SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH)

TO THE

MINISTRY OF FINANCE

ON THE

SOCIETY ACT

Issued By:

Canadian Bar Association
British Columbia Branch

Special Committee of the Charities and Not-for-Profit Law Section

October 15, 2014

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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the "CBABC") is to:

- enhance the professional and commercial interests of our members;
- provide personal and professional development and support for our members;
- protect the independence of the judiciary and the Bar;
- promote access to justice;
- promote fair justice systems and practical and effective law reform; and
- promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 39,000 members and the British Columbia Branch itself has over 6,900 members. Our members practice law in many different areas. The CBABC has established 78 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 has also established standing committees and special committees from time to time.

The CBABC Charities and Not-for-Profit Law Section (the "Section") is pleased to provide submissions to the BC Ministry of Finance (the "Ministry") on the *Societies Act* White Paper. The Section is comprised of members of the CBABC who advise charities and other non-profit organizations as well as advising donors on charitable gifts.

The comments expressed in this submission reflect the views of the CBABC's Section Special Committee (the "Committee") and are not necessarily the views of the CBABC or the Section as a whole. The Committee was composed of the following members:

- Kate Bake-Paterson, Co-Chair of the Section;
- Michael P. Blatchford, Co-Chair of the Section;
- Laura Berezan;
- Robert Pakrul;
- Luke Johnson; and
- Ken Volkenant.

EXECUTIVE SUMMARY

The Committee is pleased with the decision to adopt a separate not-for-profit Act and to modernize the many governance tools available to societies in B.C. We commend many of the proposals in the Draft Act (the "Draft Act").[1] Our submissions are, for the most part, focussed on the issues we have identified and concerns we have with the Draft Act.

In its review of Part 1 Definitions of the Draft Act, the Committee recommends that all definitions be listed in section 1 of the Draft Act, rather than placing definitions only used in one Part at the beginning of that Part. The Committee recommends changes to the definitions of "member funded society", "senior manager" and "special resolution".

In Part 2, we have recommendations regarding the nature of societies that the registrar deems "offensive", restrictions on a society's constitution and a society's bylaws.

In Part 3 we have recommendations regarding destruction of a society's records, access and disclosure to records.

In Part 4, we have concerns about the requirement for a society to disclose remuneration of directors, employees and contractors.

[1] *Societies Act* White Paper: Draft Legislation with Annotations, (August 2014)(http://www.fin.gov.bc.ca/pld/fcsp/pdfs/SocietyActWhitePaper.pdf).

In Part 5 we have recommendations during a society's management, including: *ex officio* directors, payments to directors, director terms, removal and replacement of directors, director delegation, persons performing functions of directors, director meetings, conflicts of interest, director liability, director indemnification and senior managers.

In Part 6 we have recommendations regarding members and meetings, including general meetings, annual reports and voting.

In Part 7, we recommend that a society have a right to amalgamate out of BC and a right to continue out of BC.

In Part 8, the Committee generally supports the modernization of the legislation through inclusion in the Draft Act of additional remedies for aggrieved individuals but we have concerns about remedies and public complaints.

In Part 9, the Committee is pleased that audits will not be required by the Draft Act, but have concerns that audits may be required by regulation. We are pleased at the removal of the reporting society designation, but query why the Ministry is effectively grandfathering current reporting societies by requiring them to transition with the reporting society provisions, which mandate annual audit.

In Part 10, we suggest that the Ministry may want to consider increasing the time limit for administrative restoration beyond 10 years.

For Part 11, the Committee generally supports the clarification of the requirement for societies to extra-provincially register in British Columbia and agrees that it is logical to look to the BC *Business Corporations Act* for analogous language. Also, the Committee commends the clarification of the circumstances in which an extra-provincial non-share corporation is deemed to be carrying on activities in BC. The Committee is concerned the burden that this will impose on most such corporations who most likely have not yet registered in BC.

For Part 12 we have recommendations regarding the new category of member-funded societies and the definition of “public donations or gifts”.

In Part 13 the Committee has no submissions regarding general provisions in the Draft Act.

In Part 14, the Committee is concerned about the offence for an individual who acts as a senior manager of a society but is not qualified to do so. The Committee agrees with the three-year limitation.

In Part 15 the Committee has no submissions regarding regulations.

For Part 16, the Committee recommends that Part 16 transitional provisions be re-crafted to be more consistent with the transition structure adopted in the *Canada Not-for-profit Corporations Act*.

SUBMISSIONS

BACKGROUND

In 1920, the British Columbia Legislature enacted the first *Society Act* (the "Act"). Over the years the Act has been amended a number of times. The current Act largely dates from 1977.

In 2006, the British Columbia Law Institute (the "BCLI") began a review of the Act. In 2008, the BCLI published a report recommending a modernized Act, along with draft legislation.[2]

In 2009, the Ministry of Finance began a public consultation on the Act.

In 2011, the Ministry published a discussion paper seeking comment on a new modernized Act.[3]

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[2] Report on Proposals for a New *Society Act,* (BCLI Report No. 51) (July 2008) (http://www.bcli.org/sites/default/files/BCLI_Report_on_Proposals_for_a_New_Society_Act.pdf).

[3] *Society Act* Review Discussion Paper, (2011) (http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2014_2/515315/society_act_discussion.pdf).

In 2012, the BCLI published a supplementary report in response to the Ministry's discussion paper.[4] This BCLI 2012 supplementary report sets out the areas of agreement between the BCLI's 2008 report and the Ministry's proposals and recommended alternative approaches that the Ministry should consider pursuing.

In 2012 as well, CBABC Charities and Not-for-Profit Law Section made submissions regarding proposed amendments to the Act.[5]

In 2014, the Ministry released a White Paper, with proposed legislation, for public comment, the Draft Act. The Draft Act has 16 Parts. These submissions contain comments on many of these Parts, set out in chronological order.

THE COMMITTEE'S APPROACH

As with the submission made on behalf of the Charities and Not-for-profit Section on the 2012 Report/Discussion Paper, the Committee has a favourable view of the Draft Act. The Committee is pleased with the decision to adopt a separate not-for-profit act and to modernize the many governance tools available to societies in B.C. We commend many of the proposals in the Draft Act, including:

[4] Supplementary Report on Proposals for a New *Society Act*, (BCLI Report No.63)(April 2012) (http://www.bcli.org/sites/default/files/2012-04-23_BCLI_Supplementary_Report_on_Proposals_for_a_New_Society_Act_(FINAL).pdf).

[5] The Canadian Bar Association BC Branch's (CBABC) submission regarding proposed amendments to the *Society Act*, (April 30, 2012) (http://cbabc.org/CMSPages/GetFile.aspx?guid=3d1262d6-2dd6-4032-85ce-30f75b787547).

- electronic incorporation, with only 1 member needed;
- removal of the *ultra vires* doctrine;
- removal of the ability to allow “unalterable” provisions;
- clarification of required records to be kept by a society at its records offices;
- permitting the election or appointment of *ex officio* directors;
- clarification regarding director remuneration;
- ability to remove directors with less than special resolution;
- statutory defences to director liability;
- no requirement for court approval of indemnification;
- annual general meetings able to be held by consent resolution;
- no mandatory audit; and
- clarification of when extra-provincial societies must register in B.C.

Rather than identify the Committee’s specific views on each new provision introduced in the Draft Act, these submissions are, for the most part, focussed on the issues we have identified and concerns we have. We have, for the most part, refrained from redrafting the language proposed by the Ministry and have focussed our attention at identifying areas of potential problems.

PART 1 - DEFINITIONS

In its review of Part 1, the Committee recommends that all definitions be listed in section 1 of the Draft Act, rather than placing definitions only used in one Part at the beginning of that Part. Using multiple definition sections risks misleading readers unfamiliar with current legislative drafting practices. A single definition section would enhance readability. To that end, the Committee recommends that the definition of "member funded society" in section 187 be placed in section 1.

The section 1 definition of "senior manager" – an individual who runs the society or influences its policy, and who is therefore made subject to similar qualifications and liabilities as directors (see section 62 of the Draft Act) – is imprecise, and risks imposing liability *post facto* on individuals who are not aware at the time that they are senior managers (although the Committee recognizes that the "appointment" requirement may alleviate this risk somewhat). We discuss the concept of senior managers further in the portion of these submissions addressing Part 5 of the Draft Act.

Finally, in regards to the definition of "special resolution", since the Draft Act removes the unalterable concept, societies should be able to elect in their bylaws to:

- set the special resolution threshold at 3/4, not 2/3; and
- choose a higher supermajority threshold for some particular changes (up to unanimity of members).

PART 2 - FUNDAMENTAL MATTERS IN RELATION TO SOCIETIES

Section 2(3) of the Draft Act provides authority for the registrar to order amendments to a society's purposes if found to be "offensive". The Committee thinks "offensive" is inappropriately vague, and exposes societies that hold controversial (but legal) views to risk of regulatory sanction for promoting their views.

Section 9 of the Draft Act sets out restrictions on provisions in a society's constitution to be only the name and purposes of the society. These restrictions will be problematic for some societies with relationships to national organizations, because the national organizations require that certain elements be included in the constitution, such as a statement of faith.

Section 10(3) of the Draft Act states that if a bylaw is inconsistent with a BC or Canadian enactment, that bylaw has no effect. We agree that society bylaws are not able to trump Canadian legislation; however, the Committee is concerned about the overbroad application of this section which will cause a bylaw to be of "*no effect*" for an inadvertent inconsistency with any enactment in Canada, even if not declared to be as such by the courts. We are of the view that the use of the term "inconsistent" is too vague and that bylaws should not automatically cease to have effect simply because of an inconsistency with (or even if they are actually contrary to) other enactments. Should a bylaw be challenged for being contrary to other legislation, the courts can decide at that time how to interpret the relevant bylaw. We recommend deleting subsection 10(3) of the Draft Act altogether, failing which we recommend that, at the

very least, the provision be amended so that it only prohibits societies from including provisions in their bylaws that are contrary to the Draft Act.

On a related note, the Committee favours granting as much flexibility to societies as possible in terms of structuring their governance and recommends allowing societies to deviate in their bylaws from default rules established in the Draft Act as often as possible. The Draft Act should clarify, at the relevant sections, that the provisions are subject to a society's bylaws.

Section 12 of the Draft Act, which provides for "evergreen" bylaws, must not prevent a society or the public from being able to obtain from the Registry, the text of a society's bylaws at any given point in time in the past. Sometimes societies need to be able to determine what their bylaws said at a specific time in the past. The Committee recommends that a society's historical records continue to be available at the Registry, as they are today.

Section 16(5) of the Draft Act deals with alterations to a society's bylaws. As noted above in our discussion of Part 1 Definitions of the Draft Act, societies should have somewhat more flexibility in setting a threshold higher than 2/3 for some aspects of their bylaws.

PART 3 - REGISTERED OFFICE AND RECORDS

Section 20 of the Draft Act permits a society to destroy records (specified under section 19) after seven years if the records are no longer relevant or have been altered. The "records" listed under section 19 are not simply documents concerning the activities of the society, but significant corporate documents such as:

- earlier iterations of the bylaws;
- court orders;
- conflict of interest disclosures;
- member meeting minutes; and
- financial statements.

Requiring a society to retain such records indefinitely while the society is in existence is not onerous. Requiring such long-term retention also limits the risk that records are improperly destroyed when they are needed for:

- litigation;
- audit;
- government investigation;
- resolution of internal society matters;
- historical research; and
- archives in order to preserve the documentary heritage of a society.

Once destroyed, records cannot be re-created. For these reasons, the Committee recommends that section 20 be deleted.

Section 23 of the Draft Act proposes to continue the current policy of allowing member access to any other record of the society (including board meeting minutes, board resolutions, accounting records) unless the bylaws expressly limit or exclude that right. The continuation of this policy is troubling for all societies because it is a trap for the unwary. It is extremely difficult for a society to amend its bylaws so as to actively limit the rights of members in any respect. Therefore, most societies will have bylaws that say nothing with regard to access. The policy allows disgruntled members to access a variety of sensitive, personal or competitive information that is discussed by the board or set out in accounting records. In the experience of one Section member, providing society members with access to such information can result in using this access to harass society boards and inflame disputes. The Committee recommends that the Draft Act reverse this policy for board meeting minutes and accounting documents – so that unless the bylaws of a society expressly provide a right for member access to these documents, the default is no access. This is the case in the recently enacted federal non-profit legislation.

Section 23(4) of the Draft Act provides that, unless the bylaws provide otherwise, any member of the public can inspect key records of a society, including minutes of director meetings (under section 19(2)(a)). The Appendix A Model Bylaws does not reverse this default provision. The consequence of section 23(4) is that provides an inappropriately broad right for individuals who are not members or directors of a society (such as journalists, disgruntled employees and litigation antagonists) to access records that should be confidential and may be privileged. The scope of section 23(4)'s access rights

should be tightly circumscribed. While sophisticated societies can be expected to use their bylaws to limit member or public access to confidential records, smaller and less sophisticated societies may not realize that they should take this step.

Section 24 of the Draft Act is a new section. Section 24 permits the board of a society to limit member access to its register of members if the board is of the opinion that access to member contact information is harmful to its members' interests. If this is done, then a member who wishes access to the registry must state that the access is for legitimate business related to the affairs of the society, such as requisitioning a special members' meeting, in which case the board must provide access.

Section 24 is not strong enough to protect privacy interests of members in their personal contact information. It is open for abuse by a member who wants access to contact information for purposes other than society matters. The bar for entry is not high enough. The Committee recommends that the Draft Act be revised to require the member seeking access to provide a sworn affidavit in order to obtain access. This revision would require a greater bar to access than a mere "statement" by the member. Affidavits require a member to go before a lawyer or notary, which would perhaps make a member think twice before frivolously requesting access to restricted member information.

Section 25 of the Draft Act limits use made of a director's contact information for only society matters. Section 25 could be strengthened to further discourage misuse of

private personal information. For example, such misuse contrary to section 25 could be made an offence.

Section 27 of the Draft Act permits public access to a society's financial statements after paying a reasonable fee for copies. Section 27 should expressly note that the regulatory exemption relieves member funded societies from the requirements of section 27.

PART 4 - FINANCE

Section 35 of the Draft Act is a new provision requiring reporting in the society's financial statements on remuneration of directors, employees and contractors. Section 35 presents a major concern for many societies. It is similar to the amendments to the BC *Business Corporations Act* for Community Contribution Companies (the "C3")[6] and is the first of its kind among any corporate legislation in Canada, including publicly traded business corporations. The fact that this same requirement was enacted for C3s is not persuasive since C3s have the ability to distribute income to shareholders, which is prohibited for societies.

Even registered charities do not have to provide this level of detail on remuneration as required by section 35. Registered charities need only disclose the number of employees and contractors within set bands of remuneration, without disclosing, by name or position, the actual individual or company in receipt of remuneration.

[6] See sections 51.9 to 51.99 in Part 2.2 of the *Business Corporations* Act, S.B.C. 2002, c. 57 (see http://www.bclaws.ca).

To require the disclosure of sensitive personal information such as remuneration is, to some organizations and individuals, offensive to individual privacy interests. Salary and remuneration is considered highly sensitive personal information and should be protected as such, even in societies that receive a portion of “public funds”. Required disclosure will result in much divisiveness and contention within societies and their staff and membership.

Section 35 is not needed since funders can already request this information as part of the grant application and reporting processes. Section 35 may also have a chilling effect. It may encourage the public to the view that persons in societies should not be compensated on par with private corporations or the private sector and may result in the voluntary sector losing talented people because these talented people will seek to keep their personal information private.

As a separate concern, the Committee notes that in section 35(1)(b)(i) of the Draft Act, the use of the term “to each person under a contract for services” could include payments to corporations for services rendered. The Committee wonders whether this is intentional, as it clouds the issue of remuneration for employees. The Committee recommends that 35(1)(b)(i) section be removed as it is unnecessary, problematic for many societies and contrary to personal information interests.

Section 36 of the Draft Act requires reporting in a society's financial statements any financial assistance that is provided to a person that is not in the ordinary course of the society's activities. The Committee recommends that the exceptions to this reporting requirement (see section 36(3) of the Draft Act) be broadened to include financial assistance given in furtherance of the society's purposes even if the provision of financial assistance is not an express purpose of the society.

PART 5 - MANAGEMENT

While the Committee commends many provisions in Part 5 of the Draft Act regarding management, we would have identified the following concerns with these provisions.

Ex Officio Directors

Section 41 of the Draft Act permits the appointment of *ex officio* directors (as described in the annotations to section 41 as directors who become directors because of a particular attribute or position they have or hold rather than as a result of an election). The Section supports section 41 because it confirms the inapplicability of recent case law requiring directors to be elected by members. However, we are concerned that the proposed wording may not be broad enough. As a result, the Committee recommends that section 41(3) be amended to empower individuals who hold a particular office or who have a specified attribute to appoint directors (as well as to act as directors themselves).

Payments to Directors

Section 45 of the Draft Act permits societies to make payments to directors only if authorized by bylaw, and permits societies to reimburse directors for reasonable expenses necessarily incurred by performing duties as a director. Generally, the Committee takes no issue with the prohibition on director remuneration unless it is authorized by bylaw and we support the decision to allow societies to manage internally the conflict of interest created by having a director also be a paid employee (subject to board composition requirements set out in section 40 of the Draft Act).

We have concerns, however, about the relationship between section 45(1) and section 40 of the Draft Act. Section 40 requires a majority of directors to be individuals who do not receive and are not entitled to receive remuneration from a society under contracts of employment or contracts for services, other than remuneration permitted to be paid to directors by bylaw under section 45(1). We note the potential breadth of the term "contracts for services"; one result is that "contracts for services" could capture much more than directors who are paid staff. We wonder what "contracts for services" in section 40 are intended to be captured. In addition, we raise the possibility that directors may be closely related to corporations who are service providers for remuneration. It is unclear how this may (or may not) be captured by section 40.

We also have serious concerns about subsection 45(4) of the Draft Act that provides for both reimbursement and remuneration payments to directors to be further limited by

regulation. We question the need for such limits on both reimbursement or remuneration. The annotations accompanying section 45 of the Draft Act suggest that such regulation might be required to impose a cap on director remuneration for societies receiving significant government funding. In our view, this concern could be better addressed in the applicable funding agreements and further restriction by regulation is unnecessary. Furthermore, the annotations did not provide any policy rationale for limiting reimbursement of directors' expenses. As such, the Committee recommends that section 45(4) be deleted from the Draft Act.

Director Terms

As a minor point, in respect of section 48(1)(a) of the Draft Act which provides that a director ceases to hold office when his or her term of office expires, the Committee recommends including the term "if any" in order to recognize the fact that some directors may be appointed indefinitely, without a term. As a result, the Committee recommends that section 48(1)(a) be amended to read: "the director's term of office, if any, expires;".

Removal and Replacement of Directors

Regarding the right of a society to remove and replace directors in section 50 of the Draft Act, the Committee supports the proposal to allow societies to provide in their bylaws for alternate methods of removing directors and for appointing directors to fill those vacancies. We notice that the annotations accompanying section 50 of the Draft Act are confusing as they say that section 50 differs from the current provision in the Act

only in regards to the procedure for appointing a replacement director. The annotations for section 50 should also have identified the newly proposed process for removing directors. In the same vein, we are also of the view that section 50 is worded confusingly. To correct this confusion, the Committee recommends that section 50 be amended to clarify the options available to societies to remove and replace directors and, in particular, to emphasize the ability of societies to adopt a process different from the 'default' process in the Draft Act.

Director Delegation

Regarding the ability granted to directors to delegate to committees comprised of directors in section 52(2) of the Draft Act, the Committee notes that most societies' committees are comprised of both directors and non-directors. Is the intent of section 52(2) to prohibit delegation to such committees? The Committee recommends that section 52(2) be clarified in this regard.

Persons Performing Functions of Directors

Section 53 of the Draft Act specifies which provisions of the Act apply to persons working as if they are directors of a society. The Committee understands the impetus behind proposed section 53, but is concerned that - since the origin of this provision was section 138 of the BC *Business Corporations Act* - the entirety of that section 138 has not been incorporated. We note in particular the rest of the wording in section 138(1) of the BC *Business Corporations Act* and all of 138(2), especially section 138(2)(a) which excludes those individuals acting under the direction of other managers

and section 138(2)(b) which excludes professional advisors. Consequently, the Committee recommends that section 53 of the Draft Act be amended to include the entirety of the wording in section 138(2) of the *Business Corporations Act* (modified as may be necessary to reflect the not-for-profit section) and that the drafters of the Draft Act also revisit the application of Section 138(1) of the *Business Corporations Act*.

Also, the Committee recommends that section 53 of the Draft Act be amended so that senior managers are expressly exempted from the application of section 53 since they are already governed by section 62 of the Draft Act.

Director Meetings

Section 55(1) of the Draft Act is new. The Act doesn't currently regulate directors' proceedings, including required notice of such meetings. In contrast, section 55(1) of the Draft Act establishes a default rule for directors to be able to meet at any location, on any notice and in any manner convenient to the directors. The Committee recommends that section 55(1) provide more detail as to the manner and timing of giving such notice; at the very least, the Committee recommends that section 55(1) have a requirement for notice to be given to all directors.

Conflicts of Interest

The Committee commends the modernization of conflict of interest provisions applicable to the not-for-profit sector in sections 56 to 58 of Division 5 of Part 5. We agree that it

would be logical to draw upon the analogous *Business Corporations Act* provisions. We do, however, have a number of observations on this section of the Draft Act.

First, section 56(1) of the Draft Act speaks to a director's indirect or direct "material interest" in a contract or transaction. It isn't clear to us what the term "material interest" means in the context of the not-for-profit sector where directors may not stand to benefit personally from their positions. For example, when a society seeks funding from a foundation, does a director of the society, who is also a director of the foundation, have a material interest? The Committee recommends that "material interest" in section 56(1) be clarified.

Second, the Committee recommends that Division 5 of Part 5 of the Draft Act add a provision to the effect that once a conflict has been identified and disclosure made, the conflicted director is not entitled to receive any further board materials in respect of the transaction for which the conflict has been identified.

Third, the Committee recommends that section 56 of the Draft Act be amended to increase the exceptions as to when section 56 does not apply or when a director does not have a disclosable interest. For example, none of the rules in Division 5 of Part 5 appear to make an exception for a contract or transaction that is material to a director, but does not come before the board for consideration or approval. In sophisticated organizations, many important contracts are "operational" and dealt with entirely by

management. The Committee recommends that section 56 be revised to apply only to contracts and transactions that come before the consideration of the directors.

Fourth, the Committee recommends that the Ministry look to the BC *Business Corporations Act* for other related provisions to incorporate into the Draft Act. While we understand the intent has been to specifically not incorporate many of the *Business Corporations Act*'s technical provisions on this issue, we think that some of these technical provisions bring clarity to the application of these provisions. For example, how should the directors proceed if they are all interested?

Director Liability

Section 59 of the Draft Act provides that directors are jointly and severally liable if they vote for a resolution that authorizes an illegal distribution of funds. We agree with this approach, namely that unlike the BC *Business Corporations Act*, society directors don't have to record an official "dissent" to avoid legal liability and that it is enough for the directors to vote against the resolution. However, we anticipate that most societies do not currently record the individual votes of each director and we strongly recommend more education of societies and directors on this issue.

Directors' Indemnification

Section 61 of the Draft Act permits societies to indemnify their directors. We are very supportive of the proposal that societies will not have to obtain court approval before they indemnify directors. The Committee recommends, however, that section 61 be

expanded to include (similarly to its counterpart in section 162 of the BC *Business Corporations Act*) the ability to advance funds to directors prior to a final determination of the matter at hand. In addition, we note that sections 61(1) and (2) of the Draft Act are confusingly similar; the drafters of the Draft Act may wish to consider further amendments to clarify the relationship between sections 61(1) and (2).

Senior Managers

The new section 62 of the Draft Act relating to "senior managers" provoked much discussion within the Committee, particularly regarding who was caught by this new term "senior managers". The Committee concluded that while these requirements would capture many senior staff, they are unlikely to capture officers who often don't fill such policy-making functions. Is this the intent of section 62? For example, since the Draft Act is silent on the concept of officers (which is a term used in analogous legislation elsewhere), consider whether confusion is created as to the distinction - if any - between officers and senior managers. The Committee recommends that section 62 be amended to clarify the relationship between officers, senior staff and "senior managers".

The Committee has a concern that the application of fiduciary duties to employees or volunteers has not been well thought out, particularly the interaction of fiduciary duty and employment law/duties.

First, we are concerned about the scope of obligations imposed on senior managers, including the imposition of fiduciary duties on non-fiduciary staff. Employees have duties to the organization under employment law and by contract. Some members of the Committee had significant concerns about duplicating or adding additional fiduciary duties under the Draft Act. Employees are not fiduciaries and should not be held to this highest standard because employees report to, and are subject to, directors who are ultimately responsible.

Second, a number of these legal obligations do not apply seamlessly to senior managers who are staff. For example, section 62(3) of the Draft Act says that an individual who is not qualified under section 43 of the Draft Act is not qualified to be a senior manager. Should such an individual cease to be qualified, what are the implications for his or her employment contract? Applying the same qualifications to a "senior manager" that apply to a director is a problem, particularly the obligation to resign if ceasing to qualify. When applied to senior managers, these qualifications may result in serious repercussions for a society under employment law. For example, if a senior manager goes bankrupt and "must promptly resign" (from section 42(2) of the Draft Act) this may be a constructive dismissal entitling the senior manager to severance from the society. As a result of these pressing problems, the Committee recommends that section 62(3) be deleted.

Finally, the definition of "senior manager" in section 1 of the Draft Act is too broad and catches too deeply down the chain of employees or volunteers. The Committee

recommends that the definition of “senior manager” be revised to apply only to those “senior managers” who are appointed by the board and not those that are hired by other managers. This reflects best practices, where the society board hires, for example, the Chief Executive Officer (the “CEO”) and then the CEO hires secondary staff and the CEO is subsequently responsible for secondary staff.

PART 6 - MEMBERS AND MEETINGS

Division 1 Membership

Section 64(1) of the Draft Act simply says a “person” may be admitted as a society member in accordance with the bylaws but the Draft Act does not contain a definition of “person”. This is a gap. As a result, the Committee recommends that a definition of “person” be added to section 64 to clarify the ability of partnerships and incorporated entities to be members of a society. Similarly, the Committee recommends that section 64 be expanded to include that a member’s membership is terminated upon dissolution of a corporation or partnership.

In respect of the provisions at section 67 of the Draft Act relating to discipline and expulsion, we are unsure as to how subsections (1) and (2) will be read together. In particular, subsection 67(1) allows societies to provide in their by-laws for discipline or expulsion or both, but seems to imply that societies may choose to not provide for this event at all or to choose a means of doing so that does not involve member approval; however, the implication of subsection 67(2) is that member approval would still be required (and, in fact, that a special resolution would be required unless a society’s by-

laws expressly provided otherwise). The Committee suggests revisiting the drafting of this section to clarify that the societies may opt to deviate from the default rule in the Draft Act in whatever way they choose.

Division 2 General Meetings and Annual Reports

Section 74 of the Draft Act provides for notice of general meetings. We suggest that the Ministry consider the interplay between section 74, which provides for notices of meetings to be "sent" to each member, and section 28 of the Draft Act, which describes how notices may be "sent" and whether this provides for sufficient flexibility for the delivery of meeting notices. We draw the Ministry's attention to section 63 of the Canada Not-for-profit Corporations Regulations (SOR/2011-223) under the *Canada Not-for-profit Corporations Act* (S.C. 2009, c. 23), which contains other options for a society to delivery of notices of meetings.[7]

Section 75 of the Draft Act requires the precise text of a special resolution to be circulated in advance. The Act (similar to analogous provisions in other legislation) only requires notice to be provided that specifies the intent to propose the resolution as a special resolution but does not require the verbatim text to be circulated. We wonder whether this was an intentional amendment and suggest that the current notice requirements may be preferable.

[7] See http://laws-lois.justice.gc.ca/eng/regulations/sor-2011-223/index.html.

Section 78 of the Draft Act permits society members to submit a proposal to a society. The threshold of 5% of voting society members is relatively low and we would prefer to have it match the 10% threshold for requisitioning a meeting under section 72 of the Draft Act. The most concerning part of this section 78, however, is the inability of the board to block proposals that are clearly frivolous, vexatious, abusive, defamatory, illegal or offensive. While no liability can result to the society, it could be embarrassing for a society to have to consider a ludicrous proposal merely because a small portion of the membership wishes to do so. Section 78 would also allow for issues previously decided at a society general meeting to get back on the agenda with a small number of members requesting that the proposal be brought forward. The Committee strongly recommends that a provision be added to section 78 so that board has the right to deny these frivolous, vexatious or offensive proposals from members.

Division 3 Voting

Section 81(2) of the Draft Act, which provides for each voting member to have one vote, and section 81(3), which provides for bylaws to authorize delegate or indirect voting, may be inconsistent with one another. The Committee recommends that the Ministry consider clarifying that section 81(2) is subject to (3) and (4). In addition, the Committee recommends that the Ministry consider whether the concept of delegate voting is, in principle, consistent with the concept of each voting member having the right to vote.

Section 82 of the Draft Act permits proxy holders. The Committee recommends that section 82(2) be amended to allow societies to adopt additional proxy requirements by bylaw, in addition to the minimum requirements contained in the Draft Act (for example, limitations on the number of proxies one may hold and in prescribed form).

PART 7 - CORPORATE REORGANIZATIONS

Section 88 of the Draft Act denies a society a right to amalgamate out of BC. The Draft Act should provide for amalgamation out of BC. The regulations could adequately protect against amalgamation into jurisdictions that do not provide equivalent public protections in terms of the "asset lock".

Similarly, section 94 of the Draft Act denies a society the right to continue out of BC. The Draft Act should provide for continuance out of BC. The regulations could adequately protect against continuance into jurisdictions that do not provide equivalent public protections in terms of the "asset lock".

Section 95(1) of the Draft Act permits a society to propose an arrangement for court approval and appears to be an alternate means of achieving certain corporate outcomes that are provided for elsewhere in the Draft Act. However, this section is prefaced with the clause "*Subject to this Act*", which creates an inherent consistency between that section and the provisions elsewhere in the Draft Act dealing with the applicable corporate procedure, i.e. alteration of the constitution. The Committee suggests that the appropriate introductory term for Section 95 would instead be "Despite

anything in this Act...” so as to clarify that it is an alternate route of achieving the same outcome.

PART 8 - REMEDIES

The Committee generally supports the modernization of the legislation through inclusion in the Draft Act of additional remedies for aggrieved individuals. We observe, however, that the “standard” remedies included in the Draft Act (i.e. the oppression remedies (section 98), derivative actions (section 100) and compliance orders (section 101)) are analogous to those found in the for-profit sector and, indeed, appear to be in a form consistent with similar provisions in the BC *Business Corporations Act*.

The Committee has concerns about such a broad inclusion of remedies without modification to reflect the unique nature of the not-for-profit sector that often involves the absence of a financial interest in a society. The Committee is concerned, for example, as to how a member may be found to have been “oppressed” and notes that even the *Canada Not-for-profit Corporation Act*, which includes such a remedy, has narrowed its application in certain contexts (in section 253) and that the proposed Ontario not-for-profit legislation doesn’t even include such a remedy. The Committee recommends that further consideration be given to the appropriate use of the oppression remedy in the Draft Act and what limits should be placed on its availability.

The Committee has serious reservations about the proposed new section 99 of the Draft Act on possible complaints brought by the public at large, which the annotations accompanying this section admit are “unique in corporate law”. Particularly, subsection 99(1)(b) implies and seems to create a statutory new duty for all societies - that all societies have a duty to act in the public interest. While certainly a subset of societies might be expected to have a public interest component, that would not be true for 100% of the non-share capital entities which would utilize this governance regime. The annotation itself concedes that this expectation is not necessarily relevant for all societies.

Many societies (including member-funded societies) should only be required to act in the best interests of their members, and in accordance with their stated purposes. To introduce a new statutory duty for all such entities to also act in the public interest, and subject them to the vulnerability of complaints from the general public with whom they have no interaction, may be over-reaching and inappropriate for a governance statute that must by necessity accommodate all types of non-share capital entities which may be governed by it.

Even where societies may conduct activities with a public interest component (whether or not they are publicly funded), such a unique statutory duty and complaint procedure would be inconsistent with their expectations of governance. While the annotation for section 99 suggests that courts could effectively control improper usage of this remedy, the Committee believes that the real-world potential for effective abuse through

nuisance court proceedings (even if eventually unsuccessful) is quite high. This is particularly the case for societies such as faith-based entities and those involved in admittedly controversial social issues. The cost and time to initially defend and deal with even frivolous actions may materially affect the viability of such an entity.

To remedy these problems, the range of possible changes includes:

- complete removal of section 99, to be consistent with the *Canada Not-for-profit Corporations Act* and other non-profit governance regimes in Canada;
- simple deletion of section 99(1)(b); or
- specify under Part 12 of the Draft Act that section 99 does not apply to member-funded societies (and perhaps other entities appropriate for exemption).

The Committee recommends strongly that at the very least section 99(1)(b) be deleted, but even if section 99(1)(b) were deleted, the Committee would still remain concerned about the potential for abuse through allegations of "unlawful" activity brought under section 99(1)(a) in advancement of a social policy debate, for example a society which happens to operate an abortion clinic.

Therefore, in addition, the Committee recommends that consideration be given to the underlying rationale for the creation of this entire section, and that in light of potential abuse and the uniqueness of this concept in governance statutes, consideration be given to whether the public interest is adequately addressed in other ways without the need to invent a new statutory duty as part of this reform process.

As a result of the foregoing, if the Ministry accepts our concerns, the Committee recommends that section 99 be removed in its entirety.

PART 9 - AUDIT

The Committee is pleased that audits will not be required by the Draft Act. But we are concerned about the ability for the Ministry to effectively reverse this position by regulation as permitted by section 107(1)(a). If such regulation were only to apply to those societies that are current reporting societies, such as those in the health care industry, then this is not a concern. The Committee looks forward to the regulations to clarify this intent.

We are pleased at the removal of the reporting society designation, but query why the Ministry is effectively grandfathering current reporting societies by requiring them to transition with the reporting society provisions, which mandate annual audit.

PART 10 - LIQUIDATION, DISSOLUTION AND RESTORATION

Section 156(3) of the Draft Act says that a restoration application may not be submitted for filing with the registrar for a dissolved society more than 10 years after the date on which the society was dissolved. The Ministry may want to consider increasing the time limit for administrative restoration beyond 10 years. Restorations after 15 to 20 years

are, unfortunately, not uncommon, and do not necessarily present legal complexities beyond more short-term restorations.

PART 11 - EXTRAPROVINCIAL NON-SHARE CORPORATIONS

The Committee generally supports the clarification of the requirement for societies to extra-provincially register in British Columbia and agrees that it is logical to look to the BC *Business Corporations Act* for analogous language. Also, the Committee commends the clarification of the circumstances in which an extra-provincial non-share corporation is deemed to be carrying on activities in BC.

We take this opportunity, however, to note the burden that this will impose on most such corporations who most likely have not yet registered in BC. While we recognize that a two year transition period has been suggested to allow such organizations time to complete their registration, such a requirement will also have an accompanying one-time registration fee and, thereafter, annual maintenance fees. We hope that the amounts of these fees will be determined taking into consideration the limited funds had by many not-for-profit organizations.

PART 12 - SPECIAL SOCIETIES - MEMBER FUNDED SOCIETIES

The Committee's submissions on this part are limited to the provisions relating to member funded societies.

The Draft Act includes a number of provisions that will compel societies to be more accountable and transparent to the general public. These include a right for a member of the public to inspect annual financial statements and the required disclosure of remuneration above a certain threshold paid to directors, officers, employees and contractors. In addition, the Draft Act provides an "asset lock" which prevents a society from distributing assets on dissolution to its members or other parties (with very limited exceptions).

The Draft Act also creates a new special category in sections 187 to 197, the "member funded society". A society that qualifies as a member funded society is exempt from certain provisions of the Act that are otherwise applicable. The policy rationale is that if a society is funded primarily by its members and receives little to no "public funding", then it should not be publicly accountable to the same degree as those that do. Since the public accountability provisions are relatively onerous, it is likely that the member funded society designation will be sought by societies who can qualify as a means to avoid those requirements.

As we advised in our Section's 2012 submission:

> 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.[8]

In our review of the Draft Act, we continue to have an overall lingering concern about using a corporate governance statute to establish and enforce public accountability for the majority of societies.

The Committee observes that, unless one is familiar with member funded societies and their exemptions, there is no indication throughout the majority of the Draft Act that they exist and have different rules applying. To clarify this, the Committee recommends that in each provision in the Draft Act where member funded societies are exempt, a reference be made, "subject to Part 12" or similar wording. This reference will help users of the Act know that there are exemptions that may apply to them.

As noted earlier in these submissions, to be consistent, the Committee recommends that the definition of "member funded society" be taken out of section 187 and placed in

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section 1 with other definitions. In this way, it will help users of the Act to know that this kind of society is a possibility.

The definitions in section 187 are too broad and cast too wide a net, disqualifying certain entities that are fundamentally private organizations and should therefore be member funded societies. For example, “public donations or gifts” are defined to mean “donations or gifts made by members of the public other than donations or gifts that a society solicits or receives from its voting members, directors, senior managers or employees”. The Committee recommends that “public donations or gifts” be amended to:

- exclude gifts from all members, not just voting members;
- exclude gifts from spouses and family members of members, directors as is done in section 2(5.1)(a) of the *Canada Not-for-profit Corporations Act*;
- not include gifts solicited, only those received as is done in the *Canada Not-for-profit Corporations Act*;
- expressly exclude donations from other organizations such as corporations; and
- limit to gifts from individuals, otherwise the definition would improperly catch sponsorships and private grants for instance.

To be consistent with the above discussion regarding the definition of “public donations or gifts”, the Committee recommends that section 188(2)(ii)(A) of the Draft Act, which reads “solicits public donations or gifts”, be deleted.

Regarding section 188(2)(ii)(B) of the Draft Act, we hope that the threshold set by regulation for both public donations and public funding will be significantly higher than the $10,000 provided for in the *Canada Not-for-profit Corporations Act*.[9] To that end, the Committee recommends a funding threshold of $75,000 to $100,000.

Section 188(2)(iv) of the Draft Act disqualifying a society with a charitable purpose is a major concern to the Section. The Draft Act already disqualifies registered charities (which must have exclusively charitable purposes). Adding to that, in section 188(2)(iv), is a separate disqualifier for a society having even a single charitable purpose. This is unnecessary and overbroad. Almost every society has a purpose that could be interpreted as charitable in nature, such as educating members, providing assistance to disadvantaged members, community benefit. This is particularly true for professional associations, which are the "poster children" for member funded societies. If such charitable purposes disqualifies them from being registered as member funded societies, then very few entities would qualify and the whole category becomes meaningless. If section 188(2)(iv) becomes law, then an entity that wishes to avoid the designation will be forced to alter the entity's purposes and remove any educational component; if that happens, then any benefit to the public is lost. As a result, the Committee recommends that section 188(2)(iv) be deleted.

A member funded society must include a prescribed statement in its constitution. A member funded society can choose to become a regular society at any time and must

[9] See section 16(d) of the Canada Not-for-profit Corporations Regulations (SOR/2011-223) (http://laws.justice.gc.ca/eng/regulations/SOR-2011-223/page-3.html#h-7).

do so if it ceases to qualify. Other than on incorporation or transition to the new *Societies Act*, a regular society can only become a member funded society by court order as set out in section 190(2) of the Draft Act. This appears to be overly restrictive. The Committee recommends that the section 190 be revised to allow a society to become a member funded society if it qualifies and if its members approve a special resolution to do so. We think that if that is done, there is no need for the court to act as guardian of the public interest.

Lastly, the Committee recommends that the Draft Act be amended to require public donations above the prescribed threshold in each of two consecutive years to disqualify from member funded society. By making this change, it will permit member funded societies to receive one time grants without losing their status.

PART 13 - GENERAL

The Committee has no submissions on this Part.

PART 14 - OFFENCES AND FINES

Section 216(3) of the Draft Act states that an individual who becomes or acts as a senior manager of a society and who, is not qualified to be a senior manager commits an offence. The Committee is concerned of the employment law implications of making it an offense (with a significant maximum $2,000 fine in section 219(1)(b) of the Draft

Act) for a senior management to continue in his or her job once he or she has declared bankruptcy. This relates to the concern stated above at applying fiduciary duties to employees.

The Committee approves of the three year limitation period in section 221 of the Draft Act.

PART 15 - REGULATIONS

The Committee has no submissions on this Part.

PART 16 - TRANSITIONAL PROVISIONS

In recent years across Canada, whenever a governance transition occurred from an "Old Regime" to a "New Regime", that was usually accomplished by a process where transition was a distinct watershed event between the regimes. This occurred in the mid-2000's when share capital entities transitioned from the BC *Company Act* to the *Business Corporations Act*, and more recently when all federal non-share capital entities transitioned from the *Canada Corporations Act* Part II to the *Canada Not-for-profit Corporations Act*.

Under the "watershed" approach, once a new statute comes into force, all newly-created entities must be under the New Regime and all pre-existing entities continue to routinely exist and operate under the Old Regime, but are "frozen" in terms of

fundamental change. Each pre-existing entity is required to perform a transition event by a prescribed deadline, usually 2-3 years. Once the transition event is performed, then and only then do the rules of the New Regime apply to the entity, going forward. If a pre-existing entity fails to transition by the deadline, it is dissolved.

This process moving from Old Regime to New Regime provided certainty and simplicity for the entities as to what rules apply when, and provides a clear cut-off event for the changeover.

The Committee notes that the pending Ontario *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15 would take a different approach.[10] The Ontario *Not-for-Profit Corporations Act, 2010* immediately halts the application of the old rules and instead has the new rules apply to all entities (even pre-existing), with the transition activity being more administrative in nature (i.e. clarifying and re-stating the text of the constating documents). We understand that some confusion and concern over this Ontario approach has been part of the reason for delay in implementing this legislation, and the need for some technical statutory amendments, including some attempted modification of and clarification of the Ontario transition arrangements.

Part 16 of the Draft Act seems to be a hybrid between the *Canada Not-for-profit Corporations Act* transition process and the automatic application process proposed for Ontario. The result of Part 16 transition in BC may be an unduly complex and confusing

[10] See http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_10n15_e.htm.

transition plan which immediately places all pre-existing entities partly in (but also partly out of) the new set of rules. The exceptions in section 238 of the Draft Act are quite material, and would require unsophisticated societies to learn and remember which selected rules would now apply in the interim pending transition, and which do not.

The Committee believes the hybrid approach proposed in Part 16 may be unduly complex and would be confusing for the vast majority of societies. From our experience, we expect that these societies will probably effect their transition without the benefit of professional advice or intensive reading of the details of Part 16. In support of our recommendations, we can show how one, of many possible examples, for confusion and error will occur. Our example focuses on the “special resolution”.

Sections 233(1) and 234(c) of the Draft Act specify that as part of transition, certain items require approval by “special resolution”. Pre-existing entities currently believe and understand that such a resolution is 75% approval, under existing rules and may not appreciate that, even prior to transition, they are governed by all the “new rules” (with certain exceptions) under which the threshold approval is a different level of majority approval. Add to that, existing poorly drafted bylaws (which unfortunately are common) that do not refer to a statutory definition but simply mandate that certain matters must obtain “75% approval”. The result is confusion and the real probability of mistakes being made and then the attendant cost in time and money to fix these mistakes.

Choosing between the absolute “watershed” approach and the absolute “automatic application” approach led to no clear answer in our Committee deliberations. However, the substantive governance changes in Part 16 are quite significant, and we recognize that societies should be afforded an opportunity to utilize the flexibility of the new regime and “provide otherwise” in its bylaws, at their leisure during the transition period. As a result, unless there are compelling public policy reasons for immediate automatic application, the Committee recommends that Part 16 be recrafted to be more consistent with the transition structure adopted in the *Canada Not-for-profit Corporations Act*, utilizing the principles outlined above. Pre-existing societies would continue under the old Act rules unless and until a transition event occurs. The rules of the new BC *Societies Act* would apply to newly-created entities, but would only apply to a pre-existing entity from and after the date when it has performed its “watershed” transition event. While this results in a risk of some societies being inadvertently dissolved for failure to transition by the deadline, the benefits of clarity from the watershed approach could outweigh those risks when combined with strong educational outreach.

CONCLUSION

We would be pleased to discuss our submissions further with the Ministry, either in person or in writing, in order to provide any clarification or additional information that may be of assistance to the Ministry as it undertakes this important and needed modernization of the Act.

Communications in this regard can be directed to:

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