however, two decisions that interpret an equivalent provision of the *Income Tax Act*, *supra* note 16, which applies only to registered charities: see *Alberta Institute on Mental Retardation v. Canada*, [1987] 3 F.C. 286, (*sub nom. Alberta Institute on Mental Retardation v. M.N.R.*), 76 N.R. 366 (C.A.), *leave to appeal to S.C.C. refused*, (1988) 87 N.R. 397n (S.C.C.); *Earth Fund/Fond pour la terre v. M.N.R.*, (2002) 298 N.R. 391, 2002 FCA 498.

27. Gavin Perryman, “Ten Challenges Facing the Voluntary Sector,” in *2000 Update*, *supra* note 24 at 1.2.01 at 1.2.02.

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ing as those faced by directors and officers of corporations. This complexity has created a climate where the potential for personal liability has increased. Second, there exists a large variation in the composition, purposes, and goals of societies. This variation should be taken into account when reform of the law is considered. Reform should not proceed on the basis that all societies are small volunteer-driven public service agencies.<sup>28</sup>

### III. THE SOURCES OF LIABILITY FOR SOCIETY DIRECTORS AND OFFICERS

#### A. Introduction

Society directors and officers owe duties to their societies, the employees, volunteers, and agents of their societies, other persons with whom they come into contact, and the community at large. A breach of any of these duties will result in personal liability. Therefore it is important for directors and officers to understand the nature and scope of their duties. However, the law governing directors' and officers' conduct is often unclear and difficult to apply. As one American commentator has pointed out, part of the law's complexity derives from its conflicted sources.<sup>29</sup>

The law of nonprofit corporations has developed with neither consistency nor coherence. It has evolved from an uneasy mix of trust, contract, and corporate principles, the effect of which may be difficult to predict in a particular situation. The conflicting origins of nonprofit corporation law are most keenly felt when defining the duty of care and loyalty of directors of nonprofit corporations.

A further source of difficulty lies in the lack of a significant number of decided cases applicable to society directors and officers. As a result, it is often necessary to apply analogies from cases involving corporate directors and officers, which may not transfer smoothly to the circumstances of society directors and officers.

#### B. The *Society Act*

##### 1. INTRODUCTION

Among the most important duties of society directors and officers are those owed to the society itself. Breaches of these duties will result in personal liability for society directors

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28. See "Liability Structure," *supra* note 10 at 90–93 (arguing that a "halo" effect may be partly responsible for the enactment of a number of American statutes that provide immunity from personal liability for societies, and their directors, officers, and volunteers).

29. Fishman, *supra* note 23 at 391.

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and officers more often than breaches of their common law duties to other persons, despite the fact that the latter appear to be behind most of the calls for reform of the law.<sup>30</sup>

The *Society Act* contains a number of provisions that impose personal liability on directors and officers. Many of these relate to administrative, corporate maintenance, and reporting requirements. A more important potential source of personal liability derives from the duties described in section 25: the duty to act honestly and in good faith and in the best interests of the society; and the duty to exercise the care, diligence, and skill of a reasonably prudent person. However, section 25 alone is not the last word on these duties. The common law rules, which section 25 (2) expressly preserves, must also be considered.

The common law is particularly relevant in this context for two reasons. First, section 25 only refers to “directors”; it does not mention officers. The courts have not ruled on whether section 25 applies to society officers. An argument could be made, based on a literal reading of the section, that it does not. However, the word “director” is given an expanded definition in section 1 of the *Society Act*, which says that a “director” includes an “officer.” This expanded definition could incorporate officers within section 25. Further, officers do appear to owe these duties to their societies at common law.<sup>31</sup> A cautious officer would act as if he or she were bound by these duties. This Study Paper will adopt that cautious view in discussing the two duties set out in section 25.

Second, the standard of care in relation to the duty to exercise the care, diligence, and skill of a reasonably prudent person has always been understood at common law to be a flexible one. This flexibility has provided an opening for those who argue that society directors and officers should be held to a much higher standard than corporate directors and officers, that they should, in essence, be held to the same standard as trustees.<sup>32</sup> There is authority for the proposition that society directors must meet the same standards that are imposed on trustees

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30. See Saskatchewan Report, *supra* note 1 at para. 63 (“The major source of potential liability for board members is breach of their duty to the organization, which is actionable by the organization and its representatives, including members and other directors.”).

31. The leading Canadian case on these duties held that they apply to corporate officers: see *Canadian Aero Service Ltd. v. O’Malley*, [1974] S.C.R. 592 at 605–606, 40 D.L.R. (3d) 371, Laskin J. (for the court).

32. For a discussion of the policy arguments in favour of the trustee standard see Public Trustee for Ontario, “Submissions to the Ontario Law Reform Commission: Project on the Law of Charities” (1990–1991) 10 Est. & Tr. J. 272 at 275–277; and “Developments in the Law: Nonprofit Corporations” (1992) 105 Harv. L. Rev. 1578 at 1602. The authors of the Development, however, did not in the end support holding society directors and officers to the trustee standard of care.

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under the *Trustee Act*.<sup>33</sup> However, the relevant cases were decided in Ontario, which, unlike British Columbia, has legislation that makes this result much more plausible.<sup>34</sup> There will be some uncertainty on this point until it is resolved in the courts in British Columbia; for the purposes of this Study Paper, however, given the facts that the *Society Act* is a corporate law statute and that British Columbia lacks an equivalent to the Ontario statute, it appears unlikely that the argument that directors are required by law to meet the trustee standard will be accepted. Discussion of the duty to exercise the care, diligence, and skill of a reasonably prudent person will be guided by corporate law principles.<sup>35</sup>

Finally, a brief word should be said about “figurehead” or “honourary” directors. It is very common for societies to include individuals on their boards of directors for reasons other than managerial expertise.<sup>36</sup> These types of directors usually do not play an active role in the management or supervision of management of the society. Often, they are simply expected to lend prestige to the society. In other cases, they are chosen as a reward for long service as a volunteer or because they can assist the society in its fundraising activities. Occasionally, the view is advanced that the passivity of “figurehead” or “honourary” directors shields them from liability. This view does not have a basis in the law, however. If, as is often the case, the *Society Act* or another statute or the common law imposes personal liability on the board of directors collectively, that liability will attach to all directors. “Figurehead” or “honourary” directors, therefore, are passive at their peril.<sup>37</sup>

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33. *See Re Public Trustee and Toronto Humane Society*, (1987) 60 O.R. (2d) 236, 40 D.L.R. (4<sup>th</sup>) 111 at 123 (H.C.J.), Anderson J. [*Toronto Humane Society* cited to D.L.R.] (“Addressing the status of the directors, Danckwerts J. says [in *Re French Protestant Hospital*, [1951] 1 Ch. 567 (Eng. Ch.D.)] at p. 570: ‘. . . it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees’. I am in respectful agreement with that conclusion. . . .” [first ellipsis in original]). *See also Harold G. Fox Education Fund v. Public Trustee*, (1989) 69 O.R. (2d) 742 at 746–747, (*sub nom. Harold G. Fox Education Fund v. Ontario (Public Trustee)*), 34 E.T.R. 113 (H.C.J.), Van Camp J. (court refers to the “uncertainty” in the law after *Toronto Humane Society* decision—grants relief under section 61 of the *Trustee Act*, R.S.O. 1980, c. 512 [now R.S.O. 1990, c. T.23] and authorizes payment of remuneration to directors).
34. *See Charities Accounting Act*, R.S.O. 1980, c. 65, section 1 (2) [now *Charities Accounting Act*, R.S.O. 1990, c. C.10].
35. For a fuller discussion of the background and implications of this debate over the relevant standard of care, *see* Donovan Waters, Case Comment: *Re Centenary Hospital Association* (1989) 9.1 *Philanthrop.* 3 at 9–15.
36. *See* Saskatchewan Report, *supra* note 1 at paras. 49–52.
37. Interestingly, this point was made in one of the earliest English cases to consider directors’ duties to their corporations: *see Charitable Corporation v. Sutton*, (1742) 2 Atk. 400 at 406, 26 E.R. 642 (Eng. Ch.), Lord Hardwicke L.C. (“By accepting a trust of this sort [*i.e.* a directorship], a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely *honorary*. . . .” [emphasis in original]).
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### 2. DUTY TO ACT HONESTLY AND IN GOOD FAITH AND IN THE BEST INTERESTS OF THE SOCIETY

The duty to act honestly and in good faith and in the best interests of the society has been imposed on directors and officers to prevent them from coming into conflicts of interest with societies. This duty is strictly enforced. Courts often emphasize the fiduciary character of directors or officers in cases involving this duty. Fiduciary duties are the highest duties that the civil law imposes on persons.

The major difficulty with understanding the nature of this duty is that merely labelling it as “fiduciary” does not explain very much or provide a great deal of assistance for directors and officers in the course of making managerial decisions.<sup>38</sup> Some clear examples of activities proscribed by this duty would include misappropriation of society property for a director’s or officer’s personal use, including the taking of a commercial opportunity that properly belongs to the society, and disclosure of, or inappropriate reliance, on confidential society information.<sup>39</sup> However, the scope of the duty is much broader. The leading decisions on the common law duty make it clear that any transaction or contract between a director or officer and the society which could result in a profit for the director or officer is a breach of the duty.<sup>40</sup> Even *potential* conflicts of interest must be avoided at common law.

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38. See Law Reform Commission of British Columbia, *Consultation Paper on Conflicts of Interest: Directors and Societies* (LRC CP 71) (Vancouver: The Commission, 1993) [British Columbia Consultation Paper] at 48ff (discusses supplementing the statutory rules with conduct guidelines). See also Fishman, *supra* note 23 at 393 (“Directors are fiduciaries, but this word tells us little as it is so imprecise.” [footnote omitted]).

39. See *Khalsa Diwan Society of Abbotsford v. Sidhu*, 2000 BCSC 413 (misappropriation of society property); *Evans v. Anderson*, [1977] 2 W.W.R. 385, 76 D.L.R. (3d) 482 (Alta. S.C.A.D.), *leave to appeal to S.C.C. refused*, [1977] 1 S.C.R. vii (misappropriation of society’s commercial opportunity).

40. See *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (U.K.H.L.). See also *Aberdeen Railway Co. v. Blaikie Brothers*, (1854) 2 Eq. Rep. 1281, [1843–60] All E.R. Rep. 249 at 252–253 (U.K.H.L.), Lord Cranworth L.C.:

The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into 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. . . . It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

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The fact that a transaction or contract was carried out in good faith or resulted in a benefit for the society will not assist the director or officer who breaches this duty.

The *Society Act* tempers the harshness of this rule. Sections 27 and 28 establish a procedure that allows a director to disclose his or her interests in a contract or transaction with the society to the other directors.<sup>41</sup> The other directors may approve the contract or transaction, but the interested director must abstain from voting on this approval. Section 28 provides for a further mechanism if the required disclosure has not been made before the contract or transaction is approved. If the contract or transaction is reasonable and fair to the society, the members may approve it by special resolution after the interested director has fully disclosed the nature and extent of his or her interests.

If a director or officer fails to comply with sections 27 and 28, then he or she must turn over all profits made on account of the transaction or contract to the society. Section 29 also allows the society or “an interested person” to apply to court for an order setting aside the contract or transaction.

### 3. DUTY TO EXERCISE THE CARE, DILIGENCE, AND SKILL OF A REASONABLY PRUDENT PERSON

This duty is generally considered to be analogous to the tort law duty to take reasonable care. The legal issues that arise in connection with it tend to relate to the standard of care that directors and officers must meet. As was the case with fiduciary duties, the common law origins of this duty are important to understand in order to deal with the relevant legal issues.

The leading statement of the common law duty to exercise care, diligence, and skill in the performance of one’s duties as a director or officer is Romer J.’s decision in *Re City Equitable Fire Insurance Co., Ltd.*<sup>42</sup> Justice Romer decided that directors and officers do not need to meet the standard of an ordinary prudent person; rather, the appropriate standard is that of a prudent *director*. This standard is lower than the ordinary tort law standard. It contains a measure of flexibility, to accommodate for differences in the backgrounds and experiences of directors and officers. As well, the common law recognizes that directors often cannot pay continuous attention to the details of the day-to-day operations of the corporation or society. They are entitled to rely on information prepared and presented to

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41. Sections 27 and 28, like section 25, only refer to “directors.” As with section 25, officers appear to be incorporated by virtue of the definition of “director” in section 1, though this point could stand to be clarified.

42. [1925] 1 Ch. 407 at 426–430 (Eng. Ch.D.), *aff’d*, [1925] 1 Ch. 407 at 500–549 (Eng. C.A.). The appeal in this case concerned the auditors’ liability alone. However, the Court of Appeal did express general approval of Romer J.’s judgment: *see* Pollock M.R. at 501; Warrington L.J. at 518; Sargant L.J. at 529.



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them by the society's officers and employees, unless a reasonably prudent director would recognize that the information is revealing problems within the society that require further investigation and action.<sup>43</sup> Finally, the common law duty allows directors to take risks in making broad policy decisions for the corporation by recognizing a "business judgment rule." Under this rule—and the equivalent "best judgment rule" for societies—the courts will refrain from looking too closely with hindsight at the directors' strategic choices.<sup>44</sup>

Section 25 (1) (b) refers to a "prudent person" and may therefore be seen as an attempt to raise the standard of care required of directors and officers. However, the provision has not been given much judicial consideration.<sup>45</sup> The qualifying words—"in exercising and performing those functions as a director"—may serve to incorporate the flexible common law standard.

In practice, directors and officers may fulfill this duty by spending the time necessary to make informed decisions about the direction of the society.<sup>46</sup> For directors, this time would be spent on such activities as attending board meetings and learning enough about the activities of the society and the environment in which it operates to examine critically information presented by officers and employees. For officers, this time would be spent on fulfilling the day-to-day management required to ensure that the society continues to operate. The standard is not intended to be a demanding one. In effect, a policy decision has been made to lower the ordinary negligence standard in order not to have the law of torts unduly inhibit the management of a society.

#### 4. OTHER PROVISIONS IN THE *SOCIETY ACT* AND *ULTRA VIRES*

The *Society Act* places some specific duties on directors that augment their general duty to manage, or supervise the management of, the affairs of the society. For example, a society

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43. For an illustration of this point see *Richmond Raiders Football Club v. Richmond Savings Credit Union*, [1993] B.C.J. No. 449 at paras. 26–31 (S.C.) (QL), Cohen J.

44. For a discussion of the common law rules in relation to societies see William I. Innes, "Liability of Directors of Charitable and Non-Profit Corporations" (1993) 13 Est. & Tr. J. 1 & 151 at 153 and 155 ("On balance, it would seem that the business judgment rule probably has some application in this area, but undue reliance upon the efficacy of this rule is probably not merited, particularly in the case of charitable corporations.").

45. See e.g. *Sandhu v. Guru Nanak Sikh Gurdwara Society*, 2001 BCSC 1543 at para. 12, Vickers J. (holding that society directors "are not required to meet a standard of perfection" in order to discharge their duties under section 25 (1) (b)).

46. See Carol Hansell, *What Directors Need to Know: Corporate Governance 2003* (Toronto: Carswell, 2003) at 106–108.

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must not issue financial statements unless they have been signed by two directors.<sup>47</sup> A breach in this provision is considered to be the commission of an offence by the society. Other specific rules may result in a director or officer being held personally liable.<sup>48</sup>

A more significant concern exists here, however. Some commentators have argued that the combination of section 4 (1) (d) and section 32 (1) preserves the doctrine of *ultra vires* for societies.<sup>49</sup> This doctrine holds that a society is organized to carry out specific purposes and any activity outside those purposes is void against the society. *Ultra vires* was once a feature of corporate law; however, it was abolished for British Columbia corporations in the early 1970s. Its continued existence for societies is something of an anomaly. The rationale for continuing the doctrine in this context may be a concern about the expenditure of donated funds and money received from government, particularly by charities.

*Ultra vires* is especially worrying when decisions to invest funds are made. If the investment is not in accordance with the society's purposes, then the directors or officers who authorized it could be held personally liable. However, *ultra vires* considerations are not limited to investment decisions. The doctrine has the potential to affect every contract, transaction, or decision approved by the society's directors or officers.<sup>50</sup>

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47. *Society Act*, *supra* note 11, section 40.

48. *See e.g. Society Act, ibid.*, section 24 (8) (if a society has less than three members for more than six months, the directors are personally liable for debts incurred by society for so long as it has the number of members continues to be less than three); section 84 (3) and (5) (offence for director or officer to refuse to comply with investigation or order concerning the society).

49. *See* E. Blake Bromley & Gordon B. MacRae, "The Duties and Liabilities of Directors of British Columbia Societies," in *Charities and Non-Profit Organizations—1992* (Vancouver: The Continuing Legal Education Society of British Columbia, 1992) 2.1.23 at 2.1.32. This argument is strengthened by the existence of section 4 (4), which provides protection for third parties—but not society directors or officers—from the harsh effects of the *ultra vires* doctrine.

50. Bromley & MacRae, *ibid.* at 2.1.33 give the following example of how *ultra vires* could operate in connection with a decision taken in good faith:

We were once consulted by a charity which was incorporated under the Societies Act [*sic*] in British Columbia in the 1940's as a religious organization to carry on missionary work of a very specific nature. In the 1950's a donor gave them property to start summer camps for children. Gradually the camp ministry became the total focus of their activities, even though it could not be considered an authorized activity by even the most liberal interpretation of the society's purposes. Consequently, by the 1980's they had a million dollar property and hundreds of thousands of dollars of annual income devoted to an excellent charitable program which was totally ultra vires [*sic*]. One would not want to be a director of that organization in the event of a law suit against the Society on behalf of a child who became a quadraplegic [*sic*] as a result of a diving or skiing accident at the camp.

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*Ultra vires* is arguably a dangerous source of personal liability for society directors and officers. Society members cannot relieve directors and officers from liability by ratifying *ultra vires* acts.<sup>51</sup> Even the courts may have limited scope to relieve directors and officers who have acted in good faith.<sup>52</sup> However, there appear to be no reported cases of society directors and officers suffering personal liability as a result of authorizing *ultra vires* acts. This may be due to the fact that enforcement of the doctrine is difficult, or it may be due to the confusing and underdeveloped state of the law in this area.<sup>53</sup>

### C. Other Legislation

#### 1. INTRODUCTION

A large and ever-increasing number of statutes impose personal liability on directors and officers for offences and wrongs committed by corporations. The rationale underlying these provisions is, as one judge put it, “. . . since the corporation is without body to be kicked or soul to be damned . . .” its directors and officers must in many instances be called to account for damage caused by its acts and omissions.<sup>54</sup> The number of statutes imposing personal liability in this way on directors and officers is vast, and no attempt will be made

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51. *See Cullerne v. London and Suburban General Permanent Building Society*, (1890) 25 Q.B.D. 485 at 490 (Eng. C.A.), Lindley L.J. (for the court) (“But if a director acting *ultra vires*, i.e., not only beyond his own power, but also beyond any power the company can confer on him, parts with money of the company, I fail to see on what principle the fact that he acted *bonâ fide* and with the approval of the majority of the shareholders can avail him as a defence to an action by the company to compel him to replace the money.”).
52. *See Bromley & McRae*, *supra* note 49 at 2.1.34 (arguing that the courts are reluctant to interpret a society’s purposes broadly because this may jeopardize the charitable status of the society). There may be some protection for passive directors: *see Re Dominion Trust Co. and Machray*, (1916) 23 B.C.R. 401 at 413–414 (S.C.), *rev’d on other grounds*, (1916) 23 B.C.R. 401 at 419–420, Macdonald C.J. (Martin and Galliher J.J.A. concurring) and at 435, McPhillips J.A. (dissenting in part), (*sub nom. Re Dominion Trust Co. (Directors’ Case)*), 32 D.L.R. 63 (C.A.) (the Supreme Court, Court of Appeal majority, and Court of Appeal minority decisions all agreed that the passive directors could not be held personally liable for *ultra vires* investments). However, the ruling in this case is at odds with the way passive directors are currently treated under the law and might not be sustained if the issue were to arise again.
53. *See e.g. Canada Mortgage and Housing Corp. v. Society for the Christian Care of the Elderly*, [1993] B.C.J. No. 928 at para. 8 (S.C.) (Q.L), Saunders J. (application by creditor CHMC for appointment of receiver-manager over the affairs of society—CMHC argued that entry into certain management contracts and into agreement to refinance CMHC’s mortgage with a loan at a higher interest rate were *ultra vires* acts—court decides that “. . . CMHC is stepping into matters not strictly its concern, trying to run the Society and substitute its will for the views of the members and directors”).
54. *Toronto Humane Society*, *supra* note 33 at 121, Anderson J.
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to catalogue every applicable provision.<sup>55</sup> What follows is a review of the provisions that will most often arise in practice and that contain defenses and exceptions that are important to note for a general understanding of how the law currently imposes personal liability on society directors and officers.

### 2. WITHHOLDING AND REMITTING EMPLOYEE TAXES AND OTHER SOURCE DEDUCTIONS

Several statutes require societies to deduct, withhold, and remit money to the federal government. The most familiar examples of this mechanism come from tax legislation. Under section 153 (1) the *Income Tax Act*<sup>56</sup> a society that pays “salary, wages, or other remuneration” to employees must deduct and withhold the applicable income tax. The society must remit these withheld funds to the federal government.<sup>57</sup>

The *Income Tax Act* contains a provision that imposes personal liability on directors if the society fails to deduct, withhold, and remit the required amount.<sup>58</sup> However, the statute tempers this rule by providing a due diligence defence for directors.<sup>59</sup> This defence is of vital importance in cases involving the deduction, withholding, and remission of funds. A director will be able to rely on the defence by meeting the standard of care established by the statute.

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55. See Arlene D. Wolfe, “Liability of Directors and Officers of Non-Share Corporations,” in *Fit to be Tithed: Risks and Rewards for Charities and Churches* (Toronto: Department of Continuing Legal Education, Law Society of Upper Canada, 1994) E-1 at E-2 (“There are more than 100 statutes that impose specific statutory liabilities on directors; listing all of such specific statutory liability [*sic*] is too onerous and the resultant list would never be exhaustive.”).

56. *Supra* note 16.

57. Similar schemes exist for Canada Pension Plan contributions and Employment Insurance premiums: see *Canada Pension Plan*, R.S.C. 1985, c. C-8, section 21 (1); *Employment Insurance Act*, S.C. 1996, c. 23, section 82 (1). Societies must also remit the “net tax” with respect to goods and services that attract the goods and services tax to the federal government: see *Excise Tax Act*, R.S.C. 1985, E-15, section 228 (2).

58. See *Income Tax Act*, *supra* note 16, section 227.1 (1). See also *Canada Pension Plan*, *ibid.*, section 21.1 (1); *Employment Insurance Act*, *ibid.*, section 83 (1); *Excise Tax Act*, *ibid.*, sections 96 (3) and 330 (which also provide for the personal liability of society officers).

59. See *Income Tax Act*, *ibid.*, section 227.1 (3). See also *Canada Pension Plan*, *ibid.*, section 21.1 (2) (incorporates by reference section 227.1 (3) of the *Income Tax Act*); *Employment Insurance Act*, *ibid.*, section 83 (2) (incorporates by reference section 227.1 (3) of the *Income Tax Act*); *Excise Tax Act*, *ibid.*, sections 96 (3) and 330 (director or officer must “direct, authorize, assent to, acquiesce in, or participate in” the commission of the offence).

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The leading case on the applicable standard of care under section 227.1 (3) of the *Income Tax Act* is *Soper v. Canada*.<sup>60</sup> In *Soper*, Robertson J.A. (Linden J.A. concurring) reviewed the possible standards that could apply in these circumstances: the ordinary negligence standard, a higher modified standard for professionals, and the standard of care that the common law and corporate statutes place on directors.<sup>61</sup> Robertson J.A. concluded that the appropriate standard of care is the corporate standard. Further, he described this standard as being a flexible one, which requires more than honesty and good faith, but also allows for differences in the background and experience of directors.<sup>62</sup> A later decision confirmed that this standard applies to society directors.<sup>63</sup> This decision ties the standard of behaviour required to establish the due diligence defence to the standard required under section 25 (1) (b) of the *Society Act*.

### 3. UNPAID WAGES

Under section 96 of the *Employment Standards Act*<sup>64</sup> a society director or officer may be held personally liable for up to two months' unpaid wages for each employee. Personal liability simply turns on whether one was "a director or officer of a [society] at the time wages of an employee of the [society] were earned or should have been paid."<sup>65</sup> The word "wages" is given a broad, inclusive definition in section 1 of the *Employment Standards Act*.

Unlike the *Income Tax Act*, the *Employment Standards Act* does not contain a due diligence defence for directors and officers. However, section 45 of the *Employment Standards Regulation*<sup>66</sup> relieves a ". . . director or officer of a charity who receives reasonable

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60. [1998] 1 F.C. 124, 149 D.L.R. (4<sup>th</sup>) 297 (C.A.) [*Soper* cited to D.L.R.].

61. *Ibid.* at 306–318.

62. *Ibid.* at 317–318.

63. *Canada v. Corsano*, [1999] 3 F.C. 173 at paras. 23–25, (*sub nom. Wheeliker v. Canada*), 172 D.L.R. (4<sup>th</sup>) 708 (C.A.), Létourneau J.A., *leave to appeal to S.C.C. refused*, (*sub nom. M.N.R. v. Corsano*), (2000) 256 N.R. 194n (S.C.C.) ("... it was an error for the Tax Court Judge to conclude that the standard of care was different and less rigorous in not-for-profit corporations"). Létourneau J.A. also says, at para. 24, that passive directors will not be shielded from liability by their passivity ("I agree with counsel for the appellant that the rationale for subsection 227.1 (1) is the ultimate accountability of the directors of a company for the deduction and remittance of employees' taxes and that such accountability cannot depend on whether the company is a profit or not-for-profit company, or I would add whether the directors are paid or not or whether they are nominal but active or merely passive directors.").

64. R.S.B.C. 1996, c. 113.

65. *Employment Standards Act*, *ibid.*, section 96 (1).

66. B.C. Reg. 396/95.

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out-of-pocket expenses but no other remuneration for services performed for the charity” from personal liability for unpaid wages of an employee of the charity. This provision will be of assistance to many society directors or officers. However, those who receive some remuneration for their services (other than reimbursement of expenses) or who are directors or officers of societies that are not charities will be treated the same as corporate directors or officers.

### D. The Common Law

In the same manner as everyone else, directors and officers are governed by common law principles in their dealings with third parties apart from their societies. The office of director or officer does not, in itself, provide directors and officers with immunity from personal liability as a result of any contracts entered into or torts committed personally.

However, one aspect of being a director or an officer is significant in this context. The law regards corporations and societies as separate persons, distinct from their members, shareholders, directors, officers, employees, and volunteers. Corporations and societies, unlike human beings, are “artificial persons.” Human beings have a choice whether or not to act through an agent; but corporations and societies must always act through agents. More often than not, a corporation’s or a society’s agent is a director or an officer.

The law of agency provides agents with protection from personal liability. For example, if an officer signs a contract on behalf of a society the officer will not be personally liable under the contract, so long as it is clear that the society is the principal and the officer is acting as its agent. Similarly, if an employee or a volunteer of a society harms someone and causes that person to suffer a loss, the society may be held vicariously liable for that loss, but a director will not be personally liable unless it can be shown that the director has displaced the society as that employee’s or volunteer’s principal.

Corporate directors and officers must often make risky business decisions. For example, the board of directors may authorize a corporation to breach a contract and to pay damages for the breach because they have decided that the corporation’s long-term interests outweigh this short-term loss. There have been complaints that the courts are having a difficult time deciding when the corporation’s actions pursuant to these decisions should also result in personal liability for the directors and officers involved in making a decision.<sup>67</sup> Further, there are concerns that corporate directors and officers are increasingly being joined as

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67. See Robert Flannigan, “The Personal Tort Liability of Directors” (2002) 81 Can. Bar Rev. 247 [“Personal Tort Liability”] and see especially the cases Prof. Flannigan cites at 284–309.

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defendants in lawsuits involving their corporations not for substantive reasons but as a tactic to force an early settlement.<sup>68</sup>

There is no evidence that society directors and officers are suffering from similar problems. These problems may result from the fact that corporations carry on business and societies do not. It is widely acknowledged that being held personally liable in a third party tort action is a remote possibility for society directors and officers, particularly in comparison to the possibility of being held personally liable for failure to withhold or remit taxes, unpaid wages, or breach of duty to the society.<sup>69</sup>

However, in large part the calls to reform the law and grant society directors and officers immunity from personal liability rest on this remote possibility and not on dangers that are closer to hand.<sup>70</sup> There appear to be a number of reasons for this paradox. The law in this area—particularly as it applies to corporate directors and officers—is uncertain. Further, the Supreme Court of Canada recently rendered two high-profile decisions that expanded the scope of vicarious liability involving nonprofit organizations.<sup>71</sup> There has been speculation that these two uncertain areas of the law could merge into a new source of personal liability for society directors and officers.<sup>72</sup> Personal liability for breach of duty to the society often simply requires restitution of a clearly-defined amount. The penalties for failure to remit withheld taxes or for unpaid wages are harsher but still manageable, particularly when small societies are involved. These penalties are straightforward and, in a sense,

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68. See *ADGA Systems International Ltd. v. Valcom Ltd.*, (1999) 43 O.R. (3d) 101, 168 D.L.R. (4<sup>th</sup>) 351 at para. 9 (Ont. C.A.), Carthy J.A. (for the court), *leave to appeal to S.C.C. refused*, (2000) 254 N.R. 400n (S.C.C.) (“ . . . I recognize the policy concern . . . over the proliferation of claims against officers and directors of corporations in circumstances which give rise to the appearance of the desire for discovery or leverage in the litigation process.”). See also John J. Chapman, “Joinder of Corporate Directors, Officers and Employees” (2001) 80 Can. Bar Rev. 857.

69. See Saskatchewan Report, *supra* note 1 at para. 63 (introducing a discussion about “third party liability in tort, the authors say “the major source of potential liability for board members is breach of their duty to the organization . . .”).

70. See Saskatchewan Report, *ibid.*, at paras. 1, 19, 25–26, 39, and 64. The final recommendations in the Saskatchewan Report were broader, both in terms of people and situations covered, than this returning focus on the possibility that a volunteer board of directors could be held vicariously liable would seem to suggest.

71. See *Bazely*, *supra* note 2; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 174 D.L.R. (4<sup>th</sup>) 71, (*sub nom. T. (G.) v. Griffiths*), 63 B.C.L.R. (3d) 1.

72. See Saskatchewan Report, *supra* note 1 at paras. 75–76 (“In the view of many advisors to the non-profit sector, the Supreme Court has created a test of liability that is . . . uncertain in scope. . . . The Supreme Court did not consider the question of the personal liability of board members in *Children’s Foundation v. Bazely* or *Jacobi v. Griffiths*. However, it is clear that board members are potentially liable.”).

easy to grasp and control. In comparison, being held vicariously liable in a sexual assault action is overwhelming and incomprehensible. Even if it never or rarely occurs, the fear of it occurring could affect recruitment of society officers and directors.

### E. Summary

Society directors and officers face personal liability on a range of fronts. Some provisions of the law, such as penalties for directors when societies fail to remit withheld taxes or for directors and officers for wages not paid to employees of non-charitable societies impose personal liability for well-supported social policy reasons.<sup>73</sup> Other provisions, such as the *ultra vires* rules or directors' and officers' duties under the *Society Act*, may contain significant traps for the unwary. Finally, in still other places, such as vicarious liability, the law provides protection to the directors and officers rather than exposing them to personal liability. However, the nature of this protection appears to be ill-understood, and the resulting confusion is creating anxieties about personal liability that are stronger than those created by more immediate threats.

## IV. OPTIONS FOR REFORM

### A. Introduction

The complex factual and legal situation facing many society directors and officers provides most of the reasons for reforming the law. However, the tools that the *Society Act* currently provides to relieve directors and officers from personal liability may serve as another spur to reform. The *Society Act* contains two main devices to protect directors from personal liability: indemnification<sup>74</sup> and the purchase and maintenance of insurance.<sup>75</sup> Both devices have the same flaw: their effectiveness depends on the financial strength of the society and the sophistication of its management. The provisions are a weak response to concerns about fairness, recruitment, and withdrawal of services. Reform of the law may be needed to address those concerns.

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73. See Saskatchewan Report, *ibid* at para. 121, recommendation 5 (“... immunity [from personal liability] should not affect statutory liabilities of directors and officers, but consideration should be given on a case by case basis to modifying or removing statutory liabilities with respect to directors and officers of non-profit corporations”).

74. See *Society Act*, *supra* note 11, section 30 (2). The director must have acted in good faith and in the best interests of society and (when liability is the result of a criminal or administrative proceeding) must have had reasonable grounds for believing that his or her conduct was lawful. The society must obtain the court's approval before paying the indemnity.

75. See *Society Act*, *ibid.*, section 30 (5). The provision allows the society to pay the premiums on this insurance without running afoul of the conflict of interest provisions in sections 25–29.



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Six major options for reform have either been proposed by law reform agencies or enacted in jurisdictions outside British Columbia. They are: complete immunity from personal liability; selected immunity from personal liability; a reduced standard of care; modified fiduciary duties; relief by the court when a director or officer acts honestly and reasonably; and indemnification by the society. This chapter will review how each of those options strikes a balance between concerns about fairness, recruitment, and withdrawal of services on the one hand and accountability, responsibility, and protection of the public on the other.

### B. Complete Immunity from Personal Liability

Immunity means “[a]ny exemption from a duty, liability, or service of process. . . .”<sup>76</sup> Granting society directors and officers complete immunity from personal liability is the most far-ranging and comprehensive option for reform. It requires consideration of two aspects. First, the underlying policy is controversial. Second, even if this policy were agreed to, a number of issues arise in connection with the scope of the immunity. In spite of the label “complete,” some lines will need to be drawn.

#### 1. POLICY

The arguments in favour of a policy of complete immunity rely heavily on the problems that personal liability poses for the recruitment and retention of society directors and officers. Although these problems have yet to emerge, their potential emergence is a serious concern for societies, and for the community in general. A chill in recruiting or retaining society directors and officers would harm the ability of societies to continue to provide services to the public. Since societies are being asked to deliver more and more vital services to the public, a reduction in their ability to deliver these services would have a broad impact on the community.

The Saskatchewan Report, which recommended a form of complete immunity from personal liability for society directors and officers, provided a good summary of the policy arguments in favour of this reform:<sup>77</sup>

The not-for-profit sector in Saskatchewan depends on the willingness of volunteers to serve on boards. It is volunteer directors and officers who are often at the heart of a not-for-profit organization. If concern about liability issues discourages citizens from serving on volunteer boards, the community fabric of our province will suffer. The problem of directors and officers [*sic*] liability should be confronted before it reaches dangerous proportions.

As this quotation makes clear, the argument is pre-emptive: it is necessary to take this step before a problem arises.

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76. *Black's Law Dictionary*, 7<sup>th</sup> ed., s.v. “immunity.”

77. *Supra* note 1 at para. 99.

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It can be very difficult to make a convincing case to fix a problem before the problem has actually arisen. Advocates in favour of complete immunity often make an appeal to the underlying fairness of their position. The Saskatchewan Report also drew on a variation of this argument by emphasizing the unfairness of holding society directors and officers personally liable:<sup>78</sup>

When a volunteer board fails, the reasons usually have little to do with factors that would be mitigated by fear of liability. Volunteer board members may have difficulty balancing the time required by board business with other obligations. . . . [T]his is an inevitable problem when volunteers must be relied upon. Fear of personal liability will rarely make it possible for board members to find more time for the organization. In other cases, volunteer board members lack skill and experience in management roles, and thus may rely too readily on the advice of managerial employees and officers. However, the structure of not for profit boards also makes this problem inevitable. Volunteer board [*sic*] will appropriately include fund raisers and individuals whose experience lies in providing services rather than in business management.

This quotation points to a mismatch between treating a “structural” problem (the inexperience of volunteer boards of directors) with a solution that relies on holding erring directors personally liable. The argument goes on to suggest that a program of initial education before problems occur would be a better solution than after-the-fact personal liability.<sup>79</sup>

The arguments against immunity tend to meet this point about unfairness by focussing on the accountability of society directors and officers for their actions. A policy of immunity for society directors and officers will not reduce the number of third parties harmed by torts committed by or attributable to society directors or officers. These third party victims may be left shouldering the costs of their injuries. If they are unable to do so, then they may have to rely on the community at large to bear these costs. This situation could undercut the fairness of granting society directors and officers complete immunity.<sup>80</sup>

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78. *Ibid.* at para. 102.

79. *Ibid.* at para. 103.

80. See “Liability Structure,” *supra* note 10 at 90–93. At 92 Prof. Flannigan illustrates this point with a number of questions asked in the context of granting immunity to volunteers as a class:

Is the public prepared *ex ante* to give up its right to be compensated for injuries suffered in the course of that contact [*i.e.* contact with volunteers]? Are we prepared to lift the minimal regulation that would otherwise discipline the risk-taking of volunteers? Would it make any difference if the association was the Salvation Army, a private school, a health clinic, a rugby club, a lobby group or a real estate board? What of the volunteers, themselves, given that many injuries will be ones they inflict on each other? On what coherent basis is one volunteer to be protected or favored over the other?

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Those opposed to immunity for society directors and officers have attempted to meet the arguments based on decline of services and recruitment as well. Even proponents of those arguments have conceded that, currently, they have a weak empirical foundation. Some commentators have gone further to question whether maintaining or increasing the level of services provided by societies would be worth the possibility that those services would be performed with a lower level of care.<sup>81</sup> Further, a complete immunity from liability would cover damages suffered by the society and its volunteers. If these damages were significant, then the ability of the society to continue to provide its services could be impaired. In addition, members of other occupations and the professions are subject to personal liability in connection with their occupations. In many cases, these people must meet a higher standard of care than society directors and officers. However, recruitment has not proved to be a problem for other occupations and professions.<sup>82</sup>

Finally, it may be argued that it is difficult to find one quality in common among society directors and officers that justifies a complete immunity from personal liability for all of them.<sup>83</sup> One could point to the volunteer experience; however, not all society directors and officers are volunteers. Further, societies are not the only source of valuable services in the community at large. It could be difficult to explain why this one group has been singled out for special treatment.

### 2. SCOPE

If a policy of complete immunity from personal liability for society directors and officers were accepted as the best option for reform, then other questions about its implementation would soon arise. In the main, these questions relate to the scope of the immunity offered. Scope becomes an issue because it would be impossible to sustain a policy of immunity in the face of all behaviour. For example, no one would support a provision that exempted society directors and officers from the consequences of criminal wrongdoing.

Saskatchewan is the only jurisdiction in Canada to have enacted legislation granting society directors and officers complete immunity from personal liability.<sup>84</sup> The Saskatchewan legislation is rather broad. It draws no distinctions based on the volunteer status of directors and officers or on the charitable status of the society; all society directors and officers

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81. See *ibid.* at 92 (“As for diminished services, if that were ever empirically demonstrated, it would still be necessary to compare the loss of service with the alternative of *diminished care*.” [emphasis in original]).

82. See “Personal Tort Liability,” *supra* note 67 at 314.

83. See “Liability Structure,” *supra* note 10 at 93.

84. *The Non-profit Corporations Amendment Act, 2003*, *supra* note 7. Selected provisions from the legislation in force outside British Columbia discussed in this Study Paper are reproduced in Appendix B, *infra* at 43ff.

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are covered. However, the legislation does contain some limits to its protection. These limits provide a useful lens through which to see how the scope of the immunity granted to directors and officers may be restricted.

Many of these restrictions are not controversial; rather, they are commonsense limitations. For example, the legislation is made subject to other statutes. Provincial statutes cannot affect duties and liabilities set out in federal legislation, such as the *Income Tax Act*.<sup>85</sup> In addition, under the Saskatchewan legislation, society directors and officers do not have immunity with respect to duties and liabilities set out in provincial legislation. This position simply respects the policy choices made in other provincial legislation. However, it also means that a major source of personal liability for society directors and officers is unaffected by the legislation.

The immunity only operates if the director or officer acted in good faith. This good faith requirement is given added substance by an express provision denying immunity for fraudulent and criminal acts, and for acts that constitute an offence under federal or provincial legislation. This good faith requirement should, in many cases, also prevent a director or officer who has breached a fiduciary duty owed to the society from relying on the immunity.<sup>86</sup>

The Saskatchewan legislation was clearly influenced by the recommendations set out in the Saskatchewan Report. Those recommendations were not intended to be unduly restrictive. For instance, the Saskatchewan Law Reform Commission rejected a limitation on the immunity for “willful” or “grossly negligent acts.”<sup>87</sup> This recommendation is embodied in the legislation. However, there remains significant exposure to personal liability outside the context of negligence.

In British Columbia, further limits on protection would have to be contemplated to deal with liability resulting from *ultra vires* acts and transactions. As noticed above, British Columbia societies cannot be held liable for *ultra vires* acts and transactions. If society directors and officers could rely on an immunity from personal liability in the face of an *ultra vires* act or transaction, then the third party dealing with a society in these circum-

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85. *Supra* note 16.

86. This point is qualified because it is not clear whether the good faith requirement would block directors and officers from relying on the immunity in all cases where a breach of a fiduciary duty has occurred. In the Saskatchewan Report, *supra* note 1, which was the inspiration for the Saskatchewan legislation, the Saskatchewan Law Reform Commission said at para. 116, recommendation 3 that the immunity should not extend to “. . . profit-taking at the expense of the [society].” However, not all breaches of fiduciary duties amount to “profit-taking.” See *e.g. Regal (Hastings), Ltd. v. Gulliver*, *supra* note 40.

87. *Supra* note 1 at para. 117.

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stances would, by a process of elimination, be liable for the act or transaction. Since third parties are in the worst position to determine whether an act or transaction is *ultra vires* a society's purposes, this result is unsatisfactory.

### C. Selected Immunity from Personal Liability

As discussed earlier, there is a considerable range in background, education, dedication, and experience among directors and officers, just as there is a considerable range in activities, sophistication, and financial strength among societies. Some proposals for reform attempt to recognize this range and incorporate it into a system of immunity for directors and officers. This type of immunity is "selected" in the sense that it only applies to certain directors and officers. There are two main types of criteria that form the basis of this selection. They are: qualities associated with directors and officers; and qualities associated with the society.

#### 1. QUALITIES ASSOCIATED WITH DIRECTORS AND OFFICERS

The most common example of incorporating the concept of selected immunity is found in statutes that restrict the exposure of volunteer directors and officers to personal liability. Among Canadian provinces, Nova Scotia alone has taken this approach.<sup>88</sup> Nova Scotia's legislation defines the word volunteer by reference to two facts. First, a volunteer is someone who performs services for a nonprofit organization. Second, a volunteer is someone who either does not receive compensation for those services (other than reasonable reimbursement or allowance for expenses actually incurred) or money or any other thing in lieu of compensation in excess of five hundred dollars per year.<sup>89</sup> A focus on the volunteer status of society directors and officers has its merits. It captures one of the qualities of certain society directors and officers that would make them worthy of special protection. It also recognizes the diversity of societies. Volunteer directors and officers are more likely to lack the experience and the time to perform their duties in such a manner as to avoid personal liability. Paid directors and officers effectively act in that capacity as a career choice. Very little separates them from corporate directors and officers, who would not have the benefit of special treatment.

Another distinction that could be drawn here is a functional one between directors and officers. In larger societies directors and officers tend to have distinct duties and to perform different tasks. Directors shoulder responsibility for setting the general direction of a society and for broad oversight of its operations. Officers are involved in the day-to-day

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88. See *Volunteer Protection Act*, *supra* note 5. The Nova Scotia legislation appears to have been influenced by the American *Volunteer Protection Act of 1997*, 42 U.S.C.S. §§ 14501–14505 (Law. Co-op. 1997).

89. *Volunteer Protection Act*, *ibid.*, section 1 (h). Directors and officers who meet the criteria in the definition are expressly included as "volunteers." The definition of "non-profit organization" includes societies and other related types of organizations: *Volunteer Protection Act*, *ibid.*, section 1 (f).

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management of its affairs. In this respect, officers are similar to employees, rather than to directors. Some of the arguments for exempting directors from personal liability—such as lack of knowledge of the day-to-day activities of a society and lack of time to spend involving themselves in its affairs due to other commitments—are strained when they are applied to officers. This functional distinction, then, could form the basis of another type of selective immunity.<sup>90</sup>

Other criteria for selection could be considered here. If lack of managerial experience were found to be a leading cause for the imposition of personal liability, then a system could be devised limiting immunity from personal liability to those directors and officers who have served fewer than a set amount of years. This distinction has not been introduced into any legislation in Canada or the United States, though. It has clear shortcomings. By focussing on experience it fails to address other, structural causes for personal liability. It also has the potential to produce arbitrary results.

### 2. QUALITIES ASSOCIATED WITH THE SOCIETY

Directors' and officers' immunity from personal liability may be based on certain qualities of their societies, rather than on any individual qualities they might possess. British Columbia has already implemented a limited version of this idea. As noted above, volunteer directors and officers of a "charity" will not be personally liable for unpaid wages.<sup>91</sup>

Although no Canadian province relies on the charitable status of a society as a criterion for determining whether a director or officer is eligible for immunity from personal liability, there are a number of American states that do.<sup>92</sup> Charitable status is a clear bright line test for distinguishing between which directors and officers will have the benefit of the immu-

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90. It should be noticed that neither Saskatchewan nor Nova Scotia, the two Canadian provinces with legislation in this area, draw such a distinction between directors and officers for the purposes of immunity from personal liability. Further, selective immunity is much more common in American state statutes than in Canada. In these American statutes, the key criterion for selection is usually volunteer status. No state exempts only directors to the exclusion of officers. Finally, some legislation imposing personal liability only applies to *directors*: see e.g. *Income Tax Act*, *supra* note 16, section 227.1 (1). Immunity based on this functional selection criterion would be at odds with these statutes.

91. See *Employment Standards Regulation*, *supra* note 66, section 45.

92. See e.g. *Volunteer Service Act*, Col. Rev. Stat. § 13-21-115.5 (2003), online: LexisNexis <[http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0.](http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0.;)>; *Florida Volunteer Protection Act*, Fla. Stat. ch. 768.1355 (2003), online: Florida Senate <[http://www.flsenate.gov/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=Ch0768/SEC1355.HTM&Title=->2003->Ch0768->Section%201355](http://www.flsenate.gov/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0768/SEC1355.HTM&Title=->2003->Ch0768->Section%201355)>; *Charitable Immunity and Liability Act of 1987*, Tex. Civ. Prac. & Rem. Code §§ 84.001–84.008 (2004), online: Texas Statutes <<http://www.capitol.state.tx.us/cgi-bin/statutes/pdfframe.cmd?filepath=/statutes/docs/CP/content/pdf/cp.004.00.000084.00.pdf&title=CIVIL%20PRACTICE%20%26%20REMEDIES%20CODE%20-%20CHAPTER%2084>>.

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nity. It is also reasonably connected to one of the goals that the immunity wishes to advance: the preservation of the delivery of valuable social services. However, this approach may have a firmer basis in the United States due to the exhaustive list of charitable entities set out in federal income tax legislation.<sup>93</sup> In Canada, the definition of “charity” still depends on the courts’ interpretation of the Elizabethan *Statute of Charitable Uses*<sup>94</sup> and on the judgment of the Canada Revenue Agency. This has created a situation where the definition of “charity” is uncertain and where it can be difficult, time-consuming, and costly for small or unsophisticated societies to attain charitable status. Using charitable status as a selection criterion, then, may favour the directors and officers of large and sophisticated societies over small and less sophisticated ones.

One American state has premised immunity from personal liability on whether the society has in place legislatively-defined levels of insurance coverage.<sup>95</sup> Encouraging societies to purchase insurance is a positive policy goal. This provision also manages to strike a kind of balance between relieving directors’ and officers’ anxieties and protecting those persons who are harmed by their actions. However, the legislation does nothing to make it easier for societies to purchase insurance. The legislation may operate to the benefit of directors and officers in financially-strong, sophisticated societies and provide no assistance to those associated with weaker societies. Since these individuals and their actions may be otherwise similar, it is hard to justify drawing a distinction on this basis alone. In addition, directors and officers who have the benefit of insurance coverage are less likely to need to rely on a statutory immunity from personal liability.<sup>96</sup>

A more thorough-going and fundamental approach to drawing distinctions among types of societies is found in the American *Revised Model Nonprofit Corporation Act*.<sup>97</sup> The *Revised Model Act* establishes conceptual divisions among three types of societies: public benefit corporations, mutual benefit corporations, and religious corporations. These divi-

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93. See *Internal Revenue Code of 1986*, 26 U.S.C.S. § 501 (c) (3) (Law. Co-op. 2002).

94. *Supra* note 14.

95. See Utah Code §§ 78-19-1 (2) and 78-19-2 (1) (c) (2004), online: Utah Code—Statutes and Constitution <[http://www.le.state.ut.us/~code/TITLE78/78\\_18.htm](http://www.le.state.ut.us/~code/TITLE78/78_18.htm)>.

96. See “Liability Structure,” *supra* note 10 at 90, n. 113 (“... if there is adequate insurance, the immunity would be irrelevant”).

97. The *Revised Model Nonprofit Corporation Act* was adopted in 1987 by the Subcommittee on the Model Nonprofit Corporation Law, Business Law Section, American Bar Association (Clifton, NJ: Prentice-Hall Law & Business, 1988) [*Revised Model Act*]. The *Revised Model Act* may be viewed online: Online Compendium of NPO Regulations <[http://www.muridae.com/nporegulation/documents/model\\_npo\\_corp\\_act.html](http://www.muridae.com/nporegulation/documents/model_npo_corp_act.html)>. Although the *Revised Model Act* is not legislation, it has been adopted, in whole or in part, by several American states.

sions both describe the purposes of the three types of societies and set out the basis for variations among the rules governing them.<sup>98</sup> Although the *Revised Model Act* does not contain a provision granting directors and officers immunity from personal liability, it is easy to see how selective immunity could fit into its structure. Immunity may be more appropriate for public benefit corporations and religious corporations, which are focussed on providing services to the public. It may not be appropriate for mutual benefit corporations, which often exist for the economic benefit of their members.

Finally, it should be noticed that these options are not mutually exclusive. It is possible to combine several selection criteria in one statute. Most of the American legislation takes this approach by restricting immunity from personal liability to volunteer directors and officers of societies that have charitable status.<sup>99</sup>

### D. Reduced Standard of Care

The standard of care is relevant in two respects. First, there is the standard of care that directors and officers must meet under section 25 (1) (b) of the *Society Act*. This standard relates to the duty that directors and officers owe to their societies. Second, there is the standard of care that directors and officers must meet in their dealings with other people. This standard is the ordinary negligence—or “reasonable person”—standard that generally applies to all members of the community.

Some jurisdictions have enacted legislation that lowers the standard of care that directors and officers, when acting within the scope of their positions, owe to third parties. The one Canadian example of this approach may be found in Nova Scotia’s *Volunteer Protection*

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98. One Canadian commentator has recommended this approach as a means to reform the *Society Act* and its equivalents in other provinces. See David Stevens, “Framing an Appropriate Corporate Law,” in Phillips, Chapman, & Stevens, *supra* note 25, 547 at 569:

The list of permitted purposes turns out to be quite important. If done properly, it serves well *both* functions mentioned above: it both delimits the scope of the statute, by implicitly or explicitly excluding what is off the list, and it provides a framework for rule variations throughout the statute. Older statutes listed items randomly and inclusively, rather than (as the *Revised Model Act* does) conceptually and exhaustively: public benefit, mutual benefit, and religion, the statute claims, is all there is. And, the statute claims, this division is the most appropriate, all things considered, to serve the rule-variation function. [emphasis in original]

99. See also Cal. Corp. Code §§ 5239 (Deering 1994), which draws on almost all of the selection criteria discussed in this section: volunteer status of directors and officers; charitable status of the society; “all reasonable efforts made” to obtain insurance cover; and *Revised Model Act* classification scheme. The provision adds one further criterion: financial. Directors and officers of a society with an “annual budget” of less than \$25 000 may claim the immunity in the absence of adequate insurance cover, if the society has made “at least one inquiry per year to purchase a general liability insurance policy and that insurance was not available at a cost of less than 5 percent of the previous year’s annual budget of the [society].”



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*Act*.<sup>100</sup> This statute provides volunteers (including volunteer directors and officers) with a form of immunity from personal liability. The immunity is subject to a number of exceptions. One of these exceptions provides that the immunity does not apply if “the damage was caused by . . . gross negligence by the volunteer.”<sup>101</sup> This provision has the effect of displacing the “reasonable person” standard of care for volunteer directors and officers in favour of a “gross negligence” standard.

No legislation in Canada uses the “gross negligence” standard in connection with the duty that directors and officers owe to their societies. As discussed above, however, the *Society Act* (and its equivalents in other provinces), already provides for a standard of care in these circumstances that is lower than the ordinary negligence standard.<sup>102</sup> As a result, legislatures may be reluctant to lower the standard of care further. Nevertheless, a consistent, reduced standard of care may be considered as a policy option.

The primary rationale underlying this option for reform is that it strikes a balance between the needs of directors and officers and those of tort victims. Directors and officers are offered both an acknowledgment that their positions may lead them into situations that heighten the risk of personal liability and some protection from that result. Victims of particularly egregious torts, though, are not denied recovery from society directors and officers.

The problem with lowering the standard of care is that it does not respond entirely to the needs of either directors and officers or tort victims. There have been very few lawsuits brought against directors or officers based on breach of duty owed to their society or on an independent tort committed against a third party. Rather, the concern is that directors and officers could potentially be caught up in such actions. Lowering the standard of care does little to alleviate that anxiety because the “gross negligence” standard is a very vague one. When it has been applied in other areas of the law it has done little to deter lawsuits.<sup>103</sup> The use of this standard of care also puts courts in an awkward position, as there is often no principled way to distinguish “ordinary” from “gross” negligence.

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100. *Supra* note 5.

101. *Ibid.*, section 3 (1) (c).

102. *See* section III.B.3, *supra* at 12–13.

103. *See* Saskatchewan Report, *supra* note 1 at para. 117 (Referring to the use of the standard in motor vehicle legislation: “. . . [F]rom a legal point of view, such language is more problematic than useful. . . . In practice the distinction between ordinary and gross negligence was uncertain, and it was often difficult to predict whether a driver’s behaviour would be held by a court to be grossly negligent.”).

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### E. Modified Fiduciary Duties

As discussed earlier,<sup>104</sup> sections 27 and 28 of the *Society Act* modify the strict and inflexible common law fiduciary duties imposed on directors. This approach to fiduciary duties is well-established in Canadian corporate law. It is a feature of all the provincial business and nonprofit corporations statutes, as well as the federal legislation. There is uniformity on the type of modification used as well.<sup>105</sup>

The law reform bodies that have studied this issue have tended not to propose revising the existing balance struck by the law.<sup>106</sup> Some have proposed raising the standard that must be met.<sup>107</sup> This position derives from an appreciation of the dangers inherent in allowing transactions that amount to a conflict of interest without at least an internal check in the form of a directors' or a members' resolution. In 1993, the British Columbia Law Reform Commission proposed a tightly-focussed list of such transactions, which were recommended to be set out in new legislation:<sup>108</sup>

*A transaction in which the director has a direct or indirect interest is acceptable, and does not need to be authorized by the board of directors . . . if the transaction is*

- (a) *accepting remuneration for the director's services as director,*
- (b) *a loan to the society guaranteed by the director,*
- (c) *a transaction between two societies in which the conflict of interest arises solely because the societies have a director in common,*

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104. See section III.B.2, *supra* at 11–12.

105. The interested director must fully disclose the nature and extent of the interest and must abstain from voting on the decision to approve the transaction; the transaction may be approved by a majority of the board of directors or ratified by a majority of the society's members or corporation's shareholders; and, only transactions that are fair and reasonable to the society or corporation may be approved or ratified in this manner.

106. See Alberta Institute of Law Research and Reform, *Proposals for a New Alberta Incorporated Associations Act* (AILRR Rep. No. 49) (Edmonton: The Institute, 1987) [Alberta Report] at 51–52. See also *Revised Model Act*, *supra* note 97, section 8.31.

107. See British Columbia Consultation Paper, *supra* note 38 at 43–73 and 97–101 (proposing that transactions meet community expectations about the conduct of the society's activities in addition to being fair and reasonable to the society).

108. *Ibid.* at 97–98 [italics in original]. In a footnote, the authors of the British Columbia Consultation Paper explained the policy underlying paragraph (a) as follows: "This position may appear to be contentious unless it is first realized that the exception has a limited scope. . . . The policy in subpara. (a) is not to relieve the society or its board of its responsibilities in setting appropriate levels for salary and benefits. But once these are set, there should be no impediment to a director accepting the remuneration."

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- (d) *the posting of security by a director to ensure the faithful fulfilment of the director's duties,*
- (e) *insurance for the director against personal liability incurred by virtue of the directorship,*
- (f) *an agreement by the society to reimburse a director for expenses and liabilities incurred by virtue of the directorship, or*
- (g) *participation in the activities the society regularly makes available to its members.*

Some of these transactions are already authorized by the *Society Act*.<sup>109</sup> Other transactions on this list, such as remuneration for services, have an unclear status under the law. Clearly stating that such transactions do not amount to breaches of a director's fiduciary duties and do not require approval by the board of directors or ratification by the members would be an improvement.

However, these proposals are rather modest. A more far-reaching attempt to modify fiduciary duties and provide some protection from personal liability to directors and officers could be constructed by focussing on a second list of transactions compiled by the British Columbia Law Reform Commission.<sup>110</sup>

- (a) *Transactions where the conflict of interest is slight or, where it is more serious, the financial consequences of the transaction are minimal.*
- (b) *A transaction which*
  - (i) *is an unconditional gift,*
  - (ii) *in aggregate, substantially amounts to a gift, or*
  - (iii) *represents benefits to the society so substantial that no other decision makes economic sense.*
- (c) *A transaction*
  - (i) *which no one else is capable of carrying out;*
  - (ii) *which others may be capable of carrying out, but no one else is willing to do;*

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109. See e.g. *Society Act*, *supra* note 11, section 30 (5) (permits a society to purchase insurance for the benefit of a director; stipulates that sections 27, 28, and 29 do not apply to this transaction).

110. *Supra* note 38 at 98–99 [italics in original; footnote omitted].

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(iii) *in which it is more important to the society for the director to participate in the transaction than to avoid the conflict of interest.*

The transactions described in this list are ones that a director must carry out or that result in trivial financial consequences for the society. It is important to emphasize that the Law Reform Commission proposed using this list as providing examples of the kinds of transactions that would result in breaches of a director's or an officer's fiduciary duties if the transaction was not approved by the board of directors or ratified by the members. However, it may be worthwhile to consider whether these qualities of necessity and triviality could form the basis of a further modification of directors' and officers' fiduciary duties.

Well-meaning but unsophisticated society directors and officers may breach their fiduciary duties simply because they do not appreciate the strict nature of those duties. This breach may be compounded by failing to understand the formal mechanism of board approval or member ratification that the *Society Act* mandates to prevent or cure such breaches. Further, when such a breach comes to light, a director or officer may be denied a members' resolution due to conflicts or issues that are not relevant to the matter at hand. After a breach has occurred, the *Society Act* provides no means other than a members' resolution to cure it. A director or officer in these circumstances would be personally liable.

The main argument against lowering fiduciary duties is that it creates a system that is open to abuse. Effectively, the determination of what is a trivial or a necessary breach would be left in the hands of the interested director or officer, unless disclosure were required. Disclosure in the absence of a requirement for board approval or member ratification, though, would leave those opposing a transaction with one option: an application to court. This option is expensive and time-consuming. Small, volunteer-led societies would likely be more vulnerable in these circumstances than large sophisticated societies. In addition, interested transactions could divert resources away from the services provided by such societies, undercutting the goal of such reforms.

### **F. Relief Granted by the Court When the Director or Officer Acts Honestly and Reasonably**

In discussing conflicts of interest, the British Columbia Law Reform Commission noticed an anomaly in the *Society Act*: “. . . while the members may sometimes relieve a director of some portion of responsibility [due to a conflict of interest], the court has no power to do so.”<sup>111</sup> The Commission proposed adding a provision to the *Society Act* modelled on section 96 of the *Trustee Act*.<sup>112</sup>

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111. *Ibid.* at 85 [footnote omitted].

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

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The Alberta Institute of Law Research and Reform included a similar provision in its draft *Incorporated Associations Act*:<sup>113</sup>

- 49 (4) In a proceeding in which relief is claimed under this section, the court in which the proceeding is brought may, if it appears that the director or officer has acted honestly and reasonably and ought fairly to be excused, relieve the director or officer either wholly or partly from liability for the breach.

This provision extends to more than conflicts of interest. It is contained in a section that is the equivalent of section 25 of the *Society Act*, which states directors' and officers' duties to their society.

Relief from the court turns on both subjective and objective factors. The director or officer must have acted both "honestly" and "reasonably." The reference to "ought fairly to be excused" allows the court to look beyond the director's or officer's conduct and to consider whether other factors, such as the impact of its decision on the society, are relevant.

Including a provision modelled on the Alberta provision in the *Society Act* would represent an improvement in the law. However, on its own, it may not go far enough to address directors' and officers' concerns about personal liability. Such a provision would not apply in cases involving a breach of a duty to a third party or vicarious liability. It would not, therefore, address two major sources of anxiety for society directors and officers.

### G. Indemnification by the Society

The *Society Act* currently permits a society, with the approval of the court, to indemnify a director or a former director.<sup>114</sup> Practically, an indemnity is only as strong as the financial strength of the society offering it. However, the provision also has some legal weaknesses, which could be improved by relatively simple amendments. For example, it fails to mention officers. This omission creates some uncertainty about the scope of the provision, since officers are expressly mentioned in an earlier subsection.<sup>115</sup> There is no compelling policy reason to restrict indemnification to directors; in fact, the definition of "director" likely serves to incorporate officers within this provision. Nevertheless, if the intent is to include officers, then the subsections should make it clear.

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113. *Supra* note 106 at 130. This draft legislation formed the basis of Bill 54, *Volunteer Incorporations Act*, 2d Sess., 21<sup>st</sup> Leg., Alta., 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.

114. *Supra* note 11, section 30 (2)–(4).

115. See *Society Act*, *ibid.*, section 30 (1), which deals with the posting of security by directors and officers.

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Further, the requirement that the society obtain court approval places society directors and officers in a different, and inferior, position than that of corporate directors and officers. The new *Business Corporations Act* permits a corporation to indemnify its directors and officers (as well as former directors and officers) without a court order.<sup>116</sup> The detailed and expanded indemnification provisions of the *Business Corporations Act* provide a good model for similar reforms to the *Society Act*. An objection could be raised to extending these provisions to society directors and officers based on the fact that the funds for the indemnification could come from donations or government grants.

However, the policy rationale for the changes to the *Business Corporations Act* applies in the context of societies. Directors and officers are important to the ongoing operations of the society. Practical indemnification agreements are often necessary to recruit the desired individuals. This point is recognized in the *Society Act* as it now stands. Societies should be able to decide on what indemnification arrangements they need. Court oversight simply adds a layer of time and expense here that undermines the goals of the provision. Such a reform, on its own, could not address all the concerns of society directors and officers; however, it could provide some alleviation of their anxieties about personal liability.

### H. Summary

The options for reform presented in this Study Paper are not entirely mutually exclusive. Improvements to the indemnification provisions of the *Society Act* could be made alongside with the addition of a provision allowing the court to relieve directors and officers from personal liability. Modifications to directors' and officers' duties could also be added to the package of reforms. Such reforms would all tangibly reduce the possibility that a society director or officer could be held personally liable.

However, these incremental reforms likely would not completely allay fears about personal liability. Since many of those fears are based on pre-empting the possibility of lawsuits, only a form of immunity is a complete response to them. Adopting a policy of immunity for society directors and officers is a more significant break with the past than the other reforms. It may be necessary to establish a firmer empirical footing before taking that direction. In addition, implementing a policy of selective immunity could perhaps go hand-in-hand with a rethinking of the structure of the *Society Act* as a whole, which could take into account the vast changes in the nonprofit sector that have occurred since the statute was last revised in the 1970s.

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116. *Business Corporations Act*, *supra* note 12, sections 159–164. These provisions from the *Business Corporations Act* are reproduced in Appendix A, *infra* at 40ff.

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**V. CONCLUSION**

The issues surrounding the personal liability of society directors and officers are still in a state of development. Dramatic reforms may be premature now. It is hoped, however, that this Study Paper has offered a useful discussion of the approaches to reform that may be implemented in the future.

## APPENDIX A

### *Selected Provisions Taken from Legislation in Force in British Columbia*

#### 1. *Society Act*

##### Definitions

1 In this Act:

“**director**” includes a trustee, officer, member of an executive committee and a person occupying any such position by whatever name;

...

“**society**” means a society incorporated under this Act, and includes an existing society;

\*\*\*

#### PART 1—INCORPORATION

##### Purposes

2 (1) A society may be incorporated under this Act for any lawful purpose or purposes such as national, patriotic, religious, philanthropic, charitable, provident, scientific, fraternal, benevolent, artistic, educational, social, professional, agricultural, sporting or other useful purposes, but not for any of the following:

- (a) the operation of a boarding home, orphanage or other institution for minors, or the supplying of any other form of care for minors without the written consent of the director designated under the Child, Family and Community Service Act for the purposes of this section;
- (b) the ownership, management or operation of a hospital without the written consent of the Minister of Health;
- (c) the ownership, management or operation of a social club without the written consent of the minister;
- (d) the purpose of paying benefits or rendering services as described in section 14 without the written consent of the Superintendent of Financial Institutions;
- (e) any purpose without the consent of an existing society should the registrar require it;
- (f) the purpose of carrying on a business, trade, industry or profession for profit or gain.

(2) Carrying on a business, trade, industry or profession as an incident to the purposes of a society is not prohibited by this section, but a society must not distribute any gain, profit or dividend or otherwise dispose of its assets to a member of the society without receiving full and valuable consideration except during winding up or on dissolution and then only as permitted by section 73.

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##### Effect of incorporation

4 (1) From the date of the certificate of incorporation, the members of a society are members of a corporation

- (a) with the name contained in the certificate,



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- (b) having perpetual succession,
- (c) with the right to a seal, and
- (d) with the powers and capacity of a natural person of full capacity as may be required to pursue its purposes.

...

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### No share capital

- 8 A society must not have a capital divided into shares.

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## PART 3—DIRECTORS

### Directors

- 24 (1) The members of a society may, in accordance with the bylaws, nominate, elect or appoint directors.
- (2) Subject to this Act and the constitution and bylaws of the society, the directors
- (a) must manage, or supervise the management of, the affairs of the society, and
  - (b) may exercise all of the powers of the society.
- ...
- (4) A society must have at least 3 directors.
- ...
- (8) If a society has less than 3 members for more than 6 months, each director is personally liable for payment of every debt of the society incurred after the expiration of the 6 months and for so long as the number of members continues to be less than 3.

### Duties of directors

- 25 (1) A director of a society must
- (a) act honestly and in good faith and in the best interests of the society, and
  - (b) exercise the care, diligence and skill of a reasonably prudent person, in exercising the powers and performing the functions as a director.
- (2) The requirements of this section are in addition to, and not in derogation of, an enactment or rule of law or equity relating to the duties or liabilities of directors of a society.

### No exceptions from statutory duties

- 26 Nothing in a contract, the constitution or the bylaws, or the circumstances of a director's appointment, relieves a director
- (a) from the duty to act in accordance with this Act and the regulations, or
  - (b) from a liability that by a rule of law would otherwise attach to the director in respect of negligence, default, breach of duty or breach of trust of which the director may be guilty in relation to the society.

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### Disclosure of interests

- 27 A director of a society who is, directly or indirectly, interested in a proposed contract or transaction with the society must disclose fully and promptly the nature and extent of the interest to each of the other directors.

### Accountability

- 28 (1) A director referred to in section 27 must account to the society for profit made as a consequence of the society entering or performing the proposed contract or transaction,
- (a) unless
    - (i) the director discloses the interest as required by section 27,
    - (ii) after the disclosure the proposed contract or transaction is approved by the directors, and
    - (iii) the director abstains from voting on the approval of the proposed contract or transaction, or
  - (b) unless
    - (i) the contract or transaction was reasonable and fair to the society at the time it was entered into, and
    - (ii) after full disclosure of the nature and extent of the interest in the contract or transaction it is approved by special resolution.
- (2) Unless the bylaws otherwise provide, a director referred to in section 27 must not be counted in the quorum at a meeting of the directors at which the proposed contract or transaction is approved.

### Validity of contracts

- 29 The fact that a director is, in any way, directly or indirectly, interested in a proposed contract or transaction, or a contract or transaction, with the society does not make the contract or transaction void, but, if the matters referred to in section 28 (1) (a) or (b) have not occurred, the court may, on the application of the society or an interested person, do any of the following:
- (a) prohibit the society from entering the proposed contract or transaction;
  - (b) set aside the contract or transaction;
  - (c) make any order that it considers appropriate.

### Security and indemnity of officers and directors

- 30 (1) A society may require a director or officer to give the security it considers sufficient for the faithful discharge of duties.
- (2) A society may, with the approval of the court, indemnify a director or former director of the society or a director or former director of a subsidiary of the society, and his or her heirs and personal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, actually and reasonably incurred by him or her, in a civil, criminal or administrative action or proceeding to which he or she is made a party because of being or having been a director, including an action brought by the society or subsidiary, if
- (a) he or she acted honestly and in good faith with a view to the best interests of the society or subsidiary of which he or she is or was a director, and
  - (b) in the case of a criminal or administrative action or proceeding, he or she had reasonable grounds for believing his or her conduct was lawful.

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- (3) The court may, on application of a society, a director or former director of the society, or a director or former director of a subsidiary of the society, make an order approving an indemnity under this section, and the court may make any further order it considers appropriate.
- (4) On an application under subsection (3), the court may order notice to be given to any interested person.
- (5) A society may purchase and maintain insurance for the benefit of a director against personal liability incurred by him or her as a director, and sections 27, 28 and 29 do not apply to the purchase or maintenance of that insurance.

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### PART 4—FINANCIAL

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#### Investment of society's funds

- 32** (1) The funds and property of a society must be used and dealt with only for its purposes in accordance with its bylaws.

...

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#### Approval by directors

- 40** (1) A society must not issue, publish or circulate a financial statement of the society other than to a director, employee or officer unless it is first approved by the directors and the approval is evidenced by the signatures of 2 directors.

...

- (3) A society that issues, publishes or circulates a financial statement that does not comply with this section commits an offence.

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### PART 9—SPECIAL PROCEDURES

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#### Investigation of society

- 84** (1) If it appears to the registrar that a society
- (a) exists for an illegal purpose,
  - (b) carried on chiefly as a social club is not conducted in a proper manner or as a genuine club,
  - (c) within the scope of section 14 is not conducted in a proper manner or is or is likely to become insolvent, or
  - (d) is otherwise acting in a manner contrary to the public interest,
- the registrar must report the facts to the minister, who may appoint a person to investigate the affairs and conduct of the society and to make a written report to the minister of the investigator's findings.
- (2) The investigator may
- (a) examine on oath a director, manager, officer or agent of the society or other person in relation to the affairs of the society,

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- (b) administer an oath accordingly, and
  - (c) require the production of all documents, securities and cash of the society, and of all relevant documents.
- (3) A director, manager, officer or agent of the society or other person who on examination under this section refuses to answer a question relating to the affairs of the society or to produce any documents, securities or cash in that person's custody commits an offence.
- (4) On a report from the registrar or after an investigation, and subject to the conditions the minister thinks advisable, the minister may
- (a) order that the society
    - (i) discontinue an illegal action,
    - (ii) if a social club, conduct itself in a proper manner,
    - (iii) if within the scope of section 14, conduct its affairs in a proper manner or take measures to meet its obligations, or
    - (iv) cease acting in a manner contrary to the public interest, and
  - (b) subject to the conditions the minister thinks advisable, suspend any of the powers of the society.
- (5) A society that contravenes an order made under subsection (4) commits an offence and a director, manager, officer or agent of the society who knowingly participates or acquiesces in the contravention commits an offence.

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## 2. *Business Corporations Act*

### DIVISION 5—INDEMNIFICATION OF DIRECTORS AND OFFICERS AND PAYMENT OF EXPENSES

#### Definitions

159 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 company, means an individual who

- (a) is or was a director or officer of the company,
- (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 company, or
  - (ii) at the request of the company, or
- (c) at the request of the company, 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 163 (1) (c) and (d) and 165, 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

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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 company 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;

“**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.

### **Indemnification and payment permitted**

**160** Subject to section 163, a company 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.

### **Mandatory payment of expenses**

**161** Subject to section 163, a company 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.

### **Authority to advance expenses**

**162** (1) Subject to section 163 and subsection (2) of this section, a company 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.

- (2) A company must not make the payments referred to in subsection (1) unless the company first receives from the eligible party a written undertaking that, if it is ultimately determined that the payment of expenses is prohibited by section 163, the eligible party will repay the amounts advanced.

### **Indemnification prohibited**

**163** (1) A company must not indemnify an eligible party under section 160 (a) or pay the expenses of an eligible party under section 160 (b), 161 or 162 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 company was prohibited from giving the indemnity or paying the expenses by its memorandum or articles;
- (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 company is prohibited from giving the indemnity or paying the expenses by its memorandum or articles;
- (c) if, in relation to the subject matter of the eligible proceeding, the eligible party did not act

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honestly and in good faith with a view to the best interests of the company 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 company or by or on behalf of an associated corporation, the company must not do either of the following:
- (a) indemnify the eligible party under section 160 (a) in respect of the proceeding;
  - (b) pay the expenses of the eligible party under section 160 (b), 161 or 162 in respect of the proceeding.

### **Court ordered indemnification**

**164** 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 company or an eligible party, the court may do one or more of the following:

- (a) order a company to indemnify an eligible party against any liability incurred by the eligible party in respect of an eligible proceeding;
- (b) order a company 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 company;
- (d) order a company 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.

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## APPENDIX B

### *Selected Provisions Taken from Legislation in Force Outside British Columbia*

#### 1. *The Non-profit Corporations Amendment Act, 2003 (Saskatchewan)*

##### Short title

1 This Act may be cited as *The Non-profit Corporations Amendment Act, 2003*.

##### S.S. 1995, c.N-4.2, new section 112.1

2 *The Non-profit Corporations Act, 1995* is amended by adding the following section after section 112:

##### **“Directors’ and officers’ liability limited**

112.1 (1) In this section, ‘loss’ means any pecuniary or non-pecuniary loss respecting, arising out of or stemming from any act or omission of:

- (a) the corporation; or
  - (b) any director, officer, employee or agent of the corporation in the exercise or supposed exercise of any of his or her powers or in the carrying out or supposed carrying out of any of his or her duties.
- (2) Unless another Act expressly provides otherwise, no director or officer of a corporation is liable in a civil action for any loss suffered by any person.
- (3) The limitation on liability mentioned in subsection (2) applies only if the director or officer was acting in good faith at the time of the act or omission giving rise to the loss.
- (4) The limitation on liability mentioned in subsection (2) does not apply if:
- (a) the loss was caused by fraudulent or criminal misconduct by the director or officer; or
  - (b) the act or omission of the director or officer that caused the loss constituted an offence against this Act, any other Act or any Act of the Parliament of Canada.
- (5) This section is to be interpreted as not affecting the liability of the corporation for loss suffered by any person.
- (6) Without restricting the generality of subsection (2), if damages are awarded against, or any amount is paid by, a corporation with respect to loss for which the director or officer is not liable pursuant to subsection (2), the corporation has no right of action to recover those damages or that amount against the director or officer.
- (7) This section applies to any claim for damages for loss that is filed on or after the coming into force of this section”.

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### 2. *Volunteer Protection Act* (Nova Scotia)

1 This Act may be cited as the *Volunteer Protection Act*.

2 In this Act,

- (a) “damage” includes both physical and non-physical losses and both economic and non-economic losses;
- (b) “economic loss” means any pecuniary loss resulting from damage, including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs and loss of business or employment opportunities;
- (c) “hospital” means a body designated as a hospital pursuant to the *Hospitals Act*;
- (d) “municipality” means a municipality as defined in Part XX of the *Municipal Government Act*;
- (e) “non-economic losses” means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, other than loss of domestic service, injury to reputation and all other non-pecuniary losses of any kind or nature;
- (f) “non-profit organization” means any non-profit body corporate or society incorporated under the *Societies Act* organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, health, sport, recreation, tourism, heritage or culture purposes, and includes a municipality, a school board, a regional library board or a hospital and, for greater certainty, includes each body designated as a non-profit organization by the Governor in Council in the regulations;
- (g) “school board” means a school board as defined in the *Education Act*;
- (h) “volunteer” means an individual performing services for a non-profit organization who does not receive in respect of those services
  - (i) compensation, other than reasonable reimbursement or allowance for expenses actually incurred, or
  - (ii) money or any other thing of value in lieu of compensation in excess of five hundred dollars per year,

and may include a director, officer, trustee or employee of the organization.

3 (1) Notwithstanding any enactment, no volunteer of a non-profit organization is liable for damage caused by an act or omission of the volunteer on behalf of the organization if

- (a) the volunteer was acting within the scope of the volunteer’s responsibilities in the non-profit organization at the time of the act or omission; and
- (b) the volunteer was properly licensed, certified or authorized, if required by law, by the appropriate authorities for the activities or practice undertaken by the volunteer at the time the damage occurred,

but the limitations on the liability of a volunteer under this Act do not apply if

- (c) the damage was caused by willful, reckless or criminal misconduct or gross negligence by the volunteer;
- (d) the damage was caused by the volunteer while operating a motor vehicle, vessel, aircraft or other vehicle for which the owner is required by law to maintain insurance;
- (e) the act or omission which caused the damage constitutes an offence; or



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- (f) the volunteer was unlawfully using or impaired by alcohol or drugs at the time of the act or omission which caused the damage.
  - (2) Nothing in this Section affects the liability of any non-profit organization with respect to damage caused to any person, including damage caused by an act or omission of a volunteer of the organization, for which the volunteer is not liable pursuant to subsection (1).
  - (3) For greater certainty, where damages are awarded against or any amount is paid by a non-profit organization in respect of damage caused by a volunteer of the organization for which the volunteer is not liable pursuant to subsection (1), the organization has no right of recovery against the volunteer.
- 4 This Act applies to any claim for damage caused by an act or omission of a volunteer where that claim is filed on or after the coming into force of this Act.

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