

Changes to the BC Societies Act

Frequently Asked Questions for Divisions of Family Practice

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DISCLAIMER: The information provided in this FAQ is only a summary of some of the changes coming under the new Societies Act. The information does not constitute legal advice to specific Divisions or other societies. Divisions should consult with a qualified lawyer for legal advice concerning the specifics of their particular situation.

NEW LEGISLATION

1. When is the new *Societies Act* effective?

The [new Act](#) and the [regulations](#) to the Act will come into force on November 28th, 2016. Except for a few sections, the application of which is delayed until 2018, the new Act and regulations apply to all societies, including Divisions that are incorporated under the current *Society Act*, as of that date. Any provision of a Division's bylaws that is inconsistent with the new Act is "of no effect" from that date.

DIRECTORS

1. **Who is "qualified" to act as a director?**

The new Act explicitly sets out minimum qualifications for directors and senior managers (see below) of all societies. These qualifications do not apply immediately, but take effect on November 28th, 2018, giving Divisions a chance to adapt to the new requirement.

Starting on that date, every director and every senior manager must:

- a) be at least 18 years of age (or may be 16 or 17 years of age if the bylaws of the society expressly permit and provided that a majority are 18 or older);
- b) not be found by any court, in Canada or elsewhere, to be incapable of managing his or her own affairs;
- c) not be an undischarged bankrupt; and
- d) not be convicted in or outside of British Columbia of an offence in connection with the promotion, formation or management of a corporation or unincorporated entity, or of an offence involving fraud, subject to certain exceptions.

A society may also set out additional qualifications for director or senior manager in its bylaws.

A director who ceases to be qualified under the Act or the bylaws must resign.

2. Can directors be remunerated for their work as board members? Can directors be remunerated by the Division for other work?

Under the new Act, directors may be remunerated (which includes fees, honoraria, per diems or any other form of payment) for their work as directors as long as the remuneration is clearly and expressly authorized by the

bylaws of the society. A Division that wishes to remunerate directors in that capacity must ensure that the bylaws permit this, or amend them to clearly permit remuneration. If bylaws are silent, then no remuneration of any kind may be paid to directors for acting in that capacity. The application of this new requirement is also deferred until November 28th, 2018, but Divisions are encouraged to review their bylaws in advance to confirm whether changes will need to be made in this regard.

A more significant issue for Divisions is a new limitation on the number of directors who may be remunerated by the Division for services provided under contract. Section 41 of the new Act provides that a majority of the directors of a society must not receive or be entitled to receive remuneration from the society under contracts of employment or contracts for services, other than remuneration for being a director.

While this new rule clarifies that it is permissible to engage a director to provide services in another capacity, it sets a strict limitation on the overall percentage of directors that can be remunerated by a society to provide services beyond the scope for a director. This new rule does not limit the ability for directors to provide additional services as volunteers, but will have a significant impact as most Divisions pay more than half of their directors for additional services.

Even if no formal or written contract is in place, Division directors who receive hourly/sessional fees or other remuneration for duties outside of their director role will constitute an unwritten contract for services.

Remuneration for being a director will likely include the following duties:

- a. board meetings, including attendance and preparation for same;

- b. board retreats and strategic planning;
- c. board committee meetings (e.g., HR, Finance & Audit, Nominations), including attendance and preparation for same; and
- d. additional meeting/prep time for duties of Officers, such as Treasurer and Board Chair.

To the extent one of the following meetings requires participation by a director of a Division (as opposed to where a general member of the Division could serve in the same role), remuneration received by the director for participation will likely be considered remuneration for being a director:

- a. CSC meetings;
- b. Inter Divisional meetings; or
- c. GPSC meetings; or
- d. Board-led working groups.

Director participation or leadership of working groups and/or non-board related committees, where any general member could serve in the same role, will generally be considered as outside of director duties, and as such any remuneration received will be counted as remuneration received “under contract”. This applies whether the remuneration is paid to the director personally or to his or her corporation. Each case may need to be determined on specific facts.

The provision of clinical services is also outside of director duties and would therefore be deemed to be a contractual payment, whether the payment is made to the physician or to the physician’s corporation.

A reminder that all remuneration paid to a director for being a director should be paid to the individual, not the physician's corporation, if one exists.

Current practice for many Divisions is to pay working group compensation to the physician's corporation as opposed to direct to the individual. If Divisions do include working group as a required role of directors, they will have to ensure payments for that work are made to the individual.

This new rule does not apply until November 28th, 2018, two years after the general in-force date of the new Act. This "grace period" gives Divisions more time to review their circumstances, plan strategy and make changes to adapt to the new requirements.

3. What are the risks if a Division doesn't comply with this new limitation on remunerating directors to provide additional services?

During the first two years after the new Act comes into force, this limitation does not apply to existing Divisions. During this "grace period" Divisions can operate outside of the requirements without concern, using the time to plan what steps need to be taken to comply before the grace period comes to an end on November 28th, 2018.

Once the grace period ends, the new requirement applies to all Divisions. Section 41 is not optional. It is a mandatory requirement for all societies, save for those that qualify for special member-funded society status. At this point, it appears very unlikely that Divisions will qualify for that exempt status. Therefore, Divisions should treat the requirements as being fully applicable to them as of the end of 2018.

Any intentional breach of the Act could be challenged before a court, and the court could order the non-compliance corrected and assess damages against the society, or against the directors personally.

4. What requirements does the new Act lay out in terms of disclosure of director remuneration?

The Act requires a society to disclose any remuneration paid to any one or more directors (for both director duties and any other remuneration paid to directors for other duties) as well as remuneration paid to certain employees and contractors. This disclosure must be made in a note to the society's annual financial statements, which are provided to the society's members and accessible by the public generally. Details of the disclosure requirement are set out in the [regulations](#) to the Act.

If there are more than 10 such employees or contractors receiving compensation more than that amount, then society must disclose the top 10.

In the case of directors, the [regulations](#) require that the disclosure separately lists both:

- the total amount of remuneration received in his or her capacity as a director; and
- the total amount of remuneration received in another capacity (if any)

during the fiscal period.

In the case of remuneration paid to employees or parties under contract (including both physicians and non-physicians), a society is only required to disclose where the remuneration paid is \$75,000 or more during the fiscal

period. Note that “remuneration” includes salaries, fees and benefits. For those employees or contractors that exceed the \$75,000 remuneration threshold, the [regulations](#) require that the amount of remuneration must be specified, along with the position or job title or, in the case of contracts for services (whether written or oral and including clinical services), the nature of services provided. When determining the \$75,000 threshold, compensation to a director’s incorporated entity must be included.

To counterbalance any privacy concerns, the names of the directors, employees and contractors need not be disclosed, but position or title must be disclosed in every case.

Note that these disclosure requirements are NOT delayed and will be required for annual financial statements prepared after November 28, 2016.

CONFLICT OF INTEREST

1. What are the requirements for directors regarding conflicts of interest?

Directors of societies are fiduciaries, and therefore have a legal duty to act with a view to the best interests of the society. This duty gives rise to the conflict of interest rules for directors. The new Act will expand those rules beyond what is previously required.

A director has a conflict of interest where he or she has a direct or indirect material interest in:

- a contract or transaction with the society;
- a proposed contract or transaction with the society; or
- a matter that is or is to be the subject of consideration by the directors.

Where a director has identified a real or potential conflict of interest, he or she must:

- a. fully and promptly disclose the nature and extent of the conflicting interest to all other directors;
- b. abstain from voting on, or consenting to, any resolution in respect of the contract, transaction or matter;
- c. leave any directors meeting
 - i. when the contract, transaction or matter is discussed, unless invited to remain to provide information; and
 - ii. in any case, when the vote on the matter is held; and
- d. refrain from any action intended to influence the discussion or vote.

These actions must be recorded either in board minutes, consent resolution, or a separate written document provided to the society, which must be kept with the record book and is examinable by members.

Directors that do not comply fully with these rules may be required to account for any profit or benefit received as a result of the contract, transaction or matter, even where the board has approved it.

If every director has a conflict of interest on a particular matter, the new Act allows any or all directors to vote as normal and the requirements to leave the room and refrain from influencing do not apply.

2. What is the meaning of the phrase “material interest” in the new Act’s sections addressing conflicts of interest?

The new Act does not define the term “material interest”. The concept of a “material interest” is used in law to suggest an interest that is not insignificant

and could reasonably be considered to affect a person's decision-making. In relation to a conflict of interest, the term is used to set the threshold for an interest that is significant enough to be disclosed.

It is important to be aware that a material interest may arise in a number of different circumstances. As examples, a conflict of interest:

- may relate to a person's financial involvement in a third party, such as a Division doing business with a corporation or entity of which that director is an owner, shareholder, director, employee or otherwise under contract.
- may be non-financial, but involve some other benefit or advantage received by the director, such as recognition or position;
- may also be indirect, where a Division is contemplating a transaction with an entity that involves a relative, close friend or business colleague of one of the Division's directors.

The Act clarifies that a director's interest in receiving remuneration as a director, having expenses reimbursed or being indemnified or covered by liability insurance does not constitute a conflict of interest that requires action.

SENIOR MANAGERS

1. Who is a senior manager?

Under the new Act, a "senior manager" will be any individual who has been appointed by the directors to exercise the directors' authority to manage the activities or affairs of the society as a whole or in respect of a principal unit of the society. The most common example of a role that will qualify as a senior

manager is the executive director or CEO of a Division, however, other management roles appointed by the board of a Division may also qualify. A senior manager may be an employee, contractor or volunteer. In addition, unless a society's bylaws provide otherwise, a director may be a senior manager as well.

The concept of a senior manager is being introduced into the new *Societies Act* as a means to decrease the potential for misconduct by management of societies. Senior managers must meet the same qualifications as directors (when such come into effect) and will have similar duties. The new Act imposes certain duties on all senior managers (including the duty to disclose a personal interest in a contract, transaction or matter within the society) but also provides clear rules for indemnification, insurance, and limitation of liability for such persons.

2. Will senior managers need director/officer insurance?

As is the case with directors, under the new *Societies Act*, a society may choose to purchase and maintain insurance against any liability that may be incurred by reason of a person being or having been a senior manager. Such insurance is not mandatory under the new Act and societies may decide for themselves whether or not insurance for directors and/or senior managers is appropriate.

Divisions are required in their Fund Transfer Agreements to hold Directors & Officers Liability Insurance (DOLI). Divisions should consider reviewing the policy and checking with your DOLI insurance provider to enquire as to whether employees are already, or can be added, as insured under the policy.

MEMBERS

1. Is there a minimum/maximum allowable number of members required for a society to have?

Under the new Act, the minimum number of members in a society is one. There is no prescribed maximum number of members, but a society is required to know at all times exactly who its members are. Societies, including Divisions, are required to maintain a current list of all members, whether funded or unfunded.

2. If organizations or corporations can be members, how many votes would they hold?

Corporations and other organizations can become members of a society, unless the bylaws restrict membership to individuals. The new Act provides the same rule as the current legislation, that each voting member of a society is only entitled to one vote. A corporate or organizational member will also hold a single vote.

VOTING AND SPECIAL RESOLUTIONS

1. What is the threshold for a special resolution of the members?

Under the *Societies Act*, the default threshold for a special resolution will be lowered from the current 3/4 to 2/3 of votes cast at a duly called general meeting. However, the new Act goes on to provide that a society can provide for a higher threshold for some or all special resolutions in its bylaws. This means that if the bylaws of a Division expressly reference the current 75%

threshold by number, that threshold will continue after the new Act comes into force, unless itself changed by special resolution.

2. Do 2/3 of a society's membership have to be present at a meeting in order to pass a special resolution?

A special resolution is passed at a duly constituted meeting (i.e. a meeting where required notice has been given and where quorum is present), if approved by at least 2/3 of the votes cast by the members entitled to vote, whether in person, by proxy or by permitted electronic means. The threshold depends on the number of votes cast, not the number of members in total (or even members at the meeting).

For example, if a Division has 500 members, but only 100 members attend a meeting and only 60 of those vote on a matter requiring a special resolution, at least 2/3 of the 60 votes cast (i.e. 40 votes = 2/3 of 60 votes) need to have voted in favour of the matter requiring a special resolution.

3. How can the members of a society pass a resolution at an electronic meeting under the new Act?

The threshold for passing a resolution at a meeting held by electronic means is no different than the passing of the same resolution at a physical meeting. A matter requiring an ordinary resolution may be passed by a simple majority of the votes cast, in accordance with the society's bylaws, on the resolution. Similarly, a matter requiring a special resolution may be passed by at least 2/3 of the votes cast, in accordance with the society's bylaws, on the resolution.

The mechanism for casting votes will differ depending on the type of

electronic means chosen by the society. The new Act does not prescribe a certain mechanism of voting, so long as the intentions of the members who vote are evident.

4. Does the new Act allow proxy-voting?

The new Act clarifies that proxy holders are allowed only if expressly permitted by the bylaws. If the bylaws are silent, then proxy votes are not permitted.

The Act also sets out rules for the appointment of proxy holders. Proxies must be in writing and signed, and can be revoked at any time. If the bylaws allow, a proxy may be validly given for more than one meeting. Unless the bylaws provided otherwise, the proxy holder must be a member of the society and can be under 19 years old.

ELECTRONIC MEETINGS

1. If electronic meetings are now allowed, do we need to provide for them under our by-laws?

No. The default is that electronic meetings (i.e. via telephone or other electronic means of participation) are permissible unless the bylaws of a society provide otherwise.

2. Would a society be required to hold an electronic meeting if requested by members?

No. The decision to hold a meeting using telephone or electronic means is at the discretion of the board of directors.

While members will still be able to requisition a general meeting, they cannot compel the society to hold such meeting electronically. The new Act provides that the ability to hold an electronic meeting does not obligate the society to do so.

TRANSITION AND MISCELLANEOUS

1. What is the timeline for transition to the new Act and will we need member approval to do so?

Each Division must file a transition application within two years after the new Act comes into force on November 28th, 2016. A Division does not need member approval to file the transition application. It will however require approval of the members by special resolution for any changes to the constitution and bylaws, except those changes that are a required part of the transition process, in order to comply with the new Act.

Changes to the constitution or bylaws of a Division can be made in combination with the transition process and approved by the Division's members either before or after the new Act comes into force.

2. What will it cost our Division to transition to the new Act?

Filing fees for transition will be minimal. The additional cost to your Division to address constitution and bylaw changes, in particular, will depend on each situation.

3. How will the PDO be supporting Divisions in the transition?

The PDO is working with Bull Housser, Vantage Point, and three Divisions to prepare a revised constitution and bylaws template that is compliant with the

new *Societies Act*. The template(s) will be shared with all Divisions as soon as possible. Your PEL will be up to date on the timing.

Once the templates have been shared with all Divisions, Vantage Point and Bull Housser will offer 3 in-person small group learning sessions and 2 virtual sessions to support Divisions in transitioning to the new Act. The intended outcomes, dates, and times of these group learning sessions will be shared as soon as possible.

In addition to covering the cost of these resources and training opportunities, PDO will cover the cost of physician attendance (in person or virtual) at the small group sessions. This reimbursement will be limited to the actual length of the learning sessions – anticipated to be two – three hours.

Please connect with your PEL if you have questions or would like additional information.

Additionally, Divisions may wish to work with legal counsel to customize the template to their specific governance needs. Each Division will be responsible for covering the cost of consultations they have with legal, accounting, insurance, or other advisors. The Provincial Divisions Office has worked closely with the BC based firm of Bull Housser, which has positioned Bull Housser well to work efficiently with Divisions on issues related to the new Societies Act. If a Division wishes to engage Bull Housser directly, please contact Michael Blatchford at mpb@bht.com.

4. Should constitution and bylaws be amended before or after transitioning to the new Act?

As mentioned on page 1, any provision of a Division's bylaws that is inconsistent with the new Act is "of no effect" from November 28, 2016. Though the majority of existing Division bylaws will still be valid from that date, there is still a risk in passing the Act's date of enforcement without having had approved revised bylaws, that are fully compliant with the new Act. The PDO is recommending, therefore, that each Division work to develop their replacement set of bylaws over the coming months (March – July 2016), to the extent that it is possible.

In developing new bylaws, a Division may build from the template(s) provided by the PDO, as developed by Bull Housser (expected by end of February 2016). The in-person and virtual small group learning sessions available to Divisions from April – June 2016 are intended explicitly to support the Divisions in customizing their individual Division bylaws and constitution.

Your Division will want to finalize and present these revised bylaws and constitution at your 2016 Annual General Meeting. For those Divisions that typically hold their AGM in May-June, the PDO recommends delaying the AGM until such time that the Division has completed its replacement bylaws, as long as that date is no longer than 6 months from the Division's fiscal year-end and 15 months since it held its last AGM.

Though approved at your 2016 AGM, which is likely currently scheduled for prior to the enforcement date (November 28th, 2016), each Division will only file these new bylaws following soon after the in-force date of November 28, along with the Division's application to transition to the new Act.

For additional questions or clarifications, please contact your PEL or your legal advisor.

Divisions may wish to obtain independent legal advice when deciding how and when to amend their bylaws. These consultations will not be funded by the PDO.

5. What are the risks if we don't comply by the deadline?

Divisions that do not transition within the two year period are at risk to be dissolved by the registrar of companies. In such a case, the legal structure of the society ceases to exist, all property held by the Division is forfeited to the provincial crown and individual members of the Division may be liable for any future debts or liabilities incurred by the Division.