Submission to

MINISTRY OF FINANCE

Finance and Corporate Sector Policy Branch

ON PROPOSED AMENDMENTS TO

THE SOCIETY ACT

Issued by:

Special Committee of the
Charities and Non-Profit Law Section
Canadian Bar Association
British Columbia Branch
April 30, 2012

TABLE OF CONTENTS

PREFACE

The Canadian Bar Association nationally represents over 37,000 members and the British Columbia Branch (the "CBABC") has over 6,400 members. Its members practice law in many different areas and the CBABC has established 74 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee of the Charities and Non-Profit Law Section (the "Charities Section") of the CBABC. The Charities Section is a standing committee of the CBABC. The Charities Section deals with the law and practice relating to the regulation and administration of charities, non-profit organizations and social enterprises. The comments expressed in this submission reflect the views of the CBABC Charities Section Special Committee (the "Committee") and are not necessarily the views of the CBABC or the Charities Section as a whole. The Committee was composed of the following members of the Charities Section:

- Michael Blatchford, Chair of the Charities Section;
- Katie Armitage;

- Laura Berezan;
- Blake Bromley;
- Kathryn Chan;
- Catherine Evans;
- Luke Johnson; and
- Robert Pakrul.

EXECUTIVE SUMMARY

The Charities Section submission addresses the policy objectives and principles set out in the Ministry of Finance's (the "Ministry") discussion paper released in December 2011 (the "Paper") and discusses the merits of each of the specific proposals in the Paper's framework. Not knowing how the Ministry intends the various framework proposals to work together, the Committee has simply noted where we support a particular proposal, where there are issues that require further explanation or review, and where there are concerns that lead to an alternative recommendation.

Overall, the Committee supports the major policy objectives and principles set out in the Paper and urges the Government to move quickly to modernize the corporate governance framework for societies operating in BC. Given the wide variety in the types, sizes and activities of societies, the Committee strongly supports the principle of flexibility and believes that flexibility should be further enhanced by legislative drafting that will allow societies to modify by bylaw many of the regulatory provisions established as default rules in the Proposed Statute[1]. The concept of "unless the bylaws otherwise provide" recurs as a frequent theme in comments on specific proposals. The Committee recommends

[1] This term refers to the proposed legislation in the Paper.

that the default rules in the form of template by-laws continue to be available in a Schedule to the Proposed Statute, though two versions may be needed – one for public and one for private societies.

The Committee also strongly supports the principles of harmonization and consistency with existing corporate governance rules both in BC and federally. The Committee is less convinced that public accountability is a principle to pursue in relation to all societies. For private membership societies, the priority has to be accountability to their members and for societies receiving public funds, there is a risk of duplicating the oversight already provided by Canada Revenue Agency ("CRA") and other government agencies.

Under the First Framework Proposal A, the Committee is generally supportive of all the proposals. There are some areas, however, where the details of the proposal are not clear, and/or where the potential interaction with other changes proposed in the paper needs further review. In particular, clarification is needed in the following areas:

- Incorporation by one person – what about public societies?
- Removing the doctrine of *ultra vires* – is this limited to its effect on third parties or are there broader implications?

- The rules and threshold related to allowing member proposals – the Committee recommends consistency with the BCA[2], i.e., 10% minimum rule ; and
- Remedies – the Committee is concerned that the proposal is overly broad and carries an unacceptable risk for directors. The Committee recommends that the derivative and oppression remedies in the BCA be modified to take account of the differences between the interests that members have in a society and the interests that shareholders have in a for-profit corporation.

Certain transitional provisions under Proposal A also cause some concern. The Committee does not support requiring societies to hold a ¾ vote in order to transition to the new lower 2/3 voting for special resolutions. Rather the 2/3 vote should be made the default standard with societies able to adopt a higher standard by amending their by-laws. Also, the Committee does not support requiring a court application to change existing unalterable provisions. All such provisions should be changeable by a super majority. The Committee believes that transitioning to a set of consistent default rules (subject to modification by by-law) will better achieve the objective of uniformity and consistency in the

[2] Refers to the British Columbia Business Corporations Act reference in the body of the submissions.

interpretation and application of the Proposed Statute.

Under the First Framework Proposal B, the Committee agrees that the unique nature of societies means that some special rules should continue. These include requiring the purposes of the society to be stated in its constitution, for the constitution and by-laws, and all subsequent amendments, to be filed with the Registrar, for annual general meetings to be held and financial statements to be prepared, and for a change of director to occur on filing the Annual Report. To increase certainty, however, the Committee recommends that a change to a society's constitution or by-laws only be effective on filing. The Committee does not agree that future-dated filings should be prohibited.

There are several provisions in Proposal B where the Committee has serious concerns about the Ministry's proposed direction. First, in regard to member access to records, the Committee notes that the Act[3] does not allow access to all records, but enables access to be restricted by by-law. The Committee considers this to be an appropriate decision to leave to the membership of a society. The opportunity for mischief as well as the administrative burden of redacting personal information from society records makes the proposal for unlimited access unworkable. Second, the Committee recommends greater flexible in the

[3] Refers to the Society Act as referenced in the main body of the submissions.

way directors are selected. The current practice is for many societies, through their by-laws, to include directors appointed by outside organizations or by some other means. The Ministry has an opportunity to affirm this practice and clarify that one governance model does not suit all societies. Third, the Committee does not support prohibiting a society from providing financial assistance to a member in appropriate circumstances. Fourth and final, the Committee does not support the continuation of restrictions on continuations either into or out of the Province.

In response to the Second Framework Proposal, the Committee, with some reservation, supports removing unnecessary and outdated restrictions, but notes that the implications of some of these proposals need further study.

The Committee has serious concerns about the proposal to create a distinction between public and private societies. The large number of unanswered questions raised by the proposal does not allow the Committee to take an overall position, though to the extent possible, we have commented on particular aspects of the proposal. The Committee strongly recommends further exploration and public discussion of this proposal before including it in the Proposed Statute.

The "Other Issues" section of the Paper does not raise any major concerns, but the Committee recommends that considerable care be exercised in selecting the test for requiring the registration of extra-provincial societies.

In the final section of the submission, the Committee raises several issues not addressed by the Paper. In particular, the Committee makes recommendations concerning the following matters: removing the requirement for member approval for dealing with subsidiaries; a broader and more flexible naming policy; additional transitional steps; and transitioning directly from a society to the hybrid Community Contribution Company.

CONTENTS OF SUBMISSIONS

1. BACKGROUND

The *Society Act* (the "Act")[4] is a statute that provides the legal framework for the formation and governance of organizations that exist for primarily social benefit purposes, more particularly known as societies, non-profits or not-for-profits. The Act has not been substantially amended since 1977. Other corporate governance legislation in the Province has been amended or significantly altered in the past 12 years.

The Ministry of Finance (the "Ministry") commenced a review of the Act in 2009 beginning with soliciting public input. In December 2011, the Ministry released a discussion paper soliciting further public input in regards to specific proposed amendments (the "Paper"). The Ministry is seeking feedback from the public to assist in amending the Act (the "Proposed Act"). The Committee's submissions are structured in accordance with the Paper's format. These submissions will first address the public policy objectives and principles of corporate governance framework and then address each the proposals in the order they appear in the Paper. The Committee notes the Paper is broad and preliminary. The Committee looks forward to more detailed proposals or draft

[4] R.S.B.C. 1996, c. 433.

legislation. These submissions identify areas where the policy objectives require further clarification to ensure they are in line with the stated policy objectives of the Ministry.

2. PUBLIC POLICY OBJECTIVES AND PRINCIPLES

Objectives

The Paper indicates that the underlying assumption of the fundamental importance of societies informed the Proposed Statute. The not-for-profit corporation serves a vital role in civil society. These organizations provide or address a wide variety of services or issues to and on behalf of their members and the general public. The bottom line is that these activities are provided without profit to the board or the members as compared to for-profit corporations whose primary purpose is to generate profit for the shareholders. Not-for-profit corporations range in size from small community organizations and special interest groups to large education and health care organizations. Some of these organizations employ skilled professionals to manage the day to day operations and others operate with the help of volunteer labour. A modern corporate governance legal framework needs to capture the range and diversity of the voluntary sector, providing the needed flexibility to meet all organizations needs.

Primary Objective

The Paper proposes that the primary objective of a new corporate law framework for societies in BC should be to ensure that societies have the tools they need to succeed. The Committee suggests that the new law should also aim to offer a practical, workable and user-friendly governance framework, which can service and support the governance of all not-for-profit corporations regardless of their size or expertise. In the spectrum of corporate governance framework, the Proposed Statute should meet the needs of the divergent groups that are currently incorporated under the Act.

Guiding Principles

Flexibility

The Committee endorses and supports the principle of flexibility. Given the wide variety and diverse role of societies, the Committee suggests that retaining and, where possible, increasing flexibility for societies is fundamental to the reform of the Act. In the Committee's view, the Proposed Statue should promote flexibility both by establishing rules that provide societies with flexibility in their operations, and by allowing societies to opt out of those rules.

Overall, the Committee would support an even greater level of flexibility than is contemplated in the Paper. For instance, it would suggest that the

Ministry consider drafting the legislation so that most regulatory provisions proposed in the Paper are default rules that are subject to modification by the members of a society. The Committee notes that though certain regulatory provisions may be appropriate in the majority of cases, there will almost always be a group or class of societies for which the provision is inappropriate and unnecessary to fulfil the desired policy objective. Accordingly, it makes sense to draft most regulatory provisions flexibly, in a way, which allows those societies for which the default provision is inappropriate to avoid its application.

In general, the Committee believes that default provisions should be able to be overruled by express provision in the bylaws. This approach puts the responsibility for determining which default rules are suitable to a society in the hands of a society's members, which is appropriate in our view. The concept of "unless the bylaws otherwise provide", used generously as a modifying clause for many of the provisions proposed in the Paper, would advance the principle of flexibility by permitting the societies to modify or restrict the application of some provisions proposed in the Paper according to their individual needs and circumstances.

Examples of this default provision approach are discussed more fully below. For policy points of significance, the "unless otherwise provided" feature

could be further restricted to only be available if a supermajority decision of the members occurs.

Public Accountability

The Paper acknowledges that not all societies rely on public funding or serve a public interest, but still advances "public accountability" as an underlying principle for the whole statute. This principle could result in overreaching. Again, the Committee would suggest that the best objective for reform of the Act is to offer a neutral, workable governance framework available for use by <u>all</u> societies, even those that may not provide a "community benefit" or use any public funds. Making public accountability as a guiding principle for the entire statute may lead to inadvertent overregulation and unintended results, to the detriment of those other entities.

While the Committee has no objection to the principle that a subset of entities falling under this governance regime may need to have a degree of public accountability, the Committee questions whether the corporate governance framework is the best forum in which to accomplish this. The Committee notes that:

(a) entities receiving donations from the public are most frequently registered charities and their obligation to be publically

accountable is well-regulated under the *Income Tax Act* (Canada) (the "ITA"); and

(b) entities obtaining public sector institutional funding (such as community gaming grants) are invariably subject to robust contractual requirements imposed by the public sector entities providing the funds, as part of a mandate to account for and monitor use of public monies.

It is not clear what material subset of societies are left over that needs a complex set of accountability regulations inserted into this legislation. Private member benefit organizations, which use this statute for their governance, such as golf clubs and professional associations, are accountable to their membership. Additional complex accountability mechanisms by all societies to the public-at-large risks overregulation.

Any exercise in public accountability ultimately inserted into a corporate governance framework must have clear, defined goals and rationale, should not be duplicative, and should have a specified and narrowly defined application, rather than a broad-brush approach.

Member Protection

The Committee generally supports the principle of enhanced member protection and member rights. The Committee notes that the Act provides no member protection and approves of reforms that will address this gap in legislative remedies. However, in implementing this principle care must be taken to ensure that reasonable and appropriate exceptions exist where appropriate. For example, on the issue of transparency to members, a society's ability to function appropriately may be impeded unless:

(a) some personal information of other members or constituents is shielded as confidential and unavailable, to protect the privacy rights of others;

(b) some corporate negotiations with suppliers or potential project partners are entitled to be conducted in confidence; and

(c) some board of directors proceedings occur in camera.

These are standard and well-established principles that should continue to be observed throughout this exercise, and should not be inadvertently disrupted by a generally worded extension of member rights.

The submissions on remedies highlights some of the Committee's concerns if member's rights are extended too far as to impede the lawful authority of the

director's to manage the day to day operations of the organization. In providing for the right's of members this concern needs to inform the Ministry's decisions.

Member protection from a rogue or unresponsive board does need to be addressed as the Act is updated. The Committee did not have any specific recommendations as to how this could be attained in the reform of the Act.

Simple, Accessible Rules

The Committee supports this principle, however it recognizes that attempts to become more detailed in the regulation of public societies may work against this principle. Given the broad range of societies incorporated under the Act, simple and accessible rules will ensure the primary objective of giving societies the tools they need to be successful.

Harmonization and Consistency

The Committee strongly supports this principle and recommends, where possible and appropriate, the new legislation should adopt verbatim (with consequential changes only) the text of the comparable provision from the British Columbia *Business Corporations Act* (the "BCA")[5], as many societies operating without legal advice simply assume that the "share capital company"

[5] S.B.C. 2002, c. 57.

governance rule automatically also applies in the "non-share capital corporation" context.

Minimization of Regulation

The Committee supports this principle. To the extent regulation does occur (e.g. public societies) it is not clear exactly who will be doing the regulating and what resources and procedures would exist to support this activity. Regulatory requirements expressed in a statute, without effective oversight, will jeopardize achievement of the underlying policy objectives.

Other

Standard Bylaws

The Committee recommends that a set of template bylaws (currently Schedule B) which adopt the default rules in the Proposed Statute continue to be available. Given the increased scope of governance flexibility, some care must be taken in designing this standard (which many smaller organizations adopt without consideration or understanding). There may be a need for two versions - one for public societies and one for private societies if the Proposed Statute maintains this distinction.

Reversal of Court Decisions

This law reform also creates the opportunity to reverse the effect of certain court decisions made under the existing law. In particular, the Court of Appeal's decision in *Kwantlen University College Student Association v. Canadian Federation of Students – British Columbia Component,* 2011 BCCA 133 ("*Kwantlen*"), requires careful consideration as to the effect of how directors are elected by the membership. The issues in *Kwantlen* are discussed in more detail in section IB item 9.

Use of term "society"

Many other jurisdictions in Canada do not use the term "society", but rather some variation of the term "not-for-profit corporation" (as in recent law reform initiatives in Ontario and federally). In support of consistency and for the benefit of those who deal with similar corporate entities across multiple Canadian jurisdictions, consideration should be given to moving away from the terminology of "society" in favour of the more generic and consistent term "not-for-profit corporation".

3. PROPOSED SIGNIFICANT POLICY CHANGES

The Paper proposes two frameworks from which change to the Act could be made. The Committee addresses each of the proposals as they are ordered in

the Paper. The Committee did not provide any comment as to whether one framework or the other is more preferable.

I A. First Framework Proposal: Adopt Modern Corporate Law Provisions

The Committee identified two overriding principles in its review of the proposals in this section. The first is the goal of creating greater harmonization between the BCA and the Act and the Committee submits that the proposals in this section support this principle to a great extent. The second is the principle of flexibility, including the ability of societies and their members to modify or adopt alternative rules by bylaw where they have a *bona fide* reason to do so. While the Committee acknowledges that this principle is well-served by many of the proposals in this section, this response notes specific instances where it is believed that societies, through passage of a bylaw approved by the members, should be able to adopt alternate rules or modify those default rules provided in the Proposed Statute.

Incorporation and capacity

1) Allow incorporation by one person

The Committee supports this proposal, but it is unclear how this intersects with the proposal to require a minimum of three directors for public societies. Further, it is recommended that the Proposed Act expressly permit societies to

have only a single voting member, as is currently allowed in other Canadian jurisdictions.

2) Allow electronic filing of documents at the Corporate Registry

The Committee strongly supports this proposal. The ability to file documents electronically would be of great assistance to many small societies, especially those situated in rural parts of the Province.

3) Recognize pre-incorporation contracts

The Committee supports this proposal as it promotes greater harmonization with the BCA and greater consistency with other modern corporate governance statutes.

4) Remove the doctrine of "*ultra vires*"

The Committee supports this proposal, however, it is not clear if the intention is just to protect third parties from the consequences of a finding of *ultra vires*, or if it is broader and designed to allow societies to move beyond their stated purposes without consequences – and how this might differ as between private and public societies. The Committee believes the doctrine of *ultra vires* has no place in any modern corporate governance legislation for not-for-profit corporations. In the opinion of the Committee, the proposed legislative reforms

may leave room for this doctrine to be revived unintentionally.

The Committee would like greater clarity as to how the Ministry expects the doctrine of *ultra vires* to be removed from not-for-profit corporate law. These submissions address where the Committee particularly thinks this doctrine may be vulnerable to unintentional revival.

Resolutions and records

5) Allow special resolutions to proceed by ⅔ vote

The Committee supports this proposal, as it supports harmonization and flexibility of operations. However, there are concerns that requiring a 3/4 vote to transition to the new, lower threshold will be difficult for many societies, some of which have thousands of members. The Committee fears that failure in many cases to pass this transition vote will result in a two-tiered system, with some organizations adopting a lower standard consistent with the statute and others retaining a higher standard.

To avoid this result, the Committee recommends that the lower standard take effect immediately in all societies as a default, regardless of the bylaws in effect at the time. This provision should allow societies whose members wish to return to a higher standard to subsequently amend its bylaws by special

resolution (at the default lower standard). We believe that opting out of an automatic default provides for a smoother transition, with greater chance for uniformity among societies than opting in to a new standard.

6) Remove ability to adopt unalterable provisions but allow for high voting thresholds

The Committee supports this proposal, but recommends that the Proposed Statute provide, regardless of when it was approved, a clause that is declared to be unalterable is subject to amendment by means of a supermajority. An application to the Court for amendment to unalterable provisions would be the backup option. In the experience of the Committee, societies occasionally incorporate new societies and transfer their assets over, simply to escape the unalterable provisions set out in their constitution. For example, this may occur when a religious organization's dated statement of faith or denominational affiliation no longer reflects the views of the current members, or refers to organizations that have ceased to exist. Members should have the ability to amend these unalterable provisions by a supermajority.

7) Remove requirement for special resolution to authorize debentures

The Committee strongly supports this proposal. This proposal modernizes a long-standing anachronism in the Act. The finances of a society are properly

the purview of the society's directors. Directors have the responsibility to manage the financial affairs of the society and should have the power to make decisions affecting important financial matters in a timely and flexible manner.

8) Provide detailed list of records to be kept

The Committee supports this proposal and recommends consistency with the BCA. Overregulation should be avoided and the required list of documents should be as minimally prescriptive as necessary, only prescribing those basic documents (constitution and bylaws, minutes of meetings, registers, resolutions, etc.) that are common to all societies regardless of purposes, activities, assets or governance structure. In particular, the Committee is concerned that the Proposed Statute avoid prescribing the retention of any financial records beyond a society's annual financial statements and the auditor's report (if any was obtained).

The Committee suggests that societies be able to set their own document retention requirements beyond the minimum prescribed by the Proposed Act in their bylaws, which will permit flexibility to adapt to individual circumstances.

9) Allow records to be kept outside of BC

The Committee supports this proposal.

Members and annual general meetings (AGMs)

10) Remove restrictions on non-voting members

The Committee supports this proposal as a positive step to increase flexibility and harmonization with other regimes. The Committee further recommends that societies be allowed to create different classes of members with different rights.

The Committee submits, the Proposed Statute should allow societies to adopt various different and innovative membership structures, membership classes and members' voting rights in their bylaws to meet the needs of the organization and to allow for different governance models. The Committee notes that other jurisdictions that have recently revised their non-profit corporate legislation[6] have allowed for nearly limitless flexibility regarding membership categories and voting. In this respect, the Committee encourages the Ministry to adopt a similarly flexible approach to membership that requires societies to address the matter of membership classes and voting rights in the bylaws.

11) Allow AGMs to be held outside province or by electronic means

[6] Of particular note is the new federal legislation *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23 ["CNCA"].

The Committee supports this proposal as it promotes the stated principles of flexibility and consistency.

12) Allow AGMs to be deferred

The Committee supports this proposal and also recommends that members be able to waive the requirement to hold an AGM by dealing with all of the business of an AGM by consent resolution of the members of the society.

13) Allow members' proposals

The Committee supports this proposal and recommends consistency with the BCA. In particular, the Committee suggests that there be a minimum threshold required to give effect to a member proposal and this threshold should be equivalent to the threshold set by the Act for members to requisition a special general meeting, being 10%.

The Committee submits that allowing a lower threshold number of members (or worse, a single member) to compel the inclusion of proposals and dictate the agenda of general meetings will permit societies to suffer the tyranny of the minority, in which one or more aggrieved or unhappy members force those present at general meetings to hear personal grievances which may or may not have anything to do with matters related to the society or business which is properly conducted at a general meeting. The Committee is concerned that an

uncontrolled ability to make proposals would be inappropriately used by dissatisfied members to waste time and embarrass the board with frivolous, vexatious or otherwise inappropriate proposals.

The Committee also recommends that the proposed provision expressly state that a society's bylaws can provide for a lower threshold, but not a higher one. The Committee notes that the above proposed clarifying provision could helpfully be added to the current provisions regarding requisitioned meetings, codifying the current common law.

The Committee further submits provisions regarding members' proposals include rules for when they must be submitted to the society and that they must be submitted in writing and signed by the required threshold number of members in order to be placed on the agenda. It is also recommended that the provisions require a single member to be designated as the 'proponent' by the supporting members, which member will first have the floor when the proposal is heard at the meeting.

14) Allow [permanent] proxy voting

The Committee supports this proposal provided it is subject to modification in the bylaws of society.

Directors and officers

15) Add qualifications for directors and officers

The Committee supports this proposal and encourages harmonization with the qualifications listed in the BCA for directors.

16) Remove directors' liability for low membership

The Committee supports this proposal. This provision reflects an out-dated model of society membership and inappropriately places liability on directors. As mentioned above, the Committee encourages the Ministry to allow in the Proposed Statute that a society may have a single member, provided that the member has full voting rights.

17) Allow societies to indemnify directors and officers [without court approval]

The Committee strongly supports this proposal as it promotes the principles of consistency and harmonization.

18) Make directors liable for improper payments.

The Committee supports this proposal. However, the Committee notes that the potential grounds for liability of directors under the Proposed Statute may be much broader if the doctrine of *ultra vires* is not clearly removed from the

Proposed Statute. This liability is stronger than under the BCA.

19) Provide defence of due diligence for directors and officers

The Committee strongly supports this proposal in order to provide harmonization under the BCA.

Restoration and reorganization

20) Allow for administrative restoration

The Committee strongly supports this proposal. At present, the restoration process is both costly and time-consuming for societies. Many societies have insufficient resources to obtain legal advice with respect to the current complex restoration process and are unable to navigate the process alone. As a result many societies have no effective recourse to this procedure.

The Committee supports the reform of restoration procedures to allow societies to be restored with the same ease and minimal cost as is afforded business corporations under the BCA.

21) Provide clearer process for amalgamations

The Committee strongly supports this proposal. The current amalgamation

provision contains language that casts doubt on the application to societies of the established common law of amalgamation. Specifically, the use of the words "form a new society" in section 17 of the Act arguably runs contrary to the doctrine that the entity resulting from an amalgamation is a continuation of both amalgamated corporations – not a new entity.

This language, though long assumed to be inadvertent, has unintended consequences for societies, and particularly those societies that are registered charities that are considering amalgamation. The Committee supports reform to provide a clearer amalgamation process, which conforms with the law of amalgamation in other corporate law contexts.

22) Allow for other reorganizations as appropriate

The Committee supports these proposals with the following additional recommendations:

a) In the interests of greater uniformity, continuations both into and out of BC should be allowed (see #12 of Part IB in the next section for further discussion); and
b) Creation or elimination of a subsidiary business corporation should be authorized by the directors and not require a special resolution.

Remedies

23) Provide new remedies for societies and members

The Committee generally supports the principle of increased member protection and access to remedies from the court. In particular, the Committee supports the proposed remedies regarding compliance orders, orders to correct records and orders appointing investigators.

However, the Committee is firstly concerned about the Paper's broad proposal to make the derivative and oppression remedies from the BCA available to members of societies. These remedies (and the case law surrounding them) were developed in the for-profit corporate context and are neither designed nor well suited for use by societies.

While almost all operative business corporations share a single driving purpose – to conduct business and generate wealth for shareholders, active societies have no single purpose common to all; instead each is bound to a distinct set of purposes which rarely, if ever, includes anything akin to the overriding purpose of financial performance that is common to business corporations. Furthermore, in the for-profit context a shareholder has a direct financial interest in the corporation's performance. If the corporation's directors make poor business decisions, the shareholder's financial interest is affected.

Accordingly, the oppression and derivative actions were developed to facilitate a decision by a shareholder to protect his or her financial interests. In contrast, a member of a society never has a direct financial interest in the performance of a society (indeed the distribution of profits to members of societies is prohibited by the Act) and in many cases, the member lacks even an indirect financial interest.

These differences underlie a key distinction between shareholders of business corporations and members of societies. A shareholder purchases shares to advance his or her own financial interests, not to benefit the company. In contrast, the members of a society (apart from member benefit societies such as golf clubs) join to advance the purposes of the society, not to advance their own interests.

The oppression and derivative actions work in the context of a business corporation because all these corporations are legally obligated to operate for the objectively ascertainable and measurable purpose of generating wealth for shareholders. When they make decisions that fail to accomplish this goal or prefer the interests of some members over others, they are liable to be held to account by the shareholders to whom they owe a clear and uncontested duty.

The performance of societies is much more nuanced and difficult to objectively measure. Not only is eliminating poverty (for instance) much more

difficult to achieve, but it is difficult to measure and subject to widely varying, subjective interpretations as to whether it is being achieved at all!

In addition, societies frequently have several complementary purposes and programs. A society is not obligated to operate simultaneously for all of the purposes set out in its constitution, nor is a society obligated to allocate resources evenly between its stated purposes. A society's directors have discretion to prefer one purpose or program over another. This is not the case in business corporations, where directors are legally obligated to pursue financial growth over other, secondary purposes of the corporation.

Moreover, it is not uncommon for a society to encounter circumstances where resources are limited, in which case the directors must make difficult decisions about which of its several programs will continue and which will come to an end. Invariably some persons, which may include members, are negatively affected by the decision to allocate resources. In most cases, a member of a society who claims "oppression" is in fact complaining that the society's directors have prioritized resources, purposes or programs in a way, which is contrary to the member's own views or priorities. We submit, however, that this is precisely the duty of a society's directors; to make informed and carefully considered decisions which advance the purposes of the society as much as

possible considering available resources and circumstances.

The Committee is concerned that societies with large, diverse memberships will be put in a difficult position if oppression and derivative remedies are incorporated into the Proposed Statute without strict limitations. The Committee is concerned that the broad adoption of the oppression and derivative actions as they currently stand may lead to a kind of organizational paralysis among societies with multiple purposes or programs, since any decision has the potential to disenfranchise one or more members.

Furthermore, if potential liability resulting from an oppression remedy extends to directors personally, it will almost certainly result in fewer individuals being willing to accept positions as directors.

Secondly, the Committee is concerned about the persons who may have standing to bring an oppression or derivative action against a society. The question of who has standing to bring a claim is an issue, particularly if non-voting classes of members are allowed. The Committee is in favour of leaving the question of standing to the discretion of the courts.

The following questions may helpfully be asked to assist in considering the

issue:

- Should a society, or its directors, be forced to incur significant legal fees to defend a claim that arises because a decision was made which negatively affected that member, or because that decision runs contrary to the member's views on how the society should be operating?

- Should societies and the directors that guide them be put in a position where they may be liable to compensate a member because it made a difficult decision to allocate resources to the detriment of the programs enjoyed by the member?

The Committee submits that this is not what the oppression and derivative remedies were designed for. The oppression remedy was made to assist those whose tangible financial interest, which interest was acquired for valuable consideration, has been adversely affected by a decision of the board which is not in line with the primary purpose of the organization. It should not be used as a means to provide disgruntled members with a weapon to attack difficult board decisions from the perspective of their own personal interest. Members who are unhappy should seek to join the board and thus to influence decision-making from within. The Committee does not agree with a remedy that incentivizes members to stand outside the decision-making process and criticize the decisions

made by those willing to serve.

Moreover, the Committee does not think it prudent to establish a remedy which results in societies being obliged to go before a judge to justify each of its decisions that have the effect of adversely affecting a member. This is not the purpose for which the oppression and derivative remedies were designed and developed by legislators and the courts.

The Committee requests that the Ministry provide clarification regarding the intended policy objectives of including these remedies and greater detail regarding the proposed language regulating the use of the remedies so that we may further consider and provide comment on the matter.

By way of recommendation, the Committee submits that the derivative and oppression actions should not be incorporated into the Proposed Statute without substantial modification before the remedies are appropriate for use in the context of not-for-profit corporations.

The Committee suggests that an oppression remedy for societies must be inherently restricted to situations where:

1. a member has a direct financial or other tangible interest in the operations

of the society;

2. the society's purposes create a duty to protect member's interest; and
3. the member's financial or other tangible interests are adversely affected by a decision or action of the society which does not otherwise advance one or more of the society's purposes.

With regard to the derivative action, the Committee submits that, like a member proposal or requisitioned meeting, a certain threshold of members be required to endorse the action before it can be countenanced by a court. The Committee suggests that given the unusual nature of the remedy, as it usurps the legal powers, which are vested in directors, this threshold should be significantly higher than the threshold for a requisitioned meeting and recommend a simple majority as the appropriate threshold.

In addition, the Committee queries whether the proposed expansion of member remedies is, in part, replacing the former *ultra vires* doctrine with a new "breach of purpose" cause of action.

I B. First Framework Proposal: Maintain Certain Differences from the BCA

The Committee agrees with the position stated in the Paper: that societies, though having a number of similarities with business corporations due to their common corporate status, are unique in several fundamental respects.

Moreover, the Committee submits that it is these characteristics that make societies an important part of the social fabric of our communities.

While every business corporation has without fail the generation of profit as its underlying or fundamental legal purpose, societies are created for an assortment of purposes that are, at once, both narrower and broader than those of business corporations. Narrower because certain purposes and activities (including the generation of wealth) are restricted or entirely prohibited; broader because the range of acceptable purposes allows for limitless variety, wonderful diversity and individual adaptation to best meet the needs of their members and, in many cases, the community.

Accordingly, the Committee suggests that it is appropriate that any reforms to the Act reflect the unique nature of societies and retain those concepts and provisions that distinguish societies from other entities in the Proposed Statute. The Committee's comments for each of the proposed reforms are as follows:

Incorporation and Capacity

1) Require a society's purposes to be stated in its constitution

The Committee supports this proposal. As noted above, the fact that societies exist for certain purposes is fundamental to the nature of societies. A

society's purposes should continue to be the touchstone by which the organization can gauge its effectiveness. The Committee agrees with the Paper that those who form the society should contemplate its purposes and they should be set out in the society's constitution at incorporation.

This is not to say a society should be prevented from evolving over time by amending the purposes in its constitution. However, in order that each society may know whether such a change is warranted to match its activities, it is necessary to have those purposes set out with certainty in a known place. The Committee agrees with the Paper that the constitution is an appropriate place to set out a society's purposes. The Committee agrees with the proposed retention of the requirement for societies to file any and all changes to their purposes (and the other provisions of their constitutions) with the registrar in order that both the society and the public may rely on the filed copy to provide the accurate and up to date purposes.

2) Require bylaws to be filed at the Corporate Registry

The Committee supports this proposal. As with the constitution, the bylaws of a society are an important part of the governance of the society. Both the society itself, and, in some cases, the public, may have valid reason to access a

copy of the bylaws from time to time. In the Committee's view, there is value to be found in having a repository of these fundamental documents, in case a society misplaces its own copy or must resolve a dispute involving two conflicting versions of the bylaws. The Committee agrees that it is proper for bylaws, and all changes to them over time, continue to be filed with the registry.

The Committee furthermore submits that changes to a society's constitution or bylaws should not be effective until the appropriate document outlining those changes is filed with the registrar. To allow otherwise undermines the certainty of the document on file with the registry. By retaining the provision that makes changes to constitution and bylaws effective only on the filing of the appropriate form of special resolution, the *Society Act* ensures that all parties, from the public to legal counsel to the society itself, can know with certainty at a given time what the legally effective constitution and bylaws of a given society actually provide. In many situations, this certainty is invaluable, allowing societies to determine which of several disputed versions are in effect, or what changes need to be made to correct a deficiency or inaccuracy. It also ensures that a society's actual and up-to-date legal purposes are available for anyone to access.

3) No Future-dated filings

The Committee does not support this proposal. The corporate registry has a

system in place at present that can accommodate future dating for corporations, and that system should be available to societies as well. Given the number of societies is relatively small compared to corporations in British Columbia (25,000 to 325,000 according to BC Registry Services), it is likely that the number of societies opting to take advantage of this option would not be large, and nor, therefore, would be the associated cost.

4) Provide member access to all records

The Committee strongly opposes this proposal. First of all, the Committee thinks it important to point out that the Paper inadvertently misconstrues the Act regarding access to records by members. The Paper states that, under the current law, members of a society can look at any record of a society to which they belong. While this may be true for some societies, it is incomplete and very misleading as a statement of the current law. The Paper fails to note that this provision (contained in section 37 of the Act) includes the significant phrase "unless the bylaws provide otherwise". In other words, section 37 of the Act provides a default rule that can be overcome by express provision in the bylaws of the society.

Under section 37, it is possible for a society to limit or regulate member access to documents by providing rules in the organization's bylaws.

There is no limitation on what the bylaws may provide with regard to member access; it is possible that a society could provide in its bylaws that members have no rights to access any documents from the society itself (other than the constitution and bylaws, access to which is mandated by section 69).

It is our respectful view that this ability of societies to determine by bylaw the extent of access and procedures for access to documents by members is entirely appropriate and should be retained. As recognized by the Paper, societies are a diverse group of organizations with different needs and circumstances. The Committee encourages the Ministry to retain the flexibility of each society to determine for itself what level of access to documents by members is appropriate in the circumstances. The proposed provision to grant societies the ability to restrict hours of access or other purely procedural access issues appears to follow on the Paper's misconception of the current law. As such, it is both immaterial and insufficient to protect and empower societies.

In the experience of the Committee, it is inappropriate in the majority of cases for the members of a society to have complete and unrestricted access to all society documents. First, societies generate, receive and maintain records that contain personal information, subject to the *Personal Information Protection Act*

("PIPA")[7]. Allowing complete and unrestricted access by members to all documents would place the society in a position where it was obliged by one piece of legislation to act in a manner which is potentially in breach of another.

Although societies may be able to comply with PIPA by carefully redacting personal information from all documents for which access is demanded by a member, this situation will place societies under an extremely onerous requirement, obliged to devote staff or volunteer time to finding, reviewing and redacting documents. The Committee submits that many societies, and in particular small or unsophisticated societies, will lack the capacity to comply with document requests from members in a manner, which satisfies PIPA without incurring liability for unlawfully disclosing personal information. Similarly, certain documents of a society may contain confidential information, the disclosure of which may result in liability for the society. We urge the Ministry to consider the effect of unrestricted member access to all documents on societies, particularly those smaller organizations that are volunteer-based.

Secondly, the Committee respectfully submits that accountability to members does not equate with members' unrestricted access to all documents. Very few societies are intended to be operated as a direct democracy, with

[7] S.B.C. 2003, c. 63.

members having access and input on all matters. A society's directors are empowered by the Act (and in most cases, by their members) to manage the affairs of the society for a certain term. During that term, they are responsible for the organization. Directors are tasked with making difficult decisions and so have access to all documents in order to make the best decision possible for the benefit of the society. Although directors are accountable to their members, this accountability should not, in our view, extend to permitting members to question or second guess every decision of the board based on their own interpretation of the society's documents. Members do not have the same level of duty or potential liability, and it therefore sets a poor governance standard to provide them with total access to all society documents.

Furthermore, it must be noted that members may, if a sufficient number of them wish, amend the organization's bylaws in such a way, which allows for unrestricted access to documents. The Committee encourages the Ministry to remember this ability of members when developing the default position that the Proposed Statute will utilize.

The Committee notes with interest that the CNCA has adopted a model that prescribes certain documents which are open to all members, including the articles and bylaws, the minutes of members' meetings, members' resolutions,

the register of members, and the register of directors. Beyond these basic documents, a member has no default rights to any documents of a federal not-for-profit corporation, although presumably the bylaws of a federal not-for-profit corporation could provide increased rights for members.

The Committee submits that either the current approach under the Act or the approach adopted by the CNCA is more appropriate than the proposal to allow unrestricted access to all society records to any member.

Members and annual general meetings (AGMs)

5) Prohibit financial assistance

The Committee does not support this proposal. The fiduciary obligations of directors' and the remedies for breach of those obligations protect against this mischief adequately, and a broad prohibition risks interfering with legitimate and low-risk practices in place at many societies, such as the provision of corporate credit cards. If such a prohibition is contained in the Proposed Statute, the Committee recommends that it be drafted narrowly so that its scope is limited to prohibiting self-dealing.

6) Require yearly AGMs

The Committee supports this proposal.

7) Require that financial statements be prepared

The Committee supports this proposal. The preparation of annual financial statements has an important role in ensuring continued accountability to the members of the organization. In addition, the preparation of financial statements may, in certain cases when the public has access, increase public accountability. Lastly, the exercise of preparing annual financial statements serves a useful performance and organizational function for the society itself.

The Committee urges the Ministry to allow for flexibility in the preparation of financial statements to ensure that societies of all sizes and sophistication can operate efficiently and according to their needs.

The Committee also recommends that the Ministry modernize the provisions requiring the preparation of financial statements to accord with current generally accepted accounting principles and terminology.

Directors and officers

8) Allow change of director to occur on filing of Annual Report

The Committee supports this proposal.

9) Maintain current Act's approach to determining directors.

The Committee believes it is important that a society have a high degree of flexibility in determining how its directors are selected and how they take office. In particular, the Committee submits that the Proposed Statute should allow for a wide variety of different governance models, including:

- election of directors by specific membership classes;
- *ex officio* directors who hold office by virtue of another office;
- directors who hold office by virtue of membership (members=directors);
- appointment of a certain number of directors by the elected directors; and
- directors appointed by parties who are not members (or directors) of the society.

Until recently, section 24(1) of the Act has been interpreted liberally, in a manner which gives societies considerable (and, in our view, appropriate) discretion in the way that directors are selected. On this basis, many societies have structured their governance to include directors appointed by non-member third parties, *ex officio* directors and representative directors elected by a certain class of sub-group of members.

However, the BC Court of Appeal's recent ruling in *Kwantlen* has cast much doubt on the ability of societies to have directors, which take office in any way other than as a result of a member election. The decision interprets section 24(1) of the Act strictly, placing significant limitations on the director selection process. In *Kwantlen*, the Court said that directors must be selected in accordance with the organization's bylaws, which must "place the selection of directors in the hands of members of the society".

Many societies select their directors using schemes that do not provide for direct member input. For example, a society's bylaws may provide that the members elect a certain number of directors, and those elected directors then appoint several other directors. Alternately, a society's bylaws might provide that certain directors are appointed by an external body that is not a member of the society but provides the society with funding. The Committee notes that this latter arrangement is particularly common among societies associated with various agencies of the provincial government. It is also very common for bylaws to provide that certain of the directors of an operating society, such as a hospital, serve *ex officio* on the board of the related foundation.

Given the language in the *Kwantlen* decision requiring the selection of

directors to be "in the hands" of members, there is now some question as to the legality of such schemes. These existing societies may be at risk of liability for their current governance practices, which do not conform to the strict interpretation provided by the court in *Kwantlen*. The *Kwantlen* decision also creates significant uncertainty regarding the validity of boards (and all decisions of those boards) that include directors not elected by members.

Because of the fundamental role of a board in a society, it is important that the board be composed of directors with the right skills and experience to govern and to ensure that the organization performs to the best of its abilities. The Committee believes that members should play a role in the director selection process. However, we do not support the view that there is only one appropriate governance model applicable to all societies.

If the members of a society wish to create a scheme in the bylaws whereby member involvement in the process of electing directors and officers is indirect or even wholly delegated, they should have the ability to do so. For example, the Committee submits it is appropriate in many cases for small, closely held societies to dispense with the need for a superficial election, providing rather in their bylaws that all members are automatically directors for so long as they retain membership in the society.

In addition, the Committee submits it may be appropriate for members to be asked to vote on a slate of candidates that is put forward by a nominating committee. Likewise, we submit it is appropriate for the board to be comprised of a blend of directors elected by members and *ex officio* directors, or directors appointed by certain members, the elected directors, or even non-member third parties. In some cases, it may be appropriate, based on the circumstances and activities of a society, to have a board that is wholly appointed by non-member stakeholder organizations. Each of the above governance models may be appropriate for certain societies, and the Committee encourages the Ministry to provide sufficient flexibility for a society's members to determine in its bylaws which model of governance is suitable in the circumstances.

The Committee recommends that reform to the Act should replace the current section 24 with a provision that, among other things, allows for the election, appointment and taking of office of directors by any person or party, whether or not a member, in accordance with the bylaws of the society. In addition, a society should be required to set out in their bylaws a scheme for appointing or electing directors. However, the Proposed Statute should provide societies with maximum flexibility in determining what scheme to use (i.e., directors elected by members, a combination of elected/appointed directors, all

directors appointed, etc.). Should members ever wish to amend the society's scheme, they would have the ability to amend the bylaws by special resolution.

In order to provide a default for the benefit of those societies who may not turn their minds toward this issue, we recommend that the provision be provided as a default, worded as follows:

> "*Directors will be elected by the members of a society, unless the bylaws provide an alternate system, in which case directors will take office in accordance with the bylaws of the society.*"

Provisions that expressly provide for this flexibility will have the effect of rendering the *Kwantlen* decision, which hinges on an interpretation of the current section 24(1), obsolete and of no consequence. The Committee believes this is an appropriate case for the Ministry to effectively overrule jurisprudence by subsequent legislation.

The Committee notes that a restriction on how directors take office is not mirrored in the current membership provisions of the Act. In other words, it is perfectly permissible to have *ex officio* members, or members appointed by third parties. These matters are left to the bylaws of the society, and we submit that the same treatment should be afforded societies with regard to the selection of directors. It is also worthwhile to note that under the CNCA, although members

must elect directors, the bylaws can allow for up to one third of the directors to be appointed by the elected directors.

10) Maintain current Act's approach to conflict of interest disclosure

The Committee supports this proposal. In the experience of the Committee, the current conflict of interest rules provide an adequate minimum standard, which effectively regulates the proper handling of directors' conflicts.

11) Maintain a society's right to require security.

The Committee supports this proposal. In the Committee's experience, this provision is very rarely used or required.

Reorganizations

12) Maintain restrictions on continuations

The Committee does not support this proposal. While the Committee acknowledges the concerns of the Ministry that societies may avoid certain obligations of the Act by "continuing out" of the jurisdiction, we believe that a society should have the ability to continue out to another jurisdiction (at the very least another Canadian jurisdiction) if it is in the best interests of the society to do so.

Continuations to another jurisdiction would only be possible into jurisdictions that allow for continuations "in". Although the continued corporation would no longer be subject to BC laws, it would be subject to the laws of the jurisdiction into which it continued. The Committee submits that those jurisdictions that allow for continuations "in" are, for the most part if not entirely, subject to modern corporate law, which provides protections and measures comparable to those that may be adopted by the Proposed Statute.

Furthermore, a society that continued to another jurisdiction would remain subject to the control of its members, providing additional accountability to the process and preventing abuse. The Committee suggests that a continuation would require the approval of the society's members by special resolution.

Lastly, even if continuations "out" are deemed to be too risky for the Ministry to develop, the Committee submits that none of the accountability and asset distributions concerns raised in the Paper apply to continuations "in" from other jurisdictions. As these organizations would become subject to the Proposed Statute, they would be subject to all the same rules as societies incorporated in BC. If the rationale in revising the Act includes making BC a "destination" for the non-share capital corporations of other jurisdictions, then it makes consummate sense to allow those already incorporated in other

jurisdictions to migrate here, by allowing and regulating continuations "in".

The Committee urges the Ministry to consider allowing continuations "in" to this jurisdiction.

13) Maintain current conversion provisions

The Committee supports this proposal, but encourages the Ministry to develop and implement provisions in the proposed Statute to allow for a one-step conversion from a society to the recently introduced community contribution company, should such a structure become possible under BC legislation.

Remedies

14) Retain the ability of minister to investigate

The Committee supports this proposal. Although a useful power to ensure accountability of societies, committee members are not aware of a situation in which it has been used and suspect that it will seldom be utilized in the future.

II Second Framework Proposal: Regulatory Provisions

Overall the Committee agrees in principal to removing any outdated requirements, retain core non-profit requirements and selectively apply other

"regulatory" requirements only to certain types of societies. The Committee has identified a few issues with removing some of the identified provisions of the Act and provides the following comments.

II A. Remove unnecessary and outdated restrictions

1) Remove Registrar's ability to require society to alter purposes before incorporation

The Committee generally supports the removal of this provision in the Proposed Statute as currently registry staff members have too much discretion in accepting or rejecting societies on the basis of the organization's intended purposes. This administrative approach has lead to an unfortunate level of inconsistency and arbitrariness as staff members interpret and apply the Act differently and subjectively. The Committee supports the overall harmonization of the Proposed Statute with other modern corporate governance legislation from other jurisdictions. The removal of the vetting process will provide for a quicker and more reliable incorporation process.

The Committee notes with interest that Corporations Canada, regulator and registrar under the CNCA, does not vet purposes prior to register. However, Alberta still vets and the Public Guardian and Trustee in Ontario vets selectively.

The Committee wishes to raise one significant concern regarding the removal of the requirement for vetting of purposes prior to incorporation. If there will be no vetting of purposes, how (and who) will ensure that societies are not incorporated under purposes that are prohibited by the Proposed Statute, illegal or contrary to public policy? For restricted purposes (such as insurance) who will ensure, in the absence of registry vetting, that the proper consents are received from appropriate agency?

Moreover, the Paper is not clear what would be the consequence (and the process to achieve it) for organizations that incorporate under impermissible purposes? Have the directors of these offending organizations committed an offence or will the doctrine of *ultra vires* be applied and the society declared a nullity? If the goal in modernizing the Act is to remove the doctrine of *ultra vires,* the Proposed Statute will need to provide for specific consequences for breach of the new legislation. The Committee anticipates that unintended consequences may result from a lack of clarity as to whether the doctrine of *ultra vires* is removed from the law.

There are several questions the Committee recommends the Ministry consider before a decision is made to completely remove vetting of purposes. These include:

- What purposes does vetting serve?
- Who does the vetting of a society's intended purposes on incorporation serve or protect?
- Does the unique role of purposes in a society deserve oversight by the Registry or should the registration system operate more like it does for business corporations?
- Will lack of vetting force non-profit organizations to seek legal advice more to ensure compliance with the statute? If so, is this an unintended consequence that may have a negative impact on non-profit organizations?
- Will lack of vetting make it more difficult for people to begin a non-profit organization without legal assistance?
- Will there be additional liabilities that directors take on if there is no vetting? Will this result in difficulties with board recruitment?

The Committee recognizes that the Registrar may prefer to remove the requirement for the registry staff to review the society's purposes and constitutional changes for the sake of alleviating some of the demands on the already strained financial and staff resources of the registry. However, the Committee recommends that if the requirement for vetting of purposes by the

Registrar is removed then there should be provision for consequences for societies that incorporate or subsequently adopt inappropriate purposes. Furthermore, we submit that the consequences for non-compliance should not create onerous or unreasonable liabilities on directors personally or re-introduce the doctrine of *ultra vires*.

2) Remove requirement for Registrar's approval of constitutional changes

The comments in the previous section apply to this proposal.

3) Remove requirement to file all special resolutions

The Committee supports the removal of the requirement for all special resolutions to be filed with the registry as this aligns with other modern corporate governance statutes for not-for-profit corporations in other jurisdictions. The Committee does not foresee any adverse consequences as a result of this change to the Act.

However, as outlined above, the Committee recommends that the requirement to file special resolutions, which have the effect of amending the constitution or bylaws of a society be retained. In our view, it is essential that there be an impartial record of the changes to these documents over time. The

filings and maintenance of these records by the registry serves a valuable function for both the public and the society itself.

II B. Retain core prohibition on distribution of assets

1) Retain restriction on distribution of profits or other assets to members

The Committee supports the retention of the current restriction on distribution of profits or assets to members. In our view, this restriction is one of the primary distinguishing features of societies as non-profit organizations. Non-distribution of profits and assets is what separates these organizations from for-profit organizations that incorporate under the BCA.

However, the Committee recommends that the new legislation expressly allow for the distribution of profits and assets from one society to a similar non-profit organization or charity. The features of non-distribution to members should not limit a society from transferring profits or assets to another non-distributing corporation. There are many reasons why a not-for-profit corporation would this transfer including upon the dissolution of the society. One example is the realignment of complementary services offered by several societies in the same local area to provide better efficiency for each organization.

II C. Apply 'asset lock' on dissolution only to certain types of societies

1) Classify societies as either "public" or "private"

The Committee has significant concerns about the proposal to classify societies as either "public" or "private". While the Committee did not reach a consensus on how this issue should be resolved, it would offer the following comments:

a. Dispositive effects of classification: Based on the proposals set out in section D, the Committee understands that the purpose of the classification is to reduce the regulatory requirements applicable to membership societies, while continuing to apply those requirements to other, more "public" societies. As will be discussed below, however, the Committee recommends that all or most of the regulatory requirements discussed in section D should be removed for *all* societies. If these regulatory requirements are removed, this will considerably reduce the significance of the proposed classification.

b. Criteria for classification: The Committee submits that regardless of what higher regulatory provisions may apply to those societies that are considered to be "public" as opposed to "private" under the Proposed Statute, the most important thing is that the characteristics which will distinguish the two classes of society be transparent and readily understandable to those who work with societies. In other words, the criteria which will qualify a society as either public

or private must be clearly and unambiguously delineated so that a society can know with absolute certainty whether it will, or will not, be a public society under the Proposed Statute.

The Committee believes that the 'combination approach' being proposed has the potential to create significant unforeseen complexities, undesirable incentives, and administrative burdens. In particular, the Committee cautions against a combination approach that 'deems' self-proclaimed "private" societies to be "public" if they solicit or receive a significant amount of money from the government or the public, become a registered charity, or carry on activities not primarily for the benefit of their members. This proposal has the potential to create great uncertainty for societies, particularly those that apply for government grants on a rolling or annual basis. The deeming proposal also has the potential to create incentives that run counter to the public interest: a "private" golf club, for example, might decide not open up its facilities to non-members or offer lessons to underprivileged children because this would expose it to a range of new regulatory requirements, including public scrutiny of its accounts.

If the Ministry does decide to include a deeming proposal, the Committee submits that charitable registration should not be a consideration. Charitable

registration falls within the purview of the Federal Minister of Finance and whether a society is also registered as a charity under the ITA is not material to corporate governance or an organization's obligations under its corporate statute. Simply because a society is a registered charity does not imply that it should be subject to stricter requirements regarding governance. Moreover, if holding charitable status requires a higher standard in terms of governance, reporting or otherwise, then it is for the ITA to require that standard of all registered charities. Duplicating or anticipating such requirements for charities in the Proposed Statute is inappropriate and unnecessarily troublesome for those societies that have to comply with both statutes.

Finally, the Committee submits that the fact that a society solicits funds should have no effect on its status as a private or public society. If the Ministry decides to adopt this criteria, therefore, only funds **actually received** from public sources, such as non-member donations, government grants, or registered charities should be taken into consideration.

c. Terminology: The Committee cautions against the use of the term 'charitable' to describe a category of non-membership societies that are subject to particular regulatory requirements under the Proposed Statute. The term 'charitable' is a term of art both at common law and under the federal registered charity regime.

If a not-for-profit with non-charitable objects that receives government funding is classified as a public (charitable) society under the Proposed Statute, this may create considerable confusion.

The Committee also has concerns with the use of the terms 'public' and 'private' to describe categories of societies that are subject to different regulatory requirements. The appropriateness or inappropriateness of these terms will, of course, depend upon the criteria that are adopted for classification. However, the Committee recommends that the Ministry consider the adoption of classificatory labels that have a less powerful rhetorical effect.

2) Retain restrictions on distributing assets on dissolution for public societies

Subject to the comments above, the Committee supports the retention of the restriction on distributing assets for public societies.

3) Maintain restrictions on amalgamation and conversion for public societies

Subject to the comments above, the Committee supports maintaining the restrictions on amalgamation and conversion for public societies.

II D. Apply other regulatory requirements only to "public" societies

The Committee supports the proposal to require a minimum of three

directors for public societies but questioned the rationale for maintaining the requirement for one BC-resident director. This is inconsistent with the general trend to abandon residency requirements. However, the Committee takes no position for or against.

The issue of public access to financial statements of public societies is primarily of importance with regard to not-for-profit corporations registered under the ITA. Canada Revenue Agency ("CRA") requires significant financial disclosure by all registered charities that is available to the public through a well-advertised CRA website. The Committee submits that it is not necessary for the province to duplicate this expense and to this additional regulation. There is also a significant concern that the deeming rule will force public disclosure unexpectedly.

The Committee submits that financial statements should be only available to members and also that the option of simplified financial statements be retained.

The Committee disagrees with the proposed prohibition of officers or employees of public societies from acting as directors. We recognize that having employees on boards leads to clear governance issues. However, these can be

dealt with by conflict of interest guidelines and disclosure.

Employees serving as directors is common to societies in BC. Sometimes the employees have the peculiar skills necessary to provide oversight to a society's particular activities. Societies need this flexibility and it helps make recruiting easier for small organizations. To refuse to allow churches, for example, to have their pastor on the board would be a significant break with established practice.

The Committee recommends that prohibiting employees be the default position but that the provision should contain the exception "unless the bylaws otherwise provide". The provision should not prohibit officers from being directors because the bylaws and practices of many societies define the directors to be the officers.

The Committee disagrees with the proposed requirement that public societies publicly disclose directors' and officers' remuneration. There is remuneration disclosure by CRA for both registered charities and non-profit organizations. There is no reason for the Proposed Statute to duplicate and extend this reporting requirement.

The Committee cautiously approves extending oppression remedies to

members but disapproves extending oppression remedies to the public-at-large. Arguably, any grant-seeking agency that did not get a grant from a granting foundation could argue oppression because the foundation made the grant to a competitor or some completely different charitable purpose. Societies should not be subject to indeterminate liability for discretionary spending on dance rather than libraries and the public does not benefit when a disgruntled or mischievous member of the public brings a frivolous action because it is not possible to eliminate the possibility that there may be "oppression". There is also a risk of oppression action in union-management disputes.

It is possible that new member remedies may alleviate need for broader public remedies. However, it is important to note that societies routinely have different classes of members and are subject to different rights. One should also note that constituents of a society are not necessarily to be treated equally or even-handedly because grant making and service provision is discretionary rather than an entitled right.

It might be possible to devise a provision that leaves the question of standing to the court. Saskatchewan's legislation may have good language that could be used or adapted. However, if the public is be given standing, it is important that a gatekeeper who can make an early decision as to whether a

particular complainant has standing. The Committee is concerned that the mischief potentially caused by giving the general public standing is greater than the mischief, which this provision seeks to address.

The Committee strongly supports the recommendation that audited financial statements remain optional for all societies. Further, the Committee recommends that the default position in the Schedule B bylaws be that a society not have audited financial statements.

The Committee supports the proposal to remove the concept of "reporting society". Societies in particular fields, such as health care or education, can be subject to reporting regulations or circumscribed activities, imposed by the government body regulating that field. There are other forms of accountability forced on societies by CRA or external funders. It is better that corporate governance legislation not address the "reporting society" issues but leave the matters of governance and accountability implicit in the "reporting society" designation to the wisdom and discretion of the members.

III. Other Issues

1) Require the registration of extra-provincial societies

The Committee recommends that extra-provincial societies that conduct

operations in BC be required to register. However, the Committee notes that the "conduct operations" test is potentially very broad. This test would tend to capture more societies whose activities incidentally occur in BC than the parallel "carry on business" test applied to business corporations under s. 375 of the BCA. The Committee recommends that the Proposed Statute (in either the statute or regulations) set out clear criteria for conducting operations, to enable extra-provincial societies to determine easily whether or not they meet the threshold for registration. The criteria should be tailored to the unique requirements of non-profit organizations, such as operating via volunteers and conducting public fundraising. The threshold should be set so as to exclude from registration societies that do not have an office or staff in BC but simply accept donations from BC residents.

The Committee recommends the public benefit of requiring registration should be balanced against the risk of imposing onerous requirements on extra-provincial societies.

2) Explore options for dispute resolution

The Committee makes no recommendation on the proposal to explore options for dispute resolution, but makes the following comments:

A. There is no pressing need for an independent dispute resolution

mechanism, or for a tribunal similar to the new Strata Dispute Resolution Tribunal. Any dispute resolution model should not be mandatory, to preserve a society's ability to resolve disputes in the way they see fit or pursuant to their own bylaws and policies. Organizations have many options at present, including litigation, arbitration under the *Commercial Arbitration Act*, and private mediation.

B. The new model bylaws could include dispute resolution provisions that provide for mediation and arbitration. This would be of particular value to smaller volunteer-based societies that often adopt the model bylaws without amendment.

3) Maintain occupational title protection

The Committee supports this proposal. Occupational title protection provides a service to the public by establishing clear and public requirements for the use of particular occupational titles. In view of the non-profit purposes of occupational title protection organizations, the Proposed Statute is an appropriate location for these provisions.

IV. Additional Issues

The Committee thought this review an opportune time to address some

additional aspects of the Act that should be altered or addressed.

1) Eliminate the requirement of member approval by special resolution for dealing with subsidiaries (s. 34(1) of the Act)

The Committee recommends the requirement of member approval by special resolution for the acquisition, incorporation or disposition of control of a subsidiary should be removed. Dealing with subsidiaries properly falls within the board of directors' responsibility to manage the affairs of the society. Decisions about the acquisition, incorporation or disposition of control of subsidiaries should be a board decision, and requiring member approval creates delay and detracts from the authority of the board.

Eliminating this requirement is consistent with the rationale for eliminating the requirement of member approval of debentures.

2) Transition to the new legislation

The Committee recommends that the new legislation be implemented by way of a one to two year transition period, to allow existing societies to:

- assess the new statute;
- make necessary changes to their constitution, bylaws and corporate structure;

- determine their public or private status;
- adopt the new special resolution threshold; and
- communicate the changes to their members.

3) Names

The Committee notes that the Paper does not propose to add to the Proposed Statute a provision, which would provide legislative guidance on the issue of permissible names and designations for societies. The Committee suggests that the Proposed Statute, like the BCA, should contain a provision for reservation of corporate names and rules regarding permissible name designations. The Committee encourages the Ministry to include a provision, which provides legislative guidance (as opposed to the current administrative position taken by the registrar) setting permissible name designations for societies. The Committee submits that societies should be able to name themselves using a variety of different permitted designations, including "association", "board", " centre", "foundation", "institute" and "society" and such other designations as the registrar may accept. The corporate name approval policy for societies should be harmonized to be consistent with the policy in force for share capital companies.

4) Bill 23 – Community Contribution Companies

On March 5, 2012 the government introduced Bill 23, the *Finance Statutes Amendment Act, 2012*. This bill would amend the BCA to introduce the "community contribution company" ("C3"), a new form of corporation that shares attributes of both business corporations and not-for-profit organizations. The Committee takes this opportunity to comment on the legislation (as at first reading).

The Committee welcomes this new corporate option, which will fill a gap between non-profit societies and for-profit business corporations. The C3 option will allow social enterprise organizations to incorporate in a specialized corporate structure that:

- clearly distinguishes social enterprise organizations from standard business corporations;
- is reasonably accountable to the general public;
- can be established quickly and without expensive drafting; and
- permanently limits the potential private benefit accruing to shareholders or directors.

The bill properly treats C3's as business corporations subject to particular restrictions and requirements, rather than non-profit organizations granted certain additional rights. The Committee considers that the BCA is the correct location for the C3 model, not the Proposed Statute.

The Committee recommends that the new legislation provide for a one-step transition from existing societies into C3's.

CONCLUSION

As detailed above, the Committee supports the guiding principles and objectives established by the Ministry in the Paper, as well as the majority of the specific proposals put forward to reform and modernize the Act. In particular, the Committee supports the principles of flexibility and simple, accessible rules and encourages the use of provisions which will allow societies to modify and adapt default rules to meet the specific needs of the organization and its membership through the enactment of express by-laws.

The Committee has concerns surrounding a number of proposals for provisions that are, in our view, over-regulatory. These proposed provisions relate for the most part to member remedies and public accountability. While the Committee supports both of these principles, we believe that certain of the proposals from the Paper impose a high standard of accountability which, while appropriate for certain kinds of societies, is neither necessary nor appropriate as

a minimum standard for all societies. Furthermore, the Committee is concerned this standard, if adopted, will prove to be onerous and beyond the administrative capacity of many smaller societies to comply.

In particular, the Committee has serious concerns with regard to the following proposals:

- transition from the current to the proposed threshold for special resolutions;
- allowing member proposals;
- requiring unrestricted access by members to all society documents;
- unmodified adoption of the oppression and derivative remedies;
- continued restriction on continuation of societies; and
- the public-private dichotomy.

In addition, the Committee strongly recommends that the Ministry provide a flexible framework permitting a variety of methods by which directors of societies may be selected and take office. Several other recommendations are offered relating to issues not dealt within the Paper. The Committee hopes that our submission will prove helpful to the Ministry and we would be pleased to meet with Ministry officials to discuss our response to the Paper or any of our

recommendations.

Once again, we thank the Ministry for the opportunity to comment on the proposals put forward regarding reform of the Act. We look forward to more detailed proposals or draft legislation and hope the Ministry will consider requesting further comment at that time.

Respectfully,

Laura Berezan and Michael Blatchford

Committee Co-Chairs

Laura Berezan
Fleming & Associates,
Barristers & Solicitors
4571 Marine Avenue
Powell River, BC V8A 2K5
604 485 2771
laura.b@fleminglaw.ca

Michael Blatchford
Bull, Housser & Tupper LLP
3000 Royal Centre
PO Box 11130
1055 West Georgia Street
Vancouver, BC V6E 3R3
604 641 4854
mpb@bht.com