The Law Society of British Columbia

AGENDA ADDENDA

MEETING: Benchers

DATE: **Thursday, September 2, 2010**

TIME: **7:30 a.m.** Continental breakfast

8:30 a.m. Meeting begins

PLACE: **Bencher Room**

NEW ITEM: **Tab 17 (Strategic Plan Implementation) & Tab 18 (For Information only)**

CONSENT AGENDA

The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.

1	**Minutes of July 9, 2010 meeting** • Minutes of the regular session • Minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
2	**External Appointments: JES Board of Directors** • Memorandum from the Executive Committee	Tab 2 p. 2000
3	**Bencher Approval of Agreement: FLS Mobility Defalcation Compensation** • Memorandum from Mr. Treleaven	Tab 3 p. 3000
4	**Bencher Appointment of President & First Vice President to 2010 QC Appointments Advisory Committee** • Memorandum from Mr. McIntosh	Tab 4 p. 4000
5	**Proposed PCH Changes: *R v. Cunningham*** • Memorandum from the Ethics Committee	Tab 5 p. 5000
6	**Referendum on amendment of Rule 1-6 [Annual General Meeting] to allow the Audited Financial Statements to be distributed to members electronically** • Memorandum from Mr. Hoskins for the Act & Rules Subcommittee	Tab 6 p. 6000
7	**Proposed amendment to Rule 3-3 [Confidentiality of complaints] respecting appointment of special prosecutors** • Memorandum from Mr. Hoskins for the Act & Rules Subcommittee	Tab 7 p. 7000

REGULAR AGENDA		
8	**President's Report** • Written report to be distributed electronically prior to meeting	
9	**CEO's Report**	Tab 9 p. 9000
10	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	
2009-2011 STRATEGIC PLAN IMPLEMENTATION *(FOR DISCUSSION AND/OR DECISION)*		
11	**Proposed Section 3 (LPA) Amendments** Mr. Ridgway and Mr. McGee to report • Memorandum from the Executive Committee	Tab 11 p. 11000
17	**Discipline Guidelines Task Force: Revised Abeyance Policy** Mr. Van Ommen to report • Report from the Discipline Guidelines Task Force	Tab 17 p. 17000 **NEW**
OTHER MATTERS *(FOR DISCUSSION AND/OR DECISION)*		
12	**Law Society Response to *Family Relations Act* White Paper** Ms. Hickman to report • Memorandum from Ms. Hickman and Mr. Munro	Tab 12 p. 12000
FOR INFORMATION ONLY		
13	**Law Society Response to Chief Coroner's Recommendations in Domestic Violence Death Review Panel Report** • Letter from Mr. McGee to Dr. Rothan	Tab 13 p. 13000
14	**Attorney General (Australia) & Minister of Justice (Canada) Responses to *Self Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in BC*** • Letter from the Honourable Mr. McClelland to Mr. McGee • Letter from the Honourable Mr. Nicholson to Mr. McGee	Tab 14 p. 14000
18	**Report to the Benchers on the 2010 Canadian Bar Association Annual Meeting and Canadian Legal Conference** • Report from Mr. LeRose	Tab 18 p. 18000 **NEW**
IN CAMERA SESSION		
15	**Proposed Changes to the *Notaries Act*** Mr. Ridgway and Mr. McGee to report • Memorandum to the Executive Committee	
16	**Bencher Concerns**	

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, July 9, 2010

PRESENT:

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

ABSENT:

Rita Andreone
David Loukidelis, Deputy Attorney General of BC
Jan Lindsay, QC

STAFF PRESENT:

Tim McGee
Deborah Armour
Andrea Brownstone
Stuart Cameron
Robyn Crisanti
Lance Cooke
Charlotte Ensminger
Su Forbes, QC
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Lesley Pritchard
Susanna Tam
Alan Treleaven
Adam Whitcombe

GUESTS:

Dean Chris Axworthy, Faculty of Law, Thompson Rivers University
Johanne Blenkin, Executive Director, BCCLS
Anne Chopra, Equity Ombudsperson
Katherine Corrick, Director, Policy & Tribunals, Law Society of Upper Canada
Rob Seto, Director of Programs, CLEBC
Jamie Maclaren, Executive Director, Access Pro Bono Law
Stephen McPhee, Vice-President, CBABC
Caroline Nevin, Executive Director, CBABC

BENCHER'S OATH OF OFFICE

Mr. Ridgway welcomed appointed Benchers Satwinder Bains, Benjimen Meisner and Claude Richmond to their first Benchers meeting and administered the Bencher the Bencher's oath of office to each of them, pursuant to Rule1-1.2.

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on June 12, 2010 were approved as circulated.

REGULAR AGENDA – for Discussion and Decision

2. President's Report

Mr. Ridgway referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President during the period of June 13 to July 7, 2010 (Appendix 1 to these minutes).

3. CEO's Report

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

a. 2009 – 2011 Strategic Plan – implementation update

b. 2010 Core Processes Review – implementation update

c. Financial Report – Operating Results to May 31, 2010

d. 2009 Human Resources Strategic Plan - implementation update

e. Audit Committee Review of Key Performance Measures – progress report

f. Continuing Professional Development Program – 2010 progress report

g. New Senior Management Hire – Kate Jenkins, LIF Claims Manager, effective September 7, 2010

4. Report on Outstanding Hearing and Review Reports

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

5. Presentation of the 2010 Law Society Scholarship to Jeffrey Yuen

Mr. Ridgway congratulated Mr. Jeffrey Yuen on being named by the Benchers as the recipient of the 2010 Law Society Scholarship and presented him with a Law Society cheque for $12,000.

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

6. Discipline Guidelines Task Force: Interim Report

Task Force Chair Herman Van Ommen briefed the Benchers. He noted that the policy recommendations set out in the task force's interim report (page 6000 of the meeting materials) are based on four main ideas:

- No presumption of abeyance
    - the Law Society will do its job in administering its discipline process
- Investigate as far as possible before granting any abeyance
    - make any abeyance decision at the latest possible time in the discipline process
- No abeyance until interim protections are in place
- Abeyances must be justified
    - there must be a reasonable prospect that
        - proceeding with the Law Society's discipline process will cause prejudice
        - abeyance will produce valuable information via parallel proceedings in other regimes.

Mr. Van Ommen noted the views of task force members John Hunter, QC and Anna Fung, QC that the Discipline Committee's discretion should extend to fine-tuning the proposed abeyance guidelines, but not to changing the core principles of the proposed abeyance policy.

Mr. Van Ommen moved (seconded by Mr. Kuiack) that the abeyance policy set out at page 6010 of the meeting materials (*Abeyance Policy – General Principles*) be adopted by the Benchers and then sent to the Discipline Committee for review.

In the ensuing discussion a number of issues were raised, including:

- whether or how the Discipline Committee's broad direction and narrow discretion under the proposed abeyance policy can or should be reconciled with the Discipline Committee's broad discretion under the abeyance guidelines set out at page 6012 of the meeting materials (*Guidelines for Abeyance Decisions*)
- whether the abeyance policy defines the parameters within which the Discipline Committee may exercise its discretion in applying the abeyance guidelines
- whether the interim report should be sent back to the task force and to the Discipline Committee for review of the language of the abeyance guidelines, before the abeyance guidelines are submitted to the Benchers for approval

The motion was carried.

The Benchers confirmed that while they had adopted the abeyance policy in principle, the Discipline Committee will still be welcome to return to the Bencher table with requests for the policy's refinement.

Mr. LeRose moved (seconded by Ms. Berge) that the Interim Report of the Discipline Guidelines Task Force be referred back to the task force and to the Discipline Committee for consideration of the language of the abeyance guidelines set out at page 6012 of the meeting materials (*Guidelines for Abeyance Decisions*).

The motion was carried.

Mr. Van Ommen thanked Mr. Cooke for his valuable service he has performed for the task force to date.

REGULAR AGENDA – Other Matters for Discussion and/or Decision

7. Separation of Functions Task Force: Report and Recommendations

Task Force Chair Ken Walker briefed the Benchers. Mr. Walker reviewed the task force's research, and noted that notwithstanding judicial authority for the current model of adjudication, the public could well perceive an apparent conflict between the Benchers' adjudicative and investigative roles. Mr. Walker stated that the task force believes that in the future a complete separation of the two roles would be advisable (i.e. no current Benchers will serve on hearing panels). He reported that at this stage the task force is recommending as 'the easiest first step" the creation of a pool of individuals who can be appointed to hearing panels that includes:

- sitting Benchers (the "Bencher pool")
- life Benchers, former lawyer Benchers and other lawyers, subject to meeting criteria to be established by the Benchers (the "lawyer pool")
- life appointed Benchers, former appointed Benchers, and other non-lawyer non-Benchers, also subject to meeting criteria to be established by the Benchers (the "public pool")

as outlined at pages 7007-7008 of the meeting materials. Mr. Walker informed the Benchers that the task force views an incremental approach as advisable, and recommends a review period of at least three years for monitoring the effectiveness of its recommendations, should the Benchers approve them.

Mr. Walker moved (seconded by Mr. Acheson) that the Benchers:

- adopt the Separation of Functions Task Force recommendations as set out at pages 7008-7009 of the meeting materials (Appendix 3 to these minutes) for implementation for a trial period of three years
- refer the Separation of Functions Task Force recommendations to the Act & Rules Subcommittee for consideration of the need for Rule changes to give their implementation proper effect

In the ensuing discussion a number of issues were raised, including:

- the importance of maintaining enough administrative flexibility during the trial period to ensure the timely population and convening of hearing panels

- whether, when and how to address the policy and budget issues of payment of honoraria to non-Bencher members of hearing panels

    - it was suggested that the inclusion of appointed Benchers and other non-lawyers on hearing panels would entail cost implications, which should be tracked during the trial period and assessed thereafter

The motion was carried.

Mr. Walker acknowledged the valuable service and support provided by Mr. Lucas to the Separation of Functions Task Force, and noted that with the adoption of its recommendations by the Benchers, the task force's mandate has been discharged.

Mr. Walker moved (seconded by Mr. Acheson) that the Benchers terminate the Separation of Functions Task Force.

The motion was carried.

8. A& R Subcommittee: Proposed Legislative Amendments (Part 2)

Subcommittee Chair Leon Getz, QC referred to a memorandum prepared by Mr. Hoskins on behalf of the Subcommittee for a review of proposed amendments to the following provisions of the *Legal Profession Act* (page 8003-8033 of the meeting materials, Appendix 4 to these minutes):

section 3 — Public interest paramount
section 12 — Rules requiring membership approval
section 13 — Implementing resolutions of general meeting
section 18.1 (proposed) — Regulation of law firms
section 26 — Complaints from the public (powers to aid investigations)
section 31 — Special compensation fund
section 36 — Discipline rules
section 38 — Discipline hearings
section 38.1 (proposed) — Resignation of membership
section 43 — Right to counsel
section 44 — Witnesses
section 47 — Review on the record (review board)
section 48 — Appeal
section 87 — Certain matters privileged
section 88 — Non-disclosure of privileged and confidential information
section 89 — Confidential documents

Mr. Crossin and Mr. Petrisor requested that section 3 be dealt with separately.

Mr. Getz moved (seconded by Ms. Berge) that the Benchers approve all of the proposed amendments set out in Appendix 4 (except section 3), for inclusion with the Law Society's requests to the provincial government for legislative changes in 2011 that were approved by the Benchers at their June meeting.

The motion was carried.

The Benchers then discussed section 3 of the Act, which presently states:

(3) It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

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

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

The nature and purpose of the proposed amendment of section 3 is explained at pages 8002-8003 of the meeting materials:

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

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

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

Public interest paramount

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

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

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

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

(d) regulating the practice of law.

Benchers expressed a range of views for and against the proposed amendment, including:

- for the amendment
    - the "uphold and protect the interests of members" language in subsection (b) fundamentally conflicts with the duty to "uphold and protect the public interest in the administration of justice" in subsection (a), and risks the loss of public and political confidence in the Law Society's ability and resolve regulate the profession
    - the amendment would bolster public confidence and would not hinder the Society's ability to support good practice by the profession, because supporting good professional practice also supports the public interest
    - New Brunswick is the only other provincial law society with a "protecting members' interest" in its statute
    - political appetite for public oversight is already evident in other professions, and the current language of subsection (b) will whet that appetite
    - the unfortunate language of subsection (b) is the issue, not the provision's intention or effect
        - replacing "uphold and protect" with language along the lines of "assist" should be considered

- against the amendment
    - subsection (b) as presently worded is important to many members, giving them confidence that the Law Society is their ally in their daily struggle
    - subsection (b) as presently worded contains no evil or mischief that needs to be addressed
    - the Law Society needs the confidence of the Bar to be able carry out its mandate
    - the duality of section 3's present wording supports effective self-regulation by highlighting the potential conflict between public and membership interest
        - the paramountcy of the public interest is already evident

- protection of members' interests is not inconsistent with protection of the public interest

Ms. Hickman moved (seconded by Mr. Acheson) that the Executive Committee be requested to consider the language of subsection (b), with the view to replacing "uphold and protect" with language that conveys the sense of "assist".

The motion was carried.

9. Finance Committee: Approval of 2011 Fees

Finance Committee Chair Gavin Hume, QC referred the Benchers to the updated 2011 Budget and Fee presentation (Tab 9 in the meeting materials). Mr. Hume advised that updated figures are displayed in red, indicating adjustments made following the Finance Committee's review of YTD 2010 financial results and economic conditions.

Mr. Hume reviewed management's budgeting process and the Finance Committee's deliberations leading to the proposed 2011 fee, which includes:

- 6.1% increase in the overall mandatory fees
- $82 increase in the Law Society portion of the General Fund Fee
  - the first increase in two years for the Law Society portion of the General Fund Fee
  - mainly relating to the Benchers' decision made in November 2009 to fund Forensic Accounting with the practice fee starting January 2010
- $150 increase in the Lawyers Insurance Fund assessment to $1,750
  - reflecting the continuing exposure of the profession to claims arising from the economic downturn
- $45 decrease in the Special Compensation Fund assessment to $5
  - reflecting the assumption of defalcation coverage under Part B of the insurance program and the resolution of almost all the outstanding claims arising prior to May 2004
- $14 increase in the Courthouse Libraries BC levy to $180
  - the first increase in two years, reflecting inflation on operating costs and static Law Foundation funding (driven by the current economic downturn)

Mr. Hume moved (seconded by Mr. LeRose) the adoption of the following practice fee resolution, for presentation to the membership at the Law Society's 2010 annual general meeting:

WHEREAS:

A. the Benchers have determined that the amount of $1,399.04 per practising lawyer is required to maintain and operate the programs of the Law Society and to otherwise discharge its statutory mandate during the year 2011; and

B. the Benchers have determined that it is appropriate to advance the interests of the Law Society by paying per practising lawyer the amounts to the organizations indicated below:

The Federation of Law Societies of Canada	$20.00
The Canadian Legal Information Institute (CanLII)	$32.25
The Law Foundation of BC (pro bono contribution)	$14.35
Courthouse Libraries BC	$180.00
Lawyers Assistance Program	$56.00
Vancouver Bar Association *(The Advocate)*	$27.50

BE IT RESOLVED THAT, commencing January 1, 2011, the practice fee be set at $1,729.14 pursuant to s. 23(1)(a) of the *Legal Profession Act*.

The motion was carried.

Mr. Hume moved (seconded by Mr. Kuiack) the adoption of the following insurance fee resolution:

Be it resolved that:

- the insurance fee for 2011 pursuant to section 30(3) of the *Legal Profession Act* be fixed at $1,750
- the part-time insurance fee for 2011 pursuant to Rule 3-22(2) be fixed at $800
- the insurance surcharge for 2011 pursuant to Rule 3-26(2) be fixed at $1,000

The motion was carried.

Mr. Hume moved (seconded by Mr. Walker) that the Benchers approve the following Special Compensation Fund assessment:

Be it resolved that:

- the Special Compensation Fund Assessment for 2011 be set at $5.00

The motion was carried.

10. 2010 Advisory Committees: Mid-year Reports

Reports on the work of the Law Society's Advisory Committees through 2010 to date were provided by: David Mossop, QC, Chair of the Access to Legal Services Advisory Committee; Robert Brun, QC, Chair of Equity and Diversity Advisory Committee; Herman Van Ommen, member of the Independence and Self-Governance Advisory Committee (on behalf of 2010 Chair Jan Lindsay, QC); and Thelma O'Grady, Chair of the Lawyer Education Advisory Committee.

***IN CAMERA* SESSION**

The Benchers discussed other matters *in camera*.

WKM
2010-07-29

PRESIDENT'S REPORT
July, 2010

This is the President's Report spanning the period from June 13, 2010, to July 7, 2010. This is a very short period of time, and accordingly, I do not have much to say.

Our retreat in fabulous Parksville ended on June 13. I am hopeful that everyone had a good time in Parksville and will visit Vancouver Island often. The Beach Club was an enjoyable place to stay; however, the Beach Club will not be as popular in our very near future decision-making.

After leaving Parksville, I raced to Victoria, as it was Naval Week. The Royal Canadian Navy, or whatever it's called now, is 100 years old, and they have had quite substantial celebrations on the southern tip of Vancouver Island. Similar celebrations were held last week in Halifax, presided over by the Queen. A similar event was held in Victoria, presided over by the USS Ronald Reagan, almost as good as the namesake, which is almost as good as the Queen. Unfortunately, the Reagan had left by the time I arrived, putting a real damper on the rest of my day, month and year.

On June 15 I participated in a telephone meeting with Mr. McGee, Hayden Acheson, and Peter Lloyd, wherein we discussed appointed Benchers and the Office that makes such appointments on behalf of the Provincial Government. It has always been our policy to remain hands off with respect to the appointment of such individuals and with respect to their re-appointment, but I believe it is necessary that we provide materials to the Resourcing Board so that they are knowledgeable as to the scope of the Bencher function.

That evening I journeyed to Vancouver to participate the following day in the Law Society's presentation at UBC for Aboriginal students. It was a function honouring, in part, Judge Scow, the first Aboriginal lawyer and Provincial Court Judge. It provided a networking event for young aboriginal lawyers and law students, and I was very pleased with the turnout. I was also pleased with the turnout and support shown by Chief Justice Finch, Chief Justice Bauman, and Chief Judge Crabtree. I was a little disappointed in the number of Benchers who attended.

I think it was a very useful first step in our process to ensure that the number of Aboriginal lawyers in our province increases. We have a difficult history in this regard.

In 1919 the Benchers of the day passed a resolution prohibiting our Indigenous people and other "ethnic" groups from membership.

On June 17 I participated in the CBA Golf Tournament, which was a fundraiser for scholarships for law students at UBC and UVIC. The following day, June 18, I had my usual weekly meeting with Mr. McGee and then attended the Lawyers Assistance Program lunch in Vancouver. The Lawyers Assistance Program is one that is substantially funded by the Law Society and is a useful service for our members.

On June 24 I again attended in Vancouver for my weekly meeting with Mr. McGee, the Annual Meeting of the Courthouse Library Society and, finally, the Executive Committee meeting.

I did absolutely nothing for the balance of June and early July.

In addition to the above, I have been participating (but don't check my attendance records) in the Steering Committee for the BC Branch CBA commission on legal aid.

Stephen McPhee, Vice-President until August of 2010, then President, has been carrying the ball in terms of the public comment on the commission. Presumably, Len Doust, who is the commissioner, will assume that function once the actual commission is out on the road and functioning. Former Bencher, now Life Bencher, Pat Kelly, is on the Education Committee established as part of the commission's function.

If you have any questions, don't be afraid to ask.

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

July 9, 2010

Introduction

The July Bencher meeting is the mid-year mark in the Benchers 2010 meeting calendar and I would like to take this opportunity to update you on progress and developments in a number of key areas: 2009 – 2011 Strategic Plan, Core Processes Review, Financial Results, Human Resources Strategic Plan, Key Performance Measures, and the Continuing Professional Development program.

1. 2009 – 2011 Strategic Plan

We are now at the halfway mark of the Law Society's three year 2009 – 2011 Strategic Plan.

Implementation of the plan is progressing well and on schedule. There are a total of 20 implementation initiatives divided among the 3 overarching strategic goals in the plan. Of those 20 initiatives, 8 have been completed, 9 are work in progress and the commencement of work on 3 is pending.

A detailed progress report and commentary on the Strategic Plan is attached to this report as Appendix 1. Adam Whitcombe, Chief Information and Planning Officer and Michael Lucas, Manager of Policy and Legal Services, will be available to answer any questions regarding the progress report.

In the fall, the Benchers will undertake their annual review of the Strategic Plan. The annual review has two objectives: to confirm that the priorities set out in the current plan continue to have the support of the Benchers and, secondly, to review the annual reports of the four Advisory Committees to identify and assess any emerging priorities for the current or next iteration of the Strategic Plan, starting in 2012.

2. Core Processes Review

Our most important operational initiative for 2010 is our Core Processes Review project led by Kensi Gounden. The Core Processes Review is a comprehensive operational review of each of our core regulatory areas. The purpose is to assess how our processes, resources, policies and budget choices support or hinder our efforts to fulfill our public interest mandate.

Because we need to ensure that we are being as effective and as efficient as possible, every aspect of how we do our work has been broken down into its various steps so that it can be viewed objectively, analyzed and improved. This approach often reveals opportunities to reduce duplication of effort, optimize interactions with other departments and replicate good practices in other areas.

Kensi will be presenting a midyear progress report at the meeting and he will be available to answer any questions.

3. Financial Report – Operating Results to May 31, 2010

Highlights of the financial results for the year to May 31, 2010 are summarized in Appendix 2 to this report. Normally we present results on a quarterly basis but the third quarter results to June 30 are not yet available and we wanted to make sure the Benchers had the most current information available before the summer break. As you will see, the Law Society continues to be in a solid financial position. Jeanette McPhee, our CFO, and I will be available to answer any questions you may have at the meeting.

4. Human Resources Strategic Plan - Update

In 2009 management introduced a Human Resources strategic plan with two primary goals: first, to ensure that the Law Society is an Employer of Choice and second, to develop a comprehensive online Human Resources Information System.

Our current priority as an Employer of Choice is the implementation of a Leadership Program for management and a Skills Development program for employees. In the past two years we have made a significant investment in these programs utilizing the assistance of the Kwela organization and involving almost every employee in some fashion. For example, all managers have completed individual 360° assessments and each has created a personal development plan highlighting strengths and a list of development goals for improvement. One-on-one coaching sessions have included all managers working with Kwela and peer coaching groups were established to provide peer feedback and to generate ideas. In addition, five workshops have been held in the following areas: Coaching and Developing People, Influencing Skills, Conflict Resolution, Teams and Teamwork, and Leading Change. The overall level of participation in the workshops has been approximately 75% and self evaluation surveys indicate that management competencies are improving.

At the start of 2010 we conducted a skills development survey that gave staff an opportunity to help shape their learning program. The response rate to the survey was excellent and has allowed us to better assess the needs and requirements for the program. Seminars and workshops will continue to be offered in 2010 and into 2011 in such areas as Writing for Administrative Professionals, Personal Productivity, Change Management, Leadership for Administrative Professionals and Dealing with Difficult Interactions.

Finally, our Human Resources team is working with our Information Services/ Information Technology department to continue the build-out of our Human Resource Information Services site. Good progress is being made. When completed all staff will be able to access all their personal Human Resources information at one interactive and secure intranet location.

The goal in pursuing these strategic initiatives and in making these investments in time and resources is to build at the Law Society a strong culture of leadership and a continuous learning environment.

5. Audit Committee Process re: Key Performance Measures

The Audit Committee has been delegated the authority by the Benchers to work with management to monitor and oversee the continuing development of the Key Performance Measures (KPMs) and to recommend modifications and changes as may be desirable. The Audit Committee under the Chair of Rita Andreone met in June to begin this review and assessment process. This work of the Committee will continue into the fall and will incorporate the results of the Core Processes Review as that work is finalized.

6. Continuing Professional Development Program – Update

I would like to provide a brief update on the statistics for our CPD program as at June 30, 2010. Out of 10,267 lawyers required to complete CPD in 2010:

1,511	completed the required 12 hours, including required ethics;
450	completed the required 12 hours but did not report on ethics;
3,216	reported some hours, but fewer than the required 12; and
5,090	reported 0 hours.

While there is still a significant portion of the membership who have yet to record any hours, compared to last year there are significantly more members who have completed the requirement by this date and significantly fewer lawyers who are reporting no hours of CPD. The first email reminder of the year will be sent to all lawyers in mid July.

7. New Senior Management Hire

I am delighted to report that after an extensive search Su Forbes, Director of the Lawyers Insurance Fund (LIF) has hired Kate Jenkins to fill the position of Claims Manager for LIF. Kate obtained her LLB from the University of Victoria before articling with the firm of Lindsay Kenney. Following her call to the Bar, Kate practiced with Gary Somers where she ran her own litigation practice. In 2006, she joined Manulife Financial as counsel where she was responsible for significant insurance claims arising from Manulife's business in BC and Alberta. Most recently, Kate has worked as Litigation Manager with Intrawest where she supervised more than 200 litigation files from across North America. Kate brings a practical approach and solid experience in civil litigation and insurance

claims management to the position and we're very much looking forward to her joining us. Kate's first day in the office will be September 7th.

Timothy E. McGee
Chief Executive Officer

The Law Society of British Columbia

2009 – 2011 Strategic Plan
Progress Report – July 2010

For: The Benchers

Date: July 9, 2009

Purpose of Report: **Information**

Prepared on behalf of: **Executive Committee**

INTRODUCTION

The principal aim of the Law Society is a public well-served by a competent, honourable and independent legal profession. The Law Society's mandate described in s. 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice.

In order to develop strategies to discharge the Law Society's mission and mandate, the Benchers have created a process to plan for and prioritize strategic policy development. This process was created to enhance the ability of the Benchers to focus on policy development that would best ensure proper fulfillment of the mandate of the Society, and to optimize staff resources in the development of those policies and strategies.

Through this process, the Benchers have identified three principal goals, and a number of policy initiatives that will achieve those goals. In identifying these goals and strategies, the Benchers have been mindful not only of what the role of the Law Society is in relation to its mandate, but also of what may be achievable within that mandate.

This Strategic Plan is aimed at achieving concrete results that will improve the public interest in the administration of justice. The process has tried to avoid simply identifying issues on which the only action would be to make general comments on matters within the mandate of the Society.

The strategic policy setting process is also to be distinguished from the operation of the Law Society's core regulatory programs, such as discipline, credentials, and practice standards. These programs are fundamental to fulfilling the Law Society's mandate and will always be priorities for the Law Society. The Benchers have established a set of Key Performance Measures against which the performance of the core regulatory programs will continue to be measured on an annual basis.

PRINCIPAL GOALS

The three principal goals of the 2009 - 2011 Strategic Plan are:

1. Enhancing access to legal services.
2. Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.
3. Effective education, both of legal professionals and those wishing to become legal professionals, and of the public.

PROGRESS REPORT AS OF July 2010

GOAL 1: Enhancing access to legal services.

Strategy 1–1
Increase the public's access to legal services by developing a new regulatory paradigm that may broaden the range of persons permitted to provide certain legal services.

Initiative 1–1
The Delivery of Legal Services Task Force will work in 2010 toward making recommendations about whether and how the delivery of competent legal services might be improved in a number of ways.

Status – July 2010
The Task Force gave a report at the June 2010 Benchers' Retreat in Parksville that focused on increasing the availability of effective and affordable legal services through the use of supervised paralegals who would be allowed expanded responsibilities. Staff are identifying, from the discussion at the Retreat, what recommendations can be contained in a final report from the Task Force, which will be expected in the early fall.

Strategy 1-2
Find ways to reduce the impact of financial barriers to accessing justice.

Initiative 1-2

The Access to Legal Services Advisory Committee is currently analysing issues relating to costs in the legal system. The deliberations of that Committee and their research and findings will be passed on to the Delivery of Legal Services Task Force for consideration when addressing the substantive mandate of that Task Force.

Status – July 2010

The Access to Legal Services Advisory Committee has been studying issues relating to costs in the legal system, through the lens of legal aid, over the first half of 2010, and reported on this analysis in its mid-year report. Given the time lines of the Delivery of Legal Services Task Force's efforts to report for the June Benchers Retreat, it has not been feasible to pass the Committee's analysis on to the Task Force as contemplated in the Strategic Plan. However, strategies identified by the Committee are before the Benchers, who may wish to consider whether, and if so how, to incorporate them into the Strategic Plan.

Strategy 1–3

Improve the retention rate of lawyers in the legal profession including, in particular, Aboriginal lawyers.

Initiative 1–3a

Preparing a business case for the retention of female lawyers in private practice.

Status – July 2010

The business case was presented to the Benchers for consideration at the July2009 Benchers meeting. The Task Force also presented its final report to the Benchers at that meeting, outlining a series of recommendations aimed at improving the retention of women in the profession that may be considered for development by the Law Society. Some of these recommendations (Recommendations 1,2 and 3) contemplated early implementation, and some (Recommendations 4 and 5) contemplated the creation of a body to consider the cost and feasibility of implementation. Staff has been asked to follow up regarding the feasibility of implementing Recommendations 4 and 5 of the Report. Staff is currently focused on exploring the feasibility of developing a "Think Tank" for British Columbia

Since the Report has been released, the Law Society has undertaken a comprehensive communications plan to publicize the Report, which has taken up much of the fall.

Initiative 1-3b

Developing a plan to deal with the aging of the legal profession and the potential regulatory and access to legal services issues that might result.

Status – July 2010

This initiative remains with the Equity and Diversity Committee. Census data related to aging of the profession is currently being gathered and analyzed. The Advisory Committee expects to make recommendations for next steps after this data is reviewed.

Initiative 1-3c

Prepare a business case for enhancing diversity in the legal profession and retaining Aboriginal lawyers in particular.

The Equity and Diversity Advisory Committee will review recent research regarding retention of lawyers from diverse communities, and Aboriginal lawyers in particular, and develop a business case for diversity and the retention of Aboriginal lawyers in British Columbia.

Status – July 2010

The Advisory Committee is currently reviewing research related to retention of lawyers and is awaiting results from the demographic data-gathering project, which will serve as the foundation of the business case for enhancing diversity and retaining Aboriginal lawyers.

Strategy 1-4

Developing in collaboration with interested parties a research project, through a suitable agency, of an economic analysis of the justice system in British Columbia in order to better understand in empirical terms the economic benefit of funding justice and the systems that support the rule of law.

Status – July 2010

The Sauder School of Business at the University of British Columbia has been approached in connection with this initiative and has expressed an interest in it. The School is currently trying to identify a suitable professor to supervise the project but has as of yet been unable to do so. The Committee will be pursuing this matter with the School shortly in the hope

of finalizing arrangements. If a suitable professor cannot be identified, the Committee will be required to find another interested organization.

GOAL 2: Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.

Strategy 2–1

Effectively regulate those lawyers who have received or who receive a significant number of complaints, but which complaints, individually, are not sufficiently serious to result in formal disciplinary action or referral to the Practice Standards Committee.

Initiative 2–1

A staff group has been created to examine a series of projects to reduce the number of complaints that complaints-prone lawyers receive.

Status – July 2010

The staff group has identified and is currently working on several projects aimed at reducing the number of complaints that complaint-prone lawyers receive.

The Benchers considered "ungovernability" and referred to the Act and Rules Subcommittee consideration and development of rules and possible Professional Conduct Handbook amendments. Rule 4-35(5) has been passed by the Benchers, but changes to the Handbook have not yet been approved and remain with the Subcommittee.

The staff group has underway the early intervention project in conjunction with the Discipline Committee. A Report on that project has been made to the Benchers at the July 9, 2010 meeting. The complaint rates of the lawyers in the groups will be compared periodically with the complaint rates of a historically comparable group to determine whether the interventions had any impact on the target groups.

The staff group is also working on developing criteria for referral of lawyers to the Discipline Committee on the basis of their complaints history and referring lawyers who are Practice Standards graduates to the Discipline Committee if the lawyer repeats conduct of concern. The staff group has identified several other projects for consideration when resources allow and several other projects that do not look promising although sufficient consideration has not yet been given to rule them out definitively.

Strategy 2–2
Assess possible roles of an oversight or review board for Law Society core functions.

Initiative 2–2
Is there a method to enhance the public confidence in the Law Society's decision making processes that does not run contrary to the fundamental constitutional principle of, and public right to, lawyer independence?

Status – July 2010
The Benchers considered this subject at the 2009 retreat in Whistler. Guests at the retreat presented the nature of oversight as it exists in some other jurisdictions, and the Benchers heard from the Ombudsman's office in British Columbia about the Ombudsman's oversight function of regulatory bodies in this province. The Executive Committee discussed this topic at its September 2009 meeting and determined that the Law Society would best focus on regulatory oversight models that incorporated voluntary external review or review incorporating the Ombudsman's processes should be developed further. Staff presented a further report to the Executive Committee in May 2010, and were instructed to include a policy analysis of a third model similar to the organizational audit or peer review process the accounting profession utilizes to ensure best practices. Staff expects to have a final report available for the Benchers by the fall of 2010.

Strategy 2–3
Enhance public confidence in hearing panels by examining the separation of adjudicative and investigative functions of the Law Society.

Initiative 2–3
The Benchers have created a Task Force to develop models by which the separation of the adjudicative and investigative functions of the Law Society could be accomplished and to make recommendations about which model to adopt.

Status – July 2010
The Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers will present its report and recommendations at the July 9, 2010 Benchers Meeting.

Strategy 2–4
Effective data gathering to inform equity and diversity issues.

Initiative 2–4
Through the Equity and Diversity Advisory Committee, the Law Society will develop strategies for gathering appropriate demographic data on the profession and assess such data to inform the development of initiatives to promote equity and diversity.

Status – July 2010
The Equity and Diversity Advisory Committee is currently working with a statistics analyst who is examining 2006 Census data to develop an accurate demographic picture of the profession in BC, particularly regarding the representation of Aboriginal lawyers. Census data regarding the demographics of the profession is currently being gathered and analyzed, particularly as it relates to the participation of Aboriginal lawyers. The Advisory Committee has prioritized completion of this initiative because it will serve as the foundation for two other initiatives: the strategy to support Aboriginal lawyers and student; and the business case for enhancing diversity and retaining Aboriginal lawyers in the profession.

Strategy 2–5
Develop and propose legislative amendments to improve lawyer regulation.

Initiative 2–5
The *Legal Profession Act* has not been substantively amended for a decade. Given the particular legislative cycle, the Law Society should consider if any amendments to legislation are needed to improve the Law Society's ability to meet its objects and duties.

Status – July 2010
The Act and Rules Subcommittee has reviewed and considered proposed amendments to the Legal Profession Act *and has presented a report to the Benchers accordingly. The Benchers, by the end of the July 9, 2010 meeting, will have considered and approved amendments to the* Act. *The Attorney General's Ministry has been notified that the Law Society is interested in a significant number of amendments in order to improve its ability to regulate effectively in the public interest.*

Strategy 2-6
Prepare a considered response to the Competition Bureau's "Study on Self-Regulated Professions."

Initiative 2-6a
Reconsidering rules relating to multi-disciplinary partnerships. The Ethics Committee will consider the issue and present its conclusions to the Benchers.

Status – July 2010
The Ethics Committee has completed its analysis. The issue was considered by the Benchers in July 2009 at which time the Benchers resolved in principle to permit multi-disciplinary partnerships on the Ontario model subject to the preparation of draft Rules to ensure that important values of the legal profession are not compromised, as well as liability insurance issues. Rules to implement the decision came into effect on July 1, 2010.

Initiative 2-6b
Enhancing lawyer mobility by adopting rules to finalize and implement agreements made through the Federation of Law Societies to permit mobility between members of the Barreau du Québec and the common-law law societies.

Status – July 2010
The Barreau du Québec has implemented provisions permitting the mobility of common law lawyers to practise the law of their home province and federal law as members of the Barreau du Québec in Québec, and through the Federation of Law Societies, the rest of the provinces are finalizing reciprocal arrangements with Québec and the preparation of model rules through which to implement that arrangement. The Benchers passed rules to implement this arrangement on April 23, 2010 and they came in to effect July 1, 2010.

Initiative 2-6c
Modernizing provisions relating to lawyers' advertising.

Status – July 2010
The Ethics Committee presented its recommendations on this subject to the Benchers, and the Benchers approved changes to provisions relating to advertising in the Professional Conduct Handbook in May 2009.

Initiative 2-6d
Reconsidering policies regarding referral fees.

Status – July 2010

The Ethics Committee has had this matter on its agenda for consideration, and has debated and made recommendations on fee sharing in the context of multi-disciplinary partnerships. Other policy considerations relating to referral fees are on the Committee's agenda, but no substantive reconsideration of the policies has occurred. Further examination is anticipated later in 2010.

Strategy 2-7

Re-examine the rules and internal processes of the Law Society relating to complaints, investigations and dispositions of professional conduct and competence matters in order to identify methods to improve the timely, thorough, fair and appropriate disposition of complaints and hearings.

Initiative 2-7

A task force will re-examine Law Society rules and processes for handling complaints and discipline hearings to determine if there are methods by which to improve the timely, thorough, fair and appropriate disposition of professional conduct concerns, including the consistency of decisions and sanctions.

Status – July 2010

The Discipline Guidelines Task Force presented its interim report to the Benchers on July 9, 2010 in connection with its review and recommendations concerning holding in abeyance the investigation of a complaint.

GOAL 3: Effective public and lawyer education.

Strategy 3–1
Design and implement a plan to support the mentoring of lawyers.

Initiative 3–1
A mentoring program is to be presented to the Benchers for consideration.

Status – July 2010
The Lawyer Education Advisory Committee developed and presented a mentoring program to the Benchers, which the Benchers adopted at their May 2009 meeting. Rules necessary to implement the program were approved by the Benchers in November 2009. The program was implemented commencing January 1, 2010.

Strategy 3–2
Develop and implement initiatives to more effectively educate lawyers on the topic of professionalism.

Initiative 3–2
An examination of programs available in other jurisdictions, together with the development of options for such programs in British Columbia, for consideration by the Benchers.

Status – July 2010
A working group of the Lawyer Education Advisory Committee is currently meeting to discuss options for a program to more effectively educate lawyers on the topic of professionalism and expects to present its final recommendations by the end of 2010.

Strategy 3–3
Develop and implement initiatives to improve advocacy skills for lawyers.

Initiative 3–3
The Lawyer Education Advisory Committee will examine initiatives relating to the teaching of advocacy skills and present options to the Benchers for consideration.

Status – July 2010.
A working group of the Lawyer Education Advisory Committee is currently meeting to discuss options for a program or other initiatives to improve advocacy skills for lawyers and expects to present its final recommendations by the end of 2010.

Strategy 3–4
Educate the public regarding the legal system on a variety of levels.

Initiative 3–4a
The Law Society is developing an instructional video for use in high schools.

Status – July 2010
The instructional video has been completed (and was shown to the Benchers in April 2009), as has the Teachers' Guide that accompanies the instructional video. The complete program has been delivered to high schools around the province.

Initiative 3–4b
The President of the Law Society – Gordon Turriff, QC – is undertaking a speaking tour across the province during 2009 to commemorate the 125th anniversary of the Law Society. He will address a variety of topics relating to the legal profession and its regulation.

Status – July 2010
Mr. Turriff has now completed his tour.

1. Financial Report

Attached are the financial highlights and results to May 31, 2010.

General Fund

General Fund (excluding TAF)

The General Fund operating results has a positive variance of $597,000 to May 31, 2010.

Revenue is $8,964,000, $205,000 (2%) ahead of budget due to the following:

- The Wirick custodianship generated an unexpected recovery of $100,000.
- Practicing membership is 39 members ahead of budget to date, resulting in $50,000 in additional revenue
- PLTC students are 14 ahead of budget, resulting in $40,000 in additional revenue
- CPD penalty fees resulted in an unbudgeted $15,000

Operating expenses are $6,326,000, $392,000 below budget, of which $118,000 relates to the timing of expenditures, and $274,000 arises mainly from staff vacancies unexpected at the time the 2010 was established in July 2009.

- One manager position has been eliminated
- Two senior management positions (CLO and Communications manager) were vacant for the first quarter of this year
- Two forensic accounting positions are being actively recruited
- Two vacant positions are currently being assessed and have not been filled at this time

2010 Forecast - General Fund (excluding TAF)

The 2010 General Fund (excluding TAF) budget was expected to have an operating deficit of $1,242,000 as a result of incorporating the forensic accounting program into the General Fund. With the additional revenue received and reduced operating expenses, the deficit is projected to be reduced to $400,000.

This 2010 forecast assumes the following:

Revenue

- Wirick custodianship recovery - $100,000
- 10,365 projected members to year end compared to 10,300 budget - $80,000
- Additional 26 PLTC students - $60,000
- CPD penalty revenue - $14,000

The 2011 General Fund budget has this increased base for projecting 2011 levels for practicing members and PLTC students, and a projection for CPD penalty fees has been incorporated. Custodianship recoveries have been budgeted at historical levels.

Operating Expenses

For the 2010 year, operating expenses are projected to be less than expected as a result of the following:

- Elimination of one manager position
- Elimination of the leased car policy
- Lower custodian fees due to continued movement of custodian files to our in-house counsel and reduced use of outside custodians - $100,000
- Expected lower expenses due to staff vacancies of $460,000, offset by a budgeted $200,000 as a vacancy contingency. This level of savings experienced in 2010 is unusual and is not expected to continue into 2011.

The reduction in the General Fund operating expenses arising from the first three items have been incorporated into the 2011 practice fee/ General Fund budget and the 2011 vacancy contingency has been increased to $300,000. Although we do expect to have significant vacancy savings this year, our turnover rate is still quite low.

TAF-related Revenue and Expenses

TAF revenue received to May 31, 2010 reflects only the first quarter of 2010 but remains consistent with our budget. Operating expenses are also tracking to budget.

The BC Real Estate Association has revised their market projection for 2010, now projecting a 3.1% decrease in real estate unit sales, down from the previous projection of an increase of 6%. We will continue to monitor changes in the TAF revenue levels and economic forecasts

Special Compensation Fund

The Special Compensation Fund is on track. The positive variance in Special Compensation Fund relates to the timing of costs and recoveries, as there was little activity in the Fund during the first five months of the year.

Lawyers Insurance Fund

The markets were up during the first quarter of this year, but have been in a downward trend over the past few months. With this drop in the markets, the market value of the long term investments at May 31st was $94,170,000, down $1.2 million on a year to date basis. The investment return of -1.2% for the year-to-date to May 31, 2010 was slightly better than the comparative benchmark which declined -1.6%. There were few investment changes during the five months, therefore little realization of investment income through the income statement.

LIF operating expenses are $280,000 below budget in the first five months due to savings related to one unfilled position and reduced investment management fees.

The Law Society of British Columbia

Summary of Financial Highlights - 2010
($000's)

2010 General Fund Results - YTD May 2010

	Actual	Budget	$ Var		% Var
Revenue					
Membership fees	7,263	7,216	47	*	0.65%
PLTC and enrolment fees	687	646	41		6.35%
Electronic filing revenue	237	238	(1)		-0.42%
Interest income	159	159	-		0.00%
Other revenue	618	500	118	**	23.60%
	8,964	8,759	205		
Expenses including 845 Cambie	6,326	6,718	392	***	5.84%
	2,638	2,041	597		

* Membership numbers are 10,288 to date
** CPD late fees 14k not budgeted, Custodianship recoveries 93k over budget
*** Mainly unplanned vacancies

2010 General Fund Year End Forecast (excluding Capital & Depreciation)

Practice Fee Revenue	**Ave # of Members**	**Forecast Variance**
2008 Actual	10,035	
2009 Actual	10,213	
2010 Budget	10,300	
2010 YTD	10,288	
2010 Forecast	10,365	
Revenue		
Custodian recovery		93
Membership revenue (65 members over budgeted membership of 10,300)		80
PLTC fees (26 additional students)		60
Other revenue		33
		266
Expenses		
Unplanned vacancies savings (net of budget - $200k)		261
Reduction management position		107
External counsel fees overage		(46)
Elimination of leased car policy		20
Custodian fees savings, Reduction of external custodians, files moved in-house		100
Other savings		128
		570
2010 General Fund Forecast - Variance		836
2010 General Fund Budget		(1,242)
2010 General Fund Forecast		(406)

Trust Assurance Program Forecast

	2010 Forecast	2010 Budget	Variance
TAF Revenue	2,467	2,467	-
Trust Administration Department	2,371	2,371	-
Trust Assurance Program	96	96	-
Use of TAF Reserve	-	-	-
Net Trust Assurance Program	96	96	-

Most recent Real Estate Association projection - 3.1% decrease in unit sales from 2009 to 2010.
First quarter revenue is tracking to budget.

2010 Lawyers Insurance Fund Long Term Investments - YTD May 2010

Market Value	
May 31, 2010	94,169,818
December 31, 2009	95,359,569
YTD Performance	-1.2%
Benchmark Performance	-1.6%

The Law Society of British Columbia
General Fund
Results for the 5 Months ended May 31, 2010
($000's)

	2010 Actual	2010 Budget	$ Var	% Var
Revenue				
Membership fees (1)	7,263	7,216		
PLTC and enrolment fees	687	646		
Electronic filing revenue	237	238		
Interest income	159	159		
Other revenue	618	500		
Total Revenues	8,964	8,759	205	2.3%
Expenses				
Regulation	2,402	2,676		
Education and Practice	1,134	1,211		
Corporate Services	947	936		
Bencher Governance	624	615		
Communications and Information Services	681	725		
Policy and Legal Services	547	542		
Depreciation	127	148		
Total Expenses	6,462	6,853	391	5.7%
General Fund Results before 845 Cambie and TAP	2,502	1,906	596	
845 Cambie net results	136	134	2	
General Fund Results before TAP	**2,638**	**2,040**	**598**	
Trust Administration Program (TAP)				
TAF revenues	539	520	19	
TAP expenses	865	928	63	7%
TAP Results	**(326)**	**(408)**	**82**	
General Fund Results including TAP	**2,312**	**1,632**	**680**	

(1) Membership fees include capital allocation of $1.806m (YTD capital allocation budget = $1.797m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at May 31, 2010
($000's)

	May 31 2010	Dec 31 2009
Assets		
Current assets		
Cash and cash equivalents	57	3
Unclaimed trust funds	1,525	1,439
Accounts receivable and prepaid expenses	6,854	1,372
B.C. Courthouse Library Fund	1,661	724
Due from Lawyers Insurance Fund	2,505	16,302
	12,602	19,840
Property, plant and equipment		
Cambie Street property	11,789	11,886
Other - net	1,486	1,439
	25,877	33,165
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	1,367	4,305
Liability for unclaimed trust funds	1,525	1,439
Current portion of building loan payable	500	500
Deferred revenue	7,707	14,893
Deferred capital contributions	88	92
B.C. Courthouse Library Grant	1,661	724
Due to Special Compensation Fund	9	9
Deposits	33	28
	12,890	21,990
Building loan payable	5,100	5,600
	17,990	27,590
Net assets		
Invested in P,P&E, net of associated debt	7,710	7,226
Capital Allocation	1,924	957
Unrestricted	(1,747)	(2,608)
	7,887	5,575
	25,877	33,165

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 5 Months ended May 31, 2010
($000's)

	Invested in P,P & E net of associated debt	Capital Allocation	Unrestricted	2010 Total	2009 Total
	$	$	$	$	$
Net assets - December 31, 2009	7,226	957	(2,608)	5,575	5,059
Net (deficiency) excess of revenue over expense for the period	(355)	1,806	861	2,312	516
Repayment of building loan	500	(500)	-	-	-
Purchase of capital assets:					
LSBC Operations	217	(217)	-	-	-
845 Cambie	122	(122)	-	-	-
Net assets - May 31, 2010	7,710	1,924	(1,747)	7,887	5,575

The Law Society of British Columbia
Special Compensation Fund
Results for the 5 Months ended May 31, 2010
($000's)

	2010 Actual	2010 Budget	$ Var	% Var
Revenue				
Annual assessment	222	215		
Recoveries	33	-		
Total Revenues	255	215	40	18.6%
Expenses				
Claims and costs, net of recoveries	77	306		
Administrative and general costs	29	13		
Loan interest expense	(17)	-		
Total Expenses	89	319	(230)	-72.1%
Special Compensation Fund Results	**166**	**(104)**	**270**	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at May 31, 2010
($000's)

	May 31 2010	Dec 31 2009
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	821	2,753
Due from General Fund	9	9
	831	2,763
	831	2,763
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	4	8
Current portion of claims payable	-	1,886
Deferred revenue	297	505
	301	2,399
Net assets		
Unrestricted net assets	530	364
	530	364
	831	2,763

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
For the 5 Months ended May 31, 2010
($000's)

	Unrestricted $
Net assets - December 31, 2009	364
Net excess of revenue over expense for the period	166
Net assets - May 31, 2010	530

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 5 Months ended May 31, 2010
($000's)

	2010 Actual	2010 Budget	$ Var	% Var
Revenue				
Annual assessment	5,039	5,039		
Investment income (1)	146	1,389		
Other income	22	-		
Total Revenues	5,207	6,428	(1,221)	-19.0%
Expenses				
Insurance Expense				
Provision for settlement of insurance deductibles	6,409	6,409		
Salaries and benefits	857	953		
Contribution to program and administrative costs of General Fund	542	583		
Office	270	324		
Actuaries, consultants and investment brokers' fees	100	154		
Allocated office rent	48	48		
Premium taxes	9	5		
	8,235	8,476		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	250	287		
Total Expenses	8,485	8,763	278	3.2%
Lawyers Insurance Fund Results before 750 Cambie	(3,278)	(2,335)	(943)	
750 Cambie net results	136	134	2	
Lawyers Insurance Fund Results	**(3,142)**	**(2,201)**	**(941)**	

(1) There is an unrealized loss of $1,393k for the year recognized through net assets (not through income statement). See Statement of Changes in Net Assets.

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at May 31, 2010
($000's)

	May 31 2010	Dec 31 2009
Assets		
Cash and cash equivalents	5,028	20,573
Accounts receivable and prepaid expenses	324	377
Due from members	49	35
General Fund building loan	5,600	6,100
Investments	103,689	105,082
	114,690	132,167
Liabilities		
Accounts payable and accrued liabilities	1,085	1,690
Deferred revenue	7,047	6,075
Due to General Fund	2,505	16,302
Due to Special Compensation Fund	821	2,753
Provision for claims	56,808	54,471
Provision for ULAE	8,156	8,073
	76,422	89,364
Net assets		
Unrestricted net assets	20,768	25,303
Internally restricted net assets	17,500	17,500
	38,268	42,803
	114,690	132,167

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 5 Months ended May 31, 2010
($000's)

	Unrestricted $	Internally Restricted $	Total $
Net assets - December 31, 2009	25,303	17,500	42,803
Net deficiency of revenue over expense for the period	(3,142)	-	(3,142)
Unrealized gains on available-for-sale financial assets arising during the period	(1,393)	-	(1,393)
Net assets - May 31, 2010	20,768	17,500	38,268

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

Recommendation

1. Individuals Qualified to Sit on Panels

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

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

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

2. The Task Force recommends that this pool include

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

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

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

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

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

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

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

2. Appointments to Hearing Panels

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

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

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

3. Effect of Recommendations

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

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

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

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

Public interest paramount

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

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

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

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

(d) regulating the practice of law.

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

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 12 – RULES REQUIRING MEMBERSHIP APPROVAL

General meeting to have authority to approve certain rule changes

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 13 – IMPLEMENTING RESOLUTIONS OF GENERAL MEETINGS

Five per cent of members required to requisition referendum

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 18.1 (PROPOSED) – REGULATION OF LAW FIRMS

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

Section 1 — Definition of "law firm"

Section 32 — Financial responsibility

Section 33 — Trust accounts

Section 34 — Unclaimed trust money

Section 62 — Interest on trust accounts

Section 63 — Security and investment of trust accounts

Section 64 — Definitions

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 26 – COMPLAINTS FROM THE PUBLIC

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

Investigator's power to compel evidence

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

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

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

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

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

(2)The failure or refusal of a witness

(a) to attend,

(b) to take an oath,

(c) to answer questions, or

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

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 31 – SPECIAL COMPENSATION FUND

Providing compensation through insurance

NATURE OF CHANGE PROPOSED

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

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

WHY CHANGE IS NEEDED

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

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

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 36 – DISCIPLINE RULES

Summary disbarment or suspension on conviction of an indictable offence

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 36 – DISCIPLINE RULES

Mirror-imaging rules

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38 – DISCIPLINE HEARINGS

Publication of decisions identifying respondents

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38(4) – DISCIPLINE HEARINGS

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38(9) (PROPOSED) – DISCIPLINE HEARINGS

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

RELATED AMENDMENTS

s. 27 Practice standards

s. 46 Costs

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 38.1 – RESIGNATION OF MEMBERSHIP

Permission required to resign without hearing

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

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

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

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

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

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

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

Resignation must be approved by the directors

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

Section 1 — Definition of "disciplinary proceeding"

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 43 – RIGHT TO COUNSEL

Right to counsel in all Law Society proceedings

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

Right to counsel

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 44 – WITNESSES

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

HISTORY OF PROPOSED AMENDMENT

This is a recent request from discipline staff.

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 47 – REVIEW ON THE RECORD

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

section 6 — Meetings

section 9 — Committees

section 42 — Failure to attend

section 43 — Right to counsel

section 48 — Appeal

HISTORY OF PROPOSED AMENDMENT

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

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

SECTION 48 – APPEAL

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

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

RECOMMENDATION

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

LEGAL PROFESSION ACT AMENDMENT REQUESTS 2010

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

Clarification of provisions dealing with privileged and confidential information

NATURE OF CHANGE PROPOSED

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

WHY CHANGE IS NEEDED

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

In particular, section 87 should be amended to

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

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

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

HOW CHANGE WILL CONTRIBUTE TO PUBLIC INTEREST

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

CONSEQUENTIAL AMENDMENTS

None

RECOMMENDATION

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

Memo

The Law Society of British Columbia 2000

To Benchers

From Executive Committee

Date August 25, 2010

Subject **Appointment of Leon Getz, QC to the Board of Directors of the Justice Education Society (JES)**

Background

On August 31, 2010 Margaret Ostrowski QC's third two-year term as the Law Society's appointee to the board of JES expires. The Subcommittee considers this to be an appropriate case for application of Society's policy of limiting the total period of a Law Society appointment to six years.

We are advised that the Executive Committee of JES believes their board of directors would be well-served by the appointment of Leon Getz, QC, and that Mr. Getz has been consulted and is prepared to serve (Tab 1).

Assessment

We have considered the presumption against appointing Benchers to other bodies set out in section 3 of the Benchers' Code of Conduct (Tab 2), and the provisions of section 5 regarding Benchers accepting appointments to boards or committees of other organizations (Tab 3). We also note that earlier this year JES requested the Law Society's support in relation to its serious funding challenges, and was advised that any such support will be limited to in-kind assistance (Tab 4).

We are satisfied that JES's current circumstances raise challenges warranting the appointment of an experienced Bencher to their board. We are also satisfied that JES's mission and objectives do not offend the operative passage of section 5 of the Benchers' Code of Conduct:

> From time to time, a Bencher is asked to join, or run for election to, the board of directors or a committee of an organization the objects of which may not be the same as those of the Society, or a purpose of which may be to promote the interests of lawyers. In either case, the organization might, or might be perceived to, take a position that is contrary to or conflicts with the object and duty of the Society or decisions of the Benchers.

Recommendation

The Executive Committee recommends that the Benchers appoint Leon Getz, QC to the board of directors of the Justice Education Society for a two-year term effective September 1, 2010.

From:	Rick Craig
To:	Rick Craig; Bill McIntosh
Cc:	Patricia Byrne
Subject:	RE: Nominee for the Board of the Justice Education Society
Date:	Wednesday, June 30, 2010 10:21:40 AM

Rick Craig | Executive Director

Justice Education Society
260 – 800 Hornby Street, Vancouver BC V6Z 2C5
Work (604) 660-3191
www.JusticeEducation.ca

Formerly The Law Courts Education Society of B.C.

From: Rick Craig
Sent: 29 June 2010 09:16
To: 'bmcintosh@lsbc.org'
Cc: Patricia Byrne
Subject: Nominee for the Board of the Justice Education Society

Dear Bill

Further to our last conversation, I have discussed possibilities for nominees with the Executive Committee of the Society. We have talked with Leon Getz QC and he has agreed to being nominated to be the Law Society appointee to our Board. He seems to be excited about the possibility and we would be delighted to have him as a Board member.

The AGM of the Society will be in mid September. I would appreciate if you could make the necessary arrangements to ensure that the Law Society appointment is nominated by early September.

Thank you for all of your help with this matter. Please call if you have any questions.

Best regards

Rick Craig | Executive Director

Justice Education Society
260 – 800 Hornby Street, Vancouver BC V6Z 2C5
Work (604) 660-3191
www.JusticeEducation.ca

Formerly The Law Courts Education Society of B.C.

Bencher Governance Policies

The Law Society
of British Columbia

September, 2009

APPENDIX 3

APPOINTMENTS POLICY

1. Objectives

The objective of the Law Society in making appointments to various organizations is to ensure that well-qualified persons with the requisite character, knowledge, expertise, willingness and ability to undertake the duties of the position are appointed. Once an appointment is made, it is the duty of the appointee to serve the best interests of the organizations to which he or she is appointed, keeping in mind the protection of the public interest in the administration of justice.

2. Term of Office

Law Society appointments to any position will normally be up to a total period of six years, provided that other considerations relating to the particular appointment may result in a shortening or lengthening of this period. An initial appointment to a position does not carry with it an expectation of automatic reappointment for up to six years.

3. Benchers or Non-Benchers

A Bencher should be appointed to an outside body only if that body's legislation or by-laws require that the Law Society appointee be a Bencher. In all other cases there is a presumption against appointing Benchers to other bodies. An example of a circumstance in which that presumption might be rebutted is in the case of a newly-created body, where it might be desirable to appoint a Bencher for the first one or two terms, unless the body's procedures are well established.

4. Consultation

(a) Canadian Bar Association: It is generally desirable in the case of consultation with the Canadian Bar Association that a consensus be reached in respect to appointments and that a consensus should be attempted in all cases, recognizing that there may be rare instances where the Law Society will appoint someone not approved or acceptable to the Canadian Bar Association.

(b) Chair: The chair of an organization to which an appointment is made will normally be consulted with respect to the requirements, needs or interests

facts of the situation, the Bencher's refusal to do so would unfairly prejudice the case for the member.

(b) A Bencher who gives evidence in court on a matter of legal ethics must make clear to all parties and to the court that the Bencher speaks to his or her own understanding of matters in issue and is not a spokesperson for the Law Society.

4. Transactions that may benefit a Bencher or a Bencher's firm

(a) The Benchers recognize the importance of avoiding even the appearance of conflicts of interest. However, it is in the interests of the Law Society and the legal profession as a whole that the Law Society obtain competent and cost-effective legal services from practitioners whose skills, training and experience are appropriate to the task. Very often, those practitioners are members of law firms whose members include Benchers. Accordingly, when it is appropriate to retain the legal services of a member of a Bencher's firm, the Law Society may do so, with the approval of the CEO.

(b) A Bencher must not participate in any way in a decision to retain the services of a member of the Bencher's firm.

(c) The Law Society does not pay a preferential rate for legal services to members of a Bencher's law firm.

(d) The Law Society must not enter a transaction, other than for legal services, with any concern in which a Bencher has a substantial financial interest.

5. Accepting appointment to boards or committees of other organizations

The object and duty of the Society is to uphold and protect the public interest in the administration of justice and, subject to the foregoing, to regulate the practice of law and uphold and protect the interests of the Society's members. From time to time, a Bencher is asked to join, or run for election to, the board of directors or a committee of an organization the objects of which may not be the same as those of the Society, or a purpose of which may be to promote the interests of lawyers. In either case, the organization might, or might be perceived to, take a position that is contrary to or conflicts with the object and duty of the Society or decisions of the Benchers. The Benchers govern and administer the affairs of the Society and it is important for the promotion, protection, interest and welfare of the

Society that the Benchers be, and be seen to be, independent of any organization described above.

Accordingly, Benchers must not accept appointment or election to a board of directors or a committee of an organization the objectives of which are, or may reasonably be perceived to be, in conflict with the objectives of the Law Society unless the Benchers, the Executive Committee or the President approves the appointment.

6. Confidentiality when giving practical or ethical advice

When Benchers and Life Benchers give practical or ethical advice in their capacity as Benchers, they have a discretion to keep confidential information that would otherwise be disclosed or reported under the *Professional Conduct Handbook*, Chapter 13, Rule 1(a) or 1(c).

[03/97; 07/99; 11/05; 02/06]

I. Assistance and rulings

1. In situations involving a potential or actual conflict of interest or the appearance of conflict of interest relating to Bencher responsibilities, a Bencher

   (a) is encouraged to consult informally with the President to seek guidance, and

   (b) may seek a ruling on the matter by the Benchers.

2. When a ruling is sought, the Benchers may require any Bencher concerned in the matter to

   (a) leave the meeting,

   (b) remain in the meeting to inform the Benchers, but not otherwise participate in the debate or decision, or

   (c) abstain from voting.

3. For future reference, the Benchers will maintain a record of rulings made and advice given under this section.

[03/97]

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Executive Committee

DATE: Thursday, February 18, 2010

PRESENT:

Glen Ridgway, QC, President
Gavin Hume, QC, 1st Vice-President (by telephone)
Bruce LeRose, QC, 2nd Vice-President (by telephone)
Carol Hickman
Jan Lindsay, QC (by telephone)
Peter Lloyd, FCA (by telephone)
Art Vertlieb, QC (by telephone)

ABSENT: Patrick Kelly

STAFF PRESENT:

Tim McGee
Stuart Cameron
Lance Cooke
Su Forbes, QC
Michael Lucas
Jeanette McPhee
Diana Papove
Alan Treleaven
Adam Whitcombe
Carmel Wiseman

7. Justice Education Society (JES): Funding Situation and Implications for Public Legal Education

Mr. Ridgway referred the Committee members to the JES letter at page 700 of the meeting materials, updating them on plans for a meeting that he and Mr. McGee will hold with the President and CEO of JES, to discuss that organization's funding situation. Mr. Ridgway noted that any discussion of Law Society support for JES will be limited to in-kind arrangements.

Mr. McGee updated the Committee on his recent discussion with the Executive Director of the Law Foundation:

- covered a number of funding issues facing the Law Foundation and JES
- confirmed the importance of limiting discussion of possible Law Society support for JES to in-kind arrangements

Some Committee members expressed appreciation for the value of the work done by JES.

The Committee approved the approach proposed by Mr. Ridgway and Mr. McGee for their upcoming JES meeting.

WKM / 2010-02-26

Memo

The Law Society of British Columbia

3000

To Benchers

From Alan Treleaven

Date July 22, 2010

Subject **Federation Mobility Defalcation Compensation Agreement**

Recommendation

Benchers are asked to approve the signing of the Federation Mobility Defalcation Compensation Agreement.

Background

In April of 2004, the Federation established a Task Force on Compensation Funds in response to the increased mobility of lawyers and the dissimilarities of the compensation programs in the various Canadian jurisdictions. In particular, there was a lack of uniformity with respect to payment limits (some as low as $50,000 per claimant) and entitlement to compensation (some excluded claims from financial institutions or large corporations). The Task Force was charged with developing a national approach to misappropriation of client funds. Su Forbes served on the Task Force, which was initially chaired by Alberta's Council member, Ken Nielsen (as he then was), and more recently by Manitoba's Tim Killeen. The Task Force ultimately agreed that a manageable starting point for the initiative was to work toward uniform coverage across the country *for mobile lawyers only* (as opposed to establishing a uniform compensation scheme for *all* Canadian lawyers). The coverage would be provided through each jurisdiction's respective compensation program.

Actuarial Analysis

The Task Force retained an actuarial firm to analyze claims information for the past 10 years from across the country and prepare an assessment with recommendations about coverage limits for mobile lawyers.

The actuarial report concluded that a limit of $250,000 per claimant would be a reasonable standard as it would indemnify over 90% of losses and over 99% of claimants. The report also concluded that a $2 million limit per lawyer would be reasonable.

Federation Council Resolution

At the March 2009 Federation Council meeting in Québec City, the Task Force presented its recommendations on uniform compensation for victims of lawyer theft. The main recommendations were:

1. that all law societies bound by the National Mobility Agreement provide coverage for misappropriation by a mobile lawyer arising from temporary practice in or with respect to the law of another Canadian jurisdiction in the amount of $250,000 per claimant, with an aggregate limit per lawyer of $2 million, subject to the annual aggregate limit in place in each jurisdiction;

2. that no classes of claimants be excluded from coverage;

3. that the compensation fund of the lawyer's home jurisdiction respond to a claim and that claimants deal directly with the home jurisdiction and follow its claims process.

In endorsing the recommendations, Council passed a resolution that law societies use their best efforts to give effect to the recommendations.

Su Forbes updated the Benchers in 2009.

Follow-up Steps

Consistency in coverage limits and eligibility for payment across the country for theft by mobile lawyers is clearly in the public interest. While the limit proposed by the Federation is lower than BC's Trust Protection Coverage (Part B), the actuarial analysis suggests that a limit of $250,000 would indemnify 99% of all claimants. This is generally consistent with BC's claims experience. The average compensation fund payment in BC is $49,930.

Once all law societies implement the recommendations, the public will be entitled to consistent compensation that is generous, transparent and certain regardless of the home jurisdiction of the mobile lawyer.

The Law Society of BC has implemented the recommendations by revising the insurance policy language effective January 1, 2010. Law Society of BC rule changes were not required.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Mobility Defalcation Compensation Agreement

FEDERATION OF LAW SOCIETIES OF CANADA

May 2010
Ottawa, Ontario

Background

Since the adoption of the Inter-Jurisdictional Practice Protocol by several law societies in 1994, and especially since the adoption of the National Mobility Agreement in 2002, most Canadian lawyers have had the ability to practise law on a temporary basis and subject to limited restrictions in almost all of the jurisdictions of Canada. While this can be done in most cases without notifying any law society, so there are no reliable statistics on the usage of this new ability, every indication is that lawyers are exercising their mobility rights.

While all jurisdictions provide coverage to members of the public who have suffered financial losses due to lawyer misappropriation, jurisdictional differences exist with respect to eligibility for coverage and coverage limits.

Purpose

The purpose of this agreement is to bring more consistency, certainty and transparency to the process for compensating the public if funds are misappropriated by lawyers exercising their temporary mobility rights under the National Mobility Agreement. In order to do that, the signatories to the National Mobility Agreement hereby agree to amend the Agreement by adopting new coverage limits for defalcation compensation claims against their members when they provide legal services while practising temporarily in or with respect to the law of another jurisdiction and establishing new procedures for investigating and adjudicating claims.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this agreement, unless the context indicates otherwise:

"defalcation compensation coverage" means the coverage to be provided by a home governing body to compensate members of the public who sustain a financial loss arising from the misappropriation of monies or property by a lawyer while providing legal services on a temporary basis in a host jurisdiction or with respect to the law of a host jurisdiction;

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

"home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and "home jurisdiction" has a corresponding meaning;

"host governing body" means a governing body of the legal profession in Canada in whose jurisdiction a lawyer practises law without being a member, and "host jurisdiction" has a corresponding meaning;

"Inter-Jurisdictional Practice Protocol" means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;
"lawyer" means a member of a signatory body;

"National Mobility Agreement" or **"NMA"** means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time;

"practice of law" has the meaning with respect to each jurisdiction that applies in that jurisdiction;

"providing legal services" means engaging in the practice of law: in a Canadian jurisdiction or with respect to the law of a Canadian jurisdiction;

"reciprocating governing body" means a governing body that has signed and implemented the provisions of this Agreement.

General

2. The signatory governing bodies will:

(a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

(b) amend their own rules, by-laws, insurance or other policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

(c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

(d) work co-operatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this Agreement alone,

(a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

(b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

Defalcation Compensation Coverage for Mobile Lawyers

5. The signatories adopt the "Principles for Uniform Compensation Fund Coverage for Mobile Lawyers" adopted by the Council of the Federation of Law Societies of Canada (the "Federation) in March 2009, particularized as follows:

(a) The defalcation compensation coverage in place in a lawyer's home jurisdiction must respond to a claim made against one of its lawyers arising from the lawyer providing legal services on a temporary basis in a host jurisdiction;

(b) A home governing body must provide defalcation compensation fund coverage of at least $250,000 per claimant, with an annual limit per lawyer of at least $2 million, subject to the annual aggregate limit in place in the home jurisdiction;

(c) No classes of claimants may be excluded from coverage;

(d) Claimants must contact the lawyer's home governing body and comply with the claims process in place in the home jurisdiction;

(e) Subject to paragraphs (b) and (c) above, the home jurisdiction will follow its local payment guidelines, rules, policies and procedures;

(f) When a claim is made, the home governing body must:

(i) notify the host governing body,

(ii) discuss with the host governing body the manner in which the investigation of the claim will be handled, and

(iii) keep the host governing body informed on the progress of the investigation;

(g) When a claim is made, the home governing body may:

(i) ask the host governing body, on the basis of the public interest, convenience and cost, to assume conduct of the investigation of the claim, and

(ii) agree with the host governing body as to the share of the costs of the investigation to be borne by each;

(h) Where the identity of a home jurisdiction is not obvious because a lawyer is a member and entitled to practise law in more than one jurisdiction, the governing body of the jurisdiction that has the closest and most real connection to the claim will be responsible for responding to the claim;

(i) The factors that must be considered in order to determine which jurisdiction has the closest and most real connection to a claim include, but are not limited to, the following:

(i) the jurisdiction whose law was being practised by the lawyer;

(ii) where the lawyer performed the services involved in the claim;

(iii) the ordinary location of the client;

(iv) the location of the subject matter of the services provided, or the source of the subject matter;

(v) the jurisdiction in which proceedings are commenced or are likely to be commenced;

(vi) where the trust funds were, or ought to have been, deposited; (j) If the identity of a host jurisdiction is not obvious, the host will be determined by applying the criteria set out in clauses (h) and (i).

Dispute Resolution

6. If a dispute arises with a governing body concerning any matter under this Agreement, a signatory to this Agreement may do one or both of the following:

(a) agree with a governing body to refer the matter to a single mediator;

(b) submit the dispute to arbitration under Appendix 5 of the Inter-Jurisdictional Practice Protocol.

Claimants' rights preserved

7. Governing bodies that refer a dispute to mediation or arbitration under clause 7 must make their best efforts to ensure that the ability of a rightful claimant to receive compensation in a timely fashion is not prejudiced.

Implementation

8. Provisions implementing the terms of this Agreement apply immediately with respect to claims for compensation arising when a lawyer who is a member of a reciprocating governing body provides legal services with respect to the jurisdiction of a different reciprocating governing body. The provisions previously in force under the National Mobility Agreement continue to apply with respect to all other claims.

9. Clause 22 of the NMA and the provisions in clause 42 of the NMA that apply to defalcation compensation coverage are of no effect with respect to claims involving only reciprocating governing bodies. When all signatory governing bodies have implemented this agreement, those provisions are hereby rescinded.

National Excess Plan

10. The signatories agree that the Federation of Law Societies of Canada will

(a) maintain the National Excess Plan established under the Inter-Jurisdictional Practice Protocol until all signatory governing bodies have implemented this agreement, and

(b) decide on the future use or disposition of the funds in the plan.

SIGNED as of the dates indicated below.

LAW SOCIETY OF ALBERTA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF BRITISH COLUMBIA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF MANITOBA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEW BRUNSWICK

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR

Per: _____ _____
Authorized Signatory Date

NOVA SCOTIA BARRISTERS' SOCIETY

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF UPPER CANADA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF PRINCE EDWARD ISLAND

Per: _____ _____
Authorized Signatory Date

BARREAU DU QUÉBEC

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF SASKATCHEWAN

Per: _____ _____
Authorized Signatory Date

Memo

The Law Society of British Columbia 4000

To Benchers

From Bill McIntosh

Date August 25, 2010

Subject **Law Society Representatives on the 2010 QC Appointments Advisory Committee**

At their August 19, 2010 meeting the Executive Committee resolved to recommend that the Benchers appoint First Vice-President Hume to join President Ridgway as the Law Society's representatives on the 2010 QC Appointments Advisory Committee.

Each year the President and another member of the Law Society are appointed by the Benchers participate in an advisory committee that reviews all applications for appointment of Queen's Counsel, and recommends deserving candidates to the Attorney General. The Benchers' usual practice, on the Executive Committee's recommendation, is to appoint the First Vice-President to join the President on the QC Appointments Advisory Committee.

The other members of the QC Appointments Advisory Committee are the Chief Justices, the Chief Judge and the Deputy Attorney General.

Accordingly, the Benchers are requested to adopt the following resolution:

> *BE IT RESOLVED* to appoint President Ridgway and First Vice-President Hume as the Law Society's representatives on the 2010 QC Appointments Advisory Committee.

The Law Society of British Columbia

Chapter 10 of *Professional Conduct Handbook*: Effect of *R. v. Cunningham*

August 9, 2010

Purpose of Report: **Decision by Benchers**

Prepared by: **Ethics Committee**

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date August 9, 2010

Subject **Chapter 10 of *Professional Conduct Handbook*: Effect of *R. v. Cunningham***

In the recent case from the Yukon, *R. v. Cunningham* 2010 SCC 10 (attached), the Supreme Court of Canada determined that in a criminal case a court has the authority to require counsel who is seeking to withdraw from the case to continue to represent an accused when the reason for withdrawal is non-payment of fees. With respect to this aspect of withdrawal this is a reversal of the law in British Columbia in *Leask v. Cronin* 66 BCLR 187 (BCSC), which determined that if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, subject to the court's authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose.

The court in Cunningham opined (at para. 50)

> If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (C. (D.D.), at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

We have given advice to the profession in the *Benchers' Bulletin* about the implications of *R. v. Cunningham*, and a copy of the article notifying the profession of the case's implications is attached.

The new position with respect to withdrawal for non-payment of legal fees in a criminal case is at odds with what we currently advise counsel in Chapter 10 of the *Professional Conduct Handbook*, and the attached changes to Chapter 10 are designed to update the *Handbook* to reflect *Cunningham*. We recommend you adopt those changes.

We intend to incorporate similar changes in the LSBC version of the Model Code provisions regarding withdrawal.

Attachments:

- Draft changes to Chapter 10 of the *Professional Conduct Handbook*.
- *Benchers' Bulletin* article re *R. v. Cunningham*.
- *R. v. Cunningham*.

(c10cunningham26benchers/10)

PROFESSIONAL CONDUCT HANDBOOK

CHAPTER 10

WITHDRAWAL

Withdrawal for non-payment of fee

6. If a lawyer and client agree that the lawyer will act only if the lawyer's fee is paid in advance, the lawyer must confirm that agreement in writing to the client, specifying a payment date.

7. A lawyer must not withdraw because the client has not paid the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for a hearing or trial.

Procedure for withdrawal

8. Upon withdrawal, the lawyer must immediately:

   (b) notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer has withdrawn and, where applicable, comply with any ~~statutory~~ other requirements of the tribunal,[2]

Confidentiality

9. Subject to exceptions permitted by law,[3] ~~If~~ if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not~~,~~ ~~unless the client consents,~~ disclose the reason for the withdrawal unless the client consents.

FOOTNOTES:

2. In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse to allow the withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See *R. v. Cunningham*, 2010 SCC 10.

The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, ~~If~~ if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Re Leask* ~~v.~~*and Cronin*~~, Prov. J.~~ (1985), 66 BCLR 187 (~~BC~~SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the ~~Supreme Court~~ Rules of Court ~~16(4)~~ before being relieved of the responsibilities ~~which~~ that attach as "solicitor acting for the party." See *Luchka* ~~and Luchka~~ v. *Zens* ~~et al~~ (1989), 37 BCLR (2d) 127 (~~BC~~CA).

3. One such exception is that set out in *R. v. Cunningham*, 2010 SCC 10, which establishes that, in a criminal case, if the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court. See para. 31:

> Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *R.* v. *McClure*, 2001 SCC 14 and *Smith v. Jones*, [1999] 1 S.C.R. 455). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

PROFESSIONAL CONDUCT HANDBOOK

CHAPTER 10

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FOOTNOTES:

2. In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse to allow the withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See *R. v. Cunningham*, 2010 SCC 10.

The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Re Leask and Cronin* (1985), 66 BCLR 187 (SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the Rules of Court before being relieved of the responsibilities that attach as "solicitor acting for the party." See *Luchka* v. *Zens* (1989), 37 BCLR (2d) 127 (CA).

3. One such exception is that set out in *R. v. Cunningham*, 2010 SCC 10, which establishes that, in a criminal case, if the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court. See para. 31:

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Benchers' Bulletin

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From the Ethics Committee

Withdrawal of counsel in criminal matters – implications of *R.* v. *Cunningham*

In the recent case from the Yukon, *R.* v. *Cunningham*, 2010 SCC 10, the Supreme Court of Canada determined that, in a criminal matter, a court has the authority to require counsel seeking to withdraw from a case to continue to represent an accused when the reason for withdrawal is non-payment of fees. With respect to this aspect of withdrawal, this is a reversal of the law in British Columbia stated in *Re Leask and Cronin* (1985), 66 BCLR 187 (SC), which determined that, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, subject to the court's authority to cite a lawyer for contempt if there is evidence the withdrawal was done for some improper purpose.

While the Supreme Court emphasized in *Cunningham* that refusing to allow counsel to withdraw in these circumstances should truly be a remedy of last resort to prevent serious harm to the administration of justice, it also opined:

If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power. In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

The Ethics Committee expects Chapter 10, footnote 2 of the *Professional Conduct Handbook* to be amended to refer expressly to *R.* v. *Cunningham*. However, counsel have always been bound by Chapter 10, Rule 7 which states:

A lawyer must not withdraw because the client has not paid the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

In the committee's opinion, counsel's obligation has not changed because of *Cunningham*;Rule 7 has always prevented counsel from withdrawing when it is unfair to a client to do so. What has changed is that it is now clear the court has the power, in certain circumstances, to refuse to permit counsel to withdraw from a criminal case. Such a refusal may occur if the proposed withdrawal results from the client's failure to comply with the financial terms of the retainer, and if the court is of the opinion that the withdrawal will leave the client with insufficient time to retain and instruct new counsel and the client's inability to do that will cause serious harm to the administration of justice. The Law Society continues to have power to discipline

lawyers for breaches of Rule 7.

How can lawyers comply with Rule 7?

A lawyer who proposes to withdraw because of a client's failure to comply with the financial terms of a retainer should take the following steps:

- Advise the client in writing the lawyer will withdraw from the case unless the client provides the necessary retainer by a certain date. The date must be one that leaves the client sufficient time to retain other counsel if the client is unable to come up with the necessary funds, or
- Act for the client in a limited capacity only, and do not go on the record for the client until the client has provided the necessary retainer for the trial or other matters requiring representation. When acting in a limited capacity for a client, a lawyer must comply with Chapter 10, Rule 10 of the *Professional Conduct Handbook*, which states:

  A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.

What can lawyers say to the court?

In the Cunningham decision, it was determined that, if a lawyer's reason for withdrawal goes to the merits of the case or would cause prejudice to the client, solicitor-client privilege may attach to the information. In that circumstance, a lawyer may not disclose it to the court. If the reason for withdrawal does not involve these considerations, a lawyer may give the following explanations to the court:

If the lawyer's withdrawal is for ethical reasons

If a lawyer seeks to withdraw from a case because the lawyer is in a conflict, has received instructions from the client that require the lawyer to cease acting or for other reasons relating to the lawyer's ethical obligations, the lawyer may advise the court that he or she is withdrawing "for ethical reasons."

If the lawyer's withdrawal occurs under Chapter 10, Rules 2 or 3

In other circumstances, if the lawyer is permitted to withdraw under Chapter 10 of the *Professional Conduct Handbook*, but the circumstances do not engage the lawyer's ethical obligations, the lawyer may be permitted to advise the court that the lawyer's reasons for withdrawing do not involve the lawyer's financial arrangements with the client. Such circumstances could occur under Chapter 10, Rules 2 or 3, which permit a lawyer to withdraw when there has been a serious loss of confidence between lawyer and client and the withdrawal is not unfair to the client or done for an improper purpose.

A lawyer may amplify this explanation by providing other non-confidential information to the court in support of the withdrawal. For example, a lawyer may be compelled to withdraw because another trial might have lasted longer than anticipated or for other reasons related to the lawyer's workload.

If the lawyer's withdrawal is for non-payment of fees

If a lawyer seeks to withdraw because a client has failed to pay the lawyer's fees, the lawyer must disclose that information to the court when asked to explain the withdrawal.

What if a lawyer cannot disclose the reason for withdrawal?

If a lawyer is unable to answer a court's request for the reason for withdrawal because the reason goes to the merits of the case or the client will be prejudiced by disclosing the information, the lawyer should simply advise the court of that fact. A lawyer who expects to be in such a position may want to consult a Bencher or

Law Society practice advisor.

When must counsel appear in court to withdraw from a criminal matter?

If counsel's withdrawal raises no issue about adjournment of the case, counsel may withdraw from a criminal case by notifying the client, the Crown and the appropriate registry of the withdrawal. If the withdrawal may raise such an issue, however, counsel should attend at court to withdraw.

Further analysis of *R.* v. *Cunningham* can be found in the Case Comment by David Layton in the Spring 2010 issue of *The Verdict*, published by The Trial Lawyers Association of BC.The articlemay be obtained from the Trial Lawyers Association by contacting Moya Larkin at moya@tlabc.org.

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SUPREME COURT OF CANADA

CITATION: R. *v.* Cunningham, 2010 SCC 10

DATE: 20100326

DOCKET: 32760

BETWEEN:

Her Majesty The Queen

Appellant

v.

Jennie Cunningham

Respondent

– and –

Attorney General of Ontario, Law Society of British Columbia, Law Society of Yukon, Canadian Bar Association and Criminal Lawyers' Association (Ontario)

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Rothstein J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ. concurring)

(paras. 1 to 60)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. *v.* CUNNINGHAM

Her Majesty The Queen *Appellant*

v.

Jennie Cunningham *Respondent*

and

Attorney General of Ontario, Law Society of British Columbia, Law Society of Yukon, Canadian Bar Association and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Cunningham

Neutral citation: 2010 SCC 10.

File No.: 32760.

2009: November 17; 2010: March 26.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

Law of professions — Barristers and solicitors — Counsel's withdrawal application — Whether, in criminal matter, court has authority to refuse to grant defence counsel's request to withdraw because accused has not complied with financial terms of retainer — Whether oversight of lawyer's withdrawal falls exclusively to law societies.

Courts — Jurisdiction — Counsel's withdrawal application — Whether, in criminal matter, court has authority to refuse to grant defence counsel's request to withdraw because accused has not complied with financial terms of retainer.

C, a criminal defence lawyer employed by Yukon Legal Aid, represented an accused charged with sexual offences against a young child. Prior to the preliminary inquiry, Legal Aid informed the accused that failure to update his financial information would result in the suspension of his legal aid funding. The accused failed to respond to the request and Legal Aid informed him that C was no longer authorized to represent him. C brought an application to the Territorial Court of Yukon to withdraw as counsel of record solely because of the suspended funding. However, C indicated that she was willing to represent the accused if funding were reinstated. The Territorial Court refused her application. The Supreme Court of the Yukon Territory dismissed C's application for an order in the nature of *certiorari* seeking to quash the Territorial Court's order, holding that the Territorial Court did not exceed its jurisdiction. The Court of Appeal allowed C's appeal on the basis that the Territorial Court had no discretion to refuse C's application to withdraw.

Held: The appeal should be allowed.

The Territorial Court had jurisdiction to refuse to grant C's request to withdraw. A court has the authority to require counsel to continue to represent an accused when the reason for withdrawal is non-payment of fees, but the authority must be exercised sparingly and only when necessary to prevent serious harm to the administration of justice. Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice. Likewise, in the case of statutory courts, the authority to control their process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law.

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not

prejudice an accused does not attract the protection of the solicitor–client privilege, and the remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application to withdraw does not justify leaving the decision to withdraw exclusively to counsel. As well, the oversight of a lawyer's withdrawal does not fall exclusively to the law societies. Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. These roles are not mutually exclusive; rather, they are necessary to ensure the effective regulation of the profession and protect the process of the court. While counsel's personal or professional interests may be in tension with an individual client's interest, courts must presume that lawyers act ethically. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less. Lastly, a *Rowbotham* order might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement for it.

The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles. If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the court should allow the withdrawal. If timing is an issue, the court is entitled to enquire into counsel's reasons. In either the case of ethical reasons or non–payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor–client privilege. If withdrawal is sought for an ethical reason, the court must grant withdrawal; if it is sought because of non–payment of legal fees, the court may exercise its discretion to refuse counsel's request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.

Refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer and, in that context, an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record.

In this case, the Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. The question of whether this case satisfies the high threshold that must be met to refuse leave to withdraw is now moot and the record before this Court does not provide information on several of the relevant factors. It is, therefore, not clear whether the circumstances of this case would, after full analysis of the relevant considerations, justify a refusal of leave to withdraw.

Cases Cited

Considered: *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315; *R. v. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, leave to appeal refused, [1997] 1 S.C.R. vii (*sub nom. Ferguson v. The Queen*); *R. v. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; **referred to:** *Vescio v. The King*, [1949] S.C.R. 139; *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127; *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83; *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75; *Bernier v. 9006-1474 Québec inc.*, [2001] J.Q. nº 2631 (QL); *Mireau v. Canada* (1995), 128 Sask. R. 142; *R. v. Brundia*, 2007 ONCA 725, 230 O.A.C. 29; *R. v. Peterman* (2004), 70 O.R. (3d) 481; *R. v. Golding*, 2007 NBQB 320, 325 N.B.R. (2d) 92; *Dooling v. Banfield* (1978), 22 Nfld. & P.E.I.R. 413; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *R. v. Burns*, [1994] 1 S.C.R. 656; *Young v. Young*, [1993] 4 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Patterson v. The Queen*, [1970] S.C.R. 409; *Dubois v. The Queen*, [1986] 1 S.C.R. 366; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601; *R. v. Gardiner*, 2008 ONCA 397, 231 C.C.C. (3d) 394; *Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590.

Statutes and Regulations Cited

Code of Civil Procedure, R.S.Q., c. C-25, art. 249.

Criminal Code, R.S.C. 1985, c. C-46, ss. 537(1), 674, 784(1).

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40.

Territorial Court Act, R.S.Y. 2002, c. 217, s. 77.

Authors Cited

Canadian Bar Association. *Code of Professional Conduct*. Ottawa: Canadian Bar Association, 2009 (online: http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf).

Jacob, I. H. "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs*. 23.

Law Society of Alberta. *Code of Professional Conduct*, version no. 2009_V1, June 3, 2009 (online:

http://www.lawsocietyalberta.com/files/Code.pdf).

Law Society of British Columbia. *Professional Conduct Handbook*, updated March 2010 (online: http://www.lawsociety.bc.ca/publications_forms/handbook/handbook_toc.html).

Law Society of Upper Canada. *Rules of Professional Conduct*, updated June 25, 2009 (online: http://www.lsuc.on.ca/regulation/a/profconduct/).

Law Society of Yukon. *Code of Professional Conduct* (online: http://www.lawsocietyyukon.com/code.php).

Létourneau, Gilles. *The Prerogative Writs in Canadian Criminal Law and Procedure*. Toronto: Butterworths, 1976.

APPEAL from a judgment of the Yukon Territory Court of Appeal (Newbury, Kirkpatrick and Tysoe JJ.A.), 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49, [2008] Y.J. No. 37 (QL), 2008 CarswellYukon 42, setting aside a decision of Gower J., 2006 YKSC 40, 41 C.R. (6th) 66, [2006] Y.J. No. 46 (QL), 2006 CarswellYukon 51, dismissing an application to quash an order of Lilles Terr. Ct. J., 2006 YKTC 54, 2006 YKTC 61, dismissing defence counsel's application to withdraw. Appeal allowed.

Ron Reimer and *Peter A. Eccles*, for the appellant.

Gordon R. Coffin and *Nils F. N. Clarke*, for the respondent.

Susan L. Reid, for the intervener the Attorney General of Ontario.

Leonard T. Doust, *Q.C.*, and *Michael A. Feder*, for the intervener the Law Society of British Columbia.

John J. L. Hunter, *Q.C.*, and *Brent B. Olthuis*, for the intervener the Law Society of Yukon.

Gregory P. DelBigio, for the intervener the Canadian Bar Association.

Scott C. Hutchison and *Andrea Gonsalves*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

ROTHSTEIN J. —

1. Introduction

[1] What is the role of a court when defence counsel, in a criminal matter, wishes to withdraw because of non-payment of legal fees? Does a court have the authority to require counsel to continue to represent the accused? In my opinion, a court does have this authority, though it must be exercised sparingly, and only when necessary to prevent serious harm to the administration of justice.

2. Facts

[2] Jennie Cunningham is a criminal defence lawyer employed by the Yukon Legal Services Society ("Legal Aid"). She represented Clinton Lance Morgan, who was charged with three sexual offences against a young child. Mr. Morgan's preliminary inquiry was set for June 26, 2006. The Crown had advised that it intended to bring a motion prior to the preliminary inquiry to have the complainant's testimony admitted by videotape in lieu of *viva voce* evidence.

[3] On May 3, 2006, Legal Aid informed Mr. Morgan that he had to update his financial information, which he had previously provided to Legal Aid, and that failure to do so would result in the suspension of his Legal Aid funding. By May 16, 2006, Mr. Morgan had failed to respond to the request and Legal Aid informed him that his counsel, Ms. Cunningham, was no longer authorized to represent

him. Ms. Cunningham promptly brought an application to the Territorial Court of Yukon to withdraw as counsel of record. The sole reason for the application was the suspension of Legal Aid funding and Mr. Morgan's inability to otherwise pay for legal services. Ms. Cunningham indicated that she was willing to continue to represent Mr. Morgan if his Legal Aid funding was reinstated.

3. Judicial History

A. *Territorial Court of Yukon, 2006 YKTC 61 (CanLII)*

[4] Lilles Terr. Ct. J. heard Ms. Cunningham's application to withdraw. He refused to grant her application to withdraw because: a) legal aid funding could potentially be reinstated and Ms. Cunningham was willing to continue in the event that it was; b) the charges against Mr. Morgan were very serious; c) there was a young child complainant whose memory, emotional and psychological well-being may have been affected by further delay; d) counsel would have to be appointed to cross-examine the child complainant; e) there was no information on the potential for Mr. Morgan to obtain other representation; f) there was no information on when the preliminary inquiry could be rescheduled if withdrawal was allowed; g) while a preliminary inquiry is not as critical as a trial, it is still important to how the trial is conducted; h) there was a hotly contested and difficult issue regarding videotape evidence that would be difficult for Mr. Morgan to deal with as a self-represented litigant; and i) further delay would prejudice Mr. Morgan as he was labelled as a potential sexual offender as a result of the criminal charges (para. 26).

B. *Supreme Court of the Yukon Territory, 2006 YKSC 40, 41 C.R. (6th) 66*

[5] Gower J. heard Ms. Cunningham's application for an order in the nature of *certiorari* seeking to quash the order of Lilles Terr. Ct. J. Gower J. determined that the preliminary inquiry judge had jurisdiction to exercise discretion over withdrawal on the basis of s. 537(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and s. 77 of the *Territorial Court Act*, R.S.Y. 2002, c. 217. After a thorough review of Canadian authorities on the issue of withdrawal, Gower J. concluded that the weight of authority supported the court having the power to exercise its discretion to refuse withdrawal. He held that Lilles Terr. Ct. J. did not exceed his jurisdiction and dismissed the application for *certiorari*.

C. *Court of Appeal for the Yukon Territory, 2008 YKCA 7, 257 B.C.A.C. 1*

[6] On appeal, the court found that the issue had become moot as a trial of the charges against Mr. Morgan had become unnecessary (para. 17). The appeal nevertheless proceeded in order to obtain appellate court guidance on the legal issue.

[7] The Court of Appeal allowed the appeal, finding that Lilles Terr. Ct. J. had no discretion to refuse withdrawal. It reached its conclusion on the basis of three factors. First, the law society has the primary interest in lawyer regulation and court oversight of withdrawal could create a conflict between the court's decision and any disciplinary decision by a law society. Second, the court's supervision of withdrawal potentially threatens solicitor-client privilege in cases where counsel is asked to disclose the reasons for wishing to withdraw. Third, compelled representation puts counsel in the position of a perceived or actual conflict between the client's best interest and the lawyer's interest in ending the matter as quickly as possible. It determined the better approach to withdrawal was to rely on the assumption that lawyers generally do not avoid their professional obligations and, if they do, then the law societies will take appropriate disciplinary action. The court acknowledged, however, that a court could use its contempt power "in extreme circumstances where a lawyer's conduct in connection with a withdrawal amounted to a serious affront to the administration of justice" (para. 29). The court concluded that Lilles Terr. Ct. J. should not have ordered Ms. Cunningham to continue to represent Mr. Morgan.

4. Issue

[8] The issue in the present appeal is whether, in a criminal matter, a court has the authority to refuse to grant defence counsel's request to withdraw because the accused has not complied with the financial terms of the retainer. The reasons use the phrase "non-payment of legal fees" to refer to situations where, for example, an accused has actually defaulted on payment, where an accused has failed to provide funds on account at the agreed upon time, or where a legal aid certificate has been suspended or revoked.

5. Analysis

[9] An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused (see *Vescio v. The King*, [1949] S.C.R. 139, at p. 144; though exceptionally the court may appoint an *amicus curiae* to assist the court). Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly outlined in the rules of professional conduct issued by the provincial or territorial law societies (e.g. Law Society of Yukon, *Code of Professional Conduct*, Part One, r. 21; Law Society of Alberta, *Code of Professional Conduct* (updated 2009), cc. 2, 6-7; Law Society of British Columbia, *Professional Conduct Handbook* (updated 2010), c. 10; Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2009), r. 2). This appeal raises the issue of whether a court's jurisdiction to control its own process imposes a further constraint on counsel's ability

to withdraw.

A. *Divergent Lines of Authority*

[10] There are two lines of provincial and territorial appellate court reasoning on this issue. The British Columbia and Yukon Courts of Appeal have determined that a court has no authority to prevent criminal defence counsel from withdrawing for non-payment of legal fees. The Alberta, Saskatchewan, Manitoba, Ontario, and Quebec Courts of Appeal have taken the opposite position — a court may refuse counsel's request to withdraw. Trial courts in New Brunswick and Newfoundland have also followed this line of authority.

[11] The British Columbia and Yukon position stems from the British Columbia Supreme Court decision in *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315. In *Leask*, the court, on an application for an order in the nature of prohibition, found that a provincial court judge has no right in law to order counsel to continue to represent an accused. McKay J. found that this conclusion recognized the role of a strong and independent bar and that the role of disciplining lawyers is vested in the law societies, not the court. He found that the relationship between a solicitor and client is a contractual one and that once the client breaches the contract, the solicitor is entitled to repudiate and bring the contract to an end. McKay J. was also concerned about potential infringements of solicitor-client privilege, which he thought may arise if counsel must disclose the reasons for withdrawal. Although lawyers may ask for leave, McKay J. found this was a matter of "politeness and courtesy" (p. 325), the court having no discretionary power to refuse.

[12] I would note that the issue in *Leask* did not arise from non-payment of fees, like the present appeal, but rather from a breakdown in the solicitor-client relationship. Nonetheless, subsequent British Columbia jurisprudence has relied on *Leask* as a basis for finding that the court is not empowered to refuse counsel's request to withdraw for any reason (see also *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127 (C.A.), at p. 129, *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83, at para. 19, *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75, at paras. 75-76, *per* Rowles J.A., at para. 101, *per* Southin J.A., and at paras. 121-26, *per* Smith J.A.).

[13] In contrast, the Alberta, Saskatchewan, Manitoba, Ontario and Quebec Courts of Appeal as well as their trial courts, and trial courts in New Brunswick and Newfoundland, have all accepted that a court has the authority to refuse counsel's application for withdrawal. The Alberta Court of Appeal's decision in *R. v. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, leave to appeal refused, [1997] 1 S.C.R. vii (*sub nom. Ferguson v. The Queen*), has received the most attention. In *C. (D.D.)*, the Alberta Court of Appeal determined that in addition to counsel's contractual obligations to the client, a lawyer is also an officer of the court. It is in this capacity that counsel owes a duty to the court to "attend before a judge

when requested" and "not to walk out on a client in the middle of a trial" (p. 327). So long as counsel has not expressed that he or she appears on a limited retainer, the court may refuse to grant a request to withdraw.

[14] The Alberta Court of Appeal appears to recognize two limitations to the court's discretion. First, the court *must* grant a withdrawal request when there is a breakdown in the solicitor-client relationship (p. 328). Second, where counsel seeks to withdraw for non-payment of fees, the court *may* permit withdrawal after considering harm to the Crown's case, inconvenience to witnesses, and whether the allotted court time could be filled with other business (p. 330).

[15] The Manitoba Court of Appeal has also considered the court's power to refuse counsel's request to withdraw for non-payment of fees: *R. v. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301. It agreed with the Alberta Court of Appeal that a court has the authority to refuse withdrawal. However, Steel J.A. determined that the assessment should be based on whether allowing withdrawal would cause prejudice to the accused and to the administration of justice (para. 24).

[16] The Quebec Court of Appeal has also confirmed that the court may refuse counsel's application to withdraw once a hearing date has been set (*Bernier v. 9006-1474 Québec inc.*, [2001] J.Q. n° 2631 (QL); see also s. 249 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25). Similarly, both the Saskatchewan and Ontario Courts of Appeal have acknowledged that court permission is required to withdraw as counsel of record (*Mireau v. Canada* (1995), 128 Sask. R. 142, at para. 4; *R. v. Brundia*, 2007 ONCA 725, 230 O.A.C. 29, at para. 44; *R. v. Peterman* (2004), 70 O.R. (3d) 481, at para. 38) as have trial courts in New Brunswick and Newfoundland (*R. v. Golding*, 2007 NBQB 320, 325 N.B.R. (2d) 92, at paras. 18 and 20; *Dooling v. Banfield* (1978), 22 Nfld. & P.E.I.R. 413 (Nfld. Dist. Ct.), at para. 27).

[17] For the following reasons, I conclude that a court does have the authority to refuse criminal defence counsel's request to withdraw for non-payment of legal fees.

B. *Jurisdiction of the Court*

[18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice,

the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, this Court confirmed that inherent jurisdiction includes the authority to remove counsel from a case when required to ensure a fair trial:

> The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [p. 1245]

It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal.

[19] Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:

> . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . . .
>
> (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[20] Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it.

C. *Exercise of Jurisdiction*

[21] The more contentious issue in this appeal is whether a criminal court may exercise its inherent or necessarily implied jurisdiction to control its own process by overseeing lawyer withdrawal.

[22] The reasons in favour of courts exercising this jurisdiction are numerous. An accused, who becomes unable to pay his lawyer, may be prejudiced if he is abandoned by counsel in the midst of criminal proceedings. Proceedings may need to be adjourned to allow the accused to obtain new counsel. This delay may prejudice the accused, who is stigmatized by the unresolved criminal charges and who may be in custody awaiting trial. It may also prejudice the Crown's case. Additional delay also affects complainants, witnesses and jurors involved in the matter, and society's interest in the expedient administration of justice. Where these types of interests are engaged, they may outweigh counsel's interest in withdrawing from a matter in which he or she is not being paid.

[23] On the other hand, Ms. Cunningham and the interveners taking the same position say a court must *always* decline to exercise this jurisdiction. Collectively, they support their position with the three main factors relied on by the Court of Appeal: solicitor-client privilege, the role of law societies and conflict of interest. In addition, they also direct the Court's attention to *Rowbotham* orders as a potential solution. Their position is that the proper approach is for a court to presume that lawyers act ethically and that any professional transgressions are best addressed by the law society. In exceptional cases, however, Ms. Cunningham and the Law Society of Yukon say that the contempt power would be available to a court where counsel seeks to withdraw for an improper purpose or where the manner of withdrawal warrants a citation for contempt. The Canadian Bar Association and the Criminal Lawyers' Association state that there must be clear evidence of a breach of an ethical standard or an abuse of process for a court to cite counsel for contempt.

[24] I will address each of these arguments in turn.

(1) Solicitor-Client Privilege

[25] Ms. Cunningham and the interveners argue that solicitor-client privilege could be violated in one of two ways: simply by disclosure of the mere fact that the accused has not paid his or her fees, or inadvertent disclosure of privileged information when engaging in a discussion with the court about the reasons for withdrawal.

[26] Concern regarding the protection of solicitor-client privilege is warranted. It need hardly be said that solicitor-client privilege is a fundamental tenet of our legal system. The solicitor-client relationship is integral to the administration of justice; privilege encourages the free and full disclosure by the client required to ensure effective legal representation (see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, *per* Cory J. for the majority, and *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 31 and 33, *per* Major J.).

[27] However, revealing that an accused has not paid his or her fees does not normally touch on the *rationale* for solicitor-client privilege in the criminal context. A client must be able to rely on the confidentiality of the communications made between lawyer and client because only then can there be full and frank discussion of the facts of the case, and the giving and receiving of soundly based legal advice (see *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649; relied on in *Smith v. Jones*, at para. 45, and *McClure*, at para. 32). There has been no explanation as to why an accused would be any more inclined to withhold information from counsel, where the court has discretion over withdrawal, than where counsel can unilaterally withdraw.

[28] In arguing that disclosure of the mere fact that an accused has not paid or will not be paying his or her legal fees is protected by solicitor-client privilege, the Law Societies of British Columbia and Yukon rely on this Court's decisions in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, where this Court held that, in the context of a law office search, an accused's financial and fee information may be privileged. In *Maranda*, the Court was concerned that fee information, specifically the amount of fees and disbursements, may appear to be "neutral" when in fact disclosure of the information could be prejudicial to the accused. In particular, LeBel J. stated that fee information

> might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. [para. 24]

This information could then be used to charge and/or convict the client. Because of the potentially detrimental effect of disclosure on the client, fee information is considered *prima facie* privileged for the purposes of the search. If the Crown seeks disclosure, the ultimate decision of whether the fee information is *in fact* privileged is made by the court, not the police.

[29] Counsel seeking to withdraw for non-payment of legal fees is a decidedly different context from a police search of counsel's accounts and records. The most significant difference is the content of the information being disclosed. The only information revealed by counsel seeking to withdraw is the sliver of information that the accused has not paid or will not be paying fees. It has not been explained

how, in this case, this sliver of information could be prejudicial to the accused. Indeed, it is hard to see how this simple fact alone could be used against the accused on the merits of the criminal proceeding: it is unrelated to the information given by the client to the lawyer, and unrelated to the advice given by the lawyer to the client. It would not be possible to infer from the bare fact of non-payment of fees any particular activities of the accused that pertain to the criminal charges against him.

[30] To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor-client privilege may attach.

[31] Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *McClure* and *Smith v. Jones*). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

[32] In the alternative, Ms. Cunningham and the interveners argue that counsel may inadvertently disclose privileged information when explaining the reasons for withdrawing and answering questions from the judge. They argue that this risk is so unacceptable that it requires the court to decline to exercise any discretion to refuse counsel's request to withdraw. They point to *Leask* where counsel sought withdrawal due to irreconcilable differences between counsel and the accused. The provincial court judge wanted specific details to determine if the differences could be resolved (*Leask*, at pp. 318-19). The accused in *Leask* was drawn into the conversation with the judge as well. They argue that this is dangerous because the accused may unknowingly waive his or her right to privilege and disclose information that is otherwise protected.

[33] I agree that the exchange initiated by the provincial court judge in *Leask* was inappropriate. The judge repeatedly pressed counsel for detailed reasons for withdrawal, and continued to press even when counsel attempted to rely on the professional rules of conduct. The judge bluntly asked the accused if he objected to counsel disclosing the specific reason for withdrawal. I think it is fair to say that what occurred in *Leask* was unacceptable.

[34] However, lawyers are presumed to know and respect their professional obligations. Judges are presumed to know the law (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was)). The integrity of the administration of justice rests on these assumptions. Delicate matters frequently come before courts. For example, although the initial decision not to produce a potentially privileged document is that of counsel, a judge may have to decide whether the document is in fact privileged. The remote possibility of inadvertent disclosure in the course of that proceeding does not mean that the ultimate decision must be left solely to counsel in disputed cases. I am of the view that the same is true with respect to withdrawal for non-payment of legal fees in criminal matters. The remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application does not justify leaving the decision to withdraw exclusively to counsel.

(2) Exclusive Law Society Oversight

[35] I am also unable to accept the argument of Ms. Cunningham and the interveners that oversight of lawyer withdrawal falls exclusively to the law societies. The law societies play an essential role in disciplining lawyers for unprofessional conduct; however, the purpose of the court overseeing withdrawal is not disciplinary. The court's authority is *preventative* — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is *reactive*. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

[36] The rules enacted by the law societies are essential statements of the appropriate standards of professional conduct. They offer extensive guidance on when counsel may seek to withdraw from a case. For example, the Law Society of Alberta rules state the following with respect to withdrawal for non-payment of fees:

> A lawyer may withdraw upon reasonable notice to the client when justified by the circumstances. Circumstances that may justify, but not require, withdrawal include the following:
>
> > (a) the client fails after reasonable notice to provide funds on account of fees or disbursements in accordance with the agreement made with the lawyer; . . . . [c. 14, r. 1]

The Law Society of Upper Canada rules speak directly to withdrawal for non-payment of fees in the criminal context:

> Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far

> enough removed to enable the client to obtain another licensee or to enable another licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non-payment of fees. [r. 2.09(5)]

[37] The Canadian Bar Association also offers guidance on professional conduct. Its rule on withdrawal states:

> The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.
>
> (*Code of Professional Conduct* (2009), c. XII)

The commentary to the rule states:

> Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result. [commentary 6]

[38] While the court is not bound to apply law society or Canadian Bar Association codes of professional conduct, these codes "should be considered an important statement of public policy" (*MacDonald Estate*, at p. 1246). These standards complement the court's discretion to refuse withdrawal where the effects on the administration of justice will be severe. For example, the Canadian Bar Association rules recognize the distinct, yet complementary, nature of the functions served by the court and law societies:

> Where withdrawal is required or permitted by this Rule the lawyer must comply with all applicable rules of court as well as local rules and practice. [c. XII, commentary 3]

Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. They are not mutually exclusive.

[39] Ms. Cunningham and the interveners submit that court supervision over withdrawal threatens the independence of the bar. As I note above, lawyers are intimately involved in the administration of justice. I do not agree that an exceptional constraint on counsel, necessary to protect the integrity of the administration of justice, threatens counsel's independence. For instance, McLachlin J. in *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 135-36, acknowledged that a court can award costs against counsel personally in rare cases where counsel acts in bad faith by encouraging abuse and delay of the court's process. There is no suggestion that this rare constraint has threatened the independence of the bar. Furthermore, court oversight of lawyer withdrawal has been the practice in Alberta at least since the decision in *C. (D.D.)* in 1996. There is no suggestion that this practice affects the independence of the Alberta bar. Finally, all law society rules recognize that an independent bar has obligations beyond those owed to clients. Lawyers must comply with their professional obligations to the administration of justice and the public; these obligations do not undermine counsel's independence (see, for example: Law Society of Yukon, Parts Two and Three; Law Society of Upper Canada, rr. 4 and 6; Law Society of Alberta, c. 1; Law Society of British Columbia, c. 1).

(3) Conflict of Interest

[40] I am also unpersuaded by the Law Society of British Columbia's point that forcing unwilling counsel to continue may create a conflict between the client's and lawyer's interests. It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel's financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. This argument, however, is inconsistent with the Law Society's position — with which I agree — that the court should presume that lawyers act ethically. There are many situations where counsel's personal or professional interests may be in tension with an individual client's interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affecting the client. Counsel is obligated to be diligent, thorough and to act in the client's best interest. Similarly, if counsel agrees to be retained *pro bono*, he or she must act just as professionally as if acting for the client on a paid retainer of the same nature. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less.

(4) *Rowbotham* Orders

[41] The interveners, the Law Society of Yukon, Criminal Lawyers' Association and Attorney General of Ontario, directed the Court's attention to *Rowbotham* orders. In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, the Ontario Court of Appeal found that where an indigent accused, who does not qualify for legal aid, requires legal representation to ensure a fair trial, the court may enter a conditional stay of

proceedings until the government provides funded legal counsel (at p. 69).

[42] This Court has not commented on the correctness of *Rowbotham* orders (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 90), and given that this was not at issue in the present appeal, the following comments are made in *obiter dicta*. I will note, however, that if such an order were available it would be relevant to the court's decision on whether to decline to grant counsel's request to withdraw.

[43] That said, a *Rowbotham* order could not be a complete substitute to the court's authority to refuse counsel's request to withdraw. As stated by the Ontario Court of Appeal in *R. v. Rowbotham*, at p. 69, and later in *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505, at paras. 17-21 and 24, a *Rowbotham* order is intended to ensure that an accused receives a fair trial; it does not account for the interests of any other party or person affected by the proceeding. Thus, if delay in the proceedings or the affect on others is the determinative factor in an application for withdrawal for non-payment of fees, a *Rowbotham* order does nothing to address this concern and may even exacerbate it. A *Rowbotham* order requires a separate motion where an accused must satisfy rigorous criteria in order to succeed. A *Rowbotham* order might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement to it.

(5) Remedy of Last Resort

[44] Ms. Cunningham's arguments do not, therefore, support a wholesale denial of the court's jurisdiction to refuse counsel's request to withdraw.

[45] That being said, ordering counsel to work for free is not a decision that should be made lightly. Though criminal defence counsel may be in the best position to assess the financial risk in taking on a client, only in the most serious circumstances should counsel alone be required to bear this financial burden. In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers. Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.

D. *Refusing Withdrawal*

[46] The court's exercise of discretion to decide counsel's application for withdrawal should be

guided by the following principles.

[47] If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.

[48] Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

[49] If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *C. (D.D.)*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

[50] If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (*C. (D.D.)*, at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;

- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;

- impact on the Crown and any co-accused;

- impact on complainants, witnesses and jurors;

- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;

- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

[51] Harm to the administration of justice is not simply administrative inconvenience as the interveners suggest. Harm to the administration of justice recognizes that there are other persons affected by ongoing and prolonged criminal proceedings: complainants, witnesses, jurors and society at large. Because of this, I would respectfully observe that the consideration suggested by the Alberta Court of Appeal in *C. (D.D.)* of whether allotted court time can be otherwise usefully filled is not a relevant consideration in this balancing of interests.

[52] The Manitoba Court of Appeal's decision in *Deschamps* offers a useful example of the appropriate exercise of the court's discretion. Defence counsel was representing the offender in a dangerous offender proceeding. Five days into the proceeding counsel requested an adjournment to allow the offender to be assessed for and receive treatment. The matter was remanded for approximately eight months. During this time difficulties arose with legal aid funding. Because the dangerous offender proceedings were of high complexity, counsel was initially promised a higher fee than provided by the regular tariff. "Financial difficulties" called into question Legal Aid's ability to follow through with the commitment to a higher fee. Defence counsel sought to withdraw due to Legal Aid's alleged breach of contract.

[53] The motions judge determined that there was no breach of contract. However, she found that even if there had been a breach, she would have refused counsel's request to withdraw. In the Court of Appeal, Steel J.A. upheld this decision. She agreed with the motions judge that the factors relevant to denying withdrawal were: the proceeding was serious and complex, the offender could not represent himself, the proceeding had already begun, there was no immediate prospect of obtaining another lawyer, and the offender was a difficult client who had finally developed a relationship of trust and confidence with this particular counsel. The Court of Appeal agreed with the motions judge that further

delay would have resulted from allowing withdrawal and would have caused serious prejudice to the offender. The Court of Appeal noted that after the initial motion, Legal Aid ensured that fees would still be paid, just not at the higher rate. Counsel's application to withdraw was refused.

[54] The question of whether this case meets the high threshold that must be met to refuse leave to withdraw is now moot. The parties and the judge did not have the benefit of these reasons, and the record before this Court does not provide information or analysis on several of the relevant factors. It is, therefore, not clear whether the circumstances of this case would, after full analysis of the relevant factors, justify a refusal of leave to withdraw. I simply emphasize that the threshold for refusing leave to withdraw is a high one and requires a proper basis in the record for its exercise.

E. *Procedure to Review a Decision Refusing Withdrawal*

[55] This appeal originated in the Supreme Court of the Yukon Territory as an unsuccessful application for an order in the nature of *certiorari*. Ms. Cunningham had to apply for *certiorari* because there is no provision in the *Criminal Code* providing for interlocutory appeals (see s. 674 of the *Criminal Code*). Once the superior court heard the application, Ms. Cunningham appealed to the Court of Appeal (s. 784(1) of the *Criminal Code*) and the Crown in turn to the Supreme Court of Canada (s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26).

[56] There is some question as to how the matter would have proceeded had it originated in a superior court. Both the Alberta and Manitoba Courts of Appeal have found that they do not have jurisdiction over appeals of withdrawal applications from superior courts (*C. (D.D.)*, at p. 330, *Deschamps*, at para. 42). While this Court need not decide the correct procedure for appealing a withdrawal application originating in a superior court, some guidance might be useful. These circumstances seem to be analogous to those in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. *Dagenais* involved a media challenge of a publication ban in a criminal matter. As the media was a third party to the criminal proceedings, the Court determined that this was different than an interlocutory appeal by a party to the action. It concluded that the least undesirable route of appeal was directly from the superior court to the Supreme Court of Canada through s. 40 of the *Supreme Court Act* (p. 862). Similarly, defence counsel is a third party to the main criminal action, so it appears this would be analogous to *Dagenais*.

F. *Certiorari*

[57] Orders in the nature of *certiorari* may only be granted where the inferior court has made a

jurisdictional error or an error of law on the face of the record (G. Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (1976), at p. 143). Gower J. thought he had to find an excess of jurisdiction to interfere with Lilles Terr. Ct. J.'s exercise of discretion. However, excess of jurisdiction is the standard for a preliminary inquiry judge's decision to either commit an accused to trial or issue a discharge (*Patterson v. The Queen*, [1970] S.C.R. 409, at p. 413; *Dubois v. The Queen*, [1986] 1 S.C.R. 366, at p. 380; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601, at para. 17). This high threshold for review is premised on the fact that a preliminary inquiry does not result in a final determination of guilt or innocence; therefore, there is less need for broad supervisory remedies (*Dubois*, at pp. 373-74). However, a lawyer seeking withdrawal is not analogous to a committal or discharge at a preliminary inquiry; it is more closely analogous to *Dagenais*, a third-party application. The judge at first instance has the authority to make an immediate and final determination on counsel's application to withdraw. As noted by Steel J.A. in *Deschamps*, refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer (para. 38). Therefore, in this context an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record (*Dagenais*, at pp. 864-65).

[58] Because the authority to supervise the conduct of counsel falls within the inherent or necessarily implied jurisdiction of the court, it is difficult to see how a decision to refuse withdrawal could amount to a jurisdictional error. However, it would be open for counsel to argue that the provincial or territorial court judge committed an error of law on the face of the record. Such errors would include, for example, refusing withdrawal when counsel seeks to withdraw for ethical reasons, or failing to consider a relevant factor when exercising discretion over withdrawal for non-payment of fees (see *R. v. Gardiner*, 2008 ONCA 397, 231 C.C.C. (3d) 394, at para. 26, and *Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590, at para. 49).

6. Conclusion

[59] In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.

7. Disposition

[60] I would allow the appeal. I would decline to grant an order as to costs.

Appeal allowed.

Solicitor for the appellant: Public Prosecution Service of Canada, Vancouver.

Solicitor for the respondent: Community Law Clinic, Whitehorse.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Law Society of British Columbia: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Law Society of Yukon: Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitor for the intervener the Canadian Bar Association: Gregory P. DelBigio, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Stockwoods, Toronto.

Memo

The Law Society of British Columbia

6000

To Benchers

From Jeffrey G. Hoskins, QC

Date August 24, 2010

Subject **Electronic Distribution of Financial Statements**

Rule 1-6 requires the Law Society to make two major mailings to all 12,500 members each year in advance of the Annual General Meeting. Sixty days before the AGM we must mail a notice to all members setting the date and time of the meeting and including the text of the fee resolution to be presented to the meeting. Thirty-nine days later, the Law Society has to mail each member a notice stating the location at which the meeting is to be held, the audited financial statement of the Law Society for the previous calendar year and a copy of each resolution and amendment for which notice has been received within time.

The cost of printing and mailing the audited financial statements to each Law Society member is in excess of $35,000 each year. It would make financial sense to change the rule so that each member could be given access to the statements by electronic means.

However, Rule 1-6 is among those referred to in section 12 of the *Legal Profession Act* requiring a referendum of all the members in order for the Benchers to make amendments. Since there is an off-term election coming up November 15 of this year, albeit only in the County of Nanaimo, so far as we know, this may be an opportune time to ask the members to approve an amendment to the Rules that would allow the Law Society to save the cost of multiple and expensive mailings in 2011 and thereafter.

The Act and Rules Subcommittee recommends to the Benchers that a referendum be held this year on the question of whether the Benchers may amend Rule 1-6 to allow distribution of the audited financial statements to members electronically rather than by traditional mail. The Law Society's Annual Review, which was mailed with the AGM meeting notice for many years although that is not required by the rule, has more recently been sent to members electronically with no significant problems.

Memo

The Law Society of British Columbia

7000

To Benchers

From Jeffrey G. Hoskins, QC

Date August 24, 2010

Subject **Confidentiality of complaints information**

Arising out of the recent controversy and the subsequent report of Stephen Owen, QC, the Law Society has been asked to set up a program for vetting potential special prosecutors similar to that in place for potential judicial appointments. Attached is a copy of a letter from Messrs. Ridgway and McGee to Robert Gillen, the Assistant Deputy Attorney General, Criminal Justice Branch, setting out the responsibilities that the Law Society is prepared to take on for the Ministry.

In my view it would be necessary to amend Rule 3-3(2) in order to disclose information relating to complaints that do not result in a citation being issued, which would be a necessary part of the program.

Under the current Rule, vetting for potential judicial appointment is a specific exception to the general rule that no information about complaints can be disclosed. That exception having been expressly stated as it is, I don't think that there is much room to argue that this new parallel program could go ahead without an express exception to the rule that would include it.

This is the relevant part of Rule 3-3:

Confidentiality of complaints

3-3 (1) No one is permitted to disclose any information or records that form part of the Executive Director's investigation of a complaint or the Complainants' Review Committee's review of it except for the purpose of complying with the objectives of the Act or with these Rules.

(2) Despite subrule (1), the Executive Director may do any of the following:

(a) disclose information referred to in that subrule, with the consent of the lawyer,

(i) in responding to an enquiry made for the purpose of a potential judicial appointment, or

(ii) under a protocol with a Court of which the lawyer is a part-time judicial officer;

The Act and Rules Subcommittee considered two ways in which the Rule could be amended to accommodate the new program.

- A further subparagraph could be added to subrule (2)(a) to provide another specific exception relating to potential special prosecutor appointments, or

- The Rule could be amended to allow the disclosure for any specific purpose to which the lawyer consents.

The Subcommittee concluded that there is no compelling principle that would require the Law Society to refuse to disclose complaint information in the face of the express consent of the lawyer concerned. On the other hand, the Law Society would want to reserve the discretion to do so. The *Freedom of Information and Protection of Privacy Act* requires the Law Society to take steps to protect the personal information of third parties, such as the complainants and witnesses in this situation.

Since we cannot anticipate all future requests for information that lawyers may want to cooperate with, it does not seem efficient to keep adding specific amendments for consented disclosure in specific circumstances.

The Subcommittee therefore recommends an amendment to Rule 3-3(2)(a) so that it reads as follows:

> (2) Despite subrule (1), the Executive Director may do any of the following:
>
> (a) disclose information referred to in subrule (1), with the consent of the lawyer who is the subject of the complaint;

I attach a suggested resolution to effect that change.

JGH
E:\POLICY\JEFF\ACT&RULE\memo to Benchers on complaint confidentiality Sep 10.docx

Attachments: letter Ridgway/McGee to Gillen
suggested resolution

The Law Society of British Columbia

August 19, 2010

CONFIDENTIAL

Sent via email c/o: eileen.watson@gov.bc.ca

Mr. Robert W.G. Gillen, QC
Assistant Deputy Attorney General
Ministry of Attorney General
Criminal Justice Branch
PO BOX 9276 STN PROV GOVT
Victoria, BC V8W 9J7

Dear Mr. Gillen:

Re: Special Prosecutors and Law Society of British Columbia

We refer to our meeting on July 29, 2010 relating to the role of the Law Society in the appointment of Special Prosecutors. The purpose of this letter is to record the understanding between the Criminal Justice Branch ("Branch") and the Law Society regarding the role of the Law Society going forward. Simply put, that role will mirror the process currently in place regarding judicial appointments. It will be limited to conducting and reporting to the Branch on searches of Law Society records to determine Law Society histories of lawyers called to the Bar in British Columbia and proposed to be special prosecutors ("Candidates").

The process outlined below will require a Law Society rule change. We anticipate having this completed in early September. Specifically, the process will be as follows:

- The Branch will periodically forward to the CEO of the Law Society lists of Candidates and request Law Society histories on those Candidates. All such requests will be accompanied by appropriate release and authorization forms signed by the Candidates. The Branch will also ask the Law Society to review each appointee on a periodic basis. Those requests will also be accompanied by current release and authorization forms signed by Candidates. The Law Society will not conduct searches in the absence of requests from the Branch.

- When the Law Society receives such requests from the Branch we will conduct searches of our systems and gather information including:

    - Candidates' dates of call

    - Whether the Candidates are members in good standing of the Law Society of BC

845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9
Telephone: (604) 669-2533 Facsimile: (604) 669-5232
Toll-free within B.C. 1-800-903-5300 TTY: (604) 443-5700
www.lawsociety.bc.ca

- Information in the Law Society's records relating to:
  - complaints
  - insurance claims
  - competency reviews
  - special fund claims, and
  - bankruptcy or other financial proceedings.

  This information will be limited to records from the prior 15 years.

- The information gathered by the Law Society will be forwarded to the Assistant Deputy Attorney General of the Branch as soon as possible. The target turn-around for requests by the Branch will be three business days. The Branch will indicate if a shorter timeframe is required and the Law Society will use best efforts to meet those timeframes. If we anticipate being unable to do so, we will advise the Branch at the time of the request.

We have agreed that the role of the Law Society in the appointment of Special Prosecutors will be limited to the above in keeping with our mandate to regulate in the public interest. Specifically:

- The Law Society and its directors, officers and employees will not be asked for, nor will we volunteer, suggestions or recommendations of individual lawyers as Special Prosecutors.

- The Law Society will not vet or approve lists of Candidates, or provide any qualitative assessments except as outlined above.

- The Law Society will not conduct conflicts checks of any kind such as making inquiries to determine whether Candidates, their law firms or their family members have made any political contributions or are otherwise in any way conflicted.

Please confirm that this letter reflects the Branch's understanding of the agreed upon role of the Law Society going forward in the appointment of Special Prosecutors.

Yours truly,

G. Glen Ridgway, QC
President

Yours truly,

Timothy E. McGee
Chief Executive Officer

CONFIDENTIALITY OF COMPLAINTS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend Rule 3-3(2) of the Law Society Rules by deleting paragraph (a) and substituting the following:

(a) disclose information referred to in subrule (1), with the consent of the lawyer who is the subject of the complaint;

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

September 2, 2010

Introduction

My report to the Benchers this month focuses on two major initiatives of the Federation of Law Societies and also updates the Benchers on several additional items of interest.

1. National Standards on Admission to Practice – Federation Project

At its June 2009 meeting, Council of the Federation authorized the preparation of a detailed proposal for a project to develop national standards for admission to the legal profession. The goal of the project will be to develop consistent standards for admission and to provide law societies with an objective mechanism to ensure every applicant admitted to the bar meets the national standards.

The impetus for this project comes from recognition that a number of factors reinforce the desirability of each law society having reasonably similar standards for the admission of applicants to the bar.

Probably the most compelling of these factors is national mobility. The National Mobility Agreement (the "NMA") and the Territorial Mobility Agreement reinforced by the recent amendments to the Agreement on Internal Trade (the "AIT") permit lawyers to transfer from one common law jurisdiction to another with ease.

That the standards for admission were reasonably comparable was one of the underlying premises of the NMA. The existence of common standards eliminates concerns about the qualifications of transferring lawyers. This has become even more important with the imposition of mandatory mutual recognition of credentials under the AIT. The reality, however, is that significant differences exist in the admission standards and processes employed by each law society. These differences can no longer be justified.

Finally, the establishment of national admission standards would eliminate the considerable duplication of effort and expense that is inevitable in the current system in which each law society is called upon to develop its own processes and standards to evaluate applicants.

The goal of this project is:

> "To develop consistent, defensible standards for admission to the legal profession and to ensure every applicant admitted to the bar meets these standards."

The admission process is intended to ensure that everyone admitted to the bar has the necessary competencies and other qualifications to practice law. To

gain entry to the profession, applicants must demonstrate that they possess the knowledge, skills and character necessary to fulfill their role as lawyers.

Drafting a profile of those competencies, defining and articulating the required elements of good character and developing a mechanism to assess whether applicants possess the necessary competencies and good character will be the central tasks of this project.

Once drafted and validated through a consultation process, the admission standards will be submitted to Council and to the members of the Federation for approval. Adoption and implementation of the standards by individual law societies is a key component of this project.

A Steering Committee has been appointed by the Executive of the Federation to provide overall direction for the project. The Steering Committee membership is:

Don Thompson, QC (Chair, Alberta)
Tim McGee (British Columbia)
Alan Treleaven (British Columbia)
Allan Fineblit, QC (Manitoba)
Darrel Pink (Nova Scotia)
Mike Milani (Saskatchewan)
Malcolm Heins (Ontario)
Jonathan Herman (Federation)

The Steering Committee will be responsible for the operation and supervision of the project and, through the Executive will provide regular reports to Council of the Federation. The Steering Committee will also be responsible for working with the law societies to ensure that their views and interests are reflected in the standards and that law societies are kept well informed of the progress of the project. Members of the Steering Committee will also work directly with the law societies to assist with implementation of the standards once they have been approved and adopted.

The work of the project will be divided into three distinct streams:

i. drafting and validation of the competencies profile
ii. drafting of the good character standard
iii. development of assessment mechanism

Following the drafting and validation of the competency and character standards and the development of a suitable assessment mechanism, the final standards and proposed assessment mechanism will be submitted to Council for its approval following which member law societies will be asked to adopt and implement the standard. Details of the process for adoption and

implementation will be determined by the Steering Committee in consultation with member law societies.

The tentative target for completion of the final report to Council is the end of 2011.

The Law Society of BC will play an integral role in this project through our involvement on the Steering Committee and through the expertise we will contribute by making Lynn Burns, Director, PLTC, and Lesley Small, Manager, Members Services and Credentials, available for the competencies and good character streams, respectively.

Alan Treleaven and I would be happy to speak to any Benchers about this project in greater detail at your convenience.

In addition, under the Chair of Thelma O'Grady, the Lawyer Education Advisory Committee will receive regular progress reports and provide feedback to Alan Treleaven and me.

2. Report on the Canadian Common Law Degree – Implementation Update

On March 18, 2010, Federation President John Campion reported that the Final Report of the Task Force on the Canadian Common Law Degree (known as the Hunter Report) had been approved by all law societies and that the implementation process must be complete by 2012 for the law students who begin their first year of studies that year and graduate in 2015. Council approved the Federation Executive appointing a Working Group to make recommendations to Council at its June 7, 2010 meeting on the establishment of a Task Force Report Implementation Committee.

The following was the process recommended to Council by the Working Group:

1. An Implementation Committee known as the Federation of Law Societies of Canada's Common Law Degree Implementation Committee ("the Implementation Committee") should be established .

2. The Implementation Committee's mandate should be:

    a. to determine how compliance with the recommendations of the Task Force on the Canadian Common Law Degree will be measured. Its mandate may include clarifying or elaborating on the recommendations, where appropriate, to ensure their effective implementation, but will not include altering the substance or purpose of them;

b. to make recommendations as to the establishment of a monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies and for maintaining the Federation's relationship with Canadian law schools. The Implementation Committee should consider any role the National Committee on Accreditation might play in that monitoring process; and

c. that the Committee include two representatives from academe.

John Hunter, QC, the Chair of the Task Force, and John Campion, President of the Federation, are finalizing arrangements for participation in and a process for the work of the Implementation Committee.

3. International Bar Association (IBA) – Vancouver Conference

As you know, the IBA is holding its Annual Conference in Vancouver on October 3 – 8, 2010. The Law Society has been active in assisting the local organizing committee in a variety of ways. The Law Society is formally involved as a co-sponsor or host of three specific events during the conference. These events were chosen after consultation with the Executive Committee on the basis of the connection to legal regulation and relevance to our mandate. A chart providing details on these events and other events during the conference that involve Bencher or staff involvement is attached to this report. If you have any questions regarding the Law Society's involvement in the IBA Conference, please contact me or Bill McIntosh, Manager Executive Support

4. International Institute of Law Association Chief Executives (IILACE) – Vancouver Conference

I am a member of IILACE, an international organization that brings together chief executives from law regulatory and representative bodies from around the world each year to review and discuss matters of interest and concern. This year the conference is being held in Vancouver immediately before the IBA Annual Conference. As the local Law Society for this year's conference we have played a lead role in helping to set the agenda and to make the necessary arrangements.

I am attaching a copy of the current IILACE conference program for your information. Please don't hesitate to let me know if you have any thoughts or ideas on the program topics. As usual, I will be reporting to the Benchers on the results of the conference at the Bencher meeting in October.

5. Law Society Annual General Meeting – September 28, 2010

This is a reminder that the Law Society's 2010 Annual General Meeting will be held at the Pan Pacific Hotel in Vancouver and in 10 different satellite locations around the province on Tuesday, September 28, 2010. Registration begins at 11:30 a.m. with call to order at 12:30 p.m.

There is one member resolution this year proposing a reduced CPD requirement for lawyers working on a part time basis. The Benchers have spoken against this proposal in the materials recently distributed as part of the second and final meeting notice.

If you have any questions about arrangements for the AGM, please do not hesitate to contact Bill McIntosh.

Timothy E. McGee
Chief Executive Officer

Appendix 1

International Bar Association Annual Conference October 3 – 8, 2010

LSBC Event Participation or Attendance

Date	Time/Location	Event	Notes
Sunday, October 3	6 PM – 10:30 PM Vancouver Trade & Exhibition Centre West	Opening Ceremony & Welcome Party	• Glen and Tim will attend.
Monday, October 6	3 PM – 6 PM Vancouver Trade & Exhibition Centre	Anti-Money Laundering Legislation Implementation Working Group	• Stu Cameron is participating in this panel
Tuesday, October 5	9 AM – 11:30 AM Vancouver Law Courts	Law Courts Tour	• Bill McIntosh is working with Johanne Blenkin (BC Courthouse Library Society and Public Legal Education and Information Working Group) to organize this tour for a maximum of 60 delegates. • Proposed schedule is (pending Chief Justice's approval): o 9 AM – Great Hall – photo op and greeting o 9:30 AM – visit Courtroom 20 (high security court) o 10:00 AM – 3 groups – attend proceeding in civil, criminal or appellate o 10:30 AM – Clicklaw and SHISH (self-help centre) demos o 11:15 AM – coffee at Law Courts Inn with Chiefs or delegates in attendance (cost of refreshments to be split between LSBC, CBA and Federation)
Thursday, October 7	10 AM – 1 PM Vancouver Trade & Exhibition Centre West	Multidisciplinary Practices Committee Working Session: "Alternative business structures – advancing an international perspective"	• Gavin Hume, QC will be speaking at this working session • The 'Commission on Ethics 20/20', recently created by the American Bar Association, is charged with re-examining the regulation of the legal profession in view of globalisation and technological advances. One issue to be addressed is whether American lawyers should be permitted, contrary to current US law, to engage in multidisciplinary practices, in law practices with non-lawyer managers/owners, or to work in incorporated or publicly traded law firms. The IBA Multidisciplinary Practices Committee will be researching the global landscape regarding such alternative business structures for lawyers and expects to prepare a report to the commission. At this working session, the committee will present its work and gather additional international experience for inclusion

Bill McIntosh is assisting with invitations to dignitaries - LSBC agreed to publicize conference in Benchers' Bulletin and by posting it on the LSBC online calendar

Updated: August 13, 2010

Appendix 1

Date	Time/Location	Event	Notes
			in its final report.
	1 PM – 3 PM Vancouver Trade & Exhibition Centre West	Public and Professional Interest Division Lunch	• Jointly sponsored by LSBC and FLS. • Bill McIntosh is assisting with booking the keynote speaker (most likely the AG) • Arrangements by IBA (Elaine Owen)
	8 PM Zefferelli's - 1136 Robson Street	Bar Issues Commission Dinner	• Jointly sponsored by LSBC, FLS, CBABC & CBA National • Arrangements by IBA (Elaine Owen)
Friday, October 8	9 AM - 4 PM Vancouver Trade & Exhibition Centre West	Rule of Law Symposium	• LSBC not actively involved (Glen and Tim have tickets to attend); however this event is likely to be attended by a variety of law-related non-profit organizations as they can attend free of charge. Some Law Society staff lawyers are planning to attend. • CJ Beverley McLachlin and Justice Sandra Day O'Connor will be speaking at the morning session "The state of the rule of law in Canada and the US".
	1 PM – 3 PM LSBC Bencher's Room /914	Bar Executives Lunch Workshop - "The media, government and public perception – what you don't know can hurt you"	• LSBC is hosting this lunch workshop in the Bencher Room. The session will be led by Kimanda Jarzebiak of Ascent Public Affairs.

Appendix 2

IILACE

vancouver2010

Annual Conference of the International Institute of Law Association Chief Executives

September 30 - October 2, 2010
Vancouver, Canada

Supported by LexisNexis® & Willis

IILACE vancouver2010

Wednesday, September 29

2:00 pm - 4:00 pm IILACE Executive Committee meeting
Westin Bayshore Hotel

5:30 pm - 6:30 pm Welcome reception
Sponsored by the Canadian Bar Association
Marine Room, Westin Bayshore Hotel

6:45 pm Bus departs Westin Bayshore Hotel for dinner venue

7:00 pm Dinner - Joe Fortes Seafood and Chop House
Sponsored by Canadian Law Societies

Return to Westin Bayshore Hotel (by walking or by taxi)

Thursday, September 30

9:00 am - 10:30 am PLENARY SESSION
Topic #1: Core values of the profession
What are they? Are they the same everywhere? Are they changing everywhere? Who really cares? What worms are eating our core values?

Plenary Speaker – Paul D. Paton, Professor of Law & Director, Ethics Across the Professions Initiative, University of the Pacific, McGeorge School of Law
Session Chair – Tim McGee, Law Society of British Columbia
Ken Murphy – Law Society of Ireland
Heidi Chu – Law Society of Hong Kong
Lorna Jack – Law Society of Scotland

10:30 am - 10:45 am Break

10:45 am - 11:15 am Initial breakout groups

11:15 am - 12:45 pm Topic #2: The growing divide between large and small firms

'E Unum Pluribus'? Should we not just acknowledge the fact that large and small firms now constitute two separate legal professions? Should separate ethical and regulatory rules be developed for, and applied to, large and small firms? Are Law Societies and Bar Associations in fact completely irrelevant for today's large firms?

Session Chair – Cord Brügmann, German Bar Association
Michael Brett Young – Law Institute of Victoria
Malcolm Heins – Law Society of Upper Canada
Caroline Nevin – British Columbia Bar Association

12:45 pm - 1:45 pm Lunch
Marine Room

1:45 pm - 3:30 pm Topic #3: A practical approach to strategic planning

What is a 'strategic plan'? Is it just optics or can there be a real value to a Law Society or Bar Association in having a strategic plan? How can you bridge the aspiration gap so that your strategic plan is truly a driving force and not just a dead document in your drawer?

Session Chair – John Hoyles, Canadian Bar Association
Interactive Presentation – Ron Knowles, Principal, Western Management Consultants, and author of *Strategic Planning for Associations and Not-for-Profit Organizations*

3:30 pm - 4:15 pm Breakout groups reconvene on Topic #1

5:15 pm Bus departs Westin Bayshore Hotel for Museum of Anthropology

5:30 pm - 7:00 pm Cocktail reception and guided tours - Museum of Anthropology
Sponsored by Australian Law Associations & Bar Societies
University of British Columbia, Point Grey Campus

7:00 pm - 7:15 pm Walk from Museum of Anthropology to Cecil Green Park House

7:15 pm Champagne toast - Cecil Green Park House

Dinner - Cecil Green Park House
Sponsored by LexisNexis
With special dinner guests and speaker

9:30 pm Bus departs for Westin Bayshore Hotel

9:45 pm Hospitality Suite – Westin Bayshore Hotel

Friday, October 1

9:00 am - 10:00 am Topic # 4: Impact of recession on law societies and bar associations including challenges of generating alternate revenue sources

How badly has your members' income been hit by 'the Great Recession'? How badly has your Law Society or Bar Association's income been hit by it? Have you had to 'downsize' staff numbers and, if so, how have you gone about it? What practical cost-cutting measures

have you taken and how? What steps have you taken to generate alternate revenue and how? How can you commercialise without selling your soul?

Session Chair – Ken Murphy, Law Society of Ireland
Cord Brügmann – German Bar Association
Jan Martin – Law Society of South Australia
Allan Fineblit – Law Society of Manitoba

10:00 am - 10:15 am Break

10:15 am - 11:00 am Continuance of Topic #4: Impact of recession on law societies and bar associations including challenges of generating alternate revenue sources

11:00 am - 11:45 am Drawing the Strands Together: Discussion of core values of the profession

Session Chair – Tim McGee, Law Society of British Columbia

11:45 am - 12:45 pm Lunch
Marine Room

12:45 pm - 2:00 pm Topic # 5: Communicate or Die
How can you get the attention of your members whether you are a regulatory or representative body? How can you stop yourself being boring and irrelevant? Who should be the judge of what's important - you or your members? Your message is often complex but your members have a short memory attention span - how can modern communication - from direct mail to twitter - help? Which is more important, the medium or the message?

Guest speaker – Tod Maffin, Strategist, Consultant, Author, Speaker, and Social Media Expert
Session Chair – Retha Steinmann, Law Society of Namibia
Merete Smith – Norwegian Bar Association
Bill Grant – Law Council of Australia
Raj Daya – Law Society of South Africa
Jonathan Herman – Federation of Law Societies of Canada

2:00 pm - 2:15 pm Break

2:15 pm - 3:30 pm Continuance of Topic #5: Communicate or Die

6:00 pm Bus departs Westin Bayshore Hotel for Grouse Mountain

6:30 pm - 6:45 pm Skyride to Peak Chalet

6:45 pm Reception - Timber Room, Grouse Mountain
Sponsored by British & European Law Societies & Bar Associations

7:30 pm Dinner - Timber Room, Grouse Mountain
Sponsored by Willis

9:30 pm - 9:45 pm Skyride to base of Grouse Mountain

9:45 pm Bus departs for Westin Bayshore Hotel

10:00 pm Hospitality Suite – Westin Bayshore Hotel

Saturday, October 2

9:00 am - 9:30 am Update: The insurance world post-recession

Presenter: Andrew Fryer, Willis

9:30 am - 9:45 am Distribution and review of Communiqué on core values of the profession

9:45 am - 10:45 am Topic #6: The CEO and the Board: The relationship and effective management structures

How to create a proper understanding and mutual respect for the different roles of the CEO and of the political masters in a Law Society or Bar Association - what works and what doesn't? What parts of the relationship should be defined in writing and what parts shouldn't? How can trust be generated? How can we stop the supposedly permanent becoming transient?

Session Chair – John Hoyles, Canadian Bar Association
Don Deya – East African Law Society
David Hobart – Bar Council of England and Wales
Tim McGee – Law Society of British Columbia
Hank White

10:45 am - 11:00 am Break

11:00 am - 11:45 am Continuance of Topic #6: The CEO and the Board

11:45 am - 12:15 pm IILACE Annual General Meeting

12:15 pm - 1:15 pm Lunch
Marine Room

Saturday Afternoon OPTIONAL
Into the Wild: A Westcoast Experience, Vancouver Island, British Columbia

This will be a unique overnight opportunity that will be priced separately for those that wish to participate after the formal 2010 conference proceedings end. Please see the information form. Participants will return to Vancouver by 4pm on Sunday.

IILACE vancouver2010

Registration Form

September 30- October 2, 2010

Name of Chief Executive _____ Title _____

Name of Law Association _____ E-mail _____

Address _____ Telephone _____

_____

☐ I will attend the IILACE Vancouver 2010 Conference.
US $625 registration fee. Includes all meetings and educational sessions, receptions, lunches on Thursday, Friday, and Saturday, and dinners on Thursday and Friday.

☐ I will be accompanied. The name of my guest is _____
US $375 guest registration fee. Includes all receptions, and dinners on Thursday and Friday.

Payment Information

Send a cheque to:
John Hoyles, Chief Executive Officer
Canadian Bar Association
865 Carling Avenue, Suite 500
Ottawa, ON, K1S 5S8 Canada
Please make cheques payable to IILACE

Pay by Credit Card: ☐ VISA ☐ MasterCard ☐ American Express Name on card: _____

Card Number: _____ Expiry: _____

Wire your money to:
IILACE Account
Bank Account number: 400 181 4
Bank Transit number: 01326
Bank Number: #003 1309
Bank Swift Code: ROYCCAT2

Royal Bank of Canada
Westgate Shopping Centre
Carling Avenue
Ottawa, ON H1Z 7L3

IMPORTANT: Once you have wired your money, please send an email to info@iilace.org confirming the day the money was wired for our tracking purposes.

Send your registration form by email to info@iilace.org or by fax to 613-237-0185 (Canada), attention of John Hoyles.

Hotel Accommodations

The IILACE 2010 conference will take place at the **Westin Bayshore** in Vancouver. IILACE has secured a **special conference rate** of $274 (+ tax) single occupancy and $299 (+ tax) double occupancy which **includes a full breakfast**, and is **available until September 3, 2010**. To book, please click here to visit the Starwood Meetings site.

Memo

The Law Society of British Columbia

11000

To Benchers

From Executive Committee

Date August 23, 2010

Subject **Legal Profession Act – Section 3**

At its August 18th meeting, the Executive Committee considered a memorandum from Michael Lucas and revised language for an amended section 3 of the Legal Profession Act. Copies of this material are attached.

Section 3 of the Act currently provides:

Public interest paramount

3 It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

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

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

At the July Bencher meeting, the Benchers were asked to approve proposing to government an amendment to section 3 as follows:

Public interest paramount

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

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

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

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

(d) regulating the practice of law.

As noted in Mr. Lucas' memorandum, Benchers raised concerns about how the proposed removal of s.3(b)(ii) from the current language would be perceived by lawyers. In light of these concerns, a re-draft of the proposed amendment to section 3 was presented to the Executive Committee at its August meeting. The revision from the version considered by the Benchers at the July meeting is redlined below.

Public interest paramount

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

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

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

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

(d) regulating the practice of law, and

(e) supporting and assisting lawyers in fulfilling their responsibilities in the practice of law.

The Executive Committee was of the view that the re-draft addressed concerns about continuing programs that support and assist lawyers while also addressing the concern over the current language about "protecting" the interests of lawyers.

The Executive Committee recommends that the Benchers approve presenting the language above for consideration by the government in amending section 3.

Memo

The Law Society of British Columbia

11002

To The Executive Committee

From Michael Lucas

Date August 11, 2010

Subject **Section 3, Legal Profession Act**

INTRODUCTION

At the Benchers meeting on July 9, 2010, various possible amendments to the *Legal Profession Act* were considered on recommendations from the Act and Rules Subcommittee. One of the sections considered was s. 3 of the Act. This section deals with the object and duty of the Law Society.

The recommendation was to subsume s. 3(b)(i) into s. 3(a), and to remove the provision (s. 3(b)(ii)) that set out the Society's object and duty to uphold and protect the interests of its members, subject to upholding and protecting the public interest in the administration of justice. As will be recalled, there was a considerable amount of discussion in connection with this recommendation. A number of concerns were expressed about removing s. 3(b)(ii) given the role of the Law Society, its relationship with lawyers, and concerns about how the amendment would be perceived by lawyers in the province.

CONTEXT

The Independence and Self Governance Advisory Committee had recommended that s. 3 be amended in order to ensure that the Law Society is able to identify itself first and foremost as a public interest regulatory body, rather than a member interest body. This concern has been on the Committee's list of concerns for some period of time given the experience in other jurisdictions in the Commonwealth.

It is, of course, well known that several Australian states, in particular, Queensland and New South Wales, went through a period of time in the early 2000s where a great deal of public concern was expressed over the roles of the legal regulatory bodies. In Queensland, in particular, a complaint about the billing practices of a prominent law firm in Brisbane was made to the Law Society and, in the opinion of the public (expressed through the media) the complaints were not dealt with satisfactorily. Concerns about how the Queensland Law Society had dealt with the complaint were complicated by the fact that the Queensland Law Society was both a member interest and a regulatory body. A great deal of concern was expressed about how a body whose mandate included representing members' interests could be trusted to deal with complaints brought to it about those members. Within a space of a very short period of time (a matter of a number of months), legislation was introduced by the Queensland government that effectively stripped the Law Society of its regulatory responsibilities.

The concept of self-regulation has been attacked in England and Wales as well, and recommendations contained in the Clementi Report, most of which were incorporated by the English government in the *Legal Services Act 2007*, included significant incursions on self-regulation and lawyer independence. The Law Society of England and Wales, as a combined regulatory and representative body, was thereby constrained in the position it took in connection with the changes. Any criticism it advanced of the recommendations concerning adverse effects on the public interest could immediately be itself criticized as a position advanced by the body representing lawyers.

The Law Society of British Columbia has spent a great deal of effort, in part as a result of the events in Queensland and elsewhere in the Commonwealth, to ensure that the public identifies it first and foremost as a regulatory body. The Law Society points out frequently that the Canadian Bar Association is the representative body of lawyers. This having been said, there has also always been a recognition that the interest of lawyers and the public interest will often be similar. Moreover, it has also been recognized that it is in the lawyer's interest to ensure that the Law Society effectively regulates the profession effectively in order that the integrity of the legal profession be protected. However, it has been of considerable importance to the Law Society over the past number of years to emphasize a focus on regulating in the public interest. By so doing, the public is protected as are the interests of the profession as a whole.

RECOMMENDATION AT THE JULY 9 MEETING

The recommendation of the Independence and Self Governance Advisory Committee had been to remove s. 3(b)(ii). In making that recommendation, however, the Committee had been quite concerned about whether its removal would detract from the Law Society's ability to create programs that were in the interest of lawyers, such as the practice advice function and the trust assurance programs. To that end, the Committee thought that those concerns could be addressed by including the words "and programs" between the words "standards" and "for" in s. 3(a)(iii). In the result, the object and the duty of the Law Society in upholding and protecting the *public* interest in the administration of justice could be discharged by establishing standards and programs in order to ensure that *lawyers* are educated, professionally responsible, and competent. In other words, the standards created by the Law Society would be enforced, but programs would be offered by the Law Society to ensure that lawyers were able to meet the standards, where necessary.

DISCUSSION

As was evident at the July 9, 2010 Benchers meeting, concerns remained about how the removal of s. 3(b)(ii) would be perceived by lawyers.

It has never been contemplated that the proposed amendments to s. 3 would change anything that the Law Society does. In fact, as described above, the Independence and Self-Governance Committee was concerned that changes might be viewed as requiring the Law Society to cease offering its member-focused programs, and suggested language to guard against such a result. The intent of the proposed amendments is rather to reflect

the Law Society's mandate in a way that ensures the public understands that the Law Society is a public interest regulator, without changing the way that the Law Society discharges its mandate.

While ensuring that the Law Society has the confidence of the public is necessary in order to maintain its ability to be a self-regulating body, it is also clear that the Law Society must be able to ensure that it has the confidence of the lawyers it regulates if its self regulating status is to be preserved. If lawyers in the province do not have confidence in the Law Society – particularly if lawyers are not confident that the Law Society is properly regulating the profession – self-regulation cannot last.

"Upholding and protecting" the interest of lawyers as now set out in s. 3(b)(ii) could therefore be viewed as a requirement to ensure that the Law Society is able to maintain the confidence of the lawyers it is regulating. However, those words read out of that context might be seen by members of the public (including the media and government) as "codes" to ensure that the Law Society is acting in the interest of its members in all it does which is not the message that the Law Society is trying to get across.

The context of s. 3(b)(ii) might therefore be expressed by using different words. If the Law Society were required to support and assist lawyers to fulfill their responsibilities in the practice of law, the Law Society would be able to offer programs in the interests of lawyers to ensure that lawyers are able to meet the standards prescribed by the Law Society in connection with the practice of law. Put this way, the public might be better expected to understand the Law Society's "assistance" and "protection" role regarding lawyers than it would with the current stark language used in s. 3(b)(ii). In this manner, the Law Society's assistance role also becomes part of its primary mandate. In fact, there would no longer be a secondary mandate. Protecting the public interest in the administration of justice would be accomplished by, inter alia, assisting lawyers where necessary. Such assistance would be in the lawyers' interests, and the overall effect would be to enhance the public interest.

The government is currently aware that the Law Society is considering seeking some legislative amendments. Staff have had some discussions with staff of the Attorney General's Ministry about the fact that proposed legislative amendments will be presented shortly. It is safe to say that the government has already identified s. 3 as a section that it would like to see amended. Staff in the Ministry of the Attorney General have already identified the "dual mandate" of s. 3 as an issue that it considers needs to be addressed. While we do not know if this has been communicated to senior members of the bureaucracy of the Attorney General's Ministry, one might logically expect that staff concerns will find their way to the senior bureaucrats. It should be expected that the government will propose an amendment to s. 3 if the Law Society does not present one itself.

RECOMMENDATION

Attached to this memorandum is an example of a proposed re-draft of s. 3, prepared by Mr. Hoskins, that incorporates the context and concerns expressed above. For the sake of comparison, the recommendation as proposed on July 9 is also attached.

MDL/al

Attachments.

PROPOSED AMENDMENT

Public interest paramount

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

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

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

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

(d) regulating the practice of law, and

(e) supporting and assisting lawyers in fulfilling their responsibilities in the practice of law.

AMENDMENT AS CONSIDERED ON JULY 9, 2010

Public interest paramount

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

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

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

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

(d) regulating the practice of law.

The Law Society
of British Columbia

ABEYANCE POLICY

For: The Benchers
Date: September 2010

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

Purpose of the Report:	**Discussion and Decision**
Prepared on behalf of:	**The Discipline Guidelines Task Force**

Lance Cooke
Staff Lawyer,
Policy and Legal Services Department
(604) 605-5325

Preamble

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

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

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

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

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

I. *The Principles*

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) the determinations of the other forum;

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

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

II. *Guidelines for Abeyance Decisions*

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

General

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

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

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

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

The Parallel Proceeding and the Other Forum

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

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

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

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

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

The Lawyer and Other Parties

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

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

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

The Abeyance Agreement

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

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

The Law Society's Investigation

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

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

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

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

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

And

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

Memo

The Law Society of British Columbia

12000

To Benchers

From Carol W. Hickman & Doug Munro

Date August 20, 2010

Subject ***Family Relations Act*** **White Paper**

The government has released a White Paper regarding the proposed overhaul of the *Family Relations Act.* The Ministry of the Attorney General has invited the Law Society to provide a written submission if the Benchers wish to. I brought this to the attention of the Executive Committee at its August 19th meeting to suggest that the Family Law Task Force have its mandate expanded to include recommending to the Benchers a response to the White Paper. The Executive agreed that this was the appropriate course of action.

The Family Law Task Force seeks approval for its mandate to be amended to include:

> The Family Law Task Force will review the Ministry of the Attorney General's "White Paper on *Family Relation Act* Reform: Proposals for a new Family Law Act", and recommend a response to the Benchers on October 1, 2010. The focus of the analysis will be to provide a concise response from the perspective of the Law Society's public interest mandate.

If the revised mandate is approved, the Task Force will conduct a series of additional meetings in order to meet the deadline. The Task Force does not expect there will be any substantial costs associated with conducting these additional meetings, although it may require some travel for out of town Benchers.

CH/DM

The Law Society of British Columbia

July 19, 2010

VIA EMAIL: BC.CorSer@gov.bc.ca

Dr. Diane A. Rothon MD
Chief Coroner
Province of British Columbia
Metrotower II
Suite 800 - 4720 Kingsway
Burnaby, B.C. V5H 4N2

Dear Dr. Rothon:

Timothy E. McGee
Chief Executive Officer

Re: BC Coroners Service Domestic Violence Death Review Panel Report and Recommendations

This is further to our letter of June 16, 2010. Since then, we have had discussions with Rod MacKenzie regarding the expected involvement of the Law Society in relation to Recommendations 12 and 13 of the Domestic Violence Death Review Panel Report and Recommendations. Mr. Dolan has confirmed that your office considers that Recommendations 12 and 13 were properly directed to the Law Society.

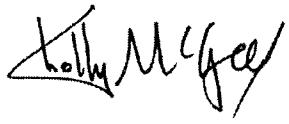
We therefore provide our responses to Recommendations 12 and 13 below.

Recommendations	Responsible Entities	Response
12. Adoption of a leadership role by the government of British Columbia in identifying and piloting civil and family law processes to achieve a more coordinated approach. This includes measures to help ensure the following: a. Appropriate information sharing between family law practitioners and Crown counsel and, in the circumstance where a victim has no legal representation in a family law proceeding, sharing of criminal	The Attorney General of British Columbia The Law Society of British Columbia	The Law Society will work cooperatively with the Ministry of Attorney General to ensure that appropriate information sharing between family law practitioners and Crown Counsel is consistent with their professional obligations.

845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9
Direct Line: 604 443-5766 Facsimile: 604 669-5232
Toll-free within B.C. 1-800-903-5300 TTY: 604 443-5700
Email: tmcgee@lsbc.org www.lawsociety.bc.ca

Recommendations	Responsible Entities	Response
information between Crown counsel and family court; b. Appropriate legal aid be provided to victims of domestic violence where there is also a pending or an active family law proceeding; c. Integrated approaches to enforcing protective conditions included in civil and criminal orders; and d. Appropriate referrals to specialized community based support services		
13. The development of a practical step-by-step guide for the Continuing Legal Education Branch and Legal Services Society that outlines domestic violence risk factors, coordination and case management protocols and referral guidelines. This guide to be made available on-line to members of the bar.	The Attorney General of British Columbia The Law Society of British Columbia	The Law Society will assess this recommendation in relation to the programs for which it is responsible.

Yours very truly



/jac

c: G. Glen Ridgway, QC, President, Law Society of British Columbia
Michael Lucas, Manager, Policy and Legal Services, Law Society of British Columbia

14000

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

cc BENCHERS
INFO
GT

10/8784 and MC10/8377

30 JUN 2010

Mr Timothy E McGee
Chief Executive Officer
Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9
Canada

Dear Mr McGee

Thank you for sending a copy of the Law Society of British Columbia's publication *Self Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia.*

This publication of the speech by former Law Society President Turriff in Perth in 2009 is timely, as Australia continues the process of reforming regulation of the legal profession. It is appropriate to look to contemporary approaches to regulation in other countries that share our strong common law tradition in undertaking such a task.

The receipt of this publication has been very helpful in providing insights into the regulatory system in British Columbia and the rationale behind maintaining professional independence in your jurisdiction. During the current discussion over reform in Australia I have publicly emphasised the importance of maintaining an independent and robust Australian legal profession.

Thank you again for this publication.

The action officer for this matter in my Department is Marjorie Todd who can be contacted on + 61 2 6141 4321.

Yours sincerely

Robert McClelland

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 • Fax (02) 6273 4102 www.ag.gov.au

Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Rob Nicholson, P.C., Q.C., M.P. / c.p., c.r., député
Ottawa, Canada K1A 0H8

→ cc. BENCHERS

JUL 15 2010

Mr. Timothy E. McGee
Chief Executive Officer
The Law Society of British Columbia
845 Cambie Street
Vancouver BC V6B 4Z9

Dear Mr. McGee:

Thank you for your correspondence of May 14, 2010, in which you enclose a copy of your publication entitled *Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia.*

I appreciate receiving a copy of this publication, which is a reproduction of the address provided by former Law Society of British Columbia (LSBC) President Gordon Turriff at the 2009 Conference of Regulator Officers in Perth, Australia. I was pleased to share it with departmental officials. I am certain that they are reviewing the speech with great interest, as it outlines a number of issues that are important to Canadians, including self-regulation of the legal profession, the role of law societies, and protecting the public interest in the administration of justice.

Moreover, I note that Mr. Turriff marked the LSBC's 125th anniversary by touring and speaking in a number of communities and scholastic institutions across the province. This kind of dialogue is most valuable in generating increased public discussion on topics such as lawyer and judicial independence, and upholding the rule of law.

Once again, I would like to thank you for writing and for providing me with a copy of this informative and engaging publication.

Yours truly,

Rob Nicholson

The Honourable Rob Nicholson

Canada

REPORT TO THE BENCHERS ON THE 2010 CANADIAN BAR ASSOCIATION ANNUAL MEETING AND CANADIAN LEGAL CONFERENCE

Niagara Falls, Ontario
[August 13 – 18, 2010]

Once again, it was my honour to represent the Law Society of British Columbia at the Canadian Bar Association (National) Annual Meeting and Legal Conference. This year it was held at Niagara Falls, Ontario and I must say that but for the falls and the nearby wineries, this location may have been more suitable for a convention of carnival owners. The only other point I will make about the location is that if humidity is your atmospheric preference, then Niagara Falls is a must see destination.

The trip from Castlegar Airport to Niagara Falls was a long one (some 12 hours not including the time change). Melanie and I arrived at the hotel at around 11:30 p.m. only to be met by President Ridgway and the wonderful Catherine, both happy to see us and anxious to go for a beer. I suspect the President was happier to see my credit card; nevertheless, it was nice to be greeted by familiar faces.

I attended the Meeting of Council of the Canadian Bar Association on Saturday morning. After greetings from President Kevin Carroll, there were a number of brief committee reports, including one from our own Kathryn Berge, Q.C., for the Awards Committee. Next came the Treasurer's Report. The year ending, August 31, 2009 saw a net surplus of $510,745.00. After 10 months of operation for 2010, it appeared that the CBA National would end this year in a similar position to 2009. The most interesting part of the Report is that, there has been a net

loss of 1% in overall membership. The west was slightly positive but Ontario sustained a loss in membership no doubt due to the state of the economy.

Chief Justice Beverly McLaughlin next gave her State of the Union Supreme Court of Canada Report. Of note was the Supreme Court's growing interest in appeals dealing with Internet and Cyber crime and National Security issues. Clearly these issues are growing not only in volume, but in national importance. These are developing areas of the law that will no doubt gain prominence as our populations become fully engaged in the information era. The Chief also spoke about the mounting pressure for the justice system to remain relevant to all Canadians. She indicated that Mr. Justice Cromwell of her court was heading up a national effort for civil and family matters with the assistance of the CBA.

There were only four resolutions at this year's counsel meeting, all of which passed. The first one was a resolution that urged the federal, provincial and territorial governments to review their legislation and policies, especially human rights legislation and hate crimes under the Criminal Code, and make amendments necessary to protect individuals from discrimination on the basis of gender identity and gender expression.

The second resolution sought the CBA's support for an initiative of the various levels of government responsible for Justice with respect to access to justice for people who suffer from Fetal Alcohol Syndrome Disorder (FASD) and to urge the levels of government to allocate

additional resources for alternatives to the current practice of criminalizing individuals with FASD.

The third resolution dealt with the issue of mandatory bilingualism in order to qualify to sit on the Supreme Court of Canada. Our Law Society has been asked to take a position on this issue as well. The resolution had three parts, the first two being uncontroversial. The third part ultimately passed with some amendment authored and promoted under the leadership of President James Bond. The resolution that passed read as follows:

> "(a) stress the importance of the principle of institutional bilingualism pursuant to which the Supreme Court of Canada must provide for the right of each litigant to be heard by judges who can understand the litigant in the official language of the litigant's choice, without the aid of an interpreter and in accordance with subsection 19(1) of the Charter;
>
> (b) reiterate its policies that judicial appointments be based solely on merit, that bilingualism is an important element of merit for judicial appointment and that governments must appoint an adequate number of bilingual judges in all courts to ensure equal access to justice for litigants in the official language of their choice;

(c) affirm that the inability of judges to understand both official languages at the time of appointment should not be a bar to appointment to the Supreme Court of Canada, that a Supreme Court of Canada composed of judges who understand both official languages is the ultimate ideal, and that Parliament can immediately undertake concrete steps to achieve institutional bilingualism that will not have the effect of reducing the pool of otherwise qualified candidates to the Supreme Court of Canada.

The last resolution to pass has its genesis in the eloquent presentation and questions Past Bencher Meg Shaw placed before the Minister of Justice in Dublin last year. Her plea to the Minister was in response to a Private Member's bill that wanted to change the test for custody from "the best interests of the child" to one where co-parenting should be the presumption. The CBA enthusiastically supported the resolution that the CBA urge federal, provincial and territorial governments to continue to support "the best interests of the child" as the paramount consideration in determining custody and access. That was enough business for Saturday and the rest of the day was taken with more frivolous but certainly more enjoyable activities.

On Sunday, I attended day two of the National Council Meeting. First up was a speech from incoming President, Rodney Snow, Q.C., of Whitehorse, the first president of the CBA from north of 60°. He described himself as the "Chief Membership Officer." His focus will be on doing more for less by focussing resources. Also, he wants to promote the concept that we

should not be tough on crime “but rather effective on crime”. Clearly, this was a swipe on the present government’s intention to leave less discretion with judges when administering sentences. The only other business of note was a report from Simon Potter updating the work of the National Class Action Task Force. They are in the process of developing draft judicial protocols to assist the Courts in determining which provincial jurisdiction should take conduct of the Class Action. Drafts are presently being exchanged between members of the Task Force. They are also working on recommendations for legislative reform to assist in standardizing the protocol.

Sunday afternoon was the opening plenary of the convention and the key note speaker was Dr. Paul Krugman, a Nobel Prize-winning economist. The best part of the presentation was sitting next to President Ridgway and watching him squirm as Dr. Krugman espoused the virtues of liberal policy. Needless to say, Krugman was somewhat impressed with our country’s performance during this world-wide recession.

Sunday night was a convention sponsored event involving dinner. This was preceded by a BC Branch sponsored event that was essentially a farewell to outgoing President James Bond and a welcome to incoming President, Stephen McPhee. I must say that our colleagues at the BC Branch, James Bond, Stephen McPhee, Sharon Matthews, Kari Simmons and, of course, the indomitable, Caroline Nevin, are wonderful hosts who bend over backward to make the Bencher’s in attendance feel a part of their team. A big thank you to all of them. Speaking of Benchers, I met up with Catherine Sas, Kathryn Berge, Glen Ridgeway, Robert Brun and staff

member, Alan Treleaven, although only once. Mr. Brun, of course, was officially installed as 2nd Vice President and this convention will be held in Vancouver the year he is President.

On Monday morning, I attended what was perhaps the highlight of the convention and that was a speech from General Rick Hillier, previous Chief of Staff of our armed forces. I will admit that I was somewhat tardy in my attendance because it started at 7:15 a.m. (4:15 a.m. PST). Nevertheless, he gave a wonderful speech on leadership tactics. He was charming, engaging, interesting, and funny. His speech was enjoyed by all.

Also, on Monday, I attended the "Dialogue with Minister of Justice Robert Nicholson Q.C." who also happens to be the MP for the Niagara Region. He gave a speech on the importance of the rule of law and respect for the Law. He strongly defended his government's policy on being touch on crime and was unrepentant about limiting Conditional Sentences and changing sentencing rules in order to provide for more and longer jail sentences. He entertained a number of difficult questions and I must say he handled them with grace and candour. He is a very polished politician who knows how to stay on message.

Monday night was another convention sponsored event involving wine tasting at three wineries. I enjoyed the wines and Ridgway the food. We were then bussed back to the convention centre where we enjoyed a performance by Jim Cuddy and Greg Keelor of Blue Rodeo fame. I was quite surprised at the number of songs I recognized.

Tuesday morning, I attended a presentation by Richard Susskind entitled “After the End of Lawyers.” It was really a re-hash of his mantra abut the commoditization of legal services. My personal take on his gospel is that we should do away with any and all regulation of lawyers and that means Law Societies and that the concepts of ethics and professional responsibilities should be subject only to whatever consumer legislation that exists for any other business. I don’t deny that he definitely has some interesting concepts but I hope I am long retired before they take hold. You see, I don’t see a problem with a market place that supports ethical and professionally responsible lawyers.

Tuesday night we attended a lovely farewell dinner/dance at Hildebrand’s Winery. It was a gorgeous setting where we ate Lake Huron Char and local Bison paired with appropriate wines. As this is my last attendance and report as the Law Society’s representative on counsel, I want to thank Past President Gordon Turriff and President Ridgway for this appointment. I have to end this final report by saying that at the outset, I questioned the need for this appointment and accompanying expense. I have concluded that the interaction and support that we lend to our colleagues of the provincial branch of the CBA on the National scene is invaluable. In the end, although there are clear and distinct differences in our organizations, we have more in common than not and I know that our local CBA colleagues very much appreciate Bencher attendance.

All of which is respectfully submitted:

Bruce LeRose.