

# NATURAL LEGACIES:

## Your Educational Guide to Conservation in BC



### Duties, Liabilities and Risk Management Strategies for Directors of Charitable Organizations

*Information for directors  
Note that this is not legal advice*

Prepared for the Land Trust Alliance of British Columbia

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2015-2016

April 29<sup>th</sup>, 2016

## **Table of Contents**

<b>Introduction</b> .....	2
<b>The <i>Societies Act</i>: General Duties and Responsibilities</b> .....	2
Directors, their election and qualifications .....	2
Director’s duties arise from two sources .....	3
The New Act delineates a set of statutory duties imposed on directors .....	3
Statutory duties are similar to those of corporate directors .....	4
Statutory duties litigated under the Old Act .....	4
Fiduciary duty arises from both common law and statutes.....	4
Directors must avoid conflicts of interest .....	5
Case study .....	6
<b>The <i>Societies Act</i>: Statutory Liability and Immunity</b> .....	7
Statutory director’s liability .....	7
Directors can be indemnified from certain types of liability .....	8
Fees .....	9
Record keeping .....	9
<b>Directors Toolbox</b> .....	10
Fiduciary duty .....	10
Conflict of interest .....	10
Personnel management .....	11
Director liability insurance can offset the costs of legal proceedings .....	12
<b>Conclusion</b> .....	12

## **Introduction**

The purpose of this memo is to discuss general duties and responsibilities of directors, as well as to identify some areas of potential liability for directors under the new *Societies Act* (the “New Act”) in British Columbia and provide tools to help mitigate the liability.<sup>1</sup> This memo does not address issues regarding areas such as charities and political activities (see the other PBSC memo from this year), employment law, the complexities around vicarious liability, or possible liabilities arising from the use of volunteers for environmental monitoring.

The majority of the information collected for this memo comes from the New Act itself, case law that considers the previous *Society Act*, (the “Old Act”) and secondary sources that discuss the law around not-for-profit and charitable organisations.<sup>2</sup> Since the New Act is not yet in force, there is no case law dealing directly with its provisions. Case law on the Old Act and related topics in the corporate field have provided some guidance for understanding principles in the New Act. However, this memo does not reflect an exhaustive search of all case law regarding the Old Act nor is there any guarantee that the interpretation of the Old Act will apply directly to the New Act. Further, there are no current regulations for the New Act. Clarity and or greater complexity may arise when they are passed. Directors should take note of the regulations that pertain to the sections discussed below. Please note that this memo has been prepared by law students and is not legal advice.

## **The *Societies Act*: General Duties and Responsibilities**

In 2015, the New Act replaced the Old Act as the main instrument governing not-for-profit societies. Societies such as land trusts need to familiarize themselves with the new regulations, scheduled to be released in November of 2016. Part 5 of the New Act is particularly relevant because it deals with directors and their duties.

### **Directors, their election and qualifications**

With the exception of a society’s first directors, all directors must be elected or appointed to the office according to the societies’ bylaws.<sup>3</sup> This is consistent with the Old Act. An election or appointment is *not valid* unless the individual consents in writing to be a director or is in attendance at the meeting where the election or appointment takes place and does not object.<sup>4</sup> The New Act includes two new sections (sections 43 and 44) that create qualifications that must be met for an individual to be eligible to be a director. Section 43 states that an individual must meet the criteria in s. 44 and any relevant society bylaws.<sup>5</sup>

These criteria are that individuals:

- Pending regulation, must be at least 18 years old.
- Cannot have been found incapable of managing their own affairs by any court.
- Cannot be an undischarged bankrupt.

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<sup>1</sup> *Societies Act*, SBC 2015, c 18.

<sup>2</sup> *Society Act*, RSBC 1996, c 433.

<sup>3</sup> *Societies Act* s. 42(2).

<sup>4</sup> *Societies Act* s. 42(4).

<sup>5</sup> *Societies Act* s. 43(1).

- Cannot be convicted of an offence involving the promotion, formation, or management of a corporate or unincorporated entity or of fraud, with the following exceptions:
  - o A court orders otherwise.
  - o The most recent of 5 years since the period of a suspended sentence has passed without sentencing, a fine was imposed, release from prison and the end of any period of probation.
  - o A pardon was issued and is still in effect.
  - o A record suspension was ordered and is still in effect.<sup>6</sup>

Additionally, s. 41 mandates that the majority of directors on any given society board may not receive payment through employment or service contracts with the society. They are only eligible for remuneration directly related to being a director, which must be explicitly allowed for in the bylaws. Reimbursement for approved expenses incurred in carrying out their duties as a director is also acceptable if done in compliance with society bylaws.<sup>7</sup>

### **Director’s duties arise from two sources**

There are two related concepts in the law that deal with director duties. The first is the statutory responsibilities arising out the New Act. The second is a fiduciary duty explained below. These two duties often appear together in the case law, blurring the lines between them.

### **The New Act delineates a set of statutory duties imposed on directors**

Directors are responsible for ensuring that the society functions as it should. Specifics about directors’ duties are more abundant in the New Act than in the Old Act. Section 52 of the New Act states that the general function of the directors is to “manage, or supervise the management of, the activities and internal affairs of the society.”

Directors are expected to “act honestly and in good faith with a view to the best interests of the society” and to “exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances.”<sup>8</sup> This establishes a standard that is slightly different than that in the Old Act which reads “...of a reasonably prudent person.”<sup>9</sup> The addition of the “comparable circumstances” element demands that directors look to a counterpart holding a similar position.

The New Act includes explicit reference to the fact that directors must act in accordance with the New Act and regulations, as well as with any bylaws of the society. Currently, the regulations are not available to the public but directors should make sure that they familiarise themselves with the central elements of the regulations. Bylaws for each society will differ and directors should be familiar with those of their society.

Finally, directors “must act with a view to the purpose of the society.”<sup>10</sup> Directors must be aware of their society’s constitution, which is filed with the registrar and outlines the purpose of the society. All decisions must be directed at fulfilling this purpose in one way or another.

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<sup>6</sup> *Societies Act* s. 44.

<sup>7</sup> *Societies Act*, s. 46.

<sup>8</sup> *Societies Act*, s. 53(1).

<sup>9</sup> *Society Act*, s. 25(1)(b).

<sup>10</sup> *Societies Act* s. 53(2).

## **Statutory duties are similar to those of corporate directors**

In the past, directors of corporations have often been held to a similar standard.<sup>11</sup> There are a number of business law cases that deal with similar wording regarding directors' duties to that in the New Act.

For example, *Kepic v Tecumseh Road Builders* established that fraudulent actions by a director, even if they benefit the corporation, cannot be seen as being in the corporation's best interest and the director will therefore be personally liable.<sup>12</sup>

## **Statutory duties litigated under the Old Act**

There is case law interpreting the Old Act that may provide insight into how courts may approach interpreting these director duties and responsibilities.

The principle that Courts must "adopt a deferential approach when reviewing actions and decisions of duly elected directors" was established in 2010 by *Watch Lake North Green Lake Volunteer Fire Department Society v Haskins* in the British Columbia Provincial Court.<sup>13</sup> The justification for this is that societies are composed of volunteers providing a valuable service that would not exist otherwise.<sup>14</sup> Although this litigation dealt with a dispute about how the board of directors allocated funds under the Old Act, the section being litigated is similar in both acts. Both acts include requirements that directors must "act honestly and in good faith with a view to the best interests of the society" and "exercise the care diligence and skill" of a "reasonably prudent person."<sup>15</sup>

In this case, the court noted that these are broad parameters and directors have significant discretion around how to handle a given situation within those parameters.<sup>16</sup> Further, directors often "have several different courses of action to choose from, each of which could be seen as a "reasonably prudent" choice "in the best interests" of the society."<sup>17</sup> Therefore, deciding whether a director met the required standard will be a judgement call and courts should be reluctant to second guess director's decisions.<sup>18</sup> Here the court held that the directors were within their scope of authority in spending money on internal litigation and therefore "cannot be held personally liable for the debts incurred as a result."<sup>19</sup> Overall, this case suggests that directors have broad discretion to exercise their statutory duties. However, acting outside of these duties could result in individual directors being held liable for debts incurred as a result of those actions.

## **Fiduciary duty arises from both common law and statutes**

A fiduciary duty is a set of obligations that arise based on the special relationship between the directors and the organisation. Directors have a fiduciary duty to act honestly, in good faith, and be loyal. Most of the case law regarding fiduciary duty comes from a business corporation context. However, the courts have found that the "fiduciary duty of directors of corporations is

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<sup>11</sup> CED 4th, Business Corporations (Western) 7.10.e at para 405.

<sup>12</sup> *Kepic v Tecumseh Road Builders* 1987 CarswellOnt 917, para 10.

<sup>13</sup> *Watch Lake North Green Lake Volunteer Fire Department Society v Haskins et al.* 2010 BCPC 114 CanLII at para 17.

<sup>14</sup> *Watch Lake*, para 17.

<sup>15</sup> *Society Act* s. 25(1) (a) and (b). *Societies Act* s. 53(1)(a) and (b).

<sup>16</sup> *Watch Lake*, para 17.

<sup>17</sup> *Watch Lake*, para 38.

<sup>18</sup> *Watch Lake*, para 38.

<sup>19</sup> *Watch Lake*, para 40.

analogous to the fiduciary duty of directors of societies.”<sup>20</sup> The fiduciary duty that a director owes to a corporation, and similarly to a society, is as follows:

“The statutory fiduciary duty requires directors and officers to **act honestly and in good faith** *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must **avoid conflicts of interest** with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the **confidentiality** of information they acquire by virtue of their position. Directors and officers must **serve the corporation selflessly**, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.”<sup>21</sup> (Emphasis added)

There is a greater onus on the directors of charitable organisations to:

- Act gratuitously (without an expectation of personal benefit);
- Not accept any benefit from their position as a director; and
- Not act for a specific group.<sup>22</sup>

The test to determine whether a director has breached his or her fiduciary duty is an objective standard in light of a reasonably prudent person. Accordingly, a director or officer's decision or action will be assessed against what would be considered a reasonable business decision in light of the circumstances that they knew or ought to have known.<sup>23</sup> This means the court will ask themselves ‘could a reasonable person have made the same decision if they had the same knowledge and information as the director whose actions are being questioned?’

Directors are expected to exercise due diligence when carrying out their fiduciary duties.<sup>24</sup> The court in *Westerlee Development Ltd v Adanac Customs Brokers Ltd* held that the standard of due diligence requires “at least equivalent to genuine and reasonable effort”<sup>25</sup> and “will depend on the circumstances, the type of organisation and the activities undertaken.”<sup>26</sup>

### **Directors must avoid conflicts of interest**

All directors of societies must take precautions to avoid anything that could be construed as a conflict of interest. This is a key component of the fiduciary duty discussed above and is also explicitly addressed in the New Act. For those directors involved with a not-for-profit holding charitable status the threshold is even higher.

Section 56 of the New Act addresses the issue of conflict of interest. A conflict of interest is when a director has a direct or indirect material interest (would derive personal benefit) in a contract or transaction. This is a conflict because it stands in direct opposition to directors’ duties

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<sup>20</sup> *Schlenker v Torgrimson*, 2013 BCCA 9.

<sup>21</sup> *People’s Department Stores Ltd (1992) Inc, Re*, 2004 SCC 68 at para 35.

<sup>22</sup> Bourgeois, Donald J. *Charities and Not-For-Profit Administration and Governance Handbook* (2009), 81-82.

<sup>23</sup> *People’s Department Stores Ltd (1992) Inc, Re*, 2004 SCC 68 at para 63.

<sup>24</sup> Bourgeois, Donald J., *The Law of Charitable and Not-For-Profit Organization*, Third Edition, Butterworths (2002), 246.

<sup>25</sup> *Westerlee Development Ltd v Adanac Customs Brokers Ltd*, 1996 CarswellBC 1861 (SC) at para 37.

<sup>26</sup> Bourgeois, Donald J., *The Law of Charitable and Not-For-Profit Organization*, Third Edition, Butterworths (2002), 246.

to the society. Conflicts of interest impose a special set of responsibilities on the director. There is both a duty to disclose the nature and extent of the interest to other directors and to ensure that this disclosure is properly recorded in one of the following:

- Director's meeting minutes;
- Consent resolution of the directors; or
- A record addressed to the directors and delivered or sent by registered mail to the registered office of the society.<sup>27</sup>

Those in conflict must also abstain from voting on the issue, leave the meeting when the matter is discussed (unless asked to remain for information purposes only) or when the matter is put to a vote, and refrain from any action intended to influence the vote of other directors.<sup>28</sup>

Exceptions to this rule are found in s. 56(5) and include when the discussion is about remuneration or reimbursing expenses, indemnification (see s. 64 below), or the purchase of insurance to benefit the director.

In the event that a director does not properly disclose and record a conflict of interest, they must pay the society any profit they made as a result of the society entering into or performing the contract or transaction.<sup>29</sup> There are two exceptions to this rule. When the director has fully disclosed their interest in the contract to the other directors, as required in s. 56, and the transaction is still approved by a directors resolution, or if the transaction is approved by a special resolution after disclosure to the members of the directors interest.<sup>30</sup> Breaching the conflict of interest standards does not void contracts, but allows the society to apply to the court to set aside the contract, prohibit the society from entering a proposed contract, or make any other order that may be appropriate.<sup>31</sup>

### **Case study**

A 2015 case in the British Columbia Supreme Court dealt with several issues around director liability, duties, disclosure, and conflict of interest. The events in *Flying Club v Gordon* took place during the summer fire season of 2009.<sup>32</sup> At the time Gordon was a director and the president of the Merritt Flying Club (MFC), and the de facto airport manager as a result of a long term relationship with Merritt Council. The position of airport manager was one that had generally been filled by the MFC due to their interest and standing rights to parts of the airport, but it was not an official arrangement. MFC derived most of its revenue from a self-serve fuelling depot at the airport. It was self-serve and run through a separate bank account to minimize potential liability.

During the 2009 fire season the BC Ministry of Forests (MoF) used the airport as a staging area for their helicopter operations and Gordon worked very long, initially voluntary, hours doing various tasks, including hot-fuelling helicopters, which requires a certified fueller due to the risk. At some point Gordon and the MoF signed a contract agreeing to pay him \$1,000/day for nearly exclusive use of the airport and Gordon's services. The conditions under

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<sup>27</sup> *Societies Act* s. 56(3).

<sup>28</sup> *Societies Act* s. 56(2).

<sup>29</sup> *Societies Act* s. 57.

<sup>30</sup> *Societies Act* s. 57(a) and (b).

<sup>31</sup> *Societies Act* s. 58.

<sup>32</sup> *Merritt Flying Club (MFC) v. Gordon*, 2015 BCSC 2093.

which this contract was signed were unclear, but Gordon contended that he only put the MFC on the contract because the MoF required a corporate bank account to pay him for his services. Gordon used the fuel account to funnel the payments through the MFC to himself.

New directors were elected in 2010 who took issue with the process, giving rise to this case. They alleged that Gordon had engaged in conversion of funds because the society bylaws prohibited directors from taking any payment from the society, or that Gordon had taken a business opportunity from the MFC. The directors contended that he failed as a fiduciary.<sup>33</sup>

The judge noted that Gordon did not have the personal authority to rent portions of the airport – the flying club may have, but the City would have been the clearest candidate in this regard.<sup>34</sup> Further, the judge noted that Gordon was exposing the MFC to risk of increased liability by placing their name on the contract and engaging in increased risk activities – hot-fuelling – under that contract.<sup>35</sup> Any incident would have exposed the MFC to liability in an area it had taken specific steps to avoid.<sup>36</sup> All of this was done without consulting the other directors, although Gordon subsequently informed two of them and they took no issue with the activities.<sup>37</sup> The court declined to find that Gordon had improperly converted funds on the grounds that the contract was clearly for his benefit – MFC also benefitted from a massive increase in fuel sales – and did not find that he had taken an opportunity from the MFC because they were not truly in a position to exploit a short-term opportunity.<sup>38</sup>

However, the court found that Gordon had erred in not distinguishing between his role as a director and his own personal interest.<sup>39</sup> Also, Gordon’s failure to consider the increased liability accrued to the MFC constituted a failure to exercise the care and diligence imposed on him as a fiduciary.<sup>40</sup> Because there were no accidents, however, there was no loss to compensate.<sup>41</sup> This implies that had there been damages, Gordon may have been held personally liable for any financial losses suffered by the MFC. This case builds on the finding in *Watch Lake* that directors have a great deal of discretion in exercising their statutory authority.<sup>42</sup> However, they are not immune from attracting personal liability when they run into undisclosed conflicts or fail to fulfill their statutory and fiduciary duties in a way that results in harm to the organisation.

## **The Societies Act: Statutory Liability and Immunity**

### **Statutory director’s liability**

Sections 59 and 60 outline director liability for contravening a society bylaw or the New Act. These are additional sections that were not in the Old Act.<sup>43</sup> These sections relate

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<sup>33</sup> MFC, para 36, 38.

<sup>34</sup> MFC, para 23.

<sup>35</sup> MFC, para 25.

<sup>36</sup> MFC, para 28.

<sup>37</sup> MFC, para 29.

<sup>38</sup> MFC, para 44, 50.

<sup>39</sup> MFC, para 48.

<sup>40</sup> MFC, para 48.

<sup>41</sup> MFC, para 49.

<sup>42</sup> *Watch Lake*.

<sup>43</sup> *Societies Act*, ss. 59-60.



specifically to liabilities that are created when society assets are distributed in contravention of the society's bylaws or the Act itself. Directors can be found liable for the amount that it distributed. Directors are liable to return to the society any money or property that was distributed in contravention of the society bylaw or the Act itself.<sup>44</sup> A director will be jointly and severally liable for this money if he or she voted or consented to the action that created the liability.<sup>45</sup> This is enforced by s. 59(4), which states that a "director who has satisfied a liability arising under this section is entitled to contribution from the other directors who voted for or consented to the resolution that gave rise to the liability."<sup>46</sup>

A director's liability may be limited if he or she made the voting decision based on information from another director, a professional opinion, or a valid piece of information. While not an absolute rule, credible sources may be grounds for a limitation of liability. Future case law will help define the specific type of information that will provide for a limitation of liability.

In addition to contravening bylaws or the New Act, a director may face removal from the board if complaints are made by a member of the Society. Section 102 allows for members of a society to apply to the court for an order in two situations:

- (a) Where the activities of a society or a director's exercise of power is being conducted in an oppressive manner towards a member of the society, or
- (b) Where a proposed or passed resolution is "unfairly prejudicial" to a member of the society.<sup>47</sup>

Of the number of remedies available to the court in these circumstances, one option is the removal and replacement of a director.<sup>48</sup>

It is important to note that director liability can endure after the dissolution of a society. Subject to some qualifications,<sup>49</sup> s. 157 states that even though a society has been dissolved, a director's liability will remain as if a society has not been dissolved.<sup>50</sup>

### **Directors can be indemnified from certain types of liability**

In some cases, the New Act will allow a society to indemnify a director against penalties and costs of court proceedings. While the Old Act provided for certain circumstances when indemnification was possible, the incoming New Act provides for when indemnification is prohibited.

Under the New Act, indemnification is available for eligible proceedings, which are delineated in the act, and is subject to a society's bylaws. Further, the new provisions require the society to pay the expenses of a director's legal proceedings when they meet the criteria of having been an eligible party engaged in an eligible proceeding, as defined under s. 63.<sup>51</sup> An eligible proceeding is defined as a proceeding in which an eligible party (a director is an eligible party), by reason of having been a director "(a) is or may be joined as a party, or (b) is or may be

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<sup>44</sup> *Societies Act* s. 59(1).

<sup>45</sup> *Societies Act* s. 59(1).

<sup>46</sup> *Societies Act* s. 59(4).

<sup>47</sup> *Societies Act* s. 102(1).

<sup>48</sup> *Societies Act* s. 102(2).

<sup>49</sup> *Societies Act* s. 151(3), 156(2), 156(4).

<sup>50</sup> *Societies Act* s. 157.

<sup>51</sup> *Societies Act*, s. 64.

liable for or in respect of a penalty in, or expenses related to, the legal proceeding or investigative action.”<sup>52</sup> This remains consistent with the Old Act where indemnification was only allowed when the director has been made party to the litigation because of their position as a director.<sup>53</sup>

However, a society cannot cover fees or penalties if the director did not act “honestly and in good faith with a view to the best interests of the society,” had no reasonable grounds for thinking their conduct was lawful, or if the Society is suing the director.<sup>54</sup> As mentioned above, there is a difference in wording between the Old Act and the incoming New Act; however, both use the phrase “good faith with a view to the best interests of a society”. Under the Old Act, acting in the best interests of the Society was discussed in *Garcha v Khalsa Diwan Society – New Westminster*.<sup>55</sup> In this case, the court held that “best interest” referred to the affairs being conducted properly and in accordance with the Act and the Society’s bylaws.<sup>56</sup>

Regardless whether or not indemnification is possible, a director may find relief in another aspect of court proceedings. The New Act mandates that a court must take into consideration certain circumstances when deciding on director liability (s. 106). This includes the nature of the situation and information regarding the director’s designation election or appointment.<sup>57</sup> The court may relieve the director from liability, wholly or partly, if the court believes the director has acted “honestly and reasonably and ought fairly to be excused.”<sup>58</sup>

## **Fees**

Under s. 212 there are certain fees related to the maintenance of a society’s incorporation status under the Act.<sup>59</sup> These fees will be laid out in detail in the forthcoming regulations.<sup>60</sup> Directors are responsible for ensuring that the society remains in good standing.

## **Record keeping**

Failing to maintain adequate records, as outlined in the New Act, can constitute a breach of a director’s fiduciary duty. Sections 20-28 list the types of records that must be maintained, where and how they must be stored, as well as how the records are allowed to be inspected or copied. A specific list of the required documents to be kept can be found under s. 20 of the Act.<sup>61</sup> Section 21 indicates that old records need not be kept. A society is not required to keep records that are “no longer relevant to the activities or internal affairs of the society and 10 years have passed since the record was created or, if the record has been altered, since the record was last altered.”<sup>62</sup>

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<sup>52</sup> *Societies Act* s. 63.

<sup>53</sup> *Garcha v Khalsa Diwan Society – New Westminster*, 2007 BCSC 60 at para 25.

<sup>54</sup> *Societies Act* s. 65(1).

<sup>55</sup> *Garcha v Khalsa*, para 25.

<sup>56</sup> *Garcha v Khalsa*, para 28.

<sup>57</sup> *Societies Act* s. 106(a).

<sup>58</sup> *Societies Act* s. 106(b).

<sup>59</sup> *Societies Act* s. 212.

<sup>60</sup> *Societies Act* s. 212.

<sup>61</sup> *Societies Act*, s. 20.

<sup>62</sup> *Societies Act*, s. 21.

## **Directors Toolbox**

This section will address ways in which director liability can be mitigated and will outline positive steps that a director can take to ensure they are fulfilling their role within the organisation they represent.

### **Fiduciary duty**

Given how central fiduciary duty and due diligence are to the role of a director, understanding the concepts and making informed decisions are crucial for reducing personal liability. As mentioned previously, the standard of due diligence applied in any given situation will vary. That being said, there are general steps that a director can take to meet this due diligence standard for fiduciary duties. First, a director should make fully informed decisions at every meeting. By understanding the society's bylaws and the implications of a decision, as well as being satisfied that they have adequate information before them, a director will have the greatest chance of making a fully informed decision. Detailed record keeping can assist in this process.

Second, understanding and following rules and policy, and actively participating in meetings can help to ensure that a director fulfills his or her fiduciary duty to the society. This requires directors to be fully informed about the overriding purpose of the society as articulated in the constitution. Founding documents will also contain the focus and scope of the society's activities. Acting outside of these, or causing the society to act outside of these, can expose a director to liability.

### **Conflict of interest**

Traditionally, fiduciaries cannot have an interest that conflicts with those whom they are bound to protect.<sup>63</sup> Directors of charitable organisations are generally considered to be held to a higher standard regarding conflicts of interest than their counter-parts in the business sector. While in many cases, including non-charitable not-for-profits, directors may enter into contract with an organisation after proper disclosure has occurred. It is more difficult for directors of charitable organisations to do so.<sup>64</sup>

However, provided that a director has fulfilled both their statutory duties and the proper procedures for disclosure, they will not be held liable to the corporation because of the mere presence of a conflict of interest.<sup>65</sup> In instances where there is confusion about the level of material interest a director has in a given project, the director may seek independent legal counsel at their own expense.<sup>66</sup>

One of the best ways to clarify the rules regarding conflicts of interest is to have a conflict of interest policy for the society. Such a policy should include the following:<sup>67</sup>

- A definition of what might constitute a conflict of interest. This should include the factors contained in the New Act discussed above as well as a discussion about the issue of family relationships and how they are relevant in conflicts of interest.

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<sup>63</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 20.

<sup>64</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 22.

<sup>65</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 102.

<sup>66</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 103.

<sup>67</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 103-10.

- A list of the information that must be disclosed in the event of a conflict of interest. Drafters should be aware that some conflicts, especially those involving personal relations, may be of a sensitive nature.
- A person or the people to whom the information must be disclosed. It is not always appropriate to inform everyone about the conflict. Many organisations have a staged process. These can involve disclosure to a chair or designate who can then help decide the course of action going forward.
- Possible remedies. These will range from resignation to disclosure.
- Penalties for breaching the policy. Societies will always have the right to take legal action against a director in violation.
- A discussion of what, if any, conflicts may be disclosed to the membership at large.

Directors should note that conflicts can be real or imagined. While it may be obvious to those within the society or to the director themselves that a conflict has been avoided or resolved, it may not be obvious to other who are not as well informed. This being said, conflicts based on misunderstanding will likely be rare and can generally be avoided with care.<sup>68</sup>

### **Personnel management**

Personnel management, including the management of volunteers, is a massive topic that requires another project to effectively address. What directors should know is that there is the potential for societies to be held vicariously liable for the actions and injuries of their employees and volunteers. A previous report addressed this issue. Having effective management strategies in place will assist in mitigating these risks. Below are some resources that directors may find useful.

Interpretation Guidelines Manual for British Columbia *Employment Standards Act* and Regulations.

<https://labour.gov.bc.ca/esb/igm/esa-part-1/igm-esa-s1-employee.htm>

A guide to BC's *Personal Information Protection Act*. This will be relevant in any scenario where the society is coming into possession of individuals' personal information.

<https://oipc.bc.ca/guidance-documents/1438>

An explanation of the basic functioning of the Employment Insurance and Canadian Pension Plan.

<http://www.cra-arc.gc.ca/tx/hm/xplnd/menu-eng.html>

A guide to income tax deductions for employers.

<http://www.cra-arc.gc.ca/E/pub/tg/t4001/t4001-14e.pdf>

WorksafeBC requirements for employers can be found here. It will be especially important to understand these requirements if a society has people working out on the land.

[http://www.worksafebc.com/insurance/registering\\_for\\_coverage/your\\_obligations\\_as\\_an\\_emplo](http://www.worksafebc.com/insurance/registering_for_coverage/your_obligations_as_an_emplo)

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<sup>68</sup> Bourgeois, Donald J. *Charities and Not-For-Profit Administration and Governance Handbook* (2009), 104.

[yer/default.asp](#)

Imagine Canada has some useful articles on strategies for managing personnel and mitigating risk. Although it is focused on the legal situation in Ontario, the practices are broadly applicable in BC.

<http://sectorsource.ca/managing-organization/staff-management/policies-and-practices>

### **Director liability insurance can offset the costs of legal proceedings**

As discussed above, societies have the option of indemnifying directors against many kinds of liability that could arise from carrying out their duties. In the event that this becomes necessary, the cost burden on the society could be significant. Having a mechanism to offset those expenses is an important consideration. This is especially true when the society does not have sufficient resources to provide adequate representation for directors in the event of legal proceedings.<sup>69</sup>

Prior to purchasing directors' insurance, societies should consider the following:<sup>70</sup>

- The amount of risk the directors are actually exposed to;
- Whether the risk can be reduced or eliminated by other means;
- Whether the cost of the insurance is proportional to the risk and benefit;
- Whether the cost of insurance is adequate in relation to the revenue available to the director; and
- Whether providing insurance advances the administration of the society.

The Land Trust Alliance offers an insurance program that includes directors' coverage.<sup>71</sup> Regardless of the insurance regime being considered, the society must bear in mind that the primary intent of the insurance would be to benefit the society, not the individual directors.<sup>72</sup>

### **Conclusion**

It is anticipated that regulations under the New Act will provide detail and clarity. The revised directors' duties and the new sections dealing with the appointment and qualifications of directors, which are additions to the New Act, will have an impact on director liability. Generally, director liability has not changed substantially, however the New Act provides additional clarity about the consequences of breaching a Society's bylaws or the New Act, the potential impact of member complaints, and the circumstances allowing for indemnity of liability. Directors can help offset this liability through a number of ways, including proper exercise of fiduciary duty, disclosing conflicts of interest, understanding the provisions of the Societies Act and the pending regulations, and obtaining insurance.

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<sup>69</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 103.

<sup>70</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 135.

<sup>71</sup> <http://ltabc.ca/2012-02-10-04-17-51/technical-and-financial-assistance>.

<sup>72</sup> Bourgeois, Donald J. Charities and Not-For-Profit Administration and Governance Handbook (2009), 136.