

# Natural Legacies:

## *Your Educational Guide to Conservation in BC*



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

The purpose of this summary is to discuss the 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>

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.

### DUTIES, LIABILITIES, AND RISK MANAGEMENT



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## *Director Duties*

There are two related concepts in the law that deal with director duties. The first is the statutory responsibilities arising out of the New Act. The second is a fiduciary duty explained below.

### *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." Furthermore, 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>2</sup> This establishes a standard that is slightly different than that in the Old Act which reads "...of a reasonably prudent person."<sup>3</sup> The addition of the "comparable circumstances" element demands that directors look to a counterpart holding a similar position. Finally, directors "must act with a view to the purpose of the society."<sup>4</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.

### *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 organization. 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 analogous to the fiduciary duty of directors of societies."<sup>5</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.

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>6</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>7</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>8</sup> and "will depend on the circumstances, the type of organization and the activities undertaken."<sup>9</sup>

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

<sup>2</sup> *Societies Act*, s. 53(1).

<sup>3</sup> *Society Act*, s. 25(1)(b).

<sup>4</sup> *Societies Act* s. 53(2).

<sup>5</sup> *Schlenker v Torgimson*, 2013 BCCA 9.

<sup>6</sup> *People's Department Stores Ltd (1992) Inc, Re*, 2004 SCC 68 at para 63.

<sup>7</sup> Bourgeois, Donald J., *The Law of Charitable and Not-For-Profit Organization*, Third Edition, Butterworths (2002), 246.

<sup>8</sup> *Westerlee Development Ltd v Adanac Customs Brokers Ltd*, 1996 CarswellBC 1861 (SC) at para 37.

<sup>9</sup> Bourgeois, Donald J., *The Law of Charitable and Not-For-Profit Organization*, Third Edition, Butterworths (2002), 246.