The Law Society
of British Columbia

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

For: The Benchers
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Purpose of Report:	**Discussion and Decision**
Prepared on behalf of:	**The Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers**
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Introduction

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

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

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

The Option Examined by the Task Force

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

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

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

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

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

The Current Model

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

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

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

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

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

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

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

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

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

Legal Considerations

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

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

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

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

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

Purpose of Proposing a New Model

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

Current Use of Appointed Benchers and Non-Benchers on Panels

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

Models Considered

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

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

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

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

Discussion of Possible Models

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

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

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

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

After some thought, three models were reviewed.

Model 1

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

Model 2

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

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

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

Model 3

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

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

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

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

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

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

Reviews of Panel Decisions

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

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

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

Recommendation

1. Individuals Qualified to Sit on Panels

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

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

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

2. The Task Force recommends that this pool include

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

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

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

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

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

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

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

2. Appointments to Hearing Panels

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

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

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

3. Effect of Recommendations

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

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

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

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

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

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

Measuring the Effectiveness of the Recommendation

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

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

- whether decisions are released and

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

- whether panels can be comprised

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

Next Steps

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

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