The Law Society of British Columbia

Agenda

Benchers

Date: Friday, December 7, 2018

Time: **7:30 am** Continental breakfast
8:30 am Call to order

Location: Bencher Room, 9th Floor, Law Society Building

Recording: ***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure an accurate record of the proceedings.***

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
CONSENT AGENDA:					
	The Consent Agenda 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. Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Governance and Board Relations, Kerryn Garvie prior to the meeting.				
1	Consent Agenda · Minutes of November 9, 2018 meeting (regular session) · Minutes of November 9, 2018 meeting (*in camera* session) · Language and gender reference corrections to BC Code rule 3.7-2 Commentary [1] · 2019 Fee Schedules	1	President	 Tab 1.1 Tab 1.2 Tab 1.3 Tab 1.4	 Approval Approval Approval Approval
EXECUTIVE REPORTS					
2	President's Report	10	President		Briefing
3	CEO's Report	10	CEO	Tab 3	Briefing

The Law Society of British Columbia

Agenda

4	Briefing by the Law Society's Member of the Federation Council	5	Herman Van Ommen, QC		Briefing
DISCUSSION/DECISION					
5	Mental Health Interim Report with Interim Recommendations	25	Brook Greenberg	Tab 5	Decision
6	Annual Fee Review Working Group: Final Report	15	Dean Lawton, QC	Tab 6	Discussion/ Decision
REPORTS					
7	Enterprise Risk Management Plan - 2018 Update	10	Craig Ferris, QC	Tab 7	Briefing
8	Year-End Reports:				Briefing
	· Access to Legal Services Advisory Committee	5	Jeff Campbell, QC	Tab 8.1	
	· Rule of Law and Lawyer Independence Advisory Committee	5	Jeff Campbell, QC	Tab 8.2	
	· Equity and Diversity Advisory Committee	5	Jasmin Ahmad	Tab 8.3	
	· Lawyer Education Advisory Committee	5	Dean Lawton, QC	Tab 8.4	
	· Legal Aid Advisory Committee	5	Nancy Merrill, QC	Tab 8.5	
	· Truth and Reconciliation Advisory Committee	5	Nancy Merrill, QC	Tab 8.6	
	· Mental Health Task Force	5	Brook Greenberg	Tab 8.7	
9	Law Firm Regulation Task Force Update	5	Steve McKoen		Briefing
10	Report on Outstanding Hearing & Review Decisions	2	Craig Ferris, QC	(*To be circulated at the meeting*)	Briefing

The Law Society of British Columbia

Agenda

FOR INFORMATION					
11	Identifying Section 3 Parameters			Tab 11	Information
12	Six Month Bencher Calendar – December to May 2019			Tab 12	Information
IN CAMERA					
13	*In camera* · Bencher concerns · Other business	20	President/CEO		Discussion/ Decision

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, November 09, 2018

Present:
Nancy Merrill, QC, 1st Vice-President
Craig Ferris, QC, 2nd Vice-President
Jasmin Ahmad
Jeff Campbell, QC
Jennifer Chow, QC
Barbara Cromarty
Anita Dalakoti
Jeevyn Dhaliwal
Martin Finch, QC
Brook Greenberg
Lisa Hamilton, QC
Roland Krueger, CD
Dean P.J. Lawton, QC
Jamie Maclaren, QC
Geoffrey McDonald
Steven McKoen
Christopher McPherson, QC
Phil Riddell
Elizabeth Rowbotham
Mark Rushton
Karen Snowshoe
Michelle Stanford
Sarah Westwood
Michael Welsh, QC
Tony Wilson, QC
Guangbin Yan
Heidi Zetzsche

Unable to Attend:
Miriam Kresivo, QC, President
Pinder Cheema, QC
Claire Marshall
Carolynn Ryan

Staff Present:
Don Avison
Gurprit Bains
Lance Cooke
Su Forbes, QC
Mira Galperin
Kerryn Garvie
Andrea Hilland
Jeffrey Hoskins, QC
David Jordan
Jason Kuzminski
Michael Lucas
Alison Luke
Jeanette McPhee
Doug Munro
Lesley Small
Alan Treleaven
Adam Whitcombe

Guests:	Karenna Williams	External Relations Executive Member, Aboriginal Lawyers Forum
	Margaret Mereigh	President, Canadian Bar Association, BC Branch
	Caroline Nevin	Executive Director, Canadian Bar Association, BC Branch
	Kari Boyle	Interim CEO, Courthouse Libraries BC
	Brenda Rose	Director, Community Engagement, Courthouse Libraries BC
	Herman Van Ommen, QC	Law Society of BC Member, Council of the Federation of Law Societies of Canada
	Dom Bautista	Executive Director, Law Courts Center
	Prof. Bradford Morse	Dean of Law, Thompson Rivers University
	Dr. Susan Breau	Dean of Law, University of Victoria

CONSENT AGENDA

1. Minutes & Resolutions

a. Minutes

The minutes of the meeting held on September 21, 2018 were approved as circulated, subject to the correction of two attendees at the meeting; the title of Mr. Bill Veenstra as "Past President" of the CBABC and the omission of Professor Bradford Morse.

The *in camera* minutes of the meeting held on September 21, 2018 were approved as circulated.

b. Resolutions

The following resolution was passed unanimously and by consent.

2019 Fee Schedules

BE IT RESOLVED to amend the Law Society Rules, effective January 1, 2019, as follows:

1. By rescinding Schedule 1 and substituting the following:

SCHEDULE 1 – 2019 LAW SOCIETY FEES AND ASSESSMENTS

A. Annual fee

1.	Practice fee (Rule 2-105 *[Annual practising fees]*)	2,260.17
2.	Liability insurance base assessment (which may be increased or decreased in individual cases in accordance with Rule 3-40 (1) *[Annual insurance fee]*):	
	(a) full-time practice	1,800.00
	(b) part-time practice	900.00
3.	Liability insurance surcharge (Rule 3-44 (2) *[Deductible, surcharge and reimbursement]*)	1,000.00
4.	Late payment fee for practising lawyers (Rule 2-108 (3) *[Late payment]*)	150.00
5.	Retired member fee (Rule 2-4 (3) *[Retired members]*)	125.00
6.	Late payment fee for retired members (Rule 2-108 (4))	nil
7.	Non-practising member fee (Rule 2-3 (2) *[Non-practising members]*) ...	325.00
8.	Late payment fee for non-practising members (Rule 2-108 (5)).....	40.00

9. Administration fee (R. 2-116 (3) *[Refund on exemption during practice year]*) 70.00

B. Trust administration fee

1. Each client matter subject to fee (Rule 2-110 (1) *[Trust administration fee]*) 15.00

C. Special assessments

D. Articled student fees

1. Application fee for enrolment in admission program (Rules 2-54 (1) (e) *[Enrolment in the admission program]* and 2-62 (1)(b) *[Part-time articles]*) 275.00
2. Application fee for temporary articles (R. 2-70 (1) (c) *[Temporary articles]*) 150.00
3. Application fee for temporary articles (legal clinic) (Rule 2-70 (1) (c)) 50.00
4. Training course registration (Rule 2-72 (4) (a) *[Training course]*) 2,600.00
5. Remedial work (Rule 2-74 (8) *[Review by Credentials Committee]*):
   (a) for each piece of work 100.00
   (b) for repeating the training course 4,000.00

E. Transfer fees

1. Application fee for transfer from another Canadian province or territory – investigation fee (Rule 2-79 (1) (f) *[Transfer from another Canadian jurisdiction]*) 1,150.00
2. Transfer or qualification examination (Rules 2-79 (6) and 2-89 (6) *[Returning to practice after an absence]*) 325.00

F. Call and admission fees

1. After enrolment in admission program (Rule 2-77 (1) (c) *[First call and admission]*) 200.00
2. After transfer from another Canadian province or territory (Rule 2-79 (1) (f) *[Transfer from another Canadian jurisdiction]*) 200.00

G. Reinstatement fees

1. Application fee following disbarment, resignation or other cessation of membership as a result of disciplinary proceedings (Rule 2-85 (1) (b) *[Reinstatement of former lawyer]*) 700.00
2 Application fee following 3 years or more as a former member (Rule 2-85 (1) (b)) 550.00
3. Application fee in all other cases (Rule 2-85 (1) (b)) 450.00

H. Change of status fees

1. Application fee to become retired member (Rule 2-4 (2) (b) *[Retired members]*) 35.00

2.	Application fee to become non-practising member (Rule 2-3 (1) (b) *[Non-practising members]*)	70.00
3.	Application fee for non-practising or retired member applying for practising certificate (Rule 2-5 (1) (b) *[Release from undertaking]*)	70.00

I. Inter-jurisdictional practice fees

1.	Application fee (Rule 2-19 (3) (b) *[Inter-jurisdictional practice permit]*)	500.00
2.	Renewal of permit (Rule 2-19 (3) (b))	100.00

J. Corporation and limited liability partnership fees

1.	Permit fee for law corporation (Rule 9-4 (c) *[Law corporation permit]*)	400.00
2.	New permit on change of name fee (Rule 9-6 (4) (c) *[Change of corporate name]*)	100.00
3.	LLP registration fee (Rule 9-15 (1) *[Notice of application for registration]*)	400.00

K. Practitioners of foreign law

1.	Application fee for practitioners of foreign law (Rule 2-29 (1) (b) *[Practitioners of foreign law]*)	700.00
2.	Permit renewal fee for practitioners of foreign law (Rules 2-29 (1) (b) and 2-34 (2) (c) *[Renewal of permit]*)	150.00
3.	Late payment fee (Rule 2-34 (6))	100.00

L. Late fees

1.	Trust report late filing fee (Rule 3-80 (2) (b) *[Late filing of trust report]*)	200.00
2.	Professional development late completion fee (Rule 3-31 (1) (c) *[Late completion of professional development]*)	500.00
3.	Professional development late reporting fee (Rule 3-31 (3) (b))	200.00
4.	Late registration delivery fee (Rule 2-12.4 *[Late delivery]*)	200.00
5.	Late self-assessment delivery fee (Rule 2-12.4)	500.00

M. Multi-disciplinary practice fees

1.	Application fee (Rule 2-40 (1) (b) *[Application to practise law in MDP]*)	300.00
2.	Application fee per proposed non-lawyer member of MDP (Rules 2-40 (1) (c) and 2-42 (2) *[Changes in MDP]*)	1,125.00**.**

2. In Schedules 2 and 3,

*(a) in the headings of the schedules, by striking the year "*2018*" and substituting "*2019*", and*

(b) by revising the prorated figures in each column according to 2019 fees set in Schedule 1.

EXECUTIVE REPORTS

2. President's Report

As President Miriam Kresivo, QC was unable to attend the meeting, First Vice-President Nancy Merrill, QC chaired the meeting in her absence. There was no President's report.

3. CEO's Report

Mr. Don Avison informed Benchers the Annual General Meeting would be reconvened on December 4, 2018 and that online voting would be provided. He reported that the Executive Committee had agreed to three additional remote locations: Courtenay, Prince Rupert and Surrey.

Mr. Avison said the Bencher by-election was underway and going well.

Mr. Avison reported on his attendance at the Federation of Law Societies meeting in Charlottetown, Prince Edward Island, and in particular, his attendance at the Chief Executive Officers forum. Topics covered included developments in the regulatory landscape, CanLII and data analytics.

The 11th Justice Summit took place on November 2 and 3, which Mr. Avison attended. The focus of the summit was on indigenous peoples and the administration of justice. Both Chief Justices and the Chief Judge were in attendance, as well as the Attorney General and a number of other government representatives. Mr. Avison reported that topics covered included Gladue reports, including both the process and development of the reports, and potential areas for reform and engagement. He encouraged Benchers to read the report of the 11th Justice Summit once it is made available.

Mr. Avison referred to the re-dedication of our plaque recognizing lawyers and students who died in the First and Second World Wars that was to take place during the coffee break at the meeting. Mr. Avison noted the efforts of Emily McKinnon in making this event happen.

4. Briefing by the Law Society's Member of the Federation Council

Mr. Herman Van Ommen, QC reported on his attendance at the Federation of Law Societies meetings in Charlottetown, Prince Edward Island. He mentioned that this year's conference centered on the topic of law and technology, artificial intelligence and what law societies should be doing about it. The discussion concerned how the current legal regulatory landscape is getting in the way of development of technology and the law, and that technology could be used to develop innovative solutions for clients. He suggested this was something the Benchers could consider. Mr. Van Ommen also reported on another lecture he attended on block chain technology, which is another piece of technology he thinks will have a significant impact on how business is conducted.

Mr. Van Ommen referred to a poll that took place about how law societies should respond to new technology. Everyone in the room agreed that it is not feasible to maintain the status quo and not allow anyone but lawyers to provide legal services. He thought this showed a general trend in people's thinking about how technology will form a greater part of providing legal services in the legal profession.

The Federation Council met and discussed the model code rule amendments concerning anti-money laundering. Mr. Van Ommen raised some issues about the way the rules are currently drafted and then voted in favour of the motion to amend the rules and the motion passed. The rules will now come back before the law society for consideration by the Benchers. Mr. Van Ommen emphasized the importance of the law society responding to concerns about money laundering and implementing these rules across the country rather than adopting a patchwork approach. He asked Benchers to balance the benefits of consistency across the country with getting the wording precisely right when it comes time to consider the issue.

DISCUSSION/DECISION

5. Mental Health Interim Report with Interim Recommendations

Mr. Brook Greenberg, Chair of the Mental Health Task Force, thanked the other members of the Task Force and Ms. Luke, staff lawyer, for their work to date and in drafting the report. Mr. Greenberg explained the report was divided into two parts: Part 1 covered research and background on the topic of mental health and substance use in the legal profession, and Part 2 covers the Task Force's recommendations to Benchers. Mr. Greenberg reiterated the recommendations represent initial recommendations and that there will be further work by the Task Force. The recommendations are intended to be incremental, relatively uncontroversial and focused on moving the project forward in a way that maintains momentum and sends a message to the profession and the public about the importance of the work that is being done.

Mr. Greenberg said there were two main aims with the recommendations: (1) to increase awareness of mental health and substance use issues and (2) to reduce stigma. The underlying purpose is to change how these issues are seen and treated within the legal profession.

The recommendations pay particular attention to educational initiatives within the Law Society itself, as this will better enable the Law Society to address these issues as they arise in a variety of contexts. The Law Society will lead by example by educating itself first. Mr. Greenberg said the hope is that, over time, there will be a culture shift and lawyers will be able to talk more openly about mental health and substance use issues, and seek support and guidance.

Mr. Greenberg highlighted some of the recommendations. First, he said there was a strong desire from staff for more education and training. Education and training would also be provided to

committee members and others who encounter mental health and substance use issues in the course of their work. In particular, Practice Advisors would receive more education and training to enable them to better deal with these issues. The legal profession would be reminded that dealing with Practice Advisors is a confidential process, and Practice Advisors would be in a position to advise lawyers about available resources. The Task Force has already identified and met with some organizations that are willing to be involved and provide training.

Mr. Greenberg also referred to other recommendations, including having registered psychologists available to provide support and guidance to staff, and expanding and improving people's understanding of the support provided by the service provider LifeWorks. Also highlighted were recommendations involving consultation with the Lawyer Education Advisory Committee regarding mandatory continuing professional development concerning mental health and substance use issues, and consultation with the Law Firm Regulation Task Force on including wellness topics as part of the self-assessment process.

Mr. Greenberg mentioned issues surrounding the credentials process, in particular the Law Society form for enrolment in the admission program. The Task Force is of the view that the form should be amended to remove the question relating to substance use and medical issues, and instead focus on conduct. He said the inclusion of the question on the form means students often do not seek support or treatment for fear of having to answer this question.

Finally, Mr. Greenberg referred to the mandatory reporting requirement in the BC Code of Professional Conduct and said it contains stigmatizing language that requires amendment. He said the Task Force believes the language is very problematic and should be changed.

Ms. Merrill opened discussion of the report.

Ms. Heidi Zetzsche commented that she did not think the report dealt with the underlying problem of why there are mental health and substance use issues in the legal profession. Mr. Greenberg said this was something that would be considered as part of next steps in 2019 and that it was important to take an evidence-based approach to identifying the cause of the problem, which may mean a survey is conducted in the future.

Ms. Guangbin Yan asked about the prioritization of the recommendations and what the ongoing budgetary implications would be. Mr. Greenberg responded that, assuming the recommendations are approved at the Bencher meeting in December, the focus would then be on implementing those recommendations. Next the Task Force would consider additional recommendations, including looking at a possible diversion or an alternate discipline approach. Mr. Greenberg said an initial amount had been set aside in the budget for training and education, but that additional resources would be required. His intention is that the recommendations would be implemented over time to spread out the cost.

Mr. Steven McKoen thanked Mr. Greenberg for his presentation and work on the Task Force to date, and encouraged the Task Force to consider how to incorporate wellness into the proposed training. Mr. McKoen also commented that he thought there was still an issue to be resolved in terms of the proposed changes to the model code.

Mr. Michael Welsh, QC inquired as to what happens once staff have identified an issue and asked what resources are available. Mr. Greenberg clarified that this is contemplated as part of the recommended education and training and that it will include what to do and not just how to identify if these issues exist.

Ms. Elizabeth Rowbotham asked about the service provider LifeWorks and whether the Law Society gets any information from them about how many people seek assistance and if people find it to be a useful resource. Mr. Greenberg responded that that has been identified as an area for further work. Greater consultation with LifeWorks is needed to figure out exactly what support they provide. Mr. Alan Treleavan, Director of Education & Practice, clarified that the Law Society receives regular reports from LifeWorks about the number of people they provide support to, broken down by lawyers, students and staff. He said the information is also broken down by the type of issue. Privacy of individuals is preserved as part of this reporting process. He recognized that there was scope for more useful data to be provided by LifeWorks that would have more practical value.

Ms. Dhaliwal asked if there was any movement in law schools to address the wellness issue and prepare people for the profession. Mr. Greenberg said the law schools are looking at ways to support students and remove barriers to seeking treatment. Studies show that mental health and substance use issues experienced in the legal profession start at law school. Students are not seeking help or accessing resources available because they do not want their ability to be called to the bar to be impacted.

Ms. Zetzsche commented on the availability of resources and if the Task Force has considered other funding options, such as asking members to pay another $25 per year so the entire profession could automatically have 10 counselling sessions. Mr. Greenberg recognized availability of resources is a problem and said the Task Force wants to do a survey to find out why people are not using resources, what resources would be useful, and make decisions in an informed and logical way. Mr. Treleavan clarified that members currently have access to counseling sessions with the LifeWorks program and that if anyone has a concern about anyone not being able to access appropriate services, please follow up with him.

Mr. Tony Wilson, QC acknowledged and thanked Mr. Greenberg for the work he has done to date to further this issue.

6. Amendment to Rule 7.1-3 of the Code of Professional Conduct

Mr. Craig Ferris, QC, as Chair of the Ethics Committee, introduced the item. He said the purpose of the memorandum before the Benchers was to seek approval to amend rule 7.1-3 of the BC Code and the text of the rule's associated commentary to reflect the changes indicated in the memorandum.

One of the goals of the Ethics Committee has been to maintain, wherever possible, consistency with the Model Code. Mr. Ferris referred to Mr. Greenberg's comments and the Mental Health Task Force's recommendation that rule 7.1-3(d) be amended to remove stigmatizing language. He outlined three options: (1) the Benchers could make no changes until the Ethics Committee had the opportunity to provide advice to the Benchers about what the Mental Health Task Force is proposing. The existing rule would be left in place, even though most people accept that the language is problematic. (2) The Benchers could adopt the language proposed by the Mental Health Task Force even though the Ethics Committee has not had an opportunity provide advice to the Benchers or discuss it with the Federation Council. (3) The Benchers resolve at this meeting to adopt the changes proposed by the Ethics Committee to make the rule incrementally better. The Ethics Committee would then work with the Federation to see if the rule could be improved further. If the Federation does not want to change the language as suggested, then the issue could come back before Benchers for consideration of a BC only alternative. Mr. Ferris favoured the third option.

Several Benchers expressed concern about approving the amendment to the rule as proposed by the Ethics Committee, as they thought it had the effect of approving stigmatizing language even though it was incrementally better than the current language. It was suggested that it would be better to change the language now rather than do an incremental change, only to have to come back at a later date to make further amendments. Or at minimum, make it clear that Benchers are looking to make further changes so people do not think we are in support of the stigmatizing language.

Other Benchers expressed concern about approving any changes to the Rule without the advice of the Ethics Committee and which had not been discussed with the Federation. While the change suggested by the Mental Health Task Force was seen as a worthwhile change to consider and possibly make, concern was expressed by some Benchers about there being a risk of getting a fractured Code after many years of trying to achieve consistency nationally. Some Benchers commented that changes to the Code should be done in an organized, systematic way to ensure uniformity across the country.

Mr. Ferris reiterated that he was committed to going to back to the Federation and discussing further changes to the Rule. However, he said if the Benchers do not approve the amended

language proposed at today's meeting that would be leaving in place language that was even more stigmatizing.

Mr. Ferris then moved that the text of rule 7.1-3 of the BC Code and the text of the Rule's associated Commentary be amended to reflect the changes indicated in the red-lined version of the Rule and Commentary presented in the memorandum. Mr. Riddell seconded the motion.

Ms. Stanford then moved an amendment to the motion to substitute the language from the Mental Health Task Force report. Mr. Jamie Maclaren seconded the motion.

Mr. Geoffrey McDonald proposed an amendment to Mr. Ferris' motion which would omit the last two sentences of Note 3 of the commentary. Mr. McDonald moved the amendment to the proposed amendment. Ms. Lisa Hamilton seconded the motion.

Mr. Greenberg said it was the Mental Health Task Force's intention to consult with the Ethics Committee about the stigmatizing language, that he was troubled by the possibility of voting for a provision that contains stigmatizing language and that the Benchers should not engage in drafting at the Bencher table. However, he suggested that the language needed to be revisited soon.

Mr. Martin Finch, QC suggested the issue be put off for another month to allow the matter to be considered further. Mr. Finch then made a motion to defer the consideration of Mr. Ferris' proposed resolution. The motion was seconded by Mr. Mark Rushton.

Ms. Merrill clarified that the motion before the Benchers was now if they should defer the matter so that it could be given further consideration.

Members of the Ethics Committee commented that they were in support of Mr. Ferris' motion and had full faith that he would bring the concerned expressed at the Bencher table today before the Federation.

In light of Mr. Finch's motion to defer, Mr. McDonald withdrew his motion.

Ms. Merrill clarified that the motion being considered, moved by Mr. Finch, was referral of the matter to the Ethics Committee to bring back before the Benchers at a later date. Ms. Merrill then called the question on the motion put forward by Mr. Finch. With 17 in favour of the motion and 7 opposed, the motion passed

REPORTS

7. New dual JD/JID degree at the University of Victoria Faculty of Law

Mr. Dean Lawton, QC and Ms. Karen Snowshoe reported that they attended the opening of the dual JD/JID program at the University of Victoria Faculty of Law in September. It is a brand new program, the first of its kind in the world. Students who go through the program will receive professional degrees in both Canadian common law and indigenous law.

Ms. Snowshoe gave a meaningful account of her experience attending the opening and how it impacted her personally. She said the program offered a beacon of hope and that the celebration of such a program was overwhelming, given the many years of indigenous laws and practices having to go underground. A lot of the leadership on indigenous issues in the past has been done by non-indigenous people, and the program reflects the opportunity to more fully engage the Indigenous community in providing that leadership. Mr. Lawton added a few observations; that the gift exchange was a symbol of the responsibility being taken on to continue the exchange of skills and knowledge. It was an optimistic experience and there was a real sense of something new happening.

8. Report on Outstanding Hearing & Review Decisions

Mr. Ferris gave a brief oral update on outstanding hearing and review decisions and thanked Benchers for making themselves available for hearings. He said they have started the new case management program and will be setting dates soon.

9. Financial Report – September YTD 2018

Ms. Jeanette McPhee, Chief Financial Officer, spoke to the materials in the package on the financial report for the third quarter. She said the forecast is a good news story, and that there will be a positive result by the end of the year. Revenue is ahead and will likely be ahead of budget at year-end.

Ms. McPhee reported that membership is up 3% (normally it is around 2%), and that we have the highest projection ever for Professional Legal Training Course students. There have been some cost increases in the Investigations and Monitoring, Discipline and Custodianships departments, but there savings to offset this. There will be additional costs incurred in 2019, but there are reserves to deal with this. Ms. McPhee confirmed the Trust Assurance program and Lawyers Insurance Fund are in good shape.

Mr. Ferris commented that we need to see if the increase in students is temporary or if it represents an upward trend. He referred to statistics presented to the Finance and Audit Committee that show 12% of all audits lead to a referral to the Professional Conduct department.

He said we need to start thinking about different ways to approach what appears to be a lot of problems with accounting in the legal profession.

In response to some questions from Benchers about the reserve funding and expected expenditure in the future, Ms. McPhee confirmed we have a working capital reserve that will be used to account for the expected increase in costs for 2019. In addition, any positive result from 2018 will be added to the reserves for 2019.

Ms. Guangbin Yan asked if staff could do more work to look at potential savings opportunities in other areas to reduce inefficiencies, for example, with the claim reimbursement system. Ms. McPhee confirmed this was something she would be looking at shortly.

Ms. Dhaliwal asked about whether it would be worth doing a deep dive into the Trust Assurance program. Mr. Ferris said it would be worth taking a serious look at the Trust Assurance program and how costs are recovered. Mr. Don Avison said this conversation had already been started at Leadership Council and that he would be looking at how the Law Society deals with a number of matters. He recognized that some of our operations have been done a certain way for a while and that there was likely room for improvement. He anticipated that in the New Year he would be in a position to come to the Benchers with some recommendations.

KG
2018-11-29

REDACTED MATERIALS

REDACTED MATERIALS

REDACTED MATERIALS

REDACTED MATERIALS

The Law Society of British Columbia

Memo

To:	Benchers
From:	Ethics Committee
Date:	November 14, 2018
Subject:	Language and gender reference corrections to BC Code rule 3.7-2 Commentary [1]

The Ethics Committee has turned its attention to the need for corrections to Commentary [1] to rule 3.7-2 of the Code of Professional Conduct for British Columbia (the "BC Code"), which do not substantively change the meaning or potential application of the provision. The corrections include improving the consistency of references using the definite article, where previously both indefinite and definite articles were used in a series of instances. Also corrected is a removal of an unnecessary gender-specific "his," used to refer to any specific client of a lawyer. In this case the correction can be made by replacing "his" with "the," without any unwanted change of meaning.

Resolution

Be it resolved that:

> The Commentary [1] to rule 3.7-2 of the BC Code be amended to reflect the changes indicated in the 'red-lined' version of the rule and Commentary presented below.

The current text of the provision in question is as follows:

> ### Optional withdrawal
>
> **3.7-2** If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.
>
> ### Commentary
>
> **[1]** A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the

threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

A ‘red-lined’ version of the rule and Commentary paragraph showing the three recommended changes reads as follows:

Optional withdrawal

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if ~~a~~ the lawyer is deceived by ~~his~~ the client, the client refuses to accept and act upon the lawyer’s advice on a significant point, ~~a~~ the client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

A ‘clean copy’ of the provision, with the recommended changes in place, reads as follows:

Optional withdrawal

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if the lawyer is deceived by the client, the client refuses to accept and act upon the lawyer’s advice on a significant point, the client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

(End of Memorandum)

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC
Date: November 27, 2018
Subject: **2019 Fee Schedules**

---

1. At the November meeting the Benchers amended the fees listed in Schedule 1 to the Rules to reflect changes adopted with the 2019 Budget.

2. Unfortunately, two related fee changes were overlooked in the resolution that was presented to and adopted by the Benchers. The 2019 Budget increases the Admission fees for both new calls and transfers from other Canadian law societies from $200 to $250. However that was inadvertently overlooked.

3. To correct the omission, I suggest that the Benchers adopt the following resolution:

   BE IT RESOLVED to amend the Law Society Rules in Schedule 1, part F, by striking "$200***" wherever it appears and substituting "***$250***".***

JGH

DM1271393

The Law Society of British Columbia

CEO's Report to the Benchers

December 7, 2018

Prepared for: Benchers

Prepared by: Don Avison

1. The Annual General Meeting

By the time of the December 7th, 2018 meeting of Benchers, the 2018 Annual General Meeting will have taken place. As a result of the technical failure experienced at the October 30th meeting, additional meeting locations have been put in place for the December 4th meeting as well as provincial online participation and voting.

2. Law Society's Second Colloquium on Legal Aid

On November 17th, the Law Society held its second Legal Aid Colloquium at Simon Fraser University's Morris J. Wosk Centre for Dialogue. The Hon. Bruce Cohen, QC, moderated the discussions that brought together a variety of stakeholders. This included many people and organizations whose views and perspectives are critical to our objective of improving legal aid but whose voices may not always take center-stage in such discussions.

As Nancy Merrill, QC observed in her introduction to the day, the Law Society's role was to provide a forum to facilitate hearing a wide range of perspectives. The speakers and participants generated much to think about and the spirit of the event was both collaborative and constructive.

A summary of the discussions is currently being prepared and will be provided to all Benchers. The Legal Aid Advisory Committee will be meeting to discuss next steps.

3. Provincial Legislative Amendments

The Fall sittings of the Legislative Assembly came to a close at the end of November. The session was an interesting one with the introduction of Bill 57 – the Attorney General Statutes Amendment Act – which made a number of changes to the Legal Profession Act. Those changes included the introduction of provisions that enable the Benchers to establish a class of "licensed paralegals" and to determine the scope of practice that can be performed by professionals. It is important to underline that the legislation recognizes the authority of the Law Society and of the Benchers to act but it is important to note that a considerable amount of work remains to provide for the appropriate and effective deployment of the program. It is anticipated that there will be continuing engagement with the profession – and with others – in shaping the further development of this initiative and of the educational program that will be necessary to properly support it.

Bill 57 also included amendments we had sought with respect to the operation of the Law Society's insurance program.

I would also note Bill 49 – The Professional Governance Act – which has significant implications for the entities that will be brought within the scope of the statutory scheme.

4. Staffing Update

Interviews are currently in progress for the position of Chief Legal Officer and I hope to be in a position to offer an update the Benchers at the meeting on December 7th.

Don Avison
Chief Executive Officer

The Law Society of British Columbia

First Interim Report of the Mental Health Task Force

Mental Health Task Force

Brook Greenberg (Chair)
Michelle Stanford (Vice-Chair)
Derek LaCroix, QC
Christopher McPherson, QC
Carolynn Ryan

December 7, 2018

Prepared for: Benchers

Prepared by: Alison Luke, Staff Lawyer, Policy and Legal Services

Purpose: Decision

Table of Contents

Executive Summary

It is well documented that those in the legal profession experience mental health and substance use disorders at rates much greater than that of the general population and the majority of other professions.

The culture and stressors unique to the legal profession appear to contribute to these problems and create barriers to open dialogue about, and action in relation to mental health and substance use disorders among lawyers. Stigma often compounds the challenges of living with, talking about and seeking help for these issues.

Given the Law Society's duty to protect the public interest by ensuring lawyers meet high ethical and competency standards, the Law Society is well positioned to respond to mental health and substance use issues in a manner that both safeguards the public and supports practitioners.

The 2018-2020 Strategic Plan sets the course for the Law Society's proactive approach to mental health, which focuses on two key goals: reducing stigma around mental health issues and developing an integrated mental health review concerning the current regulatory approach to discipline and admissions.

The Mental Health Task Force is responsible for coordinating and assisting the Benchers in implementing this strategic vision. Following a period of extensive research and consultation, the Task Force has formulated a set of 13 initial policy recommendations that include both educational and regulatory strategies which represent the first steps in the Law Society's ongoing efforts to improve responses to mental health and substance use issues. These initial recommendations are intended to be measured, incremental and relatively uncontroversial.

There has never been a better or more important time for all sectors of the profession to focus on substance use and mental health. The Law Society is committed to making a difference, within the scope of both its regulatory and support functions, to changing the way lawyers think about, and respond to mental health and substance use issues, and to encourage cultural changes within the profession that promote lawyer well-being.

The Mental Health Task Force believes that healthier lawyers have the potential to be better lawyers, and that supporting wellness within the profession will improve lawyers' practices, benefiting both practitioners and the public they serve.

Introduction

1. In recent years, a growing body of research has indicated an elevated risk in the legal community for mental health and substance use disorders, with greater rates of anxiety, depression and problem drinking than are found in the general population and other professions. This trend is both complex and troubling, resulting in increased inquiry into, and attention on lawyer well-being.

2. While mental health and substance use problems can have profound implications for affected lawyers and their families, the impacts can extend much further, to colleagues, firms, other members of the legal community and the public that lawyers serve.

3. The culture and stressors unique to the legal profession contribute to these problems and create barriers to open dialogue about, and action in relation to mental health and substance use disorders among lawyers. Stigma often compounds the challenges of living with, talking about, and seeking help for these issues.

4. Given the Law Society's duty to protect the public interest by ensuring lawyers meet high ethical and competency standards, it is uniquely positioned to respond to mental health and substance use issues in a manner that both safeguards the public and supports practitioners.

5. Tasked with regulating over 13,000 lawyers and 3,000 firms, the Law Society is in a strong position to take a leadership role in cultivating broad-scale change in the profession's approach to lawyer wellness. Such a culture change will take time, but is necessary to achieve improved outcomes over the long term.

6. Recognizing this responsibility, the Law Society's 2018-2020 Strategic Plan includes a commitment to addressing mental health within the legal profession. This work is spearheaded by the Mental Health Task Force (the "Task Force"), which was created to make recommendations and take steps to achieve the Law Society's strategic goals related to mental health and substance use in a manner that protects the public interest.[1]

7. This Interim Report, which is divided into two parts, represents the culmination of the Task Force's early work to address both the regulatory and educational aspects of its mandate.

[1] Mental Health Task Force Terms of Reference, online at: https://www.lawsociety.bc.ca/Website/media/Shared/images/initiatives/MentalHealthTaskForce_termsofreference.pdf

8. Part 1 outlines the scope and scale of mental health and substance use issues within the legal profession and the important role legal regulators, such as the Law Society, can play in addressing the issues.

9. Part 2 outlines the Task Force's first set of recommendations to the Benchers, which aim to improve the Law Society's understanding of, and responses to mental health and substance use issues affecting BC lawyers. These initial recommendations are intended to be measured, incremental and relatively uncontroversial.

Part 1: Mental Health and the Legal Profession

Prevalence of mental health and substance use issues

10. It is well documented that those in the legal profession struggle with a variety of mental health disorders — particularly depression and anxiety — and problematic alcohol use, more so than the general population[2] and the majority of other professionals.[3]

11. The most current and comprehensive study on the prevalence of mental health and substance use issues among lawyers was conducted in 2017 by the Hazelden Betty Ford Foundation and the American Bar Association (the "ABA Study"), which revealed substantial levels of problem drinking and other behavioral health problems in the nearly

[2] See, for example Benjamin G.A., Darling E. & Sales B., "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers"(1990) 13 Int. J. Law Psychiatry 233 ("Benjamin *et al*.")(Estimating rates of problematic drinking among lawyers to be 18%, almost twice the estimated prevalence of alcohol abuse and dependence among American adults. Further, 19% of lawyers studied experienced statistically significant elevated levels of depression, as contrasted with rates of depression of 3% to 9% in the general population); Beck C., Sales B. & Benjamin G.A., "Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers" (1996) 10:1 J.L. Health 1; Schiltz P.J., "On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession" (1999) 52 Vand . L. Rev 871; Ontario Lawyers' Assistance Program, "2010 Annual Report" (Rates of addiction and depression for lawyers were three times that of the general population, while anxiety disorders were estimated to affect 20% to 30% of lawyers as compared to only 4% of the general population).

[3] See Eaton W. *et al*., "Occupations and the Prevalence of Major Depressive Disorder" (1990) 32:11 J. Occup. Med. 1079 ("Eaton *et al*.") (Lawyers topped the list of 104 professions for having the highest rates of depression, at rates 3.6 that of other employed persons); ABA Study, *infra* note 4 (Reporting positive Alcohol Use Disorders Identification Test screens for 20.6% of lawyers in the sample, as compared to 11.8% of a broad, highly educated workforce); Flores R. & Arce R.M., "Why Are Lawyers Killing Themselves?" (Jan 20, 2014) CNN, online at: www.cnn.com/2014/01/19/us/lawyer-suicides/index.html (Lawyers rank fourth when the proportion of suicides in that profession is compared to suicides in all other occupations, following dentists, pharmacists and physicians).

13,000 lawyers surveyed.[4] Notably, this cohort is similar in size to the number of lawyers in British Columbia.

12. The ABA Study observed significant mental health concerns among its participants. More than 60% of lawyers reported experiencing anxiety issues over the course of their careers, while 45% had experienced depression. Rates of panic disorder, bipolar disorder and self-injurious behaviour were also notable. Disturbingly, more than 11% of lawyers reported having suicidal thoughts at some point during their career, and 0.7% — more than 90 lawyers in the study cohort — reported at least one prior suicide attempt.[5]

13. The ABA Study also explored substance use among lawyers, including alcohol and various classes of legal and illegal drugs. Researchers found that more than 36% of respondents provided answers consistent with problematic drinking or dependence. Of those that felt their use of alcohol or other substances was problematic, the vast majority reported this problematic use began either in law school or within the first 15 years of practice.[6] Based on these findings, the ABA Study concluded that being in the early stages of one's legal career is strongly correlated with a high risk of developing an alcohol use disorder.[7] Notably, three quarters of respondents did not choose to answer questions regarding consumption of licit and illicit drugs, highlighting lawyers' extreme reluctance to divulge information regarding drug use and addiction.[8]

14. The ABA Study concluded the following:

> Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations. These levels of problematic drinking have a strong association with both personal and professional characteristics, most notably sex, age, years in practice, position within firm, and work environment. Depression,

[4] Krill P.R., Johnson R. & Albert L., "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (2016) 10 J. Addiction Med. 46 ("ABA Study") online at: http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Othe r_Mental.8.aspx

[5] *Ibid*. at 50.

[6] *Ibid*. at 48.

[7] *Ibid*. at 51.

[8] *Ibid*. at 49. As result of low response rates, no inferences could be made from this data. However, the ABA Commission on Lawyer Assistance Programs' national report identified abuse of prescription drugs as second only to alcohol as the leading substance-use problem for lawyers. See Commission on Lawyer Assistance Programs, "2014 Comprehensive Survey of Lawyer Assistance Programs" at 20 ("Lawyer Assistance Program Survey"), online at: www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2014_comprehensive_survey_of_laps.authcheckdam.pdf.

anxiety, and stress are also significant problems for this population and most notably associated with the same personal and professional characteristics.[9]

15. A recent US study of law students' well-being ("the Student Well-Being Study"), involving over 3,000 students across 15 law schools also revealed that significant numbers of those on the cusp of entering the profession are experiencing high rates of mental health and substance use disorders.[10]

16. Roughly one-quarter to one-third of the Student Well-Being Study participants reported frequent binge drinking, misuse of drugs or mental health challenges. Specifically, 17% of respondents indicated they experienced depression, 14% experienced extreme anxiety and a further 23% reported mild or moderate anxiety. Six percent of the students reported serious suicidal thoughts within the past year. One quarter of the study cohort were identified by researchers as being at risk for alcoholism.

17. The results of the Student Well-Being Study are particularly troubling given that law students start out little different from students in other professional fields, but soon after law school commences, they report large increases in psychiatric symptomology, such as depression, anxiety, hostility and paranoia.[11] Moreover, research shows that the psychological factors that seem to erode during law school are the very factors most important to the well-being of lawyers.[12] Detrimental changes occurring at this

---

[9] ABA Study, *supra* note 4 at 52.

[10] Organ J.M., Jaffe D.B. & Bender K.M., "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns" (2016) 66 J. Legal Educ. 116 ("Student Well-Being Study"), online at: https://jle.aals.org/home/vol66/iss1/13/. The survey was the first multi-school study in over twenty years to address law student use of alcohol and street drugs, and the first ever multi-school study to explore prescription drug use and the mental health concerns and help-seeking attitudes of law students.

[11] Krieger L.S. & Sheldon K.M., "Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-Being" (2004) 22(2) Behav. Sci. Law 261, online at: https://pdfs.semanticscholar.org/7a44/193ddb81613e4457767c585744100083d5a3.pdf. For other literature on the negative impacts of law school on law student well-being, see for example, Krieger L.S., "Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence" (2002) 52 J. Legal. Educ. 112, online at: https://lawyerswithdepression.files.wordpress.com/2010/11/institutional-denial-about-the-dark-side-of-law-school.pdf ; Danmeyer M.M.& Nunuez N. "Anxiety and Depression Among Law Students: Current Knowledge and Future Directions" (1999) 23(1) Law & Hum. Behav. 55, online at: http://www.jstor.org/stable/1394480; Sheldon M. & Krieger L.S., "Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory" (2007) 22 Personality & Soc. Psychol. Bull. 883, online at: http://www.legaleducationsociety.org/documents/LegalAwareness/Negative%20Effects%20of%20Legal%20Education.pdf

[12] Krieger L.S., "What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success" (2015) 83 Geo. Wash. L. Rev. 554 at 560 ("Krieger"), online at: https://ir.law.fsu.edu/articles/94/

foundational stage of professional development may predispose law students to emotional and behavioural problems in later law practice.[13]

18. While these studies suggest that those who are newer to the profession are particularly at risk of experiencing mental health and substance use issues, a recent Canadian study found that lawyers at large firms in the private sector, widely considered to be the most prestigious roles, were most likely to experience depressive symptoms, reversing trends found in the general population where career success is typically equated with fewer mental health risks.[14]

Stigma

19. Stigma has a powerful, pervasive influence on how individuals, and the profession as a whole understands and addresses mental health and substance use issues. Although the academic literature reflects a variety of different conceptualizations of the stigma associated with mental health,[15] it is generally understood as being composed of several elements: a lack of knowledge (ignorance), negative attitudes (stereotypes and prejudice) and excluding or avoiding behaviours (discrimination).[16]

20. Stigma exists when four components interact. First, people distinguish and label a particular difference – for example, identifying someone as "an addict," "a substance abuser" or "mentally ill". Second, labelled differences must be linked to a set of undesirable characteristics which form a negative stereotype that is applied to every member of the group. Third, those who are labelled and stereotyped are seen as fundamentally different, creating an 'us-them' dynamic. In the last component of the stigma process, the labelled person experiences status loss and discrimination.[17]

---

[13] *Ibid.*
[14] Koltai J., Schieman S. & Dinovitzer R., "The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-Being in the Legal Profession" (2018) 59:1 J Health Soc. Behav. 20, online at: https://www.ncbi.nlm.nih.gov/pubmed/29373053 . For American research in this area, see Krieger *supra* note 12.
[15] See, for example, Link B.G. & Phelan J.C., "Conceptualizing Stigma" (2001) 27 Annual Review of Sociology 36 at 367 ("Link *et al*."), online at: www.jstor.org/stable/2678626 ; Rüsch N., Angermeyer M.C. & Corrigan P.W., "Mental Illness Stigma: Concepts, Consequences, and Initiatives to Reduce Stigma" (2005) 20 European Psychiatry 52 at 535, online at: https://www.europsy-journal.com/article/S0924-9338(05)00090-8/pdf ; Corrigan P.W., "Mental Health Stigma as Social Attribution: Implications for Research Methods and Attitude Change" (2006) 7 Clin. Psychol. Sci. Pract. 48, online at: http://www1.und.edu/health-wellness/healthy-und/mental-health-stigma-fawn.pdf; Thornicroft G., *Shunned. Discrimination Against People with Mental Illness* (Oxford: Oxford University Press: 2016).
[16] Rose D. *et al*., "250 Labels Used to Stigmatize People with Mental Illness" (2007) 7 BMC Health Services Research 97, online at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1925070/.
[17] See Link *et al*. *supra* note 15.

21. This discrimination may be experienced in the context of individual interactions or it can be structural, when accumulated institutional practices create inequities; for example, when an organization creates policies, procedures or practices that disadvantage those with a mental health disorder.[18] Self-stigma is an additional problem, arising when people with mental health issues accept and internalize prejudice against them, resulting in diminished self-esteem and self-efficacy.[19]

22. While some level of stigma surrounds mental health and substance use disorders in nearly all populations, legal professionals face some unique factors that can amplify its effect and deter help-seeking behaviours.

23. The ABA Study, for example, revealed that the majority of lawyers in need of help were reluctant to seek it based on fears of others finding out about their mental health or substance use issue and related concerns regarding privacy and confidentiality.[20] This reluctance has been variously attributed to lawyers' awareness of negative socio-cultural attitudes about such conditions, fear of adverse reactions of others in the workplace and attitudes that help-seeking is sign of weakness, particularly in a profession that rewards self-reliance and perfectionism. As a result, many legal professionals do not share their mental health concerns with others, fearing the loss of their jobs, their professional reputations and even their licences.

24. The findings of these studies are consistent with the anecdotal information provided to the Mental Health Task Force. In particular, lawyers with mental health or substance use issues seem to experience a number of barriers deterring them from taking first steps towards seeking assistance. Such obstacles include embarrassment and shame, uncertainty as to who can help and how, doubt about the efficacy of the assistance available and practice and personal obligations.

25. Consequently, measures that make taking the initial steps towards seeking assistance easier, more appealing and less stigmatizing for lawyers carry significant potential benefits to the profession and the public.

---

[18] Ritsher J.B., Otilingam P.G. & Grajales M., "Internalized Stigma of Mental Illness: Psychometric Properties of a New Measure" (2003) 121:1 Psychiatry Res. 31, online at: https://www.ncbi.nlm.nih.gov/pubmed/14572622; Stuart H., "Reducing the Stigma of Mental Illness" (2016) 3 Global Mental Health ("Stuart"), online at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5314742/

[19] Hanish *et al*., "The Effectiveness of Interventions Targeting Stigma of Mental Illness at the Workplace: A Systematic Review" (2016) 16:1 BMC Psychiatry 2, online at: https://bmcpsychiatry.biomedcentral.com/articles/10.1186/s12888-015-0706-4

[20] ABA Study *supra* note 4 at 51.

26. Given the considerable number of lawyers and law school students who experience mental health or substance use issues and the potential consequences of such conditions going untreated, the studies referenced above suggest that these matters demand not only the attention of the profession, but concerted, coordinated and sustained action.

27. In recent years, the legal community appears to be acknowledging the impact of mental health and substance use disorders on the profession, with mainstream media,[21] surveys,[22] academic studies and articles,[23] policy papers[24] and continuing professional development programs[25] all raising the profile of mental health and substance use issues affecting lawyers.

28. One of the most significant and authoritative voices in this burgeoning conversation is that of the National Task Force on Lawyer Well-Being, which authored the ground-breaking US report *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* ("National Task Force Report") in mid-2017.[26]

29. The National Task Force Report strongly advocates for action to address mental health and substance use in the legal profession, and sets out a principled basis for the legal community to prioritize engagement with these issues:

> This report makes a compelling case that our profession is at a crossroads. Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable… Our members suffer at alarming rates from conditions that impair our ability to function at levels compatible with high ethical

[21] Zimmerman E., "The Lawyer, the Addict" *The New York Times* (July 15, 2017), online at: www.nytimes.com/2017/07/15/business/lawyers-addictionmental-health.html; Singer D., "A Lawyer's Secret: Addiction, Anxiety and Depression" *The Globe and Mail* (April 14, 2017), online at: www.theglobeandmail.com/opinion/a-lawyers-secret-addiction-anxiety-and-depression/article34067482/

[22] See for example, CBA Survey of Lawyers on Wellness Issues (2012), online at: www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Wellness%20PDFs/FINAL-Report-on-Survey-of-Lawyers-on-Wellness-Issues.pdf ("CBA Survey"); Survey of CBA Members in Rural, Remote and Isolated Communities (2012), online at: www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Wellness%20PDFs/lpac-communitysurvey2013-e.pdf ; Lawyer Assistance Program Survey, *supra* note 8.

[23] *Supra* note 2-4, 10,14.

[24] National Task Force Report *infra* note 26; Law Society of Ontario, "Mental Health Strategy Task Force Final Report to Convocation"("LSO Mental Health Strategy"), online at: lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/convocation-april2016-mental-health.pdf

[25] For example, the Canadian Bar Association's "Mental Health and Wellness in the Legal Profession" CPD module and the Ontario Bar Association's "Mindful Lawyer CPD Series."

[26] The National Task Force was conceptualized and initiated by the American Bar Association Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). See the report online at: www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf

> standards and public expectations. Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough… As a profession, we have the capacity to face these challenges and create a better future for our lawyers that is sustainable. We can do so – not in spite of – but in pursuit of the highest professional standards, business practices and ethical ideals.[27]

30. The Mental Health Task Force endorses the National Task Force's view that educating and supporting lawyers to reduce the stigma associated with mental health and substance use issues is likely to be beneficial both for the members of the profession as well as the public they serve.

31. The National Task Force encourages specific actions for improving the well-being of the profession, as outlined in more than three dozen recommendations in its report. Many of these recommendations are general in their application, while others target specific stakeholders, including legal regulators.[28]

32. Given that the National Task Force Report has been characterized as the "the most ambitious roadmap yet related to the well-being of lawyers,"[29] the Mental Health Task Force has examined these recommendations and considered, in detail, how several of the proposed actions could be adopted or adapted by the Law Society of BC.

Role of the regulator

33. Historically, legal regulators have taken a hands-off approach to mental health and substance use issues affecting lawyers. Responses have primarily been "reactive," dealing with issues on an individual basis and only when impairment cannot be ignored; for example, through the filing of a complaint or a lawyer's failure to respond to communications from the Law Society.

34. With increased recognition of the prevalence of mental health and substance use disorders within the profession, many regulators are developing new approaches to these issues.[30]

---

[27] *Ibid.* at 47.
[28] The National Task Force Report also contains specific recommendations for lawyers, firms, lawyer assistance programs, law schools, the judiciary and legal insurers.
[29] American Bar Association, "Growing Concern Over Well-Being of Lawyers Leads to Comprehensive New Recommendations" (August 2017), online at: https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/growing_concern_over.html
[30] For a summary of US states that have established Task Forces or Commissions addressing lawyer wellness, see: http://lawyerwellbeing.net

Within Canada, both the Law Society of Ontario[31] and the Law Society of BC have established Task Forces specifically to address mental health and substance use among their members.

35. There are a number of compelling reasons for the Law Society to take action on these issues, including protecting the public interest, influencing professional culture and providing support to lawyers, as described below. Together, these three rationales have helped shape the recommendations presented in the second half of the Task Force's report.

Protecting the public interest

36. In order to fulfill its legislated mandate to uphold and protect the public interest in the administration of justice, the Law Society must ensure that lawyers meet high ethical and competency standards.[32] Implicit in this objective is the duty to address issues that have the potential to impact on the ability of lawyers to meet their professional responsibilities. Accordingly, within the scope of its regulatory and support functions, the Law Society must be aware of, and responsive to the ways in which mental health and substance use issues may impact on a lawyer's professional conduct and competence.

37. The majority of lawyers living with a mental health condition are not at risk of acting unethically or unprofessionally, and it is critically important that diagnosis is not incorrectly correlated with impairment.

38. Decreased mental capacity is, however, a concern with some disorders and may affect a lawyer or applicant's fitness to practice.[33] Other conditions may influence a lawyer's professional conduct, such that a practitioner is unable to perform all of their duties, despite having the capacity to do so. For example, a lawyer experiencing severe anxiety, depression or withdrawal associated with an addiction may find themselves temporarily unable to execute normally routine tasks, such as returning a client's call or meeting a court deadline.

---

[31] LSO Mental Health Strategy *supra* note 24.
[32] *Legal Profession Act*, s. 3.
[33] For example, major depressive disorder is associated with impaired executive functioning, including diminished memory, attention and problem-solving abilities. Similarly, the majority of those that abuse alcohol experience mild to severe cognitive impairment, with particularly severe deficits in executive functions that are critical features of competent lawyering, including problem-solving, abstraction, planning, organizing and memory. See National Task Force Report *supra* note 26 at 8-9. See also Seto M., "Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem" (2012) 2:2 UWO J. Leg. Stud. 5 ("Seto"), online at: https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1053&context=uwojls

39. Anecdotally, it appears that impairment of this type is often limited temporally, and may only interfere with a specific matter or task, not the lawyer's entire practice. Responding to the Law Society seems to be a particular issue for some lawyers experiencing anxiety or other mental health issues.

40. There is also some evidence that impairment stemming from untreated mental health or substance use issues may contribute to some lawyers experiencing a higher incidence of disciplinary matters.[34] Again, however, it is important not to conflate correlation with causation. A mental health or substance use condition may be a contributing factor to a lawyer's conduct, or merely symptomatic of other underlying issues that do not affect the lawyer's practice.

41. Recognizing that the public interest is served when the Law Society assists lawyers in meeting their professional responsibilities, employing proactive measures to address wellness issues clearly falls within the Law Society's mandate. This proactive model is premised on the theory that the public is best served by a regulatory scheme that prevents problems in the first place, rather than one that focuses on taking punitive action once problems have occurred.

42. One of the primary goals of this approach is to reduce the likelihood of incidences that will lead to a "reactive" regulatory response. For example, an educational initiative that links lawyers with mental health resources may avert a situation where an untreated mental health issue affects a lawyer's performance and results in a complaint.

Influence over professional culture

43. As the authors of the National Task Force Report observe, broad-scale change in the profession's approach to lawyer wellness cannot occur without buy-in and role modelling from top leadership.[35] Providing regulatory oversight to 13,000 lawyers and over 3,000 firms, the Law Society is in a strong position to be such a leader.

---

[34] Seto *supra* note 33 at 19 (Citing an Ontario study that revealed that drugs, alcohol or psychiatric illnesses were present in nearly 50% of the 172 cases categorized as serious disciplinary proceedings); Cormack C., "Lawyers Turn to Meditation to Fight Stress and Improve Performance" *Canadian Lawyer Magazine* (March 2009) (Statistics suggest that 40% to 75% of disciplinary actions are against lawyers who are chemically dependent or mentally ill); McCarthy N., "Statistics Tell Story of Stress, Addiction in Lives of Lawyers" (November 2000) California Bar Journa, asl cited in the Butler Centre for Research, "Substance Use Disorders Among Legal Professionals" (March 16, 2017), online at: https://www.hazeldenbettyford.org/education/bcr/addiction-research/substance-abuse-legal-professionals-ru-317 (A review of the California bar's disciplinary system estimated that substance use was involved in 25% to 35% of all situations requiring formal charges against lawyers).

[35] National Task Force Report *supra* note 26 at 12-13.

44. Through its various programs and processes, including those related to admissions, credentials, professional regulation, professional responsibility, professional development, practice advice and policy development, there are many ways that the Law Society can create this type of positive change within the regulatory sphere.

45. For example, through its policy work, the Law Society is well placed to explore systemic issues that may contribute to the poor mental health of some legal practitioners, including consideration of organizational norms and embedded expectations within the legal profession and how these might be influenced to support a healthier working environment for lawyers.[36]

46. Communication with the profession is another key way that the Law Society can promote dialogue around mental health and substance use within the profession and help reduce stigma. It is for this reason that the Mental Health Task Force has worked to develop a communication plan in parallel with its policy recommendations.

Supporting lawyers

47. While its primary mandate is to protect the public interest, the Law Society also plays an important role in supporting lawyers through all stages of their legal careers. This includes periods in which a lawyer may confront professional challenges. Examples of these types of support functions include access to free, confidential practice advice offered by Practice Advisors and the one-on-one remedial work done by Practice Standards lawyers and lawyers in the Professional Regulation Department's Intake and Early Resolution group.

48. Professional challenges can take many forms, including those influenced by mental health and substance use disorders. Although the Law Society is not an expert in these areas, through both its regulatory processes and support functions, there are many opportunities to advance an agenda of lawyer well-being.

The Mental Health Task Force

49. The 2018-2020 Strategic Plan sets the course for the Law Society's proactive approach to mental health, which focuses on two key goals: (1) reducing stigma around mental health issues and (2) developing an integrated mental health review concerning the current regulatory approach to discipline and admissions.[37] These goals are broad and ambitious,

[36] Seto *supra* note 33 at 15.
[37] See the Law Society of British Columbia's 2018-2020 Strategic Plan, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf

but equally, are critical to ensuring that lawyer well-being garners the attention it deserves and requires.

50. The Mental Health Task Force is responsible for coordinating and implementing the Law Society's strategic vision. Composed of both Bencher and non-Bencher members, the Task Force is guided by Terms of Reference which define the scope of its duties and responsibilities in relation to the two aforementioned goals.[38]

51. Specifically, the Terms of Reference require the Task Force to advise the Benchers on the following matters, as they pertain to mental health and substance use disorders:

- the development of a "diversion" or other alternative discipline process, and other aspects of the discipline process;
- the consideration of potential modifications to the Law Society admissions process;
- the development of additional support resources for current, former and prospective Law Society members;
- the development and promotion of education materials for Law Society members that increase awareness of mental health issues and reduce stigma;
- the development of an education program and materials for Law Society staff, hearing panel members, and Benchers that increase awareness of mental health issues and reduce stigma;
- the consideration of the role of other Law Society Committees in advancing the Task Force's goals;
- the advisability, viability and scope of a potential voluntary, confidential member survey.

52. Over the last ten months, the Task Force has made considerable progress in addressing this mandate, increasing its understanding of mental health and substance use issues and associated stigma through a comprehensive review of academic literature and other educational materials.

53. The Task Force has also greatly benefited from the insights and experiences of key stakeholders and experts on mental health and substance use. This work has included consultations with other legal regulators, academics, advocates, law school administrators, physicians specializing in occupational addiction medicine and other subject matter

[38] *Supra* note 1.

experts, including professionals at the BC Chapter of the Canadian Mental Health Association ("CMHA") and the BC Centre on Substance Use ("BCCSU").[39]

54. The Mental Health Task Force expects its engagement with, and reliance on subject-matter experts will be ongoing as it works to implement its recommendations and develop additional proposals.

Part 2: Task Force Recommendations

55. Informed by the research and consultations described above and outlined in more detail in its Mid-Year Report,[40] the Task Force has formulated a set of 13 initial policy recommendations for Bencher consideration and approval. These recommendations are regarded by the Task Force as interim recommendations, with an additional suite of proposals to follow in 2019.

56. The recommendations fall into two broad streams of activity, namely:

> *Educational strategies* that increase awareness and understanding of mental health and substance use within the legal profession and reduce the stigma that can prevent lawyers from seeking help.
>
> *Regulatory strategies* that focus on how mental health and substance use issues affecting lawyers are most appropriately addressed in the regulatory context.

Educational strategies

57. A central component of the Task Force's work is to employ educational strategies that bring attention to, and improve knowledge and understanding of mental health and substance use issues affecting lawyers. These efforts must start with the Law Society itself, beginning with a focus on enhancing education and training for Law Society staff,

[39] The BC Centre on Substance Use is a provincially networked organization with a mandate to develop, implement and evaluate evidence-based approaches to substance use and addiction. Within this framework, BCCSU is also involved in the collaborative development of policies, guidelines and standards. The Canadian Mental Health Association is a national charity that helps maintain and improve mental health for all Canadians, including those experiencing mental illness. In BC, mental health, substance use and addictive behaviour all fall within the scope of the organization's mandate.

[40] Mental Health Task Force Mid-Year Report (July 2018), online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2018MentalHealthTaskForceMidYearReport.pdf

Benchers and Committee members who encounter lawyers experiencing mental health or substance use challenges in the course of their work.

58. A focus on educational initiatives is important for two inter-related reasons. First, mental health training will enhance awareness of mental health and substance use disorders throughout the Law Society's various processes, providing staff with resources, tools and skills that improve their ability to assist lawyers in a manner that both supports practitioners and protects the public interest.

59. The ability for educational programs to improve responses to mental health issues is well documented. For example, studies on the effect of the widely acclaimed Mental Health First Aid course, which extends the concept of first aid to helping individuals to respond to someone having a mental health crisis, have found that training results in statistically significant improvements in participants' knowledge about treatments, improved helping behaviours and greater confidence in providing assistance to others.[41]

60. Second, educational initiatives create critical opportunities to reduce the harmful stigma surrounding mental health and substance use disorders. Studies have shown that various educational approaches, including mental health literacy courses (e.g. programming focusing on identifying mental health problems and treatments), speakers (e.g. presenters sharing personal experiences with mental health struggles) [42] and skills-based courses (e.g. crisis intervention and suicide prevention training) are effective in changing knowledge, attitudes and behaviours towards people with mental health disorders.[43] Combining these approaches can be particularly powerful in combatting stigma. [44]

61. Not surprisingly, the National Task Force Report advocates that all stakeholders — including legal regulators — provide high quality educational programs about lawyer distress and well-being, including training in identifying, addressing and supporting fellow professionals with mental health and substance use disorders.

---

[41] Stuart *supra* note 18; Mental Health First Aid Canada, online at: www.mentalhealthcommission.ca/English/resources/mental-health-first-aid

[42] Studies demonstrate that contact-based education, in which target audiences hear personal stories from, and interact with individuals who have recovered or are successfully managing their mental health disorder, are one of the most powerful ways to reduce stigma. This approach is based on the idea that positive interpersonal contact with members of a stigmatized group can demystify issues, replace faulty perceptions and generalizations and reduce prejudice and discrimination. This research has guided the approaches of bodies such as the Mental Health Commission of Canada, which has made contact-based education a central element of its *Opening Minds* anti-stigma initiative

[43] Hanish *et al*. *supra* note 19; Stuart *supra* note 18.

[44] Hanish *et al. supra* note 19 at 536 ("To sum up our overview of our different methods to reduce stigma, contact combined with education seems to be the most promising avenue").

62. To ascertain what educational programs are already in place at the Law Society to address these issues and assess where improvements may be necessary, the Task Force undertook consultations with a wide range of Law Society departments over the course of several months. These discussions examined which staff groups encounter lawyers dealing with mental health and substance issues, what training these staff currently receive and the extent to which further training might better equip them to address wellness issues. Several recurring themes emerged during these consultations which have informed the series of education-related recommendations presented below.

Practice Advisors

63. Practice Advisors are a free resource provided by the Law Society to assist lawyers and articling students with practice and ethical advice on a range of issues, including compliance with the Law Society Rules and the *Code of Professional Conduct for British Columbia*, practice management, practice ethics, client identification and verification, scams and fraud alerts and relationships with clients and other lawyers.[45] All communications between Practice Advisors and lawyers are strictly confidential and are not shared with any other branch of the Law Society, with the exception of a matter involving a shortage of trust funds.

64. Responding to over 5,000 enquiries a year, Practice Advisors provide an important service for lawyers in need of professional guidance. Although the practice advice program is not currently designed to provide lawyers with support for wellness issues, during consultations with the Task Force, Practice Advisors indicated that not infrequently lawyers reveal that their practice management concerns are related to mental health issues, including anxiety, depression and obsessive compulsive disorders.

65. Recognizing that Practice Advisors are instrumental in encouraging lawyers to take proactive steps to address practice concerns, and that these concerns can be influenced by mental health and substance use issues, the Task Force recommends formally expanding the role of Practice Advisors to include advice for practice concerns that are linked to mental health and substance use problems.

66. It is important to note that Practice Advisors are already addressing these issues to some degree in the course of their work. As such, the proposal seeks only to formalize the work

[45] Practice Advisors do not provide formal opinions or substantive legal advice, provide mediation services or assist lawyers in dealing with complaints. See Law Society of BC, "About Practice Advice", online at: www.lawsociety.bc.ca/support-and-resources-for-lawyers/about-practice-advice/

that Practice Advisors are currently doing and provide additional training and resources to further assist them in this regard. It is also important for the Law Society to communicate that the role of Practice Advisors is only to assist members in identifying appropriate support resources, and not to provide diagnoses or treatment advice to lawyers.

Recommendation 1: Promote, through a targeted communication campaign, an expanded role for Practice Advisors to include availability for confidential consultations about mental health and substance use issues and referrals to appropriate support resources.

67. To ensure that Practice Advisors are prepared to take on these responsibilities, the Task Force also recommends that Practice Advisors undertake specialized training to enhance their mental health literacy, develop skills to enable them to recognize signs of mental health and substance use problems and improve their awareness of, and access to support resources that may assist lawyers struggling with these issues.

68. Providing lawyers with another confidential gateway to support and treatment resources is important given the substantial barriers that frequently prevent lawyers from taking the first step of seeking assistance.

69. In addition to benefiting practitioners that seek this type of support, broadening the role of Practice Advisors also serves the public interest by providing additional mechanisms for lawyers to proactively address issues that are affecting, or may affect their ability to serve their clients. Formally recognizing mental health and substance use problems as legitimate practice concerns also raises awareness of these issues within the profession, and in so doing, reduces stigma.

70. Following consultations with the CMHA and the BCCSU, the Task Force has identified a series of possible educational programs for Practice Advisors and other Law Society staff. If the educational recommendations outlined in this report are approved by the Benchers, this training portfolio will be further refined following input from staff and subject-matter experts. This training must be frequent and ongoing.

71. As necessary, training could extend to paralegals, coordinators and assistants supporting the practice advice program who also deal directly with members.

Recommendation 2: Provide Practice Advisors with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.

72. The goal of training is not to turn Practice Advisors into mental health practitioners. Importantly, Practice Advisors would not assess, diagnose or suggest any form of specific treatment for a mental health condition or substance use disorder.

73. Rather, the recommendation is intended to ensure Practice Advisors develop a comprehensive understanding of an array of wellness issues and build skills that will enable them to better help lawyers navigate practice concerns related to these issues. As with all existing practice advice, discussions with Practice Advisors that engage mental health or substance use issues would be strictly confidential.

74. This recommendation is supported by a comprehensive communications effort that aims to explain the intended role of the Practice Advisors, including emphasizing the confidentiality of consultations and the limited scope of the information Practice Advisors will provide.

Practice Standards

75. The Law Society requires continual high standards in the practice of law so that clients and the public at large have full confidence in the professional competence of lawyers. Although the vast majority of lawyers achieve and maintain these standards, when competency concerns do arise, the Practice Standards Committee may require the lawyer to undergo a practice review — a non-punitive, remedial exercise that lies outside the Professional Regulation Department's regulatory processes.

76. Practice reviews are conducted by staff lawyers in the Practice Standards Department who are tasked with making inquiries and requesting documentation related to the lawyer's practice.[46] Following a review, the lawyer is given recommendations and must implement any recommendations to improve their practice.

77. Periodically, practice reviews reveal competency concerns that are exacerbated by underlying personal problems – including mental health and substance use disorders. In some cases, in the course of the review a lawyer may disclose experiencing mental health or substance use challenges. In such cases, Practice Standards lawyers report providing personal support for a range of issues, including depression, anxiety, suicidal thoughts and addiction, despite having limited training in these areas. In other cases, these issues

[46] See Law Society Rules 3-17(3)(d) and 3-18. In most cases, lawyers come to the attention of the Practice Standards Committee when they have been investigated for potential professional misconduct and are referred by Law Society staff, the Complainant's Review Committee or the Discipline Committee. In other instances, a lawyer may be referred to the Practice Standards Committee by the Credentials Committee or voluntarily self-refer for assistance.

emerge later; for example, in the course of monitoring the extent to which a lawyer is addressing recommendations or fulfilling conditions following a practice review.

78. As such, the Task Force recommends that Practice Standards lawyers are provided with the same comprehensive training as Practice Advisors in an effort to improve their knowledge and skills in relation to mental health and substance use issues. This training should be provided by subject-matter experts and occur at regular intervals throughout the department's professional development calendar. Training should be integrated into the orientation of new staff and extended to Practice Standards' support staff dealing directly with members, as appropriate. Refresher courses should also be made available to existing staff to ensure that knowledge and skills are maintained over time.

Recommendation 3: Provide Practice Standards lawyers and support staff with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.

Professional Regulation

79. If a complaint is made against a lawyer, the Law Society has the authority to investigate the conduct and competence of the lawyer.[47] This, and related work, is undertaken by the Professional Regulation Department, which includes four groups: Intake and Early Resolution, which is responsible for the initial review and early resolution of complaints; Investigations, Monitoring and Enforcement, which investigates complaints that raise serious conduct concerns; Discipline, which involves citation hearings, reviews and appeals, as well as administering conduct meetings and conduct reviews; and Custodianships, which is engaged when it is necessary for the Law Society to step in to manage or close a lawyer's practice.

80. Although there is no causal link between a mental health or substance use disorder diagnosis and competency concerns, anecdotally the Professional Regulation Department reports that their processes frequently involve "distressed" lawyers, including those that have disclosed that they are experiencing mental health or substance use issues.

81. Despite lawyers typically associating the Professional Regulation Department with disciplinary action, the Intake and Early Resolution group plays a very significant role in assisting lawyers dealing with practice management issues, engaging in remediation with hundreds of lawyers each year. These remedial measures can and do include providing

[47] For details on the disposition of complaints, see the Law Society of BC's Annual Report, online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/ar/2017-AnnualReport.pdf at p. 13.

advice and guidance to lawyers regarding mental health and substance use issues affecting their practices. Discussions in relation to these issues are kept confidential from the complainant.

82. Although staff in the Profession Regulation Department already address a range of wellness issues in the course of their work, the consultation revealed a strong desire for additional, specialized education in relation to mental health and substance use disorders to ensure that staff remain aware of, and responsive to these issues. This training is viewed as essential given the large volume of work overseen by this department, the majority of which involves complaints against lawyers and related remedial and disciplinary measures.

83. Accordingly, the Task Force recommends that staff lawyers and paralegals in the Professional Regulation Department receive training similar to that recommended for Practice Advisors and Practice Standards staff.

Recommendation 4: Provide lawyers and paralegals in the Professional Regulation Department with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.

Credentials, Trust Assurance and Lawyers Insurance Fund

84. In addition to Practice Advisors, Practice Standards lawyers and lawyers in the Professional Regulation Department, several other staff groups regularly encounter lawyers with mental health and substance use issues and, as a result, may benefit from additional training in these areas.

85. These groups include auditors in the Trust Assurance Program who attend lawyers' offices to undertake compliance audits, Credentials Officers that deal with lawyers or applicants who have raised mental health or substance use problems in the course of the application process and staff in the Lawyers Insurance Fund program involved in handling negligence claims and potential claims that lawyers report under the program's professional liability insurance.

86. Improving the mental health literacy of staff in these groups supports the Task Force's view that the full spectrum of the Law Society's regulatory work should be alive and responsive to wellness issues. However, given the nature of their interactions with lawyers, training for these groups could be less intensive than that provided to Practice Advisors, Practice Standards lawyers and staff in the Professional Regulation Department.

Recommendation 5: Provide Credentials Officers, auditors in the Trust Assurance Program and staff lawyers in the Lawyers Insurance Fund with basic education and training to improve their awareness of mental health and substance use issues.

Qualified Mental Health Professionals

87. Although the educational initiatives proposed in the recommendations above will provide staff with a strong foundation of knowledge and skills in relation to mental health and substance use issues, there may be circumstances where additional input and expertise from a mental health professional is required to support staffs' efforts to assist members who are in distress. The Task Force is of the view that access to such expertise will enhance staffs' confidence and ability to respond to mental health and substance use issues in a manner that recognizes the personal circumstances of the particular lawyer while continuing to protect the public interest.

88. Accordingly, the Task Force recommends that Practice Advisors, Practice Standards lawyers, Credentials Officers and staff in the Professional Regulation Department working directly with lawyers or applicants living with mental health or substance use disorders have access to a roster of registered psychologists that are available to provide advice and support to staff needing additional, professional guidance on how to understand or respond to these issues.[48]

Recommendation 6: Establish a roster of qualified mental health professionals that Practice Advisors, Practice Standards lawyers, Credentials Officers and staff in the Professional Regulation Department may consult to assist them in addressing mental health and substance use issues that arise in the course of Law Society processes involving lawyers or applicants.

89. The registered psychologist's role would be restricted to supporting Law Society staff, sourcing and disseminating information on how to recognize mental health problems and providing guidance on communicating with an affected lawyer in a manner that is respectful of the individual and effective in protecting the public interest. For example, a psychologist could provide staff with advice on how to recognize a practitioner that may be at risk of suicide and provide expert guidance on how to connect the lawyer with community supports and resources. Similarly, a psychologist could coach staff on how to deal with difficult communication styles that may stem from an underlying substance use or mental health issue.

[48] This approach can be compared with that of the Law Society of Ontario, which has a dedicated "capacity advisor" that helps guide and support staff through several hundred files each year in which capacity is an issue.

90. Importantly, the role of the psychologist would be strictly limited to supporting Law Society staff in their efforts to address mental health and substance use issues that arise in the course their work. Mental health professionals will not provide the Law Society with medical assessments; design, propose or provide treatment plans; enter into a therapist-client relationship with the lawyer or the staff member; or provide opinions that will influence or determine any regulatory outcome.

91. It will be important to effectively communicate the circumscribed support role of these mental health professionals, both among Law Society staff and with the membership. In particular, it is critical to guard against the perception that the Law Society is seeking to diagnose or "out" those with mental health or substance use issues, or to impose unwanted treatment on lawyers.

Committees and Hearing Panels

92. The Law Society has over a dozen specialized Committees that carry out the organization's core regulatory functions. Three of these Committees are frequently involved in reviewing information about lawyers and applicants with professional conduct or competency related concerns: the Credentials Committee, the Discipline Committee and the Practice Standards Committee. Some of the matters that come before these Committees involve lawyers with mental health or substance use issues.

93. For example, the Credentials Committee is required to review applications in which the applicant has affirmed in the Law Society Admission Program Enrollment Application that they have a substance use disorder or an existing mental health condition that may impact their ability to function as an articling student. The Committee may also be asked to review an articled student's failed standing in the Professional Legal Training Course ("PLTC") based on compassionate grounds supported by medical evidence.[49] These processes may require the Committee to consider mental health or substance use issues.

94. Similarly, there are numerous points at which mental health or substance use issues can arise in the course of the work of the Practice Standards Committee, which is tasked with identifying lawyers with competency concerns and recommending remedial measures to assist them in improving their practices.[50] For example, the Practice Standards Committee may be required to consider a report following a practice review in which mental health or

[49] Law Society Rule 2-74(4).
[50] Law Society Rules 3-16 to 3-25.

substance use issues influence findings and recommendations,[51] or to take action following the review of such a report, action which can include a recommendation that a lawyer obtain a psychiatric, psychological or medical assessment or receive medical assistance or counselling.[52]

95. Likewise, the Discipline Committee encounters lawyers experiencing mental health and substance use issues in the context of conduct meetings and conduct reviews, as well as in determining what discipline process is appropriate for a particular matter.

96. Currently, these Committee members do not receive dedicated training on mental health or substance use issues. Given the key role these bodies play in making decisions that affect individual lawyers and Law Society processes, the Task Force recommends that both Bencher and non-Bencher members of the Credentials, Practice Standards and Discipline Committees and their associated hearing panels are provided with basic training on mental health and substance use issues, including the effect of stigma. Given regular changes in the composition of these Committees and hearing panels, this training should be provided annually.

Recommendation 7: Provide members of the Credentials Committee, the Practice Standards Committee and the Discipline Committee and their associated hearing panels, as well as individuals who are responsible for practice reviews, conduct meetings and conduct reviews, with basic education and training to improve awareness and knowledge of mental health and substance use issues.

Communications Strategies

97. Starting a public conversation about mental health and substance use within the legal profession is an essential component of raising awareness about these issues and reducing the stigma that prevents many lawyers from seeking help.

98. In the early stages of its work, the Task Force began such a conversation by working closely with the Communications Department to promote its mandate. These efforts included establishing a dedicated mental health page on the Law Society website, creating an email box that enables members of the profession to contact the Task Force, the

[51] Law Society Rule 3-18.
[52] Law Society Rule 3-19(1)(b).

publication of an article in the *Benchers' Bulletin* [53] and participating in the Canadian Mental Health Association's Mental Health Week through a social media campaign.

99. The next step is to broaden these efforts by developing a comprehensive, proactive communication strategy designed to achieve two inter-related objectives: raising awareness of mental health and substance use issues in the legal profession and reducing stigma. The strategy should be developed by the Communications Department in consultation with subject matter-experts to ensure the approach is appropriate and effective in advancing these goals.

Recommendation 8: Develop a comprehensive, profession-wide communication strategy for increasing awareness about mental health and substance use issues within the legal profession.

100. At a minimum, the strategy should aim to improve the means by which the Law Society facilitates access to information about, and support for mental health and substance use issues facing lawyers. This could be achieved by ensuring that there are regular articles in the *Benchers' Bulletin* on wellness issues, sharing mental health resources with the profession through the Law Society website, emphasizing the availability of confidential support services such as the Lawyers Assistance Program ("LAP") and Lifeworks and finding ways to highlight professional development opportunities related to mental health and substance use.

101. Other approaches may be necessary to specifically address stigma, both at the level of the individual, and systemic stigma that is created and perpetuated by the culture and structure of the legal profession itself. Promoting anti-stigma initiatives is essential to changing the way lawyers engage with mental health and substance use disorders.

Removing Barriers to Accessing Support Services

102. One mechanism for improving lawyer well-being is to connect those needing help with support services both within and beyond the legal community. The Law Society currently promotes two such programs: LAP and LifeWorks.

103. LAP provides support for lawyers dealing with a broad range of health, work and relationship issues, with a focus on problematic alcohol and drug use and mental health issues. LAP provides education, outreach, support and referrals to lawyers, their families and other members of the legal community who are experiencing these and other wellness

[53] Greenberg B., "Mental Health Issues in the Legal Profession" (Spring 2018) *Benchers' Bulletin*, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB_2018-01-Spring.pdf#feature

issues. Lawyers' inquiries and interactions with LAP are strictly confidential and no information is shared with the Law Society or other parties, including the lawyer's firm.

104. The Law Society recognizes the key role LAP plays in supporting lawyers experiencing mental health and substance use issues. Each year, many BC lawyers access the services provided by LAP. Notably, a survey conducted by the Canadian Bar Association revealed that BC lawyers were more likely to have heard of the lawyer assistance program than those in any other province in Canada, with 90% of BC respondents reporting familiarity with the program.[54] Lawyers residing in BC were also the most likely to have used LAP themselves as compared to lawyers in other Canadian jurisdictions.[55]

105. The Law Society also funds personal counselling and referral services to lawyers and articled students dealing with wellness issues through LifeWorks Canada. Currently, there are two ways to contact LifeWorks for assistance: logging in through the Law Society's member portal or calling LifeWorks directly. Under the former approach, lawyers are required to provide their Law Society membership number and password in order to be redirected to LifeWorks online service.

106. On the basis that the ABA Study found that the most significant barriers to lawyers seeking help for mental health and substance use issues were "not wanting others to find out they needed help" and related apprehensions regarding privacy and confidentiality, requiring lawyers to access LifeWorks through the Law Society's website may deter help-seeking behaviours, regardless of the fact that the Law Society does not track, report or receive information about lawyers accessing LifeWorks.

107. Additionally, uncertainty about what services LifeWorks provides, what one should expect when contacting LifeWorks and whether LifeWorks is likely to be able to assist a particular lawyer also appear to operate as a barrier to lawyers utilizing these support services.

108. Accordingly, the Task Force recommends exploring alternative ways of accessing LifeWorks services without lawyers having to utilize the Law Society's member portal and their Law Society password, as well as expanding lawyers' understanding of the services available through LifeWorks.

Recommendation 9: Seek assistance from LifeWorks to help the Law Society better explain to the profession what services are available and who may benefit from them, and to explore

[54] CBA Survey *supra* note 22 at 35.
[55] *Ibid.* at 3.

alternate means for lawyers to connect with LifeWorks support services that do not require access through the Law Society's member portal.

Continuing Professional Development Programming

109. In 2017, the Benchers adopted the Lawyer Education Advisory Committee's recommendation that "professional wellness" be recognized as a new, non-mandatory subject matter within BC's continuing professional development program ("CPD"):

> **Professional Wellness**: Approved educational programs designed to help lawyers detect, prevent or respond to substance use problems, mental health or stress-related issues that can affect professional competence and the ability to fulfill a lawyer's ethical and professional duties. Such educational programs must focus on these issues in the context of the practice of law and the impact these issues can have on the quality of legal services provided to the public.

110. While this change represented a step forward, the practical effect was to bring the Law Society into alignment with other Canadian CPD programs, virtually all of which already recognize this type of training as eligible for credit. The next step is to consider whether BC will become a leader by making some form of professional wellness training mandatory.

111. Mandatory training on mental health and substance use disorders is not a novel concept. In 2017, the ABA amended its Model Rule for Minimum Continuing Legal Education ("ABA Model Rule") to *require* all lawyers to take at least one credit of training on mental health and substance use disorders every three years:[56]

> **Section 1. Definitions**
>
> (J) "Mental Health and Substance Use Disorders Programming" means CLE Programming that addresses the prevention, detection, and/or treatment of mental health disorders and/or substance use disorders, which can affect a lawyer's ability to perform competent legal services.

[56] See the ABA Model Rule for Minimum Continuing Legal Education, as amended by Resolution 106 (February 2017) ("ABA Resolution 106"), online at: https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/106.pdf).The Model Rule serves as a measure for comparison and for consideration by jurisdictions that have adopted a CLE requirement in an effort to support uniform standards and means of accreditation of CLE programs and providers.

> Section 3. MCLE Requirements and Exemptions
>
> (A) Requirements
>
> (1) All lawyers with an active license to practice law in this Jurisdiction shall be required to earn an average of fifteen MCLE credit hours per year during the reporting period established in this Jurisdiction.
>
> (2) As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following areas:
>
> > (a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year);
> >
> > (b) Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years); and
> >
> > (c) Diversity and Inclusion Programming (at least one Credit Hour every three years).
>
> [*emphasis added*]

112. The ABA Model Rule recommends a stand-alone requirement for mental health and substance use disorder programming for two reasons.[57] First, establishing a mandatory requirement will ensure that all lawyers receive basic training in these areas. Second, research indicates that lawyers may hesitate to attend such programs due to potential stigma, and requiring all lawyers to participate may greatly reduce the likelihood of poor attendance.[58]

113. The ABA Model Rule is supported by the authors of the National Task Force Report, who specifically recommend that regulators mandate credit for mental health and substance use disorder programming as part of their continuing professional development schemes.[59] Several states have adopted a mandatory requirement including California, Illinois, Nevada, North and South Carolina and West Virginia.[60]

114. Accordingly, the Task Force recommends collaboration between the Mental Health Task Force and the Lawyer Education Advisory Committee to explore the merits of adopting

[57] The report accompanying the amendment notes that the Model Rule may be expanded in the future to include additional programming that falls within a broader definition of "Attorney Well-Being Programming" (currently undefined) rather than being restricted to mental health and substance use disorders.
[58] ABA Resolution 106 *supra* note 56. See especially Comment 4 at 6.
[59] National Task Force Report *supra* note 26 at 26.
[60] For examples, see Rules of the State Bar of California, Title 2, Div. 4, R. 2.72 (2017); Illinois Supreme Court Rules, 794(d)(1) (2017).

some form of mandatory CPD in this area. This recommendation focuses on cross-Committee consultation, and does not advocate for any particular approach or outcome.

Recommendation 10: Collaborate with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory continuing professional development requirement for mental health and substance use disorder programming.

115. The Task Force is mindful of the potential for controversy within the profession with respect to imposing new mandatory CPD topics. Consequently, any recommendations that may result from these discussions may require broader consultation.

Regulatory strategies

116. The Task Force's second set of recommendations consider how mental health and substance use issues affecting lawyers are most appropriately addressed in the regulatory context. Three recommendations are proposed in this regard:

a. incorporating mental health and substance use issues into the Law Society's Law Firm Regulation initiative;

b. re-evaluating the Law Society's current approach to inquiring into mental health and substance use in the Law Society Admission Program Enrollment Application ("LSAP Application"); and

c. amending the "duty to report" provisions in the *Code of Professional Conduct for British Columbia* (the *"BC Code"*).

Law Firm Regulation

117. Over the last several years, the Law Society has developed a framework for the regulation of law firms. This work, which is guided by the Law Firm Regulation Task Force, has been the subject of two major reports,[61] a profession-wide firm registration process and a pilot project involving more than 350 firms from across the province.

118. The impetus for law firm regulation is the recognition that law firms wield considerable power over, and influence on professional values and conduct, and on the delivery of legal

[61] For a summary of the Law Firm Regulation Task Force's work, including its key reports, see www.lawsociety.bc.ca/our-initiatives/law-firm-regulation-initiatives/

services to the public. Yet despite occupying this powerful position in the legal landscape, these entities have largely escaped regulation. Law firm regulation is designed to fill this regulatory gap.

119. The self-assessment tool is a central feature of the Law Society's proactive approach to regulating firms. The tool is designed to encourage firms to examine their practice management systems and to evaluate the extent to which their policies and processes address core areas of professional, ethical firm practice called "Professional Infrastructure Elements."

120. As part of this exercise, firms are asked to reflect on where they are doing well and where more robust policies and processes may be necessary. This is done by reference to a broad set of Indicators and a more detailed list of Considerations found in the self-assessment tool. Collectively, the Indicators and Considerations provide guidance and suggestions on the types of policies, procedures, processes, methods, steps and systems that a prudent law firm might employ in order to achieve high standards of professional, ethical practice. The self-assessment tool also contains a set of educational resources that firms are encouraged to review.

121. One area in which the influence of firm culture is profound is lawyer wellness. Practices that rob lawyers of a sense of autonomy and control over their schedules and their lives are especially harmful, with research demonstrating that high job demands paired with a lack of a sense of control breeds depression and other psychological disorders.[62] Similarly, organizational cultures that primarily focus on materialistic, extrinsic rewards can damage well-being.[63] Unreasonable expectations of work schedules, work product and deadlines, billable hour targets, competition among colleagues and the inherent stressors associated with work that is largely problem-driven, adversarial in nature and based on uncertain

[62] Woo J.M. & Postolache T.T., "The Impact of Work Environment on Mood Disorders and Suicide: Evidence and Implications" 7 (2008) Int'l J. Disability & Human Dev. 185, online at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2559945/ ; Griffin J.M. *et al*., "The Importance of Low Control at Work and Home on Depression and Anxiety: Do These Effects Vary by Gender and Social Class?" (2002) 54 Soc. Sci. & Med. 783, online at: https://www.ncbi.nlm.nih.gov/pubmed/11999493 ; Seto *supra* note 33; Seligman E.P., Verkuil P.R. & Kang T.H., "Why Lawyers are Unhappy" (2005) 10 Deakin L. Rev. 49, online at: http://www5.austlii.edu.au/au/journals/DeakinLawRw/2005/4.html

[63] Joudrey A.D. & Wallace J.E., "Leisure as a Coping Resource: A Test of the Job Demand-Control-Support Model" (2014) 62 Human Relations 195, online at: https://soci.ucalgary.ca/manageprofile/sites/soci.ucalgary.ca.manageprofile/files/unitis/publications/233-32859/leisure%2Bas%2Ba%2Bcoping%2Bresource.pdf (Lawyers who reported that the practice of law was primarily about generating profits were more likely to be depressed); Krieger *supra* note 12 at 615 (Study showing that required billable hours undermine lawyers' sense of well-being by focusing on external rewards. As billable hours go up, income goes up and happiness goes down).

outcomes that often have serious consequences for clients all contribute to cultural norms within firms that can be unhealthy.[64]

122. Recognizing the powerful influence firms have over lawyer well-being, the National Task Force Report dedicates a discrete set of recommendations to legal employers.[65] These recommendations suggest that, among other proactive measures, firms establish policies and practices to support lawyer well-being, conduct in-depth evaluations of current wellness policies and practices and make adjustments as necessary.[66]

123. Given the role law firm regulation plays in encouraging firms to develop and evaluate policies and practices in relation to all aspects of practice management, the self-assessment tool provides an excellent opportunity for the Law Society to promote firms' engagement with mental health and substance use issues that may be affecting their lawyers.[67]

124. In this regard, the Task Force recommends collaboration between the Mental Health Task Force and the Law Firm Regulation Task Force to consider the merits of developing additional well-being specific Indicators, Considerations and resources in the next iteration of the self-assessment tool, including those that address mental health and substance use issues.

Recommendation 11: Collaborate with the Law Firm Regulation Task Force to consider developing additional guidance for the self-assessment tool that encourages firms to put in place policies, processes and resources designed to support lawyers experiencing mental health and substance use issues, and to promote the use of these policies, processes and resources within firms.

125. This collaborative work should include consideration of the National Task Force Report, which provides a comprehensive compilation of topics that law firms should address when

[64] Michalak R.T., "Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals" (2015), online at: https://docs.wixstatic.com/ugd/a8d830_08ea2117408c4b3a9ae1b628f8d0d9ee.pdf; Krieger *supra* note 12.
[65] See National Task Force Report *supra* note 26 at 31-34.
[66] Examples of some of the specific firm practices that should be reviewed are found in the National Task Force Report *supra* note 26 at 17.
[67] The National Task Force suggests that policies and procedures should cover a broad range of issues, including: lawyer training and education; assessing the state of well-being among lawyers and staff and whether the workplace supports well-being; the role of confidential reporting procedures for lawyers and staff to convey concerns about colleagues mental health or substance use; reducing the emphasis of alcohol within the firm; procedures for lawyers to seek help without being penalized or stigmatized; and developing firm policies for handling lawyer impairment (National Task Force Report *supra* note 26 at 31-34).

auditing their policies and practices.[68] For example, the self- assessment tool could be modified to ask firms to consider whether they:

- have internal resources, appropriate to the particular firm, to increase awareness of mental health and substance use issues and provide support for those who may be experiencing these issues
- are familiar with external resources, including LAP and LifeWorks
- advertise the availability of internal and external resource and encourage members of the firm to take advantage of these resources
- designate someone at the firm to oversee resources designed to assist those experiencing mental health and substance use issues

126. Importantly, adding wellness content to the self-assessment tool would not require firms to provide any particular programs, resources or supports, or to develop specific policies or processes. Rather, expanding the self-assessment's focus on well-being generally, and mental health and substance use disorders specifically, will promote engagement with these topics and provide firms with a robust body of guidance on the variety of ways to address these issues in the workplace.

Admissions Process: The LSAP Application

127. As outlined in Part 1, the Student Well-Being Study revealed that those on the cusp of entering the legal profession are experiencing troublesome rates of alcohol and drug use, anxiety and depression. The research also shows that the majority of law students are reluctant to seek help, largely due to concerns that revealing a problem would affect their admission to the bar. [69]

128. Noting that law schools are key stakeholders in catalyzing the shift toward a healthier profession, the Task Force met with representatives of BC's law schools to learn about how mental health and substance use issues manifest in the student population, what approaches law schools are currently taking to address these issues and what role the Law Society could potentially play in improving the well-being of the next generation of lawyers.

[68] National Task Force Report, Appendix D *supra* note 26 at 59.
[69] Student Well-Being Study s*upra* note 10 at 140. For example, while 42% of the respondents thought they needed help for mental health problems in the prior year, only about half of that group ever sought help from a health professional. Help-seeking behaviours were even worse for substance use issues. Although more than 25% of respondents were considered at risk for problem drinking, only 4% said they ever received counselling for alcohol or drug issues.

129. Through these consultations, administrators demonstrated strong commitment to improving student well-being and decreasing the stigma around mental health and substance use issues.[70] In discussing how the mandate of the Mental Health Task Force might support this work, the law schools highlighted their concerns regarding the manner in which mental health and substance use disorders are dealt with in the application process for the Law Society Admission Program ("LSAP").[71] In particular, the law schools critiqued Schedule A of the LSAP Application, which must be completed by all students before they commence articles.[72]

130. The LSAP Application is intended, among other things, to enable the Benchers to fulfill their statutory obligation under s. 19 of the *Legal Profession Act* to be satisfied that each applicant for articles, call or admission or transfer is of good character and repute and fit to become a lawyer. The onus is placed on the applicant to satisfy the Benchers in this regard.

131. In addition to seeking details about a student's education and employment history, the LSAP Application includes a series of "good character" questions that inquire into the applicant's record of conduct – for example, whether the applicant has any criminal offences, has filed for bankruptcy, has failed to obey a court order, has been subject to disciplinary action or suspension by another professional organization or has an outstanding civil action or judgment against them. These questions are intended to help the Law Society identify applicants that may be unfit to practice law.

132. In a separate section of the LSAP Application entitled Schedule A, there are an additional set of questions which are used to evaluate an applicant's "medical fitness." These questions are not related to past conduct. Rather they are inquiries about the applicant's medical history. Specifically, Schedule A requires applicants to answer the following questions:

---

[70] The Law Society of BC invited all BC law schools to participate in a consultation session with the Task Force and was grateful for the contributions of Dr. Catherine Dauvergne, Dean, UBC Faculty of Law, lawdean@allard.ubc.ca; Kaila Mikkelsen, Assistant Dean - Students, UBC Faculty of Law; Chira Perla, Assistant Dean - Career Services, UBC Faculty of Law; and Professor Gillian Calder, Associate Dean - Academic and Student Relations, UVic Faculty of Law).

[71] In order to be called to the British Columbia bar, applicants are required to complete a 12-month training program. The program, called the Law Society Admission Program (LSAP), consists of three components: nine months of articles, 10 weeks of full-time attendance at the Professional Legal Training Course (PLTC) and two qualification examinations.

[72] Law Society Admission Program Enrolment Application, online at: hwww.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-admissions/admission-app.pdf

2. a) Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have a substance use disorder?

   b) Have you been counseled or received treatment for a substance use disorder?

3. *If you answered yes to questions 2 (a) or (b), please provide a general description on a separate sheet.*

4. Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have any existing condition that is reasonably likely to impair your ability to function as an articled student?

5. *If the answer to question 4 is "yes", please provide a general description of the impairment on a separate sheet.*

133. Applicants that answer yes to these questions may be asked to provide further information from a source that the Law Society deems appropriate. Applicants that fail to provide answers may have their applications delayed or rejected.

134. The law schools identified a number of concerns with the Schedule A of the LSAP Application. First, administrators observe that many students fail to disclose mental health or substance use issues on the form based on fears that such disclosure poses a threat to their admission to the bar or their legal careers.

135. Relatedly, the law schools raised concerns about a lack of transparency regarding how the medical fitness information is used by the Law Society, which again reportedly deters students from being candid about their health status. Additionally, the law schools noted that it was difficult to provide advice and support to students with respect to the Law Society's process as a result of this lack of transparency.

136. The law schools also reported that many students do not seek help for mental health or substance use issues, such as counselling or a medical evaluation, due to fears that if they seek a diagnosis or treatment, they must disclose this information on the LSAP Application, and this will delay or prevent their call to the bar.

137. Similar themes emerge from recent social science research which indicates that a leading factor discouraging students from seeking help for substance use issues and mental health

concerns is perceived threats to bar admission.[73] The Student Well-Being Study found that 49% of respondents felt that their chances of being admitted to the bar were better if they were to hide a drug or alcohol problem; 43% felt similarly about hiding a mental health condition.[74]

138. Although most legal regulators still inquire, to some extent, about substance use and mental health conditions as part of their processes for evaluating an applicant's fitness to practice, there is growing debate as to whether these types of questions — particularly those seeking disclosure of diagnosis or treatment history — should be asked at all.

139. Recently, both the ABA and the US Department of Justice ("US DoJ") have encouraged states to eliminate questions relating to mental health as part of their application process:

> It has become clear that questions about mental health history, diagnoses, or treatment are inherently discriminatory, invade privacy, stigmatize and needlessly exclude applicants with disabilities, are ineffective in identifying applicants who are unfit, and discourage some applicants from seeking necessary treatment. By calling for the elimination of such questions, the proposed Resolution will help ensure that bar applicants with disabilities are assessed—like other applicants—solely on the basis of their fitness to practice law.[75]

140. Instead, these bodies argue that the focus should be on conduct or behaviour that impairs an applicant's ability to practice law in a competent, ethical, and professional manner.[76] As the ABA observes, regulators already ask a wide range of questions that focus on *conduct* relevant to applicants' fitness, which are not only sufficient to evaluate fitness, but moreover, are the most effective means for doing so.[77] This view is supported by a breadth of social science research indicating that a history of mental health diagnosis or treatment is not a useful predictor of future lawyer misconduct or malpractice.[78]

---

[73] Student Well-Being Study s*upra* note 10 at 141. Approximately 63% of respondents felt that substance use posed a potential threat to bar admission, while 45% felt that mental health concerns were a threat to bar admission. Perceived threats to job or academic status and social stigma were also strong factors discouraging students from seeking help.

[74] *Ibid*. at 142.

[75] American Bar Association, Resolution 102 and supporting report (August 2015)("ABA Resolution 102"), online at:http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2015_hod_annual_meeting_102.docx

[76] *Ibid*. See also Department of Justice Letter to the Louisiana State Bar (February 5, 2013) ("DoJ Letter to Louisiana State Bar"), online at: https://lalegalethics.org/u-s-department-justice-issues-scathing-letter-regarding-louisiana-bar-admissions-process/.

[77] ABA Resolution 102 *supra* note 75 at 6.

[78] American Bar Association Commission on Mental and Physical Disability Law, "Recommendation to the House of Delegates" (February 1998) 22 Mental & Physical Disability L. Rep. 266 as quoted in ABA Letter *infra* note 81 ("Research in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to

141. Furthermore, studies demonstrate that questions concerning mental health diagnoses and treatment may deter individuals from seeking treatment, based on concerns that such disclosure may create a barrier to admission, a result that is counterproductive to the goal of ensuring lawyers' fitness to practise.[79] These questions may also prevent applicants who are actively seeking help from being candid about their conditions with their health care provider, due to fears that this information will find its way back to the regulator.[80]

142. Numerous states have eliminated questions related to mental health history from their character and fitness reviews of bar applicants.[81] The ABA recently strongly supported such changes in Washington, observing that:

> The ABA adopted policy in 2015 urging state and territorial bar licensing entities to eliminate requests for mental health history and instead limit bar admission questions to issues involving "conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner." A growing number of states, including Arizona, Illinois, Massachusetts, Pennsylvania, and Tennessee, have eliminated discriminatory mental health questions from their bar admissions practices, and the ABA urges Washington to follow suit.
>
> Requiring bar applicants to provide their mental health histories, diagnoses, or past treatment details unfairly discriminates against individuals with disabilities and is likely to deter individuals from seeking mental health counseling and treatment. Additionally, these questions have proven to be ineffective for the

act with integrity, competence, or honor"); Bauer J., "The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act" (2001) 49 UCLA Law Rev. 93 at 141 ("Bauer"), online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=293613 ("There is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney").

[79] Bauer *ibid*. at 150 (Describing how disability-related questions can discourage applicants from obtaining treatment and undermining its effectiveness); Student Well-Being Study *supra* note 10; Association of American Law Schools, "Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools" (1994) 44 J. Legal Educ. 35 at 54 (Finding that a much higher percentage of law students would seek treatment for substance abuse problems or refer others to treatment if they were assured that bar officials would not have access to that information), online at: https://www.jstor.org/stable/42893309?seq=1#page_scan_tab_contents

[80] ABA Resolution 102 *supra* note 75 at 7.

[81] American Bar Association, "Letter to Washington State Supreme Court Re: Revisions to Admissions Practice Rules 20-25 and the Bar Application"(April 21, 2016) ("ABA Letter"), online at: https://www.americanbar.org/content/dam/aba/uncategorized/GAO/20160421_wabaradmission_final.authcheckdam.pdf . See Washington's revised rules, online at: www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=apr&ruleid=gaapr21

presumed purpose of identifying unfit applicants. The ABA does, however, make clear that:

> licensing entities are not precluded from making reasonable and narrowly-tailored follow-up inquiries concerning an applicant's mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission, and a mental health condition either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.

We believe this approach strikes the right balance and allows licensing entities to carry on in their vital role of protecting the profession and the public.[82]

143. Similarly, the US DoJ advocates for an approach in which applicants are not asked to disclose diagnosis of, or treatment for a disability unless that information is being used to explain the applicant's conduct.[83]

144. The Task Force strongly supports the approach recommended by the ABA and the US DoJ, and now adopted in some states. This is particularly the case given the low number of students who come to the attention of the Credentials Committee each year as a result of the medical fitness questions in Schedule A of the LSAP Application and concern that the inclusion of such questions discourages students from seeking counselling, support and medical treatment for mental health and substance use disorders.

145. The Task Force considers that the public interest is better served by creating an atmosphere of support and transparency for lawyers and law students, where treatment for those that may benefit from it is encouraged rather than discouraged.

146. Although substantial changes were made to the medical fitness questions in the LSAP Application in 2010, new understandings of the consequences and effectiveness of these types of questions suggest that a reconsideration of the current application form is required.[84] In this regard, the Task Force recommends a review of the LSAP Application in collaboration with the Credentials Committee and appropriate subject-matter experts.

---

[82] ABA Letter *supra* note 81.

[83] DOJ Letter to Louisiana State Bar s*upra* note 76 at 31 ("To remedy the deficiencies discussed above and protect the civil rights of individuals with mental health diagnoses or treatment who seek to practice law in the State of Louisiana, the Court should promptly implement the minimum remedial measures set forth below. a) Refrain from utilizing […] any other question that requires applicants to disclose diagnosis of, or treatment for, a disability when that information is not being disclosed to explain the applicant's conduct").

[84] Note that Question 2(a) was not the focus of the 2010 revisions to the LSAP Application. As a result, Question 2 currently singles out diagnosis and treatment for a substance use disorder as a condition that students must disclose,

Recommendation 12: Collaborate with the Credentials Committee in re-evaluating the Law Society's current approach to inquiries into mental health and substance use in the Law Society Admission Program Enrolment Application.

BC Code: Duty to Report

147. A central feature of the Law Society's duty to protect the public interest is to ensure that lawyers can identify and maintain high standards of ethical conduct. The *BC Code*, which serves as the governing document concerning professional responsibility for BC lawyers, attempts to help lawyers achieve this goal.

148. Although the *BC Code* is not a formal part of the Law Society Rules, it reflects the views of the Benchers about standards that lawyers in BC must meet in fulfilling their professional obligations. The *BC Code* is divided into three components: rules, commentary and appendices. Each of these components contain some statements that are mandatory, some that are advisory and others with both mandatory and advisory elements. A breach of a provision of the *BC Code* by a lawyer may or may not be the basis of disciplinary action against that lawyer.[85]

149. The *BC Code* is significantly related to the Federation of Law Societies' Model Code of Professional Conduct (the "Model Code"). There are, however, points of variance. These differences may be the result of the Benchers determining that a different approach is necessary to guide practice in BC or because the Model Code has been amended in advance of the Benchers considering, or making changes to corresponding provisions.

150. Currently, the *BC Code* contains stigmatizing language with respect to a lawyer's duty to report to the Law Society under rule 7.1-3, text that was removed from the Model Code in 2016.[86] The *BC Code* presently states:

> Duty to report
>
> **7.1-3** Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society:

without asking whether the student is of the view that their disorder will impact on their ability to function as an articling student, as is asked in relation to other "existing conditions" in Question 4.

[85] *Code of Professional Conduct for British Columbia*, online at: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/

[86] The changes to the text of Model Code provision 7.1-3 were motivated by concerns that the language might have a stigmatizing effect on some lawyers, resulting in the Standing Committee on the Model Code recommending, and the Federation Council adopting, revised wording to 7.1-3 and its associated commentary.

(a) a shortage of trust monies;
(a.1) a breach of undertaking or trust condition that has not been consented to or waived;
(b) the abandonment of a law practice;
(c) participation in criminal activity related to a lawyer's practice;
(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;
(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary:

[1] Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

[3] Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse." Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[emphasis added]

151. The current version of rule 7.1-3 and the associated Commentary is stigmatizing in a variety of ways. With respect to the rule itself, the phrase "mental instability" in 7.1-3(d) is an emotionally charged term that connotes negative attitudes toward mental health conditions and the people affected by them. Additionally, mental health is the only condition, or "state of being" enumerated in 7.1-3, in contrast to the other items in the rule, which focus on conduct. As such, 7.1-3(d) makes the unfounded and stigmatizing assumption that lawyers living with mental health challenges present an elevated risk to the public.

152. Rule 7.1-3(d) also requires lawyers and the Law Society to engage in speculation as to whether or not a mental health issue is of "such a nature" that it might materially prejudice a client. This adds nothing to the catchall provision in 7.1-3(f) requiring a lawyer to report any other situation that is "likely" to cause prejudice to clients.

153. In contrast, specific references to mental health have been removed from the corresponding provision in the Model Code, which instead focuses on lawyer conduct. The Model Code specifically directs the inquiry toward "conduct that raises a substantial question about the lawyer's capacity to provide professional services" at 7.1-3(e):

> **7.1-3** Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:
> (a) the misappropriation or misapplication of trust monies;
> (b) the abandonment of a law practice;
> (c) participation in criminal activity related to a lawyer's practice;
> (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;
> (e) <u>conduct that raises a substantial question about the lawyer's capacity to provide professional services; and</u>
> (f) any situation in which a lawyer's clients are likely to be materially prejudiced.
>
> *[emphasis added]*

154. To address the stigmatizing effect of BC's current rule, the Task Force recommends that 7.1-3(d) is removed from the *BC Code* and is replaced by provision 7.1-3(e) of the Model Code. This change will ensure that the focus is exclusively on lawyers' conduct rather than the presence of a mental health condition.

155. The Task Force is aware that the Law Society's Ethics Committee has similarly proposed an amendment to eliminate rule 7.1-3(d) as part of its ongoing work to bring the *BC Code* into alignment with the Model Code. The Task Force applauds the Ethics Committee's recommendation and supports the proposed amendment to the rule itself.

156. However, the Task Force believes that additional changes to the associated Commentary are also required.

157. Specifically, the Task Force is concerned with the language used in note 3 of the Commentary of the *BC Code*. This includes the unsupported and stigmatizing statement that "often" instances of improper conduct arise from "mental disturbances" or "substance abuse." In an effort to correct this language, the Task Force suggests the first two sentences of note 3 of the Commentary are amended to read the following:

> A variety of stressors, physical, mental or emotional conditions, disorders or addictions may contribute to instances of conduct described in this rule. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

158. The Task Force is also concerned about the last two sentences of note 3 of the Commentary, which state:

> Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation. *[emphasis added]*

159. This language is problematic on several fronts. First, it is not reasonable or necessary to require lawyer-counsellors to report a substantial risk relating to another lawyer's *future* behaviour. In addition to the fact that no lawyer can make an accurate assessment as to how current behaviours relate to potential future action, this Commentary also results in lawyer-counsellors being the only lawyers that are required to speculate about, and report on the possible future conduct of another lawyer. For example, the rule itself requires lawyers to report another lawyer's *participation* in a criminal activity, not their possible *future participation* in such activity.

160. Even if lawyer-counsellors were to report potential, future misconduct it is unclear to the Task Force what real value such a report would have to the Law Society and how this information could be used.

161. This portion of the Commentary also suggests that lawyers seeking help for substance use or mental health issues are more likely than other lawyers to engage in criminal

activity or other serious misconduct. Absent this assumption, there would be no need to "remind" lawyer-counsellors of the reporting obligations that apply to all lawyers under rule 7.1-3, or to add to these requirements by also including references to present and future "serious misconduct," neither of which are referenced in the main body of the rule. Given that there is no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct, this approach is misguided and stigmatizing.[87]

162. In addition to seeing little benefit to requiring lawyer-counsellors to report the risk of future misconduct, the Task Force believes that imposing this additional, onerous obligation may dissuade lawyers from seeking, or volunteering to provide assistance through programs such as LAP. The risk of a *mandatory* requirement to report potential future conduct may have a chilling effect on use of peer support programs and sends yet another stigmatizing message to the profession.

163. Finally, it is unnecessary to remind lawyers that "the Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation." This phrasing suggests that those involved in rehabilitative efforts require a specific and additional reminder that their circumstances are not a justification for criminal activities or other serious misconduct. Presumably this is based on the faulty assumption that those dealing with mental health and substance use issues are at a higher risk of misconduct, or are more likely to use their condition as an excuse for such conduct.

164. The Task Force understands that the Ethics Committee may have additional views or recommendations with respect to the Commentary, and that the provisions of the Model Code may be changed in the future. The Task Force welcomes further consultation with the Ethics Committee in respect of these changes, as necessary. However, to combat the stigmatizing approach described above, the Task Force recommends amending note 3 of the Commentary, as well as eliminating 7.1-3(d) of the *BC Code*.

Recommendation 13: To eliminate stigmatizing language and approaches to the reporting requirements in *BC Code* provision 7.1-3(d) [Duty to report] and the associated Commentary.

[87] Bauer *supra* note 78. Notably, in the context of applications for admission there has been a strong movement away from speculating as to how a current mental health condition might affect future conduct. See DoJ Letter to Louisiana State Bar *supra* note 76.

Budgetary Considerations

165. Although the majority of the Task Force's recommendations can be implemented with existing program funding, several of the education-based strategies have additional budgetary implications. This includes the comprehensive specialized training for Practice Advisors, Practice Standards lawyers and staff in the Professional Responsibility Department.

166. In considering these budgetary implications earlier this year, the Task Force worked with the CMHA to identify a series of potential educational programs and to estimate associated costs. Approximately $12,000 of funding was subsequently included in the Law Society's 2019 budget for initial staff training to ensure that the Task Force's educational recommendations could be implemented once approved by the Benchers.

167. If the full set of education-related recommendations are adopted by the Benchers, additional funding will be sought in 2019 to broaden training to include other Law Society staff, Bencher and non-Bencher Committee and hearing panel members and those responsible for practice reviews, conduct meetings and conduct reviews.

168. As ad-hoc educational programming is not an effective way to create sustained organizational change, training must be frequent and ongoing, and will require continual funding from the Law Society. Accordingly, it is expected that there will be future requests for mental health training budgets across various Law Society departments and Committees.

169. Additionally, $10,000 of funding was allocated to the implementation of Recommendation 6, which will enable some staff groups to have access to up to 50 hours of consultation time with a mental health professional. The use of this resource will be monitored to determine if similar or increased funding is required in the future.

Summary of Recommendations

170. The following summarizes the Task Force's 13 recommendations, which include both educational and regulatory strategies:

Recommendation 1: Promote, through a targeted communication campaign, an expanded role for Practice Advisors to include availability for confidential consultations about mental health and substance use issues and referrals to appropriate support resources.

Recommendation 2: Provide Practice Advisors with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.

Recommendation 3: Provide Practice Standards lawyers and support staff with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.

Recommendation 4: Provide lawyers and paralegals in the Professional Regulation Department with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.

Recommendation 5: Provide Credentials Officers, auditors in the Trust Assurance Program and staff lawyers in the Lawyers Insurance Fund with basic education and training to improve their awareness of mental health and substance use issues.

Recommendation 6: Establish a roster of qualified mental health professionals that Practice Advisors, Practice Standards lawyers, Credentials Officers and staff in the Professional Regulation Department may consult to assist them in addressing mental health and substance use issues that arise in the course of Law Society processes involving lawyers or applicants.

Recommendation 7: Provide members of the Credentials Committee, the Practice Standards Committee and the Discipline Committee and their associated hearing panels, as well as individuals who are responsible for practice reviews, conduct meetings and conduct reviews, with basic education and training to improve awareness and knowledge of mental health and substance use issues.

Recommendation 8: Develop a comprehensive, profession-wide communication strategy for increasing awareness about mental health and substance use issues within the legal profession.

Recommendation 9: Seek assistance from LifeWorks to help the Law Society better explain to the profession what services are available and who may benefit from them, and to explore alternate means for lawyers to connect with LifeWorks support services that do not require access through the Law Society's member portal.

Recommendation 10: Collaborate with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory continuing professional development requirement for mental health and substance use disorder programming.

Recommendation 11: Collaborate with the Law Firm Regulation Task Force to consider developing additional guidance for the self-assessment tool that encourages firms to put in place policies, processes and resources designed to support lawyers experiencing mental health

and substance use issues, and to promote the use of these policies, processes and resources within firms.

Recommendation 12: Collaborate with the Credentials Committee in re-evaluating the Law Society's current approach to inquiries into mental health and substance use in the Law Society Admission Program Enrolment Application.

Recommendation 13: To eliminate stigmatizing language and approaches to the reporting requirements in *BC Code* provision 7.1-3(d) [Duty to report] and the associated Commentary.

Next Steps and Conclusion

171. Evidence is mounting that mental health and substance use disorders are serious and pervasive problems within the legal profession, with research revealing that lawyers and law students are affected by these issues at rates that far exceed those found in the general population and other professions.

172. The benefits of increased lawyer well-being are compelling and the costs of lawyer impairment are too great to ignore. Given its mandate to promote and protect the public interest, the Law Society is committed to ensuring lawyers can access the supports and resources they need to stay well, so that they can continue to meet high competency and ethical standards demanded by the practice of law. Aware that stigma can prevent lawyers from accessing help, stigma-reduction is also a high priority for the Law Society.

173. As such, the Task Force proposes a series of educational and regulatory strategies, detailed in the 13 recommendations summarized above, that promote concerted, coordinated and sustained action across the Law Society's various processes and departments and improve the way that the regulator responds to mental health and substance use issues affecting lawyers.

174. While these recommendations represent progress, they are only first steps in the Task Force's ongoing efforts to fulfill the many and varied aspects of its mandate.

175. In the coming months, additional work will be done to implement the approved recommendations and to commence the next phase of the Task Force's work, which will expand its mental health review of the Law Society's regulatory approaches. This will include examining the development of a "diversion" or other alternative discipline process for lawyers affected by mental health or substance use disorders, or modifying other aspects of the discipline process. Potential changes to the Law Society's admissions process vis-à-vis mental health will also continue to be explored. Consultation and

collaboration with key stakeholders, experts and other professional organizations will remain a central element of the Task Force's activities.

176. The Task Force is also considering preparing, in consultation with subject-matter experts, a statement of best regulatory practices for dealing with mental health and substance use issues across the organization. Additionally, the Task Force is discussing whether a voluntary member survey designed to elicit more information about mental health and substance use issues affecting BC lawyers is feasible, timely and advisable.

177. As the National Task Force Report observes, there has never been a better or more important time for all sectors of the profession to focus on substance use and mental health within the profession:

> We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.[88]

178. In both its current and future work, the Task Force is committed to making a difference, within the scope of both its regulatory and support functions, to changing the way lawyers think about, and respond to mental health and substance use issues, and to encourage cultural changes within the profession that support and promote lawyer well-being.

[88] National Task Force Report *supra* note 26 at 1.

The Law Society of British Columbia

Final Report: Reduced Practice and Insurance Fees for Public Interest Practitioners

Annual Fee Review Working Group

Dean Lawton, QC Chair
Barb Cromarty
Roland Krueger, CD
Jamie Maclaren, QC
Phil Riddell

Date: October 29, 2018

Prepared for:	Benchers
Prepared by:	Staff
Purpose:	Decision

DM2114469

Table of Contents

Committee Process

1. In August of last year, a member resolution was received for consideration at the 2017 Annual General Meeting. The resolution sought to have the Law Society investigate and duly consider providing public interest practitioners with reduced rates of practice fees and insurance premiums, which together comprise the annual fee.

2. Rather than have the resolution proceed to the annual general meeting, it was agreed that the Law Society would investigate and duly consider reduced rates of practice and insurance fees for public interest practitioners and the sponsors of the proposed member resolution would withdraw their resolution.

3. In order to fulfill that commitment, in January 2018, the Benchers approved the creation of the Annual Fee Review Working Group with the following mandate:

   The Working Group will investigate and duly consider providing public interest practitioners with reduced rates of practice fees and insurance fees and will report back to the Benchers before the 2018 annual general meeting.

4. The President appointed Dean Lawton, QC as Chair of the Working Group and appointed Phil Riddell, and Barbara Cromarty as members, along with Jamie Maclaren, QC as a non-voting member. Following his appointment as a Bencher in April of this year, Roland Krueger, CD was appointed to the Working Group.

5. The Working Group has met four times during the course of the year.

6. In the course of the Working Group's initial teleconference discussion in March, 2018, the Working Group reviewed its mandate and considered how best to proceed with the review. The Working Group concluded that it would be helpful to hear from the proponents of the proposed resolution to better understand their understanding of public interest practitioners. The Working Group also concluded that it would be necessary to consult with the profession regarding reducing fees for a particular group and the professions' thoughts on who might qualify as public interest practitioners.

7. At the next meeting of the Working Group in May 2018, members heard from Mr. Aruliah, one of the two members who submitted the member resolution. Ms. Campbell, the other member, was unable to do so. Mr. Aruliah provided his thoughts on who they had hoped would benefit from the proposed fee reduction as well as their thinking behind the characterization of this group as public interest practitioners. The Working Group also reviewed a memorandum from Mr. Cooke providing basic information about the liability insurance requirements and offerings for lawyers in Ontario, because the original member resolution had referenced reduced insurance fees for lawyers practising criminal and immigration law, and exemptions for Ontario lawyers volunteering in a legal clinic, a student legal clinic, or an Aboriginal legal services corporation funded by Legal Aid Ontario.

8. The Working Group next met in July 2018, when they considered a draft consultation paper for distribution to the profession and provided comments. The consultation paper was posted on

the Law Society website and included in the July 2018 eBrief and highlighted again in August 2018.

9. The final meeting of the Working Group followed the Bencher meeting in September 2018. The Working Group discussed the submissions from individual lawyers and groups in relation to the specific issues and questions identified in the consultation paper.

Recommendation

10. The voting members of the Working Group recommend against providing public interest practitioners with reduced rates of practice fees and insurance fees but suggest that the Benchers give consideration to our current practice of charging all lawyers largely the same amount for practice and insurance fees regardless of factors such as type, volume of work, and area of legal practice, income from practice, risk, geography, clientele and other considerations identified in the consultation.

Background

11. As noted in the consultation paper, the Law Society had previously considered a similar proposal arising from a member's resolution at the 2012 AGM, that resulted in the creation of the Reduced Fee Feasibility Working Group in 2013 (the "2013 Working Group"). The 2013 Working Group produced its "Report on Fee Reduction Feasibility Review," in September, 2013 ("the 2013 Report") which concluded it was not feasible to offer a practice fee reduction to a specified class of Law Society members. A copy of the previous report is attached as **Appendix "A"**.

The Consultation

12. As noted, the Working Group conducted a consultation from mid- July to mid-September 2018.

13. The consultation paper provided background on the issues to be considered by the Working Group and asked that respondents consider several questions in their submissions as follows:

    1) Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

    2) If you would support the development and implementation of a fee reduction for public interest practitioners:

        a) How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

        b) What consequences or impacts of the fee reduction would you foresee as providing its justification?

c) How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

A copy of the consultation paper is attached as **Appendix "B"**.

14. The consultation resulted in over 30 submissions, copies of which are attached as **Appendix "C"**

Should the Law Society develop and implement a fee reduction for public interest practitioners?

15. The overarching question identified in the consultation paper was whether to provide a fee reduction for public interest practitioners. Overall, the Working Group received 25 submissions that favoured a fee reduction and 11 not in favour.

16. Some of the submissions were brief. By way of example, Mr. Mugford wrote:

> *I write to support a recent proposal from two Law Society members that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners on the premise that the current flat fees diminish members' capacity to start and sustain a practice in public interest law.*

17. More substantial submissions were made by the Criminal Defence Advocacy Society, West Coast LEAF, West Coast Environmental Law, YWCA Metro Vancouver Legal Education Program and the Arbutus Law Group LLP

18. By way of example, West Coast Environmental Law wrote:

> *West Coast strongly supports the development and implementation of a fee reduction for public interest practitioners. The Law Society should implement a fee reduction for public interest practitioners:*
>
> *a) in order to recognize and encourage public interest legal practice; and,*
>
> *b) as a measure to recognize the financial challenges of public interest law organizations and their clients …*
>
> *In this fiscal year, Law Society practice fees and insurance will add 6% on top of our salary costs for employing staff lawyers, an amount that if eliminated would allow us to add an additional entry level lawyer at .8 time to our team."*

19. Of the 11 submissions that were not in favour of a fee reduction, there were a variety of reasons for not supporting the proposal.

20. Mr. Horn commented:

> *I have read carefully both Reports and Appendices. I am of the view that the proposed differentiation in fees charged is neither practicable, nor morally justified. It is impracticable because the criteria for qualifying could never be exhaustively pre- determined and would have to be settled on a case by case basis … It is not morally justified because public interest lawyers receive the same benefits from their membership in the Law Society as all other practitioners and should shoulder the same burdens.*

21. Mr. Anderson wrote:

> *I just don't understand the idea that, based on the nature of their practice, some lawyers should pay more and some should pay less. It seems to me that, historically, the practice area which has resulted in the most significant demands on our insurance and other funds has been real estate practitioners. However, the "costs" of that practice has been allocated across all practice areas on the theory that it is more appropriate for all practitioners to bear the costs of the sins of real estate practitioners. I am content with this current model.*

22. Although the consultation paper was not directed at the public, there was one submission by a member of the public. Karin Litzcke wrote:

> *I am a non-lawyer who has just come across your call for input about reducing fees for public interest lawyers … I unfortunately don't have time before your deadline to do a full analysis and fee structure recommendations, but I do want to take a moment to say that this would be a spectacularly awful idea from any number of perspectives. I cannot think of a single reason why this would (a) be a good idea for the legal profession, or (b) engender any improvement in access to justice.*

How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

23. A number of the submissions responded to the request for suggestions about the criteria to be used to identify public interest practitioners.

24. Ecojustice suggested some criteria:

> *The characteristics of public interest law as defined above can be identified in a straightforward fashion:*
>
> *- the litigation is in the "public interest" in that its impact flows broadly or will have a substantial impact beyond the interests of litigants; and,*

- the claim cannot be monetized or, if it can, not to an extent the claim is justified in an economic sense.

Where services in the public interest are offered by a charitable or non-profit organization, these organizations will have traits that likewise identify the practice as in the public interest:

- the selection of cases by the organization is made based on criteria that defines and requires representing the public interest and/or by a board or committee that is representative of the public;

- the primary source of financial support of the organization is public and the scope of funding assures that the litigation does not act to benefit individuals akin to the private practice of law; and,

- the organization does not permit a donor to obtain a benefit from the litigation.

25. West Coast Environmental Law and West Coast LEAF provided similar suggestions.

26. There were common themes among other submissions revolving around a required number of hours or a percentage of total work for approved organizations or for clients who cannot afford to pay where the lawyer was earning an income less than available in private practice.

27. A few submissions referenced doing legal aid work as percentage of the lawyer's overall practice as a factor.

28. Ms. Olmstead commented: "*Employment by an NGO or proof that 40% or more of the lawyer's files are legal aid based, and the lawyer has a salary less than some benchmark, would greatly assist in promoting access to justice and is something that should be supported by the Law Society."*

29. The Criminal Defence Advocacy Society suggested:

Identification of those eligible for fee reduction should include:

- *Those earning less than $50,000.00, net, per annum;*
- *Those whose practice is made up of at least 50% legal aid.*
- *Those who are less than a 5 year call, in order to ensure continued access of young lawyers into the criminal law bar.*

30. Some of the submissions did question the feasibility of identifying the lawyers eligible to receive the fee reduction.

31. Mr. Barbeau observed: *"There is no accepted meaning or method for determining who would be included in the definition of "public interest practitioners", nor will there in the future*

likely be any objective measure for making such a determination … To the extent that non-public interest practitioner lawyers commit to significant pro bono work on behalf of charitable or not-for-profit organizations, one might reasonably question why those lawyers would not also request or demand, similar fee reduction accommodations, there then being no way to definitively delineate between public, social or community benefit as between public interest practitioners and non-public interest practitioner lawyers"

32. Mr. Whitman commented: *"I have read and agree entirely with the observations and conclusions of the Annual Fee Review Consultation Paper posted on the Law Society website. In particular, I agree with the committee that the process of identifying and defining a group is fraught with difficulty, so much so as to be practically impossible. If the LS were to adopt this process, it would inevitably become involved in making political judgments which should be outside its mandate."*

What consequences or impacts of the fee reduction would you foresee as providing its justification?

33. The responses to the consultation paper described a wide range of implications to providing a fee reduction.

34. Those in favour of providing a fee reduction focused on how it would encourage more lawyers to pursue careers in the public interest and create the conditions for new lawyers to choose a public interest law career, particularly in the area of criminal law.

35. It was also suggested that providing a fee reduction would demonstrate the Law Society's commitment to access to justice by extending legal services to the marginalized groups and in particular Indigenous accused. It would also be a way for members that are practising at market rates to support their colleagues who are addressing a societal need and are incurring a financial cost in doing so.

36. The Criminal Defence Advocacy Society commented that a fee reduction would assist by:

> *Ensuring the continuation and health of the criminal law bar;*
>
> *Extending access to justice to the marginalized groups our lawyers represent and in particular indigenous accused; and*
>
> *Maintaining the efficient use of court services by reducing the number of self-represented individuals involved in the criminal justice system*

37. West Coast LEAF suggested:

> *In regard to the impact of the fee reduction, from West Coast LEAF's perspective, the effect would be material to public interest lawyers and organizations … There would be a direct relationship between a reduction in expenses and provision of legal services in the public interest.*

38. Those opposed to the idea of a fee reduction tended to focus on the distributive consequences of the fee reduction and that all lawyers are free to make a choice about the areas in which they will practice.

39. Mr. Franklin commented: "*The idea behind the Law Society is that all lawyers are barristers and solicitors and for matters of convenience and to avoid exactly this sort of thing we all pay the same rates with some minor excepts* [sic] *for those who practice less.*

40. Mr. Kornfeld stated: *If the lawyer chooses to work in this manner, there is no need for the profession to support that choice.*

41. Mr. Barbeau said "*I would suggest that even if it was "feasible" (which I would agree, it is not), it is not an objective that the Law Society, and by extension its members, should be obligated to support, when other more viable and legitimizing options exist, for these individuals and their related organizations to seek and obtain support for their endeavours.*

How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

42. Unsurprisingly, most of the respondents who opposed the idea of a fee reduction did not provide a response to this part of the consultation. However, among those in favour of a fee reduction there were a number of suggestions about how much and to what the reduction should apply.

43. The most common suggestion was that the fees should be 50% of the regular fees and should apply both to the practice and insurance fees.

44. Other suggestions included the concept of a sliding scale, either predicated on the time spent doing public interest work, income or relative to their risk in relation to the insurance program.

45. Overall, the Working Group was mindful that the number of eligible lawyers and the amount of any fee reduction would have an impact on the financial position of the Law Society and, as a number of respondents pointed out, an impact on the fees that the remaining members of the profession would have to pay.

Conclusion

46. The Working Group was very appreciative of the time and effort reflected in the thoughtful comments from all of the respondents to the consultation.

47. In its consideration of the issues within its mandate and in developing the consultation, the Working Group was aware that the issue of differential fees had been recently considered by the Law Society through the 2013 Report produced by the 2013 Working Group. In particular, the Working Group observed that the 2013 Working Group had been challenged by the extent to which the proposal was incomplete, with its specifics remaining to be determined. In the result, the 2013 Working Group had found it difficult to come to answers that were non-arbitrary, principle-based, and practical.

48. The Working Group attempted to address the difficulties the 2013 Working Group had experienced in reaching a recommendation by asking specific questions in the consultation. As the above review of the consultation results shows, respondents provided suggestions and comments that spoke to the specifics of who should receive a fee reduction, how much it should be, and how it might be implemented.

49. As a result, the Working Group was provided with much more information to consider in reaching a conclusion with respect to the issues raised in its mandate. Nevertheless, the Working Group remained concerned about the feasibility and fairness of establishing a definition of "public interest practitioners" that was non-arbitrary, principle-based and practical. Although a few respondents dismissed the difficulty of defining and identifying with certainty those members who would be entitled to a fee reduction, the suggestions often amounted to placing trust in self-identification by members.

50. Moreover, the ability to define and identify those lawyers who would be entitled to a fee reduction had a significant impact on the justification for providing the reduction. For example, if the fee reduction was available to lawyers taking legal aid files, there would be a substantial number of lawyers engaged in legal work for clients in areas similar to those receiving legal aid assistance but who did not meet the financial criteria to receive legal aid. If the nature of the work and the need for better access to justice were the principled justifications for providing the fee reduction, limiting it to lawyers undertaking legal aid work would benefit some lawyers but perhaps not everyone to whom the justification would apply.

51. Ultimately in their considerations the voting members of the Working Group found it impossible to determine criteria for identifying a group of public interest practitioners that were non-arbitrary, principle-based and practical. As a result, the voting members of the Working Group concluded that they could not recommend to the Benchers providing public interest practitioners with reduced rates of practice fees and insurance fees.

52. The Working Group observed, however, that there are a number of different arguments or rationales, focusing on different sub-groups of lawyers and a range of potential justifications, that could in future lead to consideration of variations or alternatives to the fee-setting model that is currently used by the Law Society.

53. It would be difficult, in the context of successive relatively narrow mandates, such as the present one aimed at public interest practitioners, to do justice to a review of the broader policy decisions that have been taken in past. However, if the present allocation of practice fees and insurance fees represents a sufficiently important influence on the availability of legal services, then a more broad-based review may be warranted. Given the potential scope and complexity of such an investigation, the Benchers may wish to consider the level of priority that should be assigned to such a review and whether the idea should be revisited in the process of creating the Law Society's next strategic plan.

The Law Society of British Columbia

Memo

To: Executive Committee
From: Reduced Fee Feasibility Working Group
Date: September 4, 2013
Subject: Report on Fee Reduction Feasibility Review

Introduction

The Reduced Fee Feasibility Working Group (the "Working Group") has met, engaged in consultations, and identified and considered many issues relating to the proposal that a specific class of Law Society members, who practice within non-profit, non-governmental organizations, be charged lower annual practice fees than other Law Society members. **For a variety of reasons described below, the Working Group has concluded that the proposal to charge the group reduced annual practice fees is not feasible.** The Working Group recommends against the further development of the specific class fee reduction proposal.

Background

- The issue of the feasibility of a potential fee reduction for a specific class of members who practice within non-profit, non-governmental organizations was the subject of a member resolution at the Law Society's 2012 Annual General Meeting (**Attachment 1**).

- The member resolution passed by a vote of 85-75 and the Law Society was thereby requested to examine the feasibility of the proposed specific-class fee reduction.

- Subsequently, the Reduced Fee Feasibility Working Group (the "Working Group") was formed to conduct an initial feasibility review. The Working Group has included Benchers Jan Lindsay, QC (Chairperson), David Mossop, QC and Bill MacLagan, as well as Law Society staff members Jeanette McPhee (CFO), Lesley Small (Manager, Member Services) and Lance Cooke (Staff Lawyer, Policy & Legal Services).

- This Memorandum to the Executive Committee is the Working Group's report of its review of the feasibility of the proposed specific-class fee reduction.

Working Group Process

- The Working Group met a number of times in the course of its review. At its initial meeting the Working Group determined that it would be appropriate to enhance its understanding and appreciation of the issue at hand through consultation with proponents and critics of the proposal at the heart of the member resolution.

- Subsequently both proponents and critics of the member resolution were invited to attend and did attend consultations with the Working Group.

- One of the meetings, attended by member resolution proponents Scott Bernstein and Douglas King and by Ecojustice CEO and Law Society member Devon Page, was devoted to understanding the perspectives and concerns of those in favour of the proposed specific-class fee reduction.

- At another meeting the Working Group heard from Glen Ridgway, QC, who had previously addressed the proposed fee reduction in a letter to the President (**Attachment 2**) and was critical of the proposal. Law Society member David Mulroney, who had spoken against the member resolution at the Annual General Meeting, was also invited but was unable to attend due to unforeseen circumstances. The Working Group later received Mr. Mulroney's views on the proposal in the form of a written memorandum (**Attachment 3**).

- The Working Group benefitted significantly from the information and perspectives provided by all who participated in its consultation process and it is very appreciative of the time and effort of each of those participants.

- In addition to the consultations, the Working Group met to work through a range of issues, which were identified as significantly related to the feasibility of the proposed fee reduction, and to consider the implications of the information and comments provided by the consultation participants.

- The final draft of this Memorandum has been approved by all members of the Working Group. The Working Group's recommendation was reached by consensus.

Feasibility and Relevant Issues

As the Law Society was requested to "research the feasibility" of the proposed fee reduction, the Working Group gave some thought to what "feasibility" would mean in the present context. The Working Group decided that for present purposes "feasibility" included three components:

1. Financial Component: The Law Society's finances are in essence a "zero sum" matter. To collect less money from some members means that either other members would have to pay more or the organization's operating expenses (and services, potentially) would

have to be reduced accordingly. Moreover, if new systems or processes were required for the ongoing administration of the proposed fee reduction, the cost of implementing and operating those systems or processes would also need to be accounted for in the additional fees to be charged or the expenses to be reduced elsewhere. Accordingly, for the proposed fee reduction to meet the financial component of feasibility, it would need to be relatively inexpensive to administer and it should not be place an onerous burden on the other members, whose fees may be required to make up the difference and to cover the related administrative costs.

2. Operational Component: "Operational feasibility" takes into account the logistics and demands of implementing and operating a fee reduction program of the type suggested by the member resolution. If such a program were to be implemented, who would qualify for the reduction and on what criteria? Would the program involve an application process? Would applications be required from the non-profit employers of the eligible lawyers or from the lawyer's themselves? Would legitimacy checks be required for applications from members claiming the reduced rate? Who would be responsible for evaluating and determining fee reduction applications and supporting information? Could such a program be administered in the context of present Law Society staff resources or would it require the hiring of additional personnel? The Working Group's view is that a positive finding of feasibility would require significant visibility as to how the proposed fee reduction program would be set up and operated, the operational demands it would involve, and the Law Society's ability to meet those demands.

3. Justification Component: The final component of feasibility is the justification component. The Working Group has been concerned that if the Law Society were going to alter the manner in which practice fees are allotted and charged among its members, such changes would need to be justified and compellingly defensible. Also of concern is the prospect that changing from the present system in which all fully practicing members are charged the same amount in fees, to a system that exempts a specific subclass of members from a portion of the annual fees, might be apt to induce further requests from other sub-sets of Law Society members, either to be included in the proposed exemption or to be beneficiaries of a separate exemption applicable to their own specific group. With the potential that the demand for a practice fee reduction may spread beyond the present proposal, the Working Group considered that feasibility would require any proposed change to be based on principles that are acceptable and defensible and in keeping with both the Law Society's public interest mandate and its accountability for fair and reasonable treatment of its members.

Although the Working Group recognized the different aspects of feasibility represented by the three components, it also noted potential connections among them. Thus, a process that is relatively more demanding operationally is also likely to be more expensive and relatively more difficult to justify. On the other hand, the mere fact that an accommodating process is inexpensive and operationally undemanding does not necessarily imply that it is easily justified.

A suggestion might be inexpensive and operationally simple but manifestly unfair. Consequently, it is important to consider each of the identified aspects of feasibility.

Consultation: Information and Perspectives

Before the consultation meetings, the Working Group developed a list of potentially significant concerns and issues related to the possible implementation, operation, and justification of the proposed fee reduction **(Attachment 4)**. At the time the consultation meetings were being arranged, this list of potentially significant issues was provided to each of the individuals who indicated that they would attend and address the proposal with the Working Group. It was the Working Group's hope that the list of issues would provide a useful focus to the consultations and an opportunity for response and commentary on the issues that had been identified by the Group. None of the individuals with whom the Working Group consulted objected to any items on the list of issues or indicated that additional items should have been included.

PRO – Messrs. Bernstein and King (the "Proponents") and Mr. Page

Initially, the Working Group heard from Law Society members Scott Bernstein, Douglas King, and Devon Page, as representative proponents of the proposed specific-class fee reduction. Messrs. Bernstein and King are two of the three proposers of the member resolution at the heart of the Working Group's task. Each would be a member of the specific class to which the proposed fee reduction would apply. Mr. Page brought a somewhat different perspective, as the CEO of a non-profit, non-governmental organization that employs 18 lawyers in a variety of locations across Canada. Mr. Page contacted the Chair of the Working Group after learning that it had been created and tasked with examining the fee reduction feasibility issue.

The Proponents work for the Pivot Legal Society ("Pivot"). While the proposed fee reduction was envisioned as applying to lawyers who earn a lower income than many lawyers in private practice, the purpose was not to accomplish any significant income leveling effect. Instead, the envisioned purpose was more a recognition of the importance of the work performed by lawyers working for "public interest" non-profit employers, in particular a recognition that those lawyers had effectively chosen to dedicate their time to "public interest" work, despite the fact that the choice may have significantly constrained their potential incomes. The proposed fee reduction was envisioned as the Law Society's token of encouragement for lawyers who do that kind of work. The present income range for many such lawyers was suggested to be approximately $50,000 - $80,000 per annum. Although no specific maximum income level was suggested by the Proponents, their view was that there should be a threshold above which the fee reduction would not be available. The exact placement of that threshold was something that the Law Society would need to determine. When asked, the Proponents did not have a specific fee reduction percentage or amount in mind and they declined to suggest one.

The Proponents had initially envisioned the fee reduction as applicable to lawyers employed by an organization such as Pivot, which depends on grants and donations for its funding. While the

Proponents did not offer a complete model of how the fee reduction might be implemented, they suggested that one possible approach would be for the employer organizations to apply to the Law Society for reductions for their lawyer-employees. Apart from the suggestion of an upper limit on income, the non-profit status of the employer organization and some recognizable "public-interest" focus to the work of the organization and the lawyers, the Proponents did not offer a specific set of criteria for determining which applicant organizations would or would not qualify to obtain the proposed fee reduction. It was acknowledged that the suggested approach would leave the Law Society to determine what amounted to an appropriate or sufficient "public interest" focus on a case by case basis.

When asked, the Proponents indicated that they did not pay their practice fees themselves but that Pivot paid on their behalf and that Pivot's payment of the practice fees was included as a term in their employment agreements. They acknowledged that the proposed fee reduction would not necessarily have the effect of a salary increase or any additional money making it to the qualifying lawyers' hands. They also acknowledged, given the present size of the practice fee, that even a substantial percentage reduction might not amount to a significant financial incentive for lawyers to choose a path of "public interest" focused work for a non-profit organization. However, they thought that a significant component of the fee reduction rationale is the symbolic recognition of the importance of the kind of legal work that lawyers working for non-profit organizations do.

Mr. Page, CEO of Ecojustice, was quite candid that his primary interest in the fee reduction proposal was in the potential cost reduction to his organization. As with Pivot, Ecojustice pays the practice fees of the lawyers it employs, in accordance with the applicable employment agreements between the organization and the lawyers. Mr. Page related that fundraising is a substantial focus and concern of his, in his role at Ecojustice. He related that many donors want their donations to go to specifically to support one or more of the organization's causes. It is significantly more challenging for him to raise funds to pay for the organization's general administrative expenses, including lawyers' practice fees. In short: people who donate want to protect the land and the environment, not pay lawyers. From his point of view, any reduction to the practice fees that Ecojustice would need to pay on behalf of its staff lawyers would be a welcome saving of administrative costs.

Mr. Page indicated that, as of the date of the meeting, Ecojustice employed 5.8 full time lawyers in British Columbia and a total of 18 lawyers across Canada. The salary range for these lawyers was approximately $60,000 to $90,000 per year, depending in part on seniority and experience. Mr. Page indicated that the more senior the lawyers were, the further they tended to fall behind private firm pay rates for lawyers with comparable experience levels.

While Mr. Page did inform the Working Group as to his perspective and Ecojustice's interest in the proposed fee reduction, he did not specifically address the feasibility of the Law Society's potential implementation, operation and justification of the proposal.

CON – Mr. Ridgway, QC, and Mr. Mulroney

At a subsequent meeting The Working Group heard from Law Society member and past President Glen Ridgway, QC, as a representative critic of the proposed fee reduction. Mr. Ridgway initially wrote to then LSBC President Bruce LeRose, QC, by letter of October 17, 2012, **(Attachment 2)** to provide his views, which were critical of the proposed fee reduction. In his subsequent discussion with the Working Group, Mr. Ridgway indicated that his views on the issue had not changed in the interim. In brief, Mr. Ridgway's points were as follows:

- He urged the Benchers to exercise restraint in using fee revenue for core areas and to "avoid the temptation of pursuing many 'worthwhile' causes and initiatives."

- He noted that excusing some from their fee burden means that others would have to pay it.

- He suggested that the income of some lawyers in private practice in BC may be "exceeded … by earners of the minimum wage."

- He suggested that lawyers employed by non-profit organizations may enjoy very fulfilling work in keeping with the objectives of their employers or that their practices may "provide compensation in the long term."

- He noted that many non-profit organizations are "funded" and suggested that their levels of funding may already take account of "the cost of legal services and of membership in the Law Society of British Columbia."

- He noted that Law Society fees would be only a small part of the operating costs for non-profit organizations. He queried whether allowances from various levels of government or from landlords or utilities might be more impactful for the balance sheets of non-profit organizations."

- He suggested that the question of who would be included as eligible for the fee reduction was a significant question and he asked whether it would be extended to lawyers working for the Federal, Provincial, and Municipal Governments, lawyers working for the Law Society and other regulatory bodies or trade unions. He also asked about "lawyers who donate their time to non-profit organizations but who are not directly employed by them."

- He also suggested that a significant reason would be required to justify why a lawyer working in a rural community, advising members of his community, sometimes on a pro bono basis, providing employment to two or three people, and trying to earn a

profit to support a family, should pay practice fees when a lawyer working for a non-profit organization does not have to pay them.

- Mr. Ridgway summarized his opinion by saying that it was important that Law Society fees should be charged to everyone equally and that it would a mistake for the Law Society to begin selecting specific groups of lawyers to be excused from some or all of the applicable fees.

The Working Group also benefitted from the comments of Law Society member David Mulroney, who spoke against the member resolution when it was presented at the AGM. Mr. Mulroney subsequently provided the Working Group with a memorandum (**Attachment 3**) providing his criticisms of the fee reduction proposal. The following were among the points included in Mr. Mulroney's memorandum:

- There are great many different non-profit organizations with varying levels of public support; some engage in political activity or have controversial political agendas that many members would find objectionable.

- A policy of widespread or "blanket" support for non-profit organizations with funds from practice fees would run contrary to the Law Society's decision that membership in the Canadian Bar Association (which is also a non-profit organization) would not be mandatory for Law Society members.

- Many members would disagree with using fees to subsidize lawyers working for many or all non-profit organizations. Such subsidies would amount to financial support for the non-profit employer organizations. Even if the objecting members were in the minority, it would be unfair to force them to subsidize some of the non-profits, when they may disagree with those organizations' aims and activities.

- Given the diversity of non-profit organizations and their activities, any attempt to measure the relative worthiness of each individual organization would be extremely difficult and amount to an unjustifiable administrative burden relative to the size of the benefit of the proposed fee reduction.

- The Law Society's support of worthy non-profit organizations is already administered through the Law Foundation. The Law Foundation's work in allocating its support is difficult and complex. It would not be appropriate to simply spread such funds equally among organizations that employ lawyers and fit a non-profit definition. A more nuanced process would be required.

- Many lawyers who have legal aid criminal defence or family work as a significant component of their practices also make less than the average or median rate of income for the profession. They also provide a valuable public service.

- It does not make sense for those lawyers in private practice who make less money than many of the non-profit sector lawyers to be asked to subsidize them.

- It is better to have the charitable donation marketplace determine which non-profit organizations receive enough support to engage a staff lawyer than to have the Law Society compel support for those that do employ lawyers.

- Many lawyers in private practice choose to help people and do extremely worthwhile work, often to their own financial disadvantage. A system giving a financial break to others, to the detriment of those who choose how, when and to whom they will donate their time, would be unfair and bad policy.

- The proposed fee reduction is based on unsupportable assumptions about lawyers' incomes and the relative merit of various lawyers' work. It would be unfair to many lawyers and would be an inefficient means of recognizing and encouraging the contributions of lawyers who work for non-profit organizations.

Discussion

One of the challenges for the Working Group in considering the feasibility of the proposed fee reduction was the extent to which the proposal was incomplete, with its specifics remaining to be determined. Those in favour of the proposed fee reduction appeared to be flexible on such aspects as the amount or percentage of the reduction, the extent of the lawyers who might be eligible to receive the proposal, and the criteria to be used in determining whether a lawyer's work or employment was sufficiently oriented toward the public interest. While this flexibility in approach may have been intended to preserve the potential for the proposal to take on a feasible shape, it also meant that the task of envisioning the unstated specifics was left to the Working Group itself. What would be the "right amount" to consider as a potential fee reduction? Should it be extended to lawyers who had a significant component of legal aid work in their practices or who simply donated a significant amount of their time to pro bono legal work? If such additional lawyers were to be included, how might the issue of an upper income limit be decided and what means would be acceptable to demonstrate that a lawyer's income fell below the upper limit? In grappling with such issues, the Working Group found it difficult to come to answers that were non-arbitrary, principle-based, and practical.

(i) Financial Feasibility

Considering first the percentage or dollar amount that might be set for the proposed fee reduction, any choice seemed arbitrary. Despite that concern, if the amount were nominal it would be all the more likely to be ineffective as any kind of incentive or recognition for those who might receive its benefit. On the other hand, to the extent that the fee reduction might be considered unfair to any lawyers who would not receive it, then the more substantial the reduction might be, the more significant the impact of the unfairness.

While it might be possible, at least theoretically, for the Law Society to charge some members a reduced practice fee, the Working Group's understanding is that such a reduction would have to be offset by a corresponding fee increase to other members or by changes to the Law Society's budgeted program or service spending. To calculate the impact of the proposed reduction, the equation might need to take into account the magnitude of the fee reduction, the number of members who would be eligible to receive it, and the number of members over whom the corresponding fee increase would be defrayed. However, the "cost" of the fee reduction would not only include the total of the individual reductions; it would also include the administrative costs and staff resources devoted to implementing and operating the fee reduction program on an ongoing basis. Depending on how labour-intensive the operational processes might be, and how few individuals might end up being eligible, it is not difficult to imagine the "cost" component represented by the reduction itself being half, or less than half, of the total cost of the fee reduction program. Clearly, a fee reduction program that would require the creation and handling of applications, the determining of eligibility criteria, and of determining eligibility itself, annually, on a case by case basis, and any amount of supporting documentation, fact-checking, bencher-approval or committee-approval, in addition to an extra category of communications and record-keeping, might be judged to be relatively expensive and an inefficient means of accomplishing its motivating recognition and benefit. This foreseeable expense and relative inefficiency tend to speak against the financial feasibility of the proposed reduction. Simply stated, if it costs the Law Society an additional $50 per reduction-eligible member, to enable a fee reduction of $20, that probably speaks against the financial feasibility of the proposal, at least to the extent that there may be more efficient ways to recognize the value of non-profit sector lawyers, if that is what the broader membership would wish the law society to do with a portion of practice fee revenues.

Regarding the amount of a prospective fee reduction, the smaller the reduction and the fewer the eligible lawyers, the less onerous any offsetting corresponding fee increase would be. On the other hand, one might expect a relatively small fee reduction to have very little impact to those who would benefit by it, whether that impact is measured in dollars, in recognition, or in an incentive for other lawyers to be employed by non-profit organizations for less money than they might make in private practice.

To the extent that the fee reduction might be viewed on a par with charitable donations, it seems problematic that it should be considered and set in isolation from any consideration of the Law Society's other funding allocations related to public interest programs or charitable pursuits. If a financial recognition should be due the lawyers who might qualify to receive a fee reduction, or if the Law Society should choose to exercise its limited resources for the purpose of such a recognition of service and public value, then it makes sense for that decision to be made, not in isolation as a unique fee reduction would suggest, but in light of the extent of the resources that might be made available and a balanced weighing of the other worthy recognitions and charitable pursuits the Law Society would consider. In short, as recognitions of value go, there is no magic to the form of a fee reduction. An equally or more effective recognition might well be crafted in

the form of an award or charitable donation without raising many of the associated issues that would attend a change from the existing single level fee structure. In the view of the Working Group, if the hope for the fee reduction depends on its not being weighed on the balance with the other potential uses of the same resources, then it is likely not financially feasible. The creation and imposition of a fee reduction in isolation from the Law Society's overall financial reality is not financially feasible because, in the view of the Working Group, it would not amount to sound fiscal management of the Law Society.

Quite apart from the *amount* of money that would be involved, the Working Group was uncomfortable with the prospect that the proposed reduction would shift the fee burden of the eligible group, many of whom do not pay their own fees, to a group that would include a number of lawyers who do have to pay their own fees and who actually make less in annual income than the eligible lawyers do. While it might be possible for the Law Society's finances to manage such a shift, it is not clear that it would be insignificant to the finances of all of the lawyers who would bear the additional fee burden. The view of the Working Group is that if the fee reduction would amount to a shift that is both unfair and, for at least some ineligible lawyers, not insignificant, then the proposal is not financially feasible.

(ii) Operational Feasibility

From an operational point of view, one can consider the impact of the proposed fee reduction in terms of whatever additional administrative tasks and operational processes it would require. The Law Society's current processes and staffing provide the benchmark. Implementation of the fee reduction proposal would not reduce or eliminate any current operational processes but it would require additional processes. Among such additional processes, the Working Group are particularly concerned about those that would be required to determine which lawyers would be eligible for the proposed fee reduction and those that might be required in the event of any dispute or controversy about the lawyer-eligibility and program administration.

On one hand, the Working Group are not comfortable with the suggestion that the amount a lawyer would be charged for a practice fee would be contingent on a subjective value judgment as to the relative public interest merit of the work done by the lawyer or undertaken by the lawyer's employer organization. The prospect of staff's preparation of such matters for appropriately well-informed decision-making by a committee of Benchers would be prohibitively labour-intensive. However, the Working Group was even more unsatisfied with the prospect of assigning such a task to a Law Society staff member or staff group when such decisions would be open to criticism either as being arbitrary or as being an expression of the personal bias of the decision-maker imposed through the statutory machinery of the regulatory body. At the same time, the prospect of any reasonably nuanced or sophisticated process of application, evaluation and administration of a reduced fee category promises a significant additional drain on Law Society staff and resources in order to accomplish a result that is apt to be disproportionately insignificant. In this respect, the Working Group views the proposed fee reduction as lacking operational feasibility due to its propensity to decrease the efficiency of the

effected departments within the Law Society without a sufficiently significant offsetting gain for the public interest in the administration of justice.

The Working Group has similar operational feasibility concerns with respect to the proposed income level qualification. Aside from the seemingly inevitable arbitrariness concerns, if an acceptable upper income level cut-off were established, it would create a need for applicants to demonstrate that their income level is actually below the cut-off. Whatever processes might be put in place to receive and confirm the income level eligibility would necessarily require the handling and evaluation of that information by Law Society staff tasked with administering the fee reduction. It would create the potential for submitted documentation to be flawed or inadequate and the need for further communications surrounding the completion of a satisfactory application package. Given that in many cases, if not all, the primary beneficiary of the reduced practice fee is apt to be the employer organization, the upper income limit might have the unintended consequence of encouraging non-profit organizations to ensure that their lawyer-employees' salaries remain under the limit. Alternatively, it might be seen as an incentive to such organizations to find ways of increasing benefits to their employees that would not have the effect of increasing their salary – which could be seen as undermining the concept of the upper limit on income and cause a further operational burden for the Law Society in attempting to respond appropriately to such developments.

(iii) Justification Feasibility

The Working Group has been aware that any specific class fee reduction resulting from the member resolution would have to be justifiable, by and to the Benchers and more broadly to the membership as a whole. Ultimately, the Working Group is not of the opinion that the proposed fee reduction is justifiable.

To summarize the member resolution and the comments of its proponents in consultation, the purpose of the proposed fee reduction is to recognize and incentivize, even if just symbolically, the work of lawyers who have chosen to practice within the non-profit "public interest" environment. The terms of the resolution include an emphasis on the "public interest" character of the work and on the lawyers' choice to pursue that work despite the prospect of suffering personal financial disadvantage relative to many of the lawyers in private practice who earn higher incomes. The view of the Working Group is that the proposed fee reduction would not be an efficient and effective realization of its purpose and terms of reference. It does not appear that it would result in a financial recognition in the hands of the eligible lawyers. Instead it appears that the fee reduction would be much more likely to function as a charitable donation to the lawyers' employers. It also does not appear that it would function as an effective symbolic recognition because the fee assessment and payment process is one that has no public profile. Once put in place, the fact of such a fee reduction could fall into obscurity, except potentially for the attention of some of those ineligible lawyers whom it may continue to irritate on an ongoing basis and who may be expected to call for its abolishment. As such, the Working Group does not agree that the proposed fee reduction would have any practical value as an incentive for current

"non-profit" sector lawyers to continue to work for their employer organizations or for future lawyers to choose a career in the non-profit sector. The Working Group thus views the proposed fee reduction as lacking in justification because it does not appear that it would fulfill its own purpose.

The Working Group is also concerned that there is insufficient justification for the proposed fee reduction in virtue of its amounting to a change from the existing evenhanded treatment for all practicing members. Any such change raises at least the question of fairness, particularly so where the potentially perceived unfairness may be instantiated in dollars and cents. Fairness is an extremely important principle, especially as it may characterize the activities of a profession's regulatory body. It is debatable whether the imposition of an unfairness by a regulatory body can ever be adequately justified. In regard to the proposed fee reduction, a perceived unfairness would be the offsetting fee increase to be borne by other members of the Law Society, absent any cost savings by the cutting of staff and services.

Such perceived unfairness may be most acute with respect to other lawyers who pay their own fees, whose incomes are below the level of many that would be eligible for the proposed reduction, and whose work amounts to a significant benefit for their clients and, arguably, for the public interest. They may or may not do legal aid work, practice poverty law, or provide services in geographical areas where there would likely be no substitute available. There are many ways in which the work of a lawyer in private practice may benefit the public interest. The Working Group was unable to identify a principled basis for granting a fee reduction to one worthy group of lawyers while refusing it to others who might make a case for being similarly worthy. The prospect of such a fee reduction being restricted in an *ad hoc* manner again points to unfairness. It may be true that the increase to be borne by others in order to fund a modest fee reduction for a few would be a relatively small additional financial burden. But if unfairness is the result, the issue remains despite the measure. The view of the Working Groups is that there is insufficient justification for a fee reduction to warrant any measure of unfairness. The problematic question remains as to how foreseeable future requests could be refused fairly, if an initial specific class fee reduction were instituted.

Finally, it is important that the Law Society's fiscal management and budgeting decisions are made in full view of, and allow for a balanced consideration of, the various worthwhile programs calling for a funding allotment from the organization's limited resources. Increasing the complexity of the already difficult budgeting process by introducing new channels through which resources may be diverted to one or another specific cause is not advisable. Introducing a precedent of favouring one group or one cause, at the expense of others, by charging different practice fees to different groups is an example of just such an unnecessary increase in the complexity of the Law Society's tasks. The Working Group's concern is not merely that the new cause itself must be justified in its own right, but that the new method of channeling resources to the cause must be justified. The Working Group has concluded that there is no specific justification for why a recognition aimed at non-profit "public interest" lawyers would need to be created via a reduction in fees, even if it were determined that some form of recognition should

be created. In fact, the observation that many such lawyers do not pay their own fees and that the process of fee payment is not attended by any public display or public awareness tends to speak against the use of a fee reduction for the purpose of recognizing these lawyers and their valuable work.

Conclusion

In the discussion presented above, there are many significant points noted that tend to speak against the proposed specific class fee reduction. The Working Group's conclusion, following its process of consultation and analysis, is that the fee reduction proposed and described in the member resolution from the 2012 Annual General Meeting is not feasible. The Working Group's view is that proposed fee reduction would be sufficiently expensive and operationally demanding to administer as to outweigh its potential benefits. Those potential benefits ultimately are insufficient to justify the implementation of a fee reduction, particularly given that such a reduction would not appear to be an effective means of recognizing the contributions of lawyers working in the non-profit sector. The fee reduction would also appear to raise an issue of unfairness in the way that the Law Society treats different groups of its members. In light of all of the issues raised and concerns discussed in this memorandum, the Working Group has concluded that proposed fee reduction is not feasible.

Recommendation

The Fee Reduction Feasibility Working Group recommends against the further development of this specific class fee reduction proposed in the member resolution from the 2012 Annual General Meeting.

Whereas, the Law Society membership encourages the practice of law in not-for-profit, non-governmental organizations, and recognizes that these lawyers provide valuable legal services that address needs unmet by the private sector;

And whereas, non-profit lawyers and non-governmental organizations practicing law contribute to the positive image of lawyers in British Columbia, provide opportunities for lawyers in private practice to engage in high-profile pro-bono work at all levels of court, increase access to justice to the public, and provide opportunities for law students to intern and volunteer;

And whereas, lawyers in not-for-profit organizations are paid wages below the average market rates for private practice lawyers with equivalent experience;

Therefore, be it resolved that the Law Society membership direct the Law Society to research the feasibility of creating a class of membership for non-profit lawyers with a reduced rate of practice fees, and to present to the membership within six months information about the feasibility of such a class of membership.

Scott Bernstein

Katrina Pacey

"Douglas King"

Douglas King

Rec'd 10/19

G. GLEN RIDGWAY, Q.C.
Barrister and Solicitor

#200 - 44 Queens Road
Duncan, B. C.
V9L2W4

Fax: (250) 746-4070
Telephone: (250) 746-7121
E-mail: gridgway@ridgco.com

October 17, 2012

The Law Society of British Columbia
845 Cambie Street
Vancouver, B. C. V6B 4Z9

Attention: Bruce LeRose, Q.C., President

Dear Sir:

Re: Annual General Meeting- September 25 \ 2012 Members' Resolution

I had the opportunity of attending the Nanaimo version of the Annual General meeting and thank you for the organization and presentation at that meeting.

I would like to speak to the issue of members' fees and the resolution put forth by certain members of the Law Society. It is clear that these members have organized and had sufficient supporters in place to pass the resolution. I believe the total participation in the Annual General Meeting was somewhere in the area of 200 while total membership is somewhat closer to 11,000. I urge Benchers to bear that in mind in their considerations and ensure that the other 10,800 members of the Law Society have some input. I will take this opportunity to provide my input.

First let me confirm that this is the first year that there is no members' resolution dealing with fees. The determination of fees is left solely to the Benchers and hopefully the Benchers will feel some restraint in ensuring that the fees over which they now have total control, are focused on those areas that are the core area of the Law Society. Please avoid the temptation of pursuing many "worthwhile" causes and initiatives.

With respect to the members' resolution I will pose a question at the end of this letter, which I believe if answered appropriately, will resolve the thrust behind the members' resolution. However, before posing a question I would like to make several points.

Firstly, the "maintenance of the public interest" which is the function of the Law Society is one that requires financing. That financing comes from all the members regardless of their economic position. To excuse some means that others will have to pick up the ball.

Secondly, we as lawyers are all in this together regardless of our earning power, our client base, or our own individual causes. Please remember that to some lawyers in this Province, the pursuit of "profit" results in a return that is exceeded in some circumstances by earners of the minimum wage.

Please consider as well that many "non-profit organizations" have objectives and purposes for which the "legal" aspect is only a small portion. While the economic return to the lawyers practicing in such organizations may not be large, please remember that there are other forms of compensation which many find very fulfilling or where that practice provides compensation in the long term. Please remember as well that many of these organizations are funded and the provision of funding includes the consideration of the cost of legal services and of membership in the Law Society of British Columbia. I am sure one of the considerations of the Law Foundation in funding an organization is that the cost of the provision of that service includes the Law Society fees.

Please remember as well that Law Society fees are only a very small portion of the overall costs of "non-profit organizations". There are many other factors in their expenses. What impact would the waiver of L.S.B.C. fees have on the expense side of the ledger? Would not a waiver of Federal, Provincial and Municipal taxes, a waiver of rent, a waiver of utility payments also free up additional funds for those organizations? Why is it only that the Law Society fees are being considered?

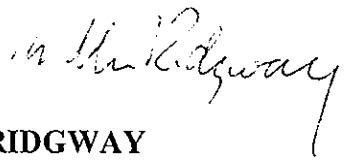
Then there is the question of what lawyers will be included in the group entitled to a waiver of the fees. What is a "non-profit organization"? Does this include lawyers who work for the Federal Government, the Provincial Government, the City of Vancouver? What about the legal staff at the Law Society, lawyers working for regulatory bodies, trade unions? What about lawyers who donate their time in advising non-profit organizations but who are not directly employed by them? Could they be entitled to a partial fee waiver?

And finally the question that I indicated I would pose.

> Why should a lawyer, perhaps in a rural community where we are having trouble attracting lawyers, with a practice in conveyancing, wills and estates, a bit of family, maybe some corporate law who advises people in his community, sometimes without compensation, and who has hired a couple of employees to help him provide this service and is working to make a "profit" to support his family pay the fees to the Law Society of British Columbia when a lawyer for a non-profit organization does not have to pay those fees?

Thanks for this opportunity of addressing this issue and I hope to hear from you.

Yours very truly,



G. G. RIDGWAY

GGR:aa

MEMORANDUM

To: Reduced Fee Feasibility Working Group
Fr: David S. Mulroney
Dt: July 22, 2013
Re: Resolution Opposition

I spoke in opposition to the reduced fee proposed for lawyers who were employed by not-for-profit organizations. While the resolution at first blush might seem attractive and seem to be supporting a worthwhile cause, the mechanism is objectionable and some of the underlying assumptions are incorrect or are generalizations that are often not true.

1. Not for profit organizations are diverse. Some have widespread public support and some do not. Some are particularly related to lawyers and others are not. Some engage in political activity, which might be objected to by many members of the Law Society. Some are pro-life. Some are pro-choice. Some are limited to rescuing animals. Some help people. The variety and objectives are endless.

2. The Canadian Bar Association and the BC Branch are part of a not-for-profit organization that has the education of lawyers and the advancement of interests of lawyers and the public at its core and yet the Law Society decided that requiring mandatory membership in the CBA was outside of the core interests of the Law Society and was also unfair to lawyers who disagreed with some of the political activity or positions taken by the Canadian Bar Association. As a result, mandatory membership was abolished. That principle should apply to blanket support of non-profits.

3. The subsidization of lawyers who work for not-for-profit organizations will amount to a similar financial support for organizations which many lawyers may not approve of or agree with. Even if a few lawyers disagree with the aims, activities, and objectives of a few of the not-for-profit organizations, forcing them to support those organizations may be unfair.

4. The diversity of not-for-profit organizations is far greater than the activities that the Canadian Bar Association, and any attempt to measure the worthiness of individual not-for-profit organizations will be extremely complex and an unjustifiable administrative load in light of the size of the benefit.

5. The law society already has an agency which attempts to choose laudable not-for-profit organizations or other ventures which are worthy of support.

The work of the Law Foundation is difficult and complex. No one could imagine that the Law Foundation would simply take the money it administers and spread it equally amongst organizations that had something to do with law and fit within a definition of not-for-profit. The process of allocating support needs to be and is far more nuanced.

6. The assumption that lawyers who work for not-for-profits make below the average market rates for private practice lawyers with equivalent experience may in fact be correct. However, it may not be correct. It is also clear that a large percentage of lawyers who have legal aid criminal defence or family work as major parts of their practice also make below average rates compared to the median. They also provide a valuable public service.

7. According to the government's opening submission on judicial compensation, twenty-five percent of the lawyers practicing in Vancouver make less than $60,373.00 per year (2010 figures). We do not know exactly what the distribution of that is, but that is a very significant percentage of our profession who might also be equally worthy of some degree of subsidization. It is quite possible that many of those lawyers who are in the lower quartile of income are there because they provide pro bono services on a regular basis or they work on legal aid files or they perhaps choose to work normal or limited hours to maintain a reasonable quality of life. Canadian Lawyer July 2013 edition relates that nationally, five percent of all partners in law firms make $50,000.00 or less. Presumably, if they have associates, the associates are even paid less than the partners. The article on the survey indicates that firms with up to nine lawyers paid first year associates as little as $40,000.00 and offered $60,000.00 on average. Does it make sense for those people to be supporting lawyers who work for non-profit organizations, some of whom may be making higher wages than the bottom quartile of the profession?

8. In light of the diversity of not-for-profit organizations, I would submit that the better approach is to have the marketplace determine which not-for-profit organizations are worthy of donation support through Canada's reasonably generous charitable giving tax laws. Those that have sufficient financial support from Canadian taxpayers and the Canadian public will be able to afford to employ lawyers but those individual not-for-profit organizations which do not have sufficient public support to get adequate donations from the Canadian public will not be able to afford to engage a staff lawyer.

9. I believe the Law Society must recognize that many members of our profession in private practice who are not engaged as staff lawyers by not-for-profit corporations choose to help people and do extremely worthwhile work, often to their own financial disadvantage. A system of giving a financial break to others to the detriment of those who are choosing how and when and to whom they will donate their time is unfair and bad policy.

10. We must remember that for every complex problem there is an answer which is simple, elegant, and wrong. The proposed resolution would be unfair to many lawyers, is based on unsupportable assumptions and will be inefficient at accomplishing its objectives.

Respectfully,

"David S. Mulroney"

David S. Mulroney
Mulroney & Company
301-852 Fort Street
Victoria, BC
V8W 1H8

From: Lesley Small
Sent: April-12-13 5:03 PM
To: 'scott@pivotlegal.org'
Cc: Jan Lindsay, QC; Bill Maclagan; David Mossop, QC; Jeanette McPhee; Lance Cooke
Subject: Reduced Fee Feasibility Working Group

Dear Mr. Bernstein and Mr. King,

Thank you for agreeing to come and speak with the Reduced Fee Feasibility Working Group in relation to the Member Resolution from the 2012 Annual General Meeting, which raised the question of reduced annual fees for a proposed class of Law Society members, including those who are employed by "not-for-profit, non-governmental organizations".

I confirm that the meeting will take place at the Law Society offices on Wednesday, April 24, 2013 at 4:30 pm in Room 914. Please proceed to the 8th floor reception for access to the 9th floor.

The Working Group has already begun to consider the terms of the Member Resolution and the many implications that may impact the feasibility question. While we are not looking for you to answer every potential issue for us, we would like you to be aware of the issues and questions that the Working Group has identified for itself and we would welcome your ideas and input on any of these points, as well as on any other aspects of the Member Resolution that you would like to address:

1. The Resolution speaks of "creating a class of membership for non-profit lawyers." What specific criteria would determine inclusion in and/or exclusion from the proposed class?

2. The Resolution noted that "lawyers in not-for-profit organizations are paid wages below the average market rates for private practice lawyers with equivalent experience." Was this assertion based on specific published statistics or an anecdotal understanding of remuneration levels within the legal profession? If the former, are the same statistics available for the Working Group to consider?

3. What is the full extent of the annual salary range for lawyers who might be included in the class of "non-profit lawyers?"

4. Apart from lawyers who practice in not-for-profit, non-governmental organizations, would the proposed class include lawyers in private practice who provide valuable services *pro bono* or who devote a portion of their practice time to working for not-for-profit organizations, on contract or file-by-file, possibly on a "reduced rate" basis?

5. The Law Society does not recognize any distinct classes within its membership for the purpose of assessing a reduced (or increased) practice fee. Lawyers in the Part Time Practising category pay a lower insurance fee but pay the same practice fee. At the same time, the Law Society is aware of a significant range of incomes and

profitability levels among its membership, including some members whose practices are at best marginally profitable. To the extent that a reduced fee might be justified by the lower than average income (or similar criterion) of the members of the proposed class, what are the implications with respect to marginally profitable private practitioners whose practice fees may be increased correspondingly, to offset the reduction for the proposed class?

6. To the extent that a reduced fee might be justified by the recognition that lawyers practicing in "not-for-profit, non-governmental organizations" provide valuable services addressing needs unmet by the private sector, what are the implications of marginally profitable private practitioners who practice in areas of law (such as poverty law) or in under-serviced geographical regions (such as remote, rural areas), such that the needs for their services might go unmet in their absence?

7. Combining 5 and 6 (above), what are the implications if another demographic group of Law Society members can be identified, which earns even lower wages than the proposed class, while also providing important services for needs that might otherwise go unmet?

8. One aspect of the feasibility of a potential fee reduction is the quantum. How much of a reduction should be considered? What might be the basis or justification for a specific quantum of reduction, given that a specific amount would need to be determined?

As indicated above, the Working Group will be pleased to hear your views on any aspect of the resolution and its implications that you wish to address. Any information or comments relevant to the listed issues that the Working Group has itself identified will be especially appreciated. Thank you in advance for your assistance with our review of this matter and we look forward to an interesting discussion.

Lesley Small | Manager, Member Services & Credentials

Law Society of British Columbia
845 Cambie Street, Vancouver, BC V6B 4Z9
t 604.443.5778 | BC toll-free 1.800.903.5300
f 604.687.0135

The Law Society of British Columbia

Annual Fee Review: Consultation Paper

Introduction

The Law Society's Annual Fee Review Working Group is seeking comment on a proposal from two Law Society members that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners on the premise that the current fees have an impact on the capacity for members to start and sustain a practice in public interest law. Law Society members wishing to provide their comments may send them to the following email address: annualfeereview@lsbc.org by September 15, 2018.

The Consultation Questions

While it is not necessary to frame your comments as answers to the following questions, it would assist the Working Group to receive responses to the following aspects of the fee reduction issue:

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

2. If you would support the development and implementation of a fee reduction for public interest practitioners:
    a. How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?
    b. What consequences or impacts of the fee reduction would you foresee as providing its justification?
    c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

Background

In August of 2017 the Law Society was approached by two members seeking to include a members' resolution on the agenda for the 2017 Annual General Meeting ("AGM"). The resolution proposed that the Law Society investigate and duly consider providing public interest practitioners with reduced rates of practice fees and insurance premiums. Upon considering the proposal, the President, in consultation with the Executive Committee, agreed that the Law Society would investigate reduced rates of practice and insurance fees for public interest practitioners. With the agreement of the two lawyers, the members' resolution was withdrawn. The Annual Fee Review Working Group (the "Working Group") was subsequently created by resolution of the Benchers, with the mandate to "… investigate and duly consider providing public interest practitioners with reduced rates of practice fees and insurance fees …."

The Law Society has previously considered a similar proposal arising from a member's resolution, from the 2012 AGM, which resulted in the creation of the Reduced Fee Feasibility Working Group in 2013 ("the 2013 Working Group"). That group produced its "Report on Fee

Reduction Feasibility Review," in September, 2013 ("the 2013 Report"), which concluded that it was not feasible to offer a practice fee reduction to a specified class of Law Society members. The 2013 Report is available by this link.

The Working Group has held initial meetings aimed at understanding various aspects of its mandate, as well as identifying and obtaining relevant information that might help to shape any resulting proposal and accompanying justification. One of the Working Group's meetings was attended by one of the proposers of the 2017 draft members' resolution, who advocated for the fee reduction proposal and provided perspective and insight into the originating intentions. The Working Group appreciates this assistance in helping to ensure that important aspects of the proposal are appropriately considered. As mentioned above, the Working Group has also determined that it should seek input more broadly from Law Society members. This consultation paper has thus been produced to draw the question of a potential targeted fee reduction to the attention of Law Society members and to request members' views and comments on that proposition.

Discussion

Currently, all full-time practicing lawyers pay the practice fee and lawyers in private practice are required to be insured and pay the insurance fee. However, non-practising and retired members pay a much reduced fee. In addition, the in-house counsel, lawyers working for government and other non-law entities do not pay the insurance fee and lawyers in private practice who work less than 25 hours a week on average pay 50% of the annual insurance fee.

The previous consideration by the 2013 Working Group of reducing the practice fee considered three factors relevant to the question of whether a reduced fee for a subset of practicing members was appropriate. The current Working Group considers that those three factors remain relevant to its investigation of whether it should recommend providing public interest practitioners with reduced rates of practice fees and insurance fees.

The first factor is the beneficial impact. The Working Group has been concerned that if the Law Society were going to alter the manner in which practice fees are allotted and charged among its members, such changes would need to be justified and justifiable to the profession as a whole. In addition, the Working Group has a concern that providing a fee reduction to one subset of the current practising membership may facilitate other justifiable requests for a similar fee reduction for another subset of the membership, defined by different criteria which may equally justifiable. Finally, the Working Group has been concerned to focus on the motivations for the suggested fee reduction, to attempt to identify its objective, which may serve as its justification. The focus on what a potential fee reduction would be trying to accomplish is important both in the evaluation of the significance of the proposal and in the assessment of the effectiveness and efficiency of any specific proposal. To this end the Working Group has received additional input on the context and motivations that gave rise to the fee reduction resolution. Additional comments

from one of the draft resolution's proposers have indicated a general motivation to increase access to justice and access to legal services.

The Working Group welcomes any comment on the benefits of providing public interest practitioners with reduced fees, including improved access to justice and legal services.

The second factor is the financial implications. The Law Society's finances are a "zero sum" matter. To collect less money from some members means that other members have to pay more to make up the difference in the Law Society's budget. In considering the financial impact of implementing and administering a fee reduction program, the Working Group has recognized that a fee reduction is not an end in itself but rather a means to an end. To the extent a targeted fee reduction would require that some members pay more, it would be important for that additional expense to amount to an efficient means of achieving the objective of the fee reduction.

The Working Group welcomes any comment on the extent to which the potential cost of assisting public interest practitioners through a reduced practice fee would be offset by the potential benefits.

The third factor is the operational impact. This factor takes into account the logistics and demands of implementing and operating a fee reduction program of the type suggested by the member resolution. If new systems or processes were required for the ongoing administration of a fee reduction, the cost of implementing and operating those systems or processes would also need to be accounted for in the additional cost to other members. In addition, any fee reduction for public interest practitioners would have to be sufficiently well defined to allow reliable assessment of who was entitled to the fee reduction. The Working Group has identified a significant challenge in locating, by reference to "public interest law" or within the group who might be considered "public interest practitioners," a clearly defined group to be the intended recipients of a fee reduction. The challenge of finding the most appropriate group for the potential reduction is complicated because a very broad range of lawyers may claim to have involvement in work that produces public interest benefits. The term "public interest practitioners" might be applied so broadly as to include most lawyers, as public interest benefits may flow even from lawyers' work for corporate clients in a civil litigation context. Additionally, the public interest value of the work or the objectives of organizations that would see themselves as serving an important public interest may be subject to significant debate and political disagreement.

The Working Group welcomes any comment on a definition or on specific criteria that could usefully determine a lawyer's eligibility for inclusion in the group who might receive a fee reduction.

In conclusion, the Working Group wishes to express its appreciation in advance to members who take the time to consider the potential fee reduction and related issues and provide comments in this consultation. The Working Group values the time and effort of Law Society members and considers that affording an opportunity for broad-based input is an important aspect of recognizing and evaluating the range of possible recommendations that could be made to the Benchers regarding the potential development of a fee reduction proposal for public interest practitioners.

From: Warren Wilson, QC
To: Annual Fee Review
Subject: Public Interest Practioners
Date: July 17, 2018 3:07:23 PM

For the reasons outlined in the distributed comments of the working group I am against offering public interest lawyers a reduced annual fee. I have no doubt many sub-groups can make a case for reduced fees but I am equally sure no member who will pay more if some members have reduced fees will be in favour of paying more. Once the Law Society departs from equal fees for each practicing lawyer there is no end to the potential chaos. Although it would be a ridiculous result, if 99% of the members can make a case for a 50% reduction the remaining 1% would see their fees increase by thousands of percentage. Let's not even start down the road.

Warren

From: Blair Franklin
To: Annual Fee Review
Subject: Request for comments
Date: July 17, 2018 4:08:17 PM

I read the Law Society E-Brief request for comments on the proposed fee reduction for public interest practitioners. I am opposed to the idea as it creates more administrative burden for lawyers, law firms and the law society in determining fees. The benefit is likely to be negligible because it is unlikely that anyone does not do "public interest" law because of the law society fees. We are also then going to have to look at reduced fees for criminal lawyers as they provide more to society than real estate lawyers. I have no idea why we would single out just public interest practitioners and how we would define it. The idea behind the law society is that all lawyers are barristers and solicitors and for matters of convenience and to avoid exactly this sort of thing we all pay the same rates with some minor excepts for those who practice less. Each one of these "I am special" I should pay less we grant the more complicated the system becomes. I also have a general problem with the idea that we should promote public interest law and not criminal law or family law or some other just as deserving area of law.

Blair Franklin
Lawyer
Johnston Franklin Bishop

From: George Hungerford
To: Annual Fee Review
Subject: Fee review consultation
Date: July 17, 2018 4:21:55 PM
Attachments: image001.png
image002.png

Comments on the review:

If there is to be a fee reduction for public interest practitioners, I think that those who practice on behalf of their ancestral Indigenous group (First Nation, Metis or Inuit) should be able to waive that percentage of time in their law society fees and insurance. Frequently, indigenous groups do not have the resources to pay full-rate for lawyers and lack the capacity to handle legal matters themselves. Practitioners would be practicing at substantially reduced rates or pro bono.

Alternatively, these practitioners should not have to pay insurance at all. Indigenous groups (be they tribal councils, bands, land claim corporations, etc.) are government. Why would Indigenous government be treated differently than federal, provincial or municipal governments, particularly with LSBC's commitment to truth and reconciliation?

George N.F. Hungerford

From: John Anderson
To: Annual Fee Review
Subject: Discrimiation between practices
Date: July 17, 2018 4:33:49 PM
Attachments: stikemanelliott_logo_rgb_120px.png

I just don't understand the idea that, based on the nature of their practice, some lawyers should pay more and some should pay less. It seems to me that, historically, the practice area which has resulted in the most significant demands on our insurance and other funds has been real estate practitioners. However, the "costs" of that practice has been allocated across all practice areas on the theory that it is more appropriate for all practitioners to bear the costs of the sins of real estate practitioners.

I am content with this current model. However, if we are going to go to a "user pays model" such as is the case with insurance premiums and WCB premiums, it only makes sense to me that the fees of ALL lawyers should be adjusted to reflect the experience/loss ratings of their particular area of practice, if not also their experience/loss ratings based on other factors such as: size of firm in which the person practices.

I am not sure that we have the time and resources to implement such a user pays model, and don't see the value in moving to such a system at the request of a very small number of public interest practitioners.

John Anderson

From: John Horn
To: Annual Fee Review
Subject: REDUCED FEES FOR PUBLICI INTEREST PRACTITIONERS
Date: July 17, 2018 5:04:06 PM

I have read carefully both Reports and Appendices.
I am of the view that the proposed differentiation in fees charged is neither practicable, nor morally justified.
It is impracticable because the criteria for qualifying could never be exhaustively pre- determined and would have to be settled on a case by case basis. Mr. Ridgeway eloquently addressed this concern .
It is not morally justified because public interest lawyers receive the same benefits from their membership in the Law Society as all other practitioners and should shoulder the same burdens.
The Law Society has no mandate to support public causes, however worthy. It is the CBA which has that mandate

John W. Horn Q.C.

From: Renee Miller
To: Annual Fee Review
Subject: Annual Fee Review Consultation
Date: July 17, 2018 5:05:37 PM

Dear Annual Fee Review,

I am grateful to the lawyer who initiated the idea of a fee review for public interest practitioners. I am a 12 year call and I practice entirely on the legal aid tariff, which means that I am routinely paid less than even the minimum LSS tariff for legal work I complete for my mostly indigenous clients.

As an example, I am counsel for [redacted] LSS told me that there is no judicial review of MCFD decisions, and the lack of any meaningful caselaw would certainly support that proposition. LSS initially refused to fund this petition. The administrative review authority considered the issue and shrugged it's shoulders. I am scheduled to argue the availability of judicial review of MCFD decisions next week. I am the first lawyer in 22 years in the entire province to even attempt this argument. While LSS initially refused to fund this work, they eventually relented in stages. The 40 hours I was eventually given to make this legal argument from scratch in the absence of any case law, expired 60 hours ago (and I still have preparation this week to complete before argument next week).

I have generously shared my filed Supreme Court pleadings with other lawyers interested in doing this work in an effort to try and address a child protection system in Canada that has been described as a national embarrassment, only to have to weather the threat of the Attorney General of having committed an offence involving a $10,000 fine and/or 6 months incarceration. The precedent value of such pleadings in the face of the gross overrepresentation of First Nations kids in care cannot be understated (and I successfully argued to keep those pleadings in the public domain). However, when I brought this issue to the attention of LSBC's Truth and Reconciliation Committee prior to the hearing, I was met with disinterest. I am on the front line of Provincial and Supreme Court where the rubber hits the road for First Nations clients in BC, doing the work that very few other lawyers want to do on a reduced sliding scale (on the above file I will be lucky to clear $25/hr at the end of the day). I have a Master's degree in English, I clerked for the Federal Court of Appeal in Ottawa, I have completed various courses of negotiation training at Harvard, and I was a Liberal candidate in the 2011 Federal Election. I have successfully argued important Charter decisions involving delay and striking some of Steven Harper's omnibus criminal Minimum Mandatory Sentence provisions. I am a public interest lawyer because I believe our laws must be applied fairly to everyone in Canada. I would welcome my law society fees being applied proportionately as well.

None of my clients have ever complained about me to the Law Society, and none of the legal aid lawyers that I know have ever been required to financially remunerate one of their clients from LSBC's insurance funds. As far as I can tell, my insurance premiums go to protect lawyers who erroneously operate trust accounts. I do not have a trust account since I do not accept any private retainers - none of my clients could afford to pay a retainer.

LSS lawyers are considering strike action in response to unfair remuneration for legal aid work generally. Lower membership fees for legal aid lawyers would be GREATLY appreciated.

Thanks kindly,

Renee Miller

From: Ron Kornfeld
To: Annual Fee Review
Date: July 17, 2018 5:14:08 PM

No. If the lawyer chooses to work in this manner, there is no need for the profession to support that choice. What of lawyers who do pro bono - are they entitled to a discount? And who decides what public interest groups qualify?

From: Paul S.O. Barbeau
To: Annual Fee Review
Subject: Annual Fee Review: Consultation Paper
Date: July 17, 2018 8:07:41 PM

LSBC Annual Fee Review Working Group ,

I am responding to the Annual Fee Review Consultation matter, raised in the Law Society E-Brief for July, 2018 (N.B. as received today). I understand that the Working Group is seeking comment from members on the idea of reducing Law Society fees for public interest practitioners.

In that regard, the following questions have been raised:

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?
2. If you would support the development and implementation of a fee reduction for public interest practitioners:
   a. How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?
   b. What consequences or impacts of the fee reduction would you foresee as providing its justification?
   c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

In response to question 1., I am **not** in favour of the Law Society developing and implementing a fee reduction for public interest practitioners, for the following reasons:

1. This matter was, in substance, considered by the Law Society back in 2013, and rejected;
2. There is no accepted meaning or method for determining who would be included in the definition of “public interest practitioners”, nor will there in the future likely be any objective measure for making such a determination;
3. The Law Society, if it were compelled to approve this fee reduction accommodation for “public interest practitioners”, would be committing its members to the support of the objectives of such individual “public interest practitioners”, without any clear and discernible test for quantifying the social and other objectives that may be pursued by such public interest practitioners;
4. To the extent that non-public interest practitioner lawyers commit to significant *pro bono* work on behalf of charitable or not-for-profit organizations, one might reasonably question why those lawyers would not also request or demand, similar fee reduction accommodations, there then being no way to definitively delineate between public, social or community benefit as between public interest practitioners and non-public interest practitioner lawyers; and,
5. Better options exist for such individual lawyers or groups of lawyers substantially engaged in public interest advocacy, to ameliorate the law society fee burden. Those options include the establishment of a practice as a non-profit operation (which is currently being done) and the seeking and obtaining of third party financial and other support for the endeavours.

While the 2013 Report determined that it was not **feasible** to offer a practice fee reduction to

a specified class of Law Society members, I would suggest that even if it was “feasible” (which I would agree, it is not), it is not an objective that the Law Society, and by extension its members, should be obligated to support, when other more viable and legitimizing options exist, for these individuals and their related organizations to seek and obtain support for their endeavours.

On the basis that I am not in favour of question 1., I have not addressed the questions set out at question 2.

Thank you.

Paul S.O. Barbeau LL.B.(Hons), J.D.

From: michael woodward
To: Annual Fee Review;
Subject: Public Interest Lawyers Fee Reduction Proposal
Date: July 17, 2018 11:30:01 PM

Q1 Differential fees should not be set. Should not further divide an already badly fractured bar (TWU Debacle, etc). On the other side of most public interest files is another client with a different lawyer who is not catching a fee break. Think that client will see the Law Society as even handed?

Our law society is not and should not be a social justice organization. Hundreds of other organizations fill that role.

Q2 Because this is impossible to do other than completely arbitrarily.

Sincerely
Michael Woodward

From: Glen Greene
To: Annual Fee Review
Subject: annual fee consultation
Date: July 18, 2018 9:35:40 AM

Dear sirs or mesdames

I suggest that there is no purpose in "asking for consultation" if you do not provide the "draft" proposal that the society is preparing for the last minute notice to the members. The entire idea behind consultation is that we have to know what is planned. It was asked for **because** the only notice on the budget that was being given was 2-4 weeks before that agm where the members are expected to "rubber stamp" whatever they are blessed with by the Benchers (read Law Society bureaucracy).

If the reader might detect a note of cynicism in this submission, the reader would be correct. The view of this writer is that the Law Society is being run "by the bureaucracy, for the bureaucracy and that the bureaucrats shall not perish from this earth"

As a practical submission, I believe that the budget should be drastically reduced. The Society does too many unnecessary political things badly. The only way that political waste will be eliminated is to reduce the budget of those who actually operate the society.

Glen Greene
Smithers B.C.

From: Peter Warner
To: Annual Fee Review
Subject: Feedback
Date: July 18, 2018 10:09:35 AM

While I have never in 42 years been a public interest lawyer, I think this fee reduction idea is a good one. They pose much less risk than a solicitor doing $50,000,000 loans.

From: Guy Whitman
To: Annual Fee Review
Subject: proposed fee reduction for "public interest practioners"
Date: July 27, 2018 11:33:41 AM

I have read and agree entirely with the observations and conclusions of the Annual Fee Review Consultation Paper posted on the Law Society website. In particular, I agree with the committee that the process of identifying and defining a group is fraught with difficulty, so much so as to be practically impossible. If the LS were to adopt this process, it would inevitably become involved in making political judgments which should be outside its mandate. As is frequently noted, one person's terrorist is another person's freedom fighter (and vice versa). Moreover, some individuals practicing in a particular area may be making great financial sacrifices for the furtherance of their ideals, while others are making very high income. Could the LS then use a low income as a principle criterion? Obviously that would create a whole new set of problems. In short, the proposal is impractical and if implemented will only have the effect of favouring certain political views or beliefs over others, and setting members against each other. This is not in the best interests of the profession or the public.

Guy Whitman

From: David Khang
To: Annual Fee Review
Subject: Support for reduction in the annual practising fee
Date: August 9, 2018 5:41:51 PM

I am a mature student who has gone back to law school do contribute to public interest law, after practising dentistry for two decades.
I wonder if an interdisciplinary comparison may shed some light on the situation.

As a dentist in BC, we have an annual licensing fee of a little over $3000.
If a dentist is in a "limited" category (in "education, armed services, or government"), the annual license fee drops to $700.
If a dentist limits her/his practice to scientific research, the fee is $73.
If a dentist (usually closer to retirement) chooses to do pro bono volunteer work, the fee is $zero.
https://www.cdsbc.org/registration-renewal/annual-renewal/renewal-fees

While this graduated fee scale doesn't map precisely onto the situation for BC's legal profession,
I do know of dental colleagues who have been incentivized by the fee system to do more public interest dentistry.

I hope that this information may prove to be useful to your deliberation.

Sincerely,

David Khang

From: Naomi Moses
To: Annual Fee Review
Subject: Fee reductions for public interest lawyers
Date: August 9, 2018 6:03:41 PM

Hello,

Below are my comments with respect to the proposed fee reductions for public interest lawyers. I have responded to the Working Group's consultation questions:

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

Yes, to promote access to justice and allow people of limited financial means to access needed legal services, and to encourage members of the profession (especially new members with outstanding law school debt) to pursue careers in the public interest to serve these goals.

2. If you would support the development and implementation of a fee reduction for public interest practitioners:
a. How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

Identify these lawyers based on the number or percentage of hours of legal work performed for clients who are unable to pay. Any percentage higher than 50% should make a lawyer eligible.

b. What consequences or impacts of the fee reduction would you foresee as providing its justification?

It would allow more lawyers to pursue careers in the public interest that serve people on low incomes, which is of net benefit to society as a whole. Research has demonstrated that providing people with free legal assistance when they cannot afford it allows them to more cost-effectively solve problems that would otherwise have financial consequences for other areas of the public sector (eg healthcare, child protection).

c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

It should apply to both fees, and could involve a sliding scale. Fees for lawyers who spend 80-100% of their time working for clients who are unable to pay should be nominal, perhaps a couple hundred a year, paid in instalments with a variety of payment options.

I do not object to paying more in fees in order to support these public interest lawyers who are doing such vital work for little recognition and almost no pay.

Thank you,

Naomi Moses

From: Sarah Allan
To: Annual Fee Review
Subject: In support of fee reduction
Date: August 10, 2018 9:31:02 AM

To address the questions posed in the consultation document...

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?
In short, yes. Those who choose to pursue a public interest career do so at great financial cost. The compensation in these roles, often with non-profit organizations, is low when compared to the private or government sectors, and it can be difficult to enter this career path, and stay in it. Having to come up with thousands of dollars a year, in two installments, is a source of much stress and anxiety for many public interest lawyers, particularly those with families to support. Additionally, most of the non-profit organizations doing legal work are headquartered in Vancouver, where the cost of living is extremely high. This adds an additional barrier to remaining in a public interest legal career. The Law Society should be working to remove barriers for young lawyers and women to practice law and to pursue public interest legal careers. Annual fees are a huge barrier and deterrent.

From my personal experience, I pursued a social justice education in law school at UBC, interned with non-profits, and was dead set on a public interest law career. I spent my first few years out of law school working for various non-profit organizations in Vancouver, always paying the majority of my own Law Society fees and insurance, as the organizations could not afford to pay them. I had two children, and suddenly I could no longer afford to work in non-profit organizations any longer, due to the low wages, annual fee burden, cost of daycare and cost of living in Vancouver. We've recently moved to Vancouver Island, where I am working with a small firm as a sole practitioner. Not the path I set out to pursue but working for a non-profit organization in Vancouver was no longer sustainable. What would have helped, especially in my early years while still paying off substantial student debt, would have been a discount in my fees, or even a way to pay them monthly, instead of two large payments. I know many other lawyers working in non-profits who have had to borrow money from family, or use credit, to pay their annual fees. These fees are a barrier that makes public interest law work only available to those with partners who subsidize their career, or who have no children to support. Non-profit work can be great for lawyers who are parents, particularly women, as the hours are reasonable and work rewarding, but it needs to make financial sense. Public interest work is vital to our society and a key part of the legal profession, and should be supported.

2. If you would support the development and implementation of a fee reduction for public interest practitioners: a. How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?
Maintain a list of approved organizations whose employees can apply for a fee reduction. If a lawyer works for a non-profit organization more than 60% of their working hours, they should qualify. Exceptions could be assessed on a case by case basis.

b. What consequences or impacts of the fee reduction would you foresee as providing its justification?
Encourage more young lawyers to pursue public interest careers, while having families to support and paying expensive costs to live in BC and paying off student debt. Financial need

is high at the start of ones career in ways that previous generations did not experience. Many young lawyers are working very hard, living paycheque to paycheque, and supporting families in very expensive cities. More passionate, driven lawyers could start and stay in public interest careers if they did not have to account for thousands of dollars in fees on meager non-profit salaries. Public interest legal work is really important and more non-profit organizations could attract lawyers to work with them if lawyers knew they would not have to carry their own fees in order to take that job. Many firms and private companies can offer this as part of their compensation package where non-profits cannot.

c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?
The fee should be applied to both and should be at least 50% to truly make an impact. Additionally, an option to pay fees by monthly installment should be offered.

Thank you,

From:
To: Annual Fee Review
Subject: Practising Fee and Insurance Fee Payable by Public Interest Practitioners
Date: August 10, 2018 4:12:51 PM

I write to support a recent proposal from two Law Society members that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners on the premise that the current flat fees diminish members' capacity to start and sustain a practice in public interest law.

This proposal serves both to reduce the difficulty of practising public interest law, and to signal the respect accorded to public interest practise by the Law Society.

William Edmund Mugford

From: Lois Salmond
To: Annual Fee Review
Subject: Reduction for Public Interest Lawyers
Date: August 13, 2018 8:11:41 PM

Dear sir or madam:

I am very much in favour of a reduction in practise fees for public interest lawyers which I would define to include
areas of law: mental health (but not for the medical profession); legal aid of any kind; animal law; human rights law ; not - for - profit law ;

The reasons for this are:

1) It would assist lawyers to enter and to continue in these areas . These areas assist people and animals who
are the most vulnerable in our society and the least able to pay legal fees;

2) It would increase the credibility of the legal profession here, in general ,with the public and that is always a concern
since lawyers are often perceived and portrayed as money -oriented, self-serving and aggressive which actually
has some root in fact;

3) It is patently UNFAIR that all lawyers pay the same fees when certain areas of practise are very lucrative and the ones
that assist the most vulnerable are the least lucrative. We are not in a business , but in a profession of which we should be proud;

4) Often the public interest - type lawyer does not have a pension plan and helping people and / or animals should
not be a recipe for financial hardship in old age, especially given the fact that these areas are fraught with difficulties and
are emotionally and physically demanding.

Thank-you.

From:
To: Annual Fee Review
Subject: My views on the fee review
Date: August 15, 2018 10:58:46 AM

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

Yes, there should absolutely be a fee reduction for public interest practitioners. A public interest practitioner is using his or her law degree for the good of an underprivileged population and is still bearing the full cost of living expenses in metro cities (as most PIPs are in the areas that require servicing large, disadvantaged members of the population). The profession should support those doing honourable work for less money than their business law counterparts.

2. If you would support the development and implementation of a fee reduction for public interest practitioners:

    a. How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

Those who are either solo or small firm practitioners who do work for organizations that are directly funded by public organizations or government where their income is LESS than that of the lowest paid government employee in their realm. For example, if they are a criminal defence practitioner who, at 4 year call, is making less than a Crown counsel at that level or an immigration and refugee lawyer who is making less than a PPSC counsel of their same year.

    b. What consequences or impacts of the fee reduction would you foresee as providing its justification?

Less struggle, less burnout and less service areas with reduced services. I also believe that people would feel better able to provide more probono work.

    c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

The fee reduction should be applied to the practice fee and should be at least 50% less than those who are practicing law and their firms are paying their practice fee. The insurance should be commiserate with the percentage of complaints that the practice area engenders (ie: criminal lawyers make up 8% of complaints to the Law Society, so their insurance should be scaled to reflect that).

Thank you for allowing me to provide a view on this.

Lisa Jean Helps
Barrister and Solicitor

From: Brittany Goud
To: Annual Fee Review
Subject: Annual Fee Review- part time practice perspective
Date: August 16, 2018 1:17:41 PM

Hello,

I am a part-time practicing lawyer in Victoria, BC. I am practicing part-time as I complete my LLM. I am a supervising lawyer at The Law Centre, a free legal service of the University of Victoria.

In my situation, even the part-time fees are prohibitive. It could take me up to a month to earn enough to cover the fees on my part-time schedule. During one term, I had considered just volunteering my time in order to reduce the fees further (application for pro bono status).

I hope this perspective is useful to you.

Best,

Brittany Goud

From: Erica Olmstead
To: Annual Fee Review
Subject: Law Society of BC seeing feedback on idea of fee reductions for public interest lawyers
Date: August 18, 2018 10:36:52 AM

Hi There - I am writing to comment on the proposal from two Law Society members that a reduction in the annual practicing fee and/or the insurance fee be made available to public interest practitioners on the premise that the current flat fees have a negative impact on members' capacity to start and sustain a practice in public interest law. I am wholly in support of this, especially where a lawyer's salary is well-below what it would be if they were not engaged in public interest work. Employment by an NGO or proof that 40% or more of the lawyer's files are legal aid based, and the lawyer has a salary less than some benchmark, would greatly assist in promoting access to justice and is something that should be supported by the Law Society.

From: Maria Sokolova
To: Annual Fee Review
Subject: Law Society of BC seeking feedback on idea of fee reductions for public interest lawyers
Date: August 19, 2018 2:31:51 AM

Hello,

As a lawyer who worked as a contractor at legal aid and, in the past, maintained an exclusively legal aid practice, I would like to voice my strong support for the idea of fee reductions for public interest lawyers.

The Law Society fees operate in a regressive manner and create impediments for those that want to work to make justice accessible. Not only are they measured by the standards of the salary of the "average" lawyer, for those lawyers that work at firms they are usually paid for by the firm. On the other hand, for lawyers that work at under-funded non-profits, or cash-strapped legal aid, they are an extra annual 'hit'. I have witnessed and personally experienced many times the impediments they create for public interest lawyers. They are a constant burden and never far from the minds of public interest lawyers. Not only the amount, but the manner in which the fees are to be paid in lump sum payments in June and November, creates cash flow issues and hardship. Here are just a few examples I have personally witnessed of how these fees deepen the access to justice crisis by creating hardship for public interest lawyers and undermining their ability to work for the most vulnerable:

- When I was a law student working with the Law Students Legal Advice Program (LSLAP), a graduate (Ph.D) student who was also called to the bar and created LSLAP's immigration program as well as often pointing us to sources of information, told us she could not become our supervising lawyer, even on a volunteer basis, because she was a student and could not afford the annual practice fees. The program, being non-profit, was not able to pay them;

- A colleague at legal aid, having completed her LLM has refused to return to the practice of law doing legal aid files because she cannot afford the practice fee unless she works for a firm taking private clients;

- I myself, have gone non-practicing on two occasions. The first time, I worked out of province. When I wished to return to BC to continue my legal aid practice, it was difficult for me to pay the fee before I began taking files. The second time, I left to complete my LLM. When I returned, I chose to do other temporary work (not public interest) which does not permit me to take legal aid files, because after being a graduate student, I could not afford the fees to start up a legal aid practice again. Moreover, the fees are a hardship for me while also paying student debt. When my temporary contract ends in September, I plan to take up a volunteer public interest opportunity. I worry about paying the November fees and my ability to continue with that opportunity given the amount;

- The fees of about $3500 amount to a significant portion of a public interest lawyer's annual earnings. When I had fewer years at the bar and maintained a legal aid practice, my annual earnings were, at best, about $60,000 gross. No one subsidized my fees or overhead. A few colleagues and I had office space and always (not only in June and November) worried about paying the fees in June and November at the same time as office rent and expenses and other expenses. We avoided buying items for our office (like a better printer) because we needed to have enough to pay the fees. Several of my colleagues restricted themselves to part time legal

practice because of the fees, which also meant they could not earn more and could not do more for clients. Eventually one of those colleagues took up a position which did not require qualification as a lawyer, which did not require her to pay fees. She expressly noted that being a mother, the fees made it difficult for her to earn enough at a public interest practice to support her family. A few others went to work for firms, doing far fewer legal aid files. Another left practice altogether.

Legal aid tariffs and public interest salaries are already very low, and these fees do nothing but add salt to the wound. They end up being the reason most of us either take up different positions where someone else pays, or simply go non-practicing. It is why good, experienced people cannot stay in public interest positions even if they want to and why many younger lawyers cannot fathom doing something like legal aid. When the Law Society decides, as it has done in the past, that it is "inequitable" to reduce the fees, it feels like a slap in the face, like the Society does not value or work and wants to do something else. I've often heard the "well if you can't pay the fees you can't hack it as a lawyer" line. This is ironic given how few people can afford the services of "real" lawyers and how few of those "real" lawyers pay their fees themselves as opposed to the firm paying them. I recommend the piece by Professor Eberts called "'Lawyers Feed the Hungry': Access to Justice, the Rule of Law, and the Private Practice of Law," (2013) 76:1 Saskatchewan Law Review 91, where she succinctly describes the under-class of lawyers she refers to as the "legal proletariat" (where incidentally, marginalized groups find themselves overrepresented) and the way that, among other things, the legal profession is structured to exploit them. This is a classic example. Public interest lawyers must pay the same, or perhaps more (since firms and other government posts pay for them) for the privilege of practice, and yet our practice is under-valued because earning less doing less lucrative files means you are not fit to be a lawyer.

I realize that in past years this proposal has been rejected as some feel that it is not possible to properly define which lawyers would qualify for this reduction. I strongly disagree it difficult to know who is and is not a public interest lawyer, but even if definition on the margins is difficult, this is no reason to do nothing in obvious cases. If one works for a non-profit organization that is not government, or if a certain proportion of one's files are legal aid (a % can be arrived at on consultation, but certainly 75%+ should qualify), in my view these cases are clear. Steps can be taken immediately, and there is no reason not to implement fee reductions for these lawyers just because there is some grey area remaining.

The grey area that everyone appears to be concerned about is sole practitioners, particularly those that that do civil cases. This fails to consider that that category would largely overlap with those whose practice is largely legal-aid based, due to the fact that legal aid operates on a contract basis in this province. Moreover, it is obvious by now that certain areas of law are less lucrative than others and some areas of law have a certain subset of issues that are not lucrative. For example, in immigration, business immigration is lucrative, refugee issues are not. In family, the property issues of high net worth individuals are lucrative, child protection is not. In many cases, the differentiation between practitioners can be made on the basis of what % of their practice is legal aid, because legal aid is targeted at the areas of law that are not lucrative. In civil cases where there is no legal aid coverage, it is still false to claim there is no difference between a practitioner who does business/corporate civil cases in firms, big or small, and that who does what may be referred to as "poverty law" issues. First of all a list of poverty law issues can be identified and the practitioner asked to certify that theirs is a poverty law practice that fits within those areas, or an area that the Law Society may approve on an ad hoc basis. Second, by defining issues as "poverty law/public interest" the Law Society can

target areas where it wishes to incentivize persons to practice because those are areas where access to justice is lacking. Third, the practitioner can be asked either to certify or provide proof that their income in the previous year, or several, was below a certain amount, say $100,000 to ensure that there is a reason for their fee reduction. There is nothing nefarious about choosing to provide services which result in lower pay, and the concern about practitioners being intentionally underemployed to qualify for fee decreases is misplaced in my view. The whole point is to incentivize lawyers to provide services on less lucrative files. Fourth, the fee reductions can be different. For example, those in non-profits or 75%+ legal aid can receive the maximum reduction, whereas those who practice civil law only some of which qualifies as "poverty law/public interest" can receive a lesser reduction.

This need not be administratively difficult. The current practice of having lawyers select the appropriate fee based on full time or part time practice, or the employer, is based on trust in the lawyers to select the right category. This could be the same. If for example, the Law Society maintains a list or a rule of what it considers to be public interest services as asks a lawyer to certify that their practice meets this definition, this only adds one box to the annual fee form.

The Law Society should also consider giving lawyers the option of paying their fees in more than 2 installments (monthly or even 4 times a year would be less of a burden). This should not be administratively difficult, given that everything nowadays is done electronically and recorded automatically.

This is not merely a matter of theory or principle. These fees result in actions and choices by lawyers every day - usually difficult choices to give up public interest practice. It is time they are reconsidered.

Thank you reviewing my comments. Please contact me if you wish to discuss.

Maria Sokolova

From: Jan Christiansen
To: Annual Fee Review
Subject: reduced Law Society fees for "public interest practitioners?"
Date: August 21, 2018 12:56:27 PM

You pose the question:

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

No. There is no definition of "public interest practioners" however it seems likely that what they really mean is practioners seeking to pursue very particular political agendas through the courts in antagonism with elected governments. They do not mean the "public interest" but rather the public interest as defined by their self selected interest group clients. There is no reason why the broad body of lawyers should be asked to subsidize the political agendas of other lawyers and clients - political agendas many of us may disagree with.

Your question #2 is not applicable since I am opposed.

Jan Christiansen, Lawyer

From: Devon Page
To: Annual Fee Review
Subject: 22 08 2018 Law Society Annual Fee Review Consultation.pdf
Date: August 22, 2018 1:15:40 PM
Attachments: 22 08 2018 Law Society Annual Fee Review Consultation.pdf

---

Please find attached our response to the Law Society's Annual Fee Review Working Group request for comment on the proposal that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners.

Devon Page
Executive Director| Ecojustice

VANCOUVER CALGARY TORONTO OTTAWA HALIFAX

ecojustice

Devon Page
390-425 Carrall Street
Vancouver, BC V6B 6E3
Tel: (604) 685-5618
Fax: (604) 685-7813
dpage@ecojustice.ca

August 22, 2018

Sent via email

The Law Society of British Columbia
Via annualfeereview@lsbc.org

Dear Sir/Madam:

Re: Law Society's Annual Fee Review – fee reduction for public interest practitioners

This is in response to the Law Society's Annual Fee Review Working Group request for comment on the proposal that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners.

1. **Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?**

Yes, the Law Society should implement a fee reduction for public interest practitioners for the specific purpose of cultivating this behaviour in the profession.

The basis for this position is that public interest law has distinct characteristics that merit the Law Society's particular support, primarily as it relates to access to justice.

Towards defining "public interest law" and its particular characteristics, in a 2015 submission to the Appeal and Federal Court Rules Committee, Ecojustice, the Canadian Environmental Law Association, and the University of Victoria ELC stated:

> …public interest litigants typically seek to assert the vindication of a public right or the enforcement of a Crown obligation that is often resistant to monetization (e.g. a Charter right for the former, or a duty to protect a listed species under the Species at Risk Act for the latter) or that targets a subject which is a common or public good (e.g. clean air or water). While litigants who bring public interest lawsuits may not always be devoid of private interest motives, private motives rarely justify bringing the claim in an economic sense.

> Furthermore, public interest litigants are driven by broader issues of public importance that transcend the immediate interests of the parties to the *lis*. In these circumstances, in our experience, settlement is rarely a realistic outcome.[1]

Because there is seldom a pecuniary benefit, generally public interest actions are either not brought or they are brought only where legal services are free. Practically, this means that access to justice is very limited, with corresponding, material detriment to the public interest:

> … environmental justice and access to courts is closely related to the civil and political ability of the public to act as stewards of the environment and to protect or improve a community's or individual's quality of life. As such access to justice is a significant element of a democratic society and is closely linked to wider social, economic and political macro and micro issues such as social exclusion, regeneration and public participation. At present numerous barriers to access of the court system mean that overall the court system does not act as tool for environmental justice.
>
> Consequently policies initiatives which would promote environmental justice such as environmental equality, environmental public participation, access to environmental decision making processes and access to information are likely to be undermined if barriers within the court system remain unaddressed. Such barriers stand to weaken any agenda of social inclusion and undermine the enforcement of environmental laws.[2]

This Australian study is somewhat unique in that it addresses the concept of access to public interest law resources as that term is defined above (as opposed to the profession's provision of *pro bono* services or publicly funded legal assistance for private interests[3]).

Our experience is that Australian conclusions about barriers to access to justice in the public interest, and the implications of that, apply equally in Canada. As in Australia, the role of lawyers in Canada is primarily a servant of private interests. Access to justice is becoming more limited and often only to those with means. This circumstance is at odds with what we tell ourselves and the public, "it is the object and duty of the Law Society of British Columbia to uphold and protect the public interest in the administration of justice."[4]

---

[1] http://www.cela.ca/sites/cela.ca/files/Costs-Access-to-Justice-Public-Interest-Envl-Litigation.pdf

[2] Adebowale, M., Capacity – Global, Using the Law: Access to Environmental Justice, Barriers and Opportunities, https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexBEJUsingtheLaw009Capacity04.pdf

[3] Noting that the provision of these services is likewise considered to be inadequate: Study on Access to the Justice System – Legal Aid, Canadian Bar Association Access to Justice Committee, 2016, https://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a

[4] Introduction to the BC Code, Code of Professional Conduct for British Columbia https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/

2. **If you would support the development and implementation of a fee reduction for public interest practitioners:**
   a. **How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?**
   b. **What consequences or impacts of the fee reduction would you foresee as providing its justification?**
   c. **How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?**

The characteristics of public interest law as defined above can be identified in a straightforward fashion:

- the litigation is in the "public interest" in that its impact flows broadly or will have a substantial impact beyond the interests of litigants; and,
- the claim cannot be monetized or, if it can, not to an extent the claim is justified in an economic sense.

Where services in the public interest are offered by a charitable or non-profit organization, these organizations will have traits that likewise identify the practice as in the public interest:

- the selection of cases by the organization is made based on criteria that defines and requires representing the public interest and/or by a board or committee that is representative of the public;
- the primary source of financial support of the organization is public and the scope of funding assures that the litigation does not act to benefit individuals akin to the private practice of law; and,
- the organization does not permit a donor to obtain a benefit from the litigation.

These conditions could act as criteria toward enabling fee reductions for lawyers employed by public interest law organizations, or by private lawyers to the extent they undertake public interest law. The courts have little difficulty applying criteria to determine public interest fee waivers; the profession can do the same.

Regarding the impact of the fee reduction, from Ecojustice's perspective, the effect would be material. Currently, 97% of Canada's charitable giving is targeted to educational institutions, religious institutions and healthcare. Funding an organization that provides free legal services to protect the environment is challenging, particularly for the 'administrative' costs of legal practise. At Ecojustice, there could be a direct relationship between a reduction in expenses and provision of legal services.

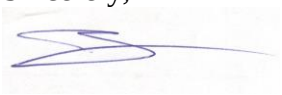
On the flip side, because the practice of public interest law in BC is very limited, it is a reasonable inference that the fiscal impact of a fee waiver for public interest practice would not be material.

The fee reduction should apply to both the practice and the insurance fees. Again, because of the unique characteristics of public interest law, the Society's oversight of public interest lawyers does not demand the same resources as practitioners practising private law. For example, because public interest law represents public not private interests, the circumstances typically do not give rise to malpractice liability. Also, public interest cases seldom deal with monetary outcomes. Where a hefty proportion of the Society's resources are allocated to regulating lawyers' use and misuse of trust accounts, Ecojustice has never needed to maintain trust accounts in our 27 years of operating a public interest litigation practice.

An insurance fee reduction would address the current situation of public interest practitioners being disproportionately burdened.

Lastly, as a grantee of the Law Foundation of BC, we know the Foundation plays a vital and material role in enabling public interest law in BC and likely has the best global sense of the its scope and impact. This inquiry would benefit from requesting a submission from the Foundation.

Sincerely,



Devon Page
Executive Director

ecojustice

From: Civil Supervising Lawyer
To: Annual Fee Review
Subject: Comments
Date: September 4, 2018 3:53:00 PM

To whom it may concern,

My name is Chris Heslinga and I am the Civil Supervising Lawyer for the UBC Law Students' Legal Advice Program ("LSLAP"). I am writing in support of the proposal proposal from two Law Society members that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners for the reasons that follow.

LSLAP provides free legal advice and representation to low-income, disadvantaged and marginalized people, throughout Vancouver and the Lower Mainland. Law School students meet with clients in the community and provide advice and representation through the supervision or myself and a Criminal Supervising Lawyer. LSLAP is the second biggest provider of legal services in B.C., second only to Legal Aid.

Our program helps thousands of low-income individuals each year. We primarily help those who could not afford legal representation otherwise, which in turn saves the court and the Tribunals we appear in untold amounts of time and energy by ensuring as few self-represented litigants appear as rarely as possible, making the court process smoother and more efficient. Therefore our services benefit the court and tribunal systems as well clients and the issues around access to justice.

LSLAP also provides training and education to hundreds of students ever year. Improving the profession, by training law students on how to actually practice law and work with clients. This also in turn saves the court and the profession untold amounts of resources by helping to create practice ready lawyers who understand the importance of client-centred practice and the need to follow their professional obligations. This also serves the public interest in helping train law students to be the best possible lawyers they can be.

LSLAP has also never, to the best of my knowledge, ever had a valid law society complaint or valid insurance claim made against us. Therefore limiting the resources practice fees and insurance pay for.

Despite all the benefits LSLAP provides to the public, the courts, and the profession, and the lack of corresponding costs, I still have to pay as much as lawyers who provide make 10 times my salary, provide no structural benefits to the public, courts, or profession and who have had successful insurance claims made against them. This does not seem fair or just.

Therefore I believe it would be more than fair to provide a reduction in annual practising fees and/or insurance to public interest practitioners.

Yours truly,

Chris Heslinga

From: Ardith Walkem
To: Annual Fee Review
Subject: annual fee review
Date: September 5, 2018 3:36:55 PM

Should the Law Society develop and implement a fee reduction for public interest practitioners?
Why or why not?

Yes. As a solo practitioner (lately small firm - 2 people) practitioner- I am very conscience of the financial differences between firms and areas of practice.

I would support a fee reduction for public interest practitioners - I would define this more broadly so that it was not just organizations who could apply - but individual practitioners, where for example:

It could be shown that a % of the work of the lawyer or firm (30-50%) was for not for profit clients - or perhaps provided at a discount or where a % of work was done on a pro bono basis.

I would also suggest that this might be an area where it was possible to offer some support to those lawyers who provide services on the legal aid tariff. While more thought would be needed, I would suggest that were a lawyer took X number of files, or could show that Y% of their time was dedicated to legal aid files, that they should likewise be eligible.

Another criterion could be to look at the income of the lawyer was below a certain threshold that could also qualify the lawyer for the reduced fee

I believe that this is both an access to justice issue (to provide some relief to members of the bar who service clients who cannot afford to pay the same fees) but also an issue of retention of certain groups within the profession to encourage diversity

From: Graeme Kotz
To: Annual Fee Review
Subject: reduction in fees for public interest lawyers
Date: September 10, 2018 12:34:02 PM

I write in regards to a proposal from two Law Society members for a reduction in the annual practicing fee and/or the insurance fee for public interest practitioners, the reason being that the current flat fees have a negative impact on members' capacity to start and sustain a practice in public interest law.

I am wholly in support of this. All my practice work to date has been with legal aid and I certainly felt the fees more than my friends who practiced in non-public interest law, some of whom didn't even know about the fees as they were paid by their firm. Honestly, I know interpreters and immigration consultants who were paid more than I was as a legal aid lawyer, and currently I am non-practicing in large part because of the (relative) financial hardship in this type of practice. It only seems fair to give a break to people who continue to take files at the legal aid tariff.

Regards,

Graeme Kotz

From: Karin Litzcke
To: Annual Fee Review
Subject: Quick input
Date: September 10, 2018 6:05:56 PM

Hi - I am a non-lawyer who has just come across your call for input about reducing fees for public interest lawyers, here: https://www.thelawyersdaily.ca/articles/7236.

I unfortunately don't have time before your deadline to do a full analysis and fee structure recommendations, but I do want to take a moment to say that this would be a spectacularly awful idea from any number of perspectives. I cannot think of a single reason why this would (a) be a good idea for the legal profession, or (b) engender any improvement in access to justice. It would not remotely serve the public interest, but would rather serve a group of lawyers whose practices veer dangerously close to rent-seeking and manipulation of the public interest for their own virtue-signalling and empire-building. The law and access to justice would be no better if that particular group of lawyers vanished from the face of the earth, so they are the last group to whom a fee reduction should be offered.

Something that is rarely considered by experts is the degree to which the public prefers to define its own interests, even if it needs experts to serve the interests it identifies. If you want to make changes to assist the public in doing so, I would have myriad suggestions, only one of which *might* be a change in fees.

But honestly, if the article is accurate in reporting how much fees currently are, they are gratifyingly low already, and no group of lawyers has any basis from which to demand a reduction. If any does, as I say, it is not this group; it would be a group whose income comes directly from individual (not institutional) clients' pockets, and in particular, not from grants.

If you'd like to know more about why I see this issue as I do, or what alternatives might exist for the society to improve access-to-justice, feel free to contact me; a more extensive consultation could be arranged.

Karin Litzcke, BHE, MBA

From:	Martin Peters
To:	Annual Fee Review
Cc:	Levy, Tamara; Gloria Ng; Brock Martland; Tony Paisana; Jeff Campbell, QC; Rachel Barsky
Subject:	Submissions from the Criminal Defence Advocacy Society (CDAS)
Date:	September 13, 2018 1:43:46 PM
Attachments:	CDAS submission.filed.docx

Annual Fee Review:
Please find attached submissions from CDAS.
Should the committee have any questions or require any further information from us, please contact me at your convenience.
Martin Peters, Director, CDAS

MEMORANDUM

TO: Law Society of British Columbia, Annual Fee Review Committee Working Group

From: Criminal Defence Advocacy Society

Date: September 13, 2018

Subject: Reduction in Fees and Insurance Costs for Young Lawyers whose practices Involve Primarily Legal Aid Cases

---

The Criminal Defence Advocacy Society ("CDAS") is engaged in advocacy, law reform and education in matters relating to criminal defence work in the justice system. The Society was founded by members of the British Columbia criminal defence bar who identified a gap in the area of law reform for criminal justice issues specifically affecting criminal defence lawyers and their clients.

CDAS represents over 300 criminal defence lawyers practicing in most areas of the province. We comprise approximately 65% of all criminal law practitioners in the province.

Our Proposal:

CDAS submits that there should be a 50% reduction in practice and insurance fees for those lawyers:

- Who earn less than $ 50,000.00 per anum on a net basis;
- Whose practice is comprised of at least 50% of cases paid for by the Legal Services Society, ("Legal Aid"); and
- Who have been called to the bar within the past 5 years.

In September 2016 CDAS submitted a Report to the LSBC Committee on Improving Criminal Law Articles in British Columbia. That report touched upon the difficulty that annual Law Society fees pose for new and young criminal lawyers:

Some of those surveyed described a virtually untenable position upon being called to the bar. They are typically several thousands of dollars in debt from university, they have been paid a meager wage during articles that may or may not have resulted in a net debt after taking into account personal expenses not covered during the articling year (e.g. gas, cellular phone, etc.), and upon being called, are faced with a significant Law Society bill associated with their call, insurance and enrollment. The situation is well-illustrated by the response we received from one young lawyer who was recently called to the bar:

> There must be a reduction of the fees we are expected to pay upon being called or as new lawyers in criminal defence. I know of many students who simply delayed or avoided being

> called because they could not afford it. For many of us, we are not paid for our gas or vehicle expenses. If the firm a student articles with is busy enough, you end up making barely enough to cover your gas, insurance, and food. I was lucky to have lived at home during articles. I cannot imagine how someone who had to pay rent in Vancouver would have fared.
>
> I was called in May. Yet despite this and despite the lack of jobs, I had to pay $2760.15 on April 30, as a call fee and insurance for May - December. I still had not secured a position at that point and was staying on at my firm and being paid just over $1000 bi-weekly for two months. I would then be unemployed for the first time since I was 16. I remember writing to the Law Society to ask if there were any part of the fee that I could opt out of as a low-income individual and a criminal articling student who would be shortly jobless. The email I received back stated simply "there is no reduced rate and insurance fees are the same for all lawyers". I was told I could switch to non-practicing and pay the $300 installment fee. Of course I couldn't afford to do that because I was trying to remain employable in a field where salaried or associate positions are virtually nonexistent.
>
> I then received another bill from the Law Society for $2955.75 on November 1, which was due November 30. I am fairly certain that I paid this bill late as I simply didn't have the money.

Unfortunately this situation is not all that unusual. Many new criminal lawyers in Vancouver find themselves struggling to make ends meet if they want to stay in criminal practice. These observations do not fail to recognize that many lawyers struggle because there is not enough work to go around for the number of lawyers who want to practice in this area. However, in our view, there should be some recognition that it is especially difficult for newer lawyers, and assistance ought to be given to at least offer them a fighting chance to start a practice. (Emphasis added)

It must be remembered that a good portion of legal aid work is done by young defence counsel. Senior counsel often reject these retainers for a variety of reasons. As a result, the mentally ill, drug addicted and other marginalized souls in our system are routinely represented by young lawyers. It is thankless work, as a Judge of the Ontario Superior Court recently reminded us:

> [51] It is the role of criminal defence counsel, frequently a most difficult role, to fully and fervently represent those persons accused of criminal offences, recognizing that their efforts will often place them at odds with public sentiments, including a natural desire for retribution. As the intervener, The Criminal Lawyers' Association, said in its factum:
>
> > Defence counsel run the risk of unpopularity or misunderstanding about their role more than any other lawyer in the Canadian justice system. One reason is the defence lawyer represents a person accused of distasteful acts. Those charged with crimes are frequently unpopular or outside the "mainstream": the poor, addicted, mentally ill, racial and ethnic minorities.
> >
> > - Groia v. Law Society of Upper Canada, 2015 ONSC 686 at para. 51.

Nonetheless, every day in our courts, young lawyers are called upon to provide this important public service and are not properly compensated or supported in their work. They are regularly expected to work for free or nearly for free when dealing with subject matters like an individual's liberty, his or right

to privacy, and other vital interests that protect everyone. As Leonard T. Doust, Q.C. recently explained, legal aid and legal aid lawyers are invaluable to the proper functioning of our system:

> We are perhaps most familiar with legal aid in criminal matters. Persons who are accused of serious crimes and who cannot otherwise afford to pay for a lawyer must be provided with publicly-funded counsel in order to ensure their right to a fair trial and to safeguard the presumption of innocence. The underlying rationale for this protection of the presumption of innocence is two-fold. First, from the perspective of the individual, legal aid ensures that individuals who face the potential of incarceration have the means to adequately defend themselves. Second, from the perspective of the system, legal aid ensures that the criminal justice system can effectively avoid wrongful convictions, function fairly, and ensure that each and everyone one of us can be confident that we live in a society where we will never be punished for something that we did not do, nor will any of our family, friends, associates, or fellow members of our society.
>
> The rights of all of us are on trial in every criminal case. Without proper representation, pre-trial processes such as disclosure, admissions of fact, and plea bargaining are ineffective, and unrepresented accused are left floundering with complex processes, procedural, evidentiary, and legal issues…
>
> - Leonard T. Doust, Q.C., Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia; March 2011 at p. 14.

Young defence lawyers do this work because they are passionate about these issues. However, as we have seen, the stark financial reality of practising in this manner eventually catches up with young lawyers and they are forced to pursue other alternatives. This is a failing of our system that we must take steps to rectify immediately.

The CDAS September 2016 report recommended *inter alia* that in order to ensure an increase in criminal law articles, we:

> Encourage the Law Society of British Columbia to investigate reducing and/or waiving PLTC tuition, bar admission fees and insurance fees for criminal law students and new calls with a predominantly legal aid based practice (initiatives which have had some success in Ontario);

The circumstances facing young criminal lawyers has not improved since 2016. In the most recent budget of the Provincial Government, some increase in funding was provided to the Legal Aid. However, the stipulation with those increases was that none of it was to be utilized to increase the legal aid tariff. This tariff has not increased since 1992.

Young criminal lawyers work with the mentally ill, drug addicted and marginalized souls in our community that so readily find their way into the criminal justice system. It is thankless work that is barely rewarded by legal services. Any benefit that the Law Society is able to confer on young criminal lawyers will produce a net benefit in the level of services available to the most challenged people in our community. The public

interest will be served by a fee structure that permits young criminal lawyers to continue in this important work.

Law Society Reduced Fee Feasibility Working Group, 2013 Report:

On September 27, 2013 the Benchers resolved to accept the report of the Reduced Fee Feasibility Working Group, ("Working Group"). The Working Group had produced a report to the Executive Committee on September 4, 2013, (the "Report"). The Report concluded that:

> "The Working Group's view is that proposed fee reduction would be sufficiently expensive and operationally demanding to administer as to outweigh its potential benefits. Those potential benefits ultimately are insufficient to justify the implementation of a fee reduction, particularly given that such a reduction would not appear to be an effective means of recognizing the contributions of lawyers working in the not for profit sector. The fee reduction would also appear to raise an issue of unfairness in the way that the Law Society treats different groups of its members. In light of all of the issues raised and concerns discussed in this memorandum, the Working Group has concluded that proposed fee reduction is not feasible."

CDAS submits that these conclusions and the entire memorandum submitted by the Working Group, has little or no application or consideration to the position of the majority of young criminal lawyers in the province. In particular:

- The research of the Working Group focused on lawyers working in the "not for profit" sector. These are lawyers working for corporations who engage in social justice issues. Their fees are paid for by the corporation. Any reduction in fees owing by such young lawyers is a net benefit to the not for profit corporation that does not flow to the lawyers themselves or enhance these lawyer's ability to make legal services available to the marginalized members of our community;

- The Report of the Working Group was concerned about the unfairness to be visited upon:

  > "lawyers who pay their own fees, whose incomes are below the level of many that would be eligible for the proposed reduction and whose work amounts to a significant benefit for their clients and, arguably for the public interest. They may or may not do legal aid work, practice poverty law, or provide services in geographical areas where there would likely be no substitute available."

  These lawyers so described are the young criminal lawyers in this Province. The argument of unfairness, so expressed, does not and cannot apply the members of CDAS who do not generally work for anyone let alone a corporation that pays their fees.

- The major concern of the Report was that a fee reduction system would unfeasible from a financial, operational and justification stand point. In this

respect CDAS submits that a reduction in membership and insurance fees for young lawyers:

- Could be simply administered by a declaration that:
  - 50% of all work was funded by the Legal Services Society, ("LSS"); and
  - The lawyer in the prior year had earned on a net basis less that $50,000.00.

    Should there be a need to review such a declaration, a waiver of confidentiality with LSS as well as the production of the members tax return for the prior year would be all that is required.

Legal Aid Task Force:

In March 2017 the Benchers approved a report of the Legal Aid Task Force, ("Task Force") : "A Vision for Publicly Funded Legal Aid In British Columbia" ("Task Force Report").

The Task Force Report identified a number of important considerations pertinent to legal aid and those whose practices involve a significant portion of these files:

- Most lawyers who take on legal aid work do so at a financial loss.[1]
- The general decline in lawyers practising criminal law is a concern'[2]
- The survey conducted by the Task Force found that the primary motivation of those responding for doing legal aid work is a commitment to social justice, although the responses also indicate that the professional responsibility to do the work and the interesting nature of the work are also motivating factors.[3]

As part of its mandate in producing this report the Task Force reviewed ways the Law Society could promote and improve lawyer involvement in delivering legal services through legal aid plans. One of the considerations in this regard was reducing insurance costs and practice fees for young lawyers and for criminal and immigration lawyers. The Task Force consulted with staff at the Lawyers Insurance Fund. The preliminary conclusion of the Task Force was that the concept of a reduction in insurance fees was not worth pursuing.[4] It is noteworthy that the Task Force did not address in its report the issue of a reduction in practice fees.

The basis on which the Task Force did not consider a reduction in insurance fees as worth pursuing included:

- Lawyer insurance is not risk-rated by lawyer category. Graded insurance schemes have been considered by benchers in the past and rejected.

[1] Task Force Report, paragraph 27 and Appendix 2.
[2] Task Force Report paragraph 48.
[3] Task Force Report, Appendix 2.
[4] Task Force Report, paragraph 48

- There could be harmful or unintended consequences to lawyers with economically marginal practices;
- In firms, the benefit would accrue to the firm and not to the lawyer performing the legal aid work;
- Insurance premiums are low in British Columbia and stable relative to other operating expenses faced by lawyers;
- The Task Force believes the benchers may wish to explore payment schemes, quarterly or monthly payments.

For the reasons submitted in this Memorandum, CDAS submits that these are not appropriate reasons not to consider insurance fee reduction for young criminal lawyers working primarily on legal aid files. At the very least the benchers should implement the recommendation of the Task Force as to payment schemes.

Annual Fee Review: Consultation Paper

The Consultation Paper provided by the Annual Fee Review Committee Working Group ("Consultation Paper") lists three factors that were addressed by the 2013 Working Group that remain relevant. CDAS's position on these issues is partially addressed above. However, in order to ensure that this Working Group has the full benefit of our submissions we set out our further response below to the three issues as well as the primary questions posed by this Working Group's mandate:

- Justification:

  The Consultation Paper raises the question of the beneficial impact of a fee reduction, whether it can be justified, whether a similar request may be engendered by subsets of the membership and the motivation for the suggested fee reduction:

  - The benefits of a fee reduction for criminal lawyers working predominantly on files paid for by legal aid is justified by the net extension of legal services to poor, marginalized groups within our communities. As noted above, these include the addicted, mentally ill and homeless women and men in our communities.

  - There may be a subset of other members serving other groups in our communities. However, to the extent that poverty, mental illness, addiction and homelessness will be addressed by the fee and insurance decrease we are proposing, CDAS submits that other subsets of the membership that may feel left out will be few. If such hypothetical groups exist or may arise in the future, our position is that the Law Society should

carefully review the justification for such further requests. If the net benefit to the community is an increase in access to justice, a fee or insurance reduction may be warranted;

- The motivation of CDAS seeking a fee and insurance reduction on behalf of some, and it is expected the younger lawyers we represent, is to ensure the continued entry of young lawyers into criminal defence work. This will in turn improve the health of the criminal law bar and ensure access to justice for the marginalized groups for whom our lawyers act. The unfortunate corollary to not easing the burden of young criminal defence lawyers is that these people leave the service of their marginalized clients. This is a loss to the continued existence of a healthy and vibrant criminal law bar and a loss to our clients.

- Financial Implications:

  Clearly a concern of the 2012 Working Group who considered this issue was the expected fee increase that would flow to the members who do not seek or would not qualify for the fee reduction. The potential benefits socially in terms of ensuring access to justice warrant and justify the potential inequity of having two classes of fee-paying members. Ensuring access to justice is a fundamental part of the Law Society public interest mandate.[5] This fee reduction would further implement policies that will fulfill this mandate.

- Operational Impact:

  The implementation of the fee and insurance reduction proposed above would require a declaration and a waiver (of confidentiality with Legal Services) from members seeking the reduction. Such declarations are common for other services and practices now utilized by the Law Society, ie. the election of benchers. CDAS expects that the operational impact would be minimal. The benefits flowing from any increase costs are readily offset by ensuring access to justice to the poor, addicted, mentally ill and homeless members of our community.

[5] Section 3 of the Legal Profession Act, S.B.C. 1998 c. 9; The Legal Aid Task Force Report in Appendix 1 recognized that access to justice is a fundamental human right.

Primary Questions to Be addressed:

1 Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

- Yes: to the extent that public interest practitioners are young lawyers struggling to provide services to marginalized groups. CDAS submits that this group should not include employees of not for profit corporations;

2. If you would support the development and implementation of a fee reduction for public interest practitioners:

(a) How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

- Identification of those eligible for fee reduction should include:
  - Those earning less than $50,000.00, net, per anum;
  - Those whose practice is made up of at least 50% legal aid.
  - Those who are less than a 5 year call, in order to ensure continued access of young lawyers into the criminal law bar.

(b) What consequences or impacts of the fee reduction would you foresee as providing its justification?

- As noted above:
  - Ensuring the continuation and health of the criminal law bar;
  - Extending access to justice to the marginalized groups our lawyers represent and in particular indigenous accused; and
  - Maintaining the efficient use of court services by reducing the number of self-represented individuals involved in the criminal justice system;[6]

[6] The Legal Aid Task Force Report at paragraph 15 identified the phenomenon of the self represented litigant strains the litigant and the justice system. The increase in self represented litigants leads to results that are less likely to be consistent with the values of a democratic society subject to the rule of law. In addition to leading to inequality of justice, this leads to disillusionment in our system of justice and laws. When these problems become endemic, public faith in our society and the rule of law is eroded.

- Avoiding wrongful convictions for those charged with offences who cannot afford or cannot find counsel with the necessary experience.[7]

(c) How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

- The fees for participating members should be reduced by 50%;
- The reduction should apply to both practice and insurance fees.

CDAS thanks the Committee for providing an opportunity to comment on a matter that is critical to the lawyers whom we represent.

[7] The Legal Aid Task Force at paragraph 36 of their Report identified the increase cost to the justice system by the rising number of self-represented before the courts, accused persons making inappropriate guilty pleas, delay – to name but a few factors – is apparent, if not yet measured in dollars. The greater cost to the public goodf is manifested in an erosion in public confidence in our system of justice.

From: Naomi Minwalla
To: Annual Fee Review
Subject: Input - Public Interest Practitioner Fee Reduction
Date: September 13, 2018 10:53:41 PM

Dear LSBC Annual Fee Review Working Group,

Thank you for the opportunity to provide input on whether the Law Society should reduce practice and insurance fees for public interest practitioners.

As you will read in my below comments, I think the first step toward a fairer fee scheme would be to drop the idea of a public interest category. Alternative fee reduction models could apply to *all* lawyers, irrespective of their practice area and their institutional status. I offer a couple of alternative models at the end of this message, one based on objective financial criteria and the other based on more comprehensive discretionary criteria.

By way of background, I'm a sole proprietor who's been representing indigent and marginalized people in my small private practice for almost two decades. I've experienced financial hardships caused by practice and insurance fees when starting and then sustaining a practice in which most clients are poor and *pro bono* work is a core component. Despite my public interest focus and despite my general support for practice/insurance fee reductions, I'm opposed to a pre-defined class of eligible public interest practitioners.

I share many of the concerns raised in the September 2013 Reduced Fee Feasibility Working Group Memo and 2018 Consultation Report. My primary concern is that the fee reduction discussions to-date seem to have been locked within a 'public interest practitioner' framework that is futile to define even for those of us who would likely fall within it. The public interest practitioner focus also deflects from consideration of other fee models (see examples below) that could lead to a fairer fee arrangement for *all* lawyers.

I've not been part of your discussions, but I gather from the reports circulated to us that the fee reduction initiative has been driven by non-profit sector (NGO) lawyers. While I don't doubt the good work of NGO lawyers and their important contributions to the public interest, including access to justice and access to legal services, if there is an assumption that advancing those causes is confined to that sector then this is a wrong assumption. Private sector lawyers, including sole proprietors such as myself, may have similar motivations but choose to advance them privately *not* because of profit-seeking advantages but rather because we prefer to maintain our independence from institutional politics, mandates, and bureaucracies (whether with NGOs, governments or law firms). I think it's unwise, misleading and unhealthy for the profession to pit one sector of lawyers against another under the rubric of 'public interest practitioner'.

Even if private practitioners were included in the public interest category, how would the Law Society validate such claims? You can't tie the claims to legal aid referrals, status with non-profit institutions, or the amount of *pro bono* hours. Private sector lawyers contribute to public interest and access to justice issues in many different ways. For instance, charging at extremely reduced rates that result in a significant financial sacrifice for the lawyer but a high quality of service for clients.

A public interest category should not replace our provincial government's responsibility to earmark our 7% PST on legal fees to legal aid and other access to justice schemes, as was initially intended. Could the Law Society not push the PST issue further with our current provincial government?

Despite my concerns about the public interest category, I support the general need for a fairer fee scheme. I would encourage the Law Society to consider other jurisdictions where, irrespective of the type of law and the institutional nature of a lawyer's practice, fee amounts are tapered objectively according to income category. In England and Wales, the annual practice fee amount varies according to the following 2018/19 income categories for barristers:

Band	**Income Band**	**2018 Fees**
1	£0 - £30,000	**£123**
2	£30,001 - £60,000	**£246**
3	£60,001- £90,000	**£494**
4	£90,001 - £150,000	**£899**
5	£150,001 - £240,000	**£1,365**
6	£240,001 and above	**£1,850**

This would seem to be a fairer and more objective way to charge fees. Clearly, our current annual fees of about $4,000 are likely to be more onerous to a lawyer who earns less than $30,000 from the practice of law than to one earning $250,000. Administration of the scheme in England and Wales also seems efficient. Barristers self-declare their income category when they make their online fee payment. Although actual income is not declared, records may be selected for spot checking. Moreover, barristers who are renewing their practising certificate for the first time or who have zero earnings in a calendar year or who are returning from parental leave automatically fall into Band 1 (the lowest fee payment) for that year. When paying their fees, barristers have the option of making a *voluntary* contribution to a *pro bono* unit and Bar Council. The full England and Wales 2018/19 policy for barristers' compulsory practising fees is located at https://www.barstandardsboard.org.uk/media/1921614/60-authorisation_to_practise_2018-19-policy_and_guidance.pdf There is a similar, but more complex and expensive, tapered income category scheme for solicitors' practising fees in England and Wales.

Alternatively, the Law Society may wish to consider a discretionary compassionate fee reduction model. I haven't had sufficient time to think through this carefully, but I can offer some preliminary thoughts, including some of the disadvantages. The principles that govern

assessments could include: (1) that a reduction would be granted on an exceptional basis, (2) applications would be open to *all lawyers irrespective of the type of law practised and institutional status*, and (3) there would be an assessment of the *particular circumstances of each applicant.* Specific assessment factors could include, for instance: (1) earning capacity and direct significant financial hardship caused by the fees; (2) impact of fees on the ability to maintain a practice and support a livelihood; (3) the lawyer's contributions to the profession and commitment to access to justice; (4) insurance liability record to-date; (5) disabilities, medical issues, mental health issues, and unforeseen crises; (6) parental leave; (7) status as an indigenous person or other disadvantaged minority; and (8) any other extenuating circumstances and hardships that a lawyer may be experiencing. A submission based solely on the fact that a lawyer works for a public interest NGO would not, in my view, be sufficient. Nor should lawyers be allowed to apply if their employers cover their fees, directly or indirectly. There are some obvious disadvantages. Firstly, the tIme and resources it could take for the Law Society to consider applications. Moreover, a lawyer's anxiety of not being able to predict whether a fee reduction application would be approved. A discretionary model could also lead to accountability issues; for instance, why one lawyer got a reduction but another lawyer in apparently similar circumstances did not. I don't know the circumstances of all other B.C. lawyers so the volume of applications that the Law Society would potentially receive would be uncertain, as would the impact on the Law Society's financial position.

In conclusion, based on the information I have so far, I do not support the public interest practitioner idea. I would, however, ask that the idea of a fairer fee scheme be kept alive and that consultations with us continue, albeit with a shifted focus on alternative models that could result in fairer fees for all lawyers.

Thank you for your generous efforts with this important matter. I wish you well in your deliberations.

Kind regards,

Naomi

Naomi Minwalla
Barrister & Solicitor

From:	Martin Peters
To:	Annual Fee Review; Lance Cooke
Subject:	Criminal Defence Advocacy Society (CDAS) submissions on annual fees
Date:	September 14, 2018 8:09:47 AM
Attachments:	CDAS submission.filed3.docx

Committee Members:
Please find attached the submissions of CDAS relevant to the questions raised in your Consultation Paper. CDAS submits that there should be an annual fee and insurance fee reduction of 50% for lawyers who are recently called to the bar, earn less than $50,000 per year and whose practices include at least 50% of work paid for by legal aid.

Should you have any questions or require any further information or submissions from us, please let us know.
Martin Peters
Director, CDAS

MEMORANDUM

TO: Law Society of British Columbia, Annual Fee Review Committee Working Group

From: Criminal Defence Advocacy Society

Date: September 14, 2018

Subject: Reduction in Fees and Insurance Costs for Young Lawyers whose practices Involve Primarily Legal Aid Cases

---

The Criminal Defence Advocacy Society ("CDAS") is engaged in advocacy, law reform and education in matters relating to criminal defence work in the justice system. The Society was founded by members of the British Columbia criminal defence bar who identified a gap in the area of law reform for criminal justice issues specifically affecting criminal defence lawyers and their clients.

CDAS represents over 300 criminal defence lawyers practicing in most areas of the province. We comprise approximately 65% of all criminal law lawyers practicing in British Columbia.

Our Proposal:

CDAS submits that there should be a 50% reduction in practice and insurance fees for those lawyers:

- Who earn less than $50,000.00, net, per *anum*;
- Whose practice is comprised of at least 50% of cases paid for by the Legal Services Society, ("Legal Aid"); and
- Who have been called to the bar within the past 5 years.

In September 2016 CDAS submitted a Report to the LSBC Committee on Improving Criminal Law Articles in British Columbia. That report touched upon the difficulty that annual Law Society fees pose for new and young criminal lawyers:

> Some of those surveyed described a virtually untenable position upon being called to the bar. They are typically several thousands of dollars in debt from university, they have been paid a meager wage during articles that may or may not have resulted in a net debt after taking into account personal expenses not covered during the articling year (e.g. gas, cellular phone, etc.), and upon being called, are faced with a significant Law Society bill associated with their call, insurance and enrollment. The situation is well-illustrated by the response we received from one young lawyer who was recently called to the bar:

There must be a reduction of the fees we are expected to pay upon being called or as new lawyers in criminal defence. I know of many students who simply delayed or avoided being called because they could not afford it. For many of us, we are not paid for our gas or vehicle expenses. If the firm a student articles with is busy enough, you end up making barely enough to cover your gas, insurance, and food. I was lucky to have lived at home during articles. I cannot imagine how someone who had to pay rent in Vancouver would have fared.

I was called in May. Yet despite this and despite the lack of jobs, I had to pay $2760.15 on April 30, as a call fee and insurance for May - December. I still had not secured a position at that point and was staying on at my firm and being paid just over $1000 bi-weekly for two months. I would then be unemployed for the first time since I was 16. I remember writing to the Law Society to ask if there were any part of the fee that I could opt out of as a low-income individual and a criminal articling student who would be shortly jobless. The email I received back stated simply "there is no reduced rate and insurance fees are the same for all lawyers". I was told I could switch to non-practicing and pay the $300 installment fee. Of course I couldn't afford to do that because I was trying to remain employable in a field where salaried or associate positions are virtually nonexistent.

I then received another bill from the Law Society for $2955.75 on November 1, which was due November 30. I am fairly certain that I paid this bill late as I simply didn't have the money.

Unfortunately this situation is not all that unusual. Many new criminal lawyers in Vancouver find themselves struggling to make ends meet if they want to stay in criminal practice. These observations do not fail to recognize that many lawyers struggle because there is not enough work to go around for the number of lawyers who want to practice in this area. <u>However, in our view, there should be some recognition that it is especially difficult for newer lawyers, and assistance ought to be given to at least offer them a fighting chance to start a practice.</u> (Emphasis added)

It must be remembered that a good portion of legal aid work is done by young defence counsel. Senior counsel often reject these retainers for a variety of reasons. As a result, the mentally ill, drug addicted and other marginalized souls in our system are routinely represented by young lawyers. It is thankless work, as a Judge of the Ontario Superior Court recently reminded us:

> [51] It is the role of criminal defence counsel, frequently a most difficult role, to fully and fervently represent those persons accused of criminal offences, recognizing that their efforts will often place them at odds with public sentiments, including a natural desire for retribution. As the intervener, The Criminal Lawyers' Association, said in its factum:

> Defence counsel run the risk of unpopularity or misunderstanding about their role more than any other lawyer in the Canadian justice system. One reason is the defence lawyer represents a person accused of distasteful acts. Those charged with crimes are frequently unpopular or outside the "mainstream": the poor, addicted, mentally ill, racial and ethnic minorities.
>
> - Groia v. Law Society of Upper Canada, 2015 ONSC 686 at para. 51.

Nonetheless, every day in our courts, young lawyers are called upon to provide this important public service and are not properly compensated or supported in their work. They are regularly expected to work for free or nearly for free when dealing with subject matters like an individual's liberty, his or right to privacy, and other vital interests that protect everyone. As Leonard T. Doust, Q.C. recently explained, legal aid and legal aid lawyers are invaluable to the proper functioning of our system:

> We are perhaps most familiar with legal aid in criminal matters. Persons who are accused of serious crimes and who cannot otherwise afford to pay for a lawyer must be provided with publicly-funded counsel in order to ensure their right to a fair trial and to safeguard the presumption of innocence. The underlying rationale for this protection of the presumption of innocence is two-fold. First, from the perspective of the individual, legal aid ensures that individuals who face the potential of incarceration have the means to adequately defend themselves. Second, from the perspective of the system, legal aid ensures that the criminal justice system can effectively avoid wrongful convictions, function fairly, and ensure that each and everyone one of us can be confident that we live in a society where we will never be punished for something that we did not do, nor will any of our family, friends, associates, or fellow members of our society.
>
> The rights of all of us are on trial in every criminal case. Without proper representation, pre-trial processes such as disclosure, admissions of fact, and plea bargaining are ineffective, and unrepresented accused are left floundering with complex processes, procedural, evidentiary, and legal issues…
>
> - Leonard T. Doust, Q.C., Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia; March 2011 at p. 14.

Young defence lawyers do this work because they are passionate about these issues. However, as we have seen, the stark financial reality of practising in this manner eventually catches up with young lawyers and they are forced to pursue other alternatives. This is a failing of our system that we must take steps to rectify immediately.[1]

[1] Criminal Defence Advocacy Society Report of the Committee on Improving Criminal Law Articles in British Columbia, September 2, 2016 ("CDAS Articling Report"), pages 7-10.

The September 2016 CDAS Articling Report recommended *inter alia* that in order to ensure an increase in criminal law articles, we:

> Encourage the Law Society of British Columbia to investigate reducing and/or waiving PLTC tuition, bar admission fees and insurance fees for criminal law students and new calls with a predominantly legal aid based practice (initiatives which have had some success in Ontario).[2]

The circumstances facing young criminal lawyers have not improved since 2016. In the most recent budget of the Provincial Government, some increase in funding was provided to Legal Aid. However, none of these increases went to increase the legal aid tariff. This tariff has not increased since 1992.

Young criminal lawyers work with the mentally ill, drug addicted and marginalized souls in our community that so readily find their way into the criminal justice system. It is thankless work that is barely rewarded by legal services. Any benefit that the Law Society is able to confer on young criminal lawyers will produce a net benefit in the level of services available to the most challenged members in our communities. The public interest will be served by a fee structure that permits young criminal lawyers to continue in this important work.

<u>Law Society Reduced Fee Feasibility Working Group, 2013 Report:</u>

On September 27, 2013 the Benchers resolved to accept the report of the Reduced Fee Feasibility Working Group, ("Working Group"). The Working Group had produced a report to the Executive Committee on September 4, 2013, (the "Working Group Report"). The Working Group Report concluded that:

> "The Working Group's view is that proposed fee reduction would be sufficiently expensive and operationally demanding to administer as to outweigh its potential benefits. Those potential benefits ultimately are insufficient to justify the implementation of a fee reduction, particularly given that such a reduction would not appear to be an effective means of recognizing the contributions of lawyers working in the not for profit sector. The fee reduction would also appear to raise an issue of unfairness in the way that the Law Society treats different groups of its members. In light of all of the issues raised and concerns discussed in this memorandum, the Working Group has concluded that proposed fee reduction is not feasible."[3]

CDAS submits that these conclusions and the entire memorandum submitted by the Working Group, has little or no application or consideration to the position of the majority of young criminal lawyers in the Province today. In particular:

[2] CDAS Articling Report page 13.

[3] Reduced Fee Feasibility Working Group Report, September 4, 2013, ("Working Group Report"), page13.

- The research of the Working Group focused on lawyers working in the "not for profit" sector. These are lawyers working for corporations who engage in social justice issues. Their fees are paid for by the corporation. Any reduction in fees owing by such young lawyers is a net benefit to the not for profit corporation that does not flow to the lawyers themselves or enhance these lawyer's ability to make legal services available to the marginalized members of our community.[4]

- The Report of the Working Group was concerned about the unfairness to be visited upon:

  > "lawyers who pay their own fees, whose incomes are below the level of many that would be eligible for the proposed reduction and whose work amounts to a significant benefit for their clients and, arguably for the public interest. They may or may not do legal aid work, practice poverty law, or provide services in geographical areas where there would likely be no substitute available."[5]

  These lawyers so described are the young criminal lawyers in this Province. The argument of unfairness, so expressed, does not and cannot apply the members of CDAS who do not generally work for anyone let alone a corporation that pays their fees.

  The major concern of the Report was that a fee reduction system would be unfeasible financially, operationally and from a justification stand point.[6] In this respect CDAS submits that the fee and insurance reduction proposed herein could be simply administered by a declaration that:

  - 50% of all work was funded by the Legal Services Society, ("LSS");
  - The lawyer in the prior year had earned on a net basis less that $50,000.00; and
  - The year of call.

  Should there be a need to review such a declaration, a waiver of confidentiality with Legal Aid as well as the production of the members tax return for the prior year would be all that was required.

<u>Legal Aid Task Force</u>:

In March 2017 the benchers approved a report of the Legal Aid Task Force, ("Task Force"): "A Vision for Publicly Funded Legal Aid In British Columbia" ("Task Force Report").

[4] Working Group Report pages 7-8.
[5] Working Group Report, page 12.
[6] Working Group Report pages 8-12.

The Task Force Report identified a number of important considerations pertinent to legal aid and those whose practices involve a significant portion of these files:

- Most lawyers who take on legal aid work do so at a financial loss.[7]
- The general decline in lawyers practising criminal law is a concern'[8]
- The survey conducted by the Task Force found that the primary motivation of those responding for doing legal aid work is a commitment to social justice, although the responses also indicate that the professional responsibility to do the work and the interesting nature of the work are also motivating factors.[9]

As part of its mandate in producing this report the Task Force reviewed ways the Law Society could promote and improve lawyer involvement in delivering legal services through legal aid plans. One of the considerations in this regard was reducing insurance costs and practice fees for young lawyers and for criminal and immigration lawyers. The Task Force consulted with staff at the Lawyers Insurance Fund. The preliminary conclusion of the Task Force was that the concept of a reduction in insurance fees was not worth pursuing.[10] It is noteworthy that the Task Force did not address in its report the issue of a reduction in practice fees.

The conclusion of the Task Force on insurance fees was based upon:

- Lawyer insurance is not risk-rated by lawyer category. Graded insurance schemes have been considered by benchers in the past and rejected.
- There could be harmful or unintended consequences to lawyers with economically marginal practices;
- In firms, the benefit would accrue to the firm and not to the lawyer performing the legal aid work;
- Insurance premiums are low in British Columbia and stable relative to other operating expenses faced by lawyers;
- The Task Force believes the benchers may wish to explore payment schemes, quarterly or monthly payments.[11]

For the reasons set out in this Memorandum, CDAS submits that these are not appropriate reasons to not consider insurance fee reduction for young criminal lawyers working primarily on legal aid files. At the very least the benchers should implement the recommendation of the Task Force as to payment schemes.

[7] Task Force Report, paragraph 27 and Appendix 2.
[8] Task Force Report paragraph 48.
[9] Task Force Report, Appendix 2.
[10] Task Force Report, paragraph 48
[11] Task Force Report, pagraraph 48, page 14.

Annual Fee Review: Consultation Paper

The Consultation Paper provided by the Annual Fee Review Committee Working Group ("Consultation Paper") lists three factors that were addressed by the 2013 Working Group that remain relevant: justification, financial considerations and operational impact.[12] CDAS's position on these issues is partially addressed above. However, in order to ensure that this Working Group has the full benefit of our submissions we set out our further response below to the three issues as well as the primary questions posed by this Working Group's mandate:

- Justification:

  The Consultation Paper raises the question of the beneficial impact of a fee reduction, whether it can be justified, whether a similar request may be engendered by subsets of the membership and the motivation for the suggested fee reduction:[13]

  1. The benefits of a fee reduction for criminal lawyers working predominantly on files paid for by legal aid is justified by the net extension of legal services to poor, marginalized groups within our communities. As noted above, these include the indigenous, addicted, mentally ill and homeless women and men in our communities.

  2. There may be a subset of other members serving other groups in our communities. However, to the extent that poverty, mental illness, addiction and homelessness will be addressed by the fee and insurance decrease we are proposing, CDAS submits that other subsets of the membership that may feel left out will be few. If such hypothetical groups exist or may arise in the future, our position is that the Law Society should carefully review the justification for such further requests. If the net benefit to the community is an increase in access to justice, a fee or insurance reduction may well be warranted;

  3. The motivation of CDAS seeking a fee and insurance reduction on behalf of younger lawyers is to ensure the continued entry of young lawyers into criminal defence work. This will in turn improve the health of the criminal law bar and ensure access to justice for the marginalized groups for whom our lawyers act. The unfortunate corollary to not easing the burden of young criminal defence lawyers is that these people leave the service of their marginalized clients. This is a loss to the continued existence of a healthy and vibrant criminal law bar, the clients and the rule of law.

[12] Consultation Paper pages 3-4.
[13] Consultation Paper page 3.

- Financial Implications:

  Clearly a concern of the 2012 Working Group who considered this issue was the expected fee increase that would flow to the members who did not qualify for the fee reduction.[14] The potential benefits socially in terms of ensuring access to justice warrant and justify the potential inequity of having two classes of fee paying members. Ensuring access to justice is a fundamental part of the Law Society public interest mandate.[15] This fee reduction would further implement policies that will fulfill this mandate.

- Operational Impact:

  The implementation of the fee and insurance reduction proposed above would require a declaration and a waiver (of confidentiality with Legal Services) from members seeking the reduction. Such declarations are common for other services and practices now utilized by the Law Society, i.e. the election of benchers. CDAS expects that the operational impact would be minimal. The benefits flowing from any increase costs are readily offset by the enhancement to access to justice.

Primary Questions to be addressed:

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?[16]

   - Yes: to the extent that public interest practitioners are young lawyers struggling to provide services to marginalized groups. CDAS submits that this group should not include employees of not for profit corporations.

2. If you would support the development and implementation of a fee reduction for public interest practitioners:

   (a) How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?[17]

   - Identification of those eligible for fee reduction should include:

[14] Consultation Paper, page 4.
[15] Section 3 of the Legal Profession Act, S.B.C. 1998 c. 9; The Legal Aid Task Force Report in Appendix 1 recognized that access to justice is a fundamental human right.
[16] Consultation Paper page 2.
[17] Consultation Paper page 2

- Those earning less than $50,000.00, net, per *anum*;
- Those whose practice is made up of at least 50% legal aid.
- These who have been called to the bar less than 5 years.

(b) What consequences or impacts of the fee reduction would you foresee as providing its justification?[18]

- As noted above:
  - Ensuring the continuation and health of the criminal law bar;
  - Extending access to justice to the marginalized groups our lawyers represent and in particular indigenous accused; and
  - Maintaining the efficient use of court services by reducing the number of self represented individuals involved in the criminal justice system;[19]
  - Avoiding wrongful convictions for those charged with offences who cannot afford or cannot find counsel with the necessary experience.[20]

(c) How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?[21]

- The fees for participating members should be reduced by 50%; and
- The reduction should apply to both practice and insurance fees.

CDAS wishes to thank the Committee for providing an opportunity to comment on a matter that is critical to the criminal lawyers of this Province.

[18] Consultation Paper page 2.
[19] The Legal Aid Task Force Report at paragraph 15 identified the phenomenon of the self represented litigant strains the litigant and the justice system. The increase in self represented litigants leads to results that are less likely to be consistent with the values of a democratic society subject to the rule of law. In addition to leading to inequality of justice, this leads to disillusionment in our system of justice and laws. When these problems become endemic, public faith in our society and the rule of law is eroded.
[20] The Legal Aid Task Force at paragraph 36 of their Report identified the increase cost to the justice system by the rising number of self-represented before the courts, accused persons making inappropriate guilty pleas, delay – to name but a few factors – is apparent, if not yet measured in dollars. The greater cost to the public good is manifested in an erosion in public confidence in our system of justice.
[21] Consultation Paper page 2.

From:	Neil Chantler
To:	Annual Fee Review
Subject:	Submissions on proposed fee reduction for public interest practitioners
Date:	September 14, 2018 11:24:41 AM

To whom it may concern on the Annual Fee Review Working Group,

Thank you for considering my submissions on the proposed fee reduction for public interest practitioners. I am in favour of the proposal. In my respectful view, such a program would be consistent with the goal of improving access to justice as it would encourage lawyers to work in the public interest area. I recognize the negative financial and operational impacts of such a program but suggest those would be outweighed by the beneficial impact.

I am a sole practitioner with offices in downtown Vancouver. I would describe a significant portion of my practice as "public interest litigation." In 2017 I was the recipient of Pivot Legal Society's annual Access to Justice Award. A significant percentage of my clients are marginalized or disadvantaged persons with personal characteristics that create challenges for them when dealing with the legal system. Often the issues that cause them to be in contact with the legal system are much bigger than their individual case. These are the types of cases I consider to be in the "public interest." I enjoy this area of work, but often lament it as a terrible business model.

That said, I am not interested in a reduction of my own Law Society fees. After 11 years I have managed to develop a practice that balances my interests with the need to run a business. My motivation in making these submissions is different.

I never felt encouraged by my professors, PLTC instructors, or the Law Society to engage in this area of work. A fee reduction for public interest practitioners would be much more than an economic incentive to practice public interest law. In my view, it would be an express recognition by the Law Society of the importance of public interest work within the profession. It would demonstrate the Law Society wished to encourage lawyers to engage in public interest work. This would benefit lawyers wishing to engage in this work, the public, and the Law Society. The economic incentive, and express recognition from the Law Society would encourage new lawyers to engage in this work. The public would benefit from the increased access to justice. And the Law Society would be seen to be recognizing the problems of access to justice and its role ensuring important matters of public interest are taken on by its members.

Turning to the questions from the consultation paper:

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

Yes, for the reasons I have described above.

2. If you would support the development and implementation of a fee reduction for public interest practitioners:

a. How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

My suggestion is to include questions in the annual practice review pertaining to this issue, and perhaps require a written submission on why the member thought she or he was eligible for the fee reduction based on a set of criteria. The criteria could define public interest work as well as some measure of time or a percentage of the member's practice devoted to public interest work. Certainly, the program would depend on a reasonable measure of transparency by the applicant.

b. What consequences or impacts of the fee reduction would you foresee as providing its justification?

As above.

c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

It seems to me that the same justification for reducing fees for part-time lawyers applies to those engaging in public interest work, and the same scale of discount (up to 50%?) should apply.

Thank you for considering my submissions.

Regards,

--
Neil M.G. Chantler*

From: Kasari Govender
To: Annual Fee Review
Subject: Submissions re fee reduction
Date: September 14, 2018 4:40:41 PM
Attachments: Submission to the LSBC re public interest fees.pdf

---

Dear Committee,

Please accept this submission in regard to the proposed fee reduction for public interest lawyers. Thank you for considering these submissions.

Regards,
Kasari

Kasari Govender
Executive Director & Lawyer
West Coast Women's Legal Education & Action Fund

West Coast Legal Education and Action Fund
555 – 409 Granville Street, Vancouver, BC, V6C 1T2
t: 604.684.8772 e: info@westcoastleaf.org
westcoastleaf.org

September 14, 2018

Sent via E-mail

Annual Fee Review Working Group
The Law Society of British Columbia
Via annualfeereview@lsbc.org

Dear Working Group Members:

Re: Law Society's Annual Fee Review – fee reduction for public interest practitioners

This is in response to the Law Society's Annual Fee Review Working Group request for comment on the proposal that a reduction in the annual practising fee and/or the insurance fee be made available to public interest practitioners.

1. **Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?**

West Coast LEAF is a mandate driven organization focussed on using the law to create an equal and just society for all women and people who experience gender based discrimination in BC. Our funding is entirely dependent on donors and funders who support our vision, and every dollar is used to support the legal work that is aimed at this vision. The legal work – the litigation, law reform, and public legal education – undertaken by West Coast LEAF is firmly rooted in the public interest.

By way of context, all staff lawyers at West Coast LEAF make under $100,000 a year, with a range from eight to fifteen years of call, all with graduate degrees. This, of course, is well under what a lawyer in private practice in Vancouver makes at this level of seniority and with the quality of legal work expected from this small team. West Coast LEAF pays for the practise fees and insurance for all staff lawyers, which represents a significant toll on the organization in the context of a small budget driven by charitable donations and grants.

In our submission, the Law Society should implement a fee reduction for public interest practitioners. Such a reduction would serve the Law Society's statement that "it is the object and duty of the Law Society of British Columbia to uphold and protect the public interest in the administration of justice."[1]

There are two ways in which a fee reduction would further the mandate of the Law Society:

[1] Introduction to the BC Code, Code of Professional Conduct for British Columbia https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/

- First, a fee reduction would relieve the pressure on organizations that pay the fee out of money that would otherwise go to supporting important public interest work.
- Second, a fee reduction would encourage lawyers to take on public interest work by reducing the financial burden of taking on this kind of work.

2. **If you would support the development and implementation of a fee reduction for public interest practitioners:**
   a. **How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?**
   b. **What consequences or impacts of the fee reduction would you foresee as providing its justification?**
   c. **How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?**

Generally, the characteristics of public interest law mean that its practice can be identified in relatively straightforward fashion:

- the litigation is in the "public interest" in that its impact flows broadly or will have a substantial impact beyond the interests of litigants; and,
- the claim cannot be monetized or, if it can, not to an extent the claim is justified in an economic sense.

Where services in the public interest are offered by a charitable or non-profit organization, these organizations will have traits that likewise identify the practice as in the public interest:

- the selection of cases by the organization is made based on criteria that defines and requires representing the public interest and/or by a board or committee that is representative of the public;
- the primary source of financial support of the organization is through fundraising and granting and the scope of funding assures that the litigation does not act to benefit individuals akin to the private practice of law; and,
- the organization does not permit a donor to obtain a benefit from the litigation.

These could act as criteria towards enabling fee reductions for lawyers employed by public interest law organizations, or by private lawyers to the extent they undertake public interest law. The courts have little difficulty applying criteria to determine public interest fee waivers; the profession can do the same.

In regard to the impact of the fee reduction, from West Coast LEAF's perspective, the effect would be material to public interest lawyers and organizations. Currently, 97% of Canada's charitable giving is targeted to educational institutions, religious institutions and healthcare. Funding an organization that provides free legal services to promote substantive equality is challenging. There would be a direct relationship between a reduction in expenses and provision of legal services in the public interest.

Conversely, given the characteristics of public interest law, its practice in BC is very, and regrettably, limited; it's a reasonable inference that the impact of a fee waiver for public interest practice would not be material.

In regard to scope of application, the fee reduction should apply to both the practice and the insurance fees. Again, because of the unique characteristics of public interest law, the Society's oversight of public interest law does not demand the same resources as private practitioners. This is particular so because public interest cases seldom deal with monetary outcomes. Where a hefty proportion of the Society's resources

are allocated to regulating lawyers' use and misuse of trust accounts, West Coast LEAF has never had need to maintain trust accounts. An insurance fee reduction would address the current situation of public interest practitioners being disproportionately burdened.

If the Law Society concludes that "public interest practice" is too difficult to define for the purposes of this fee reduction, we would support a fee reduction based on lawyer income. This would easily quantifiable and provable based on income tax returns, and would also address the concern about future groups of lawyers claiming similar discounts.

Finally, I would strongly urge the Committee to consult with the Law Foundation, which is the primary funder of public interest law in the province.

Thank you for considering this issue, which has important implications for the practice of public interest law in the province. I would be pleased to discuss the issue further, should such an opportunity arise.

Sincerely,

Kasari Govender
Executive Director

From:	Jessica Clogg
To:	Annual Fee Review
Cc:	Erica Stahl
Subject:	Submission to the Annual Fee Review
Date:	September 14, 2018 7:19:02 PM
Attachments:	2018 09 14 Submissions to LSBC annual fee review.pdf

Please find attached our submission to the Law Society's Annual Fee Review. Thank you for your consideration.
Sincerely,
Jessica

Jessica Clogg
Executive Director & Senior Counsel | West Coast Environmental Law

WEST COAST Environmental Law

200-2006 West 10th Avenue, Vancouver, BC V6J 2B3 | Coast Salish Territories
xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish) & sə̓lilwətaʔɬ (Tsleil-Waututh)
T 604.684.7378 | 1.800.330.WCEL | F 604.684.1312 | admin@wcel.org
@WCELaw | wcel.org

September 14, 2018

Sent via email

Annual Fee Review Working Group
The Law Society of British Columbia
Via annualfeereview@lsbc.org

Dear Working Group Members:
RE: Law Society's Annual Fee Review – fee reduction for public interest practitioners

We in response to the Annual Fee Review Working Group's request for comment on the proposal that a reduction in the annual practising fee and/or insurance fee be made available to public interest practitioners.

West Coast Environmental Law (West Coast) is one of Canada's oldest groups of public interest law practitioners in Canada and as such has direct and practical experience with the questions posed by the Working Group on this matter. West Environmental Law is dedicated to the protection of the environment through law, and consists of three provincially incorporated societies. We have been serving public interest environmental law needs for over 45 years.

Submissions on Working Group Questions

1. **Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?**

West Coast strongly supports the development and implementation of a fee reduction for public interest practitioners.

The Law Society should implement a fee reduction for public interest practitioners:

a) in order to recognize and encourage public interest legal practice; and,
b) as a measure to recognize the financial challenges of public interest law organizations and their clients

a) Recognizing the distinct value of public interest practice

Public interest law practice has distinct characteristics that merit the Law Society's particular support, particularly as it relates to access to justice and the role of law in addressing systemic societal issues. In this manner, a fee reduction would advance "the object and duty of the Law Society of British Columbia to uphold and protect the public interest in the administration of justice."[1]

Staff lawyers working for non-profit organizations that provide legal aid services, public legal education or law reform advocacy to uphold human rights, protect the environment or other non-pecuniary interests provide a

[1] Introduction to the BC Code, Code of Professional Conduct for British Columbia https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/

clear public benefit that is deserving of recognition by the profession. These legal services and activities contribute to the role of law in our democratic society –and access to justice –by ensuring that important values and perspectives are represented in public policy debate and decision-making that would not otherwise be.

In addition to our law reform work, West Coast sees the value of public interest legal services first hand through our two legal aid programs – the Summary Advice program and the Environmental Dispute Resolution Fund ("EDRF"). West Coast is one of the only providers of summary advice on matters of environmental law in BC, and we field hundreds of calls and emails each year from individuals, community groups, and First Nations facing threats to their health, drinking water, or other environmental or community values. For example, we fielded many calls for information and advice following the Mount Polley incident, the largest mining disaster in Canada's history.

The EDRF, meanwhile, is a Law Foundation funded program which grants $120,000 per year to British Columbians seeking to put public interest environmental cases before the courts or to resolve environmental disputes through alternative means. The monies granted can be put towards legal fees or expert fees. The EDRF caps the amount it pays lawyers at legal aid rates, with the option for a modest top up provided by the client.

Our Summary Advice clients and EDRF grant recipients face opponents who are almost always able to out-spend and "out-lawyer" them. Legal aid is a vital service in this context, making the playing field a little more level for environmental advocates in a justice system where, for better or worse, money counts.

b) Encouraging public interest practice

Unlike private practice, increase in workload does not augment the finances of non-profit law organizations. Public interest law organizations such as ours are rely on scarce grant funding or individual donations to maintain operations, the availability of which is not correlated with need or hours worked. Further, the requirement to fundraise in order to provide legal aid services or engage in public interest law practice takes away from time and resources that could otherwise be spent on legal work.

This directly affects our ability to achieve our public interest mandate. In this fiscal year, Law Society practice fees and insurance will add 6% on top of our salary costs for employing staff lawyers, an amount that if eliminated would allow us to add an additional entry level lawyer at .8 time to our team. In this manner, reduction or elimination of fees could have the direct potential to create new opportunities for public interest practice.

Alternatively, this savings could also have a modest impact on public interest law salaries. Simply put, public interest lawyers earn far less than their private bar counterparts. Many lawyers cannot afford to practice law in the public interest, and with the rising costs of law school tuition and associated debt this problem can only worsen. Easing the financial burden on public interest lawyers via a fee reduction would help lawyers who want to practice law in the public interest to do so.

2. **If you would support the development and implementation of a fee reduction for public interest practitioners:**
    a. **How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be appropriate?**

At a minimum the fee reduction should be made available to lawyers who practice law at not-for-profit organizations providing legal aid services, public legal education or undertaking public policy or law reform work to address systemic societal issues such as racism, inequality, environmental protection, human rights etc. The existence of societal debate about the appropriate manner in which to address such issues should not be a barrier to recognizing this work as being in the public interest. Indeed, the public interest bar has a critical role to play in ensuring that the legislature, the executive, and the judiciary have the opportunity to consider a range of perspectives on issues of significant public interest, and particularly in ensuring that voices and values that would not otherwise be heard (for financial, practical or other reasons such as systemic marginalization), are heard.

The fact that some clients may make a financial contribution to the costs incurred by a non-for-profit law organizations to provide services should **not** be a barrier to a staff lawyer receiving the fee reduction given the overall not-for-profit nature of the organization that employs them.

Additionally, in the context of public interest litigation we support the criteria articulated by our colleagues at Ecojustice. We endorse their broad proposal for identifying "public interest" litigation, i.e., that the litigation is in the "public interest" in that its impact flow broadly or will have a substantial impact beyond the interests of the litigants, and involves claims that cannot be monetized, of if they can, not to an extent that the claim is justified in an economic sense. Staff lawyers at not-for-profit organizations engaged in public interest litigation should be eligible for a fee reduction.

Finally, should it be practicable, we would also recommend that the Law Society consider implementing a fee reduction for private lawyers who take on public interest cases.[2] We know from our experience administering the EDRF that it is very difficult to find lawyers who are able to work on environmental cases for the legal aid rate. There are around 100 lawyers on our EDRF referral list, but in practice only a handful of these lawyers regularly accept our referrals. Our regular EDRF lawyers are generally near the beginning of their careers or starting to wind down their practices, while in the middle there are a few sole practitioners who keep their overhead costs low. The inference we draw from this observation is that, for the majority of lawyers who are interested in such work, litigating public interest cases is not financially sustainable or may not be compatible with cost structures of their private firms. A fee reduction could create an incentive for the private bar to take on more public interest work, and make a modest contribution to the financial sustainability of doing so.

However, any complexities in extending a fee reduction to lawyers in private practice who do public interest work should not delay or discourage timely introduction of fee reductions for public interest lawyers working in the not-for-profit sector.

---

[2] For private practitioners the fee reduction could possibly be applied as a refund at the end of the year (or a reduced rate in the coming year) reflecting the percentage of a lawyer's time that was devoted to public interest cases during the reporting period. Alternatively, a fixed reduction might be available to lawyers who spent over a certain amount or percentage of time on public interest cases during a reporting period. One way of simplifying verification of the public interest nature of the legal work would be if were associated with a case supported by a non-profit public interest law organization like the EDRF, West Coast LEAF or BC Civil Liberties Association.

b. What consequences or impacts of the fee reduction would you foresee as providing its justification?

A fee reduction could have a direct impact on increasing the number of public interest law practitioners and creating the conditions for new lawyers to choose a public interest law career. Please see examples noted under the heading "*Encouraging public interest practice"* above.

In turn, a robust public interest bar enhances access to justice and advances efforts to address systemic societal issues through law.

c. How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

A fee reduction would ideally be applied to both the practice fee and the insurance fee. In order to achieve the benefits noted herein, the fee reduction should be as large as possible taking into account the financial needs of the Law Society. In particular, a significant reduction of insurance fees for public interest practitioners employed by not-for-profit organizations should be considered. Due to the nature of the work of organizations like ours do, with legal work principally carried out by staff lawyers serving as in-house counsel and without administration of trust accounts, there is a straightforward justification for our lawyers paying less than those in private practice.

Thank for the opportunity to contribute to your work. We welcome the Law Society's consideration of this important matter.

Respectfully submitted,
WEST COAST ENVIRONMENTAL LAW

Jessica Clogg, Executive Director and Senior Counsel
Erica Stahl, Staff Counsel

From: Amber Prince
To: Annual Fee Review
Subject: Submission on proposed fee reduction for public interest practitioners
Date: September 15, 2018 6:36:53 PM
Attachments: image003.png
image004.png
image005.png
image006.png
image007.png
image008.png
image002.png
Atira-LSBC-ltr-fees-Sept15-18.pdf
Law Foundation Salary Results.docx.pdf

Dear Annual Fee Working Group,

Please find attached my submission on the proposed fee reduction for public interest lawyers.

Thanks for your consideration.

Sincerely,

Amber Prince, Staff Lawyer
Legal Advocacy Program
Atira Women's Resource Society

Reply to: Amber Prince, Barrister & Solicitor
Direct: 604 331 1407 x 108
Direct Fax: 604 688 1799
Email: amber_prince@atira.bc.ca

atira
WOMEN'S RESOURCE SOCIETY

T 604 331 1407
F 604 688 1799
E office@atira.bc.ca

101 East Cordova St.
Vancouver, BC V6A 1K7

September 15, 2018

Via Email: annualfeereview@lsbc.org

Annual Fee Review Working Group
Law Society of BC
845 Cambie Street,
Vancouver, BC V6B 4Z9

Dear Annual Fee Review Working Group,

Re: Proposed reduction in the annual practice / insurance fees for public interest practitioners

I am a lawyer providing *pro bono* services to low-income women in the downtown eastside in Vancouver. I am employed by a non-profit organization, Atira Women's Resource Society, and funded by the Law Foundation of BC to provide these services.

Below are my responses to your questions regarding the proposed reduction in annual practice / insurance fees [the "fees"] for public interest practitioners.

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

Yes. Public interest practitioners earn substantially less than private sector lawyers.[1] In the public interest sector, the median salary for a junior lawyer (5-year call) is $65,500, and $90,737 for a senior lawyer (10-year-call and over).

Law Foundation of BC (2015), Salary Review Results[2]

The median salary for a junior lawyer (5-year call) in private practice in Vancouver is $117,500, and $187,500 for a senior lawyer (10-year-call and over).[3]

The fees therefore pose a greater financial hardship on public interest lawyers than private lawyers. Non-profit organizations, with modest budgets, also face

[1] I include "in-house lawyers" as private lawyers in this submission.

[2] Most recent data available from the Law Foundation of BC on median salaries across BC. Median salaries may have increased a modest amount since 2015. See attached.

[3] Zsa, (2018), *Salary Guide*, available here: http://www.zsa.ca/salary-guide/.

hardship in paying legal fees for public interest lawyers. Significant legal fees paid by non-profits could otherwise be allocated to salary increases or other benefits or resources for underpaid and under-resourced public interest lawyer staff.

Significant legal fees, combined with low salaries, are a disincentive for lawyers to become or continue as public interest practitioners. As law school tuition and student loan debt has increased significantly, many new law graduates simply cannot afford to become public interest practitioners.[4]

There is a dearth of public interest practitioners at the same time that our province faces serious access to justice problems.[5] Who will ensure that the most vulnerable among us have access to justice if public interest practitioners are not supported?

2. If you would support the development and implementation of a fee reduction for public interest practitioners:

(a) How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

Lawyers could apply to the Law Society for a fee reduction based on meeting the eligibility criteria. I would propose the following eligibility criteria:

1. lawyers who work at non-profit organizations and provide *pro bono* services should pay nominal legal fees;

2. lawyers in private practice who provide *pro bono* services should receive a proportionate reduction in legal fees. For example, if 15% of a lawyer's practice includes pro services, that lawyer should be eligible for a 15% reduction in legal fees; and

3. lawyers who accept a certain number of legal aid files per year should also receive a moderate legal fee reduction.

Lawyers could self-report online as we currently do for Continuing Professional Development credit. As officers of the court lawyers have a heightened responsibility to report their eligibility truthfully and accurately.

Self-reporting would also reduce the administrative burden on the Law Society.

---

[4] H.G. Watson, (August 7, 2018), "The Debt Burden", *Canadian Lawyer*, available here: https://www.canadianlawyermag.com/article/the-debt-burden-16038/

[5] CBC, (February 16, 2017), "B.C. justice system 'heading towards a crisis,' in need of reform: report", available here: https://www.cbc.ca/news/canada/british-columbia/bc-justice-system-reform-1.3986523

(b) What consequences or impacts of the fee reduction would you foresee as providing its justification?

I recognize that wealthier lawyers or the provincial government may need to subsidize reduced fees for public interest practitioners. In my respectful submission, this is reasonable. Lawyers who have become wealthy through the practice of law can afford to give more and should have some obligation to contribute to the social good.

Our profession and government cannot merely pay lip service to the public interest and access to justice. We need to collectively take concrete steps.

The fee reduction appropriately supports and recognizes the important public service of public interest practitioners. If the Law Society takes this concrete step I foresee lawyer's having a greater capacity and incentive to take on more public interest work. Lawyers in BC will therefore be in a better position to meet the grave access to justice need in this province.

With lawyers taking on more *pro bono* or public interest cases, our Courts will see less frustrated unrepresented litigants fumbling through the court process and using the court process ineffectively. We will see better outcomes and greater public confidence in the legal system.

(c) How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

I have discussed how big the fee reduction should be in 2(a).

The fee reduction should be applied to both practice and insurance fees. As a lawyer I don't distinguish between the two fees as they are combined on Law Society invoices. What matters is that the fees pose a hardship to public interest practitioners and discourage public interest practice.

Please feel free to reach me as noted above with any questions about my submission.

Sincerely,

Amber Prince
Legal Advocacy Program

The Law Foundation of BC
2015 Salary Review Results

Position	#	Average of Adjusted Salary	Lowest of Adjusted Salary	Highest of Adjusted Salary	Median of Adjusted Salary
Administration/ Accounting assistant	22	$42,485	$24,582	$54,552	$42,500
Advocate	75	$47,109	$33,637	$65,664	$47,380
Coordinator	22	$61,757	$29,891	$100,000	$54,872
ED Lawyer	17	$102,578	$55,000	$145,846	$108,731
ED Non- Lawyer	10	$75,807	$42,250	$114,286	$77,112
Intake Worker	12	$39,698	$26,888	$49,000	$40,376
Lawyer – 5 Year call	11	$65,536	$53,000	$73,731	$65,500
Lawyer – 10 Year call	8	$77,477	$61,429	$92,743	$77,866
Lawyer – 10 Years and over	14	$94,807	$80,800	$112,079	$90,737
Program Office/ Manager	15	$52,702	$40,000	$69,607	$53,731
Other	27	$58,075	$22,821	$96,204	$53,731

Salary adjusted to full time: For comparison purposes, all salaries are adjusted to full time equivalent in this column.

Average of adjusted salary: Sum total of full time adjusted salary in each category, divided by the number of positions in that category.

Median of adjusted salary: This is the salary amount which is the mid-point in each category.

Other: This category includes miscellaneous positions that do not fit in other categories. These positions include finance managers, law student/articled student positions, technical writers/editors, graphic designers, researcher assistants, database managers etc.

Number of agencies surveyed: 69

Number of positions funded wholly or in part by the Law Foundation of BC: 250

Benefits:

195 positions have medical benefits, 38 positions do not.

169 positions have extended health benefits, 64 positions do not.

163 positions have life insurance, 70 positions do not.

Pensions:

116 positions have pensions or RRSP contribution and 117 do not.

For those who provided the amount of contribution (79 responses), the range is 2 - 9.78% contribution.

Holidays:

Many tiered 3-6 weeks (increased based on years of service)

Average 3-4 weeks

Sick days:

208 positions have sick days, 25 do not

Average sick days 13 per year

5 agencies allow carry over of sick days, 4 for up to 156 days maximum

From: Erin Gray
To: Annual Fee Review
Subject: Annual Fee Review Submission
Date: September 15, 2018 7:53:34 PM
Attachments: image001.png
20180915 Ltr EG to LSBC re fee review.pdf

Hello,

Please find attached correspondence regarding the Annual Fee Review Consultation on Fees for Public Interest Practitioners.

Best regards,

Erin Gray, Associate Counsel

Arbutus
LAW GROUP LLP
Commitment | Expertise | Respect

Micha J. Menczer
W. Ming Song*
Kathryn Deo*
Catherine Fagan
* practices under a law corporation

Reply To: Erin Gray, Victoria Office
778-679-7396 (Direct Line)
erin@arbutuslaw.ca

September 15, 2018

Annual Fee Review Working Group
Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

Via Email: *annualfeereview@lsbc.org*

Attn: Annual Fee Review Working Group

Dear Annual Fee Review Working Group members,

Re: Annual Fee Review: Consultation on Fees for Public Interest Practitioners

I write in response to the request by the Annual Fee Review Working Group (the "Working Group") for input on a proposed fee reduction program for public interest practitioners. The Working Group asked the following specific questions:

> 1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?
>
> 2. If you would support the development and implementation of a fee reduction for public interest practitioners:
>
> > (a) How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?
> > (b) What consequences or impacts of the fee reduction would you foresee as providing its justification?
> > (c) How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

In the submissions that follow, I provide background on my experience as a public interest practitioner, and then answer each question in sequence.

In summary, I support reducing fees for lawyers who spend a substantial portion of their work hours practicing public interest law. I would consider "public interest" to include any work that is at a significantly reduced rate, and that contributes to the betterment of society (the LSBC may consider the CRA's guidelines on charitable purposes as guidance). This would include all lawyers working at charities, and may include

lawyers working at non-profit organizations as well as those in the private sector that devote a significant portion of their work hours to public interest work.

Background

I am in my third year of practice. I practiced as a solo practitioner for the first year and a half, and now work as an independent contractor with Arbutus Law Group LLP.[1] During my time as a solo practitioner, the vast majority of my work was environmental law-related work for citizen groups, non-profit organizations and First Nations, often funded by the Environmental Dispute Resolution Fund (EDRF), which is administered by West Coast Environmental Law (WCEL).[2] The EDRF is an invaluable service that WCEL provides to British Columbians, and has resulted in countless victories for the environment. One only needs to scroll through their website to learn how much of a difference it has made to communities across the province and how different some of our wild spaces would look without the work that lawyers and communities have put into projects funded by the EDRF.

I still spend about half of my work hours on EDRF or other public interest files. For example, I assist non-profit organizations with day-to-day legal questions, for a deeply discounted rate that is less than half of my regular hourly rate. Needless to say, this is a financial sacrifice.

1. Should the Law Society develop and implement a fee reduction for public interest practitioners? Why or why not?

Yes, the LSBC should develop and implement a fee reduction for public interest practitioners. As an independent contractor with a paperless home office, my main expense is LSBC membership and insurance fees. I have arranged my life and other work in such a way that it is possible for me to do public interest work that I think is important, for individuals that are underserved. But given that I'm a new lawyer with significant student debt, and that I already work part-time due to childcare commitments, I have a significantly reduced income. There are many other lawyers that are making similar (and much greater) sacrifices in the practice of public interest law. In my opinion, a fee reduction would:

- demonstrate that the LSBC and the rest of its members support these lawyers;
- encourage lawyers to engage in—or keep engaging in—this type of work (acknowledging that a reduction in fees will not result in closing the salary gap between those practicing public interest law and those practicing at market rates); and
- be an example of how the LSBC is supporting access to justice.

[1] The partners at Arbutus Law Group LLP are in support of these submissions.
[2] To provide details on the current funding arrangement, the EDRF will fund up to $80/hour (plus taxes) of a lawyer's time, and the lawyer may charge up to $160/hour; the client is expected to cover the difference. In many cases, the client cannot afford to compensate at the high end, and my experience has been working in the $80-100/hour range, while also having to write-off sometime significant unexpected timing overages.

2. If you would support the development and implementation of a fee reduction for public interest practitioners:

(a) How should the lawyers eligible to receive the fee reduction be identified? What eligibility criteria might be most appropriate?

I think that lawyers should self-identify and apply for the program. It should not be an onerous application, as the costs to administer such a program must be considered; and it *need* not be, as I think it unlikely that lawyers would try to take advantage of such a program. As with other aspects of the LSBC's regulation of lawyers in the province, audits should be possible.

In order to be eligible, lawyers should have spent a significant amount of time on public interest work in the past year. I do not know if it is appropriate to define a minimum percentage of one's work that must be in the public interest, but I understand that for the sake of administrative efficiency this may be desirable. If so, 25% seems fair, given the significantly reduced compensation for public interest work.

"Public interest work" should be any work that is for a significantly reduced rate, and that furthers a charitable purpose (the LSBC may consider using the CRA's guidelines on charitable purposes as a basis for this). This would include all lawyers working at charities, and may include lawyers working at non profit organizations and those in the private sector that qualify. Key considerations in developing the eligibility criteria should be:

- the financial sacrifice that the lawyer is making, as compared with what they would earn in the private sector; and
- the lawyer's contribution to bettering society.

(b) What consequences or impacts of the fee reduction would you foresee as providing its justification?

As mentioned above, a fee reduction would encourage lawyers who are already engaging in public interest work to continue to do so. It obviously would not close the gap between public interest salaries and market rate private practice salaries, but could be significant for some, and in any case would be an important symbolic gesture. It would also be one way that the LSBC could demonstrate its commitment—both to the public and to its members—to access to justice. Last, it would be a way for members that are practicing at market rates to support their colleagues who are addressing a societal need and are incurring a financial cost in doing so.

(c) How big should the fee reduction be and should the reduction be applied to the practice fee, the insurance fee, or both?

In my opinion, the reduction should be 50% of both the insurance fee and the practice fee. This is a large enough discount that it shows the LSBC is serious about access to justice and its support for lawyers doing public interest work.

Arbutus
LAW GROUP LLP
Commitment | Expertise | Respect

In summary, I think that the LSBC should implement a fee reduction program to reduce the cost to practise for those lawyers engaging in a significant amount of public interest work.

I welcome questions and would be happy to discuss this topic further with the Working Group.

Yours Truly,

ARBUTUS LAW GROUP LLP

Erin Gray
Barrister and Solicitor

From: Amanda Aziz
To: Annual Fee Review
Subject: Fee review
Date: September 15, 2018 9:19:42 PM

Dear Law Society,

I am writing to express my support for the proposal before the Law Society that a reduction in the annual practising fee and/or insurance fee be made available to public interest lawyers/those working in non-profits. Lawyers doing such work are often making much lower salaries than those in lucrative private law, and do not always have firm resources paying these fees for them. Introducing a lower fee would greatly assist in promoting access to justice, and could be based on the legal aid or employment arrangement a lawyer is engaged in.

I would also be interested to know the reliance on the Law Society's insurance for claims made against public interest lawyers versus private law practitioners. I imagine there would he quite a difference.

I sincerely hope the Law Society considers making this change, or at the very least, putting a proposal to the membership.

Thank you,

Amanda Aziz

From: D Lambert
To: Annual Fee Review
Subject: feedback on proposed fee reduction
Date: September 15, 2018 9:21:43 PM

Dear Working Committee:

I am a non-practicing lawyer, currently working as a college instructor. I went to law school to be a social justice lawyer. When I started practicing my plan was to focus on legal aid and I worked primarily in family law taking legal aid files. After only a couple of years of this I decided to leave the practice of law. It was simply too difficult to do this work - financially, socially, emotionally - with very little/no support. I have tremendous respect for social justice lawyers who do the essential work of assisting those most in need, who work tirelessly and for very little financial reward, whose efforts are often ignored or downplayed.

The current fees are just one of many barriers that act to discourage people from doing this important work. Three thousand something dollars must seem like a small amount to many of the privileged people reading this, however, to a sole practitioner legal aid lawyer just starting out, this sum can be a serious issue. Access to justice is not the sole responsibility of a few lawyers who dedicate their careers to this work, it is a social problem and our shared responsibility. There has been so much talk about this issue, and I have seen very little actually done by the Law Society in the way of improvements. Waiving all insurance fees for those who work primarily in legal aid would be most fair.

It also never made any sense to me why a legal aid lawyer pays the same fees as lawyers practicing in other areas when the legal aid lawyer's practice is far less likely to result in claims against the insurance fund.

Treating everyone the same when they are not the same is not always the fairest approach, and certainly in this case it is not fair at all.

I appreciate your consideration of this feedback, and would appreciate you not publishing my name if you use any of it.

Sincerely,

D Lambert
BA, LL.B, MA

From: Patrick Shannon
To: Annual Fee Review
Subject: Annual Fee Review submission
Date: September 15, 2018 10:34:03 PM

Dear Colleagues and Honourable Benchers,

I write to submit comments on a proposal from two Law Society members that a reduction in the annual practicing fee and/or the insurance fee be made available to public interest practitioners on the premise that the current flat fees have a negative impact on members' capacity to start and sustain a practice in public interest law.

As staff lawyer with the YWCA Metro Vancouver Legal Education Program, I work exclusively with women in YWCA transitional housing to resolve their Family Law, Immigration, and Child Protection matters. I frequently take over files once their legal aid hours have expired, sometimes only weeks before a hearing.

As the only lawyer in my position at the YWCA, I am responsible for negotiating a very tight program budget. The annual practicing and insurance fee I must pay to the Law Society represents a considerable chunk of that budget. I can advise that it impacts my ability to pursue continuing legal education and take on new clients. I rely on lower cost programs offered by the Law Courts Center to meet my requirements, and often review with some regret the excellent programs offered by CLE BC, knowing that taking a course, even at a lower rate, would mean fewer resources available to serve my clients. If I were able to pay a reduced rate, I would put that surplus into pursuing more legal education, joining professional associations, and building a supportive network to help me better assist the women who come into my office on East Hastings. It sounds mundane, but this surplus would also go right into purchasing the paper, binders, tabs, toner, and staples we all exhaust in startling quantities in preparation for trial. In turn, this would allow me to take on more clients.

I have been practicing since my transfer from Alberta in May, but was called to the Bar and signed the rolls this past Friday afternoon. It was very moving to hear Ms. Kresivo, Q.C., speak about our mission to uphold the rule of law, the public interest, with the confluence of the two being the right of the public to the services of our profession. It is my respectful submission that this proposal would greatly serve that particular mission.

I would like to thank the committee and the Benchers for their hard work and contributions to our profession, and I am absolutely at the committee's service should you have any questions.

From: Adrienne Smith
To: Annual Fee Review
Subject: fee reduction
Date: September 16, 2018 10:07:02 PM

Dear Working Group,

Thank you for the opportunity to provide my views about a reduction in Law Society fees for public interest practitioners. My comments are brief. I am in full support of a reduction. Lawyers taking legal aid cases, employed by not for profits, or those able to demonstrate that they take on pro bono cases should have access to a reduction.

I imagine you will receive submissions from those who say the cost of Law Society fees is bourn by employers, and as a result the actual quantum is academic. Let me be an example of the contrary view. I am a fairly new lawyer in my fourth year of call. I have a vaguely legal contract day job, and I provide 100% pro bono private practice on the side. My clients are drug users, sex workers and transgender people exclusively. None of my clients have the means to pay for legal services, but in my respectful view, it is these marginalized people who have the most need for competent and accessible legal services. I do about 20 hours of pro bono work per month. Because my firm does not turn a profit, and because my employer does not pay my Law Society fees, I find staying in practice to be an immense struggle because of my law society fees.I pay more that $3000 per year while at the same time, not making any money. I also struggle with the cost of CPD hours, and debilitating student loan payments.

I am a member of an equity-seeking group which is underemployed as a group (I'm a non-binary transgender person), and I'm finding the expense that comes with the privilege of this profession to be a constant barrier. I do not enjoy a reduction of my fees from any of the collegial associations (CBA, TLABC, Advocates Society etc), nor from the Law Society. At times I wonder why I do this kind of deep service at such an obvious personal cost. For me, an immediate reduction in fees would make me feel some recognition for the pro bono work I do, it would allow me to continue doing the level of free legal work I do, and it would help me stay in the practice of law for longer.

At its most equitable, a fee reduction proposal would include a sliding scale so those who need a reduction most would benefit most from it. A reduction for lawyers at not for profit organizations would see the burden to Law Society fees lifted from their employers so that grant money could be better allocated to salaries, so that lawyers taking on this kind of noble work could be paid in a way more commensurate with their skills- particularly in Vancouver where the cost of living is so great.

Thank you again for the opportunity to provide my input. I hope you decide to reduce fees for lawyers like me.

The Law Society of British Columbia

Memo

To:	Benchers
From:	Finance and Audit Committee
Date:	November 21, 2018
Subject:	Enterprise Risk Management Plan - 2018 Annual Update

Attached is the 2018 annual update to the Law Society's Enterprise Risk Management (ERM) plan. In 2017, management prepared an in-depth 3-year review of the ERM plan, which was presented to the January 2018 Bencher meeting.

Background

The ERM plan is a governance tool to accomplish the following:

- Identify the enterprise risks that can have an impact on the achievement of the Law Society's strategic goals and mandate.
- Determine the relative priority of those risks based on the likelihood they would occur and the extent of the impact on the organization.
- Manage the risks through mitigation strategies that are either in place or in progress, which assist in retaining, reducing, avoiding or transferring the risks.

2018 Update

Attached is an ERM Executive Summary which highlights the top 10 strategic residual risks, along with the updated enterprise risk register. New initiatives or changes to the risk register are highlighted in blue. There were no changes to the residual risk levels.

This updated 2018 Enterprise Risk Management plan, which was presented and accepted at the November 2018 Finance and Audit Committee meeting, is being provided as information to the Benchers.

Law Society of British Columbia
Enterprise Risk Management - Updated November 2018
Executive Summary

An enterprise risk is the threat that an event or action will adversely affect an organization's ability to achieve its strategic goals and mandate.

An Enterprise Risk Management Plan (ERM) is a governance tool which provides for the:

- Identification of enterprise risks that can have an impact on the achievement of the Law Society's strategic goals and mandate
- Determination of relative priority of these risks based on their potential to occur and the extent of the impact
- Management of the risks through mitigation strategies, retaining, reducing, avoiding or transferring the risks

To successfully manage these risks, a framework for risk identification, measurement and monitoring has been developed and is reported to the Finance and Audit Committee (and then to the Benchers) on an annual basis.

The process going forward will be:

- Leadership Council plays a central role, with the Executive Director / Chief Executive Officer being the main liaison, per the Executive Limitations
- The ERM plan will be maintained through discussions by Leadership Council and related departments to refresh the Risk Schedule and related risk management efforts
- Should a risk change or a new risk occur, the escalation process will be to inform the appropriate Executive Team member, and/or the ED/CEO, with a report out to the President (or Executive Committee) when required, subject to the Executive Limitations

The top ten strategic residual risks are noted below, with the full Risk Schedule attached as Appendix A.

Summary of Major Strategic Residual Risks (top 10 risks)		
Category	**Risk**	**ET Lead**
Regulatory	R11: Misuse of trust funds and accounts, and/or other facilitation of financial misconduct by members	CLO and Director of Trust Regulation, Director of Insurance
Operational	O1: Natural or other disaster, such as fire, flood or earthquake	ED/CEO
Regulatory	R10: Emergence of new technologies challenging the ability to regulate legal services	DED
Regulatory	R9: Perceived failure to enable, or actual hindrance of, reasonable access to legal service providers	ED/CEO
Staff and Work Environment	SW1: Loss of key personnel or inability to recruit skilled personnel	ED/CEO
Regulatory	R5: Failure to appropriately sanction, or deal with, a lawyer in a timely way	CLO and Tribunal Counsel
Regulatory	R3: Conflict of interest event by Benchers or staff	ED/CEO
Operational	O3: Significant breach (including unauthorized access) of confidential and/or FOIPPA information to members, employees and/or the public	DED and CFO
Regulatory	R6: Significant failure to fulfill the statutory duties under the Legal Profession Act	ED/CEO
Regulatory	R12: Exercise of members' statutory right to override Bencher decisions	ED/CEO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
REGULATORY RISK	R11: Misuse of trust funds and accounts, and/or other facilitation of financial misconduct by members, and/or the perception that the Law Society needs to do more to effectively regulate	• **Political:** direct government intervention in the Law Society authority and structures • **Reputational:** diminished public confidence along with a loss of reputation with the membership • **Financial:** costs and damages - possible litigation		• Appropriate Law Society trust and conduct rules • Trust assurance audit program • Appropriate investigation and prosecution of legal matters commensurate with administrative law • Education and risk management advice to lawyers • Insurance policy terms and limits • Insurance policy for Part B underwritten by AIG • Credentialing standards and procedures • Hearing panel composition and training • Government engagement and communications • National Discipline Standards			• ~~Potential review of mandatory employee theft/crime insurance requirements for all practicing lawyers with trust accounts~~ • Development of guidelines around reporting of criminal conduct to law enforcement - in process • Federation AMLTF working group, Model Rules approved, now to be implemented in BC, including a communication plan, guidance to the profession, and best practices guide for law societies • Develop AML content for PLTC, Practice Management and Trust Accounting courses	CLO, Director of Trust Regulation, Director of Insurance, Director of Education & Practice
OPERATIONAL	O1: Natural or other disaster, such as fire, flood or earthquake	• **Operational and financial:** injury of staff and/or building damage • **Operational:** service disruption • **Financial:** unexpected costs		• Fire and earthquake safety plan and training • Building, human resources, and operational procedures and training • First Aid attendants • Information technology backup plan • Building due diligence review • Insurance coverage and Work Safe coverage • Off-site storage				ED/CEO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
				• Off-site server location • Annual manager training to back up floor wardens				
REGULATORY RISK	R10: Emergence of new technologies challenging the ability to regulate legal services	• **Regulatory:** unable to appropriately investigate and discipline • **Reputational:** loss of confidence • **Operational:** disruption to day-to-day activities		• General awareness and environmental scan • Practice advisors			• Monitor developments in blockchain and artificial intelligence to evaluate implications for legal regulation.	DED
REGULATORY RISK	R9: Perceived failure to enable, or actual hindrance of, reasonable access to legal service providers	• **Reputational:** loss of public confidence, being seen as a barrier to public access • **Political:** loss of self-regulation, direct government intervention		• Seeking legislative change to broaden legal service providers, i.e.: paralegals • Unbundling of legal services • Committees: Access to Legal Services, Legal Aid Advisory, Unauthorized Practice • Appropriate use of unauthorized practice authority • Supporting and funding pro bono service • Funding other access to legal services initiatives			Strategic Plan updated for 2018 to 2020: • Pursue our Vision for Publicly Funded Legal Services • Examine alternate legal service providers • Collaborate with other justice system organizations to identify issues • Examine costs of the provision of legal services and accessing justice • Review regulatory requirements to ensure they do not hamper innovation or hinder cost-effective delivery of legal services	ED/CEO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
STAFF AND WORKING ENVIRONMENT	**SW1:** Loss of key personnel or inability to recruit skilled personnel	• **Operational:** service disruption as well as loss of corporate knowledge		• Succession planning and cross training • Compensation and benefit philosophy, including employee recognition program • Regular review of compensation benchmarking practices in consultation with external compensation experts • Professional, leadership and skills development program and human resource policies • Performance management and coaching process • Leadership Council structure to provide leadership experience • Hiring practices and recruiting firms • Ad-hoc Telecommuting Policy				ED/CEO
REGULATORY	**R5:** Failure to appropriately sanction, or deal with, a lawyer in a timely way	• **Political:** direct government intervention in the Law Society authority and structures • **Reputational:** diminished public confidence along with a loss of reputation with the membership • **Financial:** costs and damages - possible litigation		• Appropriate procedures for investigation and prosecution of legal matters commensurate with administrative law • S.86 *Legal Profession Act* (statutory protection against lawsuits and liability) • D & O insurance policy underwritten by AIG • Government relations • Ability to seek review and/or appeal to the BC Court of Appeal • Enhanced role of Tribunal Counsel				CLO and Tribunal Counsel

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
				• Hearing panel composition and training • National Discipline standards • Federation of Law Societies AML Working Group • Tribunal Case Management • Written Hearings • Administrative suspensions for failures to respond				
REGULATORY	R3: Conflict of interest event by Benchers or staff	• **Political:** direct government intervention in the Law Society authority and structures • **Reputational:** diminished public perception of independence along with a loss of reputation with the membership		• Bencher governance policies and training • Appropriate procedures for investigation and prosecution of legal matters commensurate with administrative law, including investigations conducted by independent, external counsel where appropriate • Enhanced role of Tribunal Counsel • Hearing panel composition and training				ED/CEO
OPERATIONAL	O3: Significant breach (including unauthorized access) of confidential and/or FOIPPA information to members,	• **Reputational:** diminished public perception of independence and possible loss of reputation with membership		• Information technology security policy, process and procedures • Member file and case file management procedures • Records management procedures and LEO security profiles, confidential shredding service • Building security system and procedures				DED and CFO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
	employees and/or the public			• Information technology, privacy and security training of new staff • Established Privacy Policies, including annual privacy awareness training for staff • Information Privacy Agreements with contractors • IT Security Review completed regularly • Member portal • Encryption of Bencher and Committee agendas • Bencher and Committee member procedures for Law Society documents in place • Cyber Insurance in place				
REGULATORY	R6: Significant failure to fulfill the statutory duties under the *Legal Profession Act*	• **Political:** direct government intervention in the Law Society authority and structures • **Reputational:** diminished public confidence along with a loss of reputation with the membership • **Financial:** costs and damages - possible litigation		• Bencher governance policies and training • Bencher Strategic Plan • Appropriate procedures for investigation and prosecution of legal matters commensurate with administrative law • Crisis communication plan (note: applies to all risks) • Government relations • Hearing panel composition and training • Trust Assurance audit program			• Law Firm Regulation Working Group - self-assessment pilot project	ED/CEO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
REGULATORY RISK	R12: Exercise of members' statutory right to override Bencher decisions	• **Operational:** disruptive to day-to-day operations • **Reputational:** loss of member and public confidence, distraction from other issues, strained relationships • **Financial:** large resource commitment takes away from other initiatives		• Communication strategies • Law Society initiated consultation or member referenda • Policy analysis				ED/CEO
REGULATORY	R8: Admission decisions, including those made by the National Committee on Accreditation, are not reflective of the character, fitness, and competencies of a prospective lawyer	• **Political:** possible loss of the right to self-regulation • **Reputational:** diminished public perception of independence • **Financial:** costs and damages imposed through possible litigation		• Law Society Admission Program • Credentialing standards and procedures • Continuous updating & enhancement of PLTC student assessment and training • Hearing panel composition and training • Enhanced role of Tribunal Counsel • Legislative amendment to allow Law Society appeals of prior decisions • National Committee on Accreditation • Federation law degree approval process			• Articling program review, including quality and availability • Federation Review of National Committee on Accreditation	ED/CEO, DED, Director of Education and Practice
OPERATIONAL	O5: Loss of data and information	• **Reputational:** diminished public perception of independence and		• Information technology backup plan • Information technology security policy, process and procedures				DED and CFO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
		possible loss of reputation with membership • **Operational:** service disruption • **Financial:** unexpected costs		• Records management policies and LEO • Off-site Iron Mountain storage for closed files • Insurance coverage • Off-site storage • Off-site server location				
REGULATORY	R2: A legal proceeding alleging a failure of the Law Society to follow due process or alleging human rights breaches	• **Political:** direct government intervention in the Law Society authority and structures as well as the possible loss of the right to self-regulation • **Reputational:** diminished public perception of independence along with a loss of reputation with the membership • **Financial**: lawsuit defence and settlement costs		• Appropriate procedures for investigation and prosecution of legal matters commensurate with administrative law • Hearing panel composition and training • Enhanced role of the Tribunal Counsel • National Discipline Standards • S.86 *Legal Profession Act* (statutory protection against lawsuits and liability) • D & O insurance policy underwritten by AIG • Government engagement and communications				CLO
STAFF AND WORKING ENVIRONMENT	SW3: Labour action (strike)	• **Operational:** service disruption		• Cross training • Compensation and benefit philosophy • Human resource and operational standards, policies and procedures • Reward and Recognition Program (RREX) • 2016 – 2018 collective agreement				DED and CFO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
STAFF AND WORKING ENVIRONMENT	**SW5:** Proceeding commenced on human rights issues by staff	• **Operational and reputational:** diminished levels of staff performance • **Financial:** unexpected costs		• Human resource and operational standards, policies and procedures • Annual performance management and coaching process • Leadership development training • Legal counsel and advice				CFO
FINANCIAL	**F2:** Significant impact of economic and/or financial market downturn	• **Financial:** investment devaluation as well as losses of market value in the building and member revenue, member economic impact		• Investment policies and procedures (SIIP) • Quarterly reviews of investment performance and benchmarking • Investment managers and pooled funds • Annual operating and capital budgeting process • Monthly and quarterly financial review process • Real estate expert advice and monitoring • Appropriate reserve levels and Minimum Capital Test ratio • Updated Statement of Investment Policy, & Asset Mix Change in 2015				CFO and Director of Insurance

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
REGULATORY	R7: Loss of a lawsuit alleging wrongful deprivation of lawyer's (prospective) membership (livelihood)	• **Reputational:** diminished public perception of independence along with a loss of reputation with the membership • **Financial:** costs and damages imposed through possible litigation		• Appropriate procedures for investigation and prosecution of legal matters commensurate with administrative law • Appropriate credentialing procedures, including investigations, assessment of applications and credentials hearings • Appropriate PLTC standards in student assessment and training • Hearing panel composition and training • S.86 *Legal Profession Act* (statutory protection against lawsuits and liability) • D & O insurance policy underwritten by AIG			• Articling program review, including quality and availability	CLO, Director of Education and Practice, and Tribunal Counsel
REGULATORY	R4: Failure of the Law Society to stay within jurisdiction and/or wrongful prosecution	• **Political:** direct government intervention in the Law Society authority and structures • **Reputational:** diminished public perception of independence along with a loss of reputation with the membership		• Appropriate procedures for investigation and prosecution of legal matters commensurate with administrative law • Hearing panel composition and training • Enhanced role of the Tribunal Counsel				CLO and Tribunal Counsel

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
LAWYERS INSURANCE FUND	LIF7: Lawsuit for "bad faith" failure to settle / denial of coverage	• **Reputational:** loss of reputation with the public or profession • **Financial:** exposure to excess damage award		• Established and documented quality control (Claims Manual) • Protocol to avoid "bad faith" losses • Third Party Claims Audits • S.86 *Legal Profession Act* (possible statutory protection against lawsuits and liability) • E&O insurance policy underwritten by Markel • Appropriate reserve levels and Minimum Capital Test ratio				Director of Lawyers Insurance Fund
LAWYERS INSURANCE FUND	LIF5: Significant error in advice to insured or payment (non-payment) of individual claim	• **Financial:** unnecessary payments		• Established and documented quality control (Claims Manual) • Peer File Reviews • E&O insurance policy underwritten by Markel				Director of Lawyers Insurance Fund
FINANCIAL	F1: Misappropriation of Law Society financial assets	• **Reputational:** loss of reputation with the membership • **Financial:** loss of revenue, increased fees		• Internal controls • Schedule of authorizations • External audit • Monthly and quarterly financial review process • Crime insurance				CFO

Law Society of British Columbia
Enterprise Risk Management
Risk Schedule by Risk Level - Updated November 2018
Appendix A

Risk Category	Risk Statement	Potential Consequences	Inherent Risk Level	Existing Strategies and Controls to Mitigate the Risk	Residual Risk Level 2017	Residual Risk Level 2018	Planned (In Progress) Strategies and Controls	ET Lead
LAWYERS INSURANCE FUND	LIF6: Error in actuarial advice	• **Financial:** insufficient reserves		• External actuarial advice and projections • External auditor reviews of actuarial methodology and numbers • Monitoring of LPL insurance trends and risks • Appropriate reserve levels and Minimum Capital Test ratio				Director of Lawyers Insurance Fund
LAWYERS INSURANCE FUND	LIF4: Catastrophic losses under Part A of the LPL policy	• **Financial:** significant investigation expense and settlement payments		• Policy wording on limits and "related errors" • Proactive claims and risk management practices • Monitoring of LPL insurance trends and risks • Education and risk management advice to lawyers • Appropriate reserve levels and Minimum Capital Test ratio • Stop-loss reinsurance treaty underwritten by ENCON				Director of Lawyers Insurance Fund
LAWYERS INSURANCE FUND	LIF2: Loss of third-party lawsuit against captive, insurance operations or in-house counsel	• **Financial:** exposure to compensatory damage award		• Established and documented quality control (Claims Manual) • S.86 *Legal Profession Act* (possible statutory protection against lawsuits and liability) • E & O insurance policy underwritten by Markel				Director of Lawyers Insurance Fund

Likelihood (Rating)	Estimated Chance of a Single Occurrence Within Five Years
High (4)	80 - 100%
Medium-High (3)	60 – 80%
Medium (2)	40 – 60%
Low (1)	0 – 40%

Consequences (Rating)	Financial Consequences	Operational Consequences	Reputational Consequences	Political Consequences
High (5)	A material loss of financial assets or cash: > $750,000 in general, or 200% of gross case reserves/expected value for LIF claims, or >20% negative return for LIF investments	A substantial proportion of operations cannot be restored in a timely manner, essential services are unable to be delivered, and/or there is a significant loss of corporate knowledge that will result in the under-achievement of the Law Society's mandate	An irreparable loss of member and stakeholder trust in, or severe public criticism at a national and provincial level that brings disrepute to the reputation of, the Law Society	Change in the mandate and/or the imposition of a new governance as well as management structure for the Law Society is enacted by the government
Medium-High (4)	A substantial loss of financial assets or cash: $500,000 - $750,000 in general, 190% of gross case reserve expected value for LIF claims >15% negative return for LIF investments	Part of the operation cannot be restored in a timely manner, with some disruption to essential services, and/or a loss of corporate knowledge that can impact on the ability to render key decisions for the Law Society in the short to medium term	A substantial loss of member and stakeholder trust in, or sustained public criticism at a provincial level of, the Law Society which will be difficult to remedy over the short to medium term	The Law Society is susceptible to a potential change in government rules and legislation with implications for its authorities and/or an imposed change in the management structure

Medium (3)	A moderate loss of financial assets or cash: $250,000 - $500,000 in general 180% of gross case reserves/expected value for LIF claims 10% negative return for LIF investments	Some parts of the operation will be disrupted, but essential services can be maintained, and/or there is some loss of corporate knowledge that warrants management attention but the implications for which are limited to select projects or processes	Some loss of member and stakeholder trust in, and local public criticism over a short period of time of, the Law Society which warrants management attention	A change in Provincial direction affecting the operations of the Law Society is likely, but can be addressed within the current governance and management structure
Low-Medium (2)	A manageable loss of financial assets or cash: $100,000 - $250,000 in general 170% of gross case reserves/expected value for LIF claims 5% negative return for LIF investments	Some inefficiency will exist, leading to increased cost and/or time in the provision of essential services, and/or a loss of corporate knowledge that may result in minor disruptions in specific projects or processes	A relatively minor setback in the building of member and stakeholder trust in, or “one off” unfavorable local public attention put toward, the Law Society	Minor, non-routine changes may occur in regulation of relevance, and the nature of guidance that is provided by the government, to the Law Society
Low (1)	A relatively immaterial loss of financial assets or cash: < $100,000 in general 160% of gross case reserves/expected value for LIF claims <5% negative return for LIF investments	No measurable consequence	No measurable consequence	No measurable consequence

Law Society of British Columbia
Enterprise Risk Management
Risk Assessment Tools

		Consequences				
		Low	Low-Medium	Medium	Medium-High	High
Likelihood		1	2	3	4	5
High	4					
Medium-High	3					
Medium	2					
Low	1					

The Law Society of British Columbia

Year-End Report 2018

Committee: Access to Legal Services Advisory Committee

Jeffrey Campbell, QC (Chair)
Claire Hunter (Vice-Chair)
Brook Greenberg
Phil Riddell
Michelle Stanford
The Honourable Thomas Cromwell

December 6, 2018

Prepared for:	Benchers
Prepared by:	Access to Legal Services Advisory Committee
Purpose:	Information

Table of Contents

Introduction

1. The purpose of this report is to provide the Benchers with an update on the topics the Committee considered in 2018. The Committee's mid-year report summarized its work from the first half of the year.[1]

2. The Committee is an advisory committee. Its purpose is to monitor matters within its mandate that are relevant to the work of the Law Society. The Committee can also carry out discrete tasks the Benchers assign it. The primary focus of the Committee is to recommend to the Benchers ways the Law Society, through its strategic objectives and regulatory processes, can better facilitate access to legal services and promote access to justice.

Developing a Proposal for Large, Vancouver Law Firms to Improve Access to Legal Services / Access to Justice

3. In its July 2018 Mid-Year Report the Committee provided an update on the status of an outreach initiative it commenced in 2017, and advised the Benchers of last year. The idea was to explore with a number of large Vancouver law firms what they were doing to promote access to justice and legal services, and what the firms might be willing to do in the future. The meeting with the managing partners went well and they encouraged the Committee to return with some concepts for the firms to consider. The hope was to explore ideas that were both innovative and practical.

4. As the Committee explored the issue through the remainder of 2017 and into this year, it settled on the idea of considering the viability of a non-profit law firm that operated on a cost recovery model and provided low cost legal services in areas of underserved or unmet need.

5. Following discussions with Bill Maclagan, QC, Kim Hawkins, Executive Director of Rise Women's Legal Centre and Wayne Robertson, QC in spring, the Committee developed a subgroup of its members to work on the project. The subgroup consisted of: Jeff Campbell, QC, (Chair), Claire Hunter (Vice-Chair), Nancy Merrill, QC, Michelle Stanford and The Hon. Thomas Cromwell.

6. The subgroup held several meetings to refine its thinking on the concept. In jurisdictions where the model seems to be working (such as the DC Affordable Law Firm) several large

[1] DM1946767

firms work in partnership with an educational institution. They also try and target service gaps, so the DC Affordable Law Firm targets people who live within a few hundred percent of the poverty line. Models such as Aspire in Alberta, faced issues with volume of clients and cost containment that challenged its ability to operate in a sustainable manner.

7. The subgroup explored the idea of a non-profit cost recovery law firm, which might provide legal assistance to people in discrete areas such as family law and immigration. It is important to note that the idea is to see if someone can establish a new type of firm to address gaps in the market, rather than compete with existing service providers who already help marginalized groups. Therefore, the Committee discussed how such a firm might best serve a demographic, without cannibalizing an existing market (i.e. the group was concerned not to recommend large law firms fund a non-profit firm that competes with sole practitioners, potentially driving sole practitioners out of business). This led to discussions about the various ways firms might contribute, from establishing a firm to supporting existing clinics that serve marginalized groups.

8. In order to round out the analysis, the subgroup spoke with Stacy Kuiack (former Appointed Bencher) who agreed to help draft a business plan for how firms (or other entities) might make a non-profit firm work as a going concern. Conversations with Mr. Kuiack are ongoing as of the time the Committee submitted this report.

9. As the concept is to explore what law firms and others might do, as opposed to the Law Society creating and steering a project (which is not within the mandate of the Committee or the Law Society, the intention is to engage with lawyers in private practice who are interested in the concept of a non-profit firm venture.

10. If the Benchers have any concerns about the Committee's plan, or wish to provide guidance before the Committee takes further action, it would be ideal to do so at the December Benchers meeting, as the Committee hopes to wrap its work up by the end of the year (if possible).

The Annual Practice Declaration

11. In 2017 the Committee requested that optional questions be added to the Annual Practice Declaration ("APD") to get a better sense of the pro bon, low bono, legal aid and other access to justice work lawyers perform. Due to some technical issues the questions did not go live until a large group of the practice insured lawyers had already reported in the spring. This left about 600 practice insured lawyers and the entire cohort of uninsured lawyers captured in our current data. In November 2018 the Committee considered the preliminary findings of the APD data.

12. It is important to note that a more accurate picture will emerge in 2019 when the Law Society has a complete block of responses to the APD questions. The summary that

follows should not be relied on as an accurate snapshot of the entire profession, and is provided for information purposes only.

13. 36.25% (1284) lawyers provided pro bono over the past 12 months[2] at an average of 44 hours, and 63.75 (2258 did not).[3] 43.62% of this work was summary legal advice. 1387 lawyers indicated they provided services at a substantially reduced fee (averaging 42 hours) and 1385 lawyers indicated they provided legal aid (averaging 45 hours). We don't know if lawyers who answered the reduced fee question were also doing legal aid and considering that work reduced fee, rather than a discrete category.

14. The APD asked people who said they did not do pro bono, low bono or legal aid why they did not. Approximately 2300 explanations were provided. The main reasons were: 1) contrary to employer policy (approximately 22%); 2) the lawyer was too busy / work-life balance challenges (approximately 22%); 3) the lawyer is not insured.

15. The top five areas of practice for pro bono, low bono and legal aid were: 1) Administrative (including labour, immigration, regulatory bodies) 703 lawyers; 2) Civil litigation – plaintiff (including commercial, other than non-motor vehicle) 652 lawyers; 3) Civil litigation – defendant (including commercial, other than non-motor vehicle) 430 lawyers; 4) Commercial – other 404 lawyers; and 5) family (excluding incidental real estate, wills and estates) 388 lawyers. Note that lawyers can declare multiple categories so the totals are different than above.

16. With respect to what access to justice work lawyers are doing, other than pro bono, low bono and legal aid, the responses were varied and there was not unifying theme. However, major categories of response included: 1) community volunteer work, including participation on boards and boards of legal organizations (95 lawyers of 1645); 2) membership in the CBA (76 lawyers of 1645), and 3) teaching, CPD presenting and mentoring (59 lawyers of 1645).

17. At its December meeting the Committee will explore this topic further, and will review the APD optional questions to see how they might be improved to get better data. It is possible based on the data to date that some of the questions are being interpreted in a manner that is not consistent with the purpose of the question (for example, some lawyers may be conflating the question about providing legal aid with the question about providing services at a substantially reduced fee, the latter question being intended to refer to retainers *other than* legal aid). In addition, some of the responses to the APD suggest not all lawyers as aware of insurance coverage for non-insured lawyers (subject to certain conditions being

---

[2] From when they filled their APD.

[3] Note: there was a discrepancy of 21 lawyers between those indicating they did pro bono and those indicating hours of pro bono, but this does not likely change the average hours in a material fashion.

met) and to the modification to the conflict of interest rules to foster summary legal advice at non-profit clinics. This discussion may lead to recommendations for how the Law Society can better educate the profession about the various opportunities that exist to do pro bono and promote access to justice.

Developing Principles for a Review of how to improve access to justice through innovation and regulatory reform

18. The current Strategic Plan includes the following item: *Reviewing regulatory requirements to ensure that they do not hamper innovation regarding or hinder cost-effective delivery of legal services*.

19. While the Benchers have not tasked the Committee to look at this item, the Committee felt it was important to consider the issue as part of its general advisory role. The Committee discussed the importance of developing a set of principles that should be brought to the eventual analysis of this Strategic Plan item.

20. Regardless of which group is tasked with working on the Strategic Plan Initiative, the Committee recommends that the following principles inform that work:[4]

    a. *Reforms and innovation must balance theoretical benefits with actual safeguards* – This principle includes the idea that a certain benefit should trump a theoretical one, unless the magnitude of realizing the theoretical benefit greatly outweighs the actual impact of the benefit that is certain;

    b. *Reforms must target real problems and offer practical solutions* – Most policy analysis should include identifying and understanding the problem the Law Society seeks to address, and from that determine the causal relation between regulation or innovation and the problem or its potential solution. In order for lawyers to embrace changes and promote access, the changes need to be practical and alive to the realities of practising law;

    c. *Reforms should not sacrifice professionalism or standards of competence in order to maximize access* – The goal is not simply to improve access to justice and legal services, but access to meaningful justice and to competently delivered legal services;

[4] A more detailed description of the principles and the rationale underlying each is contained in Mr. Munro's memo to the Committee, "Regulatory Barriers to Accessing Legal Services / Accessing Justice" (October 19, 2018).

d. *The Law Society must not try to bring about change by regulating outside its jurisdiction; but should be prepared to make constructive suggestions beyond its jurisdiction when the public interest requires it* – In order to withstand judicial scrutiny and to achieve acceptance by the profession and other justice system stakeholders, it is important to ensure regulatory reform and innovation is consistent with s. 3 of the *Legal Profession Act.* However, because some matters within the Law Society's mandate affect (and are impacted by) broad, societal conditions that lie outside its mandate, the Law Society might in some circumstances lend its voice to issues the Benchers determine it is in the public interest to do so; and

e. *The Law Society should explore what opportunities exist through regulation and innovation to promote access to justice and legal services, subject to the overriding object of protecting the public interest in the administration of justice* - The Committee recognizes the importance of a pro-active, positive statement of purpose to support the objects of advancing access to justice and legal services as being consistent with the Law Society's broad, public interest mandate.

21. The Committee is of the view that the Committee is well-situated to undertake this Strategic Plan work for the Benchers, if the Benchers wish. And, in the event another group is tasked to undertake this work, the Committee stands ready to assist in any capacity the Benchers deem useful.

AGM Members' Resolutions on Pro Bono

22. As part of its monitoring function the Committee discussed the two members' resolutions regarding pro bono on the 2018 AGM. The Committee stresses that the discussion was general in nature and not about the particular content or merit of the resolutions. The purpose of the discussion arose from the view that the Committee's monitoring and advisory role properly situate it to assist the Benchers in analyzing the merits of the resolutions. The Committee is of the view that should the resolutions pass on December 4th (or amended version(s) pass), it will be important for the Committee to support the Benchers in their eventual analysis of the resolutions.

General Observations

23. Improving access to justice and legal services remains critically important. Many organizations and justice system stakeholders are engaged in the topic, trying to find solutions, and working on developing a more nuanced articulation of what the problems are. There are success stories, and it is easy to lose sight of them in the face of so much need. The Committee was very impressed with the good work Rise Women's Legal Centre is doing. The family law unbundling roster, which the Law Society's access to justice fund helped launch, is up and running, hosted on Courthouse Libraries website, and sports a

roster of approximately 140 lawyers (almost three times the original target). Other grassroots efforts are underway to normalize limited scope services, and for lawyers to develop and share best practices. But it is the nature of access to justice issues, in their vast complexity, that more always remains to be done.

24. The AGM saw remarkable lawyer participation. This is no doubt the case due to resolutions that, at their root, deal with access to justice (the pro bono resolutions and the resolution regarding alternate legal service providers). The topics have engaged government, the public and the profession. These topics will no doubt occupy considerable attention of the Law Society in 2019 (and beyond).

25. The primary functions of the Committee is to monitor and advise the Benchers regarding access to legal services and access to justice matters that fall within the Society's public interest mandate. As the Benchers move forward with these important issues in 2019, the Committee will assist in any capacity the Benchers deem helpful.

/DM

The Law Society of British Columbia

Rule of Law and Lawyer Independence Advisory Committee – Year End Report

Jeff Campbell, QC (Chair)
Christopher McPherson, QC (Vice-Chair)
Jennifer Chow, QC
Jeevyn Dhaliwal
Mark Rushton
Jon Festinger, QC
The Honourable Marshall Rothstein, QC

December 7, 2018

Prepared for: Benchers

Prepared by: Rule of Law and Lawyer Independence Advisory Committee/
Michael Lucas, Director, Policy and Planning

Purpose: Information

Introduction

1. The Rule of Law and Lawyer Independence Advisory 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 on matters relating to those issues. From time to time, the Committee is also asked to analyze policy implications of Law Society initiatives, and may be asked to develop the recommendations or policy alternatives regarding such initiatives.

2. The lawyer's duty of commitment to his or her client's cause, and the inability of the state to impose duties that undermine that prevailing duty, has been recognized as a principle of fundamental justice.[1] The importance of lawyer independence as a principle of fundamental justice in a democratic society, and its connection to the support of the rule of law, has been explained in past reports by this Committee and need not be repeated at this time. It will suffice to say that the issues are intricately tied to the protection of the public interest in the administration of justice, and that it is important to ensure that citizens are cognizant of this fact.

3. The Committee's mandate is:

   · to advise the Benchers on matters relating to the Rule of Law and lawyer independence so that the Law Society can ensure

     - its processes and activities preserve and promote the preservation of the Rule of Law and effective self-governance of lawyers;

     - the legal profession and the public are properly informed about the meaning and importance of the Rule of Law and how a self-governing profession of independent lawyers supports and is a necessary component of the Rule of Law; and

   · to monitor issues (including current or proposed legislation) that might affect the independence of lawyers and the Rule of Law, and to develop means by which the Law Society can effectively respond to those issues.

4. The Committee met on January 24, February 28, April 4, May 2, July 11, September 19, November 7 and December 5, 2018.

5. This is the year-end report of the Committee, prepared to advise the Benchers on its work in 2018 and to identify issues for consideration by the Benchers in relation to the Committee's mandate.

---

[1] Canada (Attorney General) *v.* Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 S.C.R. 401

Topics of Discussion in 2018

I. Increasing Public Awareness of the importance of the Rule of Law

6. The Committee has continued efforts to advance both the profession's and the public's understanding of the importance of the rule of law. Its primary activities to this end have been undertaken through the continuation of a yearly lecture series and high school essay contest.

a. Rule of Law Lecture Series

7. The Committee hosted the Law Society's second annual Rule of Law Lecture Series on June 7 at the UBC Downtown campus. The Lecture, which was entitled "The Rule of Law and Social Justice", included presentations by The Honourable Ian Binnie, who served as a Justice of the Supreme Court of Canada for nearly 14 years, Dr. Catherine Dauvergne, Dean of the Peter A. Allard School of Law at UBC, and Jonathan Kay, a Canadian journalist who previously practised law in New York City.

8. The Lecture was attended by approximately 170 people. This year, a decision was made to webcast the event live. A few people did attend the event through the webcast, and more advertising for next year of this alternative will be considered. A video of the entire Lecture was posted on the Law Society website.

9. The event received many favourable comments from those attending. The Committee plans to undertake a third lecture series next year, and has started giving some attention to possible topics and speakers.

b. High School Essay Contest

10. The Committee completed its third essay contest for high school students. This year's topic was "How does social media interact with the Rule of Law?"

11. The contest was open to currently enrolled high school students in British Columbia who were taking or had taken Civic Studies 11 or Law 12.

12. A total of 49 essays were received. Judging of the essays was done by a panel comprised of Jeff Campbell QC, Jennifer Chow, QC and Professor Arlene Sindelar from the Department of History at UBC.

13. Presentations were made to the winner and the runner-up at the July 13, 2018 Bencher meeting. Their essays are published on the Law Society website at https://www.lawsociety.bc.ca/our-initiatives/rule-of-law-and-lawyer-independence/secondary-school-essay-contest/.

14. The Committee has started the planning process for next year's contest. The essay question is:

> How would you explain the concept of the rule of law to a new classmate who recently arrived in Canada? Please provide examples of its application to our daily lives, which may include a discussion of any current challenges or threats to the rule of law.

Details about the contest are posted on the Law Society website and materials have been circulated and publicized via numerous educational organizations.

II. Public Commentary on the Rule of Law

15. In mid-2015, the Benchers approved the Committee's proposal that it publicly comment on issues relating to the Rule of Law. The recommendation resulted from the Committee's conclusion that, in the course of undertaking its monitoring function, it often identifies news stories or events that bring attention to the rule of law, or lack thereof, and exemplify the dangers to society where it is either absent, diminished or, perhaps, threatened, from which the Committee could usefully select appropriate instances for comment.

16. A number of controversial and sensitive issues have arisen this year relating to the rule of law that include matters relating to the criminal justice system, contempt of court, and civil disobedience. The Committee has, for the most part, been cautious not to weigh in with public commentary unless it is appropriate and prudent to do so. Instead, the Committee primarily focussed on examining proposed legislative initiatives and has proposed responses to some of the problems identified, including concerns about the amendments to the Civil Resolution Tribunal (more on this below). It has also considered commentary with respect to the defiance of court orders regarding the injunctions relating to the Trans Mountain Pipeline.

III. Meetings with Other Groups

17. The Committee met in May with a representative of the CBA National Criminal Law Section. The Committee was informed about some concerns with Bill C-75 (An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts). The proposed scheme aims to address issues relating to court delay and jury selection, and is drafted largely in response to recent Supreme Court of Canada cases that touch on those issues. While many of the concerns that were raised by the CBA may be legitimate, the Committee felt that most of them were not rule of law or lawyer independence issues.

18. A possible exception, however, is the omnibus nature of Bill C-75, which obscures many of its details, thereby making proper legislative review and debate implausible. As noted by Professor Adam Dodek, omnibus bills are problematic as they expose a conflict between

parliamentary sovereignty and separation of powers.[2] This point is illustrated by the fact that, notwithstanding the intrinsic obscurity of omnibus bills, the courts have been unwilling to interfere with parliamentary processes. Thus, given the reluctance of the courts, the Committee is not taking any action at this time. Nevertheless, the Committee will continue to monitor the issue and will keep apprised of any pertinent action that is taken by the CBA National Criminal Law Section.

IV. Amendments to the Civil Resolution Tribunal Amendment (Bill 22)

19. The Committee prepared a letter, for the President's signature, to the Premier and Attorney General concerning Bill 22, which received royal assent. The Bill, which amends the *Civil Resolution Tribunal Act*, passed very quickly, with minimal opportunity for public consultation. The letter pointed out how the Bill's proposal to increase the tribunal's jurisdiction to handle MVA claims produces a perception of conflict of interest. Specifically, the Attorney General, who oversees ICBC, and who has expressed a desire to reduce that entity's MVA damage payouts, is responsible for appointing the tribunal members. This creates a risk in that tribunal members could be seen as trying to advance the government's agenda. Such a perception could erode public confidence in the administration of justice.

20. The Committee received a letter from the Attorney General in response. In his reply, the Attorney General defended the legislation, asserting that the scheme includes adequate safeguards that mitigate any concerns respecting conflict of interest and tribunal independence.

V. Amendments to Controlled Drugs and Substances Act (Bill C-37) and other Acts

21. The Committee prepared a letter last year to the Minister of Health and the Chair of the Senate Standing Committee on Legal and Constitutional Affairs concerning proposed revisions to the *Customs Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* that would permit the opening of routine correspondence including privileged correspondence. The Committee pointed out how this could adversely affect solicitor-client privilege and urged reconsideration of the proposed amendments, or at least that provisions be included in the legislation that will create a constitutionally accepted method to preserve solicitor-client privilege and ensure that it is not even accidentally violated.

22. Earlier this year, the Committee received a letter from the Minister in response, which stated that border officers must have reasonable grounds to open any mail and that they use a variety of risk assessment techniques to make such determinations. The Committee decided to take no further action at this point, but maintained that it would examine the matter again should further issues arise.

---

[2] Dodek, Adam, *Omnibus Bills: Constitutional Constraints and Legislative Liberations*, December 12, 2016

VI. Safeguarding Lawyer Independence when Practising in Foreign Nations

23. In light of the many articles the Committee monitored concerning the state of the rule of law and related issues in various countries, the Committee discussed the risks of professional values being compromised where law firms open offices or otherwise operate in foreign nations. The Committee noted that the Solicitors Regulation Authority of England and Wales has developed principles relating to the practice of law by English lawyers in foreign countries.

24. The Committee recognised, however, that there are relatively few BC lawyers working abroad and that there do not appear to be any significant issues arising on this particular aspect of practice in a foreign jurisdiction. In light of this, the Committee will monitor the issues and will only take action if an incident emerges.

VII. Amendments to the Access to Information Act and Privacy Act (Bill C-58)

25. The Committee prepared a letter for signature by the President to the Treasury Board President and the Chair of the Standing Committee on Access to Information, Privacy and Ethics. The letter outlined concerns regarding proposed amendments that would require disclosure of information relating to judicial expenses of individual judges. While recognizing the need for transparency, the Committee was concerned that such provisions were an infringement on judicial independence. Furthermore, such disclosure could trigger unwarranted criticism of judges, who have limited ability to defend themselves.

26. The Chair of the Standing Committee on Access to Information, Privacy and Ethics sent a response letter, which the Committee views as largely unresponsive. The Chair of the Standing Committee advised our Committee to forward its concerns to the Senate as Bill C-58 was about to shift over to that chamber.

27. The Committee prepared a new letter for signature by the President that was sent to the Standing Senate Committee on Legal and Constitutional Affairs. However, the Committee has yet to receive a response. Bill C-58 passed second reading and is still being reviewed by the Standing Senate Committee on Legal and Constitutional Affairs.

VIII. Meaning of the Rule of Law in Connection with the Law Society Mandate

28. The Committee has previously identified that section 3 of the *Act* engages the Rule of Law. The Committee believes that a statement of principle could clarify the meaning and practical implications of Section 3, while also taking adequate account of the relationship between the Law Society's mandate and the Rule of Law. The topic was discussed at the May 2015 Benchers Retreat, particularly in the context of how the provisions of section 3 – and particularly s. 3(a) – inform the Law Society's activities, by examining developments in access to justice, exploring the scope of directives that the section presents, and discussing opportunities to advance the objectives of the section.

29. Improving the Law Society's public communication on the importance of the rule of law is one aspect of advancing the public interest in the administration of justice and thereby discharging the object and duty of section 3. There are, however, other considerations that can be given to this section.

30. Before finalizing an opinion, the Committee awaited the release of the Supreme Court of Canada decision in *Trinity Western*. This is because the Committee expected the judgment to provide further interpretation of section 3, which the Committee could then incorporate into its recommendations.

31. After reviewing the *Trinity Western* decision, the Committee completed a discussion paper that reflects its consideration of how s.3 should be interpreted when contemplating that section in support of Law Society initiatives. The discussion paper will be presented at the December 7, 2018 Bencher meeting.

IX. Professional Governance Act (Bill 49)

32. The Committee is monitoring the progression of Bill 49, which recently passed second reading in the legislature. The proposed Bill seeks to create an Office of the Superintendent of Professional Governance, whereby the Superintendent would oversee the following self-regulatory bodies: British Columbia Institute of Agrologists, Applied Science Technologists and Technicians of British Columbia, College of Applied Biology, Engineers and Geoscientists of British Columbia and Association of British Columbia Forest Professionals.

33. While Bill 49 does not immediately affect the governance of the legal profession, it creates a framework that includes that possibility at some future date. The Committee, and the Law Society in general, have historically advanced the position that a loss of self-governance can adversely affect lawyer independence, and thereby impair the rule of law. The Bill deserves special attention in this regard.

X. Developing Issues

34. The Committee continues to review items that appear in media reports that express concerns about the rule of law domestically and internationally. There are many issues that arise, such as social media as a court of public opinion, online privacy and state surveillance activities. Unbridled surveillance poses a particular risk to the rule of law and the Committee continues to monitor that issue closely and with concern. Concerns also continue to arise internationally where attacks on the credibility and/or rights and freedoms of lawyers, judges and independent law enforcement agencies appear to be accelerating.

The Law Society of British Columbia

Year End Report

Equity and Diversity Advisory Committee

November 14, 2018

Jasmin Ahmad (Chair)
Brook Greenberg (Vice Chair)
Jennifer Chow, QC
Tina Dion, QC
Jamie Maclaren, QC
Linda Parsons, QC
Elizabeth Rowbotham
Karen Snowshoe
Guangbin Yan

Prepared for: Benchers

Prepared by: Equity and Diversity Advisory Committee

Purpose: For information

Introduction

1. The Equity and Diversity Advisory Committee is one of the 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 analyze policy implications of Law Society initiatives, and may be asked to develop the recommendations or policy alternatives regarding such initiatives.

2. The purpose of this report is to update the Benchers about the work the Committee has undertaken since its mid-year report.

3. The Committee met on July 12, September 20, and November 8, 2018. The Committee has discussed the following matters between July and November, 2018.

Justicia

4. The Justicia Project (facilitated by the Law Society of British Columbia and undertaken by law firms) has been actively underway in British Columbia since 2012. Representatives from the Justicia firms have developed model policies, best practice guides, and video vignettes which are available on the Law Society's website.

5. Outreach to promote the use of the Justicia resources continues. To that end, Law Society staff presented the model policies on parental leave and flexible work arrangements to representatives of the Crown Prosecution Service on September 28, 2018, and a Bencher (Pinder Cheema, QC) presented on the Law Society's initiatives to support women in the legal profession, including Justicia, at the CBA BC Women Lawyers Forum Annual General meeting on October 30, 2018.

6. Representatives from the law firms participating in the Justicia Project will meet on November 23, 2018 to discuss next steps for 2019.

Maternity Leave Benefit Loan Program Review

7. The Maternity Leave Benefit Loan Program was implemented as a pilot project in 2010, on the recommendation of the Committee, to help alleviate the disproportionate number of women who leave private practice after having children. The Committee has developed a survey to gather feedback from users of the Program, with a view to improving the Program. The Committee has submitted a draft survey for consideration by the Executive Committee. If approved, the survey will be sent to Program users in the new year.

Fostering Equity and Diversity in Law Society Leadership

8. This Committee is preparing a memo containing recommendations to foster equity and diversity in Law Society leadership roles for consideration by the Governance Committee. The aim is to finalize the recommendations before the December 6, 2018 Equity and Diversity Committee meeting, so that the recommendations can be considered by the Governance Committee in the new year.

Admissions Program Survey

9. Pursuant to the Strategic Plan, the Lawyer Education Advisory Committee is currently conducting a comprehensive review of the Articling Program. This review will include an anonymous survey of all newly called lawyers (called between 2015 and 2017) to learn more about their recent experiences in the Articling Program.

10. The Lawyer Education Advisory Committee invited the Equity and Diversity Committee to provide substantive feedback on the equity and diversity aspects of the Admissions Program Review survey. The Equity and Diversity Advisory Committee assisted in the development of survey questions that explore respondents' experiences with discrimination, bullying, and harassment during articles. Demographic questions were also vetted by the Equity and Diversity Committee. The survey will be launched by the Lawyer Education Advisory Committee in the new year.

Contextual Factors in Credentials Assessments

11. The Committee considered the Law Society of BC's current process for assessing the credentials of new lawyers and reinstatement candidates. The Committee acknowledged that the current process is focused on contextual factors, and therefore facilitates the consideration of systemic barriers during credentials assessments. The Committee stressed the importance of ensuring that Credentials Committee members and Law Society staff are sufficiently trained to identify and understand systemic factors that may be relevant to credentials assessments.

12. To that end, Alden Habacon will be providing subconscious bias training to tribunal members on December 5, 2018. During the session, the video "But I was Wearing a Suit," co-developed by the Truth and Reconciliation Advisory Committee and Continuing Legal Education Society of BC, will also be shown.

13. The Committee has offered to collaborate with the Truth and Reconciliation Advisory Committee on the systemic review of the Law Society's *Act*, Rules, Code, policies, and procedures – envisaged in the Law Society's Truth and Reconciliation Action Plan.

Advocate Magazine

14. The Committee intends to meet with the editors of *Advocate Magazine* to encourage greater diverse representation on the magazine's covers. Law Society staff is in the process of setting up a meeting with the editors to discuss the issue further.

The Law Society of British Columbia

Lawyer Education Advisory Committee 2018 Year-End Report

Dean Lawton, QC (Chair)
Sarah Westwood, (Vice Chair)
Barbara Cromarty
Celeste Haldane
Michael Welsh, QC
Rolf Warburton

December 7, 2018

Prepared for:	Benchers
Prepared by:	The Lawyer Education Advisory Committee
Purpose:	Information

Introduction

1. The Lawyer Education Advisory Committee's Year-End Report to the Benchers summarizes the Committee's work in 2018, with a particular focus on the work undertaken since the July 2018 Mid-Year report.

2. The foundation for the Lawyer Education Advisory Committee's work is directed by section 3 of the *Legal Profession Act*:

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

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

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

3. The Law Society's 2018-2020 Strategic Plan includes the following goals specifically relating to the work of the Lawyer Education Advisory Committee:

> **We will ensure, bearing in mind the mobility of lawyers within Canada, that the Admission Program remains appropriate and relevant by**
>
> • Examining the availability of Articling positions and develop a Policy and proposals on access to Articling positions and remuneration.
>
> • Examining the effectiveness of Articling and develop proposals for the enhancement of Articling as a student training and evaluation program.
>
> • Examining alternatives to Articling.

4. The Lawyer Education Advisory Committee's progress in achieving these strategic goals in the latter half of 2018 is detailed below.

Articling Program review

5. Pursuant to the Strategic Plan, the Lawyer Education Advisory Committee is currently focused on a comprehensive review of the Articling Program. This review includes an evaluation of a broad range of issues related to the structure, functionality and

effectiveness of the Articling Program and a consideration of potential modifications to the existing scheme.

6. The Lawyer Education Advisory Committee began this work by developing the Admission Program Review Research Plan (the "Research Plan") earlier this year. The Research plan, which includes articling as its primary focus, identifies critical research questions in relation to four key areas:

    a. the availability of articling positons;
    b. remuneration for articling;
    c. the quality of the Articling Program; and
    d. the effectiveness of the Admission Program, in particular the articling component.

7. The Research Plan also identifies methods for collecting information and data that will answer research questions in each of these four key areas. These methods include an initial focus group, an anonymous survey of one, two and three year calls, and possible subsequent focus groups depending on the results of the survey data analysis.

8. The first stage of survey development involved holding a focus group in Vancouver comprising six lawyers called to the bar in the past three years. The focus group was well-balanced in terms of representation across ages, genders, cultural backgrounds, National Committee on Accreditation and Canadian law school graduates, year of call, firm size and firm type.

9. The goal of the focus group was to obtain, through a series of open-ended questions, participants' reflections on issues, concerns, experiences and general observations relating to each of the four areas identified in the Research Plan.

10. The focus group session resulted in a large body of information that subsequently informed the development of the survey, which has been designed to elicit information in relation to the areas of inquiry set out in the Research Plan. The questions were carefully constructed and reviewed by staff over the course of several months to ensure that the qualitative and quantitative data being sought will adequately answer the research questions.

11. In response to the Equity and Diversity Advisory Committee's request to receive updates and collaborate on any equity and diversity issues related to the review of the Articling Program, survey questions exploring respondents' experiences with discrimination, bullying and harassment, including sexual harassment, during their articles were shared with and considered by that Committee. Demographic questions were also reviewed by the Equity and Diversity Advisory Committee.

12. Similarly, the Mental Health Task Force provided commentary on the survey questions that explore respondents' concerns in relation to stress, mental health and substance use issues, and the accessibility and use of related support resources. The Credentials Committee has also been briefed on the design and development of the survey.

13. Prior to finalization, the survey was tested by focus group participants who were asked to provide feedback on its substantive content, clarity and functionality. This pre-testing, an important aspect of survey design, informed further revision to the survey prior to finalization.

14. Following approval by the Executive Committee, the survey will be sent to all one, two and three year calls in early 2019.

Eligibility of pro bono activities for CPD credit

15. In December 2018, as part of its final CPD report, the Lawyer Education Advisory Committee recommended against the accreditation of pro bono activities for CPD credit. This recommendation was not approved by the Benchers at that time, and was sent back for further consideration by the "appropriate Committees."

16. Having already considered the merits of providing CPD credit for pro bono work, the Lawyer Education Advisory Committee determined that it should refer the matter to the Access to Legal Services Advisory Committee (the "Access Committee"). Specifically, the following questions were referred:

    a. Whether pro bono work should be granted CPD credit and if so, how this meets the goals of the CPD program and/or improves access to justice.

    b. If the answer to the first question is "yes", what type and amount of pro bono work should be eligible for credit and how should such work be verified?

17. Due to a lack of consensus, the Access Committee did not make a recommendation to the Lawyer Education Advisory Committee, but provided the Committee with a memorandum summarizing arguments both for and against granting CPD credit for pro bono work.

18. In September, the Lawyer Education Advisory Committee reviewed the materials provided by the Access Committee, as well the large body of information it had previously considered on the issue over the past two years, including numerous memoranda, academic articles and the responses to the pro bono question in the 2016 CPD Survey.

19. Staff also had discussions with the Law Society of Ontario and the Law Society of Saskatchewan as the result of their inquiring about the issue of granting CPD credit for pro bono in BC.

20. The Lawyer Education Advisory Committee's final recommendation to the Benchers regarding the eligibility of pro bono work for CPD credit will be circulated to the Benchers for discussion in early 2019, and for decision at a subsequent meeting.

TRC Calls to Action

21. Over the past two years, both the Lawyer Education Advisory Committee and the Truth and Reconciliation Advisory Committee have independently discussed whether and how the CPD program might advance the Law Society's commitment to the TRC Calls to Action, specifically Call to Action #27:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal – Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

22. The Lawyer Education Advisory Committee's work in this area has primarily focused on considering potential changes to the CPD eligibility criteria.

23. In particular, in 2017 CPD credit eligibility was expanded to include programming that addresses "multicultural, diversity and equity issues that arise within the legal context." The new subject matter "educational activities that address knowledge primarily within the practice scope of other professions and disciplines, but are

sufficiently connected to the practice of law" was also included for CPD credit eligibility, resulting in a number of topics that fall within the ambit of Call to Action #27 becoming eligible for credit. Educational programs addressing substantive law on issues such as treaties, Aboriginal rights, title and governance, legislation and international legal instruments related to Aboriginal people also continue to be accredited.

24. In its 2017 Final CPD Review Report, the Lawyer Education Advisory Committee observed that despite the recent changes to the CPD program, more Committee work needs to be done in relation to the Calls to Action, and that this work must be in co-ordination with the Truth and Reconciliation Advisory Committee ("TRC Advisory Committee").

25. In September 2018, the Lawyer Education Advisory Committee proposed a joint meeting of the two Committees. It is anticipated that a joint Committee meeting will be held early in the new year, once the composition of the 2019 Committees has been finalized.

Future work

26. In early 2019, the Lawyer Education Advisory Committee will continue to advance its work in the key areas identified in this report. Areas of focus will include:

    a. Finalizing work on the eligibility of pro bono service for CPD credit
    b. Disseminating the Admission Program Review Survey to all 1, 2 and 3 year calls, and analyzing the results of the survey
    c. Conducting additional focus groups and possibly individual interviews to explore, in depth, some of the themes emerging from the survey
    d. Addressing other aspects of the Admission Program Review Research Plan
    e. Organizing a joint meeting between the TRC Advisory Committee and the Lawyer Education Advisory Committee regarding the role of lawyer education in advancing the TRC Calls to Action
    f. Collaborating with the Mental Health Task Force with respect to the role of CPD in supporting the mental health of lawyers.

The Law Society of British Columbia

Year-End Report 2018

Committee: Legal Aid Advisory Committee

Nancy Merrill, QC (Chair)
Rick Peck, QC (Vice-Chair) (Life Bencher)
Christopher McPherson, QC
Phil Riddell
Sarah Westwood
Gary Bass
Odette Dempsey-Caputo
Richard S. Fowler, QC

December 6, 2018

Prepared for:	Benchers
Prepared by:	Legal Aid Advisory Committee
Staff Support:	Michael Lucas, Aaron Bockner, Doug Munro
Purpose:	Information

Table of Contents

Introduction

1. The purpose of this report is to provide the Benchers with an update on the work of the Advisory Committee for the second half of 2018.

Research

2. The Committee's mandate includes exploring research opportunities that might bolster the case for increasing legal aid funding.

3. In its 2017 year-end report, the Committee provided a detailed overview of its meetings with Associate Professor Yvonne Dandurand, Vivienne Chin, and Mark Benton, QC on the topic of economic analysis research.

4. In 2018 the Committee engaged Professor Dandurand to perform a preliminary research project, to identify the existing data and the parameters for what a fully realized economic analysis project would entail. The ultimate object is to have data to better support advocacy efforts for increasing funding for legal aid. Professor Dandurand met with the Committee on November 8, 2018 to discuss his findings.

5. There is a scarcity of quality data at this point to support a broad economic analysis on legal aid. This is so for several reasons. While a considerable amount of information is collected by government, the courts and Legal Services Society, that information is not necessarily compiled into useful data sets. Data is lacking on how the presence of a lawyer impacts outcomes, both in the short term (e.g. with respect to disposition) and in the long term (e.g. what are the ongoing impacts for those involved who had counsel as compared to the ongoing impacts for people who did not have counsel).

6. Professor Dandurand discussed two types of research projects that might be explored. The first would be based on a survey of court files and users of the system in order to try and compile data that fleshed out some of the unknown information about how the use of legal aid impacts the proceeding and the long term outcomes. Such a study would be time consuming and costly, and faces some potential barriers regarding access to government and court information. It also faces the challenge that by the time it is complete (perhaps a matter of years) the data might become stale. The alternate concept is to use the Law Society's standing in the legal community to make the case to government, the courts and the Legal Services Society on the need to collect data that better supports an economic and social return analysis of the services and systems people use.

7. The Committee is in the process of discussing the options provided by Professor Dandurand.

8. As part of its general monitoring function, the Committee has also spoken with Mr. Benton about possible research by The World Bank titled (in draft) *Identifying Economic Benefits of Legal Aid Service Delivery* (September 10, 2018)[1], and reviewed a series of principles for legal aid, written by the International Bar Association. The IBA principles contain 27 recommendations regarding legal aid, broken into three main headings: 1) *Funding, Scope and Eligibility;* 2) *The Administration of Legal Aid*; and 3) *The Provision of Legal Aid.* While the authors do not expect every principle can be applied in every jurisdiction, the intention was to create principles that can be considered when establishing or reforming legal aid systems. The first principle is premised on the notion that legal aid generates both social and economic benefits, and this dovetails with the discussions the Committee has had regarding possible economic analysis research. The Committee will give consideration to the principles, as applicable, while carrying out its work.

Communications

9. The Committee discussed how its work on supporting a strong legal aid system in BC might fit within the Law Society's broader communication plan.

10. The Committee anticipates continuing this discussion at its December meeting to better determine what content it can provide to fit within an organizational communications strategy. To date, the Committee has been considering in general terms how to tell the stories of the people affected by legal aid, being recipients, those who exist on the margins of eligibility and lawyers who make it part of their practice.

Second Colloquium on Legal Aid

11. The main focus of the Committee in 2018 has been on hosting the Law Society's second legal aid colloquium. Mr. Riddell suggested the concept for the 2018 colloquium, and shared the idea with the Benchers earlier this year.

12. The colloquium brought together over 40 people from diverse backgrounds. Participants from across the province attended, both in traditional legal service roles such as judges, lawyers and government, and non-traditional legal services roles, such as representatives of groups who serve clients that interact with the legal aid system. These groups included Indigenous support services, transition houses, mental health and addictions, Immigration groups, users of legal aid, self-represented litigants, prison system representatives, the police, women's support services and the like.

---

[1] The World Bank has not, yet, developed a draft for citation and attribution, so the Committee is not yet relying on preliminary work to inform its own deliberations.

13. The purpose was to hear from people who might have a different take on the current state of legal aid as well as what is required. The role of the Law Society, beyond hosting, was to listen and reflect on what it learned in order to refine the institutional thinking on legal aid, and finding effective ways to champion legal aid. Justice Bruce Cohen kindly acted as moderator of the event.

14. The presentations and discussion were informative and constructive. Not surprisingly, each speaker recognized the pressing need for greater legal aid funding, but the conversation was broader than that well-known theme. Speakers highlighted the unique vulnerability of many people who rely on a strong legal aid system to realize justice: immigrants and refugees struggling with language, cultural and eligibility barriers; women and children who are living under the ever-present threat of family violence; prisoners, cut off from access to information services each of us take for granted, every aspect of their lives dictated by the State; police who struggle to balance their mandate to serve and protect, with the complex realities of poverty, mental illness and addiction they confront every day; self-represented litigants, well-educated and in the middle class whose economic resources are insufficient to retain counsel to the conclusion of disputes, when those disputes must proceed through an complex, slow, adversarial system.

15. The Colloquium reminded the Committee that at the root of access to justice problems are societal problems. Addressing these problems requires society being able to articulate what our shared values are, and finding ways to quantify those values in a manner that invites the government (and in particular the Ministry of Finance) to conclude that legal aid is not a cost, it is an investment.

Looking Ahead

16. The Committee will continue its efforts to advance the creation of data that better supports the economic value of legal aid, and discuss ways to link that to developing the Law Society's narrative for properly funding legal aid. This work will be approached in a fashion to assist the Law Society in making submissions to government regarding the next Provincial budget.

/DM&ML&AB

The Law Society of British Columbia

Year-End Report

Truth and Reconciliation Advisory Committee

November 19, 2018

Chief Ed John (Co-Chair)
Nancy Merrill, QC (Co-Chair)
John Borrows
Craig Ferris, QC
Dean Lawton, QC
Claire Marshall
Michael McDonald, QC
Ardith Walkem, QC

Prepared for: Benchers

Prepared by: Truth and Reconciliation Advisory Committee

Purpose: For information

Introduction

1. The Truth and Reconciliation Advisory Committee ("Committee") is one of the 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 analyze policy implications of Law Society initiatives, and may be asked to develop the recommendations or policy alternatives regarding such initiatives.

2. The purpose of this report is to update the Benchers about the work the Committee has undertaken since its June 2018 report.[1]

3. The Committee met on July 12, September 20, and November 8, 2018. The Committee has discussed the following matters between July and November, 2018.

Benchers' Retreat

4. At the direction of Nancy Merrill, QC (currently the First Vice President of the Law Society and a Co-Chair of the Truth and Reconciliation Advisory Committee), the 2018 Benchers' Retreat focused on truth and reconciliation. The Retreat featured two keynote speakers. The first, Dr. Jeannette Armstrong (Canada Research Chair of Indigenous Knowledge and Philosophies), provided an overview of the Syilx Okanagan legal system. The second, Dr. Marie Wilson (former Commissioner of the Truth and Reconciliation Commission), shared some of the insights she had gained from the experiences that residential school Survivors had shared with the Truth and Reconciliation Commission. The Benchers also participated in a Blanket Exercise that was facilitated by Ardith Walkem, QC (a Truth and Reconciliation Advisory Committee member). The Blanket Exercise covered over 500 years of history regarding Indigenous and colonial relations in a 2 hour participatory workshop.

Truth and Reconciliation Action Plan

5. The Committee developed a truth and reconciliation action plan that was unanimously endorsed at the July 13, 2018 Bencher meeting.

6. The Committee is now in the process of clarifying a work plan to strategically implement the action plan.

7. The Committee has discussed the possibility of creating four subcommittees to work independently on four topics: 1) Indigenous intercultural competence standards – for the

[1] The Truth and Reconciliation Advisory Committee's mid-year report was submitted for the June 2, 2018 Bencher meeting, to coincide with the Benchers Retreat that focused on the Law Society's role in truth and reconciliation.

Law Society and the legal profession, 2) Law Society engagement with Indigenous communities, 3) Law Society support for Indigenous lawyers and students, and 4) fostering Indigenous involvement in Law Society governance. Each subcommittee would consist of one Bencher and one non-Bencher.

Indigenous Scholarship

8. The 2018 Indigenous law scholarship was awarded to Christina Gray, an Indigenous LLM student attending the University of Victoria, whose research will focus on Indigenous laws with respect to human rights.

Intercultural Competency Standards

9. The Committee has had preliminary discussions regarding principles for intercultural competency, and has reached out to the Lawyer Education Advisory Committee to invite collaboration about the role of lawyer education in improving intercultural competency. In September 2018, the Lawyer Education Advisory Committee proposed a joint meeting of the two Committees. It is anticipated that a joint Committee meeting will be held in the New Year, once the members of the 2019 Committees have been finalized.

Intercultural Competence Training

10. Cultural competence training for Law Society staff continues. In recognition of National Indigenous Day on June 21, 2018, 50 Law Society staff members viewed the film “But I was Wearing a Suit” (co-developed by the Law Society and CLE BC). The screening was followed by a facilitated discussion.

11. The Committee continues to discuss potential intercultural competence training topics and speakers to present to the Benchers. The Committee intends to invite an expert present on *Gladue* principles in the near future.

Contextual Factors in Credentials Assessments

12. The Committee considered the Law Society of BC’s current process for assessing the credentials of new lawyers and reinstatement candidates. The Committee acknowledged that the current process is focused on contextual factors, and therefore facilitates the consideration of systemic barriers during credentials assessments. The Committee stressed the importance of ensuring that Credentials Committee members and Law Society staff are sufficiently trained to identify and understand systemic factors that may be relevant to credentials assessments.

13. To that end, Alden Habacon will be providing subconscious bias training to tribunal members on December 5, 2018. During the session, the video "But I was Wearing a Suit," co-developed by the Truth and Reconciliation Advisory Committee and Continuing Legal Education Society of BC, will also be shown.

Indigenous Mentorship Program

14. The Committee is considering methods to increase participation in the Indigenous Mentorship Program, such as facilitating informal networking opportunities in various locations throughout the province, to reach Indigenous lawyers who are practicing outside of the Lower Mainland.

Code of Professional Conduct

15. The Committee intends to collaborate with the Ethics Committee to review of the Code of Professional Conduct for British Columbia with the objective of identifying and clarifying provisions that may involve Indigenous issues.

Justice Summit

16. Representatives from the Truth and Reconciliation Advisory Committee participated in the Tenth BC Justice Summit on June 1 and 2, and November 2 and 3, 2018. The Tenth BC Justice Summit marked the first time that justice system leaders and Indigenous peoples have come together with the sole focus of considering the Indigenous experience of the justice system in British Columbia. The 2018 Justice Summits were designed to identify and accelerate real, transformative changes to the justice system in BC that will benefit Indigenous people, and the Law Society is honoured to have a role in this work.

Blanket Exercises

17. The Committee has discussed the possibility of the Law Society hosting a "train the trainers" session to encourage lawyers from around the province to learn how to facilitate Blanket Exercises (described above). The trained facilitators could then conduct Blanket Exercises, free of charge, to lawyers outside of the Lower Mainland.

18. The Blanket Exercise was initially developed by Kairos (a religious organization) in collaboration with Indigenous Elders and knowledge holders as an educational tool following the 1996 Royal Commission on Aboriginal Peoples. For over two decades, it was promoted as a "do-it-yourself" model, with online resources to enable individuals to facilitate Blanket Exercises.

19. Using a template from the do-it-yourself model, the content of the script was extensively edited by professors Dr. Hadley Friedland and Dr. Val Napoleon to focus on the legal history of Canada, and to incorporate Indigenous laws into the script. That script was again extensively edited by Ardith Walkem, QC (Truth and Reconciliation Advisory Committee member), Andrea Hilland (Law Society staff lawyer), Teresa Sheward (Program Lawyer with CLE BC), and Halie Bruce (an Indigenous lawyer), to specifically address the legal history of British Columbia.

20. As of June 24, 2018, Kairos has introduced a new policy that purports to require a memorandum of understanding and an annual licensing fee to deliver the Blanket Exercise.

21. The Committee has requested a legal opinion on the copyright issue prior to proceeding with the proposed "train the trainer" sessions.

Federation of Law Societies TRC Advisory Committee

22. The Federation of Law Societies' Truth and Reconciliation Committee held a teleconference on November 6, 2018. The Federation's Committee has devised a draft plan for engaging with the academy on call to action 28, and there is a recommendation that all law schools in Canada should have a tangible response to call to action 28 in place by 2023.

23. The Federation's Committee continues to consider whether call to action 27 requires compulsory continuing professional development. The Federation's Committee has suggested that if there is a mandatory requirement, it will need to be broad and flexible rather than specific.

Outreach

24. In accordance with the Truth and Reconciliation Action Plan, the Law Society has undertaken the following outreach:

    a. A number of representatives from the Law Society attended the Assembly of First Nations national annual general assembly gala in Vancouver on July 26, 2018.

    b. Dean Lawton, QC was interviewed about the Law Society's Truth and Reconciliation Action Plan on August 1, 2018 by Radio NL (a radio station based in Kamloops, BC).

    c. On behalf of the Law Society of BC, Dean Lawton, QC and Karen Snowshoe attended the launch of the University of Victoria's Joint Canadian Common Law (Juris Doctor or JD) and Indigenous Legal Orders (Juris Indigenarum Doctor or JID) Program on September 25, 2018.

d. Law Society staff and a Bencher (Jamie Maclaren, QC) conducted a Blanket Exercise at the National Pro Bono Conference on October 5, 2018.

e. Ardith Walkem, QC (a member of the Law Society's Truth and Reconciliation Advisory Committee) co-chaired the CLE BC Indigenous Laws Conference on October 25-26, 2018. Law Society staff presented on Indigenous laws in the criminal law context, and a number of the Law Society's Truth and Reconciliation Advisory Committee members attended the conference.

f. Ardith Walkem, QC and Law Society staff presented on Indigenous legal responses to the Colten Boushie and Tina Fontaine verdicts at the Indigenous Bar Association Conference on November 2-3, 2018.

g. Representatives from the Law Society of BC attended the Justice Summit on June 1-2 and November 2-3, 2018. The Justice Summit was focused on Indigenous issues, including the overrepresentation of Indigenous people in the criminal justice system, the benefits of community processes for dispute resolution, and the need for more supports aimed at prevention.

The Law Society of British Columbia

Mental Health Task Force
2018 Year-End Report

Brook Greenberg, Chair
Michelle Stanford, Vice Chair
Christopher McPherson, QC
Carolynn Ryan
Derek LaCroix, QC

December 7, 2018

Prepared for: Benchers

Prepared by: Alison Luke on behalf of the Mental Health Task Force

Purpose: Information

Introduction

1. The Mental Health Task Force (the "Task Force") is responsible for coordinating and assisting the Benchers in implementing the Law Society's strategic goals in relation to improving the mental health of the profession, namely: reducing stigma around mental health and substance use issues and developing an integrated mental health review concerning regulatory approaches to discipline and admissions.[1]

2. This is the third in a series of reports drafted by the Task Force this year,[2] and provides an informational update on the work of the Task Force since July 2018.[3]

Discussion

First Interim Report

3. Over the last six months, the Task Force has prioritized developing recommendations for its First Interim Report, which was presented to the Benchers for discussion in November 2018.

4. Prior to convening a special meeting in late July to finalize an initial set of recommendations, the Task Force reviewed a large body of materials —including articles, studies, reports and notes from consultation sessions— that had been gathered and considered by the Task Force over the course of the first half of the year.

5. The Task Force determined that its initial set of policy recommendations would predominantly focus on educational initiatives that target Law Society staff,

[1] See Law Society of BC 2018-2020 Strategic Plan, online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf
[2] In July 2018, the Task Force released its Mid-Year Report, linked here: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2018MentalHealthTaskForceMidYearReport.pdf . In November 2018, the Task Force's First Interim Report was presented to the Benchers for discussion, linked here: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf
[3] Pursuant to section 3(b) of its Terms of Reference, the Task Force is required to produce a mid-year and year-end report to the Benchers on its activities.

members of the Discipline, Credentials and Practice Standards Committees and their associated hearing panels, as well as those involved in practice reviews, conduct meetings and conduct reviews.

6. The proposed educational initiatives are intended to improve awareness, knowledge, skills and access to resources related to mental health and substance use issues across the Law Society's various departments and processes.

7. Additionally, this approach provides an opportunity for the Law Society to demonstrate leadership within the profession with respect to addressing these issues.

8. The Task Force also developed a set of recommendations that consider how mental health and substance use issues affecting lawyers are most appropriately addressed in the regulatory context, with a focus on collaborating with other Law Society bodies, including the Law Firm Regulation Task Force, the Credentials Committee, the Lawyer Education Advisory Committee and the Ethics Committee.

9. Collectively, these recommendations served as the foundation for the Task Force's First Interim Report, which was drafted in September. The report underwent internal and external review prior being presented to the Benchers for discussion in November. Feedback on the report, both by Benchers and the broader legal community, has been overwhelmingly positive.

10. In December, the Benchers will be asked to adopt the 13 recommendations contained in the First Interim Report.

Feedback on the Admission Program Survey

11. Staff supporting the Lawyer Education Advisory Committee recently sought feedback from the Task Force on a series of proposed mental health questions included in a survey that will be sent to recently called lawyers as part of that Committee's review of the Articling Program.

12. The Task Force reviewed the questions, which explore students' experience with mental health, substance use and other wellness issues during their articles, as well as investigating students' awareness and use of related support resources, and suggested some minor modifications.

Consultation

13. The Task Force has also continued to engage in consultations with various stakeholders, experts and Law Society staff. Recent discussions included a meeting with Will Bailey, policy counsel supporting the Law Society of Ontario's ("LSO") Mental Health Strategy Implementation Task Force and Lisa Ostrom, LSO's Capacity Program Advisor.

14. During these meetings, the Task Force gained a deeper understanding of LSO's approach to managing capacity files, which frequently involve lawyers experiencing mental health and substance use issues. Information was also provided on the progress of LSO's Mental Health Strategy Implementation Task Force.

15. Building on previous consultations with the Law Society's Professional Responsibility Department and the Education and Practice Management Department, the Task Force met with the Trust Assurance Department and the Lawyers Insurance Fund to learn more about their education and training needs in relation to mental health and substance use issues.

16. The Task Force also met with Dr. Annie Rochette, Deputy Director of PLTC, to explore how the work of the Task Force might support her work in addressing mental health and substance use issues that arise during enrollment in PLTC.

17. The Task Force also learned more about the National Standard for Psychological Health and Safety in the Workplace from Hilary Stoddart, Manager of Human Resources at the Law Society, following her participation in intensive training on the Standard.[4]

Communications Strategy

18. The Task Force worked closely with the Communications Department to develop a preliminary communications plan for the Law Society's mental health initiative. This strategy includes, but is not restricted to, highlighting the work of the Task Force.

19. The proposed communication plan recognizes that having a public conversation about mental health and substance use within the profession is an essential

[4] The Standard, which is voluntary, outlines a systematic approach to developing and sustaining a psychologically healthy workplace, and can be implemented by organizations of all sizes. The Standard is supported by a large body of resources and references in relation to mental health and wellness issues in the workplace. For more details, see https://www.mentalhealthcommission.ca/English/what-we-do/workplace/national-standard

component of raising awareness of these issues and reducing stigma.

Training Program Design

20. As outlined above, the First Interim Report recommends that staff across a number of Law Society departments are provided with additional education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues. Members of a number of Law Society Committees and their associated hearing panels, as well as Benchers and non-Benchers involved in practice reviews, conduct meetings and conduct reviews will also receive additional training.

21. With the assistance of the Canadian Mental Health Association, the Task Force has developed a preliminary list of training opportunities that address many of the concerns and issues highlighted by staff in the course of their consultations with the Task Force. A cross-organization educational plan will be finalized following the approval of the Task Force's education-based recommendations.

Next Steps

22. The Task Force anticipates that its work in 2019 will comprise two areas of focus:

    a. overseeing the implementation of the 13 recommendations contained in the First Interim Report; and

    b. developing a second set of policy recommendations for Bencher approval.

23. With respect to implementing the Task Force's current recommendations, upcoming work will include:

    - providing guidance for the design of training programs that will support the implementation of Recommendations 2, 3, 4, 5 and 7 of the First Interim Report

    - overseeing the creation of a roster of mental health professionals to support the implementation of Recommendation 6 of the First Interim Report

- liaising with the Communications Department to ensure the communication plan is effective at raising the profile of mental health and substance use issues within the profession, including the availability of Practice Advisors for confidential consultations on these issues, to support the implementation of Recommendations 1 and 8 of the First Interim Report

- collaborating with the Law Firm Regulation Task Force, the Credentials Committee, the Lawyer Education Advisory Committee and the Ethics Committee with respect to recommendations related to the law firm regulation self-assessment process, the Admission Program application form, the CPD program and amendments to the *BC Code*, to support implementation of Recommendations 10, 11, 12 and 13 of the First Interim Report

- exploring alternate means for lawyers to learn about and contact LifeWorks, to support the implementation of Recommendation 9 of the First Interim Report

- continuing to build relationships with subject-matter experts, including the Canadian Mental Health Association and the BC Centre on Substance Use

24. With respect to the development of additional recommendations, the Task Force aims to expand its mental health review of the Law Society's regulatory approaches, including examining the development of a "diversion" or alternative disciplinary process for lawyers affected by mental health or substance use disorders, or modifying other aspects of the discipline process.

25. The Task Force will also consider, in consultation with subject-matter experts, a statement of best regulatory practices for dealing with mental health and substance use issues affecting lawyers.

26. Additionally, the Task Force will continue to explore the feasibility and advisability of a voluntary member survey to elicit more information about mental health and substance use issues affecting BC lawyers.

The Law Society of British Columbia

Memo

To: Benchers
From: Rule of Law and Lawyer Independence Advisory Committee
Date: November 1, 2018
Subject: Identifying Section 3 Parameters

Introduction

Section s of the *Legal Profession Act* states:

Object and duty of society

3 It is the object and duty of the [Law 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 of applicants for call and admission,
(d) regulating the practice of law, and
(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

At the 2015 Benchers Retreat in Kamloops, the Benchers focused on the meaning of s. 3, and particularly s. 3(a) of the *Legal Profession Act*. That topic also formed Initiative 3-2(a) of the Law Society's 2015 - 2017 strategic plan. Following the Retreat, it was agreed (and noted in the Strategic Plan) that the matter would be considered further by the Rule of Law and Lawyer Independence Committee in order to make a recommendation as to the scope and meaning of the section and how it could be incorporated into Law Society policy considerations.

The Rule of Law Committee has discussed the subject on several occasions following the Retreat. At the same time, the Committee began to formulate a process for public commentary on rule of law issues, with significant discussion about what sort of issues would be addressed.

The nature of topics on which the Law Society could focus was informed to a considerable degree by the discussion of the public interest and s. 3 at the Retreat. In particular, the Committee's consideration of the public interest and s. 3 assisted in determining the proper role of the Law Society in making public commentary about issues affecting the rule of law and the administration of justice.

The initiative about identifying some parameters around s. 3, and particularly s. 3(a), for general guidance of the Benchers and development of Law Society policy endured, and the Committee returned to it in the latter part of 2017.

Purpose

By addressing parameters around s. 3, the Committee was aiming to facilitate a framework that would aid the Law Society in applying the section in the Law Society's policy, or other public outreach work. Furthermore, the Committee believes that setting out agreed-upon parameters could help to make the Law Society's policy decisions more visible to the public. The policy objectives associated with this initiative are to enhance efficiency and transparency around discussions relating to initiatives based on section 3.

Before finalizing its deliberations, the Committee determined to await the decision of the Supreme Court of Canada in *Trinity Western University v. Law Society of British Columbia.* The *Trinity Western* decision informs the analysis of s. 3, as the Supreme Court itself outlined general principles regarding the role and function of law societies. The Committee concluded that the principles discussed by the Supreme Court should be used to guide the Law Society when undertaking policy or communication efforts that are informed by section 3.

Discussion

The language of section 3 clearly requires that the main consideration that must underlie Law Society action is that it considers, above all else, the public interest (and not the members', the law society's or any other party's interests) in the administration of justice. It is sometimes misunderstood that the Law Society operates for the benefit and protection of members. While supporting and assisting lawyers is clearly one of the duties of the Law Society in s. 3, this is set out in the context of fulfilling lawyers' duties in the practice of law, and is directly connected to the public interest.

In considering the public interest, the Supreme Court identifies out what can be viewed as pertinent. For example:

- Promoting equal access to justice;
- Establishing programs to improve diversity in the legal profession;

- Promoting a positive public perception of the legal profession and the justice system;
- Protecting the independence of the legal profession;
- Promoting respect for the law and the values that underpin it;
- Maintaining the rule of law.

These principles can be gleaned from specific parts of the majority judgments. For example:

At paragraph 40:

> "Upholding and maintaining the public interest in the administration of justice … necessarily includes upholding a positive public perception of the legal profession."

At paragraph 41:

> "… the LSBC, as a public actor, has an overarching interest in protecting the values of equality and human rights in carrying out its functions."

At paragraph 43:

> "… the LSBC was entitled to interpret the public interest in the administration of justice as being furthered by promoting diversity in the legal profession — or, more accurately, by avoiding the imposition of additional impediments to diversity in the profession in the form of inequitable barriers to entry. A bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public's confidence in same."

At paragraph 44:

> "The LSBC's statutory objective … entitles the LSBC to consider harms to some communities in making a decision it is otherwise entitled to make…"

At paragraph 46:

> "… administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority — and may look to instruments such as the Charter or human rights legislation as sources of these values, even when not directly applying these instruments…"

At paragraph 47:

> "… there can be no question that the LSBC was entitled to consider an inequitable admissions policy in determining whether to approve the proposed law school. Its mandate is broad. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to self-regulate in the public interest."

At paragraph 140:

> "As the collective face of a profession bound to respect the law and the values that underpin it, (the LSBC) is entitled to refuse to condone practices that treat certain groups as less worthy than others."

At paragraph 150:

> "The LSBC operates under a unique statutory mandate — a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination."

At paragraph 258:

> "It was … reasonable for the LSBC to conclude that its mandate included promoting equal access to the legal profession (and) supporting diversity within the bar …"

Moreover, considerable deference is owed to the Law Society when interpreting the public interest:

At paragraph 38:

> "… … the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar."

While the above statements might suggest that the Law Society has a "carte blanche" authority for defining and applying s. 3, the majority did pre-emptively qualify these comments at paragraph 34, stating that "the public interest is a broad concept and what it requires … depend(s) on the particular context." This affirms that no matter what general principles or parameters can be placed around s. 3, the Law Society needs to consider them on a case-by-case, or initiative-by-initiative basis.

The vision of the Law Society's mandate discussed in *Trinity Western* is expansive and supports the Benchers considering shared ideals including moral and social values in carrying out the mandate of the Law Society.

While the minority judgment is not, of course, a statement of the law, it may be useful to keep in mind some of the expressions of caution expressed in that judgment when relying upon s. 3 to support various actions of the Law Society.

At paragraph 286:

> "Section 3 does not grant the LSBC the authority to exercise its statutory powers for a purpose lying outside the scope of its mandate under the guise of 'preserving and protecting the rights and freedoms of all persons.' For example, the LSBC could not take measures to promote rights and freedoms by engaging in the regulation of the courts or bar associations, even though such measures might well impact "the public interest in the administration of justice.' These matters fall outside of the scope of its statutory mandate."

At paragraph 287:

> "It is the scope of the LSBC's statutory authority that defines how it may carry out its public interest mandate, not the other way around. Had the legislator intended otherwise, the rule-making powers at s. 11

> would have presumably provided the LSBC with broad discretionary power to make rules 'to uphold and protect the public interest in the administration of justice'."

At paragraph 288:

> "The LSBC does not enjoy a free-standing power under its "public interest" mandate to seek out conduct which it finds objectionable, howsoever much the "public interest" might thereby be served. Under the Rule, the LSBC can act in the public interest only for the purpose of ascertaining whether individual applicants are fit for licensing."

At paragraph 291:

> "The LSBC is not a roving, free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate."

Recommendation

After considerable discussion, the Committee concluded that it was best to avoid imposing restrictive parameters through which to apply s. 3 and to instead have regard to the broad principles stated by the Court in *Trinity Western.* In particular, it is best to avoid a prescribed definition of "public interest," because to do so could be unnecessarily restrictive and could prevent the Benchers the necessary latitude to consider what is required in the public interest as issues came up for consideration. The range of potential issues that could face the Benchers in carrying out their duties is vast and unpredictable. Attempting to exhaustively define the scope of s. 3 might preclude action being taken on future as yet unidentified subjects. This notion also corresponds with the majority in *Trinity Western*, which confirmed that an administrative law principle of broad deference applies insofar as the Law Society's authority to interpret section 3.

In a more comprehensive sense, however, the Committee agreed that "the public interest" means the interest of the public at large. In this sense, "what is best for society in general, in the context of the administration of justice" could be referenced as a starting consideration. While the interests of the legal profession will often coincide with the interests of society in general (given that a robust, independent legal profession is an important component of a society structured around the rule of law), it is to the *public* interest aspect of issues that the Law Society must have its primary focus. This is fairly well-settled and uncontroversial.

The Committee agreed that the language of s. 3 should be interpreted liberally, having regard to the principles stated by the Court in *Trinity Western*. Public interest provisions in statutes are generally to be given a "broad, purposive and liberal" construction. Consequently, the phrase "public interest in the administration of justice" should not be construed narrowly.

Conclusion

The above discussion reflects the Committee's consideration of how s. 3 should be interpreted when considering that section in support of Law Society initiatives. It is presented to the

Benchers for information and can be used as guidance on a case-by-case or initiative-by-initiative basis as needed to assist Benchers, Committees, Task Forces, Working Groups and staff when conducting activities that involve the interpretation and application of section 3, and in particular section 3(a), of the Act.