

Society Act Review Discussion Paper

December 2011



Ministry of
Finance

Introduction and Request for Comments

The *Society Act* is the statute that provides the legal framework for the formation and governance of societies. Societies, which are often referred to as not-for-profits or non-profits, are corporations that are organized primarily for social purposes and prohibited from distributing profits to their members. There are over 26,000 societies registered in the province, ranging in size from small community-based organizations to large charitable foundations. Societies are engaged in a wide variety of endeavours. They are increasingly involved in providing social services, including health services and housing, and are often the entity of choice for community groups, such as sports and cultural organizations.

Although the *Society Act* has occasionally been amended (most notably in 2004 to streamline filing requirements for societies), it has not been substantively revised since 1977. In contrast, other corporate statutes, such as the *Business Corporations Act*, which governs companies, and the *Cooperative Association Act*, which governs cooperatives, have been completely rewritten within the last 12 years. This leaves societies at a comparative disadvantage, in that their governing framework does not recognize or fully utilize newer technological processes, such as electronic filing and storage of documents, or modern corporate law, such as provisions respecting indemnification of directors and streamlined restoration and amalgamation procedures.

In December 2009, the Ministry of Finance commenced a review of the *Society Act* through the publication of a Deputy Minister's letter to stakeholders asking for public input. The stated purpose of this initial *Society Act* consultation was to identify and address any legislative obstacles that may be preventing societies from functioning fully and efficiently, while at the same time ensuring the continued protection of the public interest. Stakeholders were specifically asked to provide information about any problems, gaps, inconsistencies or ambiguities in the *Society Act* and any reforms they would like to see considered. As well, two major framework issues were identified for consideration. The first concerned the nature of the corporate model most appropriate for societies and whether a more sophisticated business law framework should be adopted, while the second concerned the extent to which the Act should contain regulatory provisions or other rules that constrain the operation of societies in order to protect the public interest.

The December 2009 request for input resulted in submissions from over 200 stakeholders, ranging from small societies that exist solely for the benefit of their members in rural and urban communities across the province, to broad coalitions of large, sophisticated public-benefit charities and foundations. The extent and quality of the submissions, and the spectrum of issues raised, reflect the importance of this Act to communities and individuals in the province, as well as the need for reforms. The breadth of response also highlights the challenges in

designing legislation to meet the needs of such a wide diversity of organizations using the Act.

Many of the persons providing comments stressed the unique nature of societies and drew attention to the features that distinguish them from for-profit entities. The most common submission raised concerns about increasing complexity and regulation in an area populated with ever-changing and often volunteer boards that may lack the time or expertise to learn new corporate governance requirements. For most of the smaller societies that provided comments, the current Act, while requiring some adjustments, is basically working well.

Another sizable number of submissions, often from or representing larger, more sophisticated organizations and from the legal community, focused on the importance of having in place a flexible, modern corporate framework to ensure societies can continue to grow and take their place alongside other corporate entities as major contributors to society and the economy of the province.

On the second specific framework issue raised in the Deputy Minister's request for input, the submissions were largely consistent, with almost all recommending against the adoption of burdensome regulatory provisions in the new *Society Act*. Many felt that further regulatory requirements were unnecessary, given that many societies are already separately regulated by funding organizations or by government under charitable tax status rules, and would be burdensome, particularly for smaller organizations. However, most submissions specifically commenting on the issue of accountability in societies appeared to recognize that an appropriate level of regulation can be positive because it notifies the public that the work of the society is legitimate and its management is responsible.

Expressly or by implication, many submissions supported reduced regulatory requirements by advocating the adoption of modern business corporate law provisions, because that legislation generally imposes fewer regulatory requirements on business corporations. On the other hand, some submissions supported legislative reforms to promote greater accountability to members, the public or government, with their concerns often resulting from specific experiences with one or more societies. Improvements to governance and member remedies were also commonly raised.

This Discussion Paper represents the next stage of the consultation process. In response to the input already obtained, the proposals found in this paper attempt to balance the desire for a modern legal framework with the need for a relatively simple, accessible set of applicable laws. As well, in light of the special role played, and status and benefits enjoyed, by societies, we have tried to balance societies' need for flexibility with the broader public concern about accountability and integrity.

The Discussion Paper is intended to provide interested parties with the opportunity to comment on a possible direction for reforms to the *Society Act*.

The proposals in the paper do not represent government policy. Rather, the paper is intended to elicit discussion. Legislation to amend (or replace) the Act is targeted for 2013 at the earliest.

The body of the Discussion Paper contains a list of proposed amendments and a discussion on the reason underlying each proposal. For the convenience of stakeholders, the proposals are summarized in Appendix A, and a summary of stakeholder submissions is set out in Appendix B.

We are indebted to the comprehensive and well-researched 2008 *Report on Proposals for a New Society Act* by the British Columbia Law Institute (BCLI). Although the overall approach to reforming the Act that is recommended in this Discussion Paper differs from the BCLI's model, many of our specific proposals echo those of the BCLI, and all have benefited from its thorough analysis.

Please direct your comments, by **April 30, 2012**, in electronic form to: fcsp@gov.bc.ca.

If you wish to send comments in paper format, please direct them to:

Financial and Corporate Sector Policy Branch
Ministry of Finance
PO Box 9418 Stn Prov Govt
Victoria BC V8W 9V1

Please note that the Ministry will be sharing comments it receives with other branches of government, including BC Registry Services, responsible for administration of the Corporate Registry. Even where confidentiality is requested, freedom of information legislation may require that responses be made available to members of the public who request access.

Thank you in advance for your participation in this review.

Fundamental and unique nature of societies

What distinguishes societies from other types of corporations is the fact that they are created to fulfill purposes that go beyond the generation of wealth for their members. Even though they may make incidental profits, they are prohibited from paying dividends or any other amounts to their members during the society's existence. Even on dissolution, the Act prohibits a society with a "charitable purpose" from distributing remaining assets to its members, and instead requires that the assets be distributed to other entities with charitable purposes.

Historically, societies have been subject to corporate law frameworks that differ from those applicable to for-profit entities such as companies and cooperative associations. Since societies are not intended to make profits for their members, there is less need for complex rules relating to the issuance of shares, the payment of dividends or other more detailed processes that apply to for-profit businesses. The *Society Act* is therefore simpler, more straightforward and considerably shorter than the *Business Corporations Act* or the *Cooperative Association Act*. However, since many societies receive funding from the public, or obtain charitable status, they have traditionally been subject to a higher degree of public oversight and regulation than the other corporate entities. For example, societies are required to have a minimum number of directors (three) and members (five), and to make their financial statements available to the public, and are subject to Ministerial investigation if they act in a manner contrary to the public interest.

Public policy objectives and principles respecting the corporate governance framework for societies

The proposals in this Discussion Paper are founded upon certain understandings about the fundamental nature of societies and have been evaluated in light of values and principles that characterize societies. In contrast to business corporation law which is primarily about *private rights*, the *Society Act* is framework law that is focused on promoting *community interests*. Societies contribute in a myriad of ways to the province's rich and robust social fabric, and their corporate law should facilitate their operations so that their energies can be devoted to the pursuit of their community goals.

This discussion paper proposes that the primary objective of a new corporate law framework for societies in British Columbia should be to ensure societies have the tools they need to succeed and continue to make their significant and valuable contribution to BC communities, families and individuals.

We suggest that this proposed primary objective has a number of underlying component principles, including the following:

- Flexibility: Societies need a modern corporate law framework to enable them to efficiently adapt to meet changing needs and circumstances and develop new ways of administering themselves, so that they can focus more energy on achieving their social purposes. For example, wherever feasible, societies should be able to file documents with the Corporate Registry using electronic means.
- Public accountability: Societies have a special role to play in society, which justifies their separate treatment under their own statute. Framework legislation for societies should ensure a high degree of public accountability, so as to maintain and enhance public confidence in this type of entity. Protection of the public interest is ultimately in the interests of societies, given that many of them rely at least in part on funding and other types of support from the public.
- Member protection: As well, the legislation should ensure protection of the rights of members of societies, in particular the fundamental right to set the direction of the society. Members must have access to information, and the ability to collectively act to maintain control. Going to court may be a last resort, but modern legal remedies should be available.
- Simple, accessible rules: Not all societies have access to legal advice, and many are small and run entirely by volunteers. Complex legal rules and requirements should be avoided if possible. Ideally, the framework law applicable to societies should be found in one place – that is, although it may mean a larger *Society Act*, it is preferable to have one comprehensive statute, rather than incorporating other statutes by reference. Finally, avoiding unnecessary transition costs to societies caused by the imposition of a legislative framework significantly different from the current *Society Act* should be considered in evaluating any proposed amendments.

The principles underlying societies' ability to succeed will often compete with each other. For example, flexible corporate laws, such as giving directors more discretion over corporate processes, may not be consistent with public accountability or member protection. A simpler framework, such as one that does not deal with sophisticated corporate re-organizations, may not recognize the complex realities of some large, multi-faceted societies. Protection of public and member interests, such as public access to financial statements and the holding of meetings in the province, may increase costs, or decrease the society's autonomy. These tensions will have to be balanced and their resolution will inevitably lead to compromise.

In addition to the overall goal of revising the *Society Act* for the benefit of societies themselves, we suggest there are two secondary objectives:

- Harmonization and consistency: Harmonization of corporate law between the sectors, and indeed with other jurisdictions, is desirable unless there is a legitimate reason for a distinction. There are economies of scale to be achieved by providing similar rules and procedures for all corporations. As well, it is appropriate for like situations to be treated in a like way. For example, if some types of corporations are subject to certain requirements on the basis of attributes that are also shared by societies, then those requirements should apply to societies as well – again, unless there are good reasons for a departure.
- Minimization of regulation: Unnecessary government intervention in private organizations and excessive regulation should be avoided. A corporate law framework should be just that – a framework. It is not intended to provide a complete regulatory code. Societies should only be “regulated” to the extent necessary to meet the objectives of public accountability and member protection.

The foregoing is not intended to be an exhaustive list of considerations that could be relevant to a review of the legislation governing societies. Rather, these objectives and principles are set out in an attempt to be transparent respecting the underlying assumptions upon which the proposals contained in this Discussion Paper are based.

Proposed Significant Policy Changes

Two fundamental framework issues regarding the *Society Act* were raised in the December 2009 request for public input. The determination of an approach to these issues is essential to the resolution of a number of subsidiary issues.

The first framework issue concerns the nature of the corporate model most appropriate for societies and whether a more comprehensive, and less prescriptive, business law framework should be adopted. The lack of up-to-date corporate governance rules and procedures has been identified as a barrier to the efficient functioning of societies.

The second framework issue concerns the extent to which the *Society Act* should contain regulatory provisions or other rules that constrain the operation of societies. Most modern corporate statutes are “non-regulatory” in nature – that is, they merely provide a framework for incorporation, governance and dissolution, and contain few, if any, provisions that purport to regulate or control the composition or external activities of the corporations created. Modern business corporation legislation has replaced government oversight with broad and flexible self-enforcement and administrative tools, including new court actions and remedies.

Although these issues are discussed separately in this paper, in many cases, the two fundamental framework issues can be combined into a single one: the question becomes whether some – or all – societies should, because of their special purposes or activities, have certain constraints placed upon them that do not apply to business entities. For example, the requirement that societies have three directors can be seen either as outdated corporate law, or as an extra “regulatory control” that is appropriate for at least some types of societies.

I. First Framework Issue: CORPORATE LAW PROVISIONS

The *Society Act* was last revised in 1977, and is based on the 1973 *Company Act* that was superseded by the *Business Corporations Act* (BCA) in 2004. The BCA contains many innovations that increase flexibility and allow for greater efficiencies for companies. Many respondents to the initial *Society Act* consultation cited difficulties in applying outdated corporate law provisions – or in some cases, the lack of any corporate law provisions – as a major flaw with the current Act. Many supported the British Columbia Law Institute (BCLI)’s 2008 report that essentially recommended general adoption of the BCA framework for societies.

Practically, there appear to be two main options respecting the appropriate corporate law framework for societies. The two approaches reflect different starting points in revising the *Society Act*:

- Adopt the entire BCA framework. This approach, consistent with that proposed by the BCLI, would give societies a structural framework almost identical to that of companies. Essentially, the BCA would be redrafted to make it applicable to societies. This would enable societies to access a vast body of corporate law, procedure and expertise that has been developed in and for the for-profit sector.
- Adopt only certain provisions of the BCA. Under this approach, the *Society Act* would continue to provide a separate and distinct corpus of corporate law for not-for-profits, with modernization and flexibility written in as appropriate. Essentially, the *Society Act* would be re-written and expanded to include provisions of the BCA.

For the most part, it would be desirable for the *Society Act* to adopt the innovations and flexibility of the BCA. The BCA is a new statute, and incorporates some of the most modern corporate law in the country. Just because a corporation is not-for-profit does not mean it should be hampered, and many of the BCA corporate law provisions provide the type of flexibility that would, in particular, allow larger, more sophisticated societies to flourish. Consistency between the different corporate legal frameworks is also desirable.

However, it is not proposed that the new *Society Act* be entirely modelled after the BCA. The BCA is too complex and detailed to be adopted generally for societies' use. Many societies are community-based "grassroots" organizations that do not have access to legal advice, and instead rely entirely on volunteer boards of directors for their administration. It is important that their needs also be met. Nor is the *Cooperative Association Act*, which generally deals with profit-making and distributing entities formed on the basis of cooperative principles, an appropriate model for societies.

Instead it is proposed that the current *Society Act* provisions, which are fairly straightforward and familiar to users, be amended to incorporate more of the flexibility and innovation found in the BCA.

I. First Framework Proposal: Adopt, into the current *Society Act* framework, select provisions of the BCA

Details of this general proposal are set out below.

A. Adopt modern corporate law provisions

A complete redrafting of the Act, crafted from the current *Society Act*, is envisioned. This will provide an opportunity to update and clarify legal language and more clearly set out procedures to better track, where appropriate, the newer provisions of BCA. As well, it is proposed to adopt the following specific provisions of modern corporate law:

Incorporation and capacity

- 1) Allow incorporation by one person: Currently, five subscribers are required to form a society. While this is consistent with the collective nature of a “society”, many other corporate statutes, and the not-for-profit statutes of many other jurisdictions, now allow for a single incorporator. Although we expect that most societies will, by their nature, have more than one member, removal of the five person rule would simplify incorporation, particularly of subsidiaries of other societies.
- 2) Allow electronic filing of documents at the Corporate Registry: Ideally, all corporate procedures for societies would be available electronically. However, as Registry computer system changes needed to accommodate electronic filings can be expensive, and some corporate filings (e.g., amalgamations) happen so rarely in societies, it may not be practical to incur the programming costs that would enable all transactions to be made by electronic means. The Corporate Registry now allows electronic filing of annual reports, and it is proposed that the new Act would add to this by allowing for electronic incorporation, including the electronic filing of constitutions and bylaws. It is intended that paper filings would continue to be available as an option. However, it is costly to run both systems simultaneously and, over time, paper-based filing may be phased out for certain transactions.
- 3) Recognize pre-incorporation contracts: Pre-incorporation contract provisions would establish a set of rules under which binding contracts could be entered into, by those who plan to create a society, before the society actually comes into existence. Under such provisions, the person who purports to act on behalf of the yet-to-be-incorporated society warrants that the society will be incorporated in a reasonable time and will adopt the contract. The provisions would also include court oversight in terms of apportioning benefits and obligations should the pre-incorporation contract not be ultimately adopted by the society. Allowed under most modern corporate statutes, the ability to enter pre-incorporation contracts could be useful during a society’s formative stage.
- 4) Remove the doctrine of “ultra vires”: This doctrine stems from the days when corporations were specially formed by government charter to engage in certain activities. Roughly stated, the doctrine provides that if a society acts for a purpose not set out in its constitution, its actions – including its contracts with third parties – are legally invalid. Today, corporate statutes generally give corporations the rights and powers of natural persons – while corporations are still prohibited from acting outside of the scope set out in their constitutional documents, their actions are no longer invalid simply because they do so. However, the wording of the current *Society Act* raises concerns about whether the doctrine still exists for societies. Removing the

doctrine of *ultra vires* for societies would alleviate unnecessary uncertainty for persons dealing with societies, and help societies function more efficiently in the modern economy.

Resolutions and records

- 5) Allow special resolutions to proceed by $\frac{2}{3}$ vote: Special resolutions are required for major changes and other relatively important decisions made by a society. For example, a special resolution is required to amend a society's constitution or bylaws, to amalgamate with another society or to remove a director from office during his or her term. Currently, the Act requires that a special resolution be passed by at least $\frac{3}{4}$ of the votes cast by members entitled to vote. Allowing special resolutions to be passed by a slightly lower threshold would facilitate decision-making, and is consistent with other modern corporate legislation. For continuity, it is proposed that pre-existing societies would require a $\frac{3}{4}$ vote in order to transition to the new, lower threshold.
- 6) Remove ability to adopt unalterable provisions but allow for high voting thresholds: The current Act requires only that the constitution of a society contain a statement of the society's name and purposes. If the constitution contains additional provisions, the Act requires the constitution to state whether these provisions are alterable or not. There is no procedure or remedy for reversing the "unalterable" choice, and societies (whose members and management change over time) that cannot continue to function with such a provision have little choice but to dissolve. Removal of a society's ability to tie its own hands in this way would ensure it has the flexibility to adapt to new circumstances. Existing unalterable provisions would still be considered valid, although a court remedy could be provided to allow relief in certain circumstances. As well, in order to allow for stability with respect to core bylaws and actions, societies would have the same ability as companies to designate certain changes that must be approved by a "supermajority" (of potentially up to, perhaps, $\frac{9}{10}$ of the votes cast).
- 7) Remove requirement for special resolution to authorize debentures: The current Act prohibits a society from issuing a "debenture" (broadly interpreted by some lenders to include any type of security taken on the assets of the society) without a prior special resolution. This requirement for member pre-approval has been criticized as archaic and excessive – it is the role of the directors to make management decisions, and member consent is unnecessary and burdensome.
- 8) Provide detailed list of records to be kept: The current Act does not have a record-keeping provision that lists, in one place, the records a society must keep. Having a clear set of requirements respecting exactly which documents must be kept would provide societies with a helpful "checklist" to ensure that their records are in order.

- 9) Allow records to be kept outside of BC: The current Act requires a society to keep its records at its address or at another address in BC permitted by directors' resolution. Allowing societies to keep records outside BC, so long as the records are available for inspection from the society's office within BC by means of electronic technology, would be in keeping with modern business practices.

Members and annual general meetings (AGMs)

- 10) Remove restrictions on non-voting members: In contrast to business law, where voting rights are generally proportionate to share ownership, societies are governed by a "one member-one vote" rule. We believe this rule, which is fundamental to the democratic nature of societies, should be retained. Societies are allowed to have non-voting members, so long as they do not outnumber the voting members. This restriction on the number of non-voting members helps ensure broad democratic involvement, but also unduly limits structural options for societies. On balance, and given that it appears to be unique in Canadian law, it is proposed that this limitation be removed. Allowing societies greater freedom to structure the voting rights of their members would provide more flexibility, while still maintaining democratic equality among voting members.
- 11) Allow AGMs to be held outside province or by electronic means: Currently, all AGMs must be held in BC unless the Registrar of Companies (the Registrar) approves. Allowing AGMs to be held outside the province (if members approve) or held telephonically or by other means of electronic communication (unless the bylaws provide otherwise and so long as all participants are able to communicate with one another) would increase administrative flexibility for societies. The current ability to apply to the Registrar for special approval would be retained.
- 12) Allow AGMs to be deferred: Currently, AGMs must be held yearly, within 15 months of the previous AGM, unless the Registrar extends that time. Allowing AGMs to be deferred by unanimous resolution, or deemed to have been held if all business required to be transacted at the meeting is consented to by unanimous resolution, would enhance options without impairing members' rights. The current ability to apply to the Registrar for special extensions would also be retained.
- 13) Allow members' proposals: Currently, members of a society can requisition a meeting, but there is no provision to enable them to have an issue placed on the agenda at an AGM. A mechanism to formally require consideration of membership proposals would enhance member democracy.

- 14) Allow proxy voting: Currently, the Act prohibits the use of “permanent” proxies (valid for more than one meeting). This restriction could, in some situations, be important to ensure member control of the society, but as a blanket prohibition, it goes too far, and could impair democratic rights. It is proposed that each society be allowed to determine for itself, in its bylaws, the rules respecting proxy voting.

Directors and officers

- 15) Add qualifications for directors and officers: The BCA, like most other corporate statutes, disqualifies certain persons from holding office, including persons under age 18, undischarged bankrupts and persons convicted of fraud. However, the *Society Act* is silent regarding minimum qualifications. In order to provide some guidance in ensuring basic standards for a society’s directors and officers, the standard qualifications found in other corporate statutes would be added to the Act.
- 16) Remove directors’ liability for low membership: It is proposed that the provision imposing personal liability on directors for the debts incurred by societies that operate with fewer than three members be removed. The provision imposes an unfair burden on directors for matters outside of their control, and seems inconsistent with the separate legal personality of the society and with general corporate law.
- 17) Allow societies to indemnify directors and officers: Currently, societies need court approval to indemnify their directors and officers for legal liability and expenses incurred as a result of their good faith actions. Allowing societies to provide indemnity without court approval would help ensure that individuals continue to be willing to take on these important roles.
- 18) Make directors liable for improper payments: Under the BCA, directors who consent to making certain payments that are prohibited by that Act, including the payment of dividends where the company is insolvent, must return to the company the amount of the unauthorized payments. Although societies do not pay dividends, there are other types of payments (e.g., indemnification) that are only allowed in specified circumstances, and a director who authorizes or consents to an improper payment, including a payment that is clearly contrary to the purposes of the society, should be held responsible. As in the BCA, there would be express provision to allow directors to avoid liability by registering their dissent to the resolution that authorizes the improper payment.
- 19) Provide defence of due diligence for directors and officers: This defence would allow directors to be relieved of liability if they rely in good faith on the statements and reports prepared by professional advisors, including lawyers, accountants and appraisers. As well, there would be a remedy allowing the court to relieve directors or officers of liability in a legal

proceeding brought against them where they have acted in good faith and ought, in the circumstances, to be relieved. These defences will ease the legal risks of directing or managing a society. It is not proposed, however, to grant directors of not-for-profits blanket immunity for personal liability for negligence.

Restoration and reorganization

- 20) Allow for administrative restoration: The current Act applies the dissolution and restoration provisions of the 1973 *Company Act*. Currently, a society that dissolves or is struck from the Corporate Register cannot be restored without a court order. After 10 years, an Act of the Legislature is needed to restore a society. Allowing societies to restore after complying with certain procedures and filing specified records would make it easier, faster and less expensive for societies to restore. Court-ordered restorations would continue to be available for legally complicated situations.
- 21) Provide clearer process for amalgamations: Amalgamations of societies are currently allowed, but there are very few procedural guidelines in the Act. Modernization of the law in this area would involve setting out the required steps and options, including allowing for short-form amalgamations for closely-related societies and amalgamations without court approval, and clarifying that an amalgamated society is a continuing, as opposed to new, legal entity.
- 22) Allow for other reorganizations as appropriate: A number of reorganization options that exist for companies under the BCA could conceivably be useful to some societies in certain circumstances. Although these procedures would likely be rarely used, there are no significant policy concerns about providing societies with the same flexibility and options as business corporations. However, the value of these processes must be assessed against the costs of their implementation, particularly if *Society Act* filings are to become automated. The possible new reorganization provisions include the following:
 - *amalgamations with foreign societies*: Currently, societies can only amalgamate with other BC societies. Amalgamations involving a foreign society could be permitted so long as the amalgamation results in a BC society.
 - *court-approved arrangements*: An “arrangement” can involve any of a wide range of corporate alterations or restructurings, affecting just the society itself or also involving members, creditors or other persons. The ability to enter into an arrangement provides great flexibility in addressing reorganizational needs, where the desired result may not be fully met through other statutory provisions. Providing societies with the ability to enter into court-approved arrangements could give them an important tool to effect corporate

restructurings. Court approval of the arrangement would be required to ensure protection of all parties.

- *disposal of the undertaking*: This is an extraordinary transaction where all or substantially all of the society's assets would be disposed of. Under the BCA, the directors cannot dispose of the undertaking without first receiving the approval of the shareholders by special resolution. A similar provision could be included in the new *Society Act*.

Remedies

23) Provide new remedies for societies and members: The current Act offers few remedies for members to address problems within a society. Essentially all statutory member remedies are found in section 85, which allows for court rectification of consequences, or validation of actions, where there has been imperfect compliance with the Act or a society's constitution. More modern corporate law, reflected in the BCA as well as in the not-for-profit legislation of many other Canadian jurisdictions, provides additional judicial remedies. It is proposed that these remedies, most of which could be sought by members, the Registrar or other persons whom the court thinks appropriate, be made available for BC societies:

- *compliance and restraining orders* to compel the management of a society to comply with, or to prevent a contravention of, the Act or the society's constitution or bylaws;
- *oppression relief* to expressly provide a remedy if the society is being operated in a manner that is unfairly prejudicial or oppressive to a member;
- *orders to correct records*, such as bylaws and resolutions, where information has been entered or retained in error. This would supplement section 85, the current provision for remedying corporate mistakes and irregularities, which would also be retained;
- *derivative actions* to enable court proceedings to be brought on behalf of the society to enforce a right or duty owed to the society; and
- *orders appointing an investigator* to look into the activities or affairs of a society.

B. Maintain certain differences from the BCA

Despite the appeal of providing societies with the more flexible and less prescriptive approach of modern corporate law, it is recommended that certain features of the BCA not be adopted, and that certain provisions of the current *Society Act* be retained. These differences in treatment recognize the unique

and special nature of societies and the distinctive role that they play. They also recognize that many societies are locally-based, small and entirely volunteer-run, and less likely than for-profit corporations to have access to lawyers, accountants and other professional support to assist them with the requirements of a more complicated corporate law framework.

Specifically, it is proposed that the following current corporate law provisions of the *Society Act* be retained even though they differ from the approach taken under the BCA:

Incorporation and capacity

- 1) Require a society's purposes to be stated in its constitution: The BCA does not require that companies be formed with stated purposes, and companies have complete flexibility to adopt and switch business activities at will. However, societies are different. They are formed, by definition, for a broader social purpose than simply engaging in business and making a profit. Therefore, it seems desirable that incorporators undertake some initial focusing on the proposed society's mission. As well, continuing to require that a society's purposes be stated in its constitution will inform the public and funding agencies about the fundamental nature of the entity, and will help ensure continuity over time (since constitutional change requires procedural formalities and the involvement of members). The stating of purposes would not, however, necessarily tie a society's hands, since societies will expressly be given all the powers of a natural person and would be able to change their purposes by special resolution. As well, it is proposed that a society's ability to carry on business incidental to its purposes be retained.
- 2) Require bylaws to be filed at the Corporate Registry: Societies would be required to continue to file their bylaws with the Corporate Registry. This is different than the BCA which no longer requires companies to file their articles (bylaws) with the Corporate Registry. Formal filing of a society's initial bylaws and any later amendments to those bylaws will ensure that there is a definitive "source" for self-imposed governance rules that apply to each society, and avoid the need for societies themselves to maintain a publicly-accessible repository for these core documents.

Resolutions and records

- 3) No future-dated filings: The BCA allows companies to choose to delay the effective date of some electronic filings for up to ten days. However, future dating is an expensive systems option, and can only be justified for certain high volume corporate filings. Although it makes sense for some company filings, the cost would not be justified for societies at this time.

- 4) Provide member access to all records: The current law provides that members can look at any record of their society. This contrasts with the BCA, which provides that members can only look at certain records if the company's articles allow access. Having a provision that allows greater access to members appears more consistent with the democratic nature of societies. It is proposed to clarify that the bylaws can restrict procedural matters such as hours of access and the amount of notice, but not the general right of access. Similar to the remedy available to persons denied access to a society's financial statements, members would be able to apply to the Registrar for an order requiring compliance if they are denied access to records.

Members and annual general meetings (AGMs)

- 5) Prohibit financial assistance: Financial assistance includes loans, loan guaranties, subsidies or outright grants given by a corporation to its own directors, shareholders or members. Financial assistance of any kind to any person is expressly permitted under the BCA so long as it is disclosed to shareholders. While financial assistance may have its purposes in the context of a business corporation with a for-profit mandate, allowing societies to make payments to their members, directors and other insiders would be inconsistent with the underlying policy of societies being not "for-profit" or the financial benefit of members. However, we are proposing to clarify that a distribution to members where the payment is made in direct fulfillment of the purposes of the society (e.g., insurance payments from an insurance society) is not prohibited.
- 6) Require yearly AGMs: Under the BCA, companies are allowed to waive the holding of AGMs, and to deem retroactively that they have been held. This creates a very complicated approach to yearly business and financial reporting that is not in keeping with the needs of most societies. Continuing to require an annual AGM while allowing it to be deferred or effected on paper, if all members agree (see Proposal I.A.12, on page 8, above), could be seen as being more consistent with the democratic nature of societies.
- 7) Require that financial statements be prepared: Under the BCA, private companies may, by unanimous vote, waive the preparation of financial statements. Given their value to member and public accountability, the ability to waive financial statements is not being proposed for societies.

Directors and officers

- 8) Allow change of director to occur on filing of Annual Report: This is the current practice and would continue, along with the option of changing directors during their term by means of a separate filing with the Corporate Registry. This contrasts with the BCA, where director changes always require a separate filing.

- 9) Maintain current Act's approach to determining directors: Under the current *Society Act*, a director is defined as anyone who occupies such a position, by whatever name they are called. Detailed BCA provisions respecting directors, many based on the fact that the BCA defines a director as a person elected or appointed to the position, are often complex and seem unnecessary in the society context.
- 10) Maintain current Act's approach to directors' conflict of interest disclosure: Currently, the conflict of interest provisions of the Act require full and prompt disclosure of any interest in a proposed contract or transaction. A court may set aside a contract that was not disclosed as required. In some ways, this requirement may be too broad, in that it requires disclosure of very minor interests; in other ways, it may be too narrow, in that there is no requirement for disclosure of non-monetary or general conflicts. These flaws would be remedied by adding a "materiality" test to the disclosure requirement, and also by requiring disclosure of all holdings, connections and interests that could put a director or officer in a conflict of interest position. However, apart from these refinements, the current Act's relatively simple conflicts rules would be retained. BCA-style conflicts rules would not be adopted, as they are very complicated and are not stringent enough in the society context to ensure directors do not personally benefit.
- 11) Maintain a society's right to require security: The current Act allows a society to require a director or officer to provide security with respect to the faithful discharge of their duties. The provision, even if rarely used, is discretionary and provides societies with another tool for ensuring executive accountability. It is proposed that it be retained.

Reorganizations

- 12) Maintain restrictions on continuations: The BCA contains very flexible rules allowing companies to cease being BC companies by "continuing" into another jurisdiction. In order to ensure that the restraint on distributing assets to members of a society is not avoided by means of a transfer of incorporation to a new jurisdiction with different rules, continuation out to other jurisdictions is not proposed. For similar policy reasons, the one-step "amalgamation and continuation-out" process provided to companies under the BCA would not be available to societies under the new *Society Act*.
- 13) Maintain current conversion provisions: The current Act provides that a society must apply to the Registrar to convert itself to a company. This provision would remain. Given the rarity of reorganization from one form to another, no other conversion provisions are contemplated at this time.

Remedies

- 14) Retain ability of minister to investigate: The ministerial power to appoint an investigator to review a society that, in the opinion of the Registrar, exists for an illegal purpose or acts in a manner contrary to the public interest is unique to the *Society Act*. Although some consider this power to be unduly paternalistic, we are proposing that the ability for government to step in to protect the public interest in extraordinary circumstances should be retained, especially given the distinctive role and status enjoyed by societies, and the untried nature of the new private remedies (see Proposal I.A.23, on page 11, above). The ministerial intervention provision has rarely been exercised, and will have no practical impact on the administration or operation of the vast majority of societies. Proposals to provide certain enhancements, such as broadening the grounds for intervention and allowing the minister to act on his or her own initiative, are under also consideration.

The above proposals respecting the corporate law applicable to societies are intended to balance the competing objectives of flexibility and simplicity, in the context of the special nature of societies.

II. Second Framework Issue: REGULATORY PROVISIONS

The second fundamental framework issue concerns legal provisions of a “regulatory” nature that in some way constrain the operation and activities of societies in ways different from other corporations. The question raised by the 2009 Deputy Minister’s initial consultation letter was whether such rules should be maintained or strengthened, or whether they should instead be removed from the *Society Act*, on the basis that regulatory provisions have no place in a corporate framework statute.

Although it can be argued that regulation does not belong in the Act, we believe that some of the key provisions – such as the restraint on distribution of profits – are in fact essential to the nature of societies. As well, certain requirements are needed to maintain a unique niche for societies in the corporate world, and to protect the public interest where societies enlist public support for their social activities. However, it is also proposed that some regulatory provisions can be dropped as being outdated or no longer fulfilling a valuable purpose, and that exemptions from other provisions may be appropriate for certain types of societies.

- II. Second Framework Proposal: Remove outdated requirements, retain core non-profit requirements and selectively apply other “regulatory” requirements only to certain types of societies

Details of this general proposal are set out below.

A. Remove unnecessary and outdated restrictions

Some regulatory provisions of the current *Society Act* are outdated, unduly onerous, or incompatible with an automated system of Corporate Registry filings. The following changes are proposed for all societies, regardless of type:

- 1) **Remove Registrar's ability to require society to alter purposes before incorporation:** Under the current Act, the Registrar has the power to order a society to alter its purposes if those purposes do not appear to be authorized by the Act or are insufficiently set out. This discretionary oversight is inconsistent with modern corporate law, including the 2004 removal of vetting of society bylaws by the Registrar. As well, prior review of the constitutional documents of a new society will have to be removed in order to accommodate electronic incorporation, which would occur automatically upon filing. However, informal "vetting" could still be available, and the Registrar would have the power, similar to the power to order a society to change its name, to compel societies to remove illegal or offensive purposes after the fact.
- 2) **Remove requirement for Registrar's approval of constitutional changes:** Similarly, the requirement for Registrar's approval of alterations to the constitution of a society precludes those changes from being made electronically and is inconsistent with the Registrar's role under other corporate statutes. Again, it is proposed that the Registrar be able to order alterations in exceptional circumstances after the fact.
- 3) **Remove requirement to file all special resolutions:** Currently, a society must file every special resolution. This creates an unnecessary filing burden for both societies and the Corporate Registry. However, special resolutions that amend bylaws or the constitution would continue to be filed, because of the importance of creating a public record of changes over time.

B. Retain core prohibition on distribution of assets

In contrast to the unnecessary regulatory provisions discussed above, provisions restricting the distribution of earnings and other assets to members are, in our view, essential to maintaining the "not-for-profit" nature of societies. Without restrictions on distributions, societies would lose their distinctive nature and purpose, and would become indistinguishable from socially-focused business corporations. Reflecting the views of many respondents to the initial consultation, we believe it is important that a unique "not-for-profit" territory be maintained as a signal to both members and the public about the primary purposes of the society. This approach also provides a basis for maintaining a separate statute for not-for-profits.

In support of this underlying approach, it is therefore proposed to retain the following restriction on societies:

- 1) Retain restriction on distribution of profits or other assets to members: This restriction, which prohibits societies, on an ongoing basis, from transferring money or other assets to their members without receiving full consideration, prevents members from profiting from their society, and is a core distinction between societies and other business corporations that exist, at least in part, precisely in order to provide distributions to their members. The restriction would continue to apply to all societies.

C. Apply “asset lock” on dissolution only to certain types of societies

In addition to not being able to pay out any profits to members, the current Act subjects a society with a “charitable purpose” to a special “asset lock” upon its dissolution. That is, a society with a charitable purpose cannot, on its dissolution, distribute any of its assets to its members. Instead, the assets can only go to a charitable institution or to trustees on trust for a charitable purpose. This is in contrast to societies without charitable purposes that can, on dissolution, distribute to their members any assets that remain after payment of all debts.

We believe that this restriction on distributing assets on dissolution is among the most important provisions of the *Society Act*. However, unlike the prohibition on paying out profits to members while the society is a going concern, which is fundamental to the not-for-profit nature of societies and therefore should apply across the board, the restriction on distributing assets on dissolution does not – and need not – apply to all societies.

Applying the prohibition on distribution of assets on dissolution to only certain societies, as is done under the current Act, raises the need to distinguish between different types of societies. We have considered three approaches:

- the prior designation approach (where the applicability of the asset lock is determined by choice of the entity, generally at the time of incorporation),
- the functional approach (where the applicability of the asset lock is determined by looking at the entity’s activities), and
- the combination approach (where either a prior designation or the entity’s subsequent activities can result in the application of the asset lock).

These approaches are discussed in more detail in the shaded box on the next page.

Approaches to distinguishing different types of societies

Prior designation approach: The current Society Act uses a “prior designation” approach, requiring that a society’s purposes be set out in its constitution. A society with any of the following purposes is considered to have a “charitable purpose”, and is therefore subject to the asset lock on dissolution:

- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- any other purpose beneficial to the community.

A similar approach was recommended by the BCLI in its 2008 review of the Society Act. However, unlike the current Act, the BCLI recommended that only societies with exclusively charitable purposes be subject to the asset lock on dissolution.

The prior designation approach is not without its problems. There is considerable debate and uncertainty surrounding the notion of “charitable purpose”. The four prongs of the test are considered by some to be seriously outdated. The uncertainty is compounded by the fact that the restriction on distribution of assets only arises when the society is being dissolved, at which time members may have little interest in assessing the nature of their purposes. The prior designation approach also does not readily allow for changes in status over time in light of different activities.

Functional approach: An example of the functional approach can be found in the new federal Canada Not-for-profit Corporations Act. That legislation, which came into force on October 17, 2011, looks at the actual operations of the society to determine whether it should be subjected to a higher degree of regulation. If a non-profit corporation takes in a certain amount of public money it becomes a “public benefit corporation” and is subject to greater regulation, and the asset lock. The functional approach may increase legislative and operational complexity, but has the virtue of allowing an entity to change its orientation over time.

Combination approach: A slightly different approach is taken in the Saskatchewan Non-profit Corporations Act 1995, which distinguishes between “membership” corporations (existing primarily to carry on activities that benefit its members) and “charitable” corporations (existing primarily to carry on activities that benefit the public). A corporation must indicate in its bylaws whether it is a membership or charitable corporation (prior designation approach). However, even a corporation that is stated to be a membership corporation will be deemed to be a charitable corporation if it solicits public donations or receives more than 10% of its income in a fiscal year from government grants (functional approach). Charitable corporations are subject to the asset lock and certain other restrictions (such as the requirement to have at least three directors and provide greater public access to records).

It is proposed the current Act's prior designation on the basis of charitable purposes be replaced by using a "combination approach" to determine the applicability of the asset lock for BC societies. That is, societies would be required to select their status in the bylaws that they file on incorporation or, in the case of existing societies, by amending their bylaws within an appropriate transition period. The status choices would be "private" (membership) societies and "public" (charitable) societies. Even self-proclaimed "private" societies could be statutorily deemed to be "public" if they solicit or receive a significant amount of money from the government or the public (the threshold would be set out in the regulations, after further consultations), become a registered charity or carry on specified activities, such as activities not primarily for the benefit of their members.

Existing societies with charitable purposes would also be deemed to be public societies. As well, a related provision would allow the court to order a society to amend its constitution to reflect its public status if it is statutorily deemed to be a "public" society.

Private societies could change their status by amending their bylaws, but public societies could not become private except with the approval of the court. This restriction will help protect the public interest by maintaining the "asset lock" for publicly-funded societies.

Specifically, it is proposed that the following approach be taken with respect to the application of the asset lock:

- 1) Classify societies as either "public" or "private": Classification would be based on a society's own designation in its bylaws, but societies that solicit or receive public funds would be deemed to be public societies.
- 2) Retain restrictions on distributing assets on dissolution for public societies: In keeping with the essential nature of not-for-profits, both private and public societies would continue to be prohibited from distributing money or other assets to their members during the "life" of the entity. However, only public societies would be subject to the "asset lock" that restricts how they distribute their assets on dissolution.
- 3) Maintain restrictions on amalgamation and conversion for public societies: An amalgamation involving a society with charitable purposes is currently allowed, so long as the amalgamated society retains its charitable purposes. It is proposed that under the new Act, this policy would continue – amalgamations involving "public" societies would be allowed, but the resulting amalgamated society would retain the public designation. Similarly, public societies would not be able to convert to companies. These restrictions are needed to ensure that the asset lock cannot be evaded by means of a corporate reorganization.

D. Apply other regulatory requirements only to “public” societies

These provisions include certain requirements, such as having at least three directors and making financial statements publicly accessible, that currently apply to all societies, regardless of their nature, as well as some additional new requirements under consideration.

Regulatory requirements may be desirable for certain types of societies (e.g., charities and other public societies), where higher standards – in particular in the area of financial disclosure and accountability – can be justified as a means of protecting the public. On the other hand, private societies that exist only to serve their own members perhaps need not be so constrained.

Currently, the Act generally adopts a unified approach by applying certain extraordinary requirements to all societies, whatever their nature. However, it seems burdensome to apply these requirements to societies that neither accept public money nor purport to act for the benefit of the public, such as private member-focused cultural associations or sports clubs. For example, in such societies, no public protection or other social purpose is fulfilled by requiring public disclosure of financial statements.

Many have argued that the proper approach is to eliminate regulatory provisions altogether, so that they do not apply to any society. This is the general approach recommended by the BCLI in its 2008 Report.

A high degree of government oversight and regulation can be seen as being inconsistent with the notion of societies as independent, privately-operated entities, whose primary accountabilities should be, like those of other corporations, to their members. Removal of extra regulatory provisions could streamline societies' operations and provide them with the flexibility they need to flourish. In response to concerns about accountability, proponents of this “deregulation” approach point out that the vast majority of those societies that obtain public funds are already subject to regulatory oversight provided by the federal government (through its charitable tax status requirements) or through the requirements imposed by government and other funders under grant application processes.

Although there are some good arguments in favour of eliminating special restrictions and requirements for all societies, we are recommending a different approach. We believe that some additional checks and balances may be needed in certain types of societies in order to protect the public interest. We are therefore proposing to take a more nuanced approach to “regulatory” requirements, one that would apply them only in circumstances where the public interest benefits outweigh the regulatory compliance costs.

Given the need to distinguish between societies according to their fundamental nature for the purposes of applying the asset lock on dissolution (discussed

above), it becomes possible to use these same criteria to selectively apply regulatory requirements.

It is therefore proposed that “public” societies – that is, those that are prohibited from distributing assets on dissolution – would also be subject to special accountability and disclosure requirements. This would ensure a higher standard of transparency and accountability through the application of more regulations for societies that either select to be or are deemed to be “public” societies. On the other hand, it would enable private societies that do not take in public funds or pursue charitable purposes to enjoy the benefits of a lighter regulatory touch with fewer requirements.

Specifically, it is proposed that a new *Society Act* would carry forward the following provisions of the current Act but no longer make them applicable to private societies. It is proposed that the following would apply only to public societies:

- 1) Require a minimum of three directors for public societies: The *Society Act* currently requires that all societies have at least three directors. This requirement is intended to help ensure joint decision-making and accountability, and is generally not hard for most societies to fulfill. However, the need for multiple directors can create administrative difficulties in some situations and may lead to the appointment of “straw” directors, put on the board simply to fulfill the requirement.

The three-director minimum would no longer apply to private societies, but would be retained for public ones. The requirement would add an extra assurance of collective oversight and accountability appropriate for publicly-funded societies, and is consistent with requirements for other entities that engage the public trust, including community service cooperatives, financial institutions and publicly-traded companies.

- 2) Keep requirement for one BC-resident director for public societies: The current *Society Act* requires at least one director to be resident in BC. There are situations where a single extra-provincial director could be desirable for a private society, and the restriction would therefore be removed for those societies.

The one-BC director requirement would be retained, however, for public societies where the handling of public money increases the benefits of having a local presence on the board. Requiring that one (out of three or more) directors of a public society live in the province is not onerous in our view, and in fact reflects the reality of most BC societies.

- 3) Maintain public access to financial statements of public societies: Currently, the public has access to the financial statements of all societies, even private societies such as clubs and golf courses. With private societies,

where no public funding or interest is involved, there is no need for this information to be available beyond the members, and the requirement to allow public access could be removed.

The requirement would be retained for public societies, however, where there is legitimate need for broader access. As well, consideration will be given to requiring public societies to file their financial statements, or a standardized summary of core financial information, at the Corporate Registry, as was the case prior to 2004. For registered charities, this requirement could perhaps be satisfied by the public filing of financial statements with the federal government under tax rules. Moving financial statements back to a central registry might not only improve public access but could also benefit societies by simplifying their record-keeping processes.

- 4) Eliminate option of simplified financial statements for public societies: Under the current Act, most societies have the option of preparing a simple statement of receipts and disbursements instead of the more detailed statements of income, expenditure and surplus and balance sheets. Removal of this option is consistent with the greater accountability required for public societies.

In addition to the above, it is proposed that public societies be subject to the following new regulatory-type requirements:

- 5) Prohibit officers or employees of public societies from acting as directors: In private companies, it is commonplace for one person to act as both director and officer. However, having those who set the overall direction for a society also on the society's payroll creates potential for conflicts of interest, inconsistent with the greater public accountability demanded of certain types of societies. This new restriction, based on a BCLI proposal, would only apply to public societies.
- 6) Require public societies to publicly disclose directors' and officers' remuneration: This is another proposed new requirement, again applicable only to public societies. Concerns have been raised about societies that appear to operate more for the benefit of their own insiders than for the public benefit. The proposal is intended to help empower members and the public to make informed decisions regarding entities that they may be subsidizing, supporting or joining, by giving them core information about the society's executive compensation program.
- 7) Extend oppression remedy to protect the public in dealing with public societies: It is already proposed to provide a court remedy for members who feel they are being treated in an unfairly prejudicial or oppressive manner (see Proposal I.A.23, on page 11, above). For public societies, it is proposed that a similar type of relief also be available, on application of a

person whom the court thinks appropriate, where the activities or affairs of the society are conducted in a manner that is oppressive or unfairly prejudicial to the public generally, or that unfairly disregards the public interest.

It is recognized that the proposals described above could increase the regulatory burden for societies that rely on public funding. However, in our view, the benefits of increased accountability and transparency for these public societies would outweigh the costs of regulatory compliance. It is also worth noting that the proposed new requirements may already apply to some degree to many public societies as a result of tax rules for charitable status or grant arrangements imposed by funding agencies. Applying these requirements to all public societies that solicit or receive public funds would level the playing field.

Since several of these requirements currently apply to all societies, including “private” societies, the proposed approach would significantly lighten the regulatory burden on many organizations. In addition, if all the proposed changes are adopted, the overall regulatory burden for all societies, including “public” societies, should be reduced.

As well, consideration will be given to providing regulation-making authority to allow for certain exemptions from these requirements for certain classes of public society, if appropriate – for example, public societies that are subsidiaries of other public societies might not need to have three directors.

Many societies have raised concerns about the new federal legislation’s requirement for audited financial statements, applicable to many federally-incorporated non-profits. The following approach to this issue is proposed for BC societies:

- 8) Audited financial statements would be optional for all societies: It is proposed that the *Society Act* not require any society to have audited financial statements. Although audits may enhance financial accountability, there is continued debate about the value of audits in light of their cost. Currently, audited statements are only required for relatively few “reporting” societies discussed below. The “reporting societies” listed in the Act are usually already regulated under other statutes or require approval of other ministries in order to incorporate, and therefore, audit requirements can be imposed elsewhere, if considered necessary.

The ability to self-impose an audit requirement would continue to be available to those societies that so choose by means of their own bylaws. As well, many public societies, in particular those that take in significant enough amounts of money, may be subject to a requirement for audited financial statements by virtue of charitable tax status requirements or grant criteria. However, the framework law itself would not impose the requirement.

Finally, it is proposed that the current Act's distinction between reporting and non-reporting societies be eliminated:

- 9) Remove the concept of "reporting society": Under the current Act, being designated as "reporting" means that the society must prepare more detailed comparative financial statements and have these reviewed by an auditor. "Reporting" societies include those that provide child care, insurance or hospital services, as well as others ordered to be "reporting" by the Registrar. This approach is problematic – the list of designated societies is arbitrary and incomplete, and does not ensure more robust financial accounting for many societies where it could be in the public interest. Adopting the private-public distinction would allow for the phasing out of "reporting" societies, and provide a more consistent and rational basis for the application of special requirements.

III. Other Issues

This Part contains discussion and proposals relating to various issues that do not fall directly within the two framework issues.

Details of these issues are set out below.

- 1) Require the registration of extraprovincial societies: Under the current Act, societies formed in another jurisdiction that carry on operations in BC must register under the *Society Act* only if required to by the Registrar – otherwise, registration is optional. This has the potential to create public confusion respecting the use of names within the province, since no name approval is required for unregistered bodies, and undermines the ability of the Corporate Registry to maintain a comprehensive database of incorporated entities active in the province. It is therefore proposed that all extraprovincial not-for-profits that conduct operations in BC be required to register.
- 2) Explore options for dispute resolution: Societies, like all organizations, sometimes experience conflict between members, or between members and their boards. There is no government body to intervene in such situations, and none is being proposed at this time. Instead, it is anticipated that the enhanced legal remedies discussed above (see Proposal I.A.23, on page 11, above) will provide more effective options.

However, in many cases, the court system is not the best place to resolve disputes. Ministry staff invites proposals on how the Act could be amended to help ensure societies have more tools to resolve relatively minor disagreements – for example, by requiring that societies include a dispute resolution process in their bylaws. As well, we will be monitoring the work that is being done under the *Strata Property Act* to develop better processes for the resolution of strata corporation disputes.

- 3) Maintain occupational title protection: Part 10 of the current *Society Act* allows the Registrar to grant special status to a society that represents members of an occupation or profession if the society meets certain criteria (such as having bylaws that deal with the qualifications, conduct and discipline of its members) and the Registrar considers it in the public interest. Once registered under Part 10, members of the society have exclusive use of the designated name of the society and other registered identifying words or initials that relate to that occupation. The objectives of the provisions when enacted were to protect members of an occupational group from individuals who may claim the same occupational qualifications but are not part of the group, and to provide a “brand” for members of the registered group.

The *Society Act* is perhaps not the best vehicle for occupational title protection. Although there is merit in protecting *bona fide* members of an occupational group from those who are not similarly qualified, the application process can tax the expertise and resource capacity of the Corporate Registry. Some believe that, ideally, this type of regulatory role is something that should be undertaken under a statutory scheme set up specifically to regulate the occupation.

However, in the absence of specific legislation regulating a new occupation or profession, the occupational title system does help protect the public. To obtain occupational title protection, the Act requires that the society have qualifications for membership, codes of conduct and ethics and disciplinary processes in its bylaws. These requirements provide the public with assurance that members of a society with a designated title have a minimum level of qualifications and will face consequences for improper conduct.

It is therefore proposed that the occupational title protection provisions of the *Society Act* be retained for the present. Longer term, consideration will be given to developing a different approach, such as a separate statutory framework, to ensure that emergent or otherwise unregulated occupations meet minimal standards.

Conclusion

The foregoing proposals for reform of the *Society Act* recognize the unique nature of societies and the wide diversity of societies using the Act. They attempt to strike a balance between concerns over increasing complexity with the need for modernization, and between societies’ need for flexibility with the broader public concern over accountability. We invite your input on these proposals, as well as any other concerns you may have that have not been addressed by this Discussion Paper.

APPENDIX A: SUMMARY OF PROPOSALS

- I. **First Framework Proposal – CORPORATE LAW PROVISIONS:** Adopt, into the current *Society Act* framework, select provisions of the BCA

A. Adopt modern corporate law provisions

Incorporation and capacity

- 1) Allow incorporation by one person
- 2) Allow electronic filing of documents at the Corporate Registry
- 3) Recognize pre-incorporation contracts
- 4) Remove the doctrine of “ultra vires”

Resolutions and records

- 5) Allow special resolutions to proceed by $\frac{2}{3}$ vote
- 6) Remove ability to adopt unalterable provisions but allow for high voting thresholds
- 7) Remove requirement for special resolution to authorize debentures
- 8) Provide detailed list of records to be kept
- 9) Allow records to be kept outside of BC

Members and annual general meetings (AGMs)

- 10) Remove restrictions on non-voting members
- 11) Allow AGMs to be held outside province or by electronic means
- 12) Allow AGMs to be deferred
- 13) Allow members’ proposals
- 14) Allow proxy voting

Directors and officers

- 15) Add qualifications for directors and officers
- 16) Remove directors' liability for low membership
- 17) Allow societies to indemnify directors and officers
- 18) Make directors liable for improper payments
- 19) Provide defence of due diligence for directors and officers

Restoration and reorganization

- 20) Allow for administrative restoration
- 21) Provide clearer process for amalgamations
- 22) Allow for other reorganizations as appropriate
 - *amalgamations with foreign societies*
 - *court-approved arrangements*
 - *disposal of the undertaking*

Remedies

- 23) Provide new remedies for societies and members:
 - *compliance and restraining orders*
 - *oppression relief*
 - *orders to correct records*
 - *derivative actions*
 - *orders appointing an investigator*

B. Maintain certain differences from the BCA

Incorporation and capacity

- 1) Require a society's purposes to be stated in its constitution
- 2) Require bylaws to be filed at the Corporate Registry

Resolutions and records

- 3) No future-dated filings
- 4) Provide member access to all records

Members and annual general meetings (AGMs)

- 5) Prohibit financial assistance
- 6) Require yearly AGMs
- 7) Require that financial statements be prepared

Directors and officers

- 8) Allow change of director to occur on filing of Annual Report
- 9) Maintain current Act's approach to determining directors
- 10) Maintain current Act's approach to conflict of interest disclosure
- 11) Maintain a society's right to require security

Reorganizations

- 12) Maintain restrictions on continuations
- 13) Maintain current conversion provisions

Remedies

- 14) Retain ability of minister to investigate

II. Second Framework Proposal – REGULATORY PROVISIONS: Remove outdated requirements, retain core non-profit requirements and selectively apply other “regulatory” requirements only to certain types of societies

A. Remove unnecessary and outdated restrictions

- 1) Remove Registrar's ability to require society to alter purposes before incorporation
- 2) Remove requirement for Registrar's approval of constitutional changes
- 3) Remove requirement to file all special resolutions

B. Retain core prohibition on distribution of assets

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

C. Apply “asset lock” on dissolution only to certain types of societies

- 1) Classify societies as either “public” or “private”
- 2) Retain restrictions on distributing assets on dissolution for public societies
- 3) Maintain restrictions on amalgamation and conversion for public societies

D. Apply other regulatory requirements only to “public” societies

- 1) Require a minimum of three directors for public societies
- 2) Keep requirement for one BC-resident director for public societies
- 3) Maintain public access to financial statements of public societies
- 4) Eliminate option of simplified financial statements for public societies
- 5) Prohibit officers or employees of public societies from acting as directors
- 6) Require public societies to publicly disclose directors' and officers' remuneration
- 7) Extend oppression remedy to protect the public in dealing with public societies
- 8) Audited financial statements would be optional for all societies
- 9) Remove the concept of “reporting society”

III. Other Issues

- 1) Require the registration of extraprovincial societies
- 2) Explore options for dispute resolution
- 3) Maintain occupational title protection

APPENDIX B: SUMMARY OF CONSULTATIONS

The Ministry of Finance received almost 150 submissions in response to the December 2009 Deputy Minister of Finance's request for public input. As some submissions were made on behalf of a number of organizations, including one endorsed by over one hundred charities and other non-profit organizations, the submissions represent the views of many hundreds of individuals and organizations. Overall, the submissions provided the government with a wide-ranging and thoughtful set of comments on issues relating to the reform of the *Society Act*.

The submissions reflect the diversity of societies and perhaps also highlight the challenges in updating the legislation in a manner that can optimally meet the needs of all societies. Below is a summary of the key concerns and recommendations raised in the submissions, beginning with responses to the two major issues raised in the Deputy Minister of Finance's request for input.

1. *Nature of the corporate model most appropriate for societies and whether a more sophisticated business law framework should be adopted*

There were divergent comments on this issue. Approximately 45 submissions, mainly from smaller societies or their directors or members, recommended against adopting a more sophisticated business law model for societies. Most felt that the current Act is functioning well for their organizations and cautioned against adopting changes involving new requirements and processes that could further complicate the already complex work undertaken by their largely volunteer directors and officers. Some of these submissions stressed the importance of having a stand-alone statute that did not cross-reference business corporation law and/or its definitions.

On the other hand, approximately 30 submissions, some representing a number of organizations, supported broad modernization of the *Society Act*, with most of these expressly endorsing the development of a new *Society Act* based on the modern British Columbia *Business Corporations Act*. A modern framework, these submitters maintained, would give many societies the tools they need to better serve their members and communities.

A number of other submissions focussed on specific improvements to the *Society Act*, often based on modernizations that have already been adopted in business corporation legislation. For example, many recommended permitting the corporation to indemnify directors without prior court approval and expanding directors' powers to issue debt instruments or mortgages without annual approval by special resolution of members required under the current Act. Other recommended modernizations included: permitting annual meetings to be held by teleconference and annual business to be done by written resolution; adopting modern amalgamation procedures and clarifying the legal continuation of the

amalgamating entities; adopting more streamlined dissolution and restoration procedures; adopting more effective court remedies for members, including the oppression remedy; and reducing the special resolution threshold (from $\frac{3}{4}$ to $\frac{2}{3}$).

2. *The extent to which the Act should contain regulatory provisions or other rules that constrain the operation of societies*

On the second specific issue raised in the Deputy Minister's request for input, the submissions were in some respects more consistent, with most recommending against the adoption of further onerous and costly regulatory provisions in the new *Society Act*.

Regulatory burden: Many felt that further regulatory requirements were unnecessary, given the separate regulation of charities and grant-receiving organizations, and would be burdensome, particularly for smaller organizations and indeed all non-profits that are facing funding and human resource challenges.

Societies in rural communities particularly raised concerns about how changes to the Act, regarding such matters as conflicts of interest and financial reporting, might affect their organizations which rely on local volunteers to carry out so many of the support services in the community. Further burdensome regulation could distract all non-profit organizations from carrying out their vital contributions to our society. "Overly-restrictive regulation won't serve the public interest" was a point frequently made.

Diverse approaches: A number of submissions suggested that any new legislation should accommodate the needs of different societies. Societies that are more sophisticated in nature, that desire greater business-type powers or that rely on public funding should be subject to a different level of regulation than small grassroots societies with simple needs. "One size may not fit all" was a common observation.

Other organizations strongly opposed different levels of regulation, suggesting that extra regulation can be left to tax rules for charitable status or to granting organizations. By supporting the adoption of a new *Society Act* based on business corporation legislation, many submissions indirectly favoured a number of streamlining changes to regulatory requirements, because business corporation law offers more flexibility in many areas, such as directors and members (no minimum numbers, indemnification without court order, etc). Some submissions supported the view that the *Society Act* was essentially a corporate statute, not an ideal regulatory vehicle, and recommended adoption of an enabling, rather than prescriptive, framework.

Accountability: The need for better accountability of societies that solicit funds from the public was raised by a number of submissions. Most of the submissions commenting on accountability, including many of those recommending reducing

some requirements, indicated that an appropriate level of regulation can be positive because it notifies the public that the work of the society is legitimate and its management is responsible. “Keep it simple, but keep them accountable.”

Governance and public reporting were often mentioned in terms of maintaining and enhancing accountability. A number of submissions expressed the need to balance flexibility with accountability, and recommended that existing accountability mechanisms, such as minimum numbers of members and directors, directors’ residency requirements, and access to financial statements, be retained. “Societies are not private companies that need to disclose only to members – they serve the public.”

Some commentators argued that a legislated approach to regulating societies helps avoid the potential for *ad hoc* policies relating to the governance of societies imposed by different funding agencies. Minimum numbers and residency of directors were sometimes identified as important in this context.

Remedies: In place of more government regulation, some submissions focussed on the importance of increasing member remedies to enhance accountability of societies. “Self enforcement and requirements from funders work better than a regulator.” Suggestions included adopting modern business corporation law remedies, including the oppression remedy. As well, a few submissions noted the need for alternative dispute resolution, “like an Ombudsman for non-profits”, and mediation.

A few submissions advocated more government oversight to ensure societies’ adherence to the legislation. For example, it was recommended that the Registrar’s powers to investigate compliance be enhanced, and that the Registrar be allowed to intervene and make orders against a society that is not operating in the public interest.

Other issues:

Corporate governance: A number of comments focused on corporate governance issues, such as the need to clarify requirements and procedures for different types of meetings. One submission recommended removing the requirement for Registrar approval to hold meetings outside the province.

Some submissions focussed on improving clarity to the Act, for example by combining provisions covering the constitution and bylaws that are scattered through the Act in one place. A number of submissions commented on confusion and conflicts within the Schedule B model bylaws and the need to update them.

Membership issues: Another submission recommended that consideration be given to the regulation of membership enrolment and election processes of societies. Problems with fairness in the conduct of elections of some societies,

particularly ones that have a large amount of assets, have highlighted the importance of fair enrolment rules.

More flexibility in membership was also raised, with some submissions recommending the elimination of the current restriction on the proportion of non-voting members and that proportionate representation be made available (e.g., a larger member organization should have more votes than a smaller one in a delegate voting system).

Directors' issues: As noted above, a number of submissions, including those supporting the adoption of a business law model, recommend the expansion of directors' powers, for example to issue debentures and mortgages, to acquire, incorporate and dispose of subsidiaries, and to fill vacancies.

Elimination of requirements on minimum numbers of members and directors was also recommended by some submissions.

Liability of directors was a concern for a number of organizations, in light of the costs of litigation and insurance. Clearer directors' liability provisions were often recommended, "so that people are not reluctant to stand for office". The business corporation law requirement that directors consent to their appointment was also recommended for societies.

Conflict of interest provisions should, according to some submissions, be clarified to require a director with a conflict to leave the meeting and not be included in the quorum, not simply to abstain from voting.

A number of submissions expressly supported the BCLI proposal to prohibit paid employees from serving on the board, while others felt the prohibition could be detrimental for their organizations.

Financial reporting: One non-profit expressed frustration with the audit requirement imposed on "reporting societies", which can be very costly for a small society relying essentially on donations from individuals. Other submissions recommended removing the current public right of access to financial statements, as charities must already give this access under tax rules.

Constitution/Purposes: In terms of a society's purposes, several submissions requested more clarity on the ability of societies to run businesses and own taxable business subsidiaries, as long as the business activity furthers the social purposes of the society and all revenues are used to further its purposes. A few other submissions expressed concern that some societies were actually running businesses, unfairly in competition with business corporations.

One submission noted concerns with unalterable provisions in the constitution that become offside charitable tax rules, and the inability to change these provisions.

Addresses: Several submissions recommended removing the requirement for societies to maintain street addresses, which they saw as costly and unnecessary. For volunteer organizations that have frequently changing directors and officers, a post office address would be much more efficient. Some submissions expressed concerns about public access to directors' residential addresses.

Modern communication: Some comments recommended increased use of electronic communications, including email options for members to receive society correspondence, and on-line incorporation and electronic filing of forms with the Registrar. Other submissions recommended better access, particularly through electronic access, to Corporate Registry information. Some recommended that members be permitted to participate in meetings by telephone unless prohibited by the bylaws.

Special purpose societies:

Student association or unions: A number of submissions were submitted by or about these organizations. These entities receive fees mandated by legislation; financial accounting is therefore important as the association is of interest to both the student body and the educational institution. One student association recommended that all such organizations should be subject to enhanced financial reporting, and that statutory remedies should be increased and made more transparent. Another student organization strongly opposed any age restrictions on members and directors which would cause difficulties for student associations.

Occupational titles: One submission recommended eliminating occupational title protection, because it restricts competition and may be offside the Agreement on Internal Trade. Several other submissions recommended retaining the provisions, or transferring them to a separate statute, because title protection "provides the leverage to get members to comply with codes, education, etc. and allows the public to make informed decisions".

Social enterprise: A number of commentators supported legislation to foster a new legal structure for social enterprise corporations, but most of these submissions recommended against incorporating this framework within the *Society Act*.

General comments:

Education: Many submissions recommended that the government take steps to help educate societies, directors, officers, members and the public on the impact of any changes and more generally on duties and responsibilities under the *Society Act*. A number of submissions recommended that the government budget for the development of appropriate educational tools, templates, FAQs, and government guidelines on difficult areas, such as governance issues, and that a contact person be available to answer any questions about a new Act.

Outside scope of review: Finally, a number of submissions raised issues that are outside the ambit of the Ministry of Finance's *Society Act* review, including issues relating to the need to reduce or increase requirements imposed by BC Gaming and Canada Revenue Agency, employment standards, and the use of societies to deliver government services. Several submissions criticized the scope of the review – that is, the legislation governing societies – as being too narrow, and recommended that government engage the sector in a broad and collaborative discussion of how the not-for-profit system generally could be made more effective.