The Law Society
of British Columbia

TOWARDS A NEW REGULATORY MODEL – REPORT TO THE BENCHERS FROM THE FUTURES COMMITTEE

January 30, 2008

Purpose of Report:	**Information**
Prepared on behalf of	**Futures Committee by:** **Policy and Legal Services Dept.** **David Newell, Corporate Secretary**

For some time the Futures Committee has been engaged in a discussion of the attributes of lawyers and the practice of law and whether the reservation of the practice of law to lawyers is defensible on principled grounds. Its object was to develop a framework for analysis of the question of access to legal services. The impetus for the discussion was the observation that the reservation of the practice of law is an aspect in common to several issues critical to the future of the legal profession, including the independence and self-regulation of lawyers, access to justice, competition law and the globalization of trade, and education standards both before and after qualification.

For example in the United Kingdom and Australia self-regulatory powers of the legal profession have been significantly curtailed in part on the basis that self-regulation has served more to preserve the economic advantages of a professional elite than to protect the public. Competition bureaus and their equivalents in Ireland and elsewhere have criticized the monopolistic nature of reserved areas of practice, asserting that it drives up the cost of legal services and reduces access to justice. The recently released report of the Competition Bureau of Canada acknowledged that there should be a balance between the potential anti-competitive effect and public benefit of regulation of professional services. However, it also asserted that "*a primary objective of the regulatory framework should be to promote open and effectively competitive markets*" and "*to help minimize unnecessary or overly restrictive regulation, all regulators should promote competition as a primary objective*." In the background is the continuing work of the World Trade Organization on the General Agreement on Trade in Services (GATS), which has the potential to open the practice of law to global competition.

The strategic policy question is whether the current regulatory arrangements, in which lawyers have the exclusive right to practise law, facilitate or present a barrier to access to legal services and access to justice, or would the public have greater access to justice if some non-lawyers are permitted to provide some legal services? An ancillary question is who would regulate non-lawyers who provide legal services? If those questions are examined in a systematic and principled way, then the Law Society can either defend the status quo or advocate for progressive change on public interest grounds.

The discussions in 2007 proceeded on the premise that a complete reservation of the practice of law to lawyers cannot be maintained. Consequently, the committee considered principles for determining who in addition to lawyers might be permitted to engage in some or all of the activities comprising it. The committee began its discussions by considering whether it is possible, or useful, to attempt to articulate in detail the activities that comprise the "practice of law", with a view to then examining those activities to determine whether or not they have a common attribute or set of attributes that justifies reserving them to lawyers. The committee also approached the discussion from the opposite direction by considering what attributes unique to lawyers might justify reserving to them some or all of the activities comprising the practice of law. Finally, the committee considered whether the value or significance of the outcome of legal work impacts on who should be able to do the work.

It is important to note that the Committee's discussions were at the level of principles and were not based on any empirical studies. The Committee recognized that significant change in this field would require legislation but did not deliberate on whether such legislation would likely be forthcoming.

As will become apparent on reading this paper and likely in the Benchers' own discussions, the issues involved are contentious and will definitely have far-reaching effects, some of which cannot be identified precisely. The Committee's discussions were vigorous, and although there were some points of agreement, the Committee has not reached any solid conclusions, nor does it have any specific recommendations at this time. However, some consensus views have emerged from the discussion as well as some fundamental questions, which the committee thinks the Benchers should consider as a matter of high priority before any significant further steps are taken or strategies formulated. The purpose of this report is to ask the Benchers whether it is time to open the debate and broaden the range of views by inviting participation by people and groups outside the legal profession.

What is the practice of law?

As noted, the Committee first considered whether it is possible to describe in detail the activities that are encompassed by the "practice of law", and, if so, would such a comprehensive description disclose a principle or set of principles.

Statutory definitions of the practice of law focus on enforcement of unauthorized practice powers. They fall into two main categories: more or less detailed lists of services or activities, or very general statements. The BC *Legal Profession Act* is a good example of the first category and it is generally accepted that it has one of the more comprehensive definitions in Canada.

In most cases, statutory definitions of the practice of law are subject to exceptions found either in the statutes themselves or in the case-law interpreting them. For example, in BC the lawful practice of a notary public, as defined in the *Notary Public Act*, does not constitute unauthorized practice of law. Similarly, it is not the unauthorized practice of law for an immigration consultant to act as counsel before the Immigration and Refugee Board, as determined in the *Mangat* case. There are other "informal" exceptions where unauthorized practice powers are simply not enforced, such as when accountants give advice relating to tax laws. Perhaps the most significant exception found in the BC statute and others is for services provided without fee or reward.

The differentiation of authorized versus unauthorized services based on whether a fee is paid tends to emphasize the economic benefit to lawyers and diminish the public protection aspect of a reserved practice. The Committee did not think that whether a fee was charged or not provided a compelling criterion for defining an exclusive area of practice.

Even though the statutory definition includes terms such as "giving legal advice" that potentially cover a vast range of activities, it clearly does not encompass all the things that lawyers do; it encompasses just those things that by law only a lawyer is permitted to do (subject to the exceptions already mentioned). The statutory definition is intended to provide a practical basis for enforcement rather than a theoretically complete description of the activities lawyers engage in. The limitations and exceptions to statutory definitions of the practice of law make it clear that in the policy arena there is a distinction between "the practice of law" and "providing legal services", the former being a subset of the latter.

The distinction has been explicitly acknowledged in Ontario in recent amendments to the *Law Society Act*, which creates two classes of licensees: persons licensed to practice law as barristers and solicitors, and persons licensed to provide legal services. The *Law Society Act* does not specify what activities are permitted to each class; that is left to the Law Society of Upper Canada.

We cannot look to the LSUC By-law for a complete description from a policy perspective of what constitutes either legal services generally or the practice of law more particularly. Quite aside from the very general nature of the description as far as it goes, it does not touch upon the wide array of transactional work that many lawyers perform.

In 1989 the Lord Chancellor's Department in the United Kingdom published a Green Paper with the stated objective of seeing that "the public has the best possible access to legal services and that those services are of the right quality for the particular needs of the client, which it believed would be best achieved by ensuring that:

1. a market providing legal services operates freely and efficiently so as to give clients the best possible choice of cost effective services; and

2. the public can be certain that those services are being supplied by people who have the necessary expertise to provide a service in the area in question.

The Lord Chancellor's department, like the Futures Committee, started in the fairly obvious place by considering the definition of legal services, and like the Futures Committee soon found that it is elusive. The Lord Chancellor wrote:

> A comprehensive definition of what is meant by legal services is very difficult to frame, but, broadly speaking, legal services are concerned with the advice, assistance and representation required by a person in connection with his rights, duties and liabilities.

He went on:

> Most services which are "legal", in the sense that a lawyer often performs them in the ordinary course of his practice, may also be performed by non-lawyers. In England and Wales the only legal services which are by law reserved specifically

> to lawyers are handling cases in court and applying for grants of probate or letters of administration for reward.

And:

> In addition, conveyancing for reward is restricted to lawyers, licensed conveyancers and certain public officials. Solicitors used to have an effective monopoly in the provision of conveyancing services but this monopoly was abolished by Parliament in 1985, when licensed conveyancers were allowed to enter the conveyancing market in direct competition with solicitors.

The Green Paper expanded somewhat on those very general statements by describing the areas in which legal services are used.

1. The home

- conveyancing services or advice in connection with mortgages or insurance cover,
- disputes arising in connection with property, such as with landlords or neighbours.

2. The family

- advice, assistance or representation in connection with marriage or divorce, or with matters relating to children, elderly relatives, welfare benefits, pensions or wills.

3. Employment

- contracts of employment, redundancy or dismissal,
- conditions of work, racial or sexual discrimination,
- industrial action, unlawful behaviour of trade unions.

4. Social welfare

- advice, assistance or representation in connection with entitlement to welfare benefits or the resolution of problems caused by homelessness or nationality.
  social welfare;

5. Consumer protection

- rights and liabilities in connection with the purchase and sale of goods and services,
- product liability,
- consumer debt,

6. Commercial and financial operations

- setting up and running a business or company,
- taxation,
- bankruptcy and insolvency,
- intellectual property rights,
- commercial conveyancing,
- pensions,
- insurance,
- contracts,

- financial regulation of markets,
- multi-national transactions.

7. Accidents and compensation for personal injury

- civil liability for automobile or other accidents,

8. Involvement in the criminal law

Even an incomplete list such as this demonstrates the wide range of activities that might reasonably be considered "legal services". The Green paper also describes some of the providers people might seek legal services from, including: lawyers, licensed conveyancers, patent agents, insolvency practitioners, building societies, banks, accountants, other financial advisors, citizen's advice bureaux, law centres, social workers, trade unions, trade associations, chartered secretaries, immigrants' advisory services, and consumer associations. In British Columbia the list might be different but probably not much shorter.

The foregoing suggests to the Committee that compiling a complete, detailed description of the component activities comprising the practice of law might be necessary at a later date as part of an implementation effort but it is not especially helpful as a basis for establishing the boundaries of reserved areas of practice.

What are the attributes of lawyers?

What are the attributes of lawyers that differentiate them from other potential providers of services and might justify reserving some or all areas of practice to them?

Education

Lawyers are highly educated. All lawyers in BC have a law degree, most have another undergraduate degree, and many have post-graduate degrees as well. Additionally, most BC lawyers have undertaken some form of pre-qualification program such as the PLTC. Post-qualification (continuing) education has been voluntary and, therefore, variable.

We treat the profession as essentially monolithic in the sense that lawyers are permitted to engage in the full range of practice from the day they are qualified. There is no formal stratification of the profession that recognizes either limitation or specialization. Although that does not reflect the practical reality, it does necessitate a high standard of education as prerequisite to qualification. As a result, and as Professor Harry Arthurs notes [*Lawyering in Canada in the 21st Century*, Windsor Yearbook of Access to Justice, 1996, Vol. 15, p.202], lawyers who perform routine services for people of moderate means may be over-educated for the task and may be unable to amortize the real cost of obtaining their qualifications without charging fees that the market can no longer bear. At the other end of the spectrum ostensibly qualified lawyers may lack the specialized education, training and experience necessary to competently handle very complex or difficult legal work such as multinational business transactions or appellate advocacy. It

may also be observed that in some fields such as patents and taxation, non-lawyer service providers may be at least as educated as lawyers, and in some fields, such as conveyancing and mortgages, notaries with less education than lawyers (at least in terms of the breadth of education) are able to provide acceptable standards of service.

The Committee takes the view that education and training alone do not provide a complete basis for a reservation of all practice areas to lawyers.

Lawyer/client confidentiality and privilege.

The ethical obligation to keep lawyer/client communications confidential, and the privilege that attaches to such communication sets lawyers apart from other service providers. In matters where there is a prospect of litigation, regulatory proceedings, or criminal proceedings, the privilege attaching to communications with lawyers is an important differentiating attribute of lawyers as a class of service providers that might justify reserving those areas of practice to them.

It should be noted, however, that although lawyers are currently the only service providers to whom privilege applies collectively as a class, communications with other classes of service providers may become privileged in the future. For example, in the United Kingdom communications with patent agents are granted privilege by statute. In *Chancey v. Dharmadi*, 2007 CanLII 28332 (ON S.C.) the court considered whether a "class" privilege should extend to paralegal/client communications. It was ultimately unnecessary to reach a conclusion on that point but in *obiter* Master Dash wrote:

> *In my view there is no principled reason why a class privilege should not be extended to paralegal-client communications, however it must be restricted to communications with an identifiable group, namely paralegals licensed by the Law Society.*

The Committee also noted that there are some areas of practice where lawyer/client privilege may be of little significance. Lawyer/client privilege is critically important when it is a manifestation of independence from the state, which is the attribute of lawyers discussed next.

Independence

Lawyers are independent. By this we mean that lawyers are both obligated and able to give advice or to advocate on a client's behalf free of the influence of conflicting interests.

In many cases it is sufficient to maintain lawyer independence that the ethical rules of the profession, enforced by the Law Society, prohibit lawyers from acting in situations where their loyalties would be divided. This might be called "ethics-based independence" and while it is undoubtedly an important attribute of lawyers, it need not be unique to lawyers. One can imagine other regulated service providers who either have or could

develop similar ethical obligations. However, when a client's interests and the interests of the state conflict, the ethical obligation to remain free of conflicting interests is made possible by the independence from the state of the profession as a whole, as embodied in the Law Society. Thus, a lawyer can defend a person against a criminal prosecution by the state without fear, and more importantly, the accused person can be assured that his or her defence will not be constrained by defence counsel's desire to curry favour or avoid discipline at the hands of the state. Similarly, the freedom to challenge the constitutionality of legislation, whether in defence of individual or collective rights and freedoms, helps ensure that the legitimate power of the state is not exceeded or abused.

The importance of an independent legal profession to maintaining the rule of law brings a constitutional aspect to the principle that makes lawyers and the Law Society unique among the self-governing professions.

Lawyers as regulated professionals and officers of the court

Lawyers are required to abide by the rules of professional conduct and are subject to regulation by the Law Society. This provides an obvious distinction between lawyers and people who are not members of any regulated profession. Members of other professions such as accountants are subject to their own professional codes of conduct and while there may be areas of overlap between the general concepts of those codes and the professional obligations of lawyers, they are not specifically directed at the delivery of legal services, so there remains a valid distinction between lawyers and other professionals when considering who should be permitted to engage in the practice of law.

As officers of the court lawyers have obligations that others do not. Those obligations are intended to protect the integrity of the courts and maintain the rule of law. This is particularly important in a common law system where the outcome of court cases affects the future development of the law. There is a proper public interest not only in seeing justice done in individual cases, but in the progressive development of the law. Participation of knowledgeable independent advocates who are nonetheless bound to respect the fundamental principles of fairness and the rule of law is essential to the proper present application and the future development of the law.

On a practical level, the courts rely on lawyers as officers of the court to understand and adhere to standards and forms of conduct that facilitate the just and expeditious disposition of the matters brought before them.

Other providers or potential providers of legal services

As noted above, in addition to lawyers there are a number of classes of people who currently provide some legal services either with or without legal authority such as notaries, legal assistants employed by and under the supervision of lawyers, insurance adjusters, immigration consultants, accountants, workers' compensation consultants, and realtors. The committee categorized providers according to their general level of

education and training, whether they are subject to formal regulation (by a regulatory agency other than the Law Society), or whether they are subject to regulation by the Law Society (either directly as lawyers, or indirectly through employment and supervision by lawyers). The Committee agreed on four or possibly five categories of service provider, as follows:

1. unregulated non-expert. Essentially this category encompasses laypersons with no particular training in legal matters.

2. unregulated experts. Services providers such as WCB consultants would fit in this category. They are expert in their particular field but not formally regulated.

3. Regulated unsupervised non-lawyers. This category would include notaries, tax accountants, immigration consultants, and the like. In a jurisdiction where paralegals are permitted to practice independently, such as Ontario, they would fit in this category.

4. Regulated lawyer-supervised non-lawyers. Paralegals in BC would fit in this category. There was debate as to whether this should be rolled into the lawyer category.

5. Lawyers.

Contextual factors: complexity and the importance of the outcome of legal work.

The practice of law takes place in a wide range of circumstances that can affect whether the nature of the services or the unique attributes of lawyers are important enough to justify, in the public interest, reserving a particular activity or area of practice to lawyers. A principled basis for reserving and activity or area of practice to lawyers must take those contextual factors into account.

There has been a tendency in some other jurisdictions, such as the United Kingdom, to conflate consumer interests with the public interest. The Committee has resisted that tendency and resolved the public interest into two distinct components. The first is the individual's interest in obtaining competent and in some cases independent advice or assistance in legal matters at a cost that is commensurate with the significance of the matter to the individual. The second component is the societal interest in preserving the rule of law and constitutionally guaranteed freedoms for all people, and ensuring the continued availability of effective means of determining rights and resolving disputes at a cost that is proportionate to the significance of matters to the individuals involved and to society as a whole.

The Committee also recognized that for any activity within the practice of law the particular circumstances in which it occurs could significantly alter the impact of the activity on the public interest. The particular circumstances encompass such things as the technical complexity of the matter, the value or significance of the matter to the

individual party or parties, and the value of the matter to society as a whole (including the potential legal significance of a matter). These factors combine to provide a variable measure of the acceptable risk of an adverse outcome (related to the work of the service provider). The Committee described that measure as "what is at stake" in the matter. The Committee was mindful that it is not always easy to determine what is at stake in a matter from the outset and that the stakes may actually change over time.

Interaction of factors

The factors discussed above: the type of service being provided, the attributes of the provider, and what is at stake, interact.

When "what is at stake" is viewed as a notional overlay on that range of activities that may constitute legal services, it is possible to describe three categories of requirements that any particular activity might engage. The categories are:

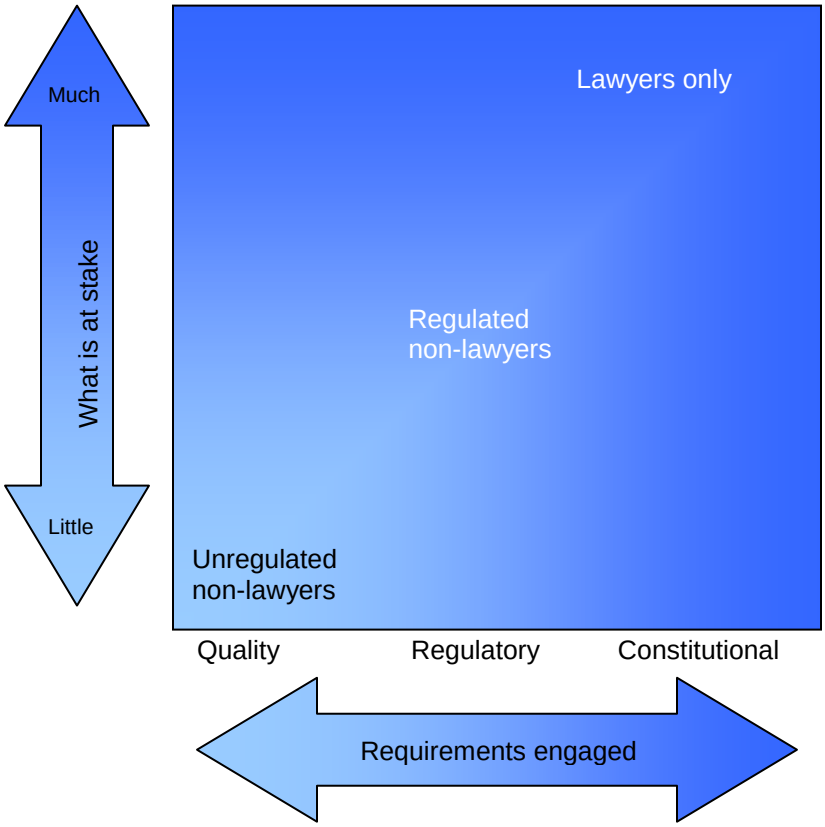
1. Quality requirements: meaning a need for substantive knowledge and training.

2. Regulatory requirements: meaning a need for regulation of accreditation, ethics, proper conduct, insurance, and supervision.

3. Constitutional requirements: meaning a need for independence (from government or government institutions) and privilege.

If the attributes of service providers, as categorized above, are then viewed as a further overlay, a matrix or pattern of interaction may be discerned that offers at least the potential for a principled basis for determining who might be permitted to perform which services under particular circumstances. For example, very simple legal services provided in circumstances where there is little at stake might engage quality requirements but not regulatory or constitutional requirements, such that it would be reasonable to consider permitting a trained but unregulated person to provide the services. Lawyers or regulated non-lawyers might also be permitted to provide such services, although market forces might make it unrewarding for them to do so. If the legal services are more technical or complex or what is at stake is more significant, a matter might engage both quality requirements and regulatory requirements, such that only lawyers or regulated non-lawyers should be allowed to provide them. In matters where constitutional requirements are engaged, such as defending against criminal charges, or where the complexity or magnitude of what is at stake is large, such as litigation in the superior courts, only lawyers have all the attributes reasonably required to perform the services and would continue to have exclusive legal authority to provide them. Of course, as the group of providers permitted to provide services in a particular field gets smaller, the issue of adequacy of access to justice becomes more significant.

Rendered graphically, the pattern might look something like this:



There is, of course, ample room for disagreement on where the lines should be drawn; indeed, it is difficult to draw distinct lines at all because there is a subjective element to determining what is at stake in every matter. The concept outlined above admits a much greater element of individual (consumer) choice in the selection of legal service providers than is possible at present. The existing system essentially seeks to define a broad area of exclusivity and then carves out exceptions to it. A system based on the above concept is the reverse. It starts with the notion that a consumer seeking legal services is free to choose any provider, and then restricts that choice only to the extent justifiable by the nature of the matter, the attributes of service providers, and the requirements that are engaged based on what is at stake from the perspective of the consumer and society as a whole. Despite the fundamentally different approach, some things would remain the same under a system based on the above concept. Matters that occupy the lower left on the diagram likely occur now and simply escape the Law Society's notice. The public interest is not sufficiently engaged to warrant action. Matters that occupy the upper right on the diagram would continue to be reserved to lawyers. The greatest difference would occur in the middle region. That is where the most difficult challenges would lie but also where the rewards might be the greatest.

Consensus

Based on the foregoing analysis the Futures Committee came to consensus on three statements of principle that potentially define a new regulatory paradigm.

1. It is in the public interest to restrict the provision of paid legal services to lawyers when the constitutional values of independence and privilege are engaged, as when the power of the state is brought to bear on an individual's liberty or other constitutionally protected freedom, or when what is at stake in a matter (measured in terms of both the individual's interest and society's interest) is of sufficient magnitude that the education, skills, and professional obligations of a lawyer is needed to protect against the consequences of an adverse outcome.

2. It is in the public interest to expand the range of permissible choices of paid legal service provider to enable a reasonably informed person to obtain the services of a provider who is adequately regulated with respect to any or all of training, accreditation, conduct, supervision and insurance, and who can provide services of a quality and at a cost commensurate to the individual and societal interests at stake in a given matter."

3. It is in the public interest to prevent service providers other than those described in the preceding two paragraphs from engaging in the unauthorized practice of law.

Who would regulate?

Application of these principles could open up the provision of paid legal services to a potentially wider group of providers, however, it would not necessarily entail less regulation. The public interest is clearly served by adequate and principled regulation. A key question is who would regulate? The Futures Committee has considered but not reached any conclusion on this question, except that the Law Society should continue to regulate lawyers, so the question may be recast as whether the Law Society is the best body to regulate non-lawyers or should that task be left to a different regulator or different regulators?

The United Kingdom offers a look at a multiple regulator model. So-called "frontline" regulators include the Bar Council, the Law Society, the Council for Licensed Conveyancers, the Institute of Legal Executives, the Chartered Institute of Patent Attorneys, and the Institute of Trade Mark Attorneys. One of the problems noted by Sir David Clementi in his *Review of the Regulatory Framework for Legal Services in England and Wales* (2004) was that people had difficulty having their complaints addressed or even knowing where to make complaints about different legal service providers. Clementi's solution to that problem was to propose a "super-regulator" to oversee the activities of all the frontline regulators. The implications of that solution for the independence of lawyers has been much discussed.

Closer to home, the regulation of medical services is based on a multiple regulator model in British Columbia. There are some 28 separate professional colleges either in existence or proposed to govern healthcare professionals in BC. It is likely too early to know whether the system will be successful from a public interest perspective, but there are already signs of difficulty with confusion and arguments over jurisdiction, and poor governance of the so-called "junior" medical professions. The experience of the government in establishing the multiple regulator model has not been positive and it is unlikely to have a taste for repeating it with another profession.

Ontario dabbled briefly with the multiple regulator model when it attempted to establish a separate regulatory body for paralegals. The failure of that attempt led the Ontario government to ask the Law Society of Upper Canada to take over regulating paralegals. As noted previously recent amendments to the *Law Society Act* create two classes of licensees: persons licensed to practice law as barristers and solicitors, and persons licensed to provide legal services. In BC the College of Dental Surgeons has taken over regulation of Certified Dental Assistants. Similarly, the Architectural Institute of BC has entered into memoranda of understanding with Building Designers and Interior Designers as the first step in bringing those groups under the regulatory umbrella of the AIBC.

A single regulator model in BC might be similar to the Ontario model, although BC already has a separately regulated group of legal service providers in the Notaries Public.

Options for the Benchers

1. Maintain the status quo on the basis that this is not an issue of sufficient strategic importance to warrant further consideration.

2. Maintain the status quo on the basis that this is a strategically important issue but not of high enough priority to warrant consideration in the next three years.

3. Endorse further consideration of a new regulatory paradigm based on the principles outlined in this discussion paper by placing the matter among the high priority strategic issues to be dealt with in the next three years.

Next Steps

If the Benchers include this in the high priority strategic issues, a key decision will be when and how to engage in external consultations. Significant further development of a new regulatory model would undoubtedly require consultation with a wide variety of external stakeholders including government, the judiciary, other Law Societies, the CBA, the Society of Notaries Public, representatives of other service providers, perhaps the Competition Bureau, consumer groups and other representatives of the public at large. The Futures Committee has not embarked on any such consultation because it recognizes that doing so will likely have repercussions such that the Benchers should first make the strategic decision to what extent and with whom the consultations should take place.