THE LAW SOCIETY OF BRITISH COLUMBIA

AGENDA

MEETING: Benchers

DATE: Friday, July 9, 2010

TIME: **7:30 a.m.** Continental breakfast
8:30 a.m. Meeting begins

PLACE: **Bencher Room**

BENCHERS' OATH OF OFFICE: *Appointed Benchers Satwinder Bains, Benjimen Meisner and Claude Richmond each will take an oath of office (in the form set out in Rule 1-1.2) before the President.*			
CONSENT AGENDA: *The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.*			
1	**Minutes of June 12, 2010 meeting**	Minutes of the regular session Minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
REGULAR AGENDA			
2	**President's Report**	Written report to be distributed electronically prior to meeting	
3	**CEO's Report**	Written report to be distributed electronically prior to meeting	
4	**Report on Outstanding Hearing & Review Reports**	Report to be distributed at the meeting	
5	**Presentation of the 2010 Law Society Scholarship to Jeffrey Yuen**	Presentation by Mr. Ridgway to Mr. Yuen	
2009-2011 STRATEGIC PLAN IMPLEMENTATION: MATTERS FOR DISCUSSION AND/OR DECISION			
6	**Discipline Guidelines Task Force: Interim Report**	Report from the Discipline Guidelines Task Force Mr. Van Ommen to report	Tab 6 p. 6000
7	**Separation of Functions Task Force: Report and Recommendations**	Report from the Separation of Functions Task Force Mr. Walker to report	Tab 7 p. 7000

8	**A& R Subcommittee: Proposed Legislative Amendments (Part 2)**	Memorandum from Mr. Hoskins for the Subcommittee Mr. Getz to report	Tab 8 p. 8000
OTHER MATTERS FOR DISCUSSION AND/OR DECISION			
9	**Finance Committee: Approval of 2011 Fees**	Report from the Finance Committee Mr. Hume to report	Tab 9 p. 9000
10	**2010 Advisory Committees: Mid-year Reports** **(5 minutes each)**	Reports from the Access to Legal Services, Equity and Diversity, Independence and Self-Governance and Lawyer Education Advisory Committees Mr. Mossop, Mr. Brun, Ms. Lindsay and Ms. O'Grady to report	Tab 10 p. 10000
FOR INFORMATION ONLY			
11	**Complaints Reduction Staff Group 2: Early Intervention Project – Report**	Report from Complaints Reduction Staff Group 2	Tab 11 p. 11000
12	**Report of the Special Committee to *Freedom of Information and Protection of Privacy Act***	Memorandum from Mr. Hoskins	Tab 12 p. 12000
13	**Appointed Bencher Claude Richmond Awarded TRU's Honorary Doctorate of Laws**	Thompson Rivers University News Release	Tab 13 p. 13000
14	**Standing Committee on the Model Code of Professional Conduct**	Letter from Mr. Ridgway to John Campion, President of the Federation of Law Societies of Canada	Tab 14 p. 14000
15	**Role of Life Appointed Benchers**	Letter from Mr. Ridgway to June Preston, MSW and Ms. Preston's email to Mr. Ridgway	Tab 15 p. 15000
16	**Presentation of Law Society Gold Medal Award to UVic's Christina Drake by Life Bencher Richard Margetts, QC**	Letter from Dean Greschner to Mr. McGee	Tab 16 p. 16000
IN CAMERA SESSION			
17	**LSBC Litigation Report**	LSBC Litigation Report Mr. Cameron to report	Tab 17 p. 17000
18	**Bencher Concerns**		

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Saturday, June 12, 2010

PRESENT:

Glen Ridgway, QC, President
Gavin Hume, QC, 1st Vice-President
Bruce LeRose, QC, 2nd Vice-President
Haydn Acheson
Rita Andreone
Kathryn Berge, QC
Joost Blom, QC
Patricia Bond
Robert Brun, QC
E. David Crossin, QC
Tom Fellhauer
Leon Getz, QC
Stacy Kuiack
Barbara Levesque
Jan Lindsay, QC
Peter Lloyd, FCA
David Loukidelis
David Mossop, QC
Suzette Narbonne
Thelma O'Grady
Lee Ongman
Gregory Petrisor
David Renwick, QC
Alan Ross
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Art Vertlieb, QC
Kenneth Walker

ABSENT:

Satwinder Bains
Carol Hickman
Benjimen Meisner

STAFF PRESENT:

Tim McGee
Deborah Armour
Stuart Cameron
Robyn Cristanti
Su Forbes, QC
Jeff Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Alan Treleaven
Adam Whitcombe

GUESTS:

John Campion, President, Federation of Law Societies of Canada
Jean Cumming, Editor-in-Chief, Lexpert, Thomson Reuters
Allan Fineblit, QC, CEO, Law Society of Manitoba
Irene Hamilton, President, Law Society of Manitoba
Jonathan Herman, CEO, Federation of Law Societies of Canada
John Hunter, QC, LSBC Member of the Federation Council
Rod Jerke, QC, President, Law Society of Alberta
Patrick Kelly, Life Appointed Bencher
Eileen Libby, President, Law Society of Saskatchewan
Douglas Mah, QC, President-elect, Law Society of Alberta
Tom Schonhoffer, QC, Executive Director, Law Society of Saskatchewan
Don Thompson, QC, Executive Director, Law Society of Alberta
Dr. Maelor Vallance, Life Appointed Bencher

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on April 23, 2010 were approved as circulated.

Consent Resolutions

The following resolutions were **passed unanimously and by consent**.

2. *BE IT RESOLVED* to accept the recommendation of the Selection Committee, and to name the Honourable John C. Bouck, deceased, as the recipient of the 2010 Law Society Award.

3. *BE IT RESOLVED to amend Rule 2-43(1) of the Law Society Rules as follows:*

1. In paragraph (b)(i), by striking "under Rule 52 of the Rules of Court***" and***

2. In paragraph (d)(iii), by striking "under the *Young Offenders Act* (Canada)***" and substituting "***under the *Youth Criminal Justice Act* (Canada)***."***

4. *BE IT RESOLVED* to amend the Law Society Rules as follows:

1. In Rule 2-23.3(1)

(a) by rescinding the preamble and substituting the following:

(1) Before a lawyer may practise law as a member of an MDP that has not been granted permission under Rule 2-23.4, the lawyer must submit the following to the Executive Director:

(b) in paragraph (b), by striking "for each lawyer member of the proposed MDP"

2. In Schedule 1, by rescinding section L and substituting the following:

L. Multi-disciplinary practice fees

1. Application fee (Rule 2-23.3(1)) $300

2 Investigation fee per proposed non-lawyer member of MDP (Rules 2-23.3(1) and 2-23.5(2)) $1,125

REGULAR AGENDA – for Discussion and Decision

5. President's Report

Mr. Ridgway referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President during the month of May (Appendix 1 to these minutes).

Mr. Ridgway welcomed our guests from the Federation of Law Societies of Canada and the Law Societies of Alberta, Manitoba and Saskatchewan.

Rod Jerke, QC, President of the Law Society of Alberta, thanked Mr. Ridgway and the Benchers for inviting the guest societies to the Benchers' 2010 Retreat and June meeting. Mr. Jerke noted the

value to all in bringing different law societies' perspectives to discussion of the vital topic of enhancing access to legal services in Canada, and expressed appreciation on behalf of the Alberta delegation for the hospitality shown by the Benchers and staff of the Law Society of BC.

Mr. Ridgway recognized the recent appointments of Ms. Satwinder Bains, Mr. Benjimen Meisner and Mr. Claude Richmond as Law Society appointed Benchers, and he acknowledged the gratitude owed by the Society to Ms. Barbara Levesque, Mr. Patrick Kelly and Dr. Maelor Vallance for their years of devoted and invaluable service as appointed Benchers.

6. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 2 to these minutes), including the following matters:

1. 2010 Law Society Communications Strategic Plan – preview
2. 2011 Budget and Fees – update
3. Core Processes Review – update
4. 2009 Law Society Annual Review – release
5. 2010 Annual Meeting of Stakeholders for YVR – attendance report and briefing
6. Law Society Retention of Aboriginal Lawyers Event on June 16, 2010 – preview

Mr. McGee thanked a number of Benchers for contributing their time and expertise to the Professional Responsibility classes of PLTC's June 2010 Session (Ms. Berge and Mr. Stewart in Victoria, and Ms. Bond, Mr. Brun, Mr. Mossop, Ms. O'Grady, Mr. Van Ommen and Life Bencher Jane Shackell, QC in Vancouver.

7. Report on Outstanding Hearing and Review Reports

The Benchers received and reviewed a report on outstanding hearing decisions.

STRATEGIC PLANNING AND PRIORITIES MATTERS – for Discussion and/or Decision

8. Law Society 2010 Strategic Communications Plan

Mr. Whitcombe introduced Robyn Crisanti, Manager of Communications and Public Relations and asked her to outline the Law Society's 2010 Strategic Communications Plan.

Ms. Crisanti outlined a number of practical ways the Communications department can support and strengthen delivery of the Law Society's key message to the public, the media and government, describing that message as:

- The Law Society of BC protects the public through effective and transparent regulation of BC lawyers

Ms. Crisanti outlined:

- the Law Society's Key External Communications Strategies

  - maintain a consistent and strategic focus on regulation and transparency
  - facilitate new rules around disclosure
  - execute a comprehensive, proactive media relations plan
  - develop communication policies and procedure
  - update government relations strategy to support legislative changes
- the Law Society's Key Audiences
  - engaged public
  - media
  - government
  - Benchers
  - employees
  - lawyers/law students
  - general public
- the Law Society's Government Relations Goals
  - Awareness of Law Society's mandate, public policy interests and general achievements
  - Apolitical and positive working relations
  - Perceived as doing a good job of protecting the public interest in the regulation of the legal profession
- the Law Society's Key Messages to Government
  - acknowledge we need to do better job
    - KPMs must answer: "How can the public tell if we are doing a good job"?
    - internal review to assess efficacy
  - ask for government help to do a better job
    - Legislative changes

Ms. Crisanti identified several measures of the effectiveness of the Law Society's Strategic Communications Plan:

- Public opinion surveys
- Media coverage
- Organizational outcomes
- Adherence to established communication protocols
- Tactical evaluations

Ms. Crisanti described the development of the Society's Strategic Communications Plan as an on-going, iterative process, and welcomed the Benchers' feedback and input.

9. *Legal Profession Act*: Proposed Amendments

Mr. Getz referred to the memorandum at page 9000 of the meeting materials (Appendix 3 to these minutes). Noting that most of the memorandum's recommendations are already familiar to the Benchers, Mr. Getz moved (seconded by Ms. Andreone) that the Benchers adopt the various recommended legislative amendments as set out in Appendix 3.

A number of issues were raised in the ensuing discussion, including:

- the proposed new section 14.1 of the Act does not provide for certification of paralegals or other non-lawyers
    - the proposed new section only provides legislative permission to the Benchers to introduce a program for certifying paralegals at some future date if they decide to follow that course
- the proposed new section 23 of the Act reflects the Benchers' commitment to effective regulation and transparency
    - the new provision would both ensure and demonstrate that those regulated by the Law Society cannot limit the amount or effectiveness of that regulation by fixing a fee too low for effective regulation
- the Law Society needs to present any proposed legislative amendments quickly for inclusion in the government's pending legislative plan

The motion was carried.

REGULAR AGENDA – Other Matters for Discussion and/or Decision

10. *Professional Conduct Handbook*: Proposed Amendments (Pro Bono)

Mr. Hume reminded the Benchers that in July 2009 they adopted a number of recommendations in the *Access to Legal Services Advisory Committee: Mid-Year Report*, including a direction to the Ethics Committee: consider whether doing pro bono work is an ethical obligation for lawyers and, if so, whether the Rules and *Professional Conduct Handbook* need revision.

Mr. Hume reported that the Ethics Committee has concluded that the Law Society should encourage pro bono service by lawyers, but not make such service mandatory. He referred the Benchers to the Committee's memorandum at page 10001 of the meeting materials for background.

Mr. Hume moved (seconded by Mr. Getz) that the Benchers approve the Committee's recommended addition of Rule 13 and Footnote 7 to Chapter 3 of the *Professional Conduct Handbook*, as follows:

COMPETENCE, QUALITY OF SERVICE AND RELATIONSHIP TO CLIENTS

Pro bono

13. A lawyer's professional responsibility to provide quality legal services to all clients is not affected by the limited ability of some clients to pay for those services, or the fact that the services are provided wholly or partly on a pro bono basis.

FOOTNOTES

7. The provision of pro bono legal services has been a long tradition of the legal profession, which is consistent with Chapter 1, Canon 3(9). It is up to each lawyer to decide how much pro bono services he or she can provide. Lawyers can consult the Law Society website (www.lawsociety.bc.ca/probono) for a list of pro bono agencies.

The motion was carried.

11. Family Law Task Force: Update and Clarification of Mandate

Mr. Stewart updated the Benchers in the absence of Task Force Chair Carol Hickman. Mr. Stewart referred to Mr. Munro's memorandum at page 11000 of the meeting materials and noted that the Family Law Task Force is seeking the Benchers' direction on whether the Law Society should participate in a standing family law committee as outlined in the memorandum, and if so, whether such participation should be under the auspices of the Family Law Task Force.

Pointing out that such action would not fit within the task force's current mandate to work with the BC Branch of the Canadian Bar Association to develop best practices guidelines for family lawyers, Mr. Stewart suggested that the Family Law Task Force be directed to explore the standing family law committee concept and then report back to the Benchers with a clear proposed mandate.

The Benchers' consensus was to adopt Mr. Stewart's suggestion.

11(a) Election of Benchers' Nominee for 2012 2nd VP: Close of Nominations

Mr. Ridgway announced that the time has passed for Benchers to put their names forward as candidates for the honour of being selected as the Benchers' nominee for the election of the Law Society's 2011 Second Vice-president, to be conducted on September 28 at the 2010 Annual General Meeting.

11(b) June 11, 2010 Benchers Retreat Workshop: *Enhancing Delivery of Legal Services in BC*

Mr. Ridgway advised the Benchers that the recommendations they endorsed at their June 11 workshop session will be delivered to the Executive Committee for further consideration.

11(c) Outgoing Appointed Benchers

Mr. Ridgway recognized the many contributions made by Patrick Kelly, Barbara Levesque and Dr. Maelor Vallance during their years as appointed Benchers (formerly known as "lay Benchers") and thanked them on behalf of the Benchers and staff of the Law Society.

Mr. Kelly thanked the Benchers for the friendship they have extended to the appointed Benchers over his years of his tenure and credited the Law Society for the commitment of its Benchers, volunteers and staff to supporting the public interest in the administration of justice.

FOR INFORMATION ONLY

12. Federation of Law Societies: 2010 Update

John Campion, President of the Federation of Law Societies of Canada, delivered a presentation to the Benchers. He noted the connections between the theme of their June workshop (enhancing the delivery of legal services in BC), affordability of and access to legal services, and the efficacy of the rule of law.

He recognized the value of the contributions of a number of individuals to the work and growth of the Federation, including:

- Federation CEO Jonathan Herman, as a source of stability and good judgment, particularly in the areas of policy development and CanLII governance
- John Hunter, QC for his leadership and wisdom as Chair of the Federation's Task Force on the Canadian Common Law Degree
- Tim McGee and Alan Treleaven for their many and ongoing contributions, particularly in relation to CanLII governance and national admission standards

Mr. Campion paid tribute to the many and ongoing valuable contributions to the work and development of the Federation by the Benchers and staff of the Law Society. He also acknowledged the many and ongoing valuable contributions to the work and development of the Federation by Benchers and staff of the other law societies across Canada.

Mr. Campion concluded by thanking the Benchers and staff of the Law Society for their kindness and hospitality throughout the Retreat.

12(a) June 2010 Meeting of the Federation Council in Ottawa

John Hunter QC, the Law Society's member of the Federation Council, briefed the Benchers on the recent Council meeting in Ottawa. He noted Council's approval of:

- a plan for CanLII's corporate reorganization
- an agreement on mobility defalcation
- the two outstanding segments of the Model Code of Professional Conduct
    - conflicts of interest
    - the future harm exception to solicitor – client privilege

Mr. Hunter noted that there continues to be strong support at the Council table for harmonization of national standards.

***IN CAMERA* SESSION**

The Benchers discussed other matters *in camera*.

WKM
2010-06-24

PRESIDENT'S REPORT
June, 2010

I am dictating this report on the evening of June 3, 2010, and accordingly, the events of June 4 through June 8 are prospective and may be altered by circumstances of which I am not aware on the evening of June 3.

Our Benchers' Meeting of April 23 concluded in the middle of the afternoon, after which I journeyed to the Westin Bayshore to prepare for the evening's events.

It was a great honour to be the Master of Ceremonies of the Court of Appeal's Centenary Gala Dinner at the Westin Bayshore, which was conducted in both official languages. Bear in mind that all present members of the BC Court of Appeal were once members of the Law Society of British Columbia. I can also indicate that after the public part of the evening, I did promise a Cowichan sweater to the Chief Justice of Ontario, who, like the Chief Justice of Canada, comes from Pincher Creek, Alberta, where I once vacationed. That promise has since been fulfilled. Thank you to the Law Society of British Columbia for its financial assistance with respect thereto.

I then did nothing until April 29, when I attended for meetings in Vancouver and the Welcoming Ceremony for Justice Christopher Hinkson of our Court of Appeal, who, incidentally, is a former member of the Law Society of British Columbia.

On May 5, I was in Vancouver for a series of meetings, namely, the weekly meeting with Tim McGee and a meeting with Gavin Hume at his office to finalize some matters relating to Mr. McGee's contract. I then attended the Vancouver Bar Association Judges' Luncheon at the Hotel Vancouver. That was followed by more activities at the Law Society offices in the afternoon and, finally, the Welcoming Ceremony for Justices Maisonville and Harris on the morning of Thursday, May 6.

On May 13, I was in Vancouver for a meeting of the Appointments Subcommittee and a meeting with Mr. McGee. I also attended at the Vancouver Airport for the Annual General Meeting and the Stakeholders' Meeting with the Vancouver Airport Authority. My evening was finalized by attending, along with Chief Justice Bowman, the Surrey Bar Association dinner in beautiful downtown Surrey.

On May 17, I journeyed almost to Alberta for the Welcoming Ceremony for Judge Grant Sheard in Cranbrook, which also involved a side trip to Slaterville. Traveling to Cranbrook is an all-day event, but I thought I was very lucky when I returned to Vancouver at 7:45 p.m., thereby making the 8 p.m. flight to Victoria, rather than having to stick around to catch the 10 p.m. flight. So I got on the 8 p.m. flight, along with another prominent British Columbian, Tony Parsons, to make my way to Victoria. Unfortunately, due to a gauge, the plane was unable to take off, and after sitting on the plane for an hour, we got off, dined at Tim Horton's and then got on a plane at 9:15 to return to Victoria.

My appointment book indicates that on May 18 I traveled to Vancouver. I can indicate that I have no recollection of this trip and no recollection of doing anything on this trip, and accordingly, I would appreciate someone letting me know what I did on Vancouver, if anything, on May 18.

On May 20, I journeyed to the Hub City of Vancouver Island, Nanaimo, for a Call Ceremony for three lawyers from the top of Vancouver Island. This was followed on May 21 by two Call

Ceremonies in Vancouver, as well as some meetings, including my weekly meeting with Tim McGee.

On May 25, I went to Vancouver for the first presentation of the Law Society budget, and I also sat in for awhile at the Act and Rules Committee Meeting.

On the evening of May 25, I was honoured by a dinner put on by the Cowichan Valley Bar Association. There were a large number of people from my own area, as well as from Victoria, Nanaimo, and up Island. I really appreciated the event.

On May 27, my plane left Victoria Harbour at 7:20 a.m. to journey to Vancouver. I was able to sit on the left-hand side of the plane and watch Beacon Hill Park and the Royal Victoria Golf Club through my window. One of the things I was going to do in Vancouver was meet with Jim Vilvang, and perhaps because of this anticipation, I then, in the plane, dozed off. I woke up a short time later, and lo and behold, the Royal Victoria Golf Club and Beacon Hill Park were passing by the window on the right-hand side. In any case, we went back to Victoria and landed because the weather over the Gulf Islands was improvident; in other words, the clouds were down to sea level. I sat in the Harbour Air waterfront terminal until 10 a.m., when a resident of Esquimalt drove me out to the Ferry so that I could get the ferry over to Vancouver. I arrived at the Commemorative Luncheon for our fifty, sixty, and seventy-year members with a half an hour remaining.

After the luncheon, Mr. LeRose and I took a taxi out to UBC to present a gold medal to the recipient from this year's Graduating Class. Full details of this will appear in one of our upcoming publications, with, hopefully, a little different twist. Rather than the usual President and recipient photograph, this year's photographs, we are hopeful, will include a guest at the event, a seeing eye dog in training named "Silas." (sp)

We were then convoyed downtown by a specially arranged taxi so that we could arrive in time for the Executive Committee Meeting, which began at approximately 5 p.m.

On the morning of May 28, I met with Kathryn Berge and Jim Vilvang to select this year's recipient of the Law Society award. This was followed by a meeting with Steve Owen at our offices. Mr. Owen is re-thinking and re-working the Special Prosecutors appointment process on behalf of the Provincial Government and wanted input from the Law Society in that regard. Incidentally, Mr. Owen is of the view that Stockwell Day is a terrific Cabinet Minister. Mr. Owen will also be meeting with former Presidents McDiarmid and Hunter. This was followed up by the first meeting of the Canadian Bar Association's Commission on Legal Aid, which was held at the CBA office at 10 a.m.

On May 31, I again attended at the waterfront terminal of Harbour Air in Victoria. My intention was to travel to Vancouver to address the Professional Legal Training Course. Unfortunately, no planes flew in any direction on that morning, so I must say a hearty "thank you" to Alan Treleaven for doing what I understand was an excellent job filling in for me in Vancouver.

I did perform that function for the Professional Legal Training Course in Victoria, attending at UVIC (the course wasn't there) and at the Lansdowne Building of Camosun College (the course wasn't there), and finally enlisting the Office of the President of Camosun College to find the course, which was being presented at the Fisher Building. I arrived there fifteen minutes late; however, since I had been misinformed as to the start of the program, I was, in fact, fifteen minutes early.

On Tuesday, June 1, I traveled to Vancouver in mid-morning for my weekly meeting with Mr. McGee and to meet, along with Ms. Armour and Mr. Lucas, with the Public Accountability

Board. This is a Canadian body that will be the "auditors" of auditors. They wished to speak to us about the need for them to see materials that the auditor receives, but which are solicitor-client privileged documents. They wish to have access to this material in their review of how the auditors function. They have this access through some legislative process in Ontario and are pursuing this type of access throughout Canada. They will be providing us with a specific request and details of what we need, and Benchers will likely be making a decision on this once staff has an opportunity to review and advise.

On Wednesday, I journeyed from Victoria to Calgary, along with Kathryn Oliphant. We made it as far as Canmore, when we had to stop and play a round of golf at the Canmore Golf & Curling Club. We were greeted as we walked down the first hole by a coyote, but no other wildlife. We later dined at Tim Horton's and then headed off to Jasper, Alberta, for the Law Society of Alberta's retreat. Proving that I am always on the job, as were approaching Banff National Park, I received a telephone message from a British Columbia citizen expressing concern about the conduct of a British Columbia lawyer. At the park gate, I indicated to the attendant that I had met Stephen Harper; however, this did not result in reduced entrance fees. It did result in some negative comments about the aforesaid Mr. Harper because of a pay freeze. Apparently, there is someone in Alberta who is not high on Mr. Harper.

We spent the rest of the afternoon and the early evening driving between Banff and Jasper, past the Columbia Ice Fields. This is one of the most scenic, storied journeys in all of the world. I recommend it to everyone.

We arrived in Jasper at approximately 7:30 p.m., in time for some lukewarm pizza, pizza being the tradition of the Wednesday night commencement of the retreat. Mr. McGee, Mr. Treleaven, Mr. Hume, and Ms. Janzen were in attendance, as were a bunch of people from throughout Canada and a few, in fact, from Alberta. The Alberta retreat is certainly one of the treats of being the President, First Vice-President, and Second Vice-President of the Law Society of British Columbia. It is a great experience and seems to be expanding in terms of its membership, with many of the usual fellow travelers from the more eastern provinces in attendance. It is an intellectually stimulating as well as socially stimulating event, and those stories that Gavin Hume will tell about me dozing off are completely untrue. I will get the letter from my ophthalmologist indicating that you listen through your ears, not your eyes.

On Thursday afternoon, we played golf at the Jasper Park Lodge Golf Course. It is a terrific experience, and this year we saw many elk, but also a big black bear putting on the fourth hole. The Golf Course was opened in 1925.

At the twelfth tee, I received a telephone call from Bruce LeRose. He was calling me to let me know that he was in Calgary on his way to Saskatoon, the former residence of many great Canadians, such as myself and Gordie Howe. The airport in Saskatoon is called the John Diefenbaker Airport, and hopefully, landing there will have a similar effect upon Bruce as the trip to Damascus had on Saul of Tarsus.

June 4 and June 5 involved more activities at the Alberta retreat and then a journey back to Calgary to catch the 9 p.m. Calgary-Victoria express. We were able to meet with Gavin and Trish at the Chateau Lake Louise to discuss important Law Society business over lunch. Lake Louise is named after Princess Louise, the fourth of Queen Victoria's daughters. Her husband was John George Edward Henry Douglas Campbell, the Duke of Argyll, more commonly called by his courtesy name, the Marquis of Lorne. Apparently the name "Lorne" is used in Canada to a far greater extent than anywhere else in the world. He was a Liberal member of the British House of Parliament. Princess Louise was the first royalty to reside in Canada as the spouse of a Governor General. She is the person who named "Regina" and "Alberta."

On June 7, I participated briefly in the second CBA Legal Aid Commission Steering Committee Meeting. I did so by telephone.

On June 8, I journeyed to Vancouver for the second sitting of the Law Society Budget Committee.

On June 9, it is my intention to travel to Parksville to prepare for the Law Society retreat.

I would like to take this opportunity to remind Benchers that on June 16, at 10 a.m., at the First Nations Longhouse at UBC, the Law Society, as part of its focus on Aboriginal students and lawyers, will be sponsoring a function to bring Aboriginal students and lawyers together. The focus of the function will be Judge Alfred Scow, who was a Provincial Court Judge for many years, primarily on Vancouver Island. It would be very useful to have many Benchers at that event, which I think would stress our focus on increasing the number of First Nations law students and members of our Law Society.

GGR/kd

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

June 12, 2010

Introduction

My report to the Benchers this month is brief as the retreat program will update the Benchers on progress of our main strategic plan item. I will be giving a comprehensive mid-year report to the Benchers on a variety of items at the next meeting on July 9, that being the mid-point of the Bencher calendar for this year.

1. Communications Strategic Plan

One of Management's top operational priorities for the year as outlined at the Bencher meeting in January is the development and implementation of a strategic plan for all of our external and internal communications. This covers communications to all of the Law Society's key stakeholders including government, media, the public at large, members and employees. Our main objective is to strike an appropriate balance in two areas, proactive and responsive communications and content which our stakeholders need to know and content which they want to know. Since January we are very fortunate to have hired Robyn Crisanti as our Manager of Communications and Public Relations. Robyn will be presenting our new Communications strategic plan at the meeting for review and discussion, ably assisted by Kimanda Jarzebiak, our external Government and Public Relations advisor.

2. Update – 2011 Budget and Fees

The Finance Committee met on May 25 to review Management's initial report on the Law Society's draft operating and capital budgets for 2011 and recommendations for 2011 fees. A second meeting will take place on June 8 to review certain items in further detail. The Committee has indicated that it expects it will be in a position to make a recommendation on 2011 fees to the Benchers at the next meeting in July.

3. Update – Core Processes Review

Work on the Law Society's Core Processes Review is proceeding well and on schedule. Kensi Gounden, the project leader, will present a full status report at the July meeting. In the meantime, I would like to report that all regulatory departments have participated in phase 1, a review to identify all processes and steps followed in carrying out their work. We are now in phase 2, which is a detailed "mapping" of these processes and steps using software tools to ensure accuracy and flexibility for working with and analyzing the results in the next phase. The mapping phase will be completed by June 30 and phase 3, which is a department by department review to identify opportunities for greater efficiency and effectiveness, will be completed in the Fall timeframe. Cooperation to date from all staff involved has been good and we are on track

to make formal recommendations to the Benchers by year end. In addition, Kensi has been liaising with the Bencher Task Force on Discipline Guidelines chaired by Herman Van Ommen to ensure coordination of efforts and information sharing where helpful.

4. 2009 Law Society Annual Review

The Law Society's 2009 Annual Review has been distributed electronically to all members and is now available on our website. In addition electronic versions have been sent to various other interested organizations and hard copies have been provided to all provincial MLAs in keeping with our recent practice. If you haven't already done so please take a moment to read the Review. It covers progress on our Strategic Plan and the results of our Key Performance Measures in addition to features on other important activities of the Law Society. There is considerable discussion in the communications industry around the value of these types of reports and the best format to attract readership. We have tried in this edition to be succinct, to write in plain language and to focus on information which we think is most relevant to the public at large. We welcome your feedback on this edition of the Annual Review. Please contact Robyn Crisanti at rcrisanti@lsbc.org with your comments.

5. Annual Stakeholders and General Meeting of YVR

President Ridgway and I attended the 2010 Annual Meeting of Stakeholders for YVR accompanied by Carol Kerfoot the Law Society's representative on the YVR board of directors. The Law Society, together with other designated bodies such as the regulatory authorities for accountants and engineers, occupies a seat on the YVR board. The meeting updated stakeholders on the highlights of operations in 2009 and the key priorities for 2010 and beyond. YVR is a large and sophisticated business with a complex set of regulatory requirements. The impression we had from attending the meeting and our consultations with Carol Kerfoot is that YVR is well served by the diversity of skills sets required of its Board members including, in particular, the skills which a lawyer can bring to the table. We thanked Carol for her contributions as she takes on the role as Chair of YVR's Governance Committee.

6. Retention of Aboriginal Lawyers Event - June 16, 2010

This is a reminder that the event to aid in the networking and retention of aboriginal lawyers organized and sponsored by the Law Society as one of our Strategic Plan initiatives is being held at the First Nations House of Learning at UBC on Wednesday, June 16 from 9:00 AM to 2:00 PM. Further details are available on the Law Society's website at:

http://www.lawsociety.bc.ca/utilities/whatsnew.html#aboriginal or you may contact Susanna Tam, our Policy Counsel at stam@lsbc.org.

Timothy E. McGee
Chief Executive Officer

Memo

The Law Society of British Columbia

To Benchers

From Jeffrey G. Hoskins, QC for the Act and Rules Subcommittee

Date June 1, 2010

Subject **Proposed amendments to *Legal Profession Act***

At the July 2009 meeting the Benchers resolved to refer a list of proposed amendments to the Act and Rules Subcommittee for consideration and recommendation to a future Benchers meeting. The Subcommittee has considered most of the issues that were referred to it. A summary of the Subcommittee's consideration and its recommendation in each case is attached in a series of separate documents. The Subcommittee plans to complete its review and consider some additional suggested amendments and report to the Benchers further at the meeting scheduled for July 9, 2010.

The Act and Rules Subcommittee recommends that the Benchers authorize a request to the provincial government for amendments to the *Legal Profession Act* as described in the attached documents with respect to the following sections of the Act (plus associated consequential amendments):

section 1 — Definitions, definition of "practice of law"

section 14.1 (proposed) — Paralegals

section 15 — Authority to practise law

section 23 — Annual fees and practising certificate

section 24 — Fees and assessments

section 26 — Complaints from the public

section 38(5) — Discipline hearings (maximum fines)

section 38(5) — Discipline hearings (suspension pending compliance)

section 39 — Suspension

section 47 — Review on the record

The Act and Rules Subcommittee has also considered possible amendment to the following sections of the *Legal Profession Act*, but recommends no changes at this time. A brief explanation of each potential change is included in the attached documents.

section 4 — Benchers

section 17 — Practitioners of foreign law

Attachments: 12 documents re sections of *Legal Profession Act*

JGH
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LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 1 – DEFINITION OF "PRACTICE OF LAW"

SECTION 15 – AUTHORITY TO PRACTISE LAW

Rationalize the definition and prohibition on unauthorized practice

NATURE OF CHANGE PROPOSED

Without changing the substantive effect of the provisions, remove from the definition and relocate in section 15 provisions that are really exceptions to the prohibition in section 15 or actions not really the practice of law but included in the definition for the purpose of invoking the prohibition in section 15.

WHY CHANGE IS NEEDED

Section 1 defines the "practice of law" as including a number of specified activities (paragraphs (a) to (g)) and then goes on to exclude from the "practice of law" certain things. The exclusions relate to what activities will not be considered unauthorized practice and, for the most part, do not address whether or not the specific service may involve the provision of legal services.

The exception in paragraph (h), when "practice of law" is done without intention of payment, results in pro bono activities of lawyers being something other than the practice of law, which, arguably, makes ethical breaches in that activity conduct unbecoming rather than misconduct.

Parallel to that is the inclusion in paragraphs (f) and (g) of the definition acts that are not actively practising law (offering to provide legal services and holding out as qualified) but are included so that non-lawyers can be prevented from doing them by means of the prohibition in section 15. As an unintended consequence of that provision, a recent applicant attempted to persuade the credentials staff that providing legal services, which is the "practice of law" under paragraph (f), was a means of keeping up on the law for purposes of satisfying the Credentials Committee to grant permission to resume practising status after some time non-practising.

For another example, paragraph (j) excludes from the "practice of law" the lawful practice of notaries public, such as conveyancing of real property and drafting wills, which are clearly the practice of law when done by a lawyer.

The exceptions belong more properly in s. 15 along with other exceptions to the general provision that only practising lawyers may practise law. The Act and Rules Subcommittee identified this as a priority in 2009.

The purpose of the proposed amendment is not to change the substance of the law, other than to correct the unintended consequences. It is intended to clarify the law so that lawyers and non-lawyers would be better able to discern their rights and limitations under the Act.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This series of amendments would continue and improve LSBC's ability to enforce the statute and protect public against unqualified people providing legal advice for payment. It would improve the ability of public and lawyers to understand what non-lawyers can and cannot do.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This sort of amendment has been discussed in the past, but not pursued primarily because Benchers were reluctant to put the sections concerned on the table for discussion with government.

In July 2009, the Benchers referred the question of amendments to clean up the definition of "practice of law" and the prohibition on unauthorized practice of law in section 15 to the Act and Rules Subcommittee for a recommendation. The Subcommittee had previously indicated that it considered this amendment to be a priority.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the Benchers make this series of amendments part of the Law Society's request for amendments for 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 4 – BENCHERS

Bencher oath of office

NATURE OF CHANGE PROPOSED

Add a statutory requirement for Benchers to take an oath of office when elected or appointed.

HISTORY OF PROPOSED AMENDMENT

This was one of the legislative amendments that the Benchers referred to the Act and Rules Subcommittee. The Subcommittee recommended to the Benchers that that be done by Rule, which has been done and implemented.

RECOMMENDATION

The Act and Rules Subcommittee is of the view that it is sufficient, and in keeping with the independence of the profession and the Law Society, that the requirement exists in the Law Society Rules. The Subcommittee recommends that this amendment not be part of the Law Society request for legislation in 2010.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 14.1 (PROPOSED) – PARALEGALS

Certification of paralegals and/or other non-lawyers

NATURE OF CHANGE PROPOSED

This change would be a new section intending to give the Benchers permission to introduce a program for certifying paralegals at some future date if they decide to follow that course.

This is a first draft of what the provision might look like:

> Paralegals
>
> **14.1** The benchers may make rules to do any of the following:
>
> (a) establish a certification program for paralegals;
>
> (b) determine the qualifications for certification as a paralegal;
>
> (c) determine the rights and privileges associated with certification as a paralegal;
>
> (d) set the annual fee for certified paralegals.

WHY CHANGE IS NEEDED

This new provision was referred to the Act and Rules Subcommittee for consideration on the basis that the Benchers could consider a program of certifying non-lawyers, presumably qualified paralegals, to provide legal services, either with lawyer supervision or without. The Subcommittee is very cognizant of the work being done by the Delivery of Legal Services Task Force and does not intend to pre-suppose what the Benchers may do in response to its endeavours. However, the Subcommittee is also aware of the time it takes to bring about legislative changes, and proposes a permissive section that will allow the Benchers the flexibility to decide to initiate a program, or not, in due course.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The program, if adopted, would ensure that paralegals or other non-lawyers offering legal services for pay are qualified, regulated and insured. Currently, paralegals are regulated through the lawyers who employ them. Those not employed by a lawyer are regulated only by UPL proceedings initiated by the Law Society where appropriate. It may be that a certification program could allow paralegals to perform some legal services for which

they are qualified, but now restricted to lawyers to ensure proper regulation. That may give members of the public more choice and some cost relief.

CONSEQUENTIAL AMENDMENTS

Section 15 – Authority to practise law. If the Benchers were to opt for an Ontario-like program that would allow paralegals to engage in activities that amount to the practice of law outside of the context of a law firm, section 15 would need to be amended to accommodate that.

HISTORY OF PROPOSED AMENDMENT

It should be noted that the Law Society has requested the statutory authority to certify paralegals on a number of occasions, going back to the 1980s, but the requests have not yet found favour in Victoria. The fact that the Law Society of Upper Canada has undertaken an extensive program may make a difference.

RECOMMENDATION

The Act and Rules Subcommittee asks that the Benchers consider if they want an amendment to allow them to decide on a course of action at a later date.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 17 – PRACTITIONERS OF FOREIGN LAW

NATURE OF CHANGE PROPOSED

This section was included in the list of possible areas for amendment so that it could be considered whether a change was needed in light of the rapidly changing conditions in trade in services on a global scale. The Act and Rules Subcommittee considers that the broad powers given to the Benchers in the current provision are sufficient to deal with any foreseeable changes.

RECOMMENDATION

No change.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 23 – ANNUAL FEES AND PRACTISING CERTIFICATE

Benchers to set annual practice fee

NATURE OF CHANGE PROPOSED

Remove the requirement that the annual practice fee be set by the majority of members voting at a general meeting or in a referendum. Substitute a provision that the annual practice will be set by the Benchers.

WHY CHANGE IS NEEDED

In almost all other jurisdictions and professions, the amount of fees set by a self-regulatory body is not set by the members themselves. In our own legislation, every other fee of the Law Society is set by the Benchers.

The Independence and Self-Governance Advisory Committee has considered this matter and its effect on the independence of the legal profession and on the public appearance of acting in the public interest. The Committee has reported its finding that the change should be made in the interest of preserving the independence and self-governance of the legal profession in British Columbia. The Committee's report was considered by the Act and Rules Subcommittee, which has agreed to recommend the change to the Benchers.

This is the text of the Independence and Self-Governance Advisory Committee's report to Act and Rules Subcommittee on this proposed amendment:

> The Committee considered whether public confidence and self regulation might be better enhanced if the Benchers set the practice fee rather than members. The Committee debated whether a fee set by members was consistent with proper regulation. The Committee expressed concern that the Law Society's ability to properly finance its activities necessary to act in the public interest could be compromised by members' opportunities, in theory, to set a fee lower than what was necessary. Members' financial interests in a low fee could thereby compromise proper regulation.
>
> The Committee believed that the case for lawyer independence and self-governance would be enhanced, and a clear delineation between member interest and the public interest would be demonstrated, if the Benchers, acting in the public interest, set fees themselves rather than on the approval of members who

may be motivated by self-interest to fix the fee at a rate that would not permit the Law Society to discharge its public interest mandate. A concern was expressed that the Law Society, through the current process, may become beholden to its members, running the risk of making it appear to be a member interest organization.

There was a considerable debate on this issue. The Committee recognized a fundamental tension between democracy and accountability (which supported the current process), and proper regulation, necessary for public confidence (which finds more support in a process that allows the governors of the regulator to set the fees). The fact that Benchers are elected may improve the notion of accountability, however, even if the fee-setting power was taken away from the members. Ultimately, given the mandate of the Committee, it was decided that the Committee should recommend a solution that erred on the side of a process that better ensured proper regulation, a necessary pre-condition to lawyer independence and self-governance.

The Committee therefore reached a consensus that an amendment to s. 23 permitting the Benchers to set the practice fee would be advisable. However, the Committee also agreed that amendments to s. 23 were likely not as pressing as amendments to s. 3.

Since that report was made, the provincial government has introduced legislation to make the elected representatives in the Association of Professional Engineers and Geoscientists responsible for setting the annual fee for members of that professional group. I believe that leaves the Law Society and Foresters as the only major professions requiring membership approval of annual fees. Among other Canadian Law Societies, only New Brunswick (which still has compulsory CBA membership) has that requirement.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This change would allow the Law Society to budget properly to serve the public interest, without the constraint of having to meet registrant approval directly. It would ensure that those regulated by the Law Society could not limit the amount of regulation by fixing a fee too low for effective regulation. It would also ensure that the public and the government could see that that was the case.

CONSEQUENTIAL AMENDMENTS

Section 24 – Fees and assessments

HISTORY OF PROPOSED AMENDMENT

The annual fee was originally set in the *Legal Professions Act*, but inflation eventually caught up with that process, and the Act was amended to allow the Benchers to seek an increase from a general meeting of the members. By the time of the *Barristers and Solicitors Act* in 1979, the current provision of the members setting the fee was in place.

In the 1980s, drafts of the new Act that eventually became the *Legal Profession Act* of 1987 contained a provision for the Benchers to set the annual fee. That was changed back to the members in a general meeting or on a referendum on the strong request of the CBA so that it would not interfere with the universal membership in the CBA. As you know, that practice ended in 2004.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 24 – FEES AND ASSESSMENTS

Removing reference to collecting CBA fees

NATURE OF CHANGE PROPOSED

Remove references to collection of CBA annual fees as part of the Law Society annual practice fee.

WHY CHANGE IS NEEDED

Section 24 of the *Legal Profession Act* contains the following unusual provisions, which formerly authorized the compulsory collection of the annual CBA fees as part of the practice fee:

> (1) The benchers may
>
> (c) authorize the society to act as agent of the Canadian Bar Association for the purpose of collecting fees of that association from lawyers who are members of it.
>
> (2) Fees collected under subsection (1) (c) form part of the practice fee referred to in section 23 (1) (a).

Since these provisions are no longer used, and since some Benchers place importance on distinguishing the Law Society from the CBA, in 2009 the Benchers requested that those provisions be removed from the *Legal Profession Act*.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This change would reflect the separation of the regulatory and advocacy functions already in place in the legal profession.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This amendment was approved by the Benchers as part of the requested amendments to the *Legal Profession Act* in 2009. It was not enacted by the Legislature.

RECOMMENDATION

The Act and Rules Subcommittee recommends that this amendment be part of the Law Society's request for 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 26 – COMPLAINTS FROM THE PUBLIC

Mediation of disputes

NATURE OF CHANGE PROPOSED

Add a specific provision allowing the Benchers to make rules providing for the mediation of disputes involving lawyers. The provision could look something like this:

> (2) The benchers may make rules
>
> (b) providing for the resolution of complaints and disputes involving lawyers to be resolved or attempted to be resolved by means of mediation or other informal resolution technique,

WHY CHANGE IS NEEDED

There is a rule (3-5(9)) allowing the use of mediation to resolve a dispute involved in a complaint:

> (9) The Executive Director may, at any time, attempt to resolve a complaint through mediation or other informal means.

However, the validity of that Rule, at least with respect to any subsequent disciplinary action, without specific legislative authority may have been called into question by the case of *Salway v. Association of Professional Engineers and Geoscientists of BC*, 2009 BCCA 350. In that case, the Court of Appeal overturned a consent resolution of a discipline matter on the grounds that the informal resolution of complaints was not mandated by the governing statute of the professional organization. Although the professional had accepted what is called a "Stipulated Order" rather than face a formal hearing, the court found that the professional regulatory body had exceeded its jurisdiction because there was no authority in the Act for such an outcome.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

Ensure that an efficient method of concluding complaints and discipline matters, by mediation to achieve consent, will not be seen to exceed the statutory mandate of the Law Society.

CONSEQUENTIAL AMENDMENTS

None.

HISTORY OF PROPOSED AMENDMENT

The Act and Rules Subcommittee was asked by the Benchers to consider whether the Act should be amended to allow for the resolution of complaints and disputes by means of mediation, arbitration or other means. The Committee is of the view that specific authority for mediation or other informal means may be of value, but that establishing a program for arbitration is not within the current scope of the Law Society as a regulatory body and they did not see any reason to try to expand it.

RECOMMENDATION

The Act and Rules Subcommittee recommends an amendment to the *Legal Profession Act* that deals only with mediation and other informal methods of dispute resolution.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38(5) – DISCIPLINE HEARINGS

Maximum disciplinary fines to be set by Benchers

NATURE OF CHANGE PROPOSED

Remove from the *Legal Profession Act* the specific maximum amount of fines that a hearing panel can impose on a respondent and give the Benchers the specific authority to set the maximum amount.

WHY CHANGE IS NEEDED

The Act currently caps the maximum fine a discipline hearing panel can impose on a lawyer at $20,000 and $2,000 for an articled student. The maximum fine for lawyers has not been adjusted since 1992 and the maximum fine for articled students remains unchanged since 1988. If the maximum fines were sufficient to deter possible misconduct in 1992, it is doubtful that they are now or that the public will perceive them as adequate.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

An increase in maximum fines would make Law Society penalties more current with acceptable levels and bring them into line with other professions in British Columbia. More significant fines are more likely to be perceived by the public as an effective deterrent to protect the public interest. Fines that are more effective could help avoid the unnecessary use of suspensions as a penalty, which can have an adverse effect on some clients.

Delegation of the authority to decide the maximum fine allowable is in keeping with the scheme of the *Legal Profession Act* as a whole, which delegates the details of most issues to the Benchers to determine and enforce by way of the Law Society Rules.

CONSEQUENTIAL AMENDMENTS

Section 36 – add a new matter on which Benchers can make Rules, maximum fines.

HISTORY OF PROPOSED AMENDMENT

In 2008, the Law Society requested an increase in the maximum fines to $50,000 and $5,000. However, in 2009 the Benchers resolved to change the request to allow the

Benchers to set the maximum fine by Rule, which required a change to section 36 as well as section 38(5). In neither case was the change enacted by the Legislature.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendments be approved as part of the Law Society's legislative request for 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38(5) – DISCIPLINE HEARINGS

Disciplinary suspension pending compliance with conditions

NATURE OF CHANGE PROPOSED

Amend the provision permitting hearing panels to impose a suspension on a finding of misconduct (s. 38(5)(d)), to extend a suspension to the time when a respondent complies with a condition or other order imposed in the same matter. Three amendments would allow for a suspension that

- begins immediately until compliance,
- begins at a later date until compliance,
- last for a specified period, or until compliance, whichever is later.

WHY CHANGE IS NEEDED

In 2008 and again in 2009, the Law Society requested a change to section 38(5) to allow a discipline hearing panel that has found a lawyer guilty of misconduct and determined that a suspension is an appropriate penalty to require compliance with conditions before the suspension is lifted.

While the current legislation allows a panel to impose a suspension pending compliance with some requirements that can be imposed as part of a disciplinary penalty, it appears to be an oversight that some other conditions and requirements cannot be enforced in that way.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This change will allow for more effective protection of the public interest by giving hearing panels the discretion to ensure that any non-penalty conditions must be met before a lawyer can return to practice.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This request was made of government in both 2008 and 2009, but has not been enacted as yet.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendments be approved as part of the Law Society's legislative request for 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 39 – SUSPENSION

Interim suspension before citation

NATURE OF CHANGE PROPOSED

At the meeting in March 2010, the Benchers adopted a new rule (3-7.1) allowing for the interim suspension of a lawyer pending the conclusion of an investigation in to the lawyer's conduct. The previous rule, and section 39, speak to the suspension of a respondent (someone against whom a citation has been issued) pending a hearing on the citation.

Prior to that, a resolution was approved calling for an amendment "to clarify and confirm the Law Society's authority to make the rule(s), not to confer or create new authority." That can best be done in section 39, which now permits the interim suspension of or imposition of practice restrictions on a "respondent", which is defined as a lawyer or articled student who is the subject of a citation. In order to apply the same provision to lawyers under investigation but not yet cited, we would change "respondent" to "lawyer" or "articled student" as is appropriate in the context. In addition, the term of the suspension becomes "while an investigation is conducted and until the decision of a hearing panel or other disposition of the subject matter of the investigation."

The Act and Rules Subcommittee also suggest changes to the section that would promote consistency of treatment between lawyers and articled students.

This is what the section as amended would look like:

39 (1) The benchers may make rules permitting the chair of the discipline committee or any 3 other benchers to do any of the following while an investigation is conducted and until the decision of a hearing panel or other disposition of the subject matter of the investigation:

(a) suspend a lawyer, if the lawyer's continued practice would be dangerous to the public or the lawyer's clients;

(b) impose conditions on the practice of a lawyer;

(c) suspend the enrolment of an articled student, if the student's continued enrolment would be dangerous to the public or the clients of the student's principal or of the principal's firm;

(d) impose conditions on the continued enrolment of an articled student.

WHY CHANGE IS NEEDED

At the meeting in October 2009, the Benchers discussed options for interim measures that could be taken to increase public protection when a lawyer is under investigation by the Law Society or is charged in the criminal justice system. It was noted that, while the current section 39 and related Law Society Rules permitted the interim suspension of a lawyer who is the subject of a citation, or the imposition of conditions and restrictions on the lawyer's practice, there is no provision permitting that prior to the citation being authorized, even though, in rare cases, there may be a compelling public interest that requires such action.

The Benchers decided that the Law Society should seek an amendment to the *Legal Profession Act* to allow for the required power. In the interim, an amendment was made to the Law Society Rules on the basis of the Benchers' general rule making power in the public interest.

Here is an extract from the *in camera* minutes of that meeting showing the resolution that was adopted:

> Mr. Vertlieb moved (seconded by Ms. Hickman) that the Law Society proceed with enactment of new rule(s) permitting the Law Society to impose interim measures before or without a citation, and proceed with appropriate amendment of the Legal Profession Act, on the understanding that the legislative amendment is to clarify and confirm the Law Society's authority to make the rule(s), not to confer or create new authority.
>
> The motion was carried.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This change would allow the Law Society, where needed, to protect the public interest more fully before the investigation into allegations has been completed, for example, in the case of a lawyer who has been charged, but not yet convicted, of a criminal offence.

CONSEQUENTIAL AMENDMENTS

Section 40 – Medical examination

The Subcommittee suggests that a similar change be made to section 40, which used to be combined with section 39. If a lawyer can be suspended before citation it makes sense that the lawyer can be ordered to be examined for medical fitness if the public interest demands it.

HISTORY OF PROPOSED AMENDMENT

This amendment was mandated by the Benchers in October, 2009. It has not yet been communicated to the provincial government.

RECOMMENDATION

The Act and Rules Subcommittee recommends including this amendment in the request for amendments for 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 47 – REVIEW ON THE RECORD

Review of award of costs

NATURE OF CHANGE PROPOSED

Add awards of cost to the decisions of a hearing panel that can be the subject of a review by the Benchers.

WHY CHANGE IS NEEDED

A strict reading of the current provisions would require that appeals of discipline or credentials hearing decisions on costs must be heard by the Court of Appeal. All other appeals can be heard by the Benchers. This anomaly in the legislation would deprive members of the Law Society, as well as others who apply for membership in the society, of a less formal and more cost-effective route of appeal.

As it happens, the Benchers have often agreed to review costs as part of a general review of the decision of a hearing panel. I don't know of a case where a review of costs alone has proceeded. However, it may be that some possible appellants are dissuaded from pursuing the matter by the current wording of the current section. In any case, the Act should accurately reflect reality in practice.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

Allows greater transparency into the remedies available to a person who is the subject of a hearing panel order.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

In 2008 and 2009, the Law Society asked for an amendment to section 47(1) to allow a lawyer who is the subject of a discipline decision or a person who is the subject of a credentials decision to apply to the Benchers for a review on the record of an order for costs. No amendment was made.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendments be approved as part of the Law Society's legislative request for 2011.

The Law Society of British Columbia

Interim Report of the Discipline Guidelines Task Force

For: The Benchers
Date: July 9, 2010

Herman Van Ommen
Stacy Kuiack
Anna Fung, Q.C.
John Hunter, Q.C.

Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **The Discipline Guidelines Task Force**

Lance Cooke
Staff Lawyer, Policy and Legal Services Department
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Interim Report of the Discipline Guidelines Task Force

Introduction

In part, the Discipline Guidelines Task Force was struck to review the function and processes of the Discipline Committee and to make recommendations regarding guidance and information the Benchers can provide to the Discipline Committee members, to assist them in reaching appropriate and consistent dispositions in professional conduct matters. With this Interim Report the Discipline Guidelines Task Force proposes a three-part policy regarding abeyance requests, a type of matter the Discipline Committee sees frequently. **[Attachment 1]** Each of the three parts of the proposed abeyance policy are addressed in the course of this Report.

The second aspect of the Task Force's broad mandate is to review the Law Society's professional conduct investigation and discipline processes and to make recommendations for any *policy-level* improvements that might assist in reducing process timelines without sacrificing careful and thorough investigations or a discipline process that is observant of the legal requirements of fairness and natural justice.

Before proceeding with the second aspect of its mandate, the Task Force looks forward to having the benefit of any results that may be available from the Law Society's Core Process Review Project, which is focused on the operational level and the activities of Law Society staff, including staff in the Professional Conduct and Discipline Departments.

First Focus: Abeyances

The first main focus of the Task Force's attention has been the abeyance issue. The following observations speak to the importance of the subject of abeyances in regard to the Law Society's regulatory responsibilities and in light of the Task Force's mandate:

- A statistical analysis conducted early in the life of the Task Force confirmed that most professional conduct investigation files ("complaint files") do not involve abeyances and are closed within 6 months of being opened. However, abeyances feature prominently in the group of investigations that are closed more than 1 year after their opening date.
- Statistics current to April 2010 revealed that less than 1% of all professional conduct investigations opened in the four year span from January 1, 2005 to December 31, 2008 still remained open. However, among the files from that group that did remain open, approximately 2/3 had spent some time in abeyances granted by the Discipline Committee.
- The Discipline Committee's decision to grant an abeyance has the practical effect of removing the matter from the normal timelines associated with completing and concluding investigations.
- A characteristic of all abeyance situations is that the lawyer subject to the Law Society's investigation is also involved in parallel proceedings, usually court

proceedings, civil or criminal, but potentially parallel regulatory proceedings (eg. securities regulation proceedings). In some cases the parallel proceedings have the potential to attract a heightened level of media and public attention; the lawyer's conduct in question may achieve significant notoriety.

- There has been no previous abeyance policy direction from the level of the Benchers as a whole. Existing abeyance policy is Discipline Committee policy, deriving from a 2000 memorandum from staff, later supplemented with an informal directive from the Discipline Committee aimed at minimizing the attachments to staff's abeyance referral memoranda.

While each abeyance decision and the policy behind it is important, the Task Force was pleased to learn that the number of files in abeyance appears to have been reduced over the past two to three years. The number of files in abeyance at May 6, 2010 was 9. The improvement has been due to the informal direction of the Discipline Committee and the successful efforts of the Professional Conduct department. In part, the present set of recommendations reflects an attempt to express the principles and the sentiment behind the improvement already indicated in our file statistics. Another aspect of the task is the attempt to expand and fortify the list of potentially relevant considerations for the Discipline Committee to bring to bear in its evaluation of abeyance requests. In applying itself to this work, the Task Force has been guided by the view that only abeyances that are truly warranted should be granted.

Consultation

In the course of supporting the work of the Task Force, staff have consulted with other law societies across the range of Canadian common law jurisdictions. While only two other law societies surveyed (the Law Society of Alberta and the Nova Scotia Barristers' Society) had *written* abeyance rules or policies they were willing to share, *all of the responding regulatory bodies* (including the Law Societies of Saskatchewan, Manitoba, and Upper Canada) indicated that they do grant abeyances in appropriate circumstances and that abeyance decisions are made either at the staff level or by the functional equivalents of our Discipline Committee. There appeared to be broad agreement across the country that in at least some circumstances abeyances were unavoidable.

In addition to the Task Force's members, attendees at the Task Force's meetings have included: Deborah Armour (Chief Legal Officer), Adam Whitcombe (Chief Information & Planning Officer), Michael Lucas (Manager – Policy & Legal Services), and Lance Cooke (DGTF Staff Liaison). Earlier drafts of the Abeyance Policy here presented were circulated with requests for comments to the Law Society's Director of Enforcement & Monitoring, Manager of Professional Conduct, Professional Conduct Staff Lawyers and Discipline Counsel.

The Task Force is grateful to all those who participated and contributed their time and comments.

Discussion of the Proposed Abeyance Policy

The proposed Abeyance Policy is divided into three parts as follows:

1. **Preamble**

   The purpose of the *Preamble* is to introduce and make clear exactly what the Task Force's recommendations are about. An abeyance is not a defined term, nor even a mentioned term, in the *Legal Profession Act* or the Law Society Rules. Nonetheless, the notion of an abeyance has a previous Discipline Committee policy and a number of years of practical development behind it. As such, the intention of the *Preamble* is merely introductory, for the assistance of the reader.

2. **General Principles**

   The recommendations of the Task Force come in two parts. The first part proposes the adoption of new policy by the Benchers to fill an existing void. The policy takes the form of four *General Principles*. These four principles have been chosen so as not to create problematic restrictions for the Discipline Committee, in its task of coming to appropriate dispositions of individual abeyance requests. However, the General Principles have been chosen to create a backdrop for the Discipline Committee's discussions that emphasizes the Law Society's responsibilities: the importance of a close observance of the public interest mandate, the importance of avoiding unnecessary delay, the importance of any required protections for the public during the period of any abeyance, and the importance that every abeyance be *justified*, in view of the circumstances of the parallel proceedings and the extent of the information that is available for the Discipline Committee's consideration.

   a. **General Principle 1**

      The first General Principle brings together a concern for the protection of the public interest in the administration of justice with the notion that the Law Society's investigation and discipline processes should proceed in a timely manner. The result is the assertion of the presumption against holding investigations in abeyance. While such a presumption may strike some as too strong, the Task Force believes the abeyance policy should make it clear that an abeyance is not a kind of 'default' or automatic result that will issue every time a lawyer under investigation is involved in a somewhat parallel proceeding. Further, the other two Canadian law societies that have written abeyance policies (Nova Scotia and Alberta) have both included express, unqualified presumptions against the granting of abeyances. In considering when and under what circumstances an abeyance ought to be granted, it is important to recognize that an abeyance involves the Law Society's suspending or delaying the immediate performance of its statutory obligation to investigate and deal with complaints.

b. General Principle 2

The second General Principle emphasizes that Law Society investigations should proceed as far as they reasonably can, before the Discipline Committee makes its decision about granting an abeyance. This stipulation aims to put the Discipline Committee in the best position in order to render its decision on an abeyance request. A relatively new idea included in the second General Principle is the suggestion that in some cases it may be appropriate to require the lawyer's response in the investigation but then to take steps to maintain the confidentiality of the lawyer's information. Such steps might include the abeyance of further disciplinary processes (eg. postponement of a subsequent disciplinary hearing) in which the lawyer's information might become available to interested third parties, to avoid unduly prejudicing the lawyer in a parallel proceeding or otherwise undermining the administration of justice.

c. General Principle 3

The third General Principle takes account of the fact that sometimes the protection of *the public interest* can require the taking of steps for the protection of *members of the public*. Abeyance arrangements always require undertakings from the requesting lawyers. In appropriate cases, these undertakings can be adapted to include effective means of protecting the public, such as practice conditions or other restrictions. The Task Force viewed the potential need to provide for the protection of members of the public as of such significance that its express inclusion in the General Principles was warranted.

d. General Principle 4

The fourth General Principle represents an attempt to describe circumstances and criteria that together amount to *necessary conditions* for the justification of an abeyance. The fourth Principle does not aspire to list *sufficient conditions*. The determination of sufficiency is left for the Discipline Committee, in light of its application of the relevant Proposed Guidelines. The point of the fourth Principle is rather that without some appropriate combination of these conditions, a proposed abeyance would not be justified. Sub-principle 4(b) requires at least some significant risk of harm to the administration of justice as part of the justification for an abeyance.

However, the fourth General Principle may be more flexible than it first appears. The occurrence of the words "reasonably," "reasonable," and "significant" create the potential for Sub-principles (a), (b), and (c) to work together with some amount of flexibility. A "reasonable" length of time may be longer, if the risk of harm to the administration of justice is more significant. Conversely, if the risk of harm justifying the abeyance is less

significant, we should not be willing to wait very long before receiving the lawyer's response. In any event, the Task Force was of the view that the justification for any abeyance requires a sufficient closeness between the basis for the Law Society's investigation and the basis for the parallel proceeding, a risk of harm to the administration of justice if no abeyance is granted, and a potential benefit to the administration of justice if an abeyance is granted.

3. Proposed Guidelines

The second part of the Task Force's recommendations, the *Proposed Guidelines*, takes the form of a list of potentially relevant considerations, for the Discipline Committee to take into account, where each may be applicable, in determining its response on individual abeyance requests. The list presented here expands significantly on the previous list of concerns that was adopted as Discipline Committee policy in 2000, and which as a matter of practice has been drawn to the Discipline Committee's attention by inclusion in Professional Conduct staff's abeyance request referral memoranda. In addition to expanding the number of potentially relevant considerations, the proposed list provides for a more specific and focused analysis of individual abeyance requests.

The Task Force recommends that the Benchers forward the *Proposed Guidelines* to the Discipline Committee for its review and potential adoption. As the considerations in the *Proposed Guidelines* do not all take the form of statements of broad principle, and as it will be up to the Discipline Committee to use and apply the *Proposed Guidelines*, with that Committee's particular blend of experience and expertise, it seems most appropriate that the Discipline Committee consider and reach its own decision on its potential adoption of the *Proposed Guidelines*. The *Proposed Guidelines* are intended to reflect and capture the ground already gained by the Discipline Committee with the assistance of staff. The Discipline Committee is likely best positioned to appreciate the extent to which the *Proposed Guidelines* actually do reflect the considerations the Discipline Committee has been bringing to bear on the abeyance requests referred for its decision. In view of the nature of the *Proposed Guidelines* recommendation, in this Interim Report we are not providing a separate discussion of each point listed in the *Proposed Guidelines*.

For your reference, the Discipline Committee Minute of July 13, 2000, evidencing the existing policy, is provided as **Attachment 2** to this Interim Report. **Attachments 3 and 4** are the precedent forms for the "usual undertakings" that have been required as part of an abeyance arrangement where the parallel proceedings are Criminal or Civil, respectively. However, it is important to remember that the undertakings required in a given case may just begin with the "usual undertakings" and may be supplemented with additional requirements, for example, for the protection of the public during the abeyance period.

Second Focus: Disposition Guidance for the DC

As the Task Force moves beyond the Abeyance Policy issue, the next focus is to provide some useful guidance for Discipline Committee members facing the task of determining appropriate dispositions of professional conduct investigations. When an investigation is concluded and referred to the Discipline Committee, the Committee has a range of 'disciplinary' outcomes available. In the most serious cases, where sufficient proof is available, a *Citation* will be issued, a hearing will follow, and the hearing panel's written decision and any resulting penalty will be published. In descending order of seriousness, the Committee's other options include: a *Conduct Review*, a *Conduct Meeting*, a *Conduct Letter* from the Chair or, if it is determined that no disciplinary action is appropriate, *No Further Action*. In particular circumstances, the Discipline Committee may also be asked to consider whether to grant or extend an Abeyance, whether to refer a lawyer to the Practice Standards Committee, or whether the product of a professional conduct investigation should be placed on a former member's personal file, to be dealt with in the event the person ever applies for reinstatement. In some cases where a Citation has been issued, the Discipline Committee may be asked to consider a request that the Citation be rescinded. In other Citation cases, the Committee may be asked whether it will approve a conditional admission and penalty proposal. Where the Committee has directed a Conduct Review, the resulting Report from the Conduct Review Subcommittee will come back to the Discipline Committee with a recommendation, usually for *No Further Action* but occasionally that the issuance of a *Citation* should be considered. It is truly a significant task to come to appropriate dispositions in such a broad range of matters, consistently, and where the individuality of the cases can tend to obscure applicable principles and the manner in which those principles should be applied. The task may have been all the more difficult given that to date Discipline Committee members have received very little in the way of guidance to assist in their general approach to the assessment of individual cases. With this demanding range of assessments in mind, the Task Force is in the process of considering what guidance can be provided that will be of practical assistance to Discipline Committee members and that will promote both the appropriateness and consistency of the Committee's dispositions.

Issues on the Task Force's horizon include the following:

1. Delineating potential outcomes:

    - What factors make a lawyer's conduct warrant a Conduct Review rather than a Conduct Meeting (and *vice versa*)? The same questions can be posed between each of the levels of disciplinary response. In approaching the delineation question at a 'first principles' level, related questions are: what are the goals, what is the purpose, and what is the anticipated effect (for each level of disciplinary response)?

    - What factors make the issuance of a Citation an appropriate disposition? The decision to issue a Citation is unlike the other disciplinary responses in that it involves a 'strength of evidence' assessment regarding the Law Society's ability

to prove the allegations in the Citation. Should the Discipline Committee use a *citation threshold* test, analogous to the Crown's charging standard? Currently the Committee does not have an express *citation threshold* policy. If there should be a recognized *citation threshold* to apply in appropriate cases, how exactly should it be expressed?

2. Principles of General Application:

- Should the Discipline Committee be thinking in terms of a principle of Progressive Discipline, where each successive referral for the same lawyer would result in a more serious level of discipline? Benchers may be concerned about taking a path of successive conduct reviews for the same lawyer and whether a second or third Conduct Review has any real prospect of beneficial effect. If a principle of Progressive Discipline should be applied in some cases, what factors would limit its application? For example: what if the subject lawyer's transgressions were completely unrelated and if the appearance was that a past disciplinary result did have a beneficial impact with respect to the specific type of transgression it addressed? For a quite different example: what if the next level of disciplinary response would be a Citation but the nature of the available evidence would make us doubtful about the results from a potential disciplinary hearing?

- From the Discipline Committee's perspective, what should be the significance of a lawyer's Professional Conduct Record, which includes indications of previous Citations and Conduct Reviews and which is available to hearing panels only at the penalty determination phase of the Citation proceeding. The Discipline Committee is aware of these past results in making its assessments and those assessments have a potential impact on the lawyer's future Professional Conduct Record. For example, a direction that the lawyer must attend a Conduct Review would place that matter on the lawyer's Professional Conduct Record; the alternative of a Conduct Meeting would not impact the lawyer's Professional Conduct Record at all.

- A similar question can be raised regarding the significance of a lawyer's Complaints Record. The Complaints Record contains a summary reference to each past complaint investigation opened regarding the same lawyer. It includes investigations previously referred to the Discipline Committee – but also investigations in which complaints were determined to be "not valid" or where the allegations were simply not serious enough to warrant a referral to the Discipline Committee. In some cases, a lawyer may have a Complaints Record with dozens of previous entries but with little or no Professional Conduct Record and with very few previous referrals to the Discipline Committee. In such situations, how should the Discipline Committee regard a lawyer's Complaints Record and what inferences, if any, may be drawn from it?

Concluding Remarks

It is anticipated that additional issues will be identified and addressed in the course of the Task Force's deliberations over the coming months. This next phase of the Discipline Guidelines Task Force's work promises to be very challenging. The Task Force's aim is to produce some written guidance that will be of practical benefit for the Discipline Committee. The Task Force anticipates providing a further report to the Benchers in the current calendar year with as many recommendations as are settled at that time being included in the Report.

Proposed Abeyance Policy

Preamble

What is an "abeyance?" An "abeyance" is a term of art. As it has developed through Discipline Committee policy and practice, an abeyance does not refer to just any decision to wait for a period of time before moving to the next step in an investigation. Instead it describes a very specific kind of arrangement between the lawyer who requests it and the Discipline Committee who grants it. A lawyer subject to an investigation may make written request to the Discipline Committee to have the matter held in abeyance because of relevant proceedings pending or ongoing in another forum. To date, abeyances have been agreements wherein the lawyer subject to investigation provides the Law Society with protective undertakings, conditional upon the Law Society's decision to grant the abeyance. The Law Society always retains the discretion to end an abeyance unilaterally at any point and to proceed immediately with its investigation.

On the Law Society's part, usually an abeyance amounts to temporarily suspending the lawyer's responsibility to provide a written response in the investigation. An abeyance could also amount to temporarily deferring any decision to authorize a citation or proceed with a hearing, and to taking reasonable steps to maintain the confidentiality of the lawyer's response in the investigation in the interim.

An abeyance requires the lawyer's agreement and undertaking not to raise any argument based on delay resulting from the abeyance and to keep the Law Society informed of any progress in the parallel proceeding. Sometimes abeyances require the lawyer's undertaking not to enter into any confidentiality agreements that would exclude the Law Society's knowledge of the terms of any settlement. The specific undertakings required of the lawyer can be tailored to fit the circumstances of each case and any specific concerns the Law Society may have, such as interim measures for the protection of the public. The undertakings can also secure in advance any specific consent or cooperation that may be of assistance in the investigation, for example, consent to the Law Society's obtaining and reviewing the transcript from the lawyer's examination for discovery.

If granted, an abeyance is in place until *the sooner* of a specified period of time (usually 6 or 12 months) or the conclusion of the parallel proceeding, but always subject to the Law Society's right to terminate the abeyance early.

An abeyance may be extended or re-struck in new terms at any time, whether prior to or following the expiration of a previously prescribed abeyance period.

I. *Abeyance Policy - General Principles*

[Proposed for the Benchers' review and possible adoption]

1. The protection of the public interest in the administration of justice requires that the Law Society's investigations and disciplinary proceedings be completed in a timely manner. There is therefore a presumption that such investigations and proceedings should not be held in abeyance.

2. Notwithstanding the presumption against abeyances, upon receiving a written request from the lawyer subject to investigation, in certain circumstances an abeyance may be warranted. It is important that all reasonably available and potentially useful avenues of investigation have been exhausted prior to agreeing to an abeyance request. In some instances, it may be preferable to first obtain the lawyer's response in the investigation and then to consider the abeyance of subsequent processes.

3. An investigation must proceed far enough that the Discipline Committee can determine whether interim conditions or practice restrictions should be required during the period of the abeyance, for the protection of the public, a third party or any of the lawyer's clients.

4. The granting of an abeyance will only be justified if:

   (a) there is a contemporaneous parallel proceeding in another forum,

      (i) in which there is a significant overlapping of the issues or factual matrix in question in the Law Society's investigation, and

      (ii) from which relevant determinations or information may reasonably be expected to flow in a reasonable period of time;

   (b) there is a significant risk that continuing the Law Society's investigation and discipline processes without abeyance will be inconsistent with the public interest in the administration of justice:

      (i) by undermining due process or the administration of justice in the parallel proceeding,

      (ii) by resulting in an abuse of the Law Society's processes, or

      (iii) by unduly prejudicing the rights of the lawyer in the parallel proceeding; and

   (c) the Law Society's investigation and ability to protect the public interest can reasonably be expected to benefit as a result of:

(i) evidence becoming available in the course of the parallel proceeding;

(ii) the determinations of the other forum;

(iii) the cooperation and participation of the lawyer subject to investigation unrestrained by concern for effects on the parallel proceeding; or

(iv) specific safeguards for the protection of the public that may be obtained by agreement as part of the terms of the abeyance.

II. *Guidelines for Abeyance Decisions*

[Proposed to be referred to the Discipline Committee for its review and possible adoption]

While each abeyance decision must be made on a case-by-case basis, in determining whether to grant, extend or re-strike an abeyance agreement the Discipline Committee should have regard to the following list of potentially relevant factors:

General

1. The presumption that Law Society investigations and proceedings should not be held in abeyance in the absence of compelling justification;

2. Whether all reasonably available and potentially useful avenues of investigation have been exhausted prior to consideration of the abeyance request;

3. Whether any step other than granting an abeyance would adequately address the lawyer's concern in making the request and enable the investigation to proceed more expeditiously.

4. Any measures required for the protection of the public;

The Parallel Proceeding and the Other Forum

5. Whether there is a reasonable expectation of timely progress toward the conclusion of the parallel proceeding;

6. The extent of the apparent overlap of the Law Society's concerns with the facts and issues in question in the parallel proceeding;

7. The expertise and powers of the other forum and the potential value and relevance of its determinations;

8. Whether the other forum is *the better forum* for the determination of any *identical issues* that may arise in the Law Society's investigation;

9. Whether the parallel proceeding is likely to be abandoned, settled without admissions, or concluded with no useful determinations or evidence becoming available for the Law Society's investigation;

The Lawyer and Other Parties

10. Whether the circumstances of the complainant or the lawyer impede his or her ability to fully participate in the Law Society's investigation or discipline proceeding before the conclusion of the parallel proceeding;

11. Whether holding the investigation in abeyance is likely to prejudice the lawyer, the complainant, a third party, the ultimate investigation, or any subsequent discipline proceeding;

12. Whether continuing without an abeyance would be likely to provide the complainant with access to information that would be privileged in the other forum;

The Abeyance Agreement

13. Whether the lawyer has provided satisfactory undertakings to the Law Society, including any measures required for the protection of the public, such as practice restrictions, supervision or monitoring;

14. Whether the length of the proposed abeyance period is appropriate in light of the circumstances of the matter, the expectation of progress or the changing visibility of progress in the parallel proceeding, and the need for periodic review and re-assessment of further time in abeyance;

The Law Society's Investigation

15. Whether the proposed abeyance is advantageous for the Law Society's investigation;

16. Whether and for how long the matter may already have been in abeyance;

17. Any proposals for further investigation that may be carried out during the proposed abeyance;

18. Whether further investigation is required to better inform the Discipline Committee's decision on the abeyance request;

19. The effect that the proposed abeyance would have on the Law Society's ability to complete its investigations and carry out its disciplinary processes in a timely manner that is attentive to the protection of the public interest;

And

20. Such other factors as may be relevant in the circumstances.

current policy

MINUTES

COMMITTEE:	**DISCIPLINE COMMITTEE**
DATE:	**JULY 13, 2000**
PRESENT:	Richard Margetts, Q.C. (Chair) [Except Item 3 (b)] Howard Berge, Q.C. (Vice-Chair) [Except Items 2 (a), (b) & 3 (b)] Bruce Woolley, Q.C. [Except Item 7 (h)] David Gibbons, Q.C. Anne Howard Robert Crawford, Q.C. Stephen Mulhall
ABSENT:	William Everett, Q.C. Deborah Lovett, Q.C. Wendy John
STAFF:	Todd Follett Jessica Gossen Luisa Hlus Tim Holmes Kyong-ae Kim Ased Mohamed Said Margaret Currie Graeme Keirstead Jackie Morris Doug Munro

8. POLICY

(b) Memorandum re: Holding Complaints in Abeyance Pending the Outcome of Parallel Proceedings

The Committee considered an opinion from staff discussing the matter of holding complaints in abeyance pending the outcome of parallel proceedings. The opinion set out the general approach in other jurisdictions, as well as illustrating the varied concerns that arise on a case by case basis, ultimately recommending that each request should be considered on its own facts and circumstances. **It was resolved** that the following list of factors is to be considered in the future when assessing whether or not to hold a matter in abeyance, which list ought to be included with future referrals to the Discipline Committee requesting that the investigation of a complaint be held in abeyance:

1. Whether or not a trial date has been set. If no date has been set at the time the request is made, it is likely that a considerable period of time will elapse before the trial of the matter is heard, which delay could make the investigation of the complaint more difficult down the road.

2. Whether or not there is any prejudice likely to be suffered by the lawyer about whom the complaint is made.

3. Whether or not there is any prejudice likely to be suffered by a third party, such as the client of the member.

4. Whether the motive in making the complaint is tactical.

5. Is the public interest served by delaying the investigation of the complaint at this time?

6. Has the member provided the 'usual' undertakings to the Law Society?

Undertaking [Criminal Charges Pending]

To: The Discipline Committee of the Law Society

Re: LSBC v. [Lawyer's name]**; file # 200XXXXX**

I would like to request that the Law Society hold its investigation of the above complaint in abeyance pending the outcome of XXX (the criminal proceedings arising from charges under sections xxx of the *Criminal Code of Canada*). In the event the Law Society grants my request, I undertake as follows:

1. not to raise a defence to any Law Society proceedings based on any delay caused by my making this request;
2. to advise the Law Society as soon as the XXX has been concluded; and
3. not to enter into a Settlement Agreement [OR DISPOSITION / DISPOSITION OF CHARGES] that is confidential from the Law Society or would preclude the Law Society from reviewing the files or otherwise obtaining information with respect to this matter.

I understand that the Law Society may, if it deems it reasonably necessary, elect to continue the investigation at any time prior to the determination of the XXX and, if it so elects, I will cooperate with the investigation.

Dated the ____ day of _____, 200_

_____

XXX [Lawyer's name]

Undertaking [Parallel Civil Proceeding]

To: The Discipline Committee of the Law Society

Re: Complainant v. Member; file # 200XXXXX

I would like to request that the Law Society hold its investigation of the above complaint in abeyance pending the outcome of the Civil Proceeding in the Supreme Court of British Columbia, No. XXX, Y Registry, XXX Petitioners and YYY et al. Respondents. In the event the Law Society grants my request, I undertake as follows:

1. not to raise a defence to any Law Society proceedings based on any delay caused by my making this request;
2. to advise the Law Society as soon as I am aware that the above described Proceedings have been concluded; and
3. not to enter into a Settlement Agreement that is confidential from the Law Society or would preclude the Law Society from reviewing files or otherwise obtaining information with respect to this matter.

I understand that the Law Society may, if it deems it reasonably necessary, elect to continue the investigation at any time prior to the determination of the above described Proceedings and, if it so elects, I will cooperate with the investigation.

Dated the ____ day of _____, 200_

_____
XXX [Lawyer's name]

The Law Society
of British Columbia

Report of the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers

For: The Benchers
Date: July 9, 2010

Ken Walker
Haydn Acheson
David Crossin, Q.C.
Ralston Alexander, Q.C.

Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **The Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers**

Michael Lucas
Manager, Policy and Legal Services
604-443-5777

Report of the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers

Introduction

In November 2008 the Benchers considered a Discussion Paper prepared by staff entitled "An Examination of Issues in Connection with the Dual Prosecutorial and Adjudicative Functions of the Benchers." The Paper examined the policy considerations arising from the fact that the Benchers are responsible for investigating complaints and disciplinary matters as well as for adjudicating citations authorized arising from such investigations. The Discussion Paper examined arguments for and against separating the investigative and adjudicative functions of the Benchers, and compared the processes in the regulatory bodies of the legal profession in other jurisdictions, as well as the processes of regulatory bodies in other professions. After debate, the Benchers referred the issue to the Independence and Self-Governance Committee for review and recommendations.

In December 2009, the Independence and Self-Governance Committee presented its Report (the "Independence Committee Report") to the Benchers. In that report, the Committee reviewed its discussion and analysis of the issue, and analysed various options for change. The Benchers resolved to create a Task Force to develop models for the separation of the Law Society's adjudicative and investigative functions based on Option 1 in the Independence Committee Report, and to make recommendations on which model to adopt.

A Task Force was appointed, comprising Ken Walker as Chair, together with David Crossin, Q.C., Haydn Acheson and Ralston Alexander, Q.C. Jeff Hoskins Q.C. (Tribunals and Legislative Counsel) and Deborah Armour (Chief Legal Officer) also participated in meetings. Staff support was provided by Michael Lucas and Colette Souvage.

The Option Examined by the Task Force

The Benchers, in their resolution in December 2009, directed the Task Force to examine Option 1 from Independence Committee Report, and to develop models based on that option for consideration by the Benchers. In Option 1, the Benchers would remain in control of the investigative process, and a separate body would be created for the adjudicative function.[1]

The Task Force therefore based its discussions on an examination of models where the investigative function of the Law Society would remain much as it is now. Decisions

[1] The Independence Committee Report described three options. Option 2 contemplated the Benchers remaining in control of the adjudicative function with an outside body being responsible for investigations and prosecutions. In Option 3, the Benchers would have retained overall responsibility for both the investigative and adjudicative functions, but a more solid division of functions within the ranks of the Benchers would be established.

about whether to authorize the issuance of a citation would continue to be made by the Discipline Committee, and Law Society counsel would continue to "prosecute" such matters essentially on the instructions of that Committee. Models were considered that would change the structure of hearing panels, so that such panels would no longer necessarily be made up of benchers, and might therefore be viewed as being more independent of the investigation of complaints undertaken by the Law Society.

The Task Force examined models from the legal profession elsewhere in Canada and in some of the other common law jurisdictions, including Australia, England and Wales, and New Zealand. It also examined models from other self-regulated professions in British Columbia, including the models recently implemented through the *Health Professions Reform Act*. What became very clear is that there is no uniform model of structuring discipline to separate it from the rule-making or investigative functions of a self-regulating body. It was also clear, however, that many of the self-regulating bodies are thinking about, or have already implemented models to effect, the separation of investigations from adjudications.

The Current Model

When proposing new models for consideration, it is useful to review what the current situation is.

The *Legal Profession Act* is permissive on the issue of hearing panels. Section 41 provides:

> **41** (1) The benchers may make rules providing for any of the following:
>
> (a) the appointment and composition of panels;
>
> (b) the practice and procedure for proceedings before panels.

The *Act* does not limit the benchers' powers in this regard.

The Rules passed by the benchers pursuant to section 41 are set out in Rule 5-2. For the purpose of this Report, the important Rules are Rules 5-2(3) and (4):

> (3) A panel must be chaired by a Bencher who is a lawyer.
>
> (4) All Benchers, all Life Benchers and all lawyers are eligible to be appointed to a panel.

The Rules therefore allow all benchers (elected and appointed), all life benchers (elected and appointed), *and all lawyers* to be appointed to a hearing panel. Panels are appointed by the President although, in practice, the panels are chosen by the Hearing Administrator, and then approved by the President.

Current bencher policy, pursuant to a benchers' resolution dated October 3, 1997, limits who can be appointed to hearing panels to benchers, life benchers and former lawyer

benchers (including attorneys general), providing (in the case of lawyers) they are still practising members. Even with those limitations, 96 individuals are currently eligible for appointment, although 10 must be subtracted from Discipline Hearings as they sit on the Discipline Committee, and 8 must be subtracted from Credentials Hearings as they sit on the Credentials Committee. It is, however, less common that a life or former lawyer bencher is appointed to a panel, and the only non-lawyers eligible are appointed benchers, or appointed life benchers, of which there are only 5.

Legal Considerations

First of all, the Task Force has noted that the Court of Appeal in *McOuat v. Law Society of British Columbia* 2001 BCCA 104 provides some judicial support for the current overlap of investigative and adjudicative processes, at least in the context of credentials hearings. It is reasonable to extend the Court's reasoning to discipline hearings as well. Furthermore, as a result of the Supreme Court of Canada's decision in *Brosseau v. Securities Commission (Alberta)* [1989] 1 S.C.R. 301, no reasonable apprehension of bias will be presumed if legislation authorizes a certain degree of overlapping functions. As the *Legal Profession Act* gives the benchers the power to set rules providing for the appointment of panels, it is likely that the legislation has contemplated that the resulting rules will permit the benchers to appoint themselves to panels and thus the overlapping functions of rule-making (authorized by the *Act*), investigative functions (also authorized by the *Act*) and adjudicative function should be permissible.

Despite apparent judicial authority for the current model, the Task Force recognizes that, while there appears to be little public concern with the current overlap of functions, public confidence in the process is important, and that a lack of public confidence in Law Society investigative or adjudicative processes could cause the government to consider legislative changes as has happened with the Health Professions.

At the same time, however, in order to be an effective self-regulator the Law Society must have the confidence of those who it regulates. The reasons of the Manitoba Court of Appeal in *Re Law Society of Manitoba and Savino* (1983) 1 D.L.R. (4th) 285 (approved by the Supreme Court of Canada in *Pearlman v. Manitoba Law Society Judicial Committee* (1991) 84 D.L.R. (4th) 105) are important when considering the proper balance of regulation:

> Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct. Professional misconduct is a wide and general term. It is conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well respected brethren in the group -- persons of integrity and good reputation amongst the membership.
>
> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.
>
> *(emphasis in original)*

The Task Force discussed the fact that lawyers elect benchers largely due to the confidence that lawyers have that those they elect are senior members of the Bar, skilled in practice, and are persons of integrity and good reputation – individuals who lawyers can be confident that, as adjudicators on disciplinary matters, they will impose the appropriate sanctions for misconduct in order to protect the reputation of the profession in the eyes of the public. Any model that would separate the function of investigation from that of adjudication should keep in mind the words of the Court in *Savino*.

Purpose of Proposing a New Model

The Independence Committee Report speaks to the need to ensure public confidence in Law Society processes. One method of doing so is to create a model through which those who adjudicate hearings are more formally separated from those who decide whether there should be a hearing. Another method is to create a model that will utilize the non-lawyer appointed benchers in hearings, as is being done, to ensure that a voice from outside the profession is heard. Other reasons for considering new models include finding the best way to utilize Law Society resources, including finding a method that best ensures that panels are composed of individuals who are skilled and trained to conduct hearings, as well as knowledgeable in the subject matter of the hearing itself. The Task Force has kept these purposes in mind when considering models.

Current Use of Appointed Benchers and Non-Benchers on Panels

As is currently permitted, life or former benchers are appointed to panels from time to time, and appointed benchers are also urged to sit on panels. During the four year period between 2006 and 2009, 103 panels were appointed. Of that number, 21 panels had an appointed bencher, and 30 had at least one life or former bencher.

Models Considered

The Task Force focused its review of models on those that have been developed, or are being developed, in the legal profession in Canada. While models from other countries and professions were considered, the Task Force determined that examining what was being done in the legal profession in Canada was best. Models from other Commonwealth jurisdictions have raised concerns with the benchers about whether lawyer independence is compromised. The Task Force believes that those models are inconsistent with the rationale of lawyer self-regulation explained in *Savino*.

The models of most interest to the Task Force were from the Atlantic provinces and Ontario.

The Atlantic provinces have all adopted models that more clearly formalize the distinction between investigations and adjudication. For example, Nova Scotia and New Brunswick each have a separate "hearing committee" from which panels are appointed. In Nova Scotia, legislation requires that the hearing committee must be non-benchers, while there is no such legislative prohibition in New Brunswick, although in practice benchers are not appointed to it. Panel appointments are made by the Chair of the committee (in Nova Scotia) and by the Registrar of Complaints (in New Brunswick).

Ontario developed a model, on the recommendation of a Task Force on Tribunals Composition in 2007, that requires non-lawyer members to be appointed to each panel. The Hearing Committee, from which appointments to panels are made, comprises all 81 Benchers (subject to disqualifying conflicts). Each panel must have a non-lawyer member. Because there are only 8 non-lawyer benchers in Ontario, changes to the Law Society Act in 2007 permitted the appointment of 4 additional non-lawyer non-benchers to the Hearing Committee to ensure a large enough pool of non-lawyers. The Law Society of Upper Canada identifies who these non-lawyers should be, but they must be approved by the Attorney General. The Law Society also appoints four non-bencher lawyers to the Hearing Committee. They are chosen to improve expertise in adjudication. In the result, the Hearing Committee is not a separate entity from the Law Society, and in fact the chances of a panel being comprised of three benchers is relatively high. There is however a more formal separation at the stage of deciding who will be appointed to a panel. This decision is made by the "Tribunals Office", a department within the Law Society but whose staff and functions are independent of all other functions at the Society.

Discussion of Possible Models

The Task Force reviewed three aspects in its consideration of models through which a separation of functions could be developed.

First of all, one has to decide what degree of separation ought to be implemented. Should there be a complete separation, where all the adjudicators on panels come from outside the Law Society? Or should it be a partial separation where some percentage of each panel (a majority or minority) comes from outside the organization? Should the "adjudicator body" be formalized as a body separate from the Law Society with its own Chair, or can it be simply a group of people the Law Society has determined ought to be adjudicators?

Second, one needs to determine how the adjudicators are to be chosen. How is the group of people that will make up hearing panels to be appointed? What criteria ought to be necessary? Should they be benchers, former benchers, life benchers or others, and if others, what qualifications would be needed? The appointments themselves could be by the benchers, or they could be made by various "stakeholder groups" within the legal profession (such as the Law Society, Canadian Bar Association, the Courts, the Attorney General, etc.) They could even be elected in separate elections (although the Task Force wondered how this would be accomplished for non-lawyers should there be a decision to ensure participation by non-lawyer adjudicators). There could be an outside body created to make or recommend appointments, along the model of the judicial councils.

The third item that needs to be determined is how the adjudicators are actually appointed to the hearing panels. Should they continue to be appointed by a Law Society official (currently they are appointed by the President) or should the Chair of the adjudicator group (assuming one has been appointed) be given that responsibility? Or should an independent office within the Law Society be created along the model of the Law Society of Upper Canada?

After some thought, three models were reviewed.

Model 1

This model would create a formalized "Hearing Committee" and members to it would be appointed by an appointments committee comprised of the major stakeholders in the legal profession based on criteria established by that group. Members of the Hearing Committee would elect a Chair, and the Chair would make appointments to hearing panels as necessary. Policies or rules could require that a non-lawyer adjudicator be appointed to each panel.

Model 2

A formalized "Hearing Committee" would be created and members to it would be appointed by the benchers, comprising members identified from for example, the following categories:

- benchers
- former (including life) benchers and eligible (qualified) non-bencher lawyers based on criteria to be determined
- former (including life) appointed benchers and eligible (qualified) non-lawyer non-benchers based on criteria to be determined.

Appointments to hearing panels would be made from this group, either by a Chair elected by the group (the most formalized separation model) or by a Law Society official such as the President (through which there would be a less formalized separation of functions). Ideally, the panel would be made up of one member from each category.

Model 3

The benchers would establish criteria for prospective adjudicators, particularly non-lawyer adjudicators, and then identify appropriate members from, for example, the categories set out in Model 2

This model would create an informal "hearings pool" from which it would be resolved that appointments to panels could be made, probably by the President, although the LSUC model of an independent Tribunals Office could also be implemented. Again, ideally, the panel would be made up of one member from each category.

The Task Force agreed that if one wanted to demonstrate the maximum degree of independence between investigations and adjudications, Model 1 should be recommended. However, the Task Force also agreed that while such a model may be one that the Law Society might eventually need to move to in the future, it represented a significant departure from the current process. Evidence suggests the current model

works relatively well, utilizing both benchers elected by lawyers for the very reason that they are senior, skilled lawyers of high ethical and professional standards who will act, as adjudicators, to protect the public interest and the profession's reputation with the public, and appointed benchers who bring a visible public face to the adjudicative process. The current model accords with the rationale for self-governance described in cases such as *Pearlman* and *Savino*. Leaping from the current model toward a model that effectively sets up a separate regulatory adjudicative Committee is, in the Task Force's opinion, too great a leap, one that is not recommended at this time given a lack of any particular identifiable public concern with the current model.

The Task Force next considered whether a recommendation should be made to move *toward* a model of greater separation, through which other identifiable goals might be realized in the meantime. Would it make sense to develop a process that would increase the number of qualified adjudicators, including non-lawyers, available to sit on hearing panels? The Independence Committee Report identified the efficient use of resources as a possible benefit that might arise from some separation of investigative and adjudicative functions. With longer hearings becoming more frequent, together with a proclivity for more specialized subject matters, strains are placed on the current benchers. Moreover, if "transparency" (which the Task Force interprets to mean including views from outside the profession on the issue of lawyer regulation) of processes is desirable, it could be advantageous to create a model that would ensure that a non-lawyer adjudicator is part of the hearing panel wherever it is appropriate to do so. However, as there are only at most 4 appointed benchers available for hearings (as two sit on the Discipline Committee and are conflicted from sitting on citation hearings and up to two sit on the Credentials Committee and are conflicted from sitting on admission hearings), one would need to identify more non-lawyers qualified to sit on panels. Life appointed-benchers are available to sit on panels, and as time progresses, more of those individuals should exist.

Models 2 and 3 might be categorized as steps toward Model 1, with Model 2 being a little farther along the line because it would formalize the "hearing body" and that model could permit it to take responsibility for hearing panel composition. Model 3 would be the easiest first step toward separating the adjudicative function from the rest of the Law Society's processes, as it would simply require a rule change authorizing the appointment of non-lawyers other than life or life-appointed benchers.

Reviews of Panel Decisions

"Reviews" of a decision by a hearing panel are referred to the benchers for a review on the record. Therefore, even if a decision is made to create a model that separates the adjudicative process even notionally from other Law Society processes, any reviews of a decision are statutorily required to return to the benchers, thereby defeating the effect of any separation that has been created between the adjudicative and the investigative process at the hearing panel stage.

A statutory requirement would be necessary to alter the current requirement for reviews, and the Task Force notes that the Benchers are currently considering whether to seek an amendment through which reviews would be heard by "review boards" rather than by the

benchers. The proposed amendment would authorize the benchers to make rules concerning the appointment of the review board. In this manner, the benchers can continue the current process of having reviews heard by the benchers, if they so desire, by making rules that would appoint the benchers to the review board. The amendment would also allow for more future latitude in the composition of review boards, including the appointment of other lawyers or even non-lawyers, should that course ever be desired as being in the public interest. The Task Force makes no recommendation in this regard.

Recommendation

1. Individuals Qualified to Sit on Panels

The Task Force recommends that a model based on Model 3 above be created at this time.

To accomplish this outcome, the Task Force recommends the following:

1. The Benchers resolve to create a pool of individuals who can be appointed to hearing panels.

2. The Task Force recommends that this pool include

- sitting benchers (the "bencher pool")
- life and former lawyer benchers and other lawyers, subject to meeting criteria to be established by the Benchers (the "lawyer pool"); and
- life and former appointed benchers, as well as non-lawyer non-benchers also subject to meeting criteria to be established by the Benchers (the "public pool"). [2]

There are several methods through which non-lawyer non-benchers could be identified for inclusion in the public pool, and if the Task Force recommendation is approved, the benchers will need to consider this issue. For example:

- Benchers themselves could recommend individuals from their region of the province, although appointments through this method might be criticized as being associated too much with the organization.
- Advertisements could be published for non-lawyers to sit on hearing panels and candidates could be chosen on the basis of the criteria established.[3]

[2] The Task Force does not propose to make any recommendations about what the criteria should be for lawyers or for non-lawyers.

[3] This is a model recently introduced in Manitoba. The weakness of the Manitoba model, in the view of the Task Force, is that the candidates are chosen *by the Law Society* from those who applied. If advertisements are to be considered, some more formalized method of choosing candidates may have to be created.

- The Law Society could identify adjudicators from some of the other self-regulatory colleges or professions in the province, and invite them to be included in the hearing pool if they otherwise meet the criteria established by the Benchers.[4]

The Task Force notes that the Law Society takes a "hands-off" approach to the issue of who the government should appoint as appointed benchers, and strongly believes that a similar "hands-off" approach should be taken to the appointment of non-bencher non-lawyers to the public pool. For that reason, the Task Force is attracted to a model by which other professional regulatory bodies would be approached to identify an adjudicator to be included in the public pool. Such adjudicators are already chosen, often by government, and the Law Society would not therefore have to identify or assess such individuals itself. The Task Force has not assessed whether this model is feasible, however, but does believe it is especially worth considering.

2. Appointments to Hearing Panels

The Task Force reviewed both the initial Discussion Paper and the Independence Committee Report and noted that the efficient use of resources and the ability to increase the public involvement in the adjudication process were central to the discussion.

After discussion, the Task Force concluded that the model proposed above creates a pool that can be filled with individuals that permit expertise, experience and public input to be appointed to panels. Benchers are elected in part because they are senior members of the Bar, skilled in practice, and are persons of integrity and good reputation and who will impose the appropriate sanctions for misconduct in order to protect the reputation of the profession in the eyes of the public. Other lawyers can be identified for skills that can be identified through the criteria for appointments created by the Law Society. Non-lawyers can also be identified for skills identified through the criteria established, and also for the additional public face that can be brought, through them, to panels.

The Task Force therefore recommends that when panels are appointed, one member is chosen from the bencher pool, one from the lawyer pool, and one from the public pool. There may be exceptional reasons to stray from this formula (such as where a delay to the appointment of a panel would exist due to difficulties in finding an available member within one of the pools), and the Task Force therefore does not recommend that this appointment method be formalized at this time For the time being, the Task Force recommends that appointments from the available "pool" to a particular panel be made formally by the President.

3. Effect of Recommendations

The Task Force has concluded that the recommendations made through the model proposed above will meet the objectives of the resolution passed by the Benchers in December 2009. In order to accomplish this end, the Rule 5-4 will need to be amended

[4] The Law Society of Upper Canada has used this approach to identify the non-lawyer, non-benchers that legislation allows to be appointed to hearing panels in Ontario.

to permit former (but not yet life) appointed benchers and non-lawyers to be eligible to be appointed to panels. Consideration will need to be given about whether to make the processes for how panels are comprised to be part of the rules or simply a policy.

While the proposed model admittedly does not *fully* separate the adjudicative process from the rest of the Law Society's functions, it *functionally* separates them because benchers will no longer form the entirety of the panel hearing a case the citation for which has been authorized by the Chair of the Discipline Committee on the recommendation of that Committee. The majority of the panel will *not* be part of the Law Society. Two out of the three panel members will not be existing regulators. One of the members of the panel will be a member of the public. The continuance of a bencher member is a recognition of the value that is brought by having a senior member of the profession skilled in practice and ethics on the panel, in recognition of the decision in *Pearlman* and *Savino.* At the same time, the experience and expertise of other lawyers will be available to the panel, and the public interest will at all times be more clearly recognized by ensuring a non-lawyer participant sits on the panel.

The Task Force recognizes that a process that requires the President to make the formal appointments to particular hearing panels further compromises the separation of the adjudicative function from that of investigations. However, if the President's involvement is merely administrative, and the actual appointment is made through some other process (perhaps a roster system, such as that established in *McOuat* , or some other process to be created), the compromise becomes of less concern.

There may be costs associated arising from the recommendation of the Task Force. It may, for example, be necessary to compensate non-bencher members of panels for their work as adjudicators, and that has not been factored in to the recommendation.[5] The Task Force believes that cost should not be a consideration as to whether the proposed recommendation should be accepted, and that a policy decision should be made by the benchers on the merit of the proposal. Costs would be better considered when deciding whether to implement the recommendation.

Measuring the Effectiveness of the Recommendation

The recommendation, if implemented, should be allowed to operate for at least a three year period. The Task Force expects that, while the panels would be more autonomous from the Law Society, there would still be some capacity for operational requirements to be placed on panels. In particular, the current directive that decisions be rendered within 60 days should continue.

After a three year period, the Law Society should review the subject to determine whether the process works effectively from a regulatory, as well as from a public interest, point of view. For example, the Law Society should determine at least the following:

- whether decisions are released and

[5] The Law Society of Upper Canada pays its non bencher members of hearing panels $500.00 per day of hearing.

- whether panels can be comprised

at least as quickly, on average, as they are at present.

Next Steps

If the Benchers resolve to approve the recommendation of the Task Force, the Task Force recommends that the matter be sent to the Act and Rules Subcommittee for consideration concerning what necessary rule changes are required.

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Memo

The Law Society of British Columbia

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To Benchers

From Jeffrey G. Hoskins, QC for the Act and Rules Subcommittee

Date June 28, 2010

Subject **Proposed amendments to *Legal Profession Act, Part II***

At the meeting in Parksville in June, the Benchers considered several proposed amendments to the *Legal Profession Act* and the recommendation of the Act and Rules Subcommittee that they be pursued with the provincial government for enactment at the earliest opportunity.

These are the provisions that the Benchers have thus far resolved to request the government to amend:

section 1 — Definitions, definition of "practice of law"

section 14.1 (proposed) — Paralegals

section 15 — Authority to practise law

section 23 — Annual fees and practising certificate

section 24 — Fees and assessments

section 26 — Complaints from the public (mediation)

section 38(5) — Discipline hearings (maximum fines)

section 38(5) — Discipline hearings (suspension pending compliance)

section 39 — Suspension

section 40 — Medical examination

section 47 — Review on the record (review of cost orders)

In addition, at the Benchers retreat the previous day, the Benchers had resolved to request that the government amend section 60 of the *Evidence Act* in order that articled students would be authorized to act as commissioners for taking affidavits in British Columbia. As an aside, that section allows the Attorney General to designate a class of persons to act as commissioners without further amendment to the *Evidence Act*. The President has

written to the Deputy Attorney General requesting that that power be used in favour of articled students in the interim, before the Act is amended as requested.

The Act and Rules Subcommittee has met subsequently and has decided to recommend to the Benchers that the following provisions be the subject of further requests for amendment:

section 3 — Public interest paramount

section 12 — Rules requiring membership approval

section 13 — Implementing resolutions of general meeting

section 18.1 (proposed) — Regulation of law firms

section 26 — Complaints from the public (powers to aid investigations)

section 31 — Special compensation fund

section 36 — Discipline rules

section 38 — Discipline hearings

section 38.1 (proposed) — Resignation of membership

section 43 — Right to counsel

section 44 — Witnesses

section 47 — Review on the record (review board)

section 48 — Appeal

section 87 — Certain matters privileged

section 88 — Non-disclosure of privileged and confidential information

section 89 — Confidential documents

As I did for the June meeting, I attach a brief document for each of the proposed changes describing the amendment and the reasons for it.

Attachments: 16 documents re sections of *Legal Profession Act*

JGH

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LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 3 – PUBLIC INTEREST PARAMOUNT

Remove the express statement that "to uphold and protect the interests of its members" is an object and duty of the Law Society

Promote regulation of the legal profession to a primary object and duty of the Law Society

NATURE OF CHANGE PROPOSED

Eliminate the two-tiered nature of the Law Society's statutory mandate by eliminating the express object of furthering the interests of lawyer and making the regulation of the legal profession a full partner with the primary objects.

WHY CHANGE IS NEEDED

Section 3 sets out the objects and duties of the Law Society. There has been much discussion over the last years about the primary and secondary mandate of the Law Society. The primary mandate of the Society is to protect the public interest. Subject to that primary mandate, the Law Society is to regulate the practice of law and uphold and protect the interest of its members.

Insofar as the Law Society is making significant efforts to distinguish itself as the body responsible for looking after the public interest and regulation of the profession, leaving to the Canadian Bar Association the responsibility for representing the interest of members in the profession, it might make some sense to move the duty to regulate the practice of law into the primary mandate of the Society, and to remove altogether the requirement to uphold and protect the interest of members. This may permit the Law Society to more clearly distinguish its public interest duties from any suggestion of it being a "member interest" body. The statutes of other Canadian law societies, with the exception of New Brunswick, do not have the "dual purpose" mandate in the legislation.

Removing the mandate to uphold and protect the interest of the members would not necessarily mean that the Law Society could never act in the interest of its members. Currently, it can only do so if the interests of its members coincide with the public interest, and there is no reason to suggest that would change by removing that provision from the Act.

That would provide the opportunity to make the regulation of the practice of law, which is now relegated to secondary status in the section, to full partnership as a primary object along with preserving rights, ensuring independence and integrity and establishing standards.

This is what a revised section 3 might look like, with the member interest removed and the regulation objective elevated to a primary position and expanded to include "the provision of legal services" as well as "the practice of law".

Public interest paramount

3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and applicants for call and admission, and

(d) regulating the practice of law.

The Benchers considered the sensitivity of this particular proposed amendment and referred the issue to the Independence and Self-Governance Advisory Committee for its opinion. This is the report that was addressed to the Act and Rules Subcommittee as a result:

> The Committee concluded that amendments to s. 3 should be pursued, in order to ensure that the Law Society is able to identify itself as a public interest regulatory body rather than a member interest body. While there is a recognition that, where the two interests are consistent, the Law Society should continue to have an ability to act in the member's interest, the majority of the Committee was concerned that leaving the section as it is currently worded was problematic because it created an opportunity for opponents to the current self regulatory model to argue that the Law Society is not sufficiently detached from a member interest function.
>
> The Committee believes that the provision in s. 3(b)(i) (the "regulation of the practice of law" provision) should be included within the primary mandate of the Law Society under s. 3(a).

The Committee also concluded that s. 3(b)(ii) should be removed. There was some discussion about whether removing s. 3(b)(ii) would detract from the Law Society's ability to create programs that were in the interest of members such as the maternity benefit loan program, and the practice advice function. The Committee thought that such concerns could be addressed by including, in s. 3(a)(iii) by adding the words "and programs" between the words "standards" and "for". The Committee also urges consideration be given to including the word "competence" in s. 3(a)(ii).

There were, however, some questions raised about whether subsection (b) should be completely eradicated. It was postulated that a requirement that the Law Society provide assistance to members was not inconsistent with requirements to uphold and protect the public interest in the administration of justice, as long as the assistance provided by the Law Society was toward that end. Subparagraph (b)(ii) currently permits the Law Society to uphold and protect members' interests subject to the public interest. Perhaps, some on the Committee proposed, subparagraph (b)(ii) should be reworded to permit the Law Society to support members toward achieving the objects of subparagraph (a).

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This change would allow the Law Society to focus entirely on the regulation of lawyers and the protection of the public interest. The Law Society would also be seen to do so, thereby increasing public confidence in the Law Society, lawyers and the justice system as a whole.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This originates in the concern for the independence and self-governance of the legal profession, since the legal profession in jurisdictions outside Canada has had its independence jeopardized and even removed apparently as a result of combining the regulatory and advocacy functions. While that is not the case in British Columbia, some Benchers have been of the view that the amendment would help dispel any appearance of an advocacy role on behalf of lawyers that the public or government may discern.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 12 – RULES REQUIRING MEMBERSHIP APPROVAL

General meeting to have authority to approve certain rule changes

NATURE OF CHANGE PROPOSED

Approval of rule changes in certain areas enumerated in section 12, to be sought through a general meeting of members, including an Annual General Meeting, as an alternative to the requirement to hold a referendum.

WHY CHANGE IS NEEDED

Under section 12 of the *Legal Profession Act*, the Benchers were initially required to enact certain Rules that were consistent with the previous statute and they may not amend those rules without a referendum vote of all the members approving the change by a two-thirds majority.

The Rules in question are generally to do with the governance of the Law Society and involve some degree of real or perceived self-interest on the part of the Benchers:

- the offices of president, first vice-president or second vice-president;
- the term of office of benchers;
- the removal of the president, first vice-president, second vice-president or a bencher;
- the electoral districts for the election of benchers;
- the eligibility to be elected and to serve as a bencher;
- the filling of vacancies among elected benchers;
- the general meetings of the society, including the annual general meeting;
- the appointment, duties and powers of the auditor of the society;
- life benchers;
- the practising fee;
- the qualifications to act as auditor of the society when an audit is required under this Act.

The fact that a referendum is required to change some rules tends to inhibit the Benchers and staff from pursuing changes that might otherwise benefit the organization. For example, the change that saved a general meeting from termination when one “remote”

location is affected by technological failure was several years in the making. A province-wide referendum is expensive in money and in staff and Bencher time, even when the proposed change is noncontroversial and of little consequence.

It is proposed that the alternative of taking proposed changes to a general meeting, presumably usually the annual general meeting. The Benchers would have to decide which issues were appropriate for which forum.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The amended provisions would mean less expenditure of resources is necessary to obtain approval of changes to improve the efficiency of the Law Society. Since a general meeting is held at least once a year in any case, the cost of obtaining membership approval should not inhibit moving forward with changes. The Law Society could then focus its resources more on regulation rather than referenda

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

The change from either referendum or general meeting being required to amend these rules to only a referendum was made on the spur of the moment in the course of the AGM in about 1993. The Benchers of the day felt that they had to abide by that commitment, but the cost of several referenda and the delay in achieving changes after they are identified as desirable has been significant. New Benchers and staff coming into the organization have noted that the provision is very unusual.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 13 – IMPLEMENTING RESOLUTIONS OF GENERAL MEETINGS

Five per cent of members required to requisition referendum

NATURE OF CHANGE PROPOSED

Increase the number of lawyers necessary to require a referendum on implementation of a general meeting resolution from 100 lawyers to 5 per cent of lawyers. Increase the elapse of time before a requisitioned referendum can be required from six months after the general meeting to 12 months in which the Benchers have not implemented the resolution.

WHY CHANGE IS NEEDED

Section 13 as it is currently worded permits a very small number of lawyers (100) to require the Law Society to hold a province-wide referendum to force the Benchers to implement a resolution previously adopted by a general meeting. By contrast, the Law Society Rule on special general meetings requires the signatures of 5 per cent of the members in good standing, or currently about 600, to require the Law Society to hold a special general meeting. That was increased in 2003 from 150, following a convincing vote (73.2%) in favour of the change in a province-wide referendum.

Currently, a petition to requisition a referendum can take effect after the Benchers have not acted on the resolution for six months. The Act and Rules Subcommittee was of the view that, for many matters, six months is not enough time to allow the Benchers, particularly if a significant change to the Law Society budget is required. The Subcommittee recommends changing that provision to allow a full year before a referendum can be requisitioned.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The changes will better ensure that the resources spent on a referendum about a general meeting resolution will only be necessary when a significant percentage of lawyers call for the referendum. They will also allow the Law Society to better focus its resources on the regulation of the profession and the protection of the public.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

The need for more flexibility has become evident in recent years as the Law Society has tried to implement resolutions that cannot easily be done in a short period.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 18.1 (PROPOSED) – REGULATION OF LAW FIRMS

Benchers to be able to make rules that apply to law firms and non-lawyers with ownership interest in a firm

NATURE OF CHANGE PROPOSED

Add a specific section empowering the Benchers to make rules to regulate the conduct of law firms and non-lawyers who have an interest in law firms, such as a Multi-Disciplinary Practice (MDP). This will require a definition of "law firm" in section 1 similar to that in the Law Society Rules. In addition several sections, mostly dealing with financial responsibility and trust accounting, should be amended to apply expressly to law firms as well as individual lawyers.

WHY CHANGE IS NEEDED

Under the current legislation, the only way for the Law Society to regulate law firms is indirectly through the individual lawyers who make up the firm. However, as the organization of law practices becomes more complex and varied, and particularly with the advent of MDPs, this will become more problematic.

As a result, the present rules are unnecessarily complex and difficult to understand because the Law Society has to regulate legitimate firm activity, such as trust accounting, by means of regulating the individual lawyers in the firm.

The Law Society of Alberta regulates firms when it comes to handling client money, while the Nova Scotia Barristers' Society has legislation that is more comprehensive, including provisions for discipline of law firms leading to the imposition of a substantial fine or other consequences. How the Benchers are inclined to proceed if the amendment is made can be determined at the time that Rules are adopted.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The proposed amendments would allow the Law Society to deal more effectively with non-lawyer partners and with trust accounting, advertising and other law firm activities. They will simplify the regulation of law practices by reducing steps necessary to regulate activities through lawyers to simple requirements for the law firm itself.

CONSEQUENTIAL AMENDMENTS

Section 1 — Definition of "law firm"

Section 32 — Financial responsibility

Section 33 — Trust accounts

Section 34 — Unclaimed trust money

Section 62 — Interest on trust accounts

Section 63 — Security and investment of trust accounts

Section 64 — Definitions

HISTORY OF PROPOSED AMENDMENT

The Act and Rules Subcommittee has discussed this proposal several times over the past two or three years, particularly in association with the difficulty of drafting rules to enforce obligations on firms in connection with client identification and verification and, more recently, MDPs.

RECOMMENDATION

The Subcommittee recommends seeking amendments to the *Legal Profession Act* that will make it easier to ensure compliance of law firms with rules intended to protect their clients and the public.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 26 – COMPLAINTS FROM THE PUBLIC

Law Society investigator to have power to enter premises, require production of documents, summon and examine witnesses under oath

NATURE OF CHANGE PROPOSED

Add an express authority for the Law Society to compel a lawyer under investigation or others to provide documents or information in connection with the investigation. Clarify the Law Society's power to compel evidence from a third party.

WHY CHANGE IS NEEDED

The discipline and professional conduct staff are concerned that investigators acting on behalf of the Law Society of British Columbia do not have powers to investigate in a lawyer's office, to require production of documents and to question law firm staff such as exists in Ontario. This is section 49.3(2) of the *Law Society Act* (Ontario), which has been in effect since 2006:

> **Powers**
>
> (2) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section has a reasonable suspicion that a licensee being investigated under subsection (1) may have engaged in professional misconduct or conduct unbecoming a licensee, the person conducting the investigation may,
>
> (a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;
>
> (b) require the production of and examine any documents that relate to the matters under investigation, including client files; and
>
> (c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation.

Staff are also concerned that investigators ought to have clearer power to compel evidence from third parties, particularly in the investigation stage, rather than to subpoena to a hearing. This provision gives that authority to investigators under the BC *Securities Act*:

Investigator's power to compel evidence

144 (1) An investigator appointed under section 142 or 147 has the same power

(a) to summon and enforce the attendance of witnesses,

(b) to compel witnesses to give evidence on oath or in any other manner, and

(c) to compel witnesses to produce records and things and classes of records and things

as the Supreme Court has for the trial of civil actions.

(2)The failure or refusal of a witness

(a) to attend,

(b) to take an oath,

(c) to answer questions, or

(d) to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

It would be consistent with the scheme of the *Legal Profession Act* to give the Benchers the power to make rules giving investigators powers similar to those of the Ontario investigators under the provision reproduced above. That would not be necessary or appropriate with respect to powers similar those under the BC *Securities Act*. I would expect the *Legal Profession Act* provision to confer the powers directly, as that Act does.

Since the focus of both provisions is on powers to be used during the investigation phase, rather than after the decision to cite and order a hearing, I suggest locating the provision under section 26, Complaints from the public.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This change would enable the Law Society to be proactive in investigating complaints so that it can fulfill its mandate to protect the public effectively and efficiently.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This is a recent request of those charged with enforcement and investigation partly in response to recent concerns of Benchers and others to ensure that the investigation of complaints is efficient and timely.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 31 – SPECIAL COMPENSATION FUND

Providing compensation through insurance

NATURE OF CHANGE PROPOSED

Replace most of the current very detailed requirement for the maintenance and operation of a particular kind of compensation fund with a more general provision that would require the Law Society to continue to maintain a process through which victims of lawyer misappropriation could be compensated, but allow the Benchers to determine the details.

The Act and Rules Subcommittee also recommends a provision that would transfer any funds remaining in the Special Compensation Fund for compensation to victims of lawyer misappropriation to the new program to be applied for that purpose.

WHY CHANGE IS NEEDED

Section 31 currently requires the Benchers to continue the Special Compensation Fund and sets some fairly specific requirements for the administration of the fund and payment of compensation from the fund. In 2004, the Benchers decided to address the issue of compensating victims of lawyer defalcation and misappropriation through an insurance model rather than through the special compensation fund. Despite section 31, rules have had to be created to require victims to first exhaust their remedies through the insurance program, as well as placing other limitations on access to the Special Compensation Fund.

Since the Benchers have concluded that the insurance program is the most effective way to protect the public interest by ensuring the victims of a lawyer's defalcation are properly compensated, an amendment to s. 31 is required to bring the legislation in line with what the Law Society is actually doing in this regard. It is proposed to seek an amendment to s. 31 to provide the Benchers with a broad discretion to implement a model for compensation as a result of a lawyer theft, defalcation or misappropriation as it deems appropriate. This would allow the Benchers the latitude of designing a scheme for compensation that would, for example, include an insurance based model.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The insurance program provides faster and more certain recoveries than the discretionary SCF and ensures through insurance regulation of the Law Society's captive insurance company that funds are available to cover expected losses.

CONSEQUENTIAL AMENDMENTS

Section 23(1)(b) — Annual fees and practising certificate

HISTORY OF PROPOSED AMENDMENT

This proposal is the natural consequence of the Benchers having decided to change the program for compensation of victims of lawyer misappropriation in 2004. The Special Compensation Fund has continued to be necessary for the intervening six years in order to complete the investigation and determination of claims made regarding misappropriations before May 1, 2004, in particular the many Wirick-related claims.

RECOMMENDATION

The Act and Rules Subcommittee recommends an amendment that would eliminate the requirement to maintain the Special Compensation Fund and allows the Benchers the flexibility to determine the scheme under which victims of lawyer defalcation can be compensated, including the flexibility to change the program in the future if necessary.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 36 – DISCIPLINE RULES

Summary disbarment or suspension on conviction of an indictable offence

NATURE OF CHANGE PROPOSED

Amend the section to allow for rules permitting summary suspension or disbarment of a lawyer convicted on indictment, or the equivalent in a foreign jurisdiction

WHY CHANGE IS NEEDED

Section 36(h) authorizes the Benchers to make rules for the summary suspension or disbarment of "a lawyer convicted of an offence that may only be prosecuted on indictment." The rules enacted under that provision (Rules 4-40 to 4-42) provide some degree of due process for a respondent who has been so convicted.

The problem with this provision is that it does not apply to a number of very serious offences where the Crown is permitted to proceed by summary conviction, the so-called "hybrid offences". The 1988 *Legal Profession Act* extended the effect of this provision to all indictable offences, including "mixed" or "hybrid" offences, which give the Crown the option to proceed summarily. It was amended in 1992 at the request of the Benchers, but at the July 2009 Benchers meeting, the question was referred to the Act and Rules Subcommittee to consider whether a further amendment was in order.

The Act and Rules Subcommittee considered this issue and decided to recommend an amendment that would allow the Benchers to summarily disbar a lawyer who was convicted of an indictable offence if the Crown proceeded on indictment, even if the summary conviction option had been open under the *Criminal Code* or other statute. The principle being that, if the Crown viewed the offence as sufficiently serious to proceed on indictment, the Law Society would likely be justified in taking the step of dealing with the lawyer summarily.

A related issue has arisen in the past when a BC lawyer has been convicted in the United States of a "felony", which is roughly equivalent of an indictable offence in Canada. Since the language of section 36 refers only to "indictable offences", it is not possible to summarily disbar a lawyer convicted of a serious offence in another jurisdiction. The Subcommittee also recommends that the amended section 36(h) apply to equivalent offences outside of Canada.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This amendment would allow the Benchers to act against a lawyer convicted of an offence serious enough for the Crown to proceed on indictment, even if there was an option to proceed on summary conviction; in other words, if the Crown treats something as a serious offence, the LSBC can do so also. Also allow the Benchers to act when a lawyer is convicted of a serious offence in a foreign jurisdiction

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

The limitation of the current provision was a problem recently when a lawyer was tried and convicted of a serious sexual offence that could have been prosecuted by summary conviction, but the Crown proceeded on indictment resulting in a well-publicized Supreme Court trial

RECOMMENDATION

The Act and Rules Subcommittee recommends that an amendment as described form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 36 – DISCIPLINE RULES

Mirror-imaging rules

NATURE OF CHANGE PROPOSED

Add a power to make rules for the protection of privacy when the Law Society copies electronic records in an investigation.

WHY CHANGE IS NEEDED

The report of the working group on mirror-imaging has been accepted by the Benchers. Among the recommendations adopted was one that would create a dispute resolution scheme involving reference of privacy issues to a retired or former judge. There is no current express provision allowing special steps to be taken to protect private information when a hard-drive is copied for forensic purposes. Although the Benchers could likely adopt such a program under their general authority for regulation and discipline of the legal profession, it would be helpful to have specific authority in the Act.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This amendment would help ensure that a Law Society investigation is not held up or frustrated by claims to privacy over records stored together with law practice records.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This proposal arises out of the report of the Working Group on Mirror-Imaging.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38 – DISCIPLINE HEARINGS

Publication of decisions identifying respondents

NATURE OF CHANGE PROPOSED

Include in section 38 a requirement for publication of the results of discipline hearings, including the name of a lawyer found guilty of a discipline infraction, subject only to serious harm to a third party.

WHY CHANGE IS NEEDED

The discussion at the Benchers meeting in July 2009 included recognition that the *Health Professions Act* and other legislation governing professions in British Columbia had imposed a higher threshold for anonymous publication of discipline decisions than the Law Society Rules had established in 2003. The Act and Rules Subcommittee indicated that it would reserve its judgment as to whether a legislative amendment was required until after the Benchers had considered Rule changes that were then in development. In December 2009, the Benchers adopted changes that make the standard comparable to that in Health Professions Act.

In the view of the Subcommittee, it is in keeping with the general scheme of the *Legal Profession Act*, which is that most regulatory decisions are assigned to the Benchers to establish through the Law Society Rules, and with the actual and apparent independence of the profession to leave the decision to publish with or without identification to the Rules and not amend the Act.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment **not** form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38(4) – DISCIPLINE HEARINGS

Panels not to have undefined third option between guilty and not guilty

NATURE OF CHANGE PROPOSED

Limit panels to findings of guilty or not guilty of professional misconduct or other discipline infractions by repealing s. 38(4)(c), "make any other disposition of the citation that it considers proper".

WHY CHANGE IS NEEDED

Section 38(4) sets out what a panel must do after a hearing. Subsections (4)(a) and (b) set out the standard findings that a panel can make. Subsection (4)(c) provides a "basket" provision, allowing a panel to make "any other disposition of the citation that it considers proper."

What such a disposition might be, however, is not clear. After the evidence has been heard, a decision to dismiss or make one of the findings available under subsection (4)(b) would be the usual result. If the evidence established that the citation should not be dismissed, it is difficult to envision some finding other than a finding available under subsection (4)(b). If it does not, then (4)(a) would be equally compelling. If a hearing panel considers that the evidence made out an discipline infraction that was not alleged in the citation, it is not open to the panel to make that finding. *Sheddy v. Law Society of BC*, 2007 BCCA 96.

As might be expected, a finding under subsection 4(c) is rarely made, and resort to it in the past has proved problematic. In one instance, a panel decided not to dismiss the citation, but instead to reconstitute the proceedings after the hearing had finished as a conduct review and to appoint itself as a conduct review subcommittee. Such a finding is problematic as it affects (at the very least) the transparency of the outcome of a process that was initially public until the order was made changing the process to a conduct review. Moreover, such a result usurps the powers assigned to the Discipline Committee to determine what to do with a complaint.

If one considers that a panel's function at a hearing is to make a finding, on the evidence, about whether the facts alleged have been proved or not and, if they have, to impose the appropriate sanction, there does not seem to be an appropriate function for section 38(4)(c). It is sensible for the panel to have the power to make a "disposition it considers

proper" *after* an adverse finding against a respondent had been made if for some reason none of the other dispositions available to it under section 38(5) was appropriate. Such a power is, in fact, found in section 38(7).

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The amendment would make it clear that the panel's function is to determine whether the respondent is guilty of a discipline infraction, based on the allegation in the citation and the evidence heard in the hearing.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

It has been a project in the Policy Department for some time to study the purpose and possible effect of section 38(4) so that panels can be advised appropriately. The informal conclusion is that there is no proper purpose and the appropriate place for flexibility and creativity is at the penalty stage, after a determination has been made.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38(9) (PROPOSED) – DISCIPLINE HEARINGS

An order of a Law Society tribunal to pay money can be filed in the Supreme Court and executed as a court order

NATURE OF CHANGE PROPOSED

Add a subsection to section 39 that would allow the Law Society (or presumably another party) to file the order of a Law Society tribunal for a fine or for costs in the Supreme Court to be enforced as a judgment of the Court. This is similar to the process set out in section 76(3) for the enforcement of a registrar's certificate resulting from the assessment of a lawyer's bill.

WHY CHANGE IS NEEDED

Currently, the Law Society must sue to collect fines and awards of costs, which makes it easier for some disciplined lawyers and especially former lawyers to escape punishment.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This amendment would enable the Law Society to enforce orders more efficiently, and provide a more effective deterrence to other lawyers regarding disciplinary infractions.

RELATED AMENDMENTS

s. 27 Practice standards

s. 46 Costs

HISTORY OF PROPOSED AMENDMENT

This is a recent request of those charged with monitoring and enforcing orders of Law Society tribunals.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38.1 – RESIGNATION OF MEMBERSHIP

Permission required to resign without hearing

NATURE OF CHANGE PROPOSED

Add a new provision requiring a lawyer who is the subject of citation, investigation or a practice review to obtain the permission of the Benchers in order to resign membership in the LSBC.

WHY CHANGE IS NEEDED

Currently, any lawyer may resign membership in the Law Society as of right and without conditions. When there is a citation outstanding, an investigation in progress or a practice review ordered by the Practice Standards Committee, the lawyer concerned can resign his or her Law Society membership in an attempt to frustrate the Law Society process. This makes it difficult to proceed with an investigation or practice review and makes a discipline hearing moot to the extent that it is difficult to enforce a monetary penalty and only symbolic to disbar or suspend the respondent.

Some other professional bodies have provisions in their legislation that require the agreement of the regulator before a registrant is permitted to resign from membership, particularly when the member is facing disciplinary proceedings or an investigation that could lead to disciplinary proceedings. This allows the regulator to impose conditions and require other concessions to protect the public interest without having to rely on the undertaking of the soon-to-be former member.

As an example, here is the provision from the Alberta *Legal Profession Act*, which has been in effect for several years:

> **Resignation instead of continued proceedings**
>
> **61** (1) Subject to the rules, a member whose conduct is the subject of proceedings under this Division may at any time during the proceedings apply to the Benchers for their approval of the member's resignation as a member instead of having the proceedings continue.
>
> (2) The Benchers may hold a hearing of an application under this section if they consider that a hearing is warranted in the circumstances.
>
> (3) The Benchers may reject the application or, if they accept it,

(a) may make their acceptance of the application subject to any conditions the Benchers consider appropriate in the circumstances, and

(b) shall give directions as to the information to be entered in the roll in relation to the member's resignation.

(4) If a person resigns as a member pursuant to this section, then, subject to any conditions prescribed by the Benchers pursuant to subsection (3)(a), proceedings under this Division shall be discontinued in respect of the conduct that was the subject of the proceedings and to which the resignation relates.

(5) The Benchers may delegate any of their authority under this section to a committee of the Benchers.

This is a provision from the BC *Notaries Act* that applies more broadly and is stated more simply:

Resignation must be approved by the directors

12 (1) A member may not resign from membership in the society without the consent of the directors.

(2) The directors may attach conditions to the granting of their consent to a resignation.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

This new provision would enable the Law Society to ensure that lawyers do not resign to escape responsibility for their actions or frustrate an investigation. The Law Society will be able to impose conditions to ensure that the public interest is protected.

CONSEQUENTIAL AMENDMENTS

Section 1 — Definition of "disciplinary proceeding"

HISTORY OF PROPOSED AMENDMENT

This is a recent request of those charged with enforcement and investigation partly in response to recent concerns of Benchers and others to ensure that the investigation of complaints is efficient and timely.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 43 – RIGHT TO COUNSEL

Right to counsel in all Law Society proceedings

NATURE OF CHANGE PROPOSED

Add to the current provision that the Law Society and a respondent or applicant may be represented by counsel in a proceeding under Part 5, which includes a review on the record.

WHY CHANGE IS NEEDED

Section 43(2) outlines when the Society may employ or retain legal advice in connection with investigations and hearings. The meaning of the phrase "or on the issue of a citation" is, however, unclear when read with the fact that the Society can retain counsel in connection with the investigation out of which the citation would issue, or at the hearing that would result from the issuance of the citation. That phrase should therefore be deleted.

Further, while "hearing" might include a "review," the two words are not used interchangeably in the Act and it would perhaps be prudent to clarify (both in s 43(1) and (2)) the issue by adding in the word "review."

Right to counsel

43(1) An applicant or respondent may appear at any hearing or review with counsel.

(2) The society may employ or retain legal or other assistance in conducting an investigation under Part 2, 3 or 4 and may be represented by counsel with respect to any hearing or review.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

Ensures that full procedural rights are provided to respondents and applicants and provides more transparency as to the nature of Law Society proceedings.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This appears to be a housekeeping matter to correct an oversight in the original statute.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 44 – WITNESSES

Law Society tribunals to have express powers under the Legal Profession Act

NATURE OF CHANGE PROPOSED

Put the powers of Law Society tribunals, now given by reference to the Administrative Tribunals Act, into the Legal Profession Act in language appropriate to the Law Society context.

WHY CHANGE IS NEEDED

The current section 44 was enacted in 2007 when the *Inquiry Act* was replaced by the *Public Inquiry Act*. We were offered the choice (or at least consulted on the choice) between reference to tribunal powers in the new Act or in the *Administrative Tribunals Act*. For reasons that I don't recall, the latter was chosen. Discipline staff are now concerned that the provisions are hard to understand. They are less accessible than they might be if located in the *Legal Profession Act* itself. I suggest re-locating the provisions from the *Administrative Tribunals Act* to the *Legal Profession Act* and using language that is more in keeping with the *Legal Profession Act* and the Law Society.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The proposed amendments would provide better accessibility and transparency of powers of Benchers and panels to conduct hearings and compel documentary and oral evidence.

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This is a recent request from discipline staff.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 47 – REVIEW ON THE RECORD

Reviews of hearing panel decisions to be conducted before a "review board" established in the rules

NATURE OF CHANGE PROPOSED

Change the body that reviews hearing panel decisions from the Benchers to a review board.

WHY CHANGE IS NEEDED

Under the current section 47, "reviews" of a decision of a hearing panel are referred to the Benchers for a review on the record. While there is no immediate plan to change this, the Separation of Functions Task Force has been examining options that would more clearly separate the adjudicative and investigative functions of the Benchers. This includes appointing to hearing panels more non-lawyers and more lawyers who are not currently Benchers. To maximize the options open to the Law Society in the future, it would be advisable to remove the statutory requirement that reviews be heard by the Benchers.

It is therefore suggested that the statute be amended to provide that reviews are heard by a "review board" and that the Benchers be authorized to make rules concerning its appointment. In this manner, the Benchers can continue the current process of having reviews heard by the Benchers, if they so desire, by making rules that would allow the appointment of only Benchers to the review board, or perhaps only Benchers not currently members of the Discipline Committee. The amendment would also allow for more future latitude in the composition of review boards, including the appointment of other lawyers or even non-lawyers, should that course ever be desired as being in the public interest.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

Allows review of hearing panel decisions by a body called the review board, which is potentially more independent of the Benchers and the Bencher committee that ordered the hearing.

CONSEQUENTIAL AMENDMENTS

section 6 — Meetings

section 9 — Committees

section 42 — Failure to attend

section 43 — Right to counsel

section 48 — Appeal

HISTORY OF PROPOSED AMENDMENT

This proposal developed as a result of the Separation Task Force. It appeared that the work of that group to make a more apparent division between the hearing panels and those who ordered the hearing could go for naught if the decision of the more independent panel could be reversed by the Benchers.

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 48 – APPEAL

Right to appeal a hearing panel decision to the Court of Appeal by Discipline or Credentials Committee

NATURE OF CHANGE PROPOSED

Allow the Discipline Committee and the Credentials Committee to appeal decisions of panels or review board to Court of Appeal

WHY CHANGE IS NEEDED

Currently, the regulatory committees are able to refer a panel decision for a review by the Benchers. Only the applicant or respondent to a citation have a right of appeal to the court. Either party should be able to get a judicial ruling on important questions

Under the recent amendments to the *Health Professions Act*, each of the colleges has a statutory right of appeal to the Supreme Court from a decision of the Discipline Committee of the college, which is the equivalent of Law Society hearing panels.

Under the *Legal Profession Act*, either the respondent or the Discipline Committee, or the applicant or the Credentials Committee, can initiate a Bencher review of a hearing panel decision, but only the respondent or applicant can appeal a decision of either a hearing panel or a Bencher review to the Court of Appeal. That could have an uneven effect on the jurisprudence of lawyer discipline. It also suggests that there is no external appeal by the Discipline Committee or Credentials Committee because the Committee and the tribunal are essentially the same entity, an impression that ought to be dispelled.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

Allows the Court to make a final ruling on regulatory issues, not just when that is in the interest of individuals affected but also when it is in the interests of the public. Makes for a more complete and balanced jurisprudence.

CONSEQUENTIAL AMENDMENTS

None

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendment form part of the Law Society request for legislation in 2011.

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 87 – CERTAIN MATTERS PRIVILEGED
SECTION 88 – NON-DISCLOSURE OF PRIVILEGED AND CONFIDENTIAL INFORMATION
SECTION 89 – CONFIDENTIAL DOCUMENTS

Clarification of provisions dealing with privileged and confidential information

NATURE OF CHANGE PROPOSED

Clarify and reduce current language, which is difficult to understand and may not be adequate to protect the integrity of Law Society investigations

WHY CHANGE IS NEEDED

The Benchers accepted a suggestion that it might be useful to consider seeking amendments to sections 87 and 88 to set out in a clearer manner the various confidentiality requirements that are placed on Law Society reports, as well as the responsibilities of the Law Society in connection with information obtained during the course of the discharge of its mandate.

In particular, section 87 should be amended to

- make it clear that it applies to proceedings under Part 5 of the Act;
- specify that a person who is in possession of confidential information acquired as an employee or agent of the Law Society continues to be non-compellable as a witness, and in fact incompetent to testify, without the consent of the Executive Director even if no longer in the employ of the Law Society.

The current sections cover the requirements, but they could be written in clearer fashion, and should be revised in light of the decision in *Skogstad* v. *Law Society of BC*, 2007 BCCA 310, to make it clear to lawyers that the Law Society can demand and receive privileged information without the lawyer breaching the duty of confidentiality and privilege and without jeopardizing the privilege of the lawyer's client.

Section 89 is based on a provision from the *Criminal Code* that was declared unconstitutional in 2002 and, again in light of the *Skogstad* decision may itself need substantial revision or repeal.

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

The proposed amendments would provide better protection of the client's right to privilege over information provided to his or her lawyer and greater clarity around what may be disclosed in the course of Law Society investigations without impugning that right. They would also better protect the integrity of LSBC investigations by ensuring that sensitive information and material does not end up being put in evidence in a proceeding outside the Law Society. Finally, it would provide expressly that the evidence necessary for an effective investigation must be produced

CONSEQUENTIAL AMENDMENTS

None

RECOMMENDATION

The Act and Rules Subcommittee recommends that the amendments form part of the Law Society request for legislation in 2011.

The Law Society of British Columbia

2011 Budgets and Fees

Presentation to:
Benchers
July 9, 2010

2011 Overview

The Law Society of British Columbia 9001

- The Finance Committee reviewed and considered budgets for General Fund, Special Compensation Fund and the Lawyers Insurance Fund at two meetings in May and June
- Executive Committee reviewed the overall fee proposal at its June meeting
- Overall mandatory fee increase of 6.1%
- Law Society portion of General Fund Fee increased by $82, which mainly relates to resolution to fund Forensic Accounting with the practice fee starting January 2010
- Pro Bono funding and Federation contribution are unchanged from 2010
- CanLII contribution increased from $30.74 to $32.25
- CLBC increased from $166 to $180
- Special Compensation Fund assessment reduced by $45 to $5
- Lawyers Insurance Fund assessment increases to $1,750
- Trust Administration Fee remains at $10

2011 Fee Recommendations

The Law Society of British Columbia

9002

	2011	2010	Difference	%
General Fund Fee - before Forensic	$ 1,320.04	$ 1,320.04		
Forensic Accounting – net change	$ 79.00	$ 0.00		
General Fund Fee – Total	$ 1,399.04	$ 1,320.04	$ 79	6.0%
Federation of Law Societies	$ 20.00	$ 20.00	$ -	
CanLII	$ 32.25	$ 30.74	$ 2	
Pro Bono Contribution	$ 14.35	$ 13.22	$ 1	
Law Society Fee	$ 1,465.64	$ 1,384.00	$ 82	5.9%
CLBC Fee	$ 180.00	$ 166.00	$ 14	
LAP Fee	$ 56.00	$ 56.00	$ -	
Advocate Subscription	$ 27.50	$ 27.50	$ -	
Total Practice Fee	$ 1,729.14	$ 1,633.50	$ 96	5.9%
Special Fund Assessment	$ 5.00	$ 50.00	$ (45)	
Total Practice Fee and Special Fund	$ 1,734.14	$ 1,683.50	$ 51	3.0%
Insurance Assessment	$ 1,750.00	$ 1,600.00	$ 150	
Total Mandatory Fee (excluding taxes)	$ 3,484.14	$ 3,283.50	$ 201	6.1%

2011 General Fund Highlights

The Law Society of British Columbia

9003

- Zero based budgeting process, full management participation
- Maintain current reserve and cash operating levels
- Deliver core regulatory programs and meet KPMs
- Continued support of Law Society Strategic Plan and Priorities
- Practising membership increases by 2% from 2010 projection to 10,575 members
- Fund Forensic Accounting costs with general practice fee
- General operating expenses increase of 1% (excluding forensic accounting and internal rent adjustments)
- Market-based salary adjustments consistent with executive limitation requiring market-based salaries
- Staffing increase of 2.26 FTEs, additions to CPD and Bencher support
- Continuation of HR strategic plan of professional and leadership development
- No change in current capital allocation of practice fee required to fund the capital plan
- General Fund reserve $5.4 million at December 2009, reasonable levels for cash management

The Law Society of British Columbia

9004

Core Process Review

- Recommendations expected towards end of 2010
- Funding assumptions for 2011:
- Capital
  - No additional capital funding incorporated
  - May either reprioritize current capital priorities or require additional capital funding
  - Example: Case Management System estimated between $250K to $500K
  - Example: Yearly CMS maintenance fees estimated at $50K annually
- Operating Expenses
  - No additional/reduction/reallocation in operating expenses incorporated into 2011 budget
  - Any increase in operating expenses for 2011 would be funded through use of reserve/loan
  - Any ongoing costs would be incorporated into 2012 fees
    - Examples: consulting, process design, retraining, personnel, IT resources, software maintenance

TAF Budget and Projections

The Law Society of British Columbia

9005

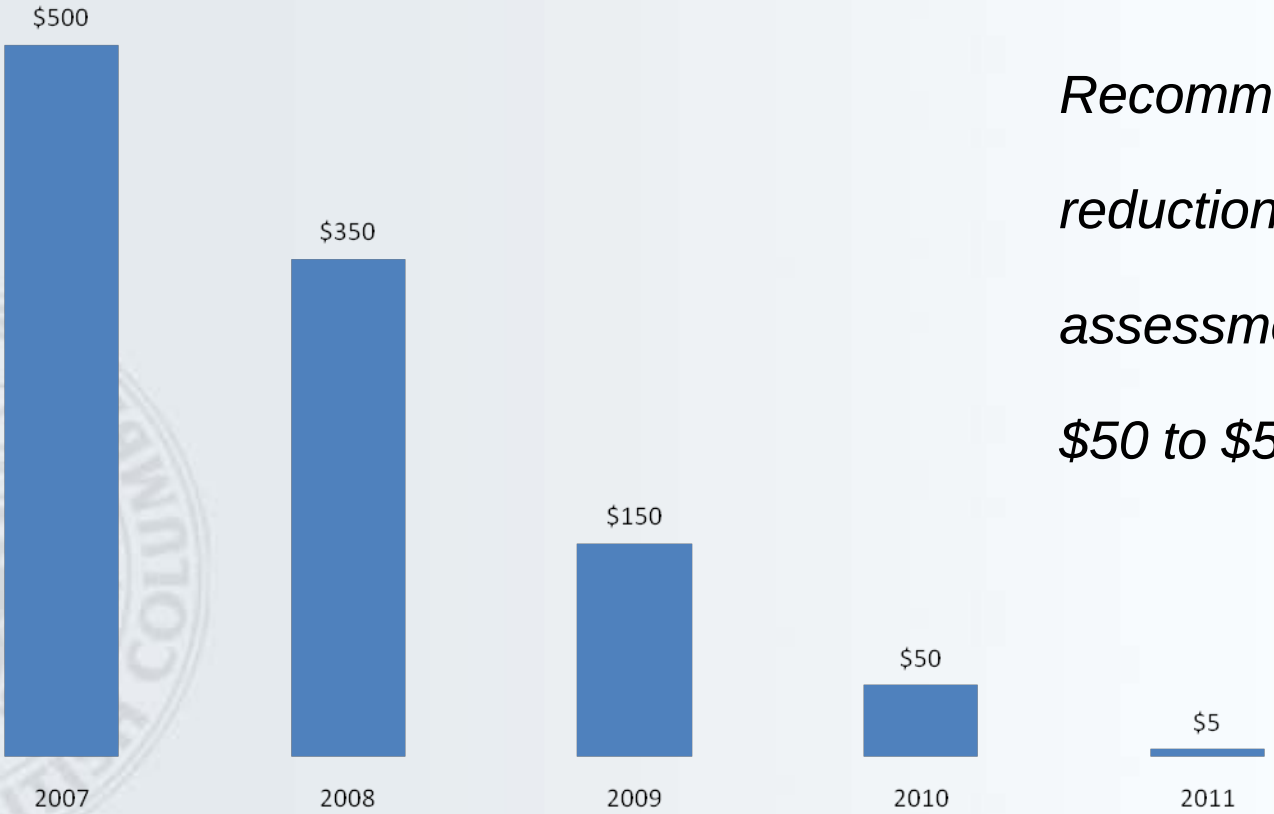
	Revenue			Trust Assurance	Net	Cumulative
	Matters	Rate	Total	Budget	Inc (Def)	TAF Reserve
2010 Budget	246,750	$ 10.00	$ 2,467,500	$ 2,371,193	$ 96,307	$ 223,117
2011 Budget	**250,000**	**$ 10.00**	**$ 2,500,000**	**$ 2,393,644**	**$ 106,356**	**$ 329,473**

- Trust assurance program fully operational and funded by $10 TAF
- Forensic accounting now funded by General Practice Fee
- TAF revenue currently $2.5 million, compared to $3.3 million in 2007
- Accumulated TAF reserve used to fund program in 2008 and 2009
- Assume current TAF transaction levels relatively stable
- No use of reserve expected in 2010 and 2011

The Law Society of British Columbia

9006

Decrease 2011 SCF Assessment



Recommend $45 reduction of SCF assessment from $50 to $5 for 2011*

* Nominal fee and reserve required by the current Legal Profession Act

2011 LIF Assumptions

The Law Society of British Columbia

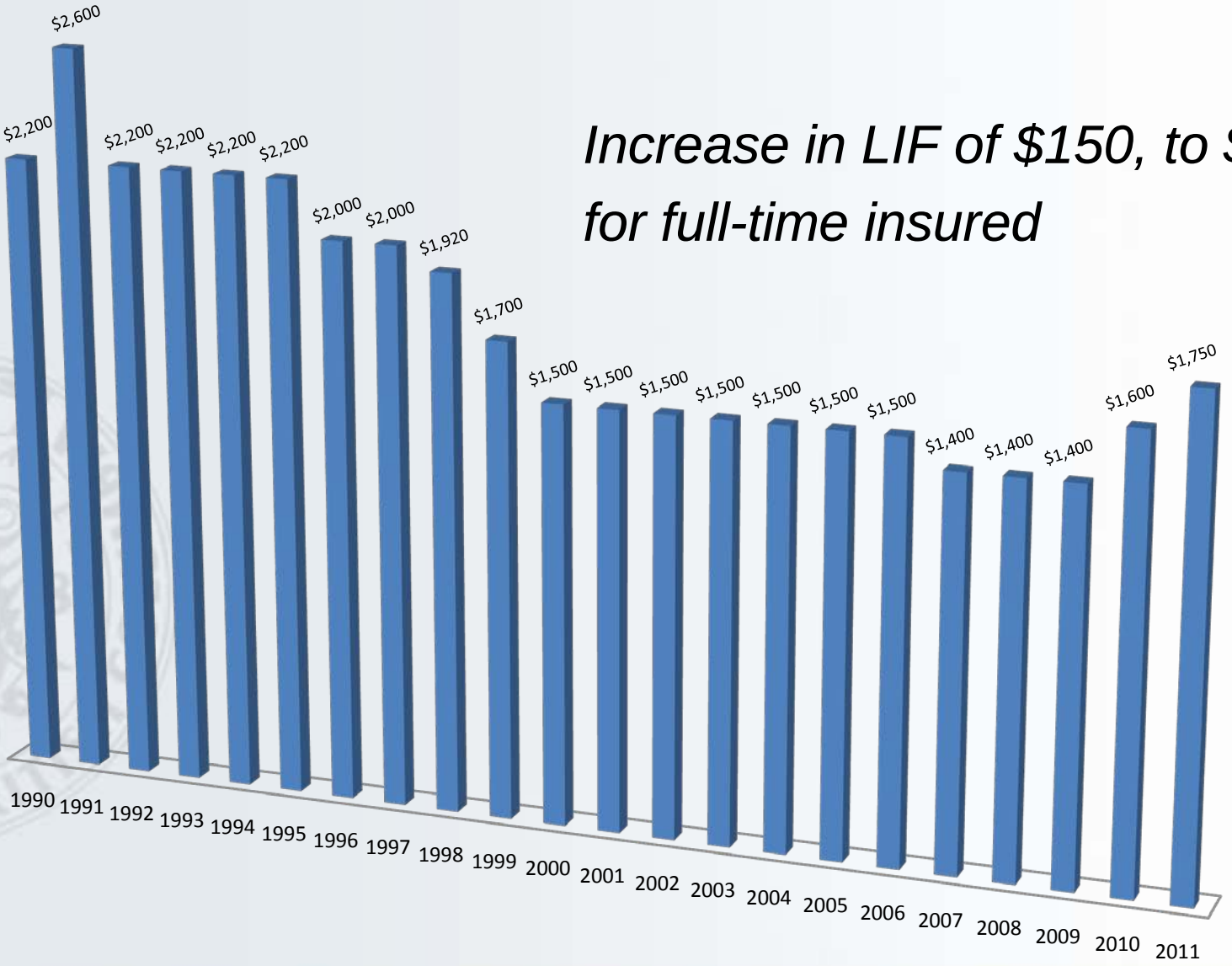
9007

- Impact of recession on claims activity in 2010 is consistent with 2009 and increased from 2008 by 13%
- During 2009, long term investment portfolio partially recovered from 2008 market downturn
- New operating expenses include market-based salary adjustments, one staff, additional extra-contractual insurance coverage, third party claims audit
- LIF reserve at December 31, 2009, $42.8 million
- Recommend LIF assessment increase $150, to $1,750

The Law Society of British Columbia

9008

2011 LIF assessment



Increase in LIF of $150, to $1,750 for full-time insured

The Law Society of British Columbia

9009

RESOLUTIONS

The Law Society of British Columbia

9010

Be it resolved that:

The Benchers recommend to the members at the 2010 Annual General Meeting a practice fee of $1,729.14 commencing January 1, 2011, consisting of the following amounts:

General Fund	$1,399.04
Federation of Law Societies	20.00
CanLII	32.25
Pro Bono Contribution	14.35
CLBC	180.00
LAP	56.00
Advocate	27.50
Practice Fee	$1,729.14

The Law Society of British Columbia

9011

Be it resolved that:

- the insurance fee for 2011 pursuant to section 30(3) of the Legal Profession Act be fixed at $1,750;
- the part-time insurance fee for 2011 pursuant to Rule 3-22(2) be fixed at $875; and
- the insurance surcharge for 2011 pursuant to Rule 3-26(2) be fixed at $1,000.

The Law Society of British Columbia

9012

Be it resolved that the Special Compensation Fund Assessment for 2011 be set at $5.00.

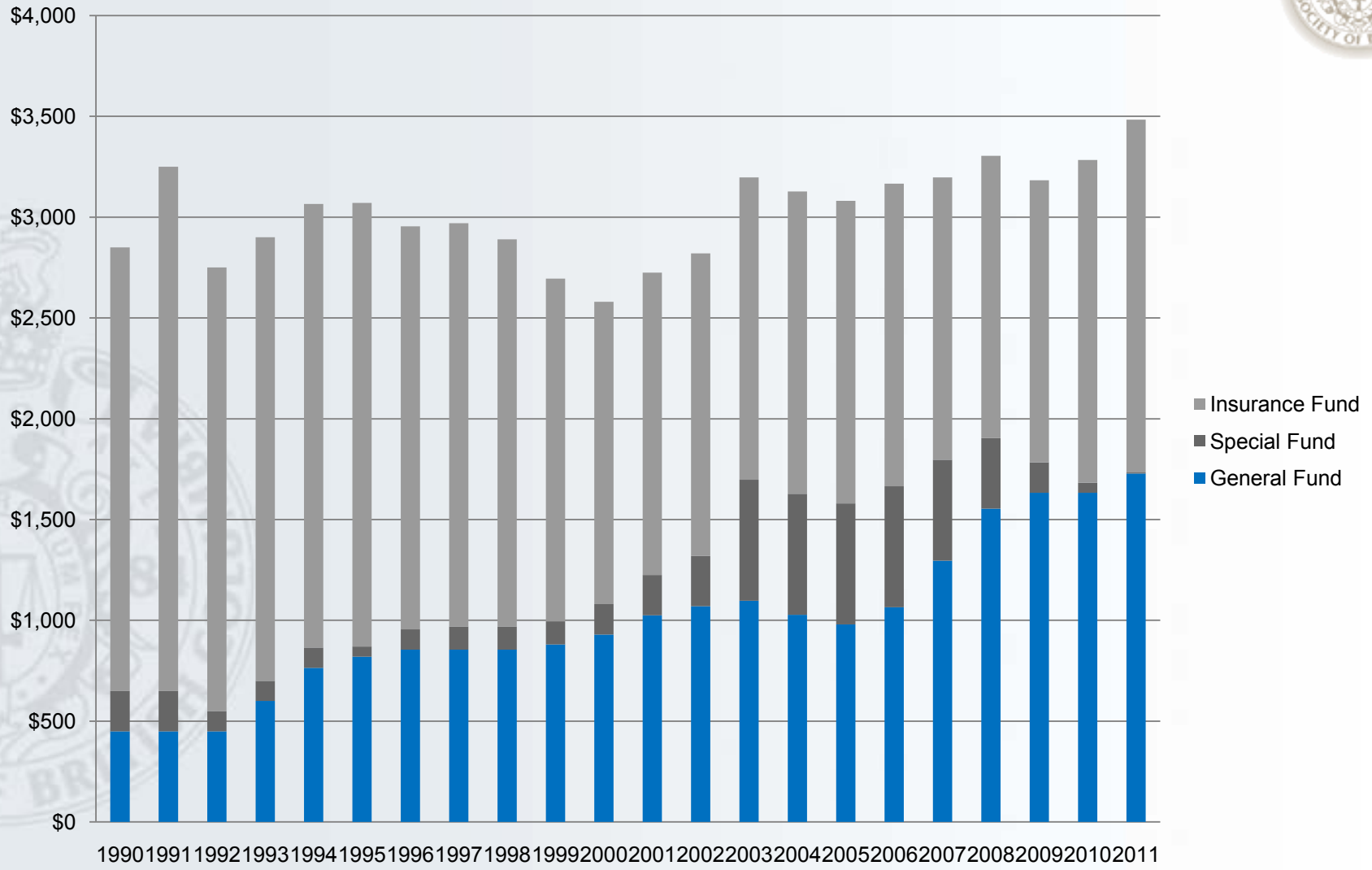
The Law Society of British Columbia

APPENDICES

Total Fee Comparison Year Over Year

The Law Society of British Columbia

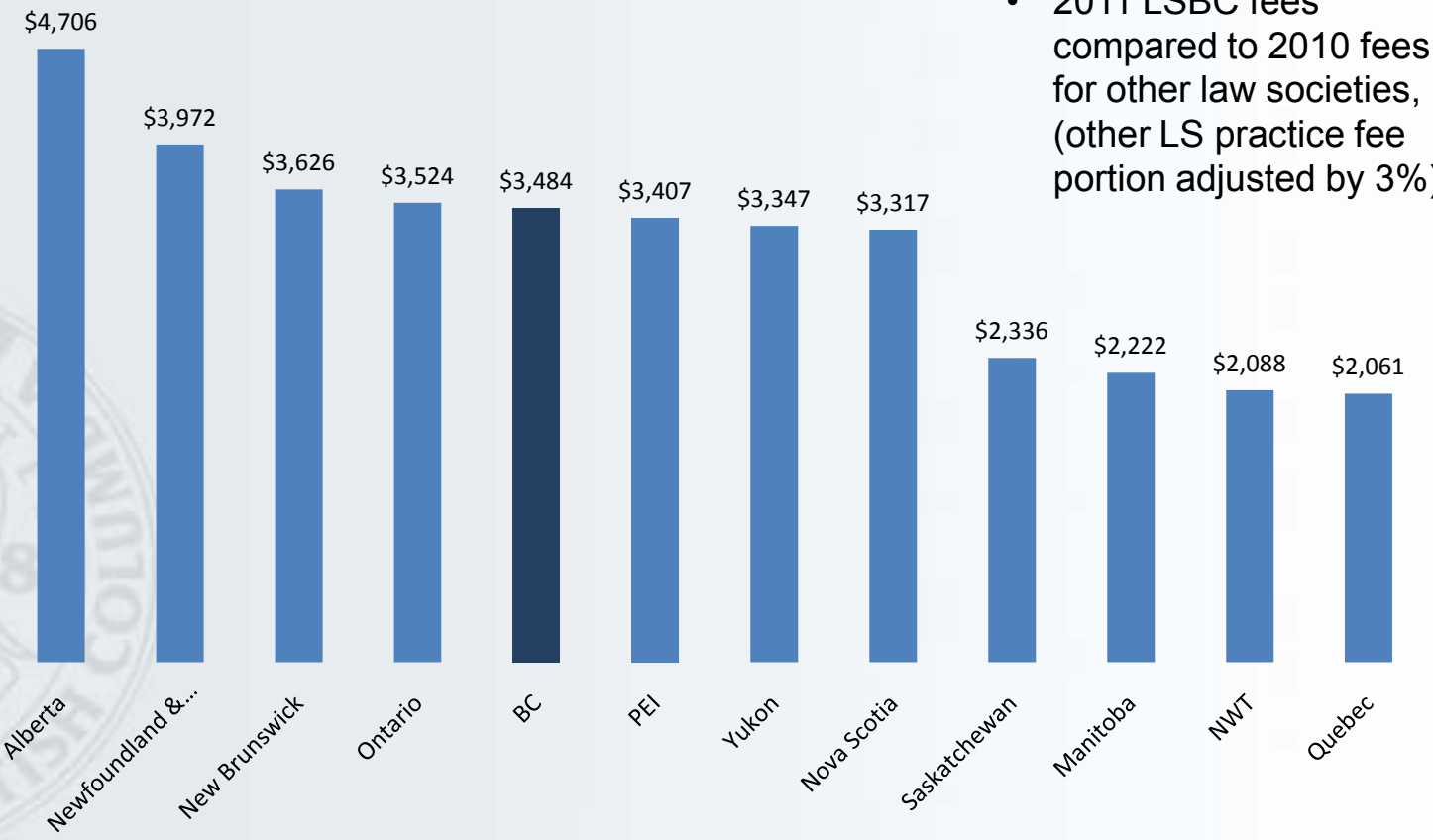
9014



Compulsory Fee Comparison (Full Time Practising Insured Lawyer)

The Law Society of British Columbia

9015



- 2011 LSBC fees compared to 2010 fees for other law societies, (other LS practice fee portion adjusted by 3%)

9016

The Law Society of British Columbia

THE LAW SOCIETY OF BRITISH COLUMBIA
DRAFT OPERATING BUDGET (excluding capital/depreciation)
For the Year ended December 31, 2011
GENERAL FUND SUMMARY

		2011 Budget	2010 Budget	2011/2010 Budget Variance	%	2011 Budget FTEs	2010 Budget FTEs	FTE Change
GENERAL FUND REVENUES								
Membership fees		14,085,938	12,876,325					
PLTC and enrolment fees		962,500	937,500					
Electronic filing revenue		596,100	507,100					
Interest income		375,000	379,000					
Other revenue		1,116,351	1,107,893					
TOTAL GENERAL FUND REVENUES		**17,135,889**	**15,807,818**	**1,328,071**	**8.4%**			
GENERAL FUND EXPENSES								
Benchers Governance		1,554,866	1,448,556			0.15	0.15	-
Communications and Information Services		1,885,982	1,807,063			18.85	17.85	1.00
Corporate Services		2,832,157	2,661,611			21.50	21.50	-
Education and Practice		3,266,832	3,132,436			32.16	30.90	1.26
Policy and Legal Services		1,665,115	1,600,064			12.10	11.10	1.00
Regulation	(1)	6,892,502	7,005,136			53.90	54.90	(1.00)
TOTAL GENERAL FUND EXPENSES		**18,097,454**	**17,654,866**	**442,588**	**2.5%**	**138.66**	**136.40**	**2.26**
GENERAL FUND NET CONTRIBUTION		**(961,565)**	**(1,847,048)**	**885,483**		**138.66**	**136.40**	**2.26**
Net Building (845 Cambie) Income	(2)	**961,565**	**604,721**	**356,844**		**3.00**	**3.00**	**-**
GENERAL FUND NET CONTRIBUTION (Inc Bldg)		**-**	**(1,242,327)**	**1,242,327**		**141.66**	**139.40**	**2.26**
Trust Assurance Program								
Trust Administration Fee Revenue		2,500,000	2,467,500	32,500	**1.3%**			
Trust Administration Department		2,393,644	2,371,193	22,451	**0.9%**			
Net Trust Assurance Program		**106,356**	**96,307**	**10,049**		**18.10**	**17.60**	**0.50**
TOTAL NET GENERAL FUND & TAP CONTRIBUTION		**106,356**	**(1,146,020)**	**1,252,376**				

Notes:

(1) Includes Forensic Accounting which was transferred from TAP after the 2010 budget was set, resulting in a deficit budget.

(2) This line represents the profit of operating the building at 845 Cambie.

The Law Society of British Columbia

9017

2011 Capital Expenditures

- 2011 capital expenditures part of a rolling 10 year capital plan which can be found in the Appendices
- No change in capital contribution from General Fund fee

Operational Maintenance and Support	Computer hardware, software and phone replacement	$340,000
	Equipment, furniture and fixtures replacement	$105,000
	9th Floor:	
	Workspace Improvements	$395,000
	Furniture and Fixtures	$180,000
845 Cambie St.	Building maintenance (Fire Alarm/835 Cambie Elevator)	$500,000
	Total	$1,520,000

The Law Society of British Columbia

9018

The Law Society of British Columbia - Lawyers Insurance Fund
Consolidated Statement of Revenue and Expense
For the Year ended December 31, 2011

	2011 Budget	2010 Budget	2011/2010 Budget Variance	%	2011 Budget FTEs	2010 Budget FTEs	FTE Change
Revenue							
Annual assessment	13,292,078	11,698,700					
Investment income	1,000,000	5,107,632					
Other income	35,000	40,000					
	14,327,078	16,846,332	(2,519,254)	-15.0%			
Insurance Expense							
Actuaries, consultants and investment brokers' fees	482,080	570,500					
Allocated office rent	148,102	116,052					
Contribution to program and administration costs of General Fund	1,525,765	1,390,235					
Legal	20,000	20,000					
Office	640,837	469,040					
Premium taxes	12,259	10,063					
Actuarial provision for claim payments	14,314,000	15,182,024					
Provision for ULAE	200,000	200,000					
Salaries, wages and benefits	2,469,634	2,286,574					
	19,812,677	20,244,488	(431,811)	-2.1%			
Loss Prevention Expense							
Contribution to co-sponsored program costs of General Fund	710,840	706,658					
Total Expense	20,523,517	20,951,146	(427,629)	-2.0%			
Net Contribution	(6,196,439)	(4,104,814)	(2,091,625)		22.05	21.25	0.80

The Law Society of British Columbia

9019

The Law Society of British Columbia - Special Compensation Fund
Statement of Revenue and Expense
For the Year ended December 31, 2011

	2011 Budget	2010 Budget	2011/2010 Budget Variance	%
Revenue				
Annual assessment	52,500	515,000		
Recoveries	250,000	-		
	302,500	515,000	(212,500)	-41.3%
Expense				
Audit	9,000	9,000		
Claim and costs	-	634,558		
Counsel and forensic audit fees	70,000	120,000		
Miscellaneous	1,000	2,250		
	80,000	765,808	(685,808)	-89.6%
Net contribution	222,500	(250,808)	473,308	
Net assets - Beginning of year	113,443	364,251		
Net assets - End of year	335,943	113,443		

Capital Costs – 10 year plan

The Law Society of British Columbia

9020

	TOTAL	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
INFORMATION TECHNOLOGY											
Computer Hardware	1,479,520	145,040	182,365	96,040	143,425	162,650	150,000	150,000	150,000	150,000	150,000
Computer Software	1,121,850	183,750	99,000	34,600	184,500	70,000	110,000	110,000	110,000	110,000	110,000
Phone System	379,750	10,500	10,500	-	6,750	2,000	270,000	20,000	20,000	20,000	20,000
OPERATIONS											
Equipment, Furniture & Fixtures	1,672,050	263,100	102,950	145,000	135,000	135,000	205,000	135,000	135,000	208,000	208,000
Subtotal	4,653,170	602,390	394,815	275,640	469,675	369,650	735,000	415,000	415,000	488,000	488,000
845 BUILDING											
Base Building/Tenant Improvements	5,010,180	501,113	465,994	721,969	818,139	512,354	146,806	582,851	260,953	500,000	500,000
Workspace Improvements	4,103,000	415,000	585,000	430,000	343,000	860,000	345,000	225,000	300,000	300,000	300,000
Subtotal	9,113,180	916,113	1,050,994	1,151,969	1,161,139	1,372,354	491,806	807,851	560,953	800,000	800,000
TOTAL CAPITAL PLAN	13,766,350	1,518,503	1,445,809	1,427,609	1,630,814	1,742,004	1,226,806	1,222,851	975,953	1,288,000	1,288,000
$500,000 building loan repayment		500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000	500,000
Capital/Loan Funding Required		2,018,503	1,945,809	1,927,609	2,130,814	2,242,004	1,726,806	1,722,851	1,475,953	1,788,000	1,788,000
Capital contribution collected from members		1,848,000	1,856,800	1,865,600	1,874,400	1,883,200	1,892,000	1,900,800	1,909,600	1,918,400	1,927,200
Cumulative loan balance *		(170,503)	(259,512)	(321,521)	(577,935)	(936,740)	(771,546)	(593,597)	(159,950)	(29,550)	109,650

*** Bencher authorized Capital Plan loan of $1 million if required, cumulative loan balance is within these limits over the 10 year period**

The Law Society of British Columbia

Report of the Access to Legal Services Advisory Committee

For: The Benchers

Date: July 9, 2010

David Mossop, QC (Chair)
Jane Milton, QC (Vice-Chair)
Patricia Bond
David Crossin, QC
Brenda Edwards
Tom Fellhauer
Suzette Narbonne
William Jackson, QC
Stanley Lanyon, QC
Dr. Carol Matusicky
Marina Pratchett, QC
Wayne Robertson, QC

Purpose of Report: **Information**

Prepared on behalf of: **Access to Legal Services Advisory Committee**

Policy and Legal Services Department
Doug Munro 604-605-5313

PURPOSE OF THE REPORT

This is the Access to Legal Service Advisory Committee's ("Committee") mid-year report. The purpose of the report is to update the Benchers on the work the Committee has been performing to date, and to outline the work the Committee intends to perform for the remainder of the year.

It is important to note that Initiative 1-2 of the Strategic Plan refers to the Committee passing along its observations regarding issues related to cost in the legal system to the Delivery of Legal Services Task Force for the Task Force's substantive analysis. Given that the Task Force performed its substantive analysis between January and May 2010, and presented its report to the Benchers in June, the timelines for this did not align as they might have had the Task Force been operational for a longer period of time. As such, the Benchers may wish to amend Initiative 1-2 by either removing it or having the Committee report back to the Benchers at a later date with its observations. At present the Committee is considering cost in the legal system through the lens of legal aid, and not in a broader fashion (e.g. lawyers fees, hearing fees, etc.). Fostering legal aid aligns with the object of Initiative 1-2 in that legal aid reduces the impact of financial barriers to accessing justice.

2010: JANUARY-JULY

The Committee met in January, March and May.

January meeting

At the January meeting the Committee revisited the methodology the Committee had followed in 2009. As the Benchers may recall, in 2009 the Committee divided its work into two broad pools: access to justice concerns for the poor, and access to justice issues affecting those of modest means and the middle-class. The Committee decided it was important to have a narrower focus, and determined that the most pressing access to justice issue in British Columbia is the state of legal aid. The Committee decided that legal aid should be the focus of its work throughout 2010. While the Committee continues to monitor access to justice issues outside of legal aid, it hopes that by concentrating on a discrete topic it can provide the Benchers with tangible policy options to consider, both in furtherance of the current Strategic Plan, but also with respect to any potential amendments to that plan. To the extent legal aid makes legal services available at a cost that would not otherwise be possible, the Committee believes it aligns with the object of Initiative 1-2 of the Strategic Plan: *Find ways to reduce the impact of financial barriers to accessing justice.*

At the January meeting the Committee considered a number of topics that were on the agenda, but were broader than legal aid. These included detained patients under the *Mental Health Review Act* ("MHRA") and civil right to counsel.

The issue of detained patients is the sort of quiet access to justice problem that does not receive much press, but is nonetheless quite troubling. Under the MHRA patients can be involuntarily detained for an indefinite period, and subject to treatment. The MHRA requires detained patients be told of their right to a hearing and the right to instruct counsel. Community Legal Assistance provides counsel work, and receives funding from the Legal Services Society. Government has not increased the funds for this LSS funded service since 2003, and the amount falls short of the growing need. This leaves many detained, mentally ill patients to fend for themselves. The Committee believes this is the sort of issue that the Law Society should speak to with respect to the adequacy of funding, and the allocation of funding. While the government may not increase the overall level of funding for legal aid, they could allocate more funds for this service that clearly affects people's freedom. These detained patients need multiple voices to champion their cause, and the Committee is concerned that simply leaving it to traditional poverty and mental health advocates might not result in the needed change. Because these are amongst the most marginalized members of society, there is a real possibility that there will not be sufficient political pressure to properly fund these advocacy services. It is also possible that there are opportunities for collaboration with other organizations to identify mental health issues at an earlier stage.

While important, the lack of counsel for detained patients is just one aspect of the intersection between mental health and access to justice. Many chronic offenders are homeless and mentally disordered, substance addicted, or a combination of all three. These individuals would benefit from legal aid assistance, but many do not receive it. They often face breach allegations, which keep them trapped in the criminal justice system in a revolving cycle of court appearances. Beyond the cost to individuals, this creates costs to the system and makes it less efficient than it might otherwise be. There exists the potential for limited legal assistance under an "exception review" but few people in these circumstances are aware of the option or functioning at a level that allows them to take advantage of the option. Consequently, they do not receive assistance that would benefit both the individual and the operational efficiencies of the system. The Committee believes there is value in a system being put in place that allows the court to identify individuals that might qualify for this exception, refer them to duty counsel, and have duty counsel contact the Legal Aid intake office to ascertain whether the individual qualifies for an exception review.

With respect to civil right to counsel, the Committee considered some initiatives from the USA on this topic, including a pilot project that is planned for California. The Committee will continue to monitor developments in that country to determine their potential applicability to the situation in British Columbia.

March meeting

At the March meeting the Committee spoke with Mark Benton, QC, Executive Director of the Legal Services Society. Mr. Benton provided an overview similar to that provided to the Benchers at their April meeting by Mr. McKimm, so it is not set out in detail here.

The key points are that legal aid funding has been under pressure due to reduction in monies collected via interest on trust accounts. The Law Foundation has maintained its funding to the Legal Services Society. The amount of funding for large criminal cases will drop. Along with the funding constraints there has been a rise in demand, particularly over the past two years. All of this has led to the decision to close all of the regional offices with the exception of Vancouver and Terrace. In addition, LawLINE has been closed and that service is no longer available. The LSS has decided to move (back) to a lawyer/agent model to deal with the challenges they face.

Lawyer participation in legal aid has been dropping over the last 12 years, from 2000 to just over 900. The amount of money lawyers are paid to perform legal aid is clearly a factor, and therefore the funding constraints affect lawyer participation. However, LSS is also taking steps to simplify its tariff from over 200 items to less than 20 in the hope it will make participation more administratively friendly for lawyers.

Similar to the observations of Mr. McKimm, Mr. Benton said the Law Society could do four things that would assist the LSS:

1. Improve communications: i.e. get the message to the public, the profession and justice system partners;
2. Develop a vision for publicly funding legal aid services;
3. Promote lawyer involvement in legal aid;
4. Develop leadership and strategies (e.g. continue with work like unbundling, delivery of legal services, etc.)

The Committee intends to explore these concepts in the second half of 2010. If the Benchers have a preferred approach the Committee would be pleased to consider it. The Committee observes that a vision for legal aid might dovetail with the concern about detained patients.

The Committee recognized that funding is a key issue, but it is unlikely government will allocate more money during this time of fiscal restraint. The Committee observes, however, that past governments cut funding to legal aid when times were prosperous. Part of what has to occur is having the public and government come to a better understanding of the value of legal aid in a civil society. In the meantime, the challenge is how best to use what exists. In addition to funding challenges, there are longitudinal challenges, such as the decreasing participation of young lawyers in legal aid. The question of how to engage junior lawyers needs to be solved, as the legal aid bar is aging.

The Committee also discussed the (as of then, "proposed") CBA commission on legal aid. The Committee is of the view that dialogue is important but it must be constructive. Thoughts should be given on how to manage matters if there is limited public involvement, as that might send a message to government that legal aid is not a public priority and such a message could make a difficult situation worse. The Commission should also get members of the public to articulate what they think the justice system should entail.

At the March meeting, and again in May, the Committee discussed the proposed economic analysis of the justice system. The Committee formed a subgroup consisting of Mr. Benton, Mr. Robertson and Mr. Munro to liaise with the Sauder School of Business regarding the feasibility and cost of such a project. Discussions are ongoing, and the Committee will report to the Benchers when they have sufficient information to form the basis of a decision as whether to proceed with the project. The Committee hopes that if the project comes to fruition it would lead to the sort of empirical evidence that is needed to effectively advocate for proper funding of the justice system, including legal aid.

May meeting

The Committee dedicated the May meeting to considering concepts that the Law Society could undertake to improve the viability of legal aid in British Columbia.

Recognizing that funding is a critical issue, the Committee considered alternate ways to fund legal aid. This approach is similar to discussions that are occurring in other jurisdictions that face this challenge. The Committee started by considering whether it was appropriate for the profession to fund a portion of legal aid, but concluded that this was not the correct approach. This discussion led the Committee to consider models of funding that might inspire the profession to participate more in legal aid, and/or contribute to its funding, while not transferring the responsibility from government to the profession or a third party. The Committee came up with the following ideas that it believes are worth pursuing.

(a) Establishing a Charitable Fund for Poverty Law and Legal Aid

The Committee believes it is worth exploring the creation of an independent, charitable fund that would provide money for poverty law services and legal aid. A charitable fund has several benefits, including favourable tax credits for those who make donations. If such a fund were created, the Law Society could then encourage lawyers to donate to the fund. As part of the concept of improving participation in legal aid, the Committee considered that the Law Society could take several steps.

First, the Law Society could amend the current Practice Declaration to track the amount of lawyer participation in legal aid and poverty law services. This would create a benchmark that could be used in future communication pieces and against which to measure progress or deterioration in the future. Second, the Law Society might try and find ways to encourage retired lawyers and judges to perform legal aid services, perhaps creating a practicing exemption for these purposes and providing insurance coverage similar to what has been done with retired lawyers who provide *pro bono* services. If this happened, the Law Society could then encourage these participants to donate their fees received to the charitable fund. This would: create a favourable tax result for the participants; increase lawyer participation; and funnel legal aid funds back into legal aid. Last, the Law Society could encourage/challenge firms to increase participation in legal

aid and/or donate to the charitable fund in lieu of participation. Some of these ideas would require consideration by the Lawyers Insurance Fund and the Act and Rules Subcommittee (for example, the retiree services would fit within the definition of the practice of law and the participants may not be practising members).

While there would be devils in the detail, the Committee believes that a charitable fund should not meet with much political resistance, would offer a service to the public, as well as provide a tax benefit to those who donate. Beyond the profession, donations could be sought from the private sector as well. At present the Law Foundation is considering the creation of a charitable fund, but issues remain unresolved as to whether the Law Foundation is the appropriate body to manage such a fund as it would require the Foundation to obtain charitable status. The Benchers may wish to liaise with the Law Foundation further on this subject.

(b) Legislative Changes

There are potential sources of funding for legal aid that could arise through amendments to various provincial and federal statutes. While the Law Society cannot control whether these amendments occur, it can advocate for them. The *Civil Forfeiture Act*, S.B.C. 2005, c. 29 was mentioned by Attorney General DeJong at his most recent meeting with the Benchers as a potential source of revenue for legal aid. The Committee believes this should be encouraged. In addition, there may be circumstances where monies are ordered in a class proceeding (or agreed to by settlement) but are not distributed to the plaintiffs,[1] and the Law Society may wish to suggest that the *Class Proceedings Act*, RSBC 1996, Chapter 50 be amended to direct that funds from a settlement or award that cannot be directed to the plaintiff be directed instead to the Law Foundation. Other potential legislative amendments could include changes to: the *Unclaimed Property Act*, SBC 1999, c. 48; to banking legislation to require the banks to work with the Law Foundations to arrive at a viable stream of funding; and to other legislation where properties and money are seized by the provincial or federal Crown.

2010: JULY-DECEMBER

Subject to any direction by the Benchers, the Committee will meet two more times in 2010 (September and November). The Committee will continue to discuss legal aid, including the concepts presented by Mr. Benton and listed above. As part of its year-end report the Committee will round out the concepts contained in this report, and recommend to the Benchers how to amend the Strategic Plan to continue to advance Strategic Goal #1: Enhancing access to legal services.

[1] This was the result in *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 where an out of court settlement led to approximately $14.6 million being made available to the Law Foundation of Ontario as a *cy pres* award.

RECOMMENDATIONS

The Committee understands that the purpose of this report is to update the Benchers on the work it is performing, and its proposed plan for the remainder of the year. As such, the Committee has not set out recommendations. However, the Benchers may feel that some of the matters identified by the Committee merit action sooner rather than later and the Benchers may wish to consider whether it is appropriate to take steps to develop these concepts.

The Law Society of British Columbia

Equity and Diversity Advisory Committee Mid-Year Report

For: Benchers

Date: June 29, 2010

Robert Brun, QC (Chair)
Barbara Levesque (Vice-Chair)
Thelma O'Grady
Catherine Sas, QC
Patrick Kelly
June Preston
Elizabeth Hunt
Lila Quastel
Jennifer Chow
Karen Whonnock

Purpose of report: **Information**

Prepared on behalf of: **The Equity and Diversity Advisory Committee**

Policy and Legal Services
Susanna Tam 604-443-5727

EQUITY AND DIVERSITY ADVISORY COMMITTEE
MID-YEAR REPORT

PURPOSE OF REPORT

This report reviews the 2010 work to date of the Equity and Diversity Advisory Committee and outlines a prioritized action plan for the remainder of the year. The report includes the Advisory Committee's responsibilities for advancing the Law Society's strategic plan, its responsibilities arising from Benchers' decisions related to former task forces, and its responsibilities related to its mandate.

The Advisory Committee met in January, March and May 2010. The Advisory Committee also held an event to support Aboriginal lawyers and students on June 16, 2010 at UBC's First Nations House of Learning.

SUPPORTING ABORIGINAL LAWYERS

The Equity and Diversity Advisory Committee began 2010 with a discussion at their January meeting regarding priorities for the year. In particular, the Advisory Committee wanted to ensure that the issues raised at the September 2009 Law Society AGM related to the participation of Aboriginal lawyers and students remained a priority of the Advisory Committee and the Benchers.

The Advisory Committee reviewed and discussed the three AGM resolutions. The first resolution asked the Law Society to include the retention of Aboriginal lawyers in the strategic plan. The Advisory Committee agreed with this resolution and recommended that the strategic plan be revised accordingly (the Benchers approved the revision in January 2010).

The second resolution asked the Law Society to strike a working group to review and update the Law Society's report from 2000, *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers*. The Advisory Committee determined that since a demographic project was already underway that would provide data regarding the representation of Aboriginal lawyers, the group itself could review the new data along with current research and recent reports, as well as the 2000 report, to develop a strategy to support Aboriginal lawyers and students. While the third resolution asked for a full-time staff lawyer, most of the Advisory Committee thought it would be more effective to make staffing recommendations to support the overall strategy developed. A staff lawyer would be a positive response to strongly consider, and one member of the Advisory Committee recommended that a full-time staff lawyer be hired immediately. However, other members believed that research and review may suggest other effective supports to consider as well.

The Advisory Committee agreed that the action plan for the year should focus on Aboriginal issues. The March meeting focused primarily on planning an outreach event

in conjunction with National Aboriginal Day (June 21), and the May meeting (a joint meeting with the CBA BC's Equality and Diversity Committee) featured a presentation by Pamela Shields, Aboriginal Programs Manager for the Legal Services Society, regarding her work in implementing their report, *Building Bridges: Improving Legal Services for Aboriginal Peoples*.

Law Society event – Inspiring stories connecting future leaders

On June 16, 2010 the Law Society delivered a highly successful event, *Inspiring stories connecting future leaders*. Law Society President Glen Ridgway, QC was pleased to welcome Chief Justice Finch, Chief Justice Bauman, Chief Judge Crabtree and Deputy Attorney General Loukidelis to the event, where over 100 lawyers, law students and other interested people attended at the First Nations Longhouse at UBC to recognize retired Provincial Court Judge Alfred Scow, the first Aboriginal person called to the bar and appointed to the bench in BC. Tina Dion, an Aboriginal lawyer and President of the Scow Institute, made a moving presentation about Judge Scow's journey and achievements. In addition to recognizing Judge Scow, the event presented the experiences of Aboriginal lawyers Grand Chief Edward John and Elizabeth Hunt, and provided a networking opportunity for participants. Duncan McCue, a trained Aboriginal lawyer and award-winning journalist, moderated the event.

The event was designed as an initial step to further the strategic objective of enhancing the retention of Aboriginal lawyers. Research has identified a number of factors that enhance lawyer retention, including the availability of role models, mentors and networks. Feedback from participants indicates that the event was successful in supporting these retention factors.

PRIORITIZING THE REMAINDER OF 2010

The June outreach event, while not identified in the current strategic plan, was an important first initiative in advancing the Law Society's strategic retention objective. Recognizing the amount of time and resources that were required for delivering that initiative, the Advisory Committee has prioritized its work for the remainder of the year and will focus on delivering further initiatives related to identifying and supporting Aboriginal lawyers and students.

Demographic data-gathering project

The Advisory Committee has long identified the need for accurate data regarding the demographics of the profession in BC. Without baseline measures and benchmarks, the Law Society is unable to measure progress regarding equity and diversity or make effective policy decisions.

The Advisory Committee believes that information regarding the participation of Aboriginal lawyers is currently the most significant data gap. In 2009, a voluntary question was added to the Annual Practice Declaration to give members the opportunity

to self-identify as Aboriginal lawyers. To date, APD responses indicate 176 Aboriginal lawyers in BC.

The Advisory Committee is currently working with a Census analyst from York University to gather and analyze available 2006 Census data related to Aboriginal lawyers in particular, women lawyers, lawyers with disabilities and visible minority lawyers. Census data regarding the aging of the profession is also being gathered.

This initiative is prioritized for 2010, as it will serve as the foundation for the strategy to support Aboriginal lawyers and students and for the business case for enhancing diversity within the profession.

Strategy to support Aboriginal lawyers and students

The Advisory Committee is currently reviewing the Law Society's 2000 report regarding discriminatory barriers, as well as more recent reports and current research related to lawyer retention, in order to develop a sustainable strategy of focused supports for Aboriginal lawyers and students. This strategy will also include resource and staffing recommendations for the Benchers. While this initiative is not identified in the strategic plan, it will be based on data and research to maximize effectiveness and advance the retention objective.

Business case for enhancing diversity and retaining Aboriginal lawyers

The Advisory Committee will use the data from the demographic data-gathering project as a snapshot of the profession on which to build a business case for enhancing diversity and retaining Aboriginal lawyers. In addition to the competitive advantages of diversity, the business case will also articulate why diversity is critical to advancing the work of the Law Society and fulfilling its public interest mandate. The business case will be prepared after sufficient data is gathered and current research related to lawyer retention is reviewed.

LOOKING AHEAD

While the Advisory Committee has prioritized initiatives related to Aboriginal lawyers for the rest of 2010, it is looking ahead to its other responsibilities, those arising from Bencher decisions related to former task forces and those arising from its mandate.

Retention of Women in Law

There is a significant amount of follow-up outstanding from the former Retention of Women in Law Task Force's recommendations. In 2010, the Advisory Committee will continue its work with the Law Society of Upper Canada and policy staff from other law societies regarding the possibility of extending the *Justicia* Think Tank to BC, as it

believes that this initiative would make the most impact to enhancing the retention of women[1].

The Advisory Committee plans to make as much progress as possible on some of the other recommendations (for example, developing a new exit survey) and carry forward other recommendations into 2011 (for example, considering the feasibility of developing new Law Society programs).

Taking Leadership for a Representative Profession

On behalf of the Law Society, the Advisory Committee strives to take leadership on equity and diversity issues and to advocate for a profession that reflects BC's diversity and includes more Aboriginal lawyers, women lawyers, lawyers with disabilities and lawyers from diverse communities. In the face of shifting demographic trends and an aging profession, the public will be best served by a more inclusive and representative profession.

In addition to its strategic plan responsibilities and responsibilities arising from Bencher decisions related to task forces, the Advisory Committee continues to monitor equity and diversity initiatives from other jurisdictions, including the Law Society of Upper Canada's *Justicia* project, the UK Law Society's *Diversity Charter*, and the US Association of Corporate Counsel's *Call to Action*. Further, the Advisory Committee has identified a number of initiatives that it will continue to pursue and carry forward into 2011:

- Embed diversity values – develop a values statement that links diversity with the public interest, have Benchers endorse the statement and incorporate it into Law Society communications wherever appropriate;
- Increase Bencher diversity – consider strategies to help enhance Bencher diversity by encouraging women, Aboriginal and visible minority lawyers to campaign for Bencher positions;
- Communicate diversity – work with communications staff to effectively promote the Law Society's leadership and commitment to diversity;
- Support the Law Societies' Equity Network – support the network of policy lawyers and ombudspersons from other law societies in Canada;
- Build partnerships – continue to work with other interested organizations including the CBA BC's Equality and Diversity Committee.

CONCLUSION

The Advisory Committee has prioritized initiatives related to supporting Aboriginal lawyers for its action plan for the remainder of 2010, given the Law Society's current focus on these issues. The Advisory Committee will continue to make as much progress as possible on its other initiatives and will carry those initiatives forward into 2011.

[1] The Law Society of Upper Canada's *Justicia* Think Tank brings firms together with the Law Society to develop policies and programs that support the retention and advancement of women in private practice.

The Law Society of British Columbia

Independence and Self-Governance Advisory Committee: Mid-Year Report

For: The Benchers
Date: July 9, 2010

Jan Lindsay, Q.C., Chair
Gordon Turriff, Q.C., Vice-Chair
Haydn Acheson
Herman Van Ommen
Craig Dennis
Hamar Foster
Cam Mowatt

Purpose of Report:	**Information**
Prepared on behalf of:	**The Independence and Self-Governance Advisory Committee**
	Michael Lucas **Manager, Policy and Legal Services** **604-443-5777**

Independence and Self-Governance Advisory Committee – Mid-Year Report

Introduction

The Independence and Self-Governance Committee is one of the four advisory Committees appointed by the Benchers to monitor issues of importance to the Law Society and to advise the Benchers in connection with those issues. From time to time, the Committee is also asked to analyse the policy implications of Law Society initiatives, and may be asked to develop recommendations for or policy alternatives regarding such initiatives.

The mandate of the Committee is to monitor developments on issues affecting the independence and self-governance of the legal profession and the justice system in BC. The Committee reports on those developments to the Benchers on a semi-annual basis. This is the mid-year report of the Committee, prepared to update the Benchers on the deliberations by the Committee to date in 2010.

Overview

As the Committee states at each opportunity, lawyer independence is a fundamental right of importance to the citizens of British Columbia and Canada. It is not a right that is well understood and, the Committee suspects, neither are the consequences of it being diluted or lost. Canadians are generally fortunate that they live in a society that recognizes the importance of the rule of law. The rule of law, through which everyone – including government – is subject to and held accountable by the law, is best protected by lawyers who operate and are regulated independent of government. Self-governance must therefore be vigilantly monitored. The Law Society must deliver a clear message about the importance that independent lawyers play in the protection of rule of law.

However, other developments that may affect the independence of the legal profession – including negotiations that could open the practice of law to foreign lawyers or the creation of business models through which legal professional values could be mixed with, or diluted by, other values (whether other professional values or corporate values) – ought not to be ignored. While enhanced mobility or alternate business structures may not be inherently "bad", they should be analysed and, if appropriate, developed in accordance with the professional values of the legal profession necessary to support the public right of lawyer independence and through it the rule of law.

Topics of Discussion January – July 2010

With the above in mind, the Committee has to date met on February 4, April 29 and June 23. It has discussed the following topics:

1. Development of the Law Society Strategic Plan

Strategies 2-2 and 2-3 of the Law Society's Strategic Plan are, respectively, "Assessing possible roles of an oversight or review board for Law Society core functions" and "Enhancing public confidence in hearing panels by examining the separation of adjudicative and investigative functions." Each are strategies that the Committee considers are important to the debate about ensuring lawyer independence and self-governance.

The Committee understands that Strategy 2-2, which was the substantive topic for discussion at the 2009 Benchers retreat, is currently being examined by staff and will be reported to the Executive Committee in due course.

The Committee understands that Strategy 2-3 is currently the subject of study by a Task Force, which is expected to report in July 2010.

The Committee will continue to monitor the progress of these initiatives.

2. Alternate Business Structures

The Committee has advocated in the past that the Law Society should develop a position on Alternate Business Structures (ABSs). ABSs are business structures that would allow non-lawyer ownership in law firms. The concept is often referred to as "Tesco law" in the United Kingdom. The *Legal Services Act 2007* in England and Wales permits alternate business structures, and the groundwork is being laid for their introduction there in the relatively near future. Australia already permits a form of ABSs by permitting law firms to list publicly on the stock market.

Like multi-disciplinary partnerships, ABSs would change the legal regulatory landscape. The involvement of non-lawyer owners in a law firm's operation could have significant consequences on professional ethics. Determining whether there should be criteria on who can be a non-lawyer owner in a law firm has resulted in lively debate in other countries. Concerns have been raised in England that criminals or terrorists could buy a law firm, and that the standing of the legal profession in the country could be detrimentally affected. Many of the bars in Europe are not in favour of ABSs for their lawyers.

ABSs have been praised, on the other hand, as a method through which legal services can be delivered more effectively, and at a cheaper price, thereby improving access to justice.

The subject, for a period of time earlier this year, threatened to tear apart the legal profession in Scotland. The Law Society in Scotland supported ABSs, but a group of solicitors raised concerns about their effect on the profession. Special meetings were called. Eventually after much debate and not a little acrimony, some compromise was reached, although that compromise is itself a bit confusing. The general result, though,

was a resolution in favour of ABSs but only where less than 50% of the ownership were non-lawyers. One resolution set the bar at 49% non-lawyer ownership, while another set it at 25%. The issue is being re-debated in the Scottish parliament.

The Scottish experience suggests that lawyers *are* interested and can become quite engaged in the topic. Consulting on and developing a position in British Columbia early in the process would, the Committee believes, be highly advisable.

3. Bail Conditions by Which Lawyers are Prohibited from Practising Law

The Committee considered the case of a lawyer who, charged with a serious criminal offence, was released on bail. One of the conditions of the release was that the lawyer not practise law. The imposition of such a condition by the Court could, one might argue, interfere with a fully independent legal profession, and the Committee generally thought that the determination as to who should practise law was a matter for the Law Society, and not the Court. For example, a lawyer in good standing has a right of audience before the Court, and absent a decision by the Law Society that the lawyer ought to be suspended or conditions be placed on his or her practice, one might argue that the Court ought not to interfere with that right. The Committee also noted, however, that courts do have a responsibility to ensure the integrity of their processes, and that where a lawyer, charged with a serious crime appears before the court seeking release, a court would understandably be concerned about the prospect of that individual continuing to provide legal advice to clients, or to the lawyer him or herself appearing before the court.

The recent addition of Rule 3-7.1 may assist by enabling the Law Society to suspend a lawyer or impose conditions on practice, where warranted in serious matters, pending the conclusion of an investigation, and this may obviate the need for such terms to be included in bail conditions.

4. Canada Revenue Agency "Requirements for Information"

The Committee considered a letter from the Senior Regional Director of the Department of Justice responding to an earlier letter from the Law Society that was written following meetings between the two organizations at which a protocol was discussed through which Requirements for Information delivered by the Canada Revenue Agency on lawyers could be addressed in a manner acceptable to all parties. As a result of the Department's letter, it appeared that a protocol was not possible at this time, and the Committee reviewed a draft letter of response and recommended it to the Executive Committee for signature by the President.

5. *R. v. Cunningham*

The Committee considered the Supreme Court of Canada's decision in *R. v. Cunningham*, on appeal from the Court of Appeal for Yukon, a case in which the Supreme Court held that, in a criminal case, a court has the authority to refuse to grant defence counsel's request to withdraw because the client had not complied with financial

terms of the retainer. The decision overturned a long-standing decision of the Court of Appeal for British Columbia, *Leask v. Cronin.*

The Committee expressed some concern over the decision, but recognized that the Court needs to ensure the integrity of its processes and protect the administration of justice. Moreover, the Committee noted that lawyers may still withdraw from a retainer for ethical reasons and are not compelled to disclose those reasons because to do so would interfere with privilege. Further, as the Court itself commented, the issue before it limited the application to criminal cases, and circumstances might be different if the question of fees were relevant to the case. The Committee agreed to recommend to the Executive Committee that a case comment should be prepared by the Law Society, and has since been advised that one is being prepared by the Ethics Committee.

6. *Nazmdeh v. Spraggs*

The Committee considered the Court of Appeal's decision in *Nazmdeh v. Spraggs*, a decision addressing the courts powers to order costs against a lawyer. The Law Society obtained leave to intervene in *Nazmdeh*, advancing the position that costs ordered to be paid by a lawyer personally required conduct on the lawyer's part that was so reprehensible as to amount to an abuse of process or a contempt of court. The court, however, determined that the true interpretation and plain meaning of Rule 57(37) of the Rules of Court was clear, and that the grammatical and ordinary sense of the words in that rule suggested that the only preconditions necessary for an order of costs are that the costs have been incurred without reasonable cause or that the costs have been wasted as a result of either delay, neglect, or some other fault on the part of the lawyer. There was no mention in the rule of "reprehensible conduct", "contempt of court", or "abuse of process". The rule did not therefore require proof of such conduct before the court could order a lawyer personally to pay wasted costs by reason of the lawyer's conduct.

The Law Society had argued that requiring a standard of egregious conduct at the most serious end of the spectrum on the part of a lawyer before making a costs order against the lawyer would assist in maintaining the distinction between the role of the Court and the role of the Law Society. The Court held, however, that its "costs powers" did not impair the Law Society's disciplinary powers, and that the court must be able to regulate and control its own processes, which of necessity includes the power to control the conduct of lawyers in the litigation process. The Court held that courts could not operate effectively if they had to refer each matter to the Law Society.

The Court noted, however, that the issues raised by the Law Society were all serious and legitimate policy considerations on the question of whether the courts should have wasted costs jurisdiction at all. Those considerations are "factors proper to have been considered and subjected to scrutiny by those who drafted [the rule]….[but] are not…informative in interpreting the rule." The Committee therefore recommended to the Executive Committee that the Law Society write to the Rules Committee asking to be consulted when revisions to the costs rules are next under consideration.

Monitoring Items

The Committee continues to monitor a number of matters:

1. Progress on the Restructuring of the Lawyer Regulatory System in England and Wales and Elsewhere

The Committee continues to follow the progress of the restructuring of the regulation of the legal profession in other jurisdictions, most notably in England and Wales and Australia. It is expected (as noted above) that England will soon have in place a system that will permit "alternate business structures" through which legal services may be provided, and this may have consequences elsewhere.

The Committee has also noted, however, that some commentators, lawyers and even judges have raised concern about how changes in England and Australia may be compromising the independence of the legal profession. The President of the Law Society of England and Wales recently warned of a "looming threat to the profession's independence," noting that the proximity of the Legal Services Board to government could threaten the independence of the legal profession. In Australia, there has been a recent push toward a national regulatory structure for the legal profession with a "peak regulator" the majority of whose members would be appointed by the government. This has been significantly criticized by the judiciary in the states of Western Australia, South Australia and Victoria. The Chief Justice of Western Australia was quoted saying "[t]here ought to be mechanisms so that the executive government doesn't have complete unconstrained power to appoint the people it wants who then control the profession."

The Committee will continue to monitor these interesting developments.

2. Developments concerning the Regulation of Professionals and Others

The Committee will continue to review the regulation of other professional bodies and other groups in British Columbia, as well as the issues that affect them that might be relevant to self-governance. For instance, the Committee has monitored the issues that have been raised in the media about concerns at the level of involvement of the British Columbia Federation of Teachers in the governance of the College of Teachers. The Committee has also followed the concerns about the discipline of police officers and calls for "independent bodies" to handle the investigations of police against who complaints have been made. The Committee has noted the recommendation by Thomas Braidwood Q.C., in his report concerning Robert Dziekanski, that there be an "independent investigations office" for police complaints in British Columbia, comprised of non-police civilians.

3. Amendments to the *Engineers and Geoscientists Act*

The Committee noted that the *Engineers and Geoscientists Act* was recently amended to authorize the Council of the Association of Professional Engineers and Geoscientists to

set annual fees for its members. This result is consistent with the Committee's recommendation to seek an amendment to s. 23 of the *Legal Profession Act* to similar effect.

4. Incursions on the Rule of Law and Lawyer Independence Elsewhere

The Committee has been monitoring events in other countries where the rule of law and lawyer and judicial independence seem to be in some jeopardy. In particular the Committee has been monitoring events in China, where there have been several stories that call into question the health of the rule of law in that country, and that demonstrate the lack of lawyer independence. Other areas of the world that bear monitoring on this subject include Zimbabwe, Venezuela and Russia.

While it is obvious that the Law Society is not in a position to fix problems existing elsewhere, it is important to understand the events or history that have given rise to the systems in place in some of these countries, which ought to better inform us should concerns develop in British Columbia.

Future Plans

Over the remainder of the year the Committee intends to consider the following topics for the purposes of advising the benchers about options or about whether to include such topics in any future iteration of the Strategic Plan.

1. Making the Case for Lawyer Independence (Part 2)

In its March 2008 Report, the Committee outlined the case for lawyer independence as a necessary component of the rule of law. The Committee has noted a lack of academic writing in support of independence and self-governance and has thought about whether commissioning such a study would be a worthwhile exercise. Mr. Turriff recently attended a conference in London England on lawyer regulation at which a number of academics were present. There was little, if any, commentary (besides that of Mr. Turriff) concerning the value of lawyer independence. The Committee will examine whether to recommend that the Law Society commission an "academic" paper about the value of the principle of lawyer independence and self-regulation.

The Committee has also considered the advisability of preparing a comparative study of Law Society regulatory processes to the processes in jurisdictions that have lost self-regulation as being a useful tool to demonstrate why circumstances in British Columbia might be different, and that why solutions from other jurisdictions may not be relevant or necessary here.

2. Examination of Insurance

The Committee has in the past debated whether the divergent interests of the Law Society as a whole and the Law Society operating through its insurance department posed any concern to the promotion and preservation of lawyer independence and effective self-

governance of lawyers. The debate was not about any concern that the Committee has in the operation of the insurance program as a stand-alone program. Rather, the issue of debate concerned the divergent interests and duties of the Law Society as a whole and the Law Society acting as an insurer of lawyers, having noted in particular that the incursions on lawyer independence and self-governance in other jurisdictions arose, at least in part, due to an apparent loss of public confidence that the regulating body was acting first and foremost in the public interest. In 2007 and again in 2008, the Committee recommended that the benchers consider whether to debate and analyse the divergence of primary duties that the Committee identified exists arising from the operation of an insurance program within the auspices of a regulatory body.

The Committee did not debate the issue in 2009, and simply noted its earlier debate and recommendation in its 2009 Year End Report. The Committee intends to examine the issue further in 2010 to identify whether there are any additional issues to consider, and to determine whether to make any further recommendations to the Benchers at the end of 2010.

3. Alternate Business Structures

The Committee will examine the debate and developments relating to the introduction of alternate business structures, as discussed above, for the purposes of making recommendations in its year end report.

4. Policy H5 – Bencher Governance Policies (Bencher Code of Conduct)

The Committee has been asked to review, consider and clarify Policy H5 of the Bencher Governance Policies (Bencher Code of Conduct) concerning the acceptance of, or election of, a bencher to boards or committees of other organizations in light of the recent debate by the benchers on this subject. The Committee will examine the policy and the related issues in the fall for the purpose of advising the benchers about the intent of the policy and making recommendations about how to clarify it to achieve that intent.

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The Law Society of British Columbia

Lawyer Education Advisory Committee – Mid-Year Report from the Chair

For: The Benchers

Date: July 9, 2010

Purpose of Report: Information

Thelma O'Grady, Chair, Lawyer Education Advisory Committee

Lawyer Education Advisory Committee
Mid-Year Report from the Committee Chair

Introduction

The Lawyer Education Advisory Committee is one of the four advisory committees appointed by the Benchers to monitor issues of importance to the Law Society and advise the Benchers in connection with those matters.

The mandate of the Lawyer Education Advisory Committee is to

(a) monitor developments affecting the education of lawyers in BC,

(b) report to the Benchers on a semi-annual basis on those developments,

(c) advise the Benchers annually on priority planning and respective issues affecting the education of lawyers in BC, and

(d) attend to such other matters as the Benchers or the Executive Committee may refer to the advisory committee from time to time.

This is the mid-year report on the Committee's activities, summarizing the work undertaken by the Committee over the first half of 2010.

Principal Focus of Committee Activity in 2010

(a) Oversight and Review of the Continuing Professional Development Program

January 1, 2010 marked the beginning of the second year of the continuing professional development (CPD) program.

The overall assessment of the program is that it has been running very successfully. In early 2010, however, staff members faced a considerable workload in dealing with 2009 end of year compliance, and in the first months of 2010 were catching up on an accreditation backlog. The hiring of an additional Member Services Department representative has alleviated the backlog problem.

The Committee continues to be asked, from time to time, for clarification with respect to issues that arise concerning the implementation of the CPD program. In response, the Committee has provided advice and, where appropriate, decision.

In September 2010, the Committee will begin a comprehensive review of the program, including consultation with the profession. The Committee plans to report to Benchers with recommendations by early 2011, so that any changes to the program would be put in place effective January 1, 2012. In the meantime, the Committee and staff are working together on ongoing monitoring of the program.

(b) Continuing Professional Development Credit for Pro Bono Services

In 2009, the Benchers approved the following recommendation of the Access to Legal Services Advisory Committee: "The Benchers should direct the Lawyer Education Advisory Committee to consider whether lawyers who provide pro bono through clinic and roster programs should be able to claim a portion of that time towards the ethics / professional responsibility component of Continuing Professional Development ("CPD"). Because CPD requires a lawyer to spend at least two hours a year on matters of ethics and professional responsibility, the Lawyer Education Advisory Committee should consider whether there is a need to limit how many of the 12 hours of CPD may be met by providing pro bono."

On April 22, 2010 the Committee met with David Mossop, Chair of the Access to Legal Services Advisory Committee, Jamie McLaren, Executive Director of Access Pro Bono BC, and Doug Munro, Law Society Policy staff lawyer. The discussion focused on how pro bono service could provide a means for lawyers to engage with the public and profession in a way that emphasizes professionalism, and how there can be unique educational value in working on a pro bono file because of the poverty law focus, a new focus for many lawyers. The Committee continues its deliberations, and will report to Benchers with recommendations.

(c) Mentoring

The mentoring program, approved by the Benchers in 2009, came into effect on January 1, 2010, and is being monitored by the Committee and staff.

The mentoring program is integrated into the CPD program, allowing both mentors and mentees to obtain CPD credit. To be eligible for accreditation, mentoring activity must feature

(i) significant and intellectual or practical content,

(ii) substantive, procedural, ethical or practice management (including client care and relations) matters relating to the practice of law,

(iii) as a primary objective, the increasing of lawyers' professional competence.

Credit for mentoring is not available if the mentoring focuses primarily on client or business development, marketing or profit maximization, specific client files, or lawyer wellness matters.

Under the accreditation process, a mentoring plan must be submitted outlining the specific development and learning goals planned for the mentee, together with a brief description of the mentor's expertise or experience in the subject matters in which the mentee seeks guidance. The mentor and mentee are required, as well, to agree that each

mentoring session will be for a minimum of 30 minutes, and that they will meet for a minimum of 6 hours over the course of the year.

By mid-year, there had been approximately 35 approved mentoring applications, mainly from within law firms. The Committee has long considered mentoring to be one of the most effective ways to provide support and guidance to lawyers, and so the Committee and staff are developing strategies for promoting the mentoring.

(d) Professionalism and Advocacy Projects

Strategies 3-2 and 3-3 of the 2009 - 2011 Strategic Plan identify the development and implementation of initiatives to, respectively, educate lawyers more effectively on the topic of professionalism, and improve advocacy skills for lawyers.

The Committee is conducting its work through two working groups, one devoted to professionalism and one to advocacy. The working groups are developing recommendations for consideration by the Committee. The Committee plans to present recommendations to the Benchers by the end of 2010.

(i) Professionalism Education Working Group

The Professionalism Education Working Group members are

- Johanne Blenkin (Chair),
- Joost Blom,
- Jim Herperger,
- Thelma O'Grady, and
- Linda Robertson.

The Working Group is developing a professionalism framework to guide and support professionalism initiatives, including education, by the Law Society, Courthouse Libraries BC, the Continuing Legal Education Society, the CBA, the Trial Lawyers' Association and others.

(ii) Advocacy Education Working Group

The Advocacy Education Working Group members are

- Jim Vilvang (Chair),
- Patricia Schmit,
- Bruce LeRose,
- David Crossin,
- Myron Claridge,
- Madam Justice Susan Griffin
- Mr. Justice Jon Sigurdson, and
- Judge Paul Meyers.

The Working Group is focusing on ways to enhance practical advocacy skills and practice opportunities for lawyers. While mentoring is an ideal method for enhancing advocacy skills, mentoring is not readily available to everyone. The Working Group is therefore exploring a variety of ways to enable junior lawyers to obtain practical experience before courts and other tribunals. The Working Group has been assisted considerably by meeting with Chief Justice Bauman to discuss how the judiciary can contribute to the enhancement of advocacy training, and with Jamie McLaren, Executive Director of Access Pro Bono BC, to discuss how advocacy training might be linked to pro bono. The Working Group is considering how advocacy skills programs could be tied in with the CPD mentoring program, and perhaps also through the auspices of Access Pro Bono BC and the Legal Services Society. The Working Group has concluded that advocacy programs should be broadly based, covering criminal, civil, family, and a range of administrative advocacy work, and be available throughout the province.

Memo

The Law Society of British Columbia

11000

To The Benchers and
The Discipline Committee

From Complaints Reduction Staff Group 2

Date June 23, 2010

Subject **Second Interim Report on the Early Intervention Project: Feedback from Participants**

INTRODUCTION

As the Benchers and Discipline Committee members are aware, the Complaints Reduction Staff Group 2 (the "CRSG2") had indicated that it would follow up with the participants in the Early Intervention Project to ask for their feedback. As the project can only be evaluated when there is sufficient data to allow a comparison of the complaint rates garnered by the participants in the project and a historical group of lawyers, the CRSG2 thought this early feedback from the participants would be useful. The CRSG2 anticipates running reports on the complaint rates of the participants starting in early 2011. It will report back periodically thereafter. This is the report on the feedback to date from the participants in the project.

FEEDBACK RECEIVED FROM PARTICIPANTS

The CRSG2 wrote to the participants seeking feedback. Copies of the form of letter for each of the two groups are attached.

Of the 39 lawyers participating in the Early Intervention Project, as of the date of this report, the CRSG2 had received feedback from 12. Three of the respondents were in the group that had only received the letter; the other nine were in the group that also met with a Bencher.

Of those who responded, three participants indicated that they did not consider their involvement in the project to be useful. However, one went on to say that he saw no drawback in participating in the project. He explained that he received good feedback and advice from counsel he hired to assist him with the complaints that had been made against him and from the staff lawyers who evaluated his complaints and, accordingly, the additional feedback from the Bencher wasn't necessary. Another found it helpful to have the opportunity to ask questions of a Bencher but didn't otherwise find the process to be particularly helpful. The third participant felt that she was "flagged" to participate as a result of two complaints that were without merit.

The remainder of the respondents indicated that their involvement in the project had been useful. The feedback on the meetings with the Benchers from all nine in that group was uniformly positive and several of the participants referred to the supportive, helpful

advice they had received from their volunteer Bencher. One also commented that the discussions with the Bencher made her feel less alienated from the Law Society.

Most of the respondents indicated that, at a minimum, their involvement caused them to reflect on their practice and to approach their files and issues arising on them differently. Several had taken the Communications Toolkit course and provided very positive feedback on the course. One participant said the course should be mandatory for all lawyers called less than two years. Other respondents indicated that they have had occasion to contact practice advisors or to take the small firm course. One respondent indicated that the Law Society should develop more online programs such as the Communications Toolkit which that participant found particularly useful.

CONCLUSION

While it is too early to assess the effectiveness of the Early Intervention Project, the feedback to date from the participants has been rather positive. It would appear that those participants who met with a volunteer Bencher were particularly impacted by the experience. The CRSG2 will report further in due course.

CW/al

Attachments.

Reply to: Michael D. Lucas
Direct line: (604) 443-5777

CONFIDENTIAL [date]

[Group A] **VIA EMAIL AND POST**

Dear []:

Re: Early Intervention Pilot Project

As you know, you were selected to participate in a pilot project designed to help lawyers in the early years of practice to reduce the number of complaints they receive. You were part of a group of lawyers who, at the end of 2008 had 5 or fewer years of call and who had received two or more complaints. We understand that in late 2009 or early 2010, you met with a Bencher. We are now writing to seek your feedback about the project. Your feedback is important to us as it will assist us in determining the usefulness of the project. Although your comments may be used in reports to the Benchers, they will not be attributed to you nor will the Bencher you met with be provided with your comments.

1. Overall, did you think your involvement in the project was useful?

2. What was the most helpful aspect of the project?

3. What was the least helpful aspect?

4. As a result of your involvement in the project, have you changed anything about your practice? Please elaborate.

5. Since the letter to you advising of your inclusion in the project have you accessed any of the following resources which were referred to in that letter?

    - Communications Toolkit
    - Small Firms Course

- Law Society Practice Advisor
- Lawyers' Assistance Program

6. Do you anticipate having follow up contact with the Bencher, or using the Bencher as a resource person?

7. How would you describe the tone of the meeting with the Bencher?

If you have any other comments or feedback on the project, we would be pleased to receive it. Please respond by email or letter to the attention of my assistant, Anna Lin, at alin@lsbc.org or to the address set out at the foot of this letter.

Thank you for your participation in this project, and for taking the time to provide us with your feedback.

Yours truly,

Michael D. Lucas
Manager, Policy and Legal Services

MDL/al

/letterA-feedback

Reply to: Michael D. Lucas
Direct line: (604) 443-5777

CONFIDENTIAL [date]

[Group B] **VIA EMAIL AND POST**

Dear []:

Re: Early Intervention Pilot Project

As you know, you were selected to participate in a pilot project designed to help lawyers in the early years of practice to reduce the number of complaints they receive. You were part of a group of lawyers who, at the end of 2008 had 5 or fewer years of call and who had received two or more complaints. We are now writing to seek your feedback about the project. Your feedback is important to us as it will assist us in determining the usefulness of the project. Although your comments may be used in reports to the Benchers, they will not be attributed to you.

1. Overall, did you think your involvement in the project was useful?

2. What was the most helpful aspect of the project?

3. What was the least helpful aspect?

4. As a result of your involvement in the project, have you changed anything about your practice? Please elaborate.

5. Since the letter to you advising of your inclusion in the project have you accessed any of the following resources which were referred to in that letter?

    - Communications Toolkit
    - Small Firms Course
    - Law Society Practice Advisor
    - Lawyers' Assistance Program

If you have any other comments or feedback on the project, we would be pleased to receive it. Please respond by email or letter to the attention of my assistant, Anna Lin, at alin@lsbc.org or to the address set out at the foot of this letter.

Thank you for your participation in this project, and for taking the time to provide us with your feedback.

Yours truly,

Michael D. Lucas
Manager, Policy and Legal Services

MDL/al

/letterB-feedback

Memo

The Law Society of British Columbia

12000

To Benchers

From Jeff Hoskins, QC

Date June 23, 2010

Subject **Report of the Special Committee to Review the *Freedom of Information and Protection of Privacy Act* – May 31, 2010**

The Special Committee to Review the *Freedom of Information and Protection of Privacy Act* (the "FIPPA") submitted its report (the "Report") to the Legislative Assembly on May 31, 2010. Copies of the Report and the Law Society's January 22, 2010 submission to the Special Committee are attached. The Special Committee made 35 recommendations in its Report.

The Law Society's submission included four recommendations which were approved by the Benchers at the January 22, 2010 meeting. Two of the recommendations were on the subject of solicitor client privilege and related to section 14 of the FIPPA (Legal Advice) and section 44 (Powers of commissioner in conducting investigations, audits or inquiries). The third recommendation related to Section 15 (Disclosure harmful to law enforcement) and the definition "law enforcement" in Schedule 1 of the FIPPA, and the fourth was on the subject of fees chargeable by public bodies under section 75 (Fees) and the Schedule of Maximum Fees found in FIPPA Regulation 323/93.

Solicitor client privilege

The Special Committee accepted the Law Society's recommendation that section 14 be made mandatory except when the public body is the client and can choose to waive privilege or when the client is a third party who has agreed to waive privilege. (Report, p. 17; Law Society submission, p. 4)

The Special Committee also made a recommendation related to the production of privileged records to the Information and Privacy Commissioner (the "IPC"). The Report does not specifically refer to section 44 or the Law Society's submission on the subject, but the Special Committee accepted a recommendation made by the Insurance Corporation of British Columbia in its submission that section 14 of the FIPPA be amended to say that the privileged status of records requested under the FIPPA must be referred to the Supreme Court of British Columbia for a decision. (Report, p. 17; Law Society submission, p. 7)

Law Enforcement

The Special Committee considered submissions made by the Law Society and others to amend the definition of "law enforcement" found in Schedule 1 (Definitions) of the FIPPA and decided that the definition is "adequate." The Special Committee did not recommend any changes to Schedule 1. (Report, p. 7; Law Society submission, p. 9)

Fees

The Special Committee reported that it received "considerable input" regarding section 75 (Fees). There is no specific reference made to the Law Society's recommendation but the Special Committee has recommended that the Schedule of Maximum Fees in FIPPA Regulation 323/93 be reviewed "with an emphasis on meeting the original objectives of the legislation" using "the criterion of reasonableness throughout the whole process." (Report, p. 30; Law Society submission, p. 12)

Other recommendations made by the Special Committee

The Report includes a summary of the 35 recommendations made by the Special Committee at pages 31-34. A number of the recommendations, should they be implemented by the government as recommended by the Special Committee, will have some impact on the way the Law Society responds to requests made under the FIPPA for access to records, but will likely only result in minor procedural changes and not in any significant change to the way the Law Society responds to requests for access to its records.

There is no formal procedure in place for making reply submissions to the Report of the Special Committee. Should the government proceed with implementing any of the recommendations made by the Special Committee by amending the FIPPA, there may be further consultation with interested parties.

REPORT | SECOND SESSION | THIRTY-NINTH PARLIAMENT

12002

Special Committee to Review the Freedom of Information and Protection of Privacy Act

LEGISLATIVE ASSEMBLY
PROVINCE OF BRITISH COLUMBIA

MAY 2010

May 31, 2010

To the Honourable
Legislative Assembly of the
Province of British Columbia

Honourable Members:

I have the honour to present herewith the Report of the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*.

The Report covers the work of the Special Committee from October 5, 2009 to May 31, 2010.

Respectfully submitted on behalf of the Special Committee,

Ron Cantelon, MLA
Chair

Table of Contents

Composition of the Committee

Members

Ron Cantelon, MLA	Chair	Parksville-Qualicum
Doug Routley, MLA	Deputy Chair	Nanaimo-North Cowichan
Harry Bloy, MLA		Burnaby-Lougheed
Stephanie Cadieux, MLA		Surrey-Panorama
Katrine Conroy, MLA		Kootenay West
Marc Dalton, MLA		Maple Ridge-Mission
Eric Foster, MLA		Vernon-Monashee
Guy Gentner, MLA		Delta North
Douglas Horne, MLA		Coquitlam-Burke Mountain
Jenny Wai Ching Kwan, MLA		Vancouver-Mount Pleasant
Harry Lali, MLA		Fraser-Nicola
Ralph Sultan, MLA		West Vancouver-Capilano

Clerk to the Committee

Craig James, Clerk Assistant and Clerk of Committees

Research Staff

Josie Schofield, Manager, Committee Research Services

Kathryn Butler, Committee Researcher

Byron Plant, Committee Researcher

Terms of Reference

On February 10, 2010, the Legislative Assembly approved a motion that a Special Committee be reappointed to continue its review of the *Freedom of Information and Protection of Privacy Act* (RSBC 1996, c. 165) pursuant to section 80 of that Act, and that the Special Committee so appointed shall have the powers of a Select Standing Committee and is also empowered:

> (a) to appoint of their number, one or more subcommittees and to refer to such subcommittees any of the matters referred to the Committee;
>
> (b) to sit during a period in which the House is adjourned, during the recess after prorogation until the next following Session and during any sitting of the House;
>
> (c) to adjourn from place to place as may be convenient;
>
> (d) to conduct public consultations by any means the Committee considers appropriate, including but not limited to public meetings and electronic means; and
>
> (e) to retain personnel as required to assist the Committee;

and shall report to the House by May 31, 2010; to deposit the original of its reports with the Clerk of the Legislative Assembly during a period of adjournment and upon resumption of the sittings of the House, the Chair shall present all reports to the Legislative Assembly.

Executive Summary

In October 2009, the Legislative Assembly appointed the all-party Special Committee to conduct the third review of the *Freedom of Information and Protection of Privacy Act*, the province's public sector access and privacy law.

During the consultation process, 118 submissions were received from a variety of stakeholders - including provincial and local public bodies, professional organizations, advocacy groups, labour unions and concerned citizens.

This report contains 35 recommendations that are designed to ensure the Act remains current. Eleven of these recommendations were originally made in 2004 by this Committee's predecessor.

To improve access, the Special Committee is reiterating the call for public bodies to adopt the practice of routine proactive disclosure of electronic records, made by the two previous statutory review committees. In its opinion, implementation of recommendations 7, 8 and 9 would promote a culture of openness and reduce the need for formal access requests to obtain general information. This would also reduce the cost to the public purse.

In regard to exceptions to access, the Special Committee is recommending that section 14 (Legal advice) become a mandatory exception. No change, though, is proposed for section 13 (Policy advice or recommendations), despite the considerable interest in amending this provision.

In the privacy field, the question of whether to adopt consent provisions, similar to the private sector privacy law, was a controversial topic. The Committee agreed on other recommendations, including consultations on data-sharing initiatives, and a new position of Government Chief Privacy Officer.

The report also contains recommendations to elaborate on the purposes of the Act, and to expand the scope of the Act to cover records of corporations and contractors under the control of public bodies.

Other amendments are designed to streamline the processes related to the Office of the Information and Privacy Commissioner and to strengthen the Commissioner's powers.

The final section of the report includes a recommendation to review the Schedule of Maximum Fees to ensure fees are not a barrier to access and that the criterion of reasonableness is used.

The Statutory Framework

The province's *Freedom of Information and Protection of Privacy Act* (the Act) was passed unanimously in June 1992 and came into force in October 1993. In keeping with other public-sector access and privacy laws, the Act seeks to strike a balance between the right of citizens to access information held by public bodies, and the right to have their own personal information protected.

1997-99 Statutory Review

Section 80 stipulates that review of the Act must take place at least once every six years, with the first six-year period to begin on October 4, 1997. The first all-party special committee to conduct a statutory review began its work in the fall of 1997. During this review, the committee heard 116 oral presentations and received 136 written submissions. Based on the input received from the public, the committee recommended 18 changes to the Act in its report tabled in July 1999. Legislative amendments enacted in 2002 included the provincial government's response to the 1999 report.

2003-04 Statutory Review

The second statutory review of the legislation began with the appointment of an all-party special committee by the Legislative Assembly on May 29, 2003. This review coincided with the passage and implementation of the province's new private sector privacy law, the *Personal Information Protection Act* (SBC 2003 c. 63), which came into force on January 1, 2004. Following its review of the access and privacy provisions of the public sector privacy law, the committee made 28 recommendations in its report tabled May 19, 2004. Half of these recommendations have either been completed or addressed through legislative amendments, and 14 are still under consideration.

Amendments to the Act, 2004-08

In 2004, important amendments were made to the Act in response to the USA PATRIOT Act. Provisions were added that limit storage and disclosure of personal information outside of Canada; prevent access to personal information from outside Canada; provide whistleblower protection; and institute fines for unauthorized disclosure of personal information.

Further amendments in 2005 were designed to improve information-sharing among public bodies for common or integrated programs and activities.

The most recent amendments to the Act were made in the spring of 2008, and included provisions to permit public bodies to routinely disclose predetermined personal information, and to strengthen the office and powers of the Information and Privacy Commissioner.

2009-10 Statutory Review

Pursuant to section 80 of the Act, on October 5, 2009, the Legislative Assembly appointed an all-party Special Committee to conduct the third review of the *Freedom of Information and Protection of Privacy Act* (RSBC 96, c. 165) and to report back to the House by May 31, 2010. As parliamentary committees in British Columbia are appointed on a sessional basis, the House reappointed the Special Committee on February 10, 2010, at the start of the second session of the 39th Parliament, and granted it the same terms of reference to complete its work.

Contemporary Trends

Like our colleagues who conducted the previous statutory reviews, members of the Special Committee believe it is important to consider the broader social and political context within which the *Freedom of Information and Protection of Privacy Act* operates. Accordingly, before reporting on the results of the third statutory review, we would like to comment briefly on three contemporary trends affecting access and privacy rights: changes in information technology; the open-government movement; and privacy challenges.

Changes in Information Technology

Now more than ever before, British Columbians are living in the Information Age and using the Internet for a variety of information, communication, and data-sharing purposes. It has been recently reported that 92 percent of the population now have access to the Internet. Provincial initiatives to expand broadband Internet connectivity, such as NetworkBC, have helped to "bridge the digital divide" in rural and remote areas of the province.

The Internet has dramatically altered the ways in which data are stored and shared. Sometimes referred to as "cloud computing", the general shift towards Internet-based computing has allowed for freer transfer of information independent of specialized hardware and proprietary software platforms. Perhaps there is no greater example of this than the growing use of online social media applications such as Facebook, Twitter, Flickr, and YouTube. It has been recently estimated that 12 million Canadians use Facebook, and over two-thirds of Canadians have either stored data online or used a web-based software application. In addition to providing a way to connect with families and friends, social media applications have also provided new means for governments, as well as political actors and institutions, to interact and share information with citizens.

Movement towards Open Government

For governments, cloud computing offers new opportunities for proactive disclosure, or the automatic release of certain types of records. Proactive disclosure provides efficient and cost-saving ways for government agencies to share general information. It also serves to further government transparency and ensure accountability to citizens, which are both essential tenets of democracy.

Since 2004, several countries have taken steps to proactively disclose more information. In the United States, for instance, President Barack Obama pledged to increase government openness, accountability and transparency. Immediately after taking office in January 2009, he issued a memorandum to the heads of executive departments and agencies, directing them to "take affirmative steps to make information public. They should not wait for specific requests from the government. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely." Since then, the US federal government has launched the website Data.gov, which provides datasets generated by the executive branch from across the country.

The United Kingdom has been another leader in the area of routine proactive disclosure. Since 2005, public authorities have had to adopt and publish publication schemes setting out the types of information that public authorities make routinely available and how this can be accessed. Following an extensive review of publication schemes, the Information Commissioner's Office introduced a model publication scheme for all public authorities to adopt on January 1, 2009.

Some jurisdictions within Canada have taken similar steps to make certain types of government information more readily available to citizens. The practice of routine disclosure has been adopted at the federal level under the *Access to Information Act*, which sets out a mandatory publication scheme for government departments. Several Canadian municipalities have also made their records more publicly available without the need for a formal request. In British Columbia, for instance, the cities of Nanaimo and Vancouver have unveiled open-data websites that facilitate access to municipal information such as building permits and property searches.

Privacy Challenges

In addition to promoting access, changes in information technology have also had an impact in the privacy field. The growing use of firewalls and data encryption provides examples of ways in which governments have utilized technology to enhance privacy protection. On the other hand, they have raised new challenges for privacy protection. According to a 2010 report of the Privacy Commissioner of Canada, privacy risks associated with cloud computing technologies include: problems of jurisdiction; misuse of personal information arising from the creation of new data streams; concerns about the security of on-line transactions and storage; data intrusion; unintended consequences of lawful access; security issues surrounding "outsourcing for processing"; misuse of processing data; risk of data permanence; and concerns about data ownership.

Two recent privacy breaches in BC involved inappropriate disclosure of government information. In the first case, in December 2009, a provincial government employee was alleged to have used a government e-mail account to send confidential data to an American border guard in Washington State. In another case last year, documents containing the personal information of over 1,400 clients were found in the home of a government employee under RCMP investigation for other matters. The reports of three investigations into this second case included recommendations to improve education, training, policies and procedures to prevent a similar situation occurring in the future.

The Consultation Process

To carry out its mandate, the Special Committee to Review the *Freedom of Information and Protection of Privacy Act* followed the precedent set by the first two statutory review committees and consulted directly with stakeholders and the public at large to inform its deliberations on the content of its report. The schedule of its meetings is contained in Appendix A.

Briefings

The Special Committee heard first from the two entities charged with monitoring and administering the Act: the independent Office of the Information and Privacy Commissioner (OIPC) for British Columbia and the Ministry of Citizens' Services (MCS). These preliminary briefings took place on October 28, 2009 and each provided an overview of the legislation. The A/Executive Director of the OIPC summarized access to information legislation; the privacy context; the scope of the Act's coverage; the FOI process; and the Office's role of independent oversight. The MCS representative was the Director of Legislation and Strategic Privacy Practices, Knowledge and Information Services Branch. She reviewed the Act's purpose, scope/coverage and structure; the Ministry's responsibilities; right of access; exceptions to access; privacy protection; and amendment history.

In March 2010, the OIPC and the provincial government presented formal submissions, containing their recommendations for legislative amendments. The Deputy Minister of Citizens' Services and the Government Chief Information Officer, accompanied by the Deputy Minister for Housing and Social Development and the Deputy Solicitor General, presented the Government submission on March 24, 2010. Part I, Background Information, contained an overview of the Act and its limitations, amendment history, changes since 1992 and international comparisons. Part II of the Government submission focused on the practical challenges ministries are facing. Specific topics covered include ministry themes for reform, ministry examples, and a summary of recommendations.

The Acting Information and Privacy Commissioner presented the OIPC submission to the Special Committee on March 31, 2010. Topics covered included privacy protection; the current privacy environment; and the Office's recommendations on privacy and access.

Privacy Conference

Committee members and research staff attended the provincial government's 11th annual privacy and security conference, "Navigating the Digital Ocean: Riding the Waves of Change", held at the Victoria Conference Centre, February 8-10, 2010.

Public Consultation

The Special Committee initiated the public consultation process in the fall of 2009. Organizations that had participated in the first two statutory reviews were contacted and invited to participate in the third review of the Act, by providing a written submission or appearing at a public hearing.

The call for submissions was posted on the committee's website, and advertisements were placed in the province's daily newspapers in November. The deadline for written submissions was originally set for January 29, 2010, but later extended to March 15, 2010. Participants were asked to submit their assessment of the Act and ideas for improvement, by mail, e-mail, fax, or in a video or audio file.

In December 2009, two public hearings were advertised in the province's dailies and community newspapers. The Special Committee heard from 22 presenters at the hearings in Vancouver (February 2, 2010) and Victoria (February 3, 2010), and received 118 written submissions – a higher level of participation than in 2004. The participants included representatives of the broad range of public bodies covered by the Act, including provincial government ministries, Crown corporations, and local public bodies. Equally important, the Committee also heard from advocacy groups, labour unions and individual citizens with experience in requesting personal information and/or general information from public bodies. A complete list of witnesses who participated in the consultation process is provided in Appendix B.

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Before turning to report on the outcome of our consultations, Members of the Special Committee would like to thank everyone who participated in the third statutory review of the Act. We received a lot of ideas and suggestions on how to improve the legislation. This input has been very helpful in the deliberations stage, during which we considered whether the legislation needs updating, and how we could strike an appropriate balance between access and privacy rights. For some of us, frankly, it turned out to be a difficult struggle to reconcile what seems to be an inherent contradiction in the title and structure of the statute. At the same time we recognize that the legislation reflects the tension between freedom of information and privacy protection in modern society.
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Part 1 – Introductory Provisions

Part 1 of the *Freedom of Information and Protection of Privacy Act* (the Act) contains three sections: definitions, purposes and scope. During the consultation process, the Special Committee received proposals for legislative amendments affecting each of these provisions.

Section 1 Definitions

Definitions of terms used in the Act are contained in Schedule 1. The Special Committee received requests from the two justice ministries and the provincial bodies representing lawyers and school trustees to amend the definition of "law enforcement". Other submissions proposed changing the definitions of "personal information" and "health care body". After careful consideration, we have decided that the existing definitions of these terms in Schedule 1 are adequate.

Section 2 Purposes of this Act

Section 2 states that the intended purposes of the Act are to make public bodies more accountable to the public and to protect personal privacy. It also outlines how these purposes will be achieved.

With regard to this provision, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Add a new section 2(3) stating that the Act recognizes that new information technology can play an important role in achieving the purposes outlined in subsection (1), particularly with respect to promoting a culture of openness and informal access to information by enhancing privacy protection.*

During the consultation process, the Special Committee heard from the Ministry of Citizens' Services that this recommendation remains under consideration. We also received pleas for its speedy implementation from the major advocacy group, the Freedom of Information and Privacy Association, and members of the BC Branch of the Canadian Bar Association. We too urge government to take action along the lines recommended in the 2004 Report, since we believe information technology has the capabilities to strengthen both access rights and privacy rights.

Recommendation 1:

Add a new section 2(3) to acknowledge that information technology plays an important role in achieving the dual purposes of the Act, by facilitating the routine disclosure of general information as well as enhancing safeguards for privacy protection.

The Special Committee also considered an amendment proposed by the OIPC. Its submission pointed out that section 2 does not acknowledge that an infringement of the right to privacy must be reasonable and justifiable, whereas this concept is in the *Personal Information Protection Act*.

We support this amendment since we think it is desirable to harmonize the language of the public sector and private sector privacy laws, wherever practicable.

Recommendation 2:

Add a new section 2(4) to require that for an infringement of the right to privacy to be lawful, it must be proportional to the public interest that is achieved.

Section 3 Scope of this Act

Section 3 defines the records that are covered by the Act as those in the custody or under the control of a public body. It also lists the types of records that are not covered by the Act.

The Act applies to some 2,900 public bodies in British Columbia, the widest scope of any jurisdiction in Canada. All are either fully or partially taxpayer-funded, perform vital public functions or services for other public bodies, or are bodies in which the provincial government has a controlling interest. Provincial ministries, agencies, boards and commissions and most Crown corporations have been covered since October 1993. The category of local public bodies comprises local government bodies (e.g. municipalities, regional districts and police boards), health care bodies (e.g., hospitals, health boards) and educational bodies (e.g. universities, colleges and school boards). Local public bodies have been covered since November 1994, and they are listed in Schedule 2 of the Act. Self-governing bodies of a profession or occupation (e.g., doctors, lawyers and teachers) have been covered since May 1995, and they are listed in Schedule 3.

The Special Committee received several proposals to expand the scope of the Act to cover the records of any entity that receives taxpayers' money; however, we consider this type of amendment to be much too broad. Other requests for the exclusion of claim files and files relating to all phases of a police investigation were also rejected because of our concerns about the impact on access rights.

At the Victoria public hearing, we were asked to consider inclusion of a strata corporation as a local public body under Schedule 3; however, a private entity obviously does not qualify under this Act. Nine written enquiries were also received from people seeking access to strata council records, and they were referred to relevant information resources available on the OIPC website.

BCSPCA

The Special Committee revisited one case of exclusion first examined by the second statutory review committee, which made the following recommendation in its 2004 Report:

> *Investigate why the B.C. Society for the Prevention of Cruelty to Animals was assigned the dual status of a public body and a non-profit society in the first place and whether there is a case for clarifying or even changing its status.*

During the consultation process, the Special Committee was informed by the Ministry of Citizens' Services that its investigation has determined that the BCSPCA does not meet the criteria for a public body under FIPPA, although it does have some regulatory responsibilities under the *Prevention of Cruelty to Animals Act*. According to the Ministry, the BCSPCA does not have dual status; it is a not-for-profit society that acts in part under statute.

Despite this decision, we share the view of the previous committee that the Society qualifies as a public body in terms of having statutory authority to enforce laws relating to animal cruelty, and by virtue of receiving a small annual grant ($75,000) from the Ministry of Agriculture and Lands for the training of animal cruelty investigators. For this reason, we endorse the plea from the Animal Rights Coalition for access to the records pertaining to the status of animals seized by BCSPCA agents.

Recommendation 3:

Include the British Columbia Society for the Prevention of Cruelty to Animals, by using definition (b) of *public body* in Schedule 1 that makes provision for adding an "other body" by regulation to Schedule 2; and add the proviso that access rights pertain only to those records that relate to this Society's statutory powers.

Subsidiary Company

On November 9, 2009, the Supreme Court of British Columbia ruled that the records of Simon Fraser Univentures Corporation are not under the control of SFU and hence not subject to the FIPPA; instead, SFUV is clearly regulated by the PIPA. (SFU v. BC (IPC) 2009 BCSC 1481) This decision is currently under appeal.

In response to this court decision, the Special Committee was asked to consider proposals to expand the coverage of the Act to cover a subsidiary company of a public educational body. The UBC Alma Mater Society, for example, urged us to address the "corporate veil" problem created by the establishment of businesses by some universities and a few school districts. The B.C. School Trustees Association, however, requested a statutory exemption for the records of business companies created under the *School Act* to market education services abroad.

The Special Committee is concerned about the impact the court decision has on access rights, and believes school trustees' concerns about harmful disclosure would be protected under ss. 17 and 21.

To deal with this issue, the Canadian Centre for Policy Alternatives (CCPA) suggested following the lead of other jurisdictions (e.g., State of Virginia, US, UK) and amending the definition of *public body*. The BC Health Coalition and the OIPC also recommended changing this definition.

While the Special Committee is receptive to proposals to include corporations under the definition of public body, we are not inclined to include all the structures listed in the proponents' recommendations. The CCPA and the BC Health Coalition, for example, would include *"organizations, corporations and agencies",* and the OIPC submission lists *"any board, committee, commission, panel, agency or corporation"* created or owned by a public body.

Recommendation 4:

Expand the definition of "public body" in Schedule 1 to include any corporation that is created or owned by a public body, including an educational body.

Contractors' Records

The previous statutory review committee made the following recommendation on the topic of contractors' records in its 2004 Report:

> *Amend Section 3 to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body are under the control of the public body for which the contractor is providing services.*

During the consultation process, the Special Committee learned from the Ministry of Citizens' Services that this recommendation remains under consideration. We also received numerous submissions urging its implementation. The OIPC, for example, claimed that this amendment is urgently required in order to clear up any confusion on the part of contractors and public bodies regarding who has custody or control of requested records. Other proponents of speedy implementation included advocacy groups, labour unions, librarians and taxpayers. We share their concerns about the delay and urge government to take action.

Recommendation 5:

Amend Section 3 to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

Academic Records

The Special Committee received a submission from the Confederation of University Faculty Associations (CUFA) BC, representing over 4,500 academic staff members. Three of their seven recommendations focused on amendments related to section 3:

- CUFA BC recommends that Schedule 1 be amended to include the definition of a "faculty member" (i.e. a person employed by a post-secondary educational body as a tutor, instructor, lecturer, assistant professor, associate professor, professor, researcher, [professional] librarian, program director or in an equivalent position). We recommend replacing the broad phrase "employees of a post-secondary educational body" (as in s.3(1)(e)) with "faculty members".

- CUFA BC recommends that no changes be made to the exemptions of examination and test questions (s. 3(1)(d)) and teaching materials and research information (s.3(1)(e)) from the scope of the Act.

- CUFA BC recommends that new provisions be created in s. 3(1) to clarify that the following records of a faculty member at a public post-secondary institution are excluded from the scope of the Act: a record containing personal notes or annotations, and a record containing personal communications, including e-mail messages. These records are as much part of the scholarly enterprise as the teaching and research materials excluded in s. 3(1)(e), and their exclusion is necessary to protect academic freedom.

The Special Committee thinks the existing exemption for the category of "research information" in section 3(1)(e) is broad enough to incorporate records containing personal notes or annotations, or personal communications. Conversely, we consider the CUFA BC definition of "faculty members" to be too narrow since it excludes teaching support staff (i.e., teaching assistants, tutor markers or persons in equivalent positions). In our opinion, the records of the latter also warrant protection.

Recommendation 6:

Amend section 3(1)(e) by replacing "employees" with "faculty members and teaching support staff" of a post-secondary educational body.

Part 2 – Freedom of Information

Division 1 – Information Rights and How to Exercise Them

Part 2, Division 1 of the Act defines information rights; explains how to make an access request; outlines the duty of a public body to assist applicants; defines what the time limit is for responding; describes what the content of a response should be; explains how access will be given; and specifies the conditions for extending the time limit for responding and for transferring a request.

Routine proactive disclosure

As noted in an earlier section of this report, routine proactive disclosure of government information is now becoming common practice. The previous statutory review committee made the following recommendations on this topic in its 2004 Report:

> *Add a new section at the beginning of Part 2 of the Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.*
>
> *Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.*

The Special Committee learned from the Ministry of Citizens' Services that these two recommendations remain under consideration. During the consultation process, we received numerous submissions urging government to take action. The OIPC submission, for example, pointed out that routine disclosure could reduce processing costs for public bodies, since they could avoid the necessity of responding individually to specific and often repeated access requests for the same information. Implementation would also enhance openness and provide easier public access to information. Other proponents of proactive release of electronic records included advocacy groups, journalists, labour unions, librarians and taxpayers.

Recommendation 7:

Add a new section at the beginning of Part 2 of the Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

The Special Committee supports the proponents' position and reiterates the call for routine disclosure made in 2004. We believe it is imperative that government no longer delays taking action to promote the routine proactive release of electronic records containing the types of general information listed in s. 13(2) – e.g., any factual material, statistical surveys, public opinion polls,

environmental impact statements. This practice has already been implemented at the federal level in Canada. If implemented, routine disclosure would also align British Columbia with the trend towards open government in the USA and, closer to home, with municipal initiatives underway in the cities of Vancouver and Nanaimo.

Recommendation 8:

Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

The OIPC submission also proposed that public bodies be required to use information technology to facilitate efficient and cost-effective responses to access requests, which is already a statutory requirement in Nova Scotia and Prince Edward Island. It recommended section 9(2) be amended to require that public bodies provide electronic rather than print records, wherever practicable. CUPE BC made a similar suggestion. The Special Committee supports this amendment because it aligns with citizens' growing preference for receiving information via e-mail.

Recommendation 9:

Amend section 9(2) of the Act to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

Section 4 Information rights

Section 4 establishes the public's information rights and the key access principles of the Act: the public has a right of access to all records in the custody or under the control of public bodies, including the right of individuals to personal information about themselves. That right does not extend to information excepted from disclosure under Division 2 of Part 2 of the Act.

On the topic of access requests, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.*

The Special Committee was informed by the Ministry of Citizens' Services that this recommendation has been resolved through policy. The Ministry explained that in response to the Information and Privacy Commissioner's first annual report on the timeliness of government's access to information responses (February 2009), government has indicated that while there are times when the identity of a requester needs to be known as part of the decision-making process, it will undertake efforts to ensure that anonymity is protected to the greatest extent possible.

Despite the ministry's assurance, the OIPC believed an amendment was still desirable to ensure that timely access to general information is not affected by the nature of the request or the identity of the requester. Its submission points out that one of the findings of its 2009 timeliness report was the fact that the identity of the applicant – particularly one representing the media, a political party or an interest group – had a significant negative impact on how quickly the request was processed. Therefore the OIPC argued that the most efficient way to ensure that all requests are treated equally is to guarantee that the identity of the requester remains shielded throughout the process, known only to the branch responsible for making the decision on disclosure and sending the records to the requester. When the request is for personal information, or business information, the response processes should, wherever possible, also protect anonymity.

The Special Committee agrees with the OIPC that it is important that the Act acknowledges the importance of the democratic right to anonymity.

Recommendation 10:

Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

Section 5 How to make a request

Section 5 describes how to make a formal request for a record under the Act and provides that an applicant may ask for a copy of the record or to view the original record. The submission of the Victoria and Vancouver police departments, however, claimed that providing access to original records is "impracticable" for the following reason:

> *"In accordance with Section 5, and 9, of FOIPPA an applicant may ask for a copy of the record or ask to examine the original record by stating their preference in their written request. In practice, only copies of records (usually in a severed format) are disclosed to applicants. It would be extremely difficult, if not impossible, to apply the provisions of the FOIPPA to original hard copy records without damaging the records. In a police setting, it is extremely important to protect the sanctity of original records for use in criminal proceedings.*
>
> *Sections 5 and 9 require amendment to allow applicants a right of access to original records if reasonable. This will allow police to ensure the "continuity of evidence" and the physical security of evidence, in criminal proceedings. This is particularly the case where evidence or documents were located or created prior to the introduction of digital record-keeping systems, where the concept of "originality" is significantly different."*

While endorsing the amendment, the Special Committee does not believe that protecting the sanctity of an original record prevents a public body from supplying a reasonable facsimile of the record to an applicant when it is impractical to make the original record available for inspection.

Recommendation 11:

Amend sections 5 and 9 to allow applicants a right of access to original records if reasonable.

Section 6 Duty to assist applicants

Subsection 6(1) requires the head of a public body to make every reasonable effort to assist applicants and to respond openly, accurately, completely and without delay.

The submissions of the Alma Mater Society of UBC-Vancouver, CUPE BC, the Canadian Centre for Policy Alternatives, the Dogwood Initiative and the Freedom of Information and Privacy Association voiced concerns about the adequacy of the search process conducted by some public bodies, using their own experiences to demonstrate the problem. Each proposed penalties for heads of public bodies that breach the statutory duty to assist.

The Special Committee has concluded that rather than imposing penalties, it is more important to waive fees to provide some kind of incentive for heads of public bodies who breach the duty to assist.

Section 7 Time limit for responding

Section 7 places a duty on public bodies to respond to requests without delay and imposes a response time limit of 30 days with specific exceptions.

The Special Committee received considerable public input regarding the existing 30-day time limit for responding. Some citizens complained about unreasonable delays in obtaining records, while others proposed more flexibility. Extensions, which fall under s.10, were another topic of concern.

After due deliberation, we have decided not to recommend any changes to the existing timelines in sections 7 and 10 for the following reason. We anticipate that by moving forward with proactive release of electronic records, and fee waivers for non-compliance, there will be a decrease in the number of unreasonable delays.

On the topic of time limits for third-party consultation (sections 23, 24), the Special Committee is reluctant to recommend any changes at this time.

Section 11 Transferring a request

Section 11 stipulates when and how a public body may transfer a request.

During the consultation process, we considered a proposal from the Freedom of Information and Privacy Association to amend section 11 to eliminate the 20-day transfer period for public bodies which are part of the new centralized system for the handling of FOI requests. It pointed out that these requests will be sent to the relevant public body immediately, rather than being transferred among ministries. Another advocacy group, the Dogwood Initiative, suggested amending section 11 to reduce the time allowed for file transfers from 20 days to five business days, or amending s. 11 to reduce the time allowed for the new public body to respond after the transfer.

The Special Committee considered both these suggestions. We concluded that a 10-day reduction is feasible now that a centralized system is in place to handle document requests more efficiently.

Recommendation 12:

Amend section 11 to reduce the time allowed for file transfers to ten business days.

Division 2 – Exceptions

Part 2, Division 2 of the Act specifies the conditions under which information may be refused. There are two kinds of exceptions to access under the Act. Mandatory exceptions require information to be withheld if it meets the criteria listed in the Act. Discretionary exceptions allow information to be released if the head of the public body feels it is in the public interest to do so.

The Special Committee considered requests to amend the mandatory exception, section 12 (Cabinet and local public body confidences) but concluded that it is undesirable to make confidential records more accessible at this time.

With regard to Section 13 (Policy advice or recommendations), we acknowledge that there is considerable interest in amending this discretionary exception along the lines proposed by the second statutory review committee in its 2004 Report. Advocacy groups, the OIPC and some committee members were all in favour of a narrower definition of "policy advice". However, the majority of members think it is prudent to maintain the advice exception for evidence-based interpretations, analyses and recommendations.

After careful consideration, we have decided not to accept amendments to section 15 (Disclosure harmful to law enforcement), proposed by the justice ministries, because subsections (j) and (k) provide public bodies with the authority to refuse to disclose security footage, and we are not persuaded that access should be restricted to police audit records.

We are also not convinced that access needs to be restricted to records of a Crown corporation in negotiations with First Nations (Section 16) or commercial activities (Section 17). Further, we are not persuaded by the school trustees' argument for exempting files relating to labour relations (Section 17), or containing confidential contract information (Section 21). In all these cases, we think existing provisions of the Act are adequate to protect commercial and sensitive information. Lastly, the majority of committee members does not support the call to repeal the ban on hospital abortion statistics (Section 22.1).

Section 14 Legal advice

Section 14 is a discretionary exception to the public's general right of access to legal advice or communications contained in government records under section 4 (Information rights) of the Act.

During the consultation process, the Law Society of British Columbia expressed a concern about the current wording of section 14. It pointed out that by giving the head of a public body the discretion to refuse to disclose information that is subject to solicitor client privilege, it appears by implication to give discretion to disclose privileged information. In its view, there is no basis for a discretion to release privileged information, and so disclosure must be refused. The Special Committee endorses the Law Society's amendment to clear up the ambiguity.

Recommendation 13:

Make section 14 a mandatory exception, by changing "may refuse" to "must refuse", except when the public body is the client and can choose to waive privilege, or, if the client is a third party, the client agrees to waive privilege.

The Insurance Corporation of British Columbia (ICBC) also proposed an amendment to section 14 of the Act stating that decisions on the privileged status of materials must be referred to the Supreme Court of British Columbia, and not be within the purview of the OIPC. Its submission pointed out that following the Blood Tribe decision of the Supreme Court of Canada in July 2008, the former Information and Privacy Commissioner, acknowledging the special status of privilege, developed a separate process to follow for reviews under section 14. However, ICBC maintains that the determination of privileged status should remain the sole prerogative of the court – a position that is not entirely supported by the Trial Lawyers Association of British Columbia.

The Special Committee considers the ICBC proposal to be a reasonable one particularly at the stage when FOI requests are made and the claim files in question are the subject of active litigation.

Recommendation 14:

Amend section 14 of the Act to state that decisions on the privileged status of materials when FOI requests are made must be referred to the Supreme Court of British Columbia.

Section 20 Information that will be published or released within 60 days

Section 20 is a discretionary exception which allows the head of a public body to refuse to disclose information which is currently available for purchase by the public or which will be released to the public or available for purchase by the public within 60 days of the applicant's request.

The Special Committee received a number of submissions proposing amendments to section 20. The Freedom of Information and Privacy Association and the Dogwood Initiative, for example, suggested amending section 20(3) to provide for immediate release of all requested records to the requester if the records in question are not made public after the 60 day period.

Other proposals included a request from the justice ministries that an extension be given if a public report is in the process of being drafted, and the submission of the B.C. School Trustees' Association sought an exemption if the publication of a report is a statutory requirement.

The Special Committee acknowledges that "access delayed is access denied" and supports amendments proposed by advocacy groups to section 20(3) that would prevent a public body changing its mind about release after 59 days, so that the application process has to start over again. At the same time we recognize the need for some flexibility in case unforeseen circumstances prompt a delay. In our opinion, the ministries' proposed timelines for the extension request (3 to 6 months) are too broad, but we think an exemption for reports to be published according to a statutory schedule is a sensible amendment.

Recommendation 15:

Amend s. 20(3) to provide for immediate release of all requested records if 90 days have elapsed since receiving the applicant's request; and to provide that an access request may be refused if the information will be published according to a statutory schedule.

Section 22 Disclosure harmful to personal privacy

Section 22 is a mandatory exception that protects personal privacy of individuals whose personal information is held by a public body. This section requires the head to refuse disclosure of personal information where that disclosure constitutes an unreasonable invasion of a third party's privacy.

In regard to this provision, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 22(4) to state that it is not an unreasonable invasion of third-party privacy to disclose the personal information of an individual who has been dead for over 20 years.*

During the consultation process, the Special Committee was informed by the Ministry of Citizens' Services that recommendation 14 remains under consideration. The OIPC reported that its

experience in the past six years suggests that there will be occasions when the personal information of an individual deceased for 20 years could cause an unreasonable invasion of personal privacy (eg, if an infant or young child dies as a result of a violent crime). To continue to protect personal information in unusual circumstances, and for the sake of internal consistency with s. 36, the OIPC proposed changes in the wording of the 2004 recommendation, which the Special Committee supports.

Recommendation 16:

Amend s. 22(2) to state that the personal information of an individual who has been dead for over 20 years is a relevant consideration in determining whether the disclosure of the deceased's personal information would be an unreasonable invasion of personal privacy.

The Special Committee considered a proposal from the University of British Columbia (UBC) for another amendment to section 22 relating to protecting the confidentiality of references. The UBC submission pointed out that section 22(3)(h) protects the identity of individuals who provide confidential references or evaluations. However, where the identity of the individual is known to a candidate, section 22(3)(h) and the cases interpreting this provision may offer no similar protection for the contents of the evaluation. UBC has faced this issue in respect of applications for medical or dental schools, where applicants to these schools are asked to provide personal letters of reference. In doing so, the candidate contacts an individual to provide a reference for them and so is aware of the identity of the referee. To protect the confidentiality of the reference, UBC suggested two amendments. The Special Committee agrees the proposed wording of the amendments will clear up the ambiguity.

Recommendation 17:

Amend section 22(3)(h), as follows: "The disclosure could reasonably be expected to reveal the substance of a personal recommendation, or evaluation, character reference, or personnel evaluation, that was supplied in confidence by a third party, or, to reveal the identity of the third party who supplied the reference in confidence". A corresponding amendment would be required to repeal section 22(5).

The Special Committee also considered a submission from the University of Victoria to make explicit in the Act the university's authority to disclose personal information about degrees, displomas and certificates. It proposed a minor amendment to section 22(4)(i) to include academic credentials as a discretionary benefit similar to a licence or permit, which we think is a sensible suggestion.

Recommendation 18:

Amend section 22(4)(i) by adding "degree, diploma or certificate".

Division 4 – Public Interest Paramount

Section 25 Information must be disclosed if in the public interest

Section 25 is a general override provision that obligates the head of a public body to disclose information where disclosure is clearly in the public interest. Even if information falls within an exception to disclosure, section 25 requires the release of the information. The current wording of subsection (1) permits the head of a public body to disclose information "(a) about a risk of significant harm to the environment or to the health and safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest."

The OIPC submission described the wording of section 25(1) as too narrow to have any real impact. It argued that the legislative criteria for release of records in the public interest must be broadened to mandate the disclosure of non-urgent information that nevertheless concerns a matter of clear public interest, such as a report addressing how a public authority dealt with a public health issue. Similar proposals were submitted by advocacy groups, unions, librarians and a drafter of the original Act. The Freedom of Information and Privacy Association, for example, suggested an amendment to take into account the ruling on public interest by the Supreme Court of Canada in Grant v. Torstar Corp.

The Special Committee reviewed the relevant sections of this court decision, including para. 102 which suggests that to qualify as a topic of "public interest", "it is enough that some segment of the community would have a genuine interest in receiving information on the subject." We think there is a case for adding this type of criterion to the existing list.

Recommendation 19:
Review section 25(1) in light of the Supreme Court of Canada decision, Grant v. Torstar Corp.

Part 3 – Protection of Privacy

Part 3 of the *Feedom of Information and Protection of Privacy Act* consists of two divisions. Division 1 contains provisions relating to the collection, protection and retention of personal information by public bodies. Division 2 covers the use and disclosure of personal information by public bodies.

Privacy provisions

Government submission

The Government submission was presented to the Special Committee on March 24, 2010. It described the Act's privacy provisions governing the collection, use and disclosure of personal information as representing "highly prescriptive, rules-based legislation". Government's overall conclusion is that the current Act has ill-defined terms that result in multiple conflicting interpretations and impede joint coordinated programs due to confusion over what is permitted.

Key restrictions of the Act include the limitations on collection, in particular the inability for an individual to consent explicitly to the collection of their personal information by a public body or its use for a different purpose. This inability to consent can become a problem when public bodies are considering how the information can be used later on. The Government submission pointed out that there are more liberal provisions for collection, use and disclosure of similar information in the *Personal Information Protection Act* that covers private sector organizations.

Another limitation is the wording in the statute that creates impediments in the implementation of consistent-purpose programs. For example, section 33.2(d), added in 2005, is difficult to operationalize at the bureaucracy level. The current challenge facing government is how to share a person's personal information with, say, two different programs they have some involvement with.

Also, the wording of the Act inhibits the government's ability to embrace the recent IT trend toward cloud computing for efficiency measures or just good business practices.

To summarize, the nature of the way government works has changed significantly since the Act was written. Government ministries and agencies are encountering common challenges to implement innovative ways of providing more effective, integrated services to citizens, due to the limitations in the Act. The major thrust of their recommendations is to break down barriers across ministries in the interest of sharing information to deal with increasingly complex health and social issues:

- permitting an individual to consent to collection, use and disclosure
- allowing indirect collection of information where a citizen is involved in an integrated program, or where a ministry sees a benefit to a citizen
- recognizing the range of common-purpose programs and activities

- recognizing the fact that government works in a horizontal way to try and deliver the best services to citizens and needs to share information with public bodies and non-public bodies

- recognizing that social media make jurisdictional boundaries artificial and promote engagement

- taking advantage of commercial opportunities, including cloud computing

- adopting a broader approach to research, including applied research for program planning/evaluation

Some committee members were sensitive to the reservations of the OIPC and privacy advocates about the collective impact the proposed amendments would have on privacy rights. They also questioned whether the concept of consent was meaningful because of the power imbalance between the clients and providers of on-line, integrated government services. The majority of committee members, though, are in favour of adding consent provisions to the public sector privacy law, and clarifying the definition of research.

Recommendation 20:

Amend the Act to allow an individual to consent to the collection, use and disclosure of their personal information by a public body (similar to the *Personal Information Protection Act*).

Recommendation 21:

Amend the Act to include language confirming a broader approach to research so that applied research into issues, facts, trends, etc for the purpose of program planning and/or evaluation can be undertaken, provided that only de-identified data are used.

The Special Committee shared a common position on the other five government recommendations. We do not support the idea of indirect collection of personal information, without consent, except for the extenuating circumstances specified in the existing Act, nor the addition of an implicit-consent clause. With regard to the recommendations promoting information sharing, we do not think a compelling case was made in general terms to expand the consistent-purpose provision, and the language of the amendments was not specific enough to guide committee members during their deliberations.

Lastly, we are not prepared to recommend amending the provision in the Act prohibiting the storage of information outside Canada to take into account changes in information technology. We believe it is important to protect the integrity of records held by BC public bodies as much as we can. At the same time we are aware that controlling data transfers poses challenges for a provincial jurisdiction located adjacent to the USA.

OIPC submission

The OIPC submission, presented to the Special Committee on March 31, 2010, also focused on the privacy provisions of the Act. The submission pointed out that new information technologies enable data sharing initiatives on a scale and frequency that were never contemplated at the time the Act was drafted. The new ways in which the personal information contained in electronic databases is being collected, used and disclosed in data sharing projects raise significant privacy issues. When there is a bulk disclosure of personal information from a large database of one public body to another public body, citizens usually do not know how their personal information is being reconfigured, who is accessing it, for what purpose, whether it is accurate and how they can access it. This is particularly true where the transferred data is linked with personal information in other databases.

For this reason, the OIPC argued the public must be engaged in discussions around protecting privacy rights in data sharing projects. Its submission recommended that a code of practice be developed by government in an open and transparent manner with stakeholder consultation through something like a White Paper process. A public consultation process on data sharing was successfully conducted by government and the Commissioner's office in Britain in recent years.

The Special Committee supports the idea of a consultation process because we see it as a way to educate British Columbians on how the Act works now and how requests are treated by public bodies. We have concerns, though, about the prescriptive tone and broad scope of this OIPC amendment (as well as the one requiring the Commissioner's approval for data-sharing initiatives). Our own recommendation to government in regard to consultation is more modest.

Recommendation 22:

Consider holding public consultations on data sharing initiatives.

The OIPC submission also stated that a government-appointed Chief Privacy Officer is urgently required to act as a privacy advocate in the decision-making process and to ensure that privacy is fully considered and respected in any new initiative. This recommendation had been made by the former Information and Privacy Commissioner, and the current A/Commissioner in his investigation report into a recent privacy breach.

While the Special Committee is reluctant to create a new layer of bureaucracy, we think there is a need to educate ministries about what they can and cannot do in regard to privacy matters.

Recommendation 23:

Appoint a Government Chief Privacy Officer.

The OIPC submission suggested too that some form of specific ethics review is necessary and desirable for government's data sharing activities for the purposes of research. Complementary research-governance measures should be adopted in addition to the approval role for the OIPC.

A committee of experts should be appointed by government that would function in a manner similar to research ethics boards of universities and the stewardship committees of the Ministry of Health Services. It would apply the criteria in s. 35(1) of the Act and such other criteria as are considered desirable in the committee's terms of reference. The committee's approval should be a mandatory precondition to disclosure of personal information by any public body for research purposes.

Recommendation 24:

Amend the Act to require that data sharing projects for the purpose of research must be subject to ethics review by an arm's length stewardship committee.

Lastly, the OIPC submitted that it should be specified in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of databases. This requirement should be extended to health authorities as they use databases containing very sensitive personal information to a significant degree.

The Special Committee supports this proposal because it would save money down the road and offer the best protection for citizens' privacy.

Recommendation 25:

Add a requirement in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries.

Public input

The Special Committee also considered the public input on the Act's privacy provisions. After careful consideration, we concluded that a privacy charter and the appointment of a privacy officer for each public body are both unnecessary. Also, as noted earlier in this section, we are not in favour of lifting the ban on disclosure and storage of personal information outside Canada at this time.

Other proposals we considered included requests that section 27 be clarified with respect to the collection of employee personal information. BC Hydro, UBC and members of the BC Branch of the Canadian Bar Association suggested harmonizing the provisions of the Act with the private sector privacy law so that public bodies can conduct employment investigations and collect employee personal information directly/indirectly without notice.

The Special Committee believes the province's privacy laws should be consistent, wherever possible. We also agree with lawyers who work in the privacy field that the language of the amendment should make it clear that employment investigations conducted without consent would not permit targeted or indiscriminate collection of information or monitoring that has no reasonable basis.

Recommendation 26:

Amend the Act to reflect the approach taken in the *Personal Information Protection Act* with respect to the collection of employee personal information.

Individual citizens at the Victoria hearing urged the Special Committee to consider including provisions that allow health care providers to share health information with immediate family members. The written submission of the BC Schizophrenia Society, Vernon branch recommended that professionals in the mental health community be educated more thoroughly about information sharing with family members, since the existing Act permits disclosure in certain circumstances.

The Special Committee has struggled with this complex legal issue. While we are sympathetic to caregivers seeking information, we are also mindful that some adults do not want their information shared with family members, and that the privacy of all individuals must be protected.

Recommendation 27:

Re-examine the protocols regarding sharing health information with immediate family members.

The Special Committee also considered two requests to amend the Act to accommodate health-related research. The Canadian Institute for Health Information requested that health care bodies be permitted to disclose health data without the individual's consent so that the Institute can analyze resource allocation and health human resource planning across jurisdictions. The submission of Population Data BC expressed concern that ambiguities in section 35 of the Act can cause delays in access to administrative data for research projects.

The Special Committee agrees that personal health information is vital to research and future planning, as long as the data are de-identified to protect personal privacy.

Recommendation 28:

Amend section 35 of the Act to permit a health care body to disclose de-identified personal health information without the individual's consent for legitimate research purposes.

Part 4 – Office and Powers of the Information and Privacy Commissioner

Part 4 of the *Freedom of Information and Protection of Privacy Act* establishes the Information and Privacy Commissioner (Commissioner) and a supporting office. The Commissioner has a continuing responsibility to ensure that public bodies are complying with the letter and spirit of the Act. The Commissioner's powers include investigating complaints and reviewing the decisions of the heads of public bodies on requests for information under the Act.

Section 42 General powers of commissioner

In regard to this section, the previous statutory review committee made the following recommendations in its 2004 Report:

> *Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.*
>
> *Combine the complaint process and the review and inquiry process - referred to in sections 42(2) and 52(1) respectively - into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act and other allegations of non-compliance with the Act.*

During the consultation process, the Special Committee was informed by the Ministry of Citizens' Services that these two recommendations remain under consideration. We endorse the call made by the OIPC for their speedy implementation.

Recommendation 29:

Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

Recommendation 30:

Combine the complaint process and the review and inquiry process - referred to in sections 42(2) and 52(1) respectively - into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act and other allegations of non-compliance with the Act.

The Special Committee also considered and rejected the OIPC request to give the Commissioner the power to ensure compliance with the *Document Disposal Act*. We believe the existing oversight undertaken by the Public Documents Committee and the all-party Select Standing Committee of Public Accounts of the Legislative Assembly is adequate.

Part 5 – Reviews and Complaints

Section 56 Inquiry by commissioner

Section 56 establishes the process to be followed by the Commissioner when conducting an inquiry to settle a matter under review and stipulates that such an inquiry must be completed within 90 days.

The OIPC informed the Special Committee that the Office had exceeded the 90-day limit in order to complete almost half of the 586 request-for-review files that were closed in 2009. It pointed out that section 56 is currently silent about the ability to extend the 90-day timeline, unlike section 50(8) of the *Personal Information Protection Act* that allows the Commissioner to specify a later date.

The Special Committee agrees that the Commissioner should be permitted to extend this time limit, for practical reasons and in the interests of consistency with the private sector privacy law.

Recommendation 31:

Amend section 56 to permit the Commissioner to extend the 90-day time limit to review access requests in a manner that is consistent with s. 50(8) of the *Personal Information Protection Act.*

Section 59 Duty to comply with orders

Section 59 sets out the duty of the head of a public body or the service provider to comply with a Commissioner's order within 30 days of delivery of the order. If an application for judicial review of the order is brought within the 30 days, it imposes an automatic stay of the Commissioner's order unless the Court orders otherwise. Because the automatic stay is not time limited, a third party can neglect or refuse to proceed with the judicial review.

In regard to this section, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order.*

The Special Committee was informed by the Ministry of Citizens' Services that this recommendation remains under consideration, and we urge its speedy implementation.

Recommendation 32:

Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order.

Part 6 - General Provisions

Section 66 Delegation by the head of a public body

Section 66 of the Act authorizes the head of a public body (but not of a local public body) to delegate any of the head's duties, powers or functions to another person.

The submission of the Regional District of Fraser-Fort George pointed out that currently under section 66(3), the head of a local government body cannot delegate any of the duties assigned to that position. Its request for an amendment is endorsed by the Special Committee.

Recommendation 33:

Amend section 66 of the Act to include local government bodies in order that local governments have the option of appointing the Chair of the Board or the Mayor of the municipality as the head of the public body with the ability to delegate the duties, power or function to staff.

Section 71 Records available without request

Section 71 states that the head of a public body may designate records that are appropriate for routine release and make them available without a formal access request. To encourage greater use of this provision, the previous statutory review committee made the following recommendation in its 2004 Report:

> *Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.*

The Special Committee learned from the Ministry of Citizens' Services that this recommendation still remains under consideration. We call for its speedy implementation as a way to promote open government.

Recommendation 34:

Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

Section 75 Fees

Section 75 allows public bodies to charge fees for certain services which they provide in the processing of formal FOI access requests and provides guidance in assessing or waiving such fees.

The maximum fees for service are set out in the Schedule in section 7 of the *Freedom of Information and Protection of Privacy Regulation* (B.C. Reg. 323/93). This fee schedule has not been amended since 1993 and so reflects the state of information technology at that time.

During the consultation process, the Special Committee received considerable input on the topic of fees, and opinion was divided on the question of whether fees are, in fact, a barrier to the right of access. Some members of the public identified "unreasonable fees" as a barrier to access rights, whereas local public bodies and lawyers argued that fees should be more realistic.

The Special Committee agrees with the original drafters of the Act that fees were never intended to be so prohibitive that people could not make applications for records. Examples of fees cited by witnesses struck some committee members as "quite astronomical" and defeating the whole purpose of access rights – for example, $16.50 a minute for the cost of using a central mainframe processor for producing a record. We believe a review of the fee schedule is long overdue and recommend that it be updated to reflect current technology.

Recommendation 35:
Review the Schedule of Maximum Fees with an emphasis on meeting the original objectives of the legislation and use the criterion of reasonableness throughout the whole process.

Summary of Recommendations

The Special Committee urges government to implement in a timely manner its recommendations for legislative amendments to the *Freedom of Information and Protection of Privacy Act* (the Act).

Part 1 - Introductory Provisions:

1. Add a new section 2(3) to acknowledge that information technology plays an important role in achieving the dual purposes of the Act by facilitating the routine disclosure of general information as well as enhancing safeguards for privacy protection.

2. Add a new section 2(4) to require that for an infringement of the right to privacy to be lawful, it must be proportional to the public interest that is achieved.

3. Include the British Columbia Society for the Prevention of Cruelty to Animals by using definition (b) of *public body* in Schedule 1 that makes provision for adding an "other body" by regulation to Schedule 2; and add the proviso that access rights pertain only to those records that relate to this Society's statutory powers.

4. Expand the definition of "public body" in Schedule 1 to include any corporation that is created or owned by a public body, including an educational body.

5. Amend Section 3 to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

6. Amend section 3(1)(e) by replacing "employees" with "faculty members and teaching support staff" of a post-secondary educational body.

Part 2 - Freedom of Information:

7. Add a new section at the beginning of Part 2 of the Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

8. Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

9. Amend section 9(2) of the Act to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

10. Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

11. Amend sections 5 and 9 to allow applicants a right of access to original records if reasonable.

12. Amend section 11 to reduce the time allowed for file transfers to ten business days.

13. Make section 14 a mandatory exception, by changing "may refuse" to "must refuse" except when the public body is the client and can choose to waive privilege, or, if the client is a third party, the client agrees to waive privilege.

14. Amend section 14 of the Act to state that decisions on the privileged status of materials when FOI requests are made must be referred to the Supreme Court of British Columbia.

15. Amend section 20(3) to provide for immediate release of all requested records if 90 days have elapsed since receiving the applicant's request; and to provide that an access request may be refused if the information will be published according to a statutory schedule.

16. Amend section 22(2) to state that the personal information of an individual who has been dead for over 20 years is a relevant consideration in determining whether the disclosure of the deceased's personal information would be an unreasonable invasion of personal privacy.

17. Amend section 22(3)(h), as follows: "The disclosure could reasonably be expected to reveal the substance of a personal recommendation, or evaluation, character reference, or personnel evaluation, that was supplied in confidence by a third party, or, to reveal the identity of the third party who supplied the reference in confidence." A corresponding amendment would be required to repeal section 22(5).

18. Amend section 22(4)(i) by adding "degree, diploma or certificate" granted to the third party by a public body.

19. Review section 25(1) in light of the Supreme Court of Canada decision, Grant v. Torstar Corp.

Part 3 - Protection of Privacy:

20. Amend the Act to allow an individual to consent to the collection, use and disclosure of their personal information by a public body (similar to the *Personal Information Protection Act*).

21. Amend the Act to include language confirming a broader approach to research so that applied research into issues, facts, trends, etc for the purpose of program planning and/or evaluation can be undertaken, provided that only de-identified data are used.

22. Consider holding public consultations on data sharing initiatives.

23. Appoint a Government Chief Privacy Officer.

24. Amend the Act to require that data sharing projects for the purpose of research must be subject to ethics review by an arm's length stewardship committee.

25. Add a requirement in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries.

26. Amend the Act to reflect the approach taken in the *Personal Information Protection Act* with respect to the collection of employee personal information.

27. Re-examine the protocols regarding sharing health information with immediate family members.

28. Amend section 35 of the Act to permit a health care body to disclose de-identified personal health information without the individual's consent for legitimate research purposes.

Part 4 - Office and Powers of the Information and Privacy Commissioner:

29. Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

30. Combine the complaint process and the review and inquiry process - referred to in sections 42(2) and 52(1) respectively - into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act and other allegations of non-compliance with the Act.

Part 5 - Reviews and Complaints:

31. Amend section 56 to permit the Commissioner to extend the 90-day time limit to review access requests in a manner that is consistent with section 50(8) of the *Personal Information Protection Act.*

32. Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order.

Part 6 - General Provisions:

33. Amend section 66 of the Act to include local government bodies in order that local governments have the option of appointing the Chair of the Board or the Mayor of the

municipality as the head of the public body with the ability to delegate the duties, power or function to staff.

34. Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

35. Review the Schedule of Maximum Fees with an emphasis on meeting the original objectives of the legislation and use the criterion of reasonableness throughout the whole process.

Appendix A: Schedule of Meetings

October 26, 2009	Organization
October 28, 2009	Briefings
February 2, 2010	Public Hearing, Vancouver
February 3, 2010	Public Hearing, Victoria
February 11, 2010	Organization
March 24, 2010	Briefing
March 31, 2010	Briefing
May 5, 2010	Deliberations
May 19, 2010	Deliberations
May 25, 2010	Deliberations
May 26, 2010	Deliberations
May 31, 2010	Adoption of Report

Appendix B: Witness List

Abbsry Used Tires Ltd., Wade Larson, Sub-51

Marilyn Abram, Sub-75

AMS Student Society of UBC Vancouver, Adrienne Smith, Sub-104

Animal Rights Coalition, Donna Liberson, 02-Feb-10 (Vancouver) Sub-24

Douglas Babcook, Sub-62

Alexis Barken, 02-Feb-10 (Vancouver) Sub-30

Don Barz, Sub-85

Hollister Baxter, Sub-13

BC Civil Liberties Association, Micheal Vonn, Sub-103

BC Freedom of Information and Privacy Association, Darrell Evans, Vincent Gogolek, 02-Feb-10 (Vancouver) Sub-22

BC Government and Service Employees' Union, Carol Adams, Sub-107

BC Health Coalition, Alice Edge, Rachel Tutte, Sub-110

BC Schizophrenia Society - Vernon, Beatrice Cormier, Sub-21

Clare Marie Belanger, Sub-1

Adrian Blais, Sub-49

Ron Bolin, Sub-40

Robert Botterell, 02-Feb-10 (Vancouver) Sub-25

British Columbia Hydro and Power Corporation, Scott Macdonald, Sub-87

British Columbia Library Association, Kenneth Cooley, Sub-95

British Columbia Lottery Corporation, Constance Ladell, Sub-96

British Columbia School Trustees Association, Connie Denesiuk, Stephen Hansen, Sub-84

Chris Budgell, 02-Feb-10 (Vancouver) Sub-23

Canadian Association of Journalists, Stanley Tromp, 02-Feb-10 (Vancouver) Sub-14

Canadian Bar Association, British Columbia Branch, Freedom of Information and Privacy Law Section, Alexis Kerr, Janina Kon, Sub-102

Canadian Centre for Policy Alternatives, Keith Reynolds, 03-Feb-10 (Victoria) Sub-35

Canadian Institute for Health Information, John Wright, Sub-77

Canadian Taxpayers Federation, Maureen Bader, Sub-41

Lynn Christensen, Sub-113

City of Chilliwack, Karla Graham, Sub-101

City of Port Moody, Colleen Rohde, Sub-111

Pauline Cohen, Sub-19

Confederation of University Faculty Associations of British Columbia, Rob Clift, 02-Feb-10 (Vancouver) Sub-97

CUPE BC Division, Barry O'Neill, Sub-83

Tom Currelly, Sub-46

David Dahm, Sub-114

Annette Davidson, Sub-66

David DeCosse, 02-Feb-10 (Vancouver) Sub-29

Donna Dewdney, Sub-20

David Disney, Sub-59

District of North Vancouver, James Gordon, Sub-38

Dogwood Initiative, Morgan Blakley, 03-Feb-10 (Victoria) Sub-36

Curtis Eastcott, Sub-61

Lyne England, 03-Feb-10 (Victoria) Sub-33

Vince Fairleigh, Sub-65

Josef Fischer, Sub-12

Rachel Forbes, Sub-88

Fraser Valley Real Estate Board, Deanna Horn, Sub-90

Friends of the Chilliwack River Valley, Wendy Bales, Zvonko Bezjak, Glen Thompson, 02-Feb-10 (Vancouver)

Norrie Froman, Sub-57

David Galloway, Sub-60

Ted Gerk, 03-Feb-10 (Victoria) Sub-32

George Good, Sub-71

Government of British Columbia, Ministry of Citizens' Services, Sharon Plater 28-Oct-09 (Victoria)

Government of British Columbia, Ministry of Citizens' Services, Kim Henderson, 21-Mar-10 (Victoria)

Government of British Columbia, Ministry of Citizens' Services, Dave Nikolejsin, 21-Mar-10 (Victoria)

Government of British Columbia, Ministry of Housing and Social Development, Cairine MacDonald, 21-Mar-10 (Victoria)

Government of British Columbia, Ministry of Public Safety and Solicitor General, David Morhart, 21-Mar-10 (Victoria)

Kevin Granger-Brown, Sub-44

Glenn Hallworth, 03-Feb-10 (Victoria) Sub-34

James Happer, Sub-70

Tony Hetman, Sub-52

Richard Holmes, Sub-68

Hospital Employees' Union, Judy Darcy, Sub-92

J.C. Hunter, Sub-76

Information Technology Association of Canada, Bill Munson, Sub-94

Insurance Corporation of British Columbia, David Wedemire, Sub-99

Dennis Jaques, Sub-42

Garth Johnson, Sub-69

Alice Johnston, Sub-81

Clint Kanester, Sub-9

George Kaufmann, 02-Feb-10 (Vancouver) Sub-27

Heather Keenan, Sub-15

Mike Kennedy, Sub-43

Gemma Laska, Sub-85

Law Society of British Columbia, Jeffrey G. Hoskins, QC, Sub-17

Local Government Management Association, Paul Hancock, Sub-82

Josie Lofting, Sub-3

Bruce MacLeod, Sub-74

D.H. Macleod, Sub-5

Jeff Marta, Sub-2

Kate Maxon, Sub-79

Linda Meyer, 02-Feb-10 (Vancouver) Sub-26

Pat Morton, Sub-56

Croft Murphey, Sub-47

Murrin Construction Ltd., Lindsay McInnis, Sub-78

Sy Murseli, Sub-16

Office of the Information and Privacy Commissioner, Catherine Tully, 28-Oct-09 (Victoria)

Office of the Information and Privacy Commissioner, A/Commissioner Paul Fraser, Celia Francis, Helen Morrison, Catherine Tully, 31-Mar-10 (Victoria)

Brandon Parker, Sub-50

Beatrice Patrick, 02-Feb-10 (Vancouver) Sub-28

Steven Patterson, Sub-7

Rodney J. Philippson, 02-Feb-10 (Vancouver)

Glenn Pineau, Sub-45

Arlene Pippolo, Sub-58

Population Data BC, Nancy Meagher, Sub-117

Regional District of Fraser-Fort George, Karla Jensen, Sub-89

Sharon Sadler, Sub-52

Janine Sakowicz, Sub-10

Salesforce.com, Kris Klein, Sub-116

Janet Sansalone, Sub-18

Alfred Schalm, Sub-72

Sharon Schnurr, Sub-6

David D. Schreck, Sub-11

Jill Scott, Sub-105

Roland Siegmund, Sub-63

Brian Skakun, Sub-98

Elizabeth Smith, Sub-53

Anne Spencer, Sub-73

Don Startin, 03-Feb-10 (Victoria)

Dave Stevens, Sub-80

Jason Testar, Sub-8

Donna Thompson, Sub-112

Elizabeth Thompson, 03-Feb-10 (Victoria) Sub-93

Bill Tozer, Sub-48

Sandra Trudell, Sub-67

Trial Lawyers Association of British Columbia, Bentley Doyle, Sub-118

University of British Columbia, Lorene Novakowski, Fasken Martineau, Sub-108

University of Victoria, Julia Eastman, Sub-106

Nancy Van Veen, Sub-4

Vancouver Island Strata Owners Association, Deryk Norton, Harvey Williams, 03-Feb-10 (Victoria) Sub-37

A.N. Thomas Varzeliotis, Sub-86

Victoria Police Department and Vancouver Police Department, Debra Taylor, Sub-100

Sally Volkers, Sub-64

Warren Walker, 02-Feb-10 (Vancouver) Sub-31

Mark Weiler, Sub-109

Josette Wier, Sub-39

Jonathan Young, Sub-55

The Law Society
of British Columbia

Submission to the Special Committee of the Legislative Assembly of British Columbia on the Review of the *Freedom of Information and Protection of Privacy Act*

January 22, 2010

The Law Society of British Columbia
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INTRODUCTION

The Law Society of British Columbia is the governing body of the legal profession in British Columbia. It was recognized and given statutory authority in legislation enacted in 1884. Today, the Law Society continues under the authority of the *Legal Profession Act*, which was enacted in 1998. The object and duty of the Law Society, as stated in s. 3 of the *Legal Profession Act*, is to uphold and protect the public interest in the administration of justice by, amongst other things, preserving and protecting the rights and freedoms of all persons.

The Law Society supports the principles of openness and accountability that the *Freedom of Information and Protection of Privacy Act* (the "*FOI Act*") is intended to promote. However, there are some concerns in connection with how the public interest in the administration of justice is affected by the *FOI Act* as well as about its application to a professional governing body such as the Law Society that we wish the Special Committee of the Legislative Assembly to consider. We have focused our attention on four points that we consider to be particularly important. The four points are set out in some detail below; however, they are best understood in the context of the Law Society's statutory mandate.

We start from the premise that both the *FOI Act* and the *Legal Profession Act* are intended to protect the public interest. The purposes of the *FOI Act* as set out in section 2(1) are to make public bodies more accountable to the public and to protect personal privacy by

- giving the public a right of access to records,
- giving individuals a right of access to, and a right to request correction of, personal information about themselves,
- specifying limited exceptions to the rights of access,

- preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

- providing for an independent review of decisions made under the Act.

The paramount duty of the Law Society under section 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice by

- preserving and protecting the rights and freedoms of all persons,

- ensuring the independence, integrity and honour of its members, and

- establishing standards for the education, professional responsibility and competence of its members and applicants for membership.

In many respects the requirements of both Acts are congruent and the public is well served. However, in some respects the public interests served by the Acts are at crossed purposes. The Law Society's concerns arise from these points of tension. Dealing with information that is subject to solicitor-client privilege (a civil right of supreme importance in Canadian law) is one place where such tension can arise; investigating allegations of lawyer misconduct or incompetence is another.

Some of the recommendations submitted by the Law Society in these submissions mirror recommendations made in 2004 (see recommendations 1 and 3 below). The balance of the recommendations are made as the result further developments in the law that we

consider affect the premises underlying the statute and therefore need to be addressed in the legislation.

I. SOLICITOR-CLIENT PRIVILEGE

1. Legal Advice

Section 14 of the *FOI Act* provides:

Legal Advice

> **14** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

In the *Lavallee* case (*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209, 2002 SCC 61) Madam Justice Arbour described solicitor-client privilege as a "*principle of fundamental justice and civil right of supreme importance in Canadian law*". The paramount duty to protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons means the Law Society's duty to protect the privilege of clients applies in all cases, not only in those where the Law Society is the custodian of the privilege as a result of its involvement with its members. The confidential relationship takes precedence over the rights of third parties to information, and only the client has the option of releasing privileged information arising from that relationship.

The Law Society's concern with section 14 of the *FOI Act* is that, by giving the head of a public body the discretion to refuse to disclose information that is subject to solicitor client privilege, it appears by implication to give discretion to disclose privileged information. In the *Lavallee* case Madam Justice Arbour concluded "*solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does*

not involve a balancing of interests on a case-by-case basis." In our view, there is no basis for a discretion to release privileged information. Disclosure must be refused.

RECOMMENDATION #1

The Law Society recommends that section 14 be made mandatory except when the public body is the client and can choose to waive privilege or, if the client is a third party, the client agrees to waive privilege.

2. Production to the Commissioner of information subject to solicitor-client privilege

Sections 44(1) and 44(3) of the *FOI Act* require production of any record to the Commissioner during an investigation or an inquiry under the *FOI Act*, and permit the Commissioner to examine such records, despite any privilege of the law of evidence. Subsection 44(2.1) provides that disclosure of a privileged document to the Commissioner at the Commissioner's request under subsection (1) does not affect the privilege. Although subsection 44(2.1) goes some way to limit the potential harm done by disclosure, in our respectful opinion, it does not go far enough.

The Law Society has a statutory obligation to investigate complaints made against lawyers, and in so doing may obtain privileged or confidential information of a lawyer's client. The Law Society can also be a party to litigation itself and, like other entities from time to time is required to seek advice and instruct counsel in connection with matters affecting its legal rights and obligations.

In the *Cypress Bowl* case (*B.C. Minister of Environment, Lands & Parks v. B.C. Information & Privacy Commissioner*, (1995) 16 B.C.L.R. (3d 64)), Mr. Justice Thackray confirmed that solicitor-client privilege is a principle that cannot be abridged by interpreting it narrowly, as the Commissioner had attempted to do by ordering the severance of certain documents related to giving legal advice. The Court held that s.4(2)

of the *FOI Act* (the "severance" provision) does not modify the common law principle of solicitor-client privilege which is incorporated into the *FOI Act* by s.14. Mr. Justice Thackray went on to say that the Commissioner does not need to look at documents that are subject to solicitor-client privilege in order to determine if they should be disclosed:

"*I have not seen Documents 254 and 311 and have no reason to do so. Neither, in my opinion, did the Commissioner. I am not suggesting that there are not cases wherein the Commissioner should not peruse the questioned documents. However, when a question of solicitor-client privilege is the issue that step should be taken only if necessary. It should never become routine."*

Since the *Cypress Bowl* case, the Supreme Court of Canada has had occasion to review in a significant manner, in a number of cases, the law concerning privilege, and has further and more firmly articulated the limits on disclosure of privileged documents. In the *Lavallee* case, the Supreme Court of Canada stated that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, and that the Court must therefore adopt stringent norms to ensure its protection. In order to pass the scrutiny of the *Charter*, therefore, any statutory provision affecting the privilege must only do so as minimally as possible.

In *Lavallee*, the Court determined that the impugned statutory provision (s. 488.1 of the *Criminal Code)* more than minimally impaired solicitor-client privilege. Three problems identified in the *Lavallee* case included:

- the naming of clients
- the fact that notice may not be given to clients
- the possibility of access by the Attorney General to the information prior to the determination of privilege.

We are concerned that all three of those failings exist in s. 44(1) and (3) of the Act at present should the Commissioner compel a public body (such as the Law Society) to produce information or documents in its possession over which a claim of solicitor-client privilege of a lawyer's client may be made. Production of such information would, at the very least, name clients. There is no statutory provision for notifying the clients that their privileged information is being required to be produced. Should the privileged information disclosed amount to evidence of an offence, the Commissioner by virtue of s. 47(4) may disclose that information to the Attorney General. This provision constitutes a *substantial*, not a minimal impairment of privilege.

Moreover, the Supreme Court of Canada has made clear in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* [2008] 2 S.C.R. 574 that an adjudication of privilege by the Federal Privacy Commissioner (or presumably anyone delegated by the Commissioner to make the decision), who is an administrative investigator and not an adjudicator, would be an infringement of privilege. While there are some differences between the federal *Personal Information Protection and Electronic Documents Act* and the provincial Act that is the subject of these submissions, in our opinion the decision of the Supreme Court of Canada on this point is apposite. Consequently, the purpose for which s. 44(3) contemplates the production of documents over which a claim of privilege is made would itself be an infringement of the privilege and would apply equally whether the documents were third-party documents in the hands of the public body or of the public body itself.

The Supreme Court of Canada's decisions in *Goodis v. Ontario (Ministry of Correctional Services)* [2006] 2 S.C.R. 32 and in the *Lavallee* case state that any statutory provision permitting access to privileged documents must, in order to pass constitutional scrutiny, be "absolutely necessary" and "no more than minimally impair the privilege." In our submission, access to privileged documents by the Commissioner is not "absolutely necessary" in these cases. Nor would such access no more than "minimally impair privilege". If the Commissioner were, in error, to determine that the documents were not privileged, that privilege would be absolutely impaired as the documents would

ultimately be disclosed to the party seeking them, and the privilege would be lost. This outcome is not "absolutely necessary", as a process that allows the court to make a determination, in a manner that we have in the past suggested, is available. The Law Society therefore urges that a process be developed through which contested claims of privilege can be decided by the Courts, which is the ultimate and proper arbiter of privilege.

RECOMMENDATION #2

We recommend that section 44(3) be amended to exclude from disclosure to the Commissioner all records that are subject to solicitor-client privilege. We recommend that where an issue arises about the validity of a claim of privilege, a process be devised that would permit the Court to rule on the issue, on notice to all persons whose privilege may be affected by the order.

II. DISCLOSURE HARMFUL TO LAW ENFORCEMENT – Section 15(1) and Schedule 1: Definition of "law enforcement."

Section 15(1)(a) of the *FOI Act* applies to Law Society investigations leading to disciplinary proceedings involving a penalty or sanction. The Information and Privacy Commissioner confirmed this in Order 163-1997. However, there are several other methods by which the Law Society protects the public that require investigations to which section 15(1)(a) might not apply.

Under Part 2 of the *Legal Profession Act*, the Benchers and the Credentials Committee are responsible for ensuring that no person becomes a lawyer in B.C. who is not of good character and repute or is otherwise unfit. It is common for an extensive Credentials investigation of an applicant to take place when there is a question of character or fitness. Preventing unfit persons from becoming lawyers is obviously a more effective way of

protecting the public than attempting to discipline them for transgressions affecting members of the public after they become lawyers.

Credentials investigations should have the same protection as investigations related to disciplinary functions performed by the Law Society. In the course of Credentials investigations, the Law Society frequently receives confidential information, often from confidential sources. Section 15(1) might not apply to protect that confidential information because the investigation does not or might not lead to the imposition of a penalty or sanction, and therefore, does not fall within the definition of "law enforcement" in Schedule 1 of the *FOI Act*.

Similarly, the Law Society maintains programs to determine competence of individual members and, when they are found wanting, to assist them to achieve a higher level of competence. Again, investigations leading to voluntary remediation are arguably not included in the definition of "law enforcement" because they do not or might not lead to the imposition of a penalty or sanction.

The Law Society is authorized by section 33 of the *Legal Profession Act* to conduct audits to ensure that lawyers are maintaining proper records and following the requirements of the Act and the Law Society Rules concerning accounting for money held in trust. Audits may be initiated on the basis of confidential information, and confidential information is very often obtained during the audit. The purpose of the audit is to enforce the law with respect to lawyers' trust accounts, but it is not always clear that the audit could lead to the imposition of a penalty or sanction. We are concerned that other provisions of the *FOI Act* might not be able to prevent the disclosure of audit reports obtained through section 33 of the *Legal Profession Act* if they could be termed "routine inspections".

Our third recommendation reflects our view that the ability of the Law Society to conduct investigations in order to fulfill its statutory obligations should be the same whether the

issue is punishment and possible exclusion from practice of a current member, or preventing an applicant from becoming a member, or some other regulatory function.

RECOMMENDATION #3

We recommend that the definition of "law enforcement" in Schedule 1 be expanded to include:

> (d) proceedings or investigations authorized by an Act to be conducted by a professional governing body in furtherance of its duties and obligations in the public interest.

Alternatively, we recommend using more specific and restrictive language to define "law enforcement" as it applies to professional governing bodies:

> (d) proceedings or investigations conducted by a professional governing body in furtherance of its duties and obligations in the public interest, including but not limited to investigations or audits regarding
>
> > (i) the qualification, character and fitness of an individual to become a member of the professional governing body or to be enrolled as a student under the authority of the professional governing body,
> >
> > (ii) the ability of a member of a professional governing body to practise and continue to practise a profession,
> >
> > (iii) a complaint, allegation or other information concerning the conduct of a member or former member of a professional governing body or a student under the authority of the professional governing body, and

compliance with rules or regulations governing the profession.

III. FEES – SECTION 75 AND REGULATIONS

The cost burden that has to be assumed by public bodies, and including in particular professional governing bodies, in complying with the provisions of the *FOI Act* remains of concern to the Law Society. Professional governing bodies receive no public funds. While the provincial government relies on a sizable tax base of over 3.7 million people, professional governing bodies are financed through assessments on relatively small groups of private individuals. Moreover, most of the applications under the *Act* made to governing bodies, such as the Law Society as an example, are made by persons who are not members of the governing body.

While it is, of course, appropriate for government to make the policy decision to provide certain services to members of the public at little or no cost and finance the cost of providing the services from general revenue, it is another thing to impose this requirement on relatively small organizations such as the professional governing bodies like the Law Society.

The *FOI Act* and the Regulations appear to contemplate that there are two types of persons who make applications under the *FOI Act*: individual applicants and commercial applicants. Policy considerations may militate in favour of ensuring that individuals who want to make applications are not precluded from doing so by reason of the risk of having to bear the costs of the public body in processing the request. Different policy considerations have been expressed, however, where the applicant is a commercial applicant. In such circumstances, where the application is made for information in connection with a business or venture for profit, the "actual cost" of the processing services is more justifiable, and this has been recognized in Reg 323/93.

In light of the Commissioner's Order F09-05, however, the Law Society submits that some statutory clarification is warranted. In that order, fees for certain services that the Law Society undertook in the course of processing an application under the *Act* were disallowed, including

- the cost of making working copies;
- staff time spent making working copies;
- staff time spent severing records;
- staff time spent drafting lists of records.

In many, and perhaps even all, circumstances, these sorts of services are inherent in or ancillary to the nature of activities listed in s. 75(1) of the *FOI Act.* Disallowing a fee for these services means, by necessity, that the public body cannot recover the actual cost of processing a request under the *Act* because some necessary services are, by virtue of the Commissioner's decision, apparently excluded by the *FOI Act*. Applicants, particularly commercial applicants, therefore are *not* having to pay the reasonable cost of their requests, and the public body is having to subsidize the cost of the service. It is not that the Commissioner considers these sorts of services to be necessarily *unreasonable*, just that it is not a s. 75(1)(a) "service."

In the past, a practice appears to have developed whereby a charge of 25¢ per photocopy (the "maximum fee" for photocopying) has been applied by public bodies through which, we expect, public bodies have attempted to recoup some of the ancillary or "overhead" services that may not be specifically provided for in the legislation. The charge of 25¢ per photocopy is the general charge allowed for photocopying services by the courts on costs matters and is generally approved by Registrars in reviews of lawyers' accounts. In Order F09-05, the Commissioner permits only the "actual cost" of photocopying. If this is to be the case, then the Law Society submits that the

ancillary costs must be recoverable at their actual cost. Otherwise, applicants, particularly commercial applicants, will receive a benefit at the cost of the public body. If the service is useful or reasonable in processing the application or is necessarily inherent in or ancillary to a service required to process a request, then the Law Society submits that it is reasonable to charge a commercial applicant the actual cost of that service. Statutory instruments should not place limits on the services that can be charged, at least to commercial applicants, provided they are reasonable services that aid in properly responding to the request.

RECOMMENDATION #4

We recommend that s. 75 and Regulation 323/93 be amended or clarified, in light of the Commissioner's Order F09-05 and particularly with respect to the cost of photocopying and ancillary services related to processing applications. We recommend that public bodies be permitted to charge for *all* services that are useful or reasonable in the processing of a request made under the *FOI Act* by a commercial applicant.

Four Distinguished Individuals to Receive Honorary Doctorates from TRU

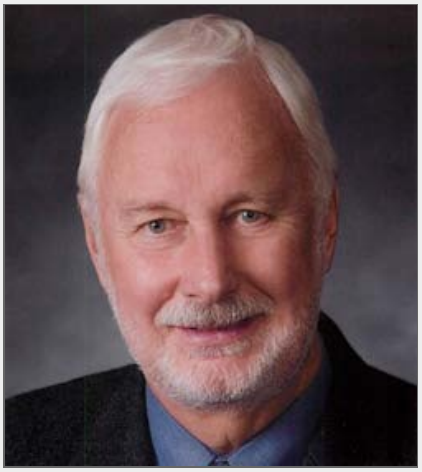
By dskoglund *on May 18, 2010*

Four Distinguished Individuals to Receive Honorary Doctorates from TRU: Claude Richmond, Richard Wagamese, Elspeth McDougall, and Ruth Williams

Thompson Rivers University will bestow four Honorary Doctorates during spring Convocation ceremonies June 3 and 4 in Kamloops. They will be awarded to Claude Richmond, Richard Wagamese, Elspeth McDougal and Ruth Williams.

More than 1,700 students are eligible to receive their degrees, diplomas and certificates at four Convocation ceremonies on the TRU Kamloops Campus.

Thursday, June 3: 10am, Convocation for School of Education, School of Social Work and School of Tourism



Honorary Doctorate recipient Claude Richmond

Claude Richmond will receive an Honorary Doctorate of Laws degree as recognition for over 20 years of steadfast public service to Kamloops, the Kamloops-Thompson region and to the Province. Now retired from the legislature, Mr. Richmond has been instrumental in increasing employment and accessibility for persons with disabilities in British Columbia, changing BC's Adoption Act and introducing the Super Host program. As Minister of Tourism and Expo 86, he tirelessly promoted the province for an event that hosted some 22 million people. Locally his economic development initiatives have included ensuring the BC Lottery Corporation's headquarters, Moly-cop and Pollard Banknote were located in Kamloops. Mr. Richmond never waivered in his support for Thompson Rivers University, including its quest for full university status that was granted in 2005.

2 pm, Convocation for Faculty of Arts and Faculty of Student Development

Richard Wagamese will receive an Honorary Doctorate of Letters degree recognizing his distinguished, award-winning career as an author. Without the benefit of a formal education beyond grade 9, he is the only Aboriginal Canadian to be honoured with the National Newspaper Award for

The Law Society
of British Columbia

June 24, 2010

Sent Via Email: jcampion@fasken.com

John Campion
President
Federation of Law Societies
c/o Fasken Martineau
66 Wellington Street West
Suite 4200, Toronto Dominion Bank Tower
Box 20, Toronto-Dominion Centre
Toronto, ON M5K 1N6

G. Glen Ridgway, QC
President

Dear John:

Re: Standing Committee on the Model Code of Professional Conduct

Thank you for your June 14, 2010 email advising of the development of the Standing Committee on the Model Code of Professional Conduct.

I write to request that a British Columbia representative be appointed to that committee. This is an area to which we have made considerable contributions in the past and we would like to continue to do so through active participation in this new committee.

Please call me to discuss how we might contribute to this important initiative.

Yours very truly,

G. Glen Ridgway, QC
President

c: Timothy E. McGee
CEO, Law Society of British Columbia

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The Law Society of British Columbia

June 24, 2010

SENT BY E-MAIL
junepreston@shaw.ca

June Preston, MSW
1268 Patrick Street
Victoria, BC V8S 4Y4

Dear June:

Re: Law Society of British Columbia – The Role of Life Benchers

G. Glen Ridgway, QC
President

I am writing at long last to follow-up on your e-mail regarding the particular role that Appointed Benchers might play after they become Life Benchers.

I appreciate the time and effort you invested in preparing this submission and sharing it with me. It is clear that your years of service to the Law Society as an appointed Bencher mean a great deal to you.

In considering the role of Life Benchers, whether they were appointed or elected as Benchers, I think we need to start from the premise that the Benchers have set term limits on their role as Benchers. Under our present scheme, once that term limit is reached, Benchers become Life Benchers as defined under the Rules with the following roles and responsibilities:

- The title Life Bencher is intended to honour an individual who has served the Law Society for four terms or who is a former President of the Law Society.

- Life Benchers are entitled to attend and speak at Benchers' meetings, but are not eligible to vote and may not exercise any of the powers of a Bencher

- Life Benchers may be appointed to Law Society committees, task forces and working groups, where they serve at the pleasure of the Law Society President and may also sit on discipline hearing panels

- Life Benchers may be invited to participate as part of a Law Society delegation in law-related community events (e.g., to attend Call and Admission Ceremonies, to fill available seats at events where the Law

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Society has purchased a table or block of tickets), as well as the annual Life Benchers dinner.

These features of the Life Bencher role have served the Law Society well over the years. While we might consider expanding the role of Life Benchers as you propose, we would also have to consider how a greater role would be reconciled with the role and responsibilities of the current Benchers. In particular, in providing greater outreach to the public, there are also some competing considerations which I highlight below.

It has long been Bencher policy (a sensible one in my view) that the President of the day is the only person entitled to speak on behalf of the Law Society. In practice, the President assumes this role on most significant matters but, at his or her discretion, also delegates this role to the CEO or others, as appropriate. On more routine matters, our Communications staff have been delegated this responsibility.

While we would hope all Life Benchers would support the Law Society's mandate and its strategic objectives at a personal level (as we know you do), public appearances and communications on behalf of the Law Society are the responsibility of the President, current elected and appointed Benchers and staff. While not expanding this role to include Life Benchers may limit the scope of our public outreach somewhat it is an appropriate trade off to ensure consistency of messaging and accuracy of information.

I believe that an enhanced role in our Bencher orientation process for Life Benchers, and in particular Life Benchers who were appointed Benchers, is the area of greatest opportunity among those which you have suggested. We have recently expanded and improved our Bencher orientation program and I am pleased to report it is much more comprehensive than what was offered upon your arrival. However, new Benchers can always benefit from hearing the experiences of others. If you would be interested in working with us in our Bencher orientation program we would be delighted to include you.

Once again, thanks for sharing your ideas with us and for your on-going support for the Law Society.

Yours very truly,

G. Glen Ridgway, QC

From:	June Preston
To:	Justine Clark
Cc:	Glen Ridgway, QC
Subject:	Thanks Re: Role of Life Benchers
Date:	Thursday, June 24, 2010 8:57:09 PM

Dear Ms Clark,

Thank you so much for forwarding President Ridgway's email.

I appreciate the time he gave to review my submission. He has answered my questions. I agree with his position on the role of Life Appointed Benchers with possible ongoing connections and contributions to the Law Society.

President Ridgway has expressed appreciation for the role of Life Appointed Benchers. It is an honour to have served as a Appointed Bencher and I remain keen to support Law Society goals and contribute to committee membership as invited.

I value and accept his invitation to contribute to the Law Society Appointed Bencher Orientation program.

My thanks to President Ridgway for his email to me,

June Carol Preston, MSW, Life Appointed Bencher

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RECEIVED
JUN 24 2010
THE LAW SOCIETY OF B.C.

June 17, 2010

Mr. Tim McGee
The Law Society of BC
845 Cambie Street
Vancouver, BC V6B 4Z9

Tim

Dear Mr. ~~Tim~~ McGee,

I am delighted to inform you that the Faculty of Law has recommended to the University of Victoria Senate that the Law Society Gold Medal Prize be awarded to:

Christina Drake

Please accept my warmest thanks for your continued support of our students. You and your guests will be invited to the **Student Awards Celebration** in honour of the academic achievements of UVic Law students. It will be held sometime in the spring term 2011, and you will receive an invitation closer to the time of the event.

I look forward to seeing you at the Student Award Celebration in 2011!

Best regards,

Donna

Donna Greschner
Dean

Hi, Tim,
Richard Margetts did a great job in presenting the medal yesterday!
DMG.