



Interim Report to Benchers

Legal Services Providers Task Force

Bruce LeRose, QC (Chair)
Ken Walker, QC (Vice-Chair)
Satwinder Bains
Godfrey Archbold
John Eastwood
Carmen Marolla
Kerry Simmons

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Prepared for: Benchers

Prepared by: Michael Lucas and Doug Munro
Policy and Legal Services Department

Purpose: Information

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Task Force Mandate

1. The Task Force is to consider whether the Law Society ought to regulate only lawyers in British Columbia or whether it should regulate other legal service providers. In particular, the Benchers said the Task Force should:
 1. consider previous work at the Law Society on the regulation of non-lawyers;
 2. consider and report on legal service regulatory regimes in other jurisdictions where the regulation extends to non-lawyers;
 3. consider and report on the implications for Law Society operations on regulating non-lawyers;
 4. consider and report on whether it is in the public interest that non-lawyer legal service providers be regulated and if so, whether it is in the public interest that the Law Society should be that regulator;
 5. consider and report on whether the recognition and regulation of non-lawyer legal service providers would improve access to law-related services for the public;
 6. make a recommendation to the Benchers about whether the Law Society should continue to regulate only lawyers in British Columbia or whether it should take steps to implement the regulation of other legal service providers.

Task Force Process

2. The Task Force is comprised of Bruce LeRose, QC (Chair), Ken Walker QC (Vice-Chair), Satwinder Bains, Kerry Simmons, John Eastwood, Carmen Marolla, and Godfrey Archbold.
3. The Task Force has to date met six times.
4. The Task Force agreed to report to the Benchers in mid-2013 to provide a status report on its work.
5. Before providing the background giving rise to this report, the Task Force sets out some key points to assist in understanding its approach to its mandate.
6. The Task Force has addressed items 1 and 2 of its mandate, and its work on those items is detailed in this and the following section. The purpose of the consideration of items 1 and 2 is to assist in analyzing the remaining mandate items.
7. The main focus of the Task Force's work to date has been on items 4 and 5 of its mandate. In this interim report, the Task Force sets out its analytic process and some discussion of these subjects. The Task Force is of the view that these are concepts that need to be fleshed out in the consultation process in order to be refined into conclusions.
8. The Task Force has not yet analyzed item 3 of the mandate. As is detailed in the "Next Steps" section of this report, it is expected that this operational analysis can begin in the second half of 2013 and this analysis may well continue into 2014 and beyond and will, the Task Force expects, require significant resource allocation.
9. The mandate requires the Task Force to consider whether the Law Society ought to regulate just lawyers or also other legal service providers. In its discussion the Task Force recognized that the scope of what is meant by "other legal service providers" needs to be considered. The Task Force did not consider it realistic that the Law Society would regulate immigration consultants who are already regulated by the Canadian Society of Immigration Consultants in an area of federal jurisdiction, or the accounting profession with respect the circumstances where accountants provide accounting-related legal services. Instead the Task Force chose to focus on whether the Law Society should regulate notaries, paralegals and potentially other categories of similar legal service providers. The Task Force also considered that if an expanded regulatory role was to occur, future expansion might be possible if the public interest required it.

10. The Task Force has heard a wide range of views about how to define the concepts in this report and whether conclusions could be drawn based on the research and discussion to date. This report is written in a manner to suggest that the issues the Task Force is grappling with are open for discussion and are not hard and fast conclusions.

Purpose of Report

11. The purpose of this interim report is to provide the Benchers with an update on the work of the Task Force and to set out a plan for moving forward with the work of the Task Force to enable it to provide its final report by December 2013. The report provides an opportunity for the Benchers to comment on the work of the Task Force to date and to provide any suggestions as the Task Force moves forward with its work.

Background

12. At the 2011 Benchers' retreat, the Benchers debated whether the Law Society should seek to expand the scope of who it regulates. In particular the Benchers debated whether the Law Society should confine its regulatory responsibilities to regulating only lawyers, or whether it should expand its responsibilities to include regulating non-lawyers. The Benchers did not reach a consensus as to the best approach. Rather, it was determined that the scope of Law Society regulation was worth exploring in the next Strategic Plan.
13. When the Benchers adopted the current Strategic Plan, they established as Initiative 1-1(c): "Examine whether the Law Society should regulate just lawyers or whether it should regulate all legal service providers." The Task Force was constituted to carry out this work.
14. In establishing the Task Force the Benchers took several developments into account.
15. For over a decade, the Society of Notaries Public of British Columbia has sought to increase the scope of practice of notaries public in British Columbia. It has also approached government seeking to modernize the Notaries Act. Representatives of the Society of Notaries Public, the Law Society of British Columbia and the Canadian Bar Association (BC Branch) met with officials at the Ministry of Justice to discuss these proposals. While the Attorney General did not ultimately act on the Society of Notaries Public's request, the Attorney General expressed the hope that the Notaries Society and the Law Society could work through issues relating to expanding the scope of practice for notaries and a regulatory model for legal service providers that best protects the public while improving access to justice. Consequently, when the Task Force was appointed, representatives from both the CBA BC and the Society of Notaries Public were included on it.
16. While the discussions about the Notaries Society's requests was occurring with the government, the Law Society was moving forward with its own reforms for expanding the permitted roles of articulated students and paralegals. The Delivery of Legal Services Task Force proposed a model of expanded roles for paralegals under the existing model of lawyer supervision. The topic of paralegal credentialing and regulation was left open for future discussion. Consequently, a representative from the British Columbia Paralegal Association was also appointed to the Task Force. The British Columbia Paralegal Association supports the Law Society's exploration of expanding its regulatory role to perhaps include credentialing and regulating paralegals.
17. Lastly, Godfrey Archbold, President of the Land Title and Survey Authority (LTSA) of British Columbia, was appointed to the Task Force to represent a perspective not

aligned to any one profession's interest in the subject. Mr. Archbold has spent much of his career with the British Columbia provincial government in a senior management and executive capacity and in his capacity as President of the LTSA has worked extensively with lawyers and notaries.

18. The Task Force has compiled a large volume of research, including materials the Law Society has developed over the past 25 years relating to paralegals and the regulation of the practice of law, as well as statistics, surveys, reports and academic articles from other jurisdictions.

19. Of particular importance, as a starting point, was "Towards a New Regulatory Model, the report of the Futures Committee" (January 30, 2008). That report was considered by the Benchers and was instrumental to the development of the Law Society's Strategic Plan of 2009 - 2011. The report states:

i. The strategic policy question is whether the current regulatory arrangements, in which lawyers have the exclusive right to practise law, facilitate or present a barrier to access to legal services and access to justice, or would the public have greater access to justice if some non-lawyers are permitted to provide some legal services? An ancillary question is who would regulate non-lawyers who provide legal services? If those questions are examined in a systematic and principled way, then the Law Society can either defend the status quo or advocate for progressive change on public interest grounds...The discussions in 2007 proceeded on the premise that a complete reservation of the practice of law to lawyers cannot be maintained. (p. 2)

20. The Task Force has also reviewed extensive core materials that set out the approach to regulation in British Columbia, Alberta, Ontario and Quebec. Jurisdictions outside of Canada that were considered include Washington State, Denmark and England and Wales.

21. The Task Force has engaged in some preliminary consultations to round out its analysis. This included meeting with Shelley Brown, Chair of the Canadian Institute of Chartered Accountants and co-chair of the Chartered Professional Accountants of Canada. Ms. Brown detailed the current initiative which is bringing the Chartered Accountants, Certified General Accountants and Certified Management Accountants under a single designation of Chartered Professional Accountants. The initiative seeks to harmonize standards of education and regulation and to streamline the number of regulatory bodies overseeing the delivery of accounting services. The initiative recognizes the evolution of the various accounting professions and how the public interest is better served by harmonizing standards. In addition, the professions

recognized the increasingly global nature of their practices and that Canada would fall behind if it maintained a patchwork of regulatory standards in the accounting world.

22. The Task Force also reviewed the Law Society's unauthorized practice program and analyzed the current scope of practice and regulatory structure of notaries public in British Columbia.
23. The Task Force has considered the decision by the Benchers to expand the scope of legal services that could be provided by paralegals as an important context for this report. The Task Force recognized that expanding the scope of practice of non-lawyers has always had two core elements: 1) the types of practices that non-lawyers should be permitted to perform; and 2) the type of regulation of non-lawyer legal service providers.
24. The work of the Task Force builds upon past work at the Law Society that recognizes that an expansion of legal practices by non-lawyers is worth pursuing but requires developing regulatory standards that properly protect the public. Before those regulatory standards can be developed, it is essential to determine which body (or bodies) is best suited to engage in the regulation of legal service providers.

Discussion

25. As noted, the Task Force worked through mandate items 1 and 2 as part of its background research and analysis. After its review of the previous examinations of this subject at the Law Society, and after a review of selected regulatory regimes concerning the legal profession of other provinces and countries, the Task Force has focused its efforts on mandate items 4 and 5:

Mandate item 4

Consider and report on whether it is in the public interest that non-lawyer legal service providers be regulated and if so, whether it is in the public interest that the Law Society should be that regulator.

How should “the public interest” be defined?

26. To advance item 4 of the mandate, the Task Force attempted to arrive at a working definition of what constitutes “the public interest.”
27. The Task Force attempted to develop a methodology for defining the “public interest” that takes into consideration the expectations the public has of: 1) the legal service provider, 2) the regulator, 3) how complaints and discipline are dealt with, and 4) the rule of law. The objective was not to arrive at operational processes for giving effect to the public interest. The objective was to arrive at overarching public interest values from which a regulatory structure could be established to give effect to those values.
28. Ultimately, the Task Force came to the conclusion that the public interest is varied and context specific. The Task Force was concerned that any effort to arrive at a water-tight definition of the public interest would be futile and the Task Force would be unable to report to the Benchers in a timely manner if it sought to do so. The Task Force discussed the need for legal service providers to be competent and ethical. It also recognized the need for legal services to be accessible to the public. The Task Force did not, however, identify the deeper levels of what might constitute the “public” interest.
29. The Task Force considered that a single regulator, with a clear public interest mandate, may be able to play a role in educating the public as to the roles of legal service providers and the justice system, thereby improving public confidence in the administration of justice.
30. The Task Force plans to engage in consultations to arrive at a determination of whether a single regulator of other legal service providers is in the public interest.

Mandate item 5

Consider and report on whether the recognition and regulation of non-lawyer legal service providers would improve access to law-related services for the public.

31. Barriers to accessing legal services and access to justice are problems in every jurisdiction the Task Force considered in detail, regardless of the regulatory model that exists.
32. One of the challenges the Task Force faced in analyzing item 5 of the Mandate is that there are no empirical studies that analyze how forms of legal service regulation affect access to legal services and access to justice. The academic articles the Task Force reviewed confirmed the general lack of data and analysis on the relationship between regulation and access to legal services.
33. As a result, the Task Force considered statistics on the general wealth of Canadians to try and get a sense of the capacity of Canadians to pay for services. This included a review of materials from Statistics Canada as well as past survey material of the Law Society. The Task Force supplemented these materials with academic studies detailing the challenges with assessing the affordability of legal services, as well as research that suggested that cost was not the primary factor that determined whether one chose to seek legal assistance or not. The Task Force further considered whether capacity to afford services would be a real issue for anyone who ultimately did decide to seek the assistance of a legal professional.
34. The ability of the Task Force to analyze the affordability of legal services has been limited by the lack of data and methodologically sound studies. The Task Force recognized that the costs of delivering legal services or the capacity of the general public to pay for the services are not well understood. Also, because the services are delivered in a free market, the Task Force recognized that the cost of legal services is set at levels that the general market can afford, rather than what particular segments of the market can afford. In the legal profession, as in other professions or industries, this creates inequalities in the members of society to enjoy equal access to justice.
35. The Task Force also attempted to discern how regulation in general, and a single regulatory model in particular, might improve access to legal services.
36. The Task Force recognized that access to legal services is a concern for regulators of the legal profession and other legal system stakeholders and that changes are necessary if we hope to improve access to legal services. But the Task Force also recognized the tension between the desirability of empirical evidence to support change and the difficulty of ever changing if empirical evidence was a necessary prerequisite.

37. The Task Force discussed past initiatives of the Law Society, such as providing insurance coverage for pro bono legal services, modifying the rules of professional conduct to facilitate limited scope legal services, and expanding the roles of articulated students and paralegals to improve access to lower cost, competently delivered legal services. These initiatives removed regulatory barriers in the market for legal services.
38. The Task Force noted that at this point we do not know whether these initiatives have improved access to legal services. However, the common element of each of the initiatives is that they eliminate or modify regulatory barriers to services being provided. The Task Force also noted that regulation is necessary to ensure that standards are established and followed. In any regulatory model, therefore, there is a tension between attempting to maximize access to the regulated services while also providing assurances that services are provided by competent and ethical professionals.
39. The Task Force discussed the concept that a regulator can seek to facilitate greater access through policy reforms. It is then up to the market place to embrace or reject the reforms.
40. Regulatory reforms in other jurisdictions that the Task Force has examined are intended, in part, to maximize choice to the public in an effort to close the “access to justice gap”¹ but have recognized that this result is not certain. In Washington State, for example, the Supreme Court order that recognizing limited license legal technicians stated:
- No one has a crystal ball. It may be that stand-alone limited license legal technicians will not find the practice lucrative and that the cost of establishing and maintaining a practice under this rule will require them to charge rates close to those of attorneys. On the other hand, it may be that economies can be achieved that will allow these very limited services to be offered at a market rate substantially below those of attorneys. There is simply no way to know the answer to this question without trying it.*
41. In Ontario, the Law Society of Upper Canada submitted its five year review of the new regulatory paradigm to the Attorney General of Ontario in 2012. The regulatory regime has largely been viewed as a success by the Law Society and the Ontario government. The report expresses the view that access to justice has been improved.
42. The Task Force recognizes that no one form of regulation has a monopoly on improving access to legal services or facilitating access to justice. In order for access to justice benefits to flow from a regulator it is necessary that the regulator have a

¹ “The difference between the level of legal assistance available and the level that is necessary to meet the needs of low-income Americans is the “justice gap.” Legal Services Corporation, “Documenting the Justice Gap in America: *The Current Unmet Civil Legal Needs of Low-Income Americans* (September 2009).

commitment as part of its mandate and policy vision to improve the public's access to legal services. The regulator must then act on that vision. This is true whether one is dealing with a single regulator, or multiple regulators.

What are the possible advantages and disadvantages of a single regulator model?

43. Because the Task Force envisions the need for broad consultation on this project, it recognized the value in setting out some potential advantages and disadvantages of a single regulator model. The Task Force views these as propositions and not conclusions, as the conclusions will be informed by the feedback that results from the consultation process.
44. The Task Force identified the following possible advantages to a single regulator model:
 - a. a single regulator can better align codes of conduct and the rules that govern the providers of legal services;
 - b. a single regulator can better collect data to determine what services each category of provider may offer the public, and may be better positioned to develop reforms to meet the public need in underserved areas;
 - c. a single regulator is more likely to achieve economies of scale;
 - d. a single regulator gives the public a “one-stop shop” for legal service regulation and can develop processes that assist the public in navigating the variety of services that are offered;
 - e. a single regulator carries greater weight when negotiating with other stakeholders, such as government and the courts, and is more likely to offer a greater range of solutions to the problems stakeholders face than a multiplicity of regulatory bodies;
 - f. a single regulator provides a stable platform for the regulation and expansion of needed legal services; and
 - g. a single regulator can clarify the separation between the regulator and various member advocacy bodies.
45. The Task Force identified the following possible disadvantages to the single regulator model:
 - a. a single regulator may not generate as much innovation as a multiplicity of regulators as they are not all bound to a common governance and management scheme;

- b. a single regulator, if not properly structured, can lead to second class licensees – and this could lead to a stifling of reform initiatives. Consider the efforts of the notaries to expand their scope of practice. At present, the notaries can make such petitions directly to government. Under a single regulatory model, the Benchers would have to champion such reforms;
- c. a single regulator, and the scope of practices of the service providers it regulates, may expose the regulator to greater risk; and
- d. a single regulator of multiple legal service providers may generate more potential conflicts of interest.

Methodology and Next Steps

46. The methodology in the attached Appendix 1 was prepared to aid the Task Force in analyzing whether the Law Society should regulate legal service providers or maintain the status quo. The Task Force proposes to use this methodology as a framework for future consultation on the issues.
47. The Task Force recognizes the importance of a broad-based consultation given that the issue under consideration is whether it should become the regulator of other legal service providers. It notes, for example, that in the case of the regulatory reforms the three accounting professions are undertaking, each profession engaged in a vote on whether to proceed with efforts to harmonize education and regulatory standards. The vote resulted in approximately 80% of the professionals being in favour of moving forward with the reform initiative. There are, however, obvious differences between the national efforts of three large accounting professions to harmonize regulation and the question of whether the Law Society ought to regulate all legal service providers in British Columbia.
48. The Task Force believes that, at a minimum, consultation ought to include the Ministry of Justice, the Courts, the Council of Administrative Tribunals, lawyers (through for example the Canadian Bar Association, the Trial Lawyers Association, and local bar associations), notaries, paralegals, the Law Foundation, Access Pro Bono, and various groups through which direct input could be obtained from members of the public who need access to legal services.
49. The Task Force does not intend to consult with other groups, such as accountants and immigration consultants at this time. However, The Task Force expects that at some future point the Law Society should enter into discussions with the regulators of the accounting profession to settle on best practices for accountants who are giving legal advice in discrete areas to ensure they are not crossing the line into areas of practice for which they are not qualified. The Task Force also believes there is value in discussing best practices and standards with the Canadian Society of Immigration Consultants at some future date.
50. As noted earlier, the Task Force did not address the operational question in its mandate (item 3) because item 3 presupposes both a conclusion that the Benchers would move forward with consultations on the issues under discussion and what the results of those consultations would be. The Benchers need to be aware that item 3 has the potential to be a large, time-intensive project that will require allocation of staff resources and may stretch through 2014 and perhaps beyond.

51. The Task Force proposes the following consultation and communication process to set the groundwork for consultation in the late summer and fall of 2013:
- a. A copy of this Interim Report along with the consultation questions will be posted on the Law Society's website
 - b. A copy of the Interim Report with the consultation questions will be delivered to the groups identified in paragraph 48 above to elicit comment and discussion.
 - c. Meetings with the leadership of the groups identified will be organized so that in-person consultation on the questions can take place. The Task Force believes that in-person consultation is important in this process, and that merely requesting written responses from the groups to the questions circulated would not suffice.
52. The Task Force expects that the information gathered from these consultations together with the work it has already completed will allow it to make its final report to the Benchers in December 2013.

Appendix 1: Methodology for Analyzing the Mandate

1. Is it in the public interest for the Law Society to regulate “all” legal services providers?
 - a. why / why not?
2. Who should the Law Society regulate?
 - a. Why / why not?
 - b. On what basis do we include certain legal service providers?
 - c. On what basis do we exclude certain legal service providers?
3. Does a single regulator model give the public greater choice?
 - a. How does it improve choice?
 - b. How does it impede choice?
 - c. Consider:
 - i. Impacts on quantity of services that are available;
 - ii. Impacts on quality of services that are available;
 - iii. How the model protects the public;
 - iv. What theoretical policy options are available to a single legal service; regulator that are in the public interest and are not available when multiple regulators are used.
4. What evidence is there to support (or refute) a hypothesis that a single regulator is in the public interest?
5. Is there potentially relevant evidence we are missing?
 - a. Is it possible to obtain this evidence? How? Is it worth trying to do so?
6. Synthesis of discussion / analysis / weighing the options.
7. Conclusion.

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² The Task Force reviewed materials on regulation of the various legal professions in England and Wales; as a starting point, see http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm. The Task Force also reviewed materials on regulation of health care professionals in British Columbia, available at <http://www.health.gov.bc.ca/professional-regulation/>.