BRITISH COLUMBIA
REAL ESTATE
ASSOCIATION

October 15, 2014

Financial and Corporate Sector Policy Branch
Ministry of Finance
PO Box 9418 Stn Prov Govt
Victoria, BC V8W 9V1
Submitted by email: fcsp@gov.bc.ca

Attention: Honourable Michael de Jong, Minister of Finance

RE: Comments and Concerns regarding Draft *Societies Act*

The British Columbia Real Estate Association (BCREA) is the professional association for approximately 19,000 REALTORS® in BC, focusing on provincial issues that impact real estate. BCREA works with the province's 11 regional real estate boards, and provides continuing professional education, advocacy, economic research and standard forms to help REALTORS® provide value for their clients. While BCREA is a large organization with a sophisticated governance and management structure, the regional real estate boards themselves vary greatly in size and sophistication. Both BCREA and each of the real estate boards are incorporated under the *Society Act*.

BCREA, on behalf of the real estate sector, responded to the *Society Act* Review Discussion Paper issued by the Ministry in late 2011. We appreciate that the Ministry has continued to consult with stakeholders on this important legislative initiative. On behalf of British Columbia's real estate sector, we write to provide comments and identify certain concerns arising from the draft legislation proposed to replace the *Society Act*. We suggest that many of our concerns are likely to be shared by other professional associations governed by the *Society Act*.

We note that the majority of the proposed provisions in the draft legislation are an improvement over the current statute. In particular, the draft legislation adopts modern corporate provisions while maintaining a high degree of flexibility to allow societies to structure their governance according to their unique needs and models. However, BCREA has several significant concerns with specific provisions and with the policies that these provisions appear to reflect. We will focus our submission on these issues.

1. Member Funded Societies

First and foremost among BCREA's concerns are the provisions related to member funded societies. We understand that the intent behind these provisions is to exempt societies that are primarily funded by and benefiting the members of the society (as opposed to the public generally) from several provisions that enforce a high standard of public accountability.

First, as a general comment, we note that, apart from Part 12 itself, the remainder of the draft *Societies Act* does not mention "member funded societies" or make note of when a section does not apply to such a society. This was both confusing and alarming for the regional real estate boards, who had to reach Part 12 of the *Societies Act* before learning that certain provisions set out earlier in the legislation do not apply to member funded societies. **BCREA requests that each of the provisions from which member funded societies are exempt should note this in the section itself, to alleviate the potential for confusion.**

Second, we have serious concerns regarding the rules set out in s. 188 that determine when a society qualifies as a member funded society.

In our view, associations, including BCREA, the regional real estate boards, and professional associations of all types, are precisely the kind of society that was meant to be classified as a member funded society and exempt from accountability to the general public. BCREA and the real estate boards are funded almost exclusively by fees and dues from members. Moreover, the purpose of these societies is to benefit members by a variety of means, including access to programs, services, education and benefits. Although there are indirect benefits to the public that arise from having real estate professionals who are supported, trained and knowledgeable, this benefit is secondary and incidental to the objectives of BCREA and the real estate boards.

By all practical measures, BCREA and other professional associations should be classified as member funded societies, and we believe it is the intent of the Ministry that this be the case. However, several of the provisions of Part 12 are, in our view, drafted too broadly, potentially capturing even associations like BCREA. Other provisions are ambiguous, thereby resulting in uncertainty that may cause disruption for all member funded societies.

Section 188, paragraph (2)(a)(iv) states that a society may not be a member funded society if it has a charitable purpose. This is in addition to paragraph (2)(a)(i), which separately disqualifies societies that are registered charities. **BCREA submits that paragraph (2)(a)(iv) of s. 188 is ambiguous, over-broad and unnecessary, and we strongly suggest that it should be deleted from the legislation.**

The draft legislation does not provide a definition of "charitable purpose." We understand that the concept of charitable purpose is not defined by any statute (even the federal *Income Tax Act* that regulates registered charities), but is loosely defined only by various court decisions made in the past. The four main established categories of charitable purposes are religion, education, relief of poverty and "other purposes beneficial to the community," which itself includes a variety of purposes and activities. We also understand that a purpose can be considered charitable at law even if it is not for the benefit of the entire general public, but for the benefit of a significant segment of the public.

Although neither BCREA nor the real estate boards would qualify for charitable registration under the *Income Tax Act*, they have a number of purposes that could be interpreted as charitable under this loose

definition. These include providing education and training to members, assisting members in difficult financial circumstances (i.e., relieving poverty) and providing community benefits. The fact that these benefits are available to thousands of REALTORS® across the province is potentially a broad enough segment that it could constitute a charitable purpose. This uncertainty is extremely problematic for our organizations. We do not view ourselves as charitable organizations, but professional associations committed to the improvement and support of our members and the profession. Accordingly, we do not see why the fact that some of our purposes may constitute charitable purposes under the legal rules should disqualify professional association from being classified as a member funded society.

Furthermore, the inclusion of this paragraph seems inconsistent to the main reasoning of the provisions, which is that a society should be accountable to the public if it is receiving significant public funding. Having one or more purposes that could be charitable does not mean that a society is operating for the public benefit, and it certainly does not equate with receipt of significant (or any) public funding.

For these reasons, BCREA requests that the Ministry delete paragraph (2)(a)(iv) from s. 188.

BCREA is also concerned in several respects regarding the definition of "public donations and gifts" in s. 187. It is unclear from the definition whether it captures only donations from individuals, or whether transfers or grants from other organizations would also be included in the definition. This is problematic because both BCREA and real estate boards receive occasional and project-based funding from other real estate organizations, including the Real Estate Foundation of British Columbia, the Canadian Real Estate Association and other national and regional organizations in the sector. While these funds are not referred to as "gifts" they are occasionally called donations, grants, sponsorships or funding. BCREA is concerned that these transfers from like organizations could, under the current definition, be included as public donations. In our view, it would be inappropriate that a professional association could lose status as a member funded society on the basis of receipt of these funds.

BCREA requests that the definition of public donations and gifts in s. 187 be revised to refer to "donations or gifts <u>from individuals</u>, other than . . .".

BCREA is further concerned that the exemption for donations from members, directors, employees is not broad enough. We advise that not only members, etc., but also the immediate families (spouses, children, other close relatives) of such persons may have reason to make donation to support the professional association or one of its programs. We also note that members may wish to donate through a corporate entity that they control, including their professional corporations. We are of the view that this donation is not "public" in any meaningful sense and should be expressly excluded from the definition of public donations and gifts. We note in particular that since all donations to a member funded society are, by definition, not made to a registered charity, then there is no tax benefit to making a donation or gift. Therefore, all such donations are tax-paid funds and therefore are not public funds. Accordingly, receipt of such donations should not cause a society to lose member funded status.

In addition, BCREA strongly disagrees that the mere solicitation of donations from public sources should disqualify a society from having member funded status. A society should be able to attempt solicitation without committing itself to losing member funded status. Should the society actually receive donations from public sources (revised as recommended above) then it can properly be required to accept the obligations that flow from being publicly accountable. Furthermore, we note that the draft *Societies Act* provides no guidance as to what constitutes solicitation of public donations or gifts, which will lead to uncertainty and inconsistency.

BCREA requests that the references to solicitation of public donations be removed from s. 187 and s. 188, paragraph (2)(a)(i)(A).

BCREA is concerned about the threshold that may be set for public donations and gifts and for public funding. By way of example, BCREA has annual revenues of over $5,000,000, with the vast majority of this amount coming from member contributions and dues. However, it may receive over $100,000 in grants in a given year. This amount, while miniscule in comparison with the overall budget, could disqualify BCREA from member funded status if it were from a governmental or other "public" source. **BCREA submits that, as an alternative to a single fixed amount, the threshold for public donations or gifts and public funding be set as a reasonable percentage of operating revenues.** This approach would provide greater flexibility for societies whose funding amounts and sources vary year over year.

Lastly, we think it is overly onerous to require a society that otherwise qualifies but has lost member funded status in a previous year (perhaps due to receipt of a significant government grant) to have to apply to the court to re-qualify for member funded status in a subsequent year. This approach suggests that societies are punished for receiving public funding and must go to considerable expense to regain member funded status, even where they otherwise qualify. We are of the view that if the society is otherwise compliant with s. 188, then its members should be able to approve a return to member funded status by special resolution. Similarly, a society may evolve from being publicly funded to being privately funded by its members, and should not be forced to expend considerable funds to seek court approval.

BCREA requests that s. 190 be revised to allow alteration of a society's constitution to become a member funded society by special resolution, if the society qualifies in accordance with the legislation and the members so approve by special resolution.

2. Constitution and Bylaws

BCREA does not oppose the proposals affecting societies' constitutions and bylaws and, in particular, approves of the lowering of the threshold for a special resolution from 3/4 to 2/3 member approval at a general meeting. We believe that electronic filing of amendments to constitution and bylaws, as well as the automatic consolidation that will result from the electronic filing system, will benefit the sector and reduce confusion.

However, we hope that the electronic system will still allow a society to retrieve from the registrar a copy of its bylaws as they existed on a given past date. The ability to access "point in time" versions of the constitution and/or bylaws is very important to societies should there be a dispute about a governance matter that occurred under a previous version of the bylaws.

3. Records

BCREA approves of the clarity provided by the list of required documents set out in s. 19 of the draft *Societies Act*, as well as the certainty and flexibility provided by respective sections regarding the place, format and duration for which records must be kept.

However, BCREA continues to be very concerned with the proposed language of s. 23, which would provide, as a default, open access to all the records listed in s. 19 to any member, including, by virtue of paragraph (2)(b), minutes of directors' meetings and detailed accounting records.

We recognize that this section continues the policy of default open access as it exists in the current *Society Act*. As noted in our previous submission, the current policy is the source of significant difficulties for societies both large and small. While we have no objection to members having access to the documents listed in paragraph 19(1), it is inappropriate and potentially damaging to the best interests of many societies for their members to have, as a default, unrestricted access to minutes of directors' meetings and to detailed accounting records (such as the general ledger). Default open access to these documents by members could have serious negative impacts on the operation of BCREA and the regional real estate boards. There is a strong likelihood that certain members would access and use this information to advance a personal agenda and attempt to "micro-manage" the elected directors of the society.

We quote from our previous submission: "Although directors of a society are and should continue to be accountable to their members, this accountability does not extend to members having access to every board decision open for critique, every contract accessible for viewing and every authorized expense available for scrutiny. A society's directors are empowered by the Act (and, in most cases, by their members) to manage the affairs of the society for a certain term. During that term, they accept responsibility for the organization, which responsibility is buttressed by the possibility of personal liability. Directors are tasked with making difficult decisions and so have access to all documents in order to make the best decision possible for the benefit of the society. Members do not have the same level of duty or potential liability, and it is therefore inappropriate, in our view, to provide them with the privileges of total access (which can be used to second guess the decisions of the duly elected directors) without the responsibility that flows from the decision-making power."

BCREA does not believe that s. 23(2)(b) properly respects the authority, responsibility and potential liability of duly elected boards of directors and gives too much power (and potential for abuse) into the hands of unaccountable members.

In addition, both of these categories of documents frequently contain sensitive, personal, competitive or proprietary information regarding a society and its internal affairs. This kind of sensitive information should by default be limited to access by directors, who have a fiduciary duty to act in the best interests of the society as a whole. Members of a society have no such duty and can, if they obtain access to personal, sensitive or proprietary information, freely exploit that information for their own personal benefit. In the case of personal information contained in directors' minutes or accounting records, access by members could result in a breach of the obligations imposed on the society by the *Personal Information Protection Act*, potentially resulting in liability for the society. We note that under the provision even the minutes of executive or "in-camera" meetings would be available as a default. This is wholly inappropriate and detrimental to the ability of boards of directors to effectively govern their organizations.

We strongly believe that the more appropriate policy is that minutes of directors' meetings and accounting records should, unless the bylaws provide otherwise, be restricted from member access. We believe this to be a best practice in governance, and note that the recently enacted *Canada Not-for-Profit Corporations Act* followed this policy, with neither minutes of directors' meetings nor accounting records included in the list of documents to which members had default statutory access. We recommend that the *Societies Act* observe the same policy for consistency, if nothing else.

Moreover, it is unnecessary to set open access as the default for all societies because, under the preferred policy outlined above, members can, should they at any time determine that open and unrestricted access is what they desire, propose and pass a special resolution to amend the bylaws so as to provide additional access beyond the statutory minimum. Therefore, there is no risk of any lack of transparency contrary to the wishes of the members of a society, since they have the power to require access. Conversely, should the proposed policy be allowed to continue, it is very unlikely that members will allow a bylaw to restrict their access, even where there are legitimate reasons for proposing such a restriction.

BCREA urges the reversal of the proposed policy in s. 23(2)(b), and requests that record access by members be limited to the records listed in s. 19(1) unless the bylaws expressly provide access to additional documents. This change could be accomplished by revising the words in paragraph (2)(b) from "unless the bylaws provide otherwise" to "if the bylaws allow."

BCREA also has some concerns with regard to s. 24. We appreciate that members need access to the member register for legitimate purposes related to their rights as members, however, there is significant potential for abuse, where a member uses contact information for a personal or ulterior reason unrelated to the affairs of the society. This potential for abuse may be particularly present in professional associations where members are competing for business or customers. To limit this potential for abuse, **BCREA recommends that members who desire to access the member registry, pursuant to s. 24, be required to swear a statutory declaration that the information will only be used for legitimate purposes.** Having to go before a lawyer or notary will impress on members the seriousness of the situation and discourage frivolous or non-legitimate access requests. We note that

the new federal legislation adopts this approach, requiring a statutory declaration for a member or representative to access the member registry in any case (see s. 23).

4. Finances

BCREA and its various regional real estate boards are gravely concerned at s. 35 of the draft *Societies Act*. This proposal to require disclosure of remuneration of directors, employees and contractors for services goes beyond any requirement in any corporate legislation anywhere in Canada. Not even registered charities are required to specifically disclose the remuneration of officials by position and amount.

The policy established by s. 35 disregards the fact that salary and compensation information is highly sensitive personal information in which individuals have a reasonable expectation of privacy. Even the receipt of public funding does not make a society so "public" in character that it would be subject to the *Freedom of Information Act* that applies to governmental bodies.

Requiring the disclosure of this personal information will have extremely negative effects on many societies. We understand from the annotations to the draft *Societies Act* that this same policy was recently enacted for community contribution companies. However, this parallel reasoning is inadequate for two reasons. First, there are many thousand times more societies in existence than community contribution companies, which can only be created as of August 2013. Secondly, these entities could consciously choose whether to adopt that structure with its obligations, or choose a different structure with no such requirements. This is a very different situation than requiring thousands of societies who did not choose to adopt this level of compelled transparency.

BCREA is very concerned with mandatory disclosure of employee remuneration and benefits. We are less concerned about societies having to disclose remuneration paid to directors in that capacity. Forced disclosure of employee salaries will result in discord, contention and disputes, both between members and the society, and among employees. We have seen numerous examples where members wish to access or disclose employee salaries to create strife and advance a personal grievance.

For example, access by members of a society (or members of the public) to employee remuneration information (particularly CEO salary information) may damage the relationship between the directors and the CEO, resulting in stress, frustration and even the resignation of a competent employee. Moreover, compelled disclosure can foreseeably lead to morale and performance issues that undermine the workplace culture and environment.

BCREA calls for the Ministry to remove s. 35 or, at the very least, limit its scope to director remuneration. Employee remuneration is personal information that should not be put into the public sphere.

5. Management

BCREA is strongly opposed to ss. 53 and 62, both of which have the effect of imposing fiduciary duties on certain employees of societies. It appears that s. 53 is meant to apply to outsiders who control operations and should, therefore, not apply to employees or managers of a society.

BCREA is strongly opposed to the portions of the *Societies Act* that propose to regulate senior managers of societies. We consider it inappropriate for a governance statute to regulate what amounts (in large societies) to the senior employee positions, nor to impose director-like duties and obligations on employees or volunteers.

First, BCREA is concerned with s. 62(1), which provides boards of directors with a default power to appoint and remove senior managers. In our experience, organizations following best practices for management follow a model where the board of directors appoints the chief executive (by whatever title) and that CEO is empowered to hire and manage all secondary staff. However, this model is rarely, if ever, set out in the organization's bylaws. Adopting this section means that in any society that has not, by bylaw, enacted the preferred model, the directors will be empowered to hire and fire senior managers, contrary to the expectations of the chief executive (or the provisions of his or her employment contract and job description). In some cases, the exercise of this power could constitute constructive dismissal of the CEO, with attendant liability for severance to the society. Moreover, we do not believe that this level of governance should be required to be set out in bylaws.

BCREA is also concerned that imposing the obligations of directors on employees may negatively affect existing employment relationships, as well as staff morale and performance. By way of example, BCREA has at least seven persons that would likely qualify as senior managers under the definition.

Another serious problem with these provisions is the application of director qualifications to senior managers. Under s. 42(2), a director who ceases to qualify must resign. The qualifications for directors are applied equally to senior managers by virtue of s. 62(3). If the qualifications apply, we are concerned that the obligation to resign will likewise apply. If so, this is a serious problem from an employment perspective.

Overall, we are not convinced that the Ministry has fully contemplated the effect of imposing director-like duties on a large group of people, including hundreds of employees, who do not currently have those duties by virtue of statute. The duties of employees, including managers, should be determined by employment law and the contract of employment between a society and its staff. If the directors of a society fail to impose binding employment contracts on employees that have important duties, then any loss to the society would be recoverable from the directors, who would be personally liable for negligence.

BCREA strongly recommends that the Ministry remove provisions related to senior managers and rely on other statutes and existing law to govern this relationship and the responsibilities of "managers." If

the Ministry declines to remove provisions related to senior managers, then BCREA requests that the definition of "senior manager" be restricted to the chief staff officer of a society.

BCREA does not oppose the expanded conflict of interest rules for directors. We think this reflects best practices in governance, generally. However, we point out that not all contracts or transactions that may be "material" to a director are approved (or, in many cases, even known about) by the board of directors. Under the proposed language, a director could incur liability for a transaction of which he had no knowledge and no authority or opportunity to approve. **BCREA requests that s. 56 be revised to limit application to transactions and contracts that come before the consideration of the directors.**

6. Members

Consistent with our previous submission, BCREA is concerned at the rights conferred by s. 78 of the draft *Societies Act* that will allow a small number of members to dictate items on the agenda of a general meeting. While we are not opposed to having democratic participation of voting members, we are concerned that this right will be abused by members with a personal agenda or grievance to attempt to address an issue that is outside the authority of the members (or of the society generally) or inappropriate to discussion before the entire assembly. In particular, we are concerned that the directors will not have the ability to reject proposals that are offensive, illegal or otherwise inappropriate.

For example, nothing would prevent a disgruntled member from making five or ten such proposals, and causing undue and self-serving delay and contention at the annual general meeting. Certain proposals could cause serious damage to a society's reputation, as well as its relations with members and the public. We do not believe this should be allowed.

We note that the federal legislation allows proposals from a single member, but gives the directors broad powers to refuse inappropriate proposals. If faced with a choice, we would prefer this model over the proposed provision with no such ability.

BCREA requests that the proposal power in s. 78 be revised to be subject to stricter limitations as to use (e.g., a member may propose no more than two such proposals for a given meeting), and include the ability of the directors to block inappropriate proposals, consistent with the federal legislation.

7. Remedies

BCREA previously raised serious concerns with regard to the proposed remedies for members and the public contained in Part 8. We pointed out that the oppression remedy and derivative remedy that were developed in the context of companies with shareholders are, at best, ill-suited to non-profit societies.

First, unlike shareholders of a company, members of societies do not have a vested financial interest in the organization. Second, unlike companies, the purpose of a society is not to generate wealth for its

members. Rather, societies (and the boards that govern them) must balance multiple purposes, which often means allocating its limited resources to different purposes or programs at different times, depending on circumstances. These considered decisions may have adverse effects on certain groups of members, but are necessary to serve the best interests of the society as a whole.

Almost without fail, the decisions directors must make to steward the resources and advance the purposes of a society will upset some member. We submit, however, that this is precisely the duty of a society's directors; to make informed and carefully considered decisions that advance the purposes of the society as much as possible considering available resources and circumstances. To provide the oppression and derivative remedy to societies will empower disgruntled members to force the discretionary decision of the directors to a courtroom to be scrutinized, at significant expense to the society itself and to the detriment of its ability to carry out its purposes.

Should a society, or its directors, be forced to incur significant legal fees to defend a claim that arises because a decision was made which negatively affected that member, or because that decision runs contrary to the member's views on how the society should be operating? Should societies and the directors that guide them be put in a position where they may be liable to compensate a member because it made a difficult decision to allocate resources to the detriment of the programs enjoyed by the member?

We submit that this is not the purpose for which the oppression remedy was designed. The oppression remedy was made to assist those whose tangible financial interest, which interest was acquired for valuable consideration, has been adversely affected by a decision of the board of directors that is not in line with the primary purpose of the organization. It should not be used as a means to provide disgruntled members with a weapon to attack directors' decisions. Members who are unhappy should seek to join the board of directors and thus to influence decision-making from within. We do not agree with a remedy that incentivizes members to stand outside the decision-making process and criticize the decisions made by those willing to serve.

BCREA does not consider that the concerns raised in our first submission have been addressed and, therefore, we request that the provisions for oppression and derivative remedies in Part 8 be deleted from the proposed *Societies Act*.

Lastly, BCREA is concerned at the proposed inclusion of a public complaint remedy in s. 99 of the *Societies Act*. We note that this remedy is applicable to all societies, even those that qualify as member funded societies. We assert that this is incongruous with the concept of member funded societies. The purpose of the member funded society designation is to recognize that some societies do not operate for a public benefit, but wholly or primarily for the benefit of their members. The public has no direct or indirect interest in such organizations and should not be statutorily empowered to take legal action against such societies. We note that, if a society is conducting itself fraudulently or unlawfully, then there are other statutes that would grant a right of action to a person who is affected by such behaviour. Accordingly, the inclusion of the provision for these broad purposes is superfluous.

In particular, we are opposed to s. 99(1)(b) of the *Societies Act*, which provides a public right of action against any society for "carrying on activities that are detrimental to the public interest." This is a vaguely stated and subjective basis for legal action. We are concerned that it will encourage litigation against societies for frivolous reasons, compelling societies to waste funds on defending baseless personal grievances.

The media has reported criticism from several societies for this provision in the proposed *Societies Act*. For example, on October 10, an article in *The Tyee* indicated that 32 organizations had registered concerns similar to those expressed by BCREA in this submission.

BCREA requests that the Ministry delete s. 99 from the proposed *Societies Act* or, failing that, delete paragraph 99(1)(b).

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BCREA submits that, while the proposed *Societies Act* contains many improvements over the current legislation, which will benefit the not-for-profit sector greatly, we believe that the several concerns we raise are significant and must be addressed before the legislation is adopted.

Thank you for considering BCREA's comments and concerns. We will continue to work with Minister de Jong's staff to schedule a meeting in December to discuss BCREA's submission in greater detail.

Yours sincerely,

Robert Laing

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Chief Executive Officer

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