Supplementary Report no 2. on

PROPOSALS FOR A NEW SOCIETY ACT

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Supplementary Report no. 2 on Proposals for a New Society Act

A Response to the Ministry of Finance's Societies Act White Paper (2014) prepared for the British Columbia Law Institute by Members of the Society Act Reform Project Committee

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

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

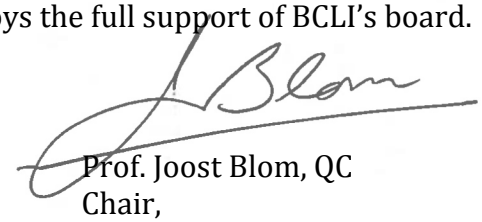
This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Justice for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.

Introductory Note

Supplementary Report no. 2 on Proposals for a New Society Act

BCLI would like to thank the Ministry of Finance for British Columbia for this opportunity to respond to the draft legislation set out in its *Societies Act White Paper*. The white paper displays the considerable progress that the ministry has made toward the goal of creating a new and modern act governing societies in British Columbia. This supplementary report notes that progress, and it also discusses several provisions—dealing with access to society records, financial regulation, rights and duties of directors and senior managers, and complaints by the general public—that in BCLI's view raise some concerns.

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



Prof. Joost Blom, QC
Chair,
British Columbia Law Institute

October 2014

Society Act Reform Project Committee

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

The members of the committee are:

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

Ken Burnett
(associate counsel, Miller Thomson LLP)

Colleen Kelly
(executive director (retired), Vantage Point)

Bob Kucheran
(associate, Pacific Medical Law)

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

Mike Mangan
(barrister & solicitor)

Kim Thorau
(principal, Perrin, Thorau & Associates)

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

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

SOCIETY ACT Reform Project BCLI

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INTRODUCTION

BCLI is grateful to the ministry of finance for this opportunity to respond to its *Societies Act White Paper*. The draft legislation set out in the white paper displays the considerable progress that the ministry has made in advancing the cause of reform in the not-for-profit sector. But there remain some concerns with the draft legislation that should be addressed.

BCLI SOCIETY ACT REFORM PROJECT

This supplementary report is informed by BCLI's *Society Act* Reform Project. Carried out from 2006 to 2008 with funding from the Law Foundation of British Columbia, this project recommended that British Columbia enact a new and modern *Society Act* as a framework statute for not-for-profit corporations. BCLI is pleased to see many of its recommended reforms reflected in the draft legislation in the white paper.

A volunteer project committee made up of leaders in the not-for-profit field assisted BCLI in forming its recommendations in the *Society Act* Reform Project. The members of the committee are:

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

Ken Burnett
associate counsel, Miller Thomson LLP

Colleen Kelly
executive director (retired), Vantage Point

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

Mike Mangan
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Kim Thorau
principal, Perrin, Thorau & Associates

Bob Kucheran
associate, Pacific Medical Law

Since the completion of the project in 2008, the committee has met to consider the issues raised in the previous consultations held by the ministry on *Society Act* reform. The committee continued this pattern, and its input helped to form this response to the white paper.

MODEL FOR DRAFT LEGISLATION

Before commenting on specific provisions in the draft legislation, some attention should be paid to the model selected for the ministry's draft legislation. In the introductory letter set out at the start of the white paper, the ministry noted that it had not adopted the *Business Corporations Act* (British Columbia's legal-framework statute for for-profit corporations) as a model for its proposed *Societies Act*. Instead, the draft legislation "maintains the basic framework of the current Act," while adopting "specific provisions of the BCA and other corporate legislation . . . for use by societies."

BCLI took a different approach in its *Report on Proposals for a New Society Act*. The draft legislation included in that report was consciously modelled on the BCA. Specific provisions that were needed to affirm the core not-for-profit character of societies and to address issues relevant only to societies were integrated into that model.

BCLI's choice seemed fully justified when it published its report in 2008. At that time, the BCA was seen as the state of the art for corporate legislation in British Columbia. It contained a comprehensive restatement of key corporate-law principles and accommodated a system of administration fully based on modern technology. Aligning the *Society Act* with the BCA appeared to be the clearest and quickest route to achieve reform in the not-for-profit sphere.

Although the ministry's draft legislation begins from a different starting point, the result is acceptable. We think the proposed *Societies Act* is an appropriately modern corporate statute.

NOTABLE PROVISIONS IN THE WHITE PAPER

The improvements over the current *Society Act* that would be brought in by the ministry's proposed *Societies Act* are important to note. Although BCLI has some concerns with the white paper's draft legislation (which are spelled out later in this response), its general impression of the proposed statute is that it would represent a considerable advance over the existing *Society Act*.

The following provisions (which all have equivalents in the BCLI report) should be acknowledged as significant reforms that will benefit British Columbia societies:

- moving the voting threshold for passing a special resolution from 3/4 of the votes cast at a general meeting to 2/3, a figure that is in line with the BCA and other corporate statutes in Canada;
- extending access to electronic incorporation to societies and lowering the number of people required to incorporate a society to one;
- formulating clear and comprehensive record-keeping standards, which takes the guesswork out of maintaining a society's key corporate records;
- setting out updated rules on directors' appointment, election, powers, and duties, which include useful provisions on directors' qualifications and conflicts of interest;
- establishing modern rules for calling and holding members' meetings and for voting at members' meetings, which reflect developments in communications technology;
- spelling out a clear and modern set of members' remedies, revitalizing an area that the *Society Act* left to the common law and to legacy provisions from the old *Company Act*;
- modernizing the *Society Act*'s severely outdated amalgamation provision, giving societies that wish to amalgamate a viable option for combining their organizations;
- eliminating the cumbersome requirement that routine corporate restorations require a court order by allowing for restoration of a dissolved society by administrative process;
- creating a modern framework for the registration of extraprovincial not-for-profit corporations;
- phasing out many of the out-of-date ideas in the current legislation, such as unalterable provisions in a society's constitution and reporting societies, which will be dealt with as part of the transition process to the new act, and occupational titles protection, which will be gradually eliminated.

PROVISIONS IN THE WHITE PAPER THAT RAISE CONCERNS

Introduction

But in addition to these improvements BCLI noted a number of provisions that gave us concerns.

Section 1 (Definition of "Senior Manager")

Both the white paper and the BCLI report contain the concept of a "senior manager," who is someone involved in the operations of a society who wields some of the managerial powers of a director without being on the board. The legislation contains provisions that ensure that the senior manager is also bound by certain rules applicable to directors (such as rules on conflicts of interest and duties) and is able to rely on certain privileges granted to directors (such as rules on indemnification, insurance, and limitation of liability).

Given the specific nature of this concept, there is some concern with the breadth of the white paper's definition of "senior manager." The definition captures people who are appointed to be senior managers. It also has a functional component, sweeping in anyone who "oversee[s] the activities of a society as a whole or [is] in charge of a principal unit of a society, including operations or finance, or (b) perform[s] a policy-making function in respect of a society, with the capacity to influence the direction of the society." The concern is that this language is too broad in its scope, and may end up vaulting relatively junior employees or even part-time contractors into the realm of a society's senior managers.

In contrast, the BCLI report defines what it calls a "senior officer" in a rather more restrictive fashion, embracing the following:

- the chair and any vice chair of the board of directors or other governing body of the society, if that chair or vice chair performs the functions of the office on a full-time basis;
- the president of the society;
- any vice president in charge of a division of the society; and
- any officer of the society, whether or not the officer is also a director of the society, who performs a policy-making function in respect of the society and who has the capacity to influence the direction of the society.

The ministry should consider a similar approach for the *Societies Act*.

Section 23 (Inspection of Records)

The general thrust of this section, which sets out the rights of access to society records granted to various groups, is acceptable. But BCLI does have a concern with the default level of access granted to society members.

The white paper gives members open access to records that a society is required by the legislation to maintain. This approach raises concerns about the scope of access presumptively granted to members. It could embrace directors' resolutions, sensitive financial information, or even legally privileged communications.

A society that prefers a different level of access for members can change the white paper's rule by adopting bylaws spelling out a contrary rule. But, in practice, this will likely always prove to be exceedingly difficult. Many societies will simply adopt bylaws on incorporation that do not address this issue and will fail to see it as a concern until a problem arises. In those circumstances, it will be very difficult to secure the member support needed to amend the bylaws.

BCLI continues to favour its approach to this issue. It recommended that the statute provide members with limited access to society records. A society could displace this rule by adopting a more liberal one in its bylaws.

Section 24 (Inspection of Register of Members)

BCLI agrees with the idea underlying this section, which is to create a special legal framework governing access to a society's register of members and use of the information obtained by that access. A similar provision was included in the BCLI report.

There are some differences in detail between the white paper's section and the BCLI provision. A noteworthy difference is in the limitations imposed on using information found in the register of members. The main rationale for access to the register of members is that it is often needed if a member is going to use a corporate procedure, such as requisitioning a meeting, to hold a society's management to account. If the personal information on the register can be used for other purposes, then the provision is open to abuse.

The BCLI report recommends limiting the use of this information strictly to these purposes: "(a) influenc[ing] the voting of members of a society at any meeting of the society, or (b) call[ing] a meeting" under the act's requisition provisions. The white paper allows for the information to be used for these purposes, as well as for "other matters related to the internal affairs of the society." This rather open-ended catchall purpose should be tightened up—or discarded from the provision altogether.

Section 35 (Reporting on Remuneration of Directors, Employees, and Contractors)

This concept was not part of the BCLI report. The provision appears to be designed to encourage transparency in society governance, but it's unclear exactly what mischief the section is intended to address.

Any advantages gained by the provision are likely to be more than offset by potential downsides. The section could be open to abuse. In particular, the privacy of employees and contractors could be compromised, even though the provision allows a society to opt out of identifying these people by name in its disclosure. Disclosure of the person's position in the society or the nature of the services offered to the society will likely be enough, in many cases, to identify the person.

Section 36 (Reporting on Financial Assistance)

This section covers a very specific type of financial assistance. It applies to financial assistance "by means of a loan, a guarantee, an indemnity agreement, the provision of security or another transaction prescribed by regulation" from a society to anyone.

This situation is not likely to arise very often. But when it does, abuses may accompany it. Financial assistance may be entwined with other failures of society governance.

For this reason, the BCLI report recommended that the *Society Act* adopt the cautious approach to financial assistance found in many other corporate statutes. Financial assistance would be limited to cases in which the directors could make the reasonable judgment that it would be in the best interests of the society or in accordance with the society's purposes. Finance assistance to directors, or financial assistance given when the society was insolvent or that would render the society insolvent, would be banned outright.

The white paper takes a different approach. It calls for reporting in the society's financial statements of any financial assistance given by a society. While this provision would be an advance on the current position of the *Society Act* (which is silent on the question of financial assistance), it is, in BCLI's view, a less desirable approach than the one adopted in the BCLI report.

Section 40 (Employment of Directors)

The white paper requires a majority of a society's directors to be "individuals who do not receive and are not entitled to receive remuneration of society under contracts of employment or contracts for services." While this section would be an improvement on the current act—which does not address this issue—BCLI still prefers the approach it took in its report.

The BCLI report recommended that the roles of paid staff member and director be kept strictly separate in all cases. This rule was to be a bulwark against the conflicts of interest that inevitably arise when one person occupies both roles. This problem can be mitigated to a degree if such people are to be a minority on the board, but the potential for abuse still exists under that rule. And, to some extent, formalizing the rule in the way proposed by the ministry might be seen as legitimating the practice of having employees on a society's board of directors.

Section 52 (2) (Responsibility of Directors)

This white-paper provision does not have an equivalent in either the BCLI report or the BCA. It appears to take the bylaw 32 (1) from the act's Schedule B bylaws and adopt it as a statutory rule.

The commentary on this provision says that it was included to set out "the express ability of directors to delegate some of their responsibilities to committees of directors." Strictly speaking, it is not necessary to take this step. There is an extensive and well-developed body of case law on corporate delegation. Even in the absence of this provision, it would be clear that society directors would be able to delegate their powers.

The concern raised by this provision is that it could be read as placing limits on those powers of delegation. Does it mean that the directors can only delegate to a committee? Is delegation to a society employee not permissible? If delegation is only to a committee, then must that committee consist solely of directors? Different societies will come up with different answers to these questions. It is apparent that the goal of the white paper's provision could not be to impose a one-size-fits-all model of delegation on societies. But to avoid the prospect of ending up with an unduly limited set of rules on corporate delegation, it would be better to follow the BCLI report and the BCA and leave this issue to the society's bylaws.

Section 59 (Directors' Liability for Money or Other Property Distributed)

This section of the white paper sets out rules that hold directors personally accountable for authorizing an improper distribution of a society's money or other property. This is an important principle, and the legislation would benefit from spelling it out. BCLI's concern with the section only extends to how it allocates liability to specific directors.

In BCLI's equivalent of this section all of a society's directors are presumptively held to be liable for an unlawful distribution. A director can only escape liability in these circumstances by showing that the director formally dissented from the decision to authorize the distribution. What constitutes a formal dissent is clearly spelled out in the legislation. This approach is the orthodox way of dealing with this issue, found in most if not all for-profit corporate statutes (including the BCA) and most modern not-for-profit corporate statutes.

The white paper, on the other hand, would only assign liability in these cases to directors who "vote for a resolution passed at a meeting of directors, or consent to a consent resolution of directors." This approach appears in a few not-for-profit corporate acts, and represents the common-law position on this issue. It provides enhanced protection for directors who are absent when the decision is made or who otherwise did not take part in the deliberation or voting on it.

BCLI continues to favour its approach to directors' liability. Under this approach, an absent or otherwise disengaged director can still be shielded from liability by using the dissent procedure. This rule would encourage vigilance and engagement in directors' decision making, which is one of the cornerstones of good corporate governance.

The white paper's approach could encourage passivity in directors, since a passive director is effectively given a liability shield. It could also lead to disputes over whether a director has actually voted for a resolution at a meeting. Many societies' meetings operate by consensus, without creating a paper trail on who voted for or against specific resolutions. Courts could have to try to resolve disputes over directors' liability on a murky evidentiary record.

Section 61 (Directors' Indemnification and Insurance)

The white paper's provisions on directors' indemnification and insurance are a welcome modernization of the current articulation of these rules in the *Society Act*. But there is one area where the white paper could be improved.

The BCLI report contains a section expressly authorizing a society to pay expenses incurred in advance of a disposition of a legal proceeding. Defending a civil proceeding is often an expensive undertaking. This provision directly addresses that reality, and it would be worthwhile for the ministry to include an express statement of the society's authority to make these types of payments.

Sections 83–88 (Amalgamation)/Sections 90–94 (Continuation)

BCLI approves the modernization of amalgamation rules contained in the white paper and the adoption of provisions addressing continuation of not-for-profit corporations into British Columbia. There is one decision relating to these provisions that should be given more thought.

Both the amalgamation and continuation procedures are limited in their geographic scope. A British Columbia society is not allowed to amalgamate with a not-for-profit corporation from outside this province. Similarly, a society cannot transfer its incorporation to another jurisdiction by continuing out of British Columbia.

The absence of provisions addressing these situations seems short sighted. Not-for-profit activities increasingly take place beyond the borders of any one jurisdiction. For this reason, most modern not-for-profit corporate statutes allow for continuation out or amalgamation with a not-for-profit corporation from outside the jurisdiction.

If there are concerns that the modern, open approach could result in societies decamping to jurisdictions with lax laws, then perhaps the geographic scope of these provisions could be limited to Canadian jurisdictions or to jurisdictions that are determined to have appropriate not-for-profit corporate legislation.

Section 99 (Complaints by Public)

This proposed section raises two concerns. For the reasons that follow, we are not in agreement with this proposal.

Scholars of the not-for-profit sector have long acknowledged that effective oversight of the sector that safeguards against the potential for damage that may be caused by a rogue society poses many difficult issues. The orthodox model for restraining these rogue societies combines a robust set of court-based remedies for members with a measure of governmental administrative regulation and oversight. This model is not perfect, but experience has shown it to be better than any other approach to the difficult problems that beset this area of the law. For this reason, it is the model adopted by modern not-for-profit corporate statutes (such as the *Canada Not-for-*

Profit Corporations Act and Saskatchewan's *Non-profit Corporations Act, 1995*), law-reform studies (such as the BCLI report), and, indeed, much of the white paper's proposed *Societies Act*.

This section imports an element into that model that the commentary in the white paper concedes to be "unique in corporate law." BCLI had concerns about this concept when it was proposed in the ministry's 2011 discussion paper on *Society Act* reform. In a response to that discussion paper we noted extending the oppression remedy—a remedy traditionally reserved for a corporation's shareholders or members—to the general public carried an inherent risk that the remedy could be abused. The risk that concerned BCLI was that a disgruntled person or organization could brandish this provision as a weapon against a society. Given the costs of proceeding in the civil courts, this may be enough to force the society into an unattractive settlement or into financial failure. Any advantages that may be gained by the proposed section do not seem to BCLI to outweigh this risk of potential abuse. The proposed section might give rise to vexatious litigation.

But if the ministry comes to a different conclusion on weighing the benefits and risks of this section, then a second concern arises. This concern relates to the drafting of the section in the white paper. If the ministry decides to press on with implementing this concept, it should still consider clarifying and tightening the vague and open-ended language used currently used to express it.

The terms used to guide the courts on evaluating applicants and on determining whether a remedy should be granted are particular sticking points. The section allows a "person whom the court considers to be an appropriate person" to proceed with an application. These words are also used in section 98 for complaints by members and other interested persons. In BCLI's view, the two groups are not similarly situated and should not implicitly be aligned by the use of similar language. The ministry should consider imposing a higher, and more detailed, test on members of the general public who seek a remedy under section 99.

Section 99 also holds that a remedy may be granted by the court if the society "is carrying on activities that are detrimental to the public interest." This test is very broad. The section would be improved if a more detailed and focussed test were used in its place.

Finally, the commentary to the section downgrades the possibility that "the provision could be used improperly" because "the court effectively controls the process." Courts do have the inherent jurisdiction to control their process, but that jurisdiction is constrained by many factors. Courts are bound by precedent, which in this

area tends to favour giving litigants their day in court in all but the most extreme cases. Courts also take direction from the legislation they are applying. If that legislation is broad and open-ended, then a court will be reluctant to summarily prevent a litigant from proceeding under it.

CONCLUSION

The ministry has made great strides with its proposed *Societies Act*. But there are still a few areas where that proposed act could be improved. BCLI hopes that the ministry gives careful thought to the concerns expressed in this response, and then moves on implementing these needed reforms to the *Society Act*.

The changes contemplated by the white paper will represent a significant redesign of the law for societies. The ministry should implement a program of public legal education for directors, to inform them of their responsibilities under the new legislation.

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- Vancouver Island Strata Owners Association.

BCLI also reiterates its thanks to all those individuals and organizations who have provided financial support for its present and past activities.