The Law Society of British Columbia

AGENDA

MEETING: Benchers

DATE: Saturday, June 18, 2011

TIME: **7:30 a.m.** Breakfast Buffet *(Fairmont Chateau Whistler, Frontenac Ballroom B)*

8:30 a.m. Meeting begins *(Fairmont Chateau Whistler, Frontenac Ballroom C)*

PLACE: **Fairmont Chateau Whistler**

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 May 13, 2011 meeting** • Minutes of the regular session • Minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
2	**Act & Rules Subcommittee: Proposed Amendments**	Tab 2a
	a. Rules Governing Appointments to Regulatory Committees (allowing non-lawyer, non-Bencher appointments) • Memorandum from Mr. Hoskins, for the Act & Rules Subcommittee	p. 2000
	b. Rule 1:39 (Executive Committee Elections) • Memorandum from Mr. Hoskins, for the Act & Rules Subcommittee	Tab 2b p. 2010
3	**Professional Conduct Handbook: Amendments to Chapter 4, Rule 6 (Fraudulent Conveyances)** • Memorandum from the Ethics Committee	Tab 3 p. 3000
REGULAR AGENDA		
4	**President's Report** • Written report to be distributed electronically prior to the meeting	
5	**CEO's Report** • Written report to be distributed electronically prior to the meeting	
6	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	

2009-2011 STRATEGIC PLAN IMPLEMENTATION *(FOR DISCUSSION AND/OR DECISION)*		
7	**Discipline Guidelines Task Force Recommendations** Mr. Van Ommen to report • Report from the Discipline Guidelines Task Force	Tab 7 p. 7000
OTHER MATTERS *(FOR DISCUSSION AND/OR DECISION)*		
8	**Act & Rules Subcommittee: Proposed Amendments to Rule 3-5 (Investigation of Complaints)** Mr. Getz to report • Memorandum from Mr. Hoskins, for the Act & Rules Subcommittee	Tab 8 p. 8000
9	**Election of Benchers' Nominee for 2012 Second Vice-President: Candidates' Entry Deadline**	
FOR INFORMATION ONLY		
10	**a. Federation of Law Societies of Canada (FLSC) 2011 Report** Ronald MacDonald, QC and Jonathan Herman to report **b. Federation of Law Societies of Canada Council Update** Mr. Hume to report	
11	**Equity Ombudsperson's Annual Report for 2010**	Tab 11 p. 11000
12	**Law Foundation Report on use of LSBC Pro Bono Funding in 2010**	Tab 12 p. 12000
IN CAMERA SESSION		
13	**Collective Agreement Ratification (following PEA ratification)** Mr. Hume and Mr. Whitcombe to report	
14	**Bencher Concerns**	

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, May 13, 2011

PRESENT:

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

ABSENT:

Nancy Merrill
Claude Richmond
Catherine Sas, QC

STAFF PRESENT:

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

GUESTS:

Chris Axworthy, QC, Faculty of Law Dean, Thompson Rivers University
Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Anne Chopra, Equity Ombudsperson
Rob Seto, CLE
Donna Greschner, Faculty of Law Dean, UVIC
Jeremy Hainsworth, Reporter, Lawyers Weekly
Azool Jaffer-Jeraj, President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Sharon Matthews, Vice-President, CBABC
Caroline Nevin, Executive Director, CBABC
Wayne Robertson, QC, Executive Director, Law Foundation of BC

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on April 15, 2011 were approved as circulated.

REGULAR AGENDA – for Discussion and Decision

2. President's Report

Mr. Hume referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President since his last report, and elaborated on a number of matters, including those outlined below.

a. Independent Committee on Bencher Election Issues Update

Life Benchers Brian Wallace, QC (Chair), Patrick Kelly and Patricia Schmit, QC have been appointed to an independent committee to consider and provide recommendations regarding a number of Bencher election issues (Benchers' term of office, Bencher turnover and election district boundaries), as directed by the Benchers at their April meeting.

b. Access Symposium Steering Committee Update

Weekly meetings of the Access Symposium Steering Committee are proceeding, with planning of the program for a fall symposium on enhancing access to legal services in BC still in the formative stages.

c. April 28 – 2011 Certificate Luncheon

The annual luncheon to recognize current recipients of 50 and 60-Year Certificates was held on April 28. Mr. Hume has received a number of letters of appreciation from attendees.

d. May 9 – Meeting with the Attorney General (Legislative Amendments)

Mr. Hume and Mr. McGee met with the Honourable Barry Penner, QC to discuss the purpose of Law Society's package of proposed amendments to the Legal Profession Act that was submitted to the Legislature last fall (enhancement of the Society's ability to carry out its mandate).

e. May 10 – Meeting with Chief Justice Bauman (Enhanced Role of Paralegals in the BC Courts)

Mr. Hume met with Chief Justice Bauman to review the Law Society's proposal for expanding the permitted range of court services by paralegals.

f. Subcommittee on Hearing Panel Pools Update

The Subcommittee is currently reviewing the 126 applications received from BC lawyers for inclusion in the non-Bencher lawyer pool. Work is well advanced on a website notice and call for applications for inclusion in the non- lawyer pool.

g. Money-Laundering Litigation Update

Mr. Hume briefed the Benchers, referring to the Federation submissions circulated in advance of the meeting by Ms. Armour and noting that the Law Society is well-represented by Mr. Doust.

h. Selection of the Benchers' Nominee for 2012 Second Vice-President

Mr. Hume reminded the Benchers that the candidacy deadline for seeking the Benchers' nomination as 2012 Second Vice-President is the June 18 Benchers meeting.

3. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

a. Financial Report – Q1 Operating Results

b. 2012 - 2014 Strategic Plan – Planning Process

c. Government Relations Plan – Meeting with the Attorney General

d. Recruiting for New Hearing Panel Pools

e. BencherNet Update

f. Management Group Retreat

4. Report on Outstanding Hearing and Review Reports

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

5. Amendments to Credentials Rules Governing Articled Students

Mr. Renwick briefed the Benchers as chair of the Credentials Committee. He reminded the Benchers that in late 2010 they accepted the Report of the Delivery of Legal Services Task Force, including its recommendation that the Credentials Committee be directed to explore the expansion of legal services permitted to be performed by articled students.

After outlining the deliberations conducted by the Credentials Committee and the Act & Rules Subcommittee, Mr. Renwick referred to Mr. Lucas's memorandum on behalf of the Committee and the Subcommittee (page 5000 of the meeting materials) for a summary of the recommendations being presented to the Benchers for approval:

> … that an articled student be allowed to offer all legal services that a lawyer is able to offer on the condition that the student's principal, or another practising lawyer who is responsible for supervising the student on a particular file:
>
> - has ensured that the student is competent to provide the services offered;
> - supervises the student providing the legal services to the extent necessary in the circumstances; and
> - has properly prepared the student before the student appears or access counsel in any litigation matter.

> … that an [articled] student must not appear as counsel:
>
> - on an appeal in the Court of Appeal or Supreme Court of Canada;
> - in a civil or criminal jury trial; or
> - on a trial proceeding by way of indictment in the Supreme Court
>
> unless the principal or another practising lawyer is in attendance at the time that the Court appearance is made, and is directly supervising the provision of the service.
>
> … that undertakings offered or received by an [articled] student on his or her own should not be allowed, but that, if another lawyer supervising the student was prepared to sign the undertaking, the student could sign it as well. (at page 5001)

Mr. Renwick noted that the proposed amendments to the Law Society Rules entail significant departure from the current approach to regulating the provision of legal services by articled students. Rather than specifying particular permitted services, the proposed amendments start from the premise that an articled student should be able to provide the same services as may be provided by lawyers, with appropriate preparation and supervision by the student's principal or other practising lawyer responsible for supervising the student on a particular file. From that general premise, the proposed Rule 2-32.01 specifies a number of exclusions: services that articled students should not be permitted to provide.

Mr. Renwick also noted that the Rules dealing with temporary articled students will be reviewed next; for the time being, the proposed amendments to Rule 2-43 allow temporary articled students to provide the same services that they may provide under the current rule. Mr. Renwick advised that it is understood that the BC Courts are generally very supportive of the proposed expansion of permitted appearances by articled students in court.

Mr. Renwick moved (seconded by Mr. Getz) that the Benchers adopt the resolution set out at pages 5007-5008 the meeting materials (Appendix 2 to these minutes).

Key points raised in the ensuing discussion were:

- it is important that the Law Society communicate clearly and effectively with current principals and students regarding the purpose and effect of the proposed changes, and the importance of the provision of adequate supervision
    - perhaps to the extent of implementing a principals' undertaking and/or protocol regarding the provision of adequate supervision
- maintenance of public confidence requires that the Discipline Committee be ready to address performance breakdowns arising from inadequate supervision
- the proposed expansion of permitted services by articled students should support the recruiting of articled students by smaller firms in rural areas
- credit is due to the work of Kamloops Bencher Kenneth Walker for his leadership in the development of this initiative, and for his on-going work with articled students
- implementation should be delayed to enable preparation and execution of a thorough communications and Practice Standards plan, focusing on the supervision issues

- the proposed requirement of direct supervision by the student's principal or another practising lawyer for articled students to conduct the defence of criminal proceedings by way of indictment in the Supreme Court only

    - should be extended to articled students' conduct of the defence of criminal proceedings by way of indictment in Provincial Court, in light of the seriousness of potential consequences to clients

    - should not be extended to articled students' conduct of the defence of criminal proceedings by way of indictment in Provincial Court, in light of the resulting increased cost of representation and negative impact on access to legal services

Mr. Renwick and Mr. Getz agreed to a friendly amendment of their motion, making implementation of the proposed amendments be effective September 1, 2011.

Mr. Crossin moved (seconded by Ms. Hickman) that the proposed language for the new Rule 2-32.01(2)(a)(iii) be amended by striking the phrase "*in the Supreme Court*" as follows:

Rule 2-32.01 (2) An articled student must not

(a) appear as counsel without the student's principal or another practising lawyer in attendance and directly supervising the student in the following proceedings:

…

(iii) a trial proceeding by way of indictment ~~*in the Supreme Court*~~.

The discussion of the motion to amend centred on the question of whether the risks of prejudice to a client in the event of inadequacies in an articled student's unsupervised conduct of a trial proceeding by way of indictment in Provincial Court

- are appropriate, in light of the strategic goal of enhancing access to legal services

- can be managed adequately by warning principals of the potential disciplinary consequences of inadequate supervision

The motion to amend was defeated.

Ms. Berge moved (seconded by Mr. Ross) that the proposed new Rule 2-32.01(2)(a)(iii) be struck and replaced by "*a proceeding on an indictable offence, unless the offence is within the absolute jurisdiction of a provincial court judge*" as follows:

Rule 2-32.01 (2) An articled student must not

(a) appear as counsel without the student's principal or another practising lawyer in attendance and directly supervising the student in the following proceedings:

…

(iii) *a proceeding on an indictable offence, unless the offence is within the absolute jurisdiction of a provincial court judge.*

The motion to amend was carried.

Mr. Van Ommen moved (seconded by Mr. Crossin) to postpone the main motion pending clarification regarding the availability of a supervising lawyer's Part B insurance coverage in a negligence claim arising from the provision of legal services by an articled student.

Ms. Forbes advised that she does not envision gaps in insurance coverage arising as a result of the proposed expansion of legal services permitted to be provided by articled students. She noted that to her knowledge, there has never been a denial of coverage of a claim under a supervising lawyer's policy of insurance arising from services provided by an articled student on the ground of inadequate supervision. Ms. Forbes also advised that the issue under discussion is more a matter of communication with current and potential principals and supervising lawyers regarding the importance of supervision and the potential consequences of failure to provide supervision, than a question of availability or administration of insurance coverage.

The motion to postpone was defeated.

The main motion (as amended) was carried by a majority of greater than two-thirds of the Benchers who voted.

Mr. Hume confirmed that the Credentials Committee and Law Society staff will work together in managing communications to the profession and the public regarding the September 1, 2011 implementation of the approved Rules amendments.

6. Review Conflicts Portion of the Model Code of Professional Conduct

Professor Blom briefed the Benchers as Chair of the Ethics Committee. He provided background for the process followed by the Committee in developing the draft BC Code of Conduct (Conflicts Provisions) (the BC Code) as an adaptation of the Federation of Law Societies of Canada's Model Code of Professional Conduct (the Model Code). Professor Blom reminded the Benchers that last month they approved the Ethics Committee's proposed non-conflicts portion of the BC Code, with implementation to be delayed pending the Committee's further advice to the Benchers regarding the conflicts provisions.

Professor Blom expressed the Committee's view of the importance of a unified national framework for standards of professional conduct for lawyers, and noted the connection between that view and the Committee's decision to apply the structure and content of the Federation's Model Code wherever possible. The draft BC Code follows the Model Code as closely as possible, deviating from it only in instances where the Ethics Committee concluded that BC's current Profession Conduct Handbook is clearly superior, or where the BC context demands a different approach.

Professor Blom also noted that

- the Federation has asked its Standing Committee on the Model Code (chaired by Mr. Hume) to review its conflicts provisions

- the Ethics Committee proposes to circulate the draft BC Code to the profession in early summer for comment and then report back to the Benchers in the fall

    - taking into account the profession's feedback and the status of the conflicts review being conducted by the Federation's Standing Committee.

Professor Blom highlighted key provisions of the draft BC Code, referring the Benchers to the redlined draft (at page 6061 of the meeting materials, Appendix 3 to these minutes) for detailed depiction of its

points of departure from the Model Code. He also circulated a re-drafted version of Section 2.04 (4), included as Appendix 3a to these minutes.

Professor Blom moved (seconded by Ms. Bond) that the draft BC Code be approved, and that the Ethics Committee be authorized to consult with BC's legal profession regarding its provisions.

The key points raised in the ensuing discussion were:

- national consistency is important
- the principle of undivided loyalty is important
- large firms are pushing for moderation of the conflicts rules to permit multiple representation if the clients agree
- The term "Code" may be misleading because it suggests a set of general principles
    - whereas the Model Code includes both general principles and, on certain topics that frequently arise, detailed guidelines"
- Neither the general nor the specific provisions are binding rules; they are only the Law Society's best advice to the members as to their ethical obligations

The motion was carried.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

WKM
2011-05-31

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

May 13, 2011

Introduction

My report this month includes our financial results for the first quarter ending March 31, 2011, as well as a review of the timeline for the strategic planning process and other items of interest.

1. Financial Report – Q1 Operating Results

Highlights of the financial results to March 31, 2011 are summarized in Appendix 1. Jeanette McPhee, our CFO, and I will be available to answer any questions you may have on the results at Friday's meeting.

2. 2012 - 2014 Strategic Plan – Planning Process

The process for reviewing and restating the Law Society's current 2009 - 2011 Strategic Plan will formally begin in early July and run through the balance of this year. Preparatory work at the policy staff and Advisory Committee levels has already begun. I am attaching a brief timeline as Appendix 2, which shows the key proposed dates and activities for this process. Please let me know if you have any comments or questions.

3. Government Relations Plan – Meeting with the Attorney General

The main objective of the Law Society's Government Relations Plan ("GR Plan") adopted by the Benchers in 2006 is to establish and maintain a consultative relationship with government, with effective channels for communication and cooperation. The desired outcomes of the plan are twofold; first, government consults with the Law Society in advance on matters within our mandate, and second, the Law Society has effective and responsive channels to communicate our key messages and issues to government.

2010 was an "off" year in many respects under our GR Plan. This was mainly because of mega issues during the year, such as the HST, absorbing much of the government's time (not to mention the interest of the opposition) and the subsequent focus on the leadership changes for both of the main parties. As a result, we weren't able to engage with government in the year as much as we would have liked, such as through our successful caucus receptions events, lawyer MLA outreach and briefing sessions with the Attorney General.

We have refocused our efforts to get our GR Plan back in gear for 2011 even though we realize that a provincial election may disrupt those efforts. With this in mind, Gavin and I met with the Attorney General, the Honourable Barry Penner, QC, and members of his staff in his Victoria office on May 9. The main purpose of the meeting was to familiarize the Attorney with the major features of our requests for changes to the *Legal Profession Act*, which are

designed to make us a more effective regulator in the public interest. The meeting was also a good opportunity to introduce the Attorney to additional features of our ongoing efforts to be more transparent and accountable in pursuing our mandate. A copy of our presentation entitled "Improving Self-Regulation – A Collaborative Approach" is attached as Appendix 3. We welcome any suggestions or comments you may have about this material.

4. Recruiting for New Hearing Panel Pools

One of the recent Bencher initiatives designed to enhance the transparency and accountability of our regulatory processes was the decision to include members of the public and non-Bencher lawyers on hearing panels for discipline and credentials matters. Below is an update on the implementation of those decisions.

A call for applications from non-Bencher lawyers was posted on the Law Society website in March with a closing date of April 30, 2011. Notices were also sent to members by email and published in the Benchers' Bulletin. The response has been very good with over 120 applications received to date and more arriving daily. The working group, which has been established to vet the applications and to consider the size of the pool constructed, will meet on May 11 to commence its work. The members of that working group are Messrs Hume, Vertlieb and Acheson and Ms Lindsay.

An advertisement for non-lawyer applicants is being drafted and will soon be finalized and posted on the Law Society website, with an anticipated closing date of June 30, 2011. This will be supported by advertising in daily papers across BC. Our Communications group is also considering arranging radio or TV interviews of a Law Society spokesperson to bring attention to this initiative to include members of the public in the hearing process, and to the call for applications specifically.

5. BencherNet Update

Changes are underway to simplify and update content and access to BencherNet. In addition to formatting changes, the major change is to discontinue the use of BencherNet as a separate web entity. Instead, when Benchers log in to the general Lawyer login section, they will be given access to all content to which they are entitled as Benchers, including committee and task force materials. Life Benchers will also have access to some content available to Benchers, as defined by their profiles. We expect this change to be implemented before July 2011.

6. Management Group Retreat

All managers at the Law Society will be participating in a one and a half day retreat in Vancouver on June 23 and 24, 2011. The purpose of the session is to examine our "culture" and to learn more about what we believe that culture is, how it is helping us achieve our goals and what aspects of our culture we should strengthen or change. This retreat will be a first for this management team and we are enlisting the help of facilitators who have assisted us in the past with our employee survey and leadership development programs. I look forward to reporting on the results of our retreat, and how this can be extended to include all staff, at a future Bencher meeting.

Timothy E. McGee
Chief Executive Officer

Appendix 1

CFO Quarterly Financial Report – First Quarter 2011

Attached are the financial results and highlights for the first quarter of 2011.

General Fund

General Fund (excluding TAF)

The General Fund operating results has a positive variance of $148,000 to March 31, 2011.

Revenue

Revenue is $6,430,000, $134,000 (2.1%) ahead of budget due to the following:

- PLTC will have 400 students this year, 15 ahead of budget,$30,000 of additional revenue
- CPD penalty fees were much higher than expected, actual collection was $130,000, compared to a budget of $30,000

Operation Expenses

Operating expenses for the first quarter were $4.36 million, very close to budget. The regulation area incurred a negative variance of $90,000, mainly due to unbudgeted external counsel fees. This was offset by savings in other areas.

2010 Forecast - General Fund (excluding TAF)

Revenue

Practicing membership is expected to be at budget this year, with 10,575 members. There will be additional PLTC and CPD revenue of $130,000, as noted above. We will not expect to re-lease the VOA space until 2012, so lease revenue will be reduced by $85,000 in the fourth quarter of the year. The net result is $45,000 positive variance for total revenue.

Expenses

With an increased focus on our regulatory mandate and reduced timelines, there are a number of initiatives this year. These are expected to increase costs in the regulatory area by approximately $650,000. As the 2011 budget was set in May 2010, these costs would not have been known at that time.

- Additional external counsel costs in regulation - $470,000

  - Additional files sent out in fall 2010 and first quarter 2011 due to staffing shortages (*Note: In the first quarter, there was $130,000 in regulation vacancy savings, which is applied to the 2011 Salary Vacancy budget)*
  - Additional files sent out to close files and reduce timelines
  - A number of large, complex files, where specific expertise was required
  - Two files with court applications
  - Increases in external counsel rates to attract senior counsel
- Regulation Staffing Plan – increased costs in last half of 2011 - $125,000
- Hearing Panels – advertising for new hearing panel membership - $50,000

At this time, we expect operating cost savings of $230,000 to year end. This consists of general operating expense savings, along with 'green' initiatives instituted by various departments at the Law Society. Some of the positive variances are noted below:

- Reduced usage of stationery and paper supplies - $40,000
- Electronic distribution of annual report – $20,000
- Reduced file storage costs, with reduced rates through renegotiation file storage contract and a focus on file destruction - $35,000
- One less Bencher meeting - $20,000

Forecast

Although it is early in the year, with the above noted changes, the current General Fund year end projection is a $370,000 negative variance to budget.

TAF-related Revenue and Expenses

The first quarter TAF revenue is not received until the April/May time period. The revenue received to date is tracking to budget.

The 2011 budget is $2.5 million, 6% over 2010 revenue. The BC Real Estate Association market projection for 2011 real estate unit sales is 8% increase over 2010, so the 2011 revenue budget appears reasonable.

TAF operating expenses had a positive variance in the first quarter.

Special Compensation Fund

The Special Compensation Fund is on track. There was little activity in the Fund during the first quarter.

Lawyers Insurance Fund

For the first quarter, LIF operating results were very close to budget. LIF assessments were $3.5 million in the first quarter, very close to budget. LIF

operating expenses had a $72,000 positive variance, due to an unfilled position and lower investment management fees.

The market value of the LIF long term investments increased $1.9 million in the first quarter. The year to date investment return was 2.0%, slightly better than the benchmark 1.7%.

The Law Society of British Columbia

Summary of Financial Highlights - First Quarter 2011
($000's)

2011 General Fund Results - YTD March 2011 (Excluding Capital Allocation & Depreciation)

	Actual	Budget	$ Var		% Var
Revenue					
Membership fees	3,570	3,568	2	*	0.06%
PLTC and enrolment fees	273	237	36	**	15.19%
Electronic filing revenue	152	171	(19)		-11.11%
Interest income	137	132	5		3.79%
Other revenue	468	322	146	***	45.34%
	4,600	4,430	170		
Expenses including 845 Cambie	3,982	3,977	(5)		-0.13%
	618	453	165		

* Membership numbers are 10,401 to date, tracking to budget
** 15 Additional PLTC students
*** CPD late fees over budget by $100k

2011 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**	**Forecast Variance**
2008 Actual	10,035	
2009 Actual	10,213	
2010 Actual	10,368	
2011 Budget	10,575	
2011 YTD	10,401	
Revenue		
CPD late fees over budget		100
PLTC - 15 additional students		30
Leased space vacancy - Oct to Dec 2011		(85)
2011 General Fund Forecast		45
Additional Costs		
Regulation - external counsel costs		(470)
Regulation - Plan		(125)
Hearing Panels - advertising		(50)
Savings		
Custodianship - file storage		35
IT - servers now offsite		35
ERDMS - maintenance cost - delay until 2012		30
Stationery & supplies		40
Bencher travel		20
Annual report distribution		20
Miscellaneous		50
		(415)
2011 General Fund Forecast Variance		(370)
2011 General Fund Budget		-
2011 General Fund Forecast		(370)

Trust Assurance Program Forecast

	2011 Forecast	2011 Budget	Variance
TAF Revenue	2,500	2,500	-
Trust Administration Department	2,405	2,394	(11)
Trust Assurance Program	95	106	(11)
Use of TAF Reserve	-	-	-
Net Trust Assurance Program	95	106	(11)

Most recent Real Estate Association projection predicts an 8% increase in unit sales from 2010 to 2011.

First quarter revenue not yet received. Preliminary estimate shows that we are tracking to budget on revenue.

2011 Lawyers Insurance Fund Long Term Investments - YTD March 2011

Market Value		
	March 31, 2011	97,915,411
	December 31, 2010	96,026,006
Performance		2.0%
Benchmark Performance		1.7%

The Law Society of British Columbia
General Fund
Results for the 3 Months ended March 31, 2011
($000's)

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Membership fees (1)	5,340	5,434		
PLTC and enrolment fees	273	237		
Electronic filing revenue	152	171		
Interest income	137	131		
Other revenue	528	323		
Total Revenues	6,430	6,296	134	2.1%
Expenses				
Regulation	1,597	1,506		
Education and Practice	764	777		
Corporate Services	669	700		
Bencher Governance	468	444		
Communications and Information Services	438	444		
Policy and Legal Services	358	386		
Depreciation	66	87		
Total Expenses	4,360	4,344	(16)	-0.4%
General Fund Results before 845 Cambie and TAP	2,070	1,952	118	
845 Cambie net results	161	131	30	
General Fund Results before TAP	**2,231**	**2,083**	**148**	
Trust Administration Program (TAP)				
TAF revenues	3	-	3	
TAP expenses	523	572	49	9%
TAP Results	**(520)**	**(572)**	**52**	
General Fund Results including TAP	**1,711**	**1,511**	**200**	

(1) Membership fees include capital allocation of $1.831m (YTD capital allocation budget = $1.866m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at Mar 31, 2011
($000's)

	Mar 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	197	177
Unclaimed trust funds	1,740	1,682
Accounts receivable and prepaid expenses	1,113	1,243
B.C. Courthouse Library Fund	1,867	635
Due from Lawyers Insurance Fund	11,602	17,578
	16,519	21,315
Property, plant and equipment		
Cambie Street property	11,848	12,002
Other - net	1,299	1,372
	29,666	34,689
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	2,675	3,965
Liability for unclaimed trust funds	1,740	1,682
Current portion of building loan payable	500	500
Deferred revenue	10,874	16,014
Deferred capital contributions	78	81
B.C. Courthouse Library Grant	774	635
Due to Lawyers Insurance Fund	-	-
Due to Special Compensation Fund	-	-
Deposits	22	20
	16,663	22,897
Building loan payable	4,600	5,100
	21,263	27,997
Net assets		
Capital Allocation	2,539	1,221
Unrestricted Net Assets	5,864	5,471
	8,403	6,692
	29,666	34,689

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 3 Months ended Mar 31, 2011
($000's)

	Unrestricted Net Assets	Capital Allocation	2011 Total	2010 Total
		$	$	$
Net assets - December 31, 2010	5,471	1,221	6,692	5,627
Net (deficiency) excess of revenue over expense for the period	(119)	1,830	1,711	1,065
Repayment of building loan	500	(500)	-	-
Purchase of capital assets:				
LSBC Operations	-	-	-	-
845 Cambie	12	(12)	-	-
Net assets - March 31, 2011	5,864	2,539	8,403	6,692

The Law Society of British Columbia
Special Compensation Fund
Results for the 3 Months ended March 31, 2011
($000's)

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	13	13		
Recoveries	65	65		
Total Revenues	78	78	-	0.0%
Expenses				
Claims and costs, net of recoveries	-	-		
Administrative and general costs	16	20		
Loan interest expense	(7)	-		
Total Expenses	9	20	(11)	-55.0%
Special Compensation Fund Results	**69**	**58**	**11**	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at Mar 31, 2011
($000's)

	Mar 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	953	895
	954	896
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	16	14
Deferred revenue	39	52
	55	66
Net assets		
Unrestricted net assets	899	830
	899	830
	954	896

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
For the 3 Months ended Mar 31, 2011
($000's)

	Unrestricted $
Net assets - December 31, 2010	830
Net excess of revenue over expense for the period	69
Net assets - March 31, 2011	899

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 3 Months ended March 31, 2011
($000's)

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	3,544	3,535		
Investment income **(1)**	1,272	165		
Other income	5	-		
Total Revenues	4,821	3,700	1,121	30.3%
Expenses				
Insurance Expense				
Provision for settlement of insurance deductibles	3,628	3,628		
Salaries and benefits	602	617		
Contribution to program and administrative costs of General Fund	363	394		
Office	125	157		
Actuaries, consultants and investment brokers' fees	94	97		
Allocated office rent	37	37		
Premium taxes	6	4		
Income taxes	-	-		
	4,855	4,934		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	167	160		
Total Expenses	5,022	5,094	72	1.4%
Lawyers Insurance Fund Results before 750 Cambie	(201)	(1,394)	1,193	
750 Cambie net results	100	85	15	
Lawyers Insurance Fund Results	**(101)**	**(1,309)**	**1,208**	

(1) There is an unrealized gain of $553k for the three month period 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 Mar 31, 2011
($000's)

	Mar 31 2011	Dec 31 2010
Assets		
Cash and cash equivalents	13,491	21,530
Accounts receivable and prepaid expenses	1,337	1,149
Due from members	29	25
Due from General Fund	-	-
General Fund building loan	5,100	5,600
Investments	108,054	108,287
	128,011	136,591
Liabilities		
Accounts payable and accrued liabilities	2,239	2,709
Deferred revenue	3,277	6,707
Due to General Fund	11,602	17,578
Due to Special Compensation Fund	953	895
Provision for claims	56,413	55,652
Provision for ULAE	7,643	7,618
	82,127	91,159
Net assets		
Unrestricted net assets	28,384	27,932
Internally restricted net assets	17,500	17,500
	45,884	45,432
	128,011	136,591

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 3 Months ended Mar 31, 2011
($000's)

	Unrestricted $	Internally Restricted $	Total $
Net assets - December 31, 2010	27,932	17,500	45,432
Net deficiency of revenue over expense for the period	(101)	-	(101)
			-
Unrealized gains on available-for-sale financial assets arising during the period	553	-	553
Net assets - March 31, 2011	28,384	17,500	45,884

Appendix 2

Timeline – Strategic Planning Process, 2011

July 15, 2011

- Benchers receive memo from Policy Department:
    - describing where the organization is at present with respect to the current Plan, and what has been accomplished;
    - outlining considerations for creating the next Strategic Plan. Describes for purposes of debate what the ongoing goals of the Law Society might be for strategic planning purposes, and how to develop strategies and initiatives in a Strategic Plan to achieve aspects of those goals over a period of time. Definition of "strategies" and "initiatives" provided.
- Benchers receive mid-year reports from Advisory Committees identifying topics for consideration for Strategic Planning purposes.

September 9, 2011

- Benchers debate and set Law Society goals to give the Plan its overarching structure.
- Benchers receive any additional information from committees, task forces or individuals that may identify topics for consideration as strategies or initiatives for Strategic Planning purposes.

October 21, 2011

- Follow-up work as required and preparation for November (December) meeting.

December 2, 2011

- Benchers receive a package compiled by staff categorizing strategies and initiatives that have been proposed through which to achieve the goals that the Law Society aims to achieve as identified by the Benchers. Benchers debate and prioritize the strategies and initiatives.

December/January

- 2012 – 2014 Strategic Plan approved.

The Law Society of British Columbia

Improving Self-Regulation
A collaborative approach

May 2, 2011

Overview

- The Law Society of BC regulates 10,000+ lawyers
- Canadian Bar Association is lawyer advocacy body
- The Law Society is seeking amendments to *Legal Profession Act* to enhance ability to regulate by:
  - Improving ability to investigate, act and enforce
  - Simplifying regulation
  - Increasing accountability and transparency
  - Adopting best-practices of other self-regulating professions
  - Modernizing the Act in regards to privacy and proceedings
  - Removing any suggestion of lawyer advocacy

Mandate

- The Law Society of BC was created in 1869 and incorporated by provincial statute in 1884
- Through the *Legal Profession Act*, the provincial government has given the Law Society the task of upholding and protecting 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 lawyers in BC
  iii. Establishing standards for the education, professional responsibility and competence of registrants and applicants

Current public perception research (2010)

- Confidence in Law Society has been trending up in recent years
- Ability of Law Society to:
  - handle complaints: 66% somewhat or very confident
  - discipline lawyers who are in violation of standards and practices: 63% somewhat or very confident
  - ensure lawyers operate with ethical standards: 72% somewhat or very confident
- Gratified to see higher results, but ongoing improvement requires enhanced ability to regulate

Importance of public confidence

- Heightened awareness and expectations in recent years regarding self-regulating professions
- From the Law Society's perspective, public confidence is best improved by ensuring that its actions are worthy of public confidence
- When it comes to self-regulation, justice must not only *be* done, it must be *seen* to be done in a manner that can be understood by the general public

Law Society initiatives

a) Proactive transparency and accountability

- Aggressive steps have been taken to ensure regulatory programs are transparent and accountable to the public
- Many initiatives represent best practices among self-regulating professions
  - Including the public and non-elected lawyers on hearing panels for discipline and credential matters
  - Discipline and credential citations and decisions posted to website
  - Discipline hearings, credential hearings and director meetings open to the public
  - Practice restrictions posted to website through Lawyer Lookup service
  - Completely redesigned website focused on transparency and usability launched in March 2011
  - Developing changes to current Rules that will allow greater disclosure

Law Society initiatives (cont'd)

b) Key performance measures

- Created to answer the question "How does the public know we are doing a good job?"
- Implemented in 2008 to evaluate capability with respect to complainant satisfaction, timeliness of responses and other aspects of public confidence
- Results are communicated annually to all lawyers and posted to website
- Currently refining key performance measures to more effectively evaluate regulation in the public interest

Law Society initiatives (cont'd)

c) Core process review

- Significant project completed in December 2010 to assess and redesign all major regulatory processes to improve efficiency and effectiveness
- Solutions now being implemented, including enhancements to complaint intake and investigative processes

Legislative Changes

Suggested changes to *Legal Profession Act* will enhance ability to regulate in the public interest and improve public confidence

1. Improve ability to investigate, act and enforce the statute

- Clarifying definition, prohibitions and exceptions to the practice of law will improve enforcement and better protect the public from unauthorized practice
- Adding express authority to compel a lawyer or others to provide documentation will enable Law Society to be proactive in investigating complaints
- Provision for summary suspension of a lawyer convicted on indictment will allow Law Society to move quickly and treat an offence as seriously as the Crown treats it
- Allowing the order of a Law Society tribunal to be filed in the Supreme Court and enforced as a judgment of the court will provide ability to enforce orders and be a better deterrent.
- Permitting Benchers to set maximum fines (which haven't been altered since 1992 and are seen as insufficient) will provide an increased deterrent

Legislative Changes (cont'd)

2. Simplify regulation while increasing accountability

   For example, by creating the ability to regulate law firms directly, the Law Society will be able to more effectively oversee trust accounting

3. Adopt best practices of other self-regulating professions

   For example, registrants of the Law Society still have fee setting powers, which could unduly hamper investigation budgets

4. Modernize the Act in regards to privacy and proceedings

   Clarify language and deal more effectively with electronic records and protection of privacy

5. Ensure Law Society is focused entirely on regulation of lawyers

   For example, the current statute allows for a two-tiered mandate that includes advocacy for the profession in addition to protection of the public

Discussion and next steps

- As the organization mandated by the provincial government through the *Legal Profession Act* to uphold and protect the public interest in the administration of justice, the Law Society of BC believes that improving public confidence in the justice system is of paramount importance
- The Law Society looks forward to working with the government to achieve this goal and welcomes any comments or suggestions from the government as to how this goal might best be achieved

THANK YOU

ARTICLED STUDENTS

SUGGESTED RESOLUTION:

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

1. By adopting the following Rule:

Legal services by articled students

2-32.01(1) Subject to any prohibition in law, an articled student may provide all legal services that a lawyer is permitted to provide, but the student's principal or another practising lawyer supervising the student must ensure that the student is

(a) competent to provide the services offered,

(b) supervised to the extent necessary in the circumstances, and

(c) properly prepared before acting in any proceeding or other matter.

(2) An articled student must not

(a) appear as counsel without the student's principal or another practising lawyer in attendance and directly supervising the student in the following proceedings:

(i) an appeal in the Court of Appeal, the Federal Court of Appeal or the Supreme Court of Canada;

(ii) a civil or criminal jury trial;

(iii) a trial proceeding by way of indictment in the Supreme Court.

(b) give an undertaking unless the student's principal or another practising lawyer supervising the student has also signed the undertaking, or

(c) accept an undertaking unless the student's principal or another practising lawyer supervising the student also accepts the undertaking.

2. By rescinding Rule 2-43 and substituting the following:

Court and tribunal appearances by temporary articled students

2-43(1) Despite Rule 2-32.01, a person enrolled in temporary articles must not appear as counsel before a tribunal except

(a) in the Federal Court or the Federal Court of Appeal as the Court permits,

(b) in the Supreme Court of British Columbia in Chambers on any

(i) uncontested matter, or

(ii) contested application for

(A) time to plead,

(B) leave to amend pleadings, or

(C) discovery and production of documents, or

(iii) other procedural application relating to the conduct of a cause or matter,

(c) before a registrar or other officer exercising the power of a registrar of the Supreme Court of British Columbia or Court of Appeal for British Columbia,

(d) in the Provincial Court of British Columbia

(i) on any summary conviction offence or proceeding,

(ii) on any matter in the Family Division or the Small Claims Division, or

(iii) when the Crown is proceeding by indictment or under the *Youth Criminal Justice Act* (Canada) in respect of an indictable offence, for the purposes only of

(A) speaking to an application for an adjournment,

(B) setting a date for preliminary inquiry or trial,

(C) speaking to an application for judicial interim release or an application to vacate a release or detention order and to make a different order, or

(D) an election or entry of a plea of Not Guilty on a date before the trial date,

(e) on an examination of a debtor,

(f) on an examination for discovery in aid of execution, or

(g) before an administrative tribunal.

(2) A person enrolled in temporary articles must not do the following:

(a) conduct an examination for discovery;

(b) represent a party who is being examined for discovery;

(c) represent a party at a pre-trial conference.

(3) A person enrolled in temporary articles under Rule 2-42(2)(c) *[Temporary articles]* may appear in court only on a summary conviction matter and under the direct supervision of a practising lawyer.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

CONFLICTS

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(conflicts provisions only)

Redlined Version

May 2011

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" ~~is~~ means a person who:

(a) consults ~~the~~ a lawyer and on whose behalf a lawyer renders or agrees to render legal services; or

(b) having consulted ~~the~~ a lawyer, ~~has~~ reasonably ~~concluded~~ concludes that the lawyer has agreed to render legal services on his or her behalf.

~~In the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing;~~

~~For greater clarity, a client does not include a near-client, affiliated entity, director, shareholder, employee or family member unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established.~~

Commentary

A lawyer-client relationship may be established without formality.

~~In the case of~~When an individual ~~who~~ consults ~~the~~a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that ~~they~~such an individual had a reasonable expectation that a lawyer-client relationship would be established.

~~**"conflict of interest"** or **"conflicting interest"** arises when there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client or a third person;~~

~~**Commentary**~~

~~A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.~~

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of ~~<province or territory>~~British Columbia;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures~~;~~.

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not advise or represent more than one side of a ~~dispute~~matter, except as permitted under this Code.

2.04 (2) A lawyer must not act or continue to act in a matter when there is~~, or is likely to be,~~ a conflicting interest, unless, after disclosure, the client consents, or as otherwise permitted under this Code.

Commentary

In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

~~As defined in these rules, a~~A conflict of interest or a conflicting interest arises when there is a substantial risk that ~~the~~ a lawyer's representation of ~~the~~ a client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client or a third person. A substantial risk is one that is significant~~,~~ and, while not certain or probable, is more than a mere possibility.~~.~~

A lawyer should be aware that he or she might owe duties to a third person, even though no formal lawyer-client relationship exists. The lawyer might, for instance, receive confidential information from a person, giving rise to a duty of confidentiality. Duties to third persons might also arise when a lawyer acts in a non-lawyer capacity, for example as a corporate director or officer, a trustee or ~~as an executor~~ a personal representative of an estate.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest. It is prudent to avoid situations in which the possibility of a conflicting interest arising is significant.

A lawyer's disclosure should inform the client of the relevant circumstances and the reasonably foreseeable ways ~~that~~ in which the conflicting interest could have an adverse effect on the client's interests. This ~~would~~ includes the lawyer's relations to the parties and interest in or connection with the matter, if any.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's

behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, such as when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A lawyer should not act for a client if the lawyer's duty to the client and the personal interests of the lawyer, a law partner or an associate are in conflict. Conflicting interests include, but are not limited to, the financial interest of a lawyer, a law partner or an associate of a lawyer including a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, an associate, ~~a family member or~~ a law partner or a family member~~,~~ had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. ~~The definition of~~

It is not a conflict of interest, however, ~~does not capture~~if the financial interests ~~that~~ do not compromise a lawyer's duty to the client. For example, a lawyer owning a small number of shares of a ~~publicly traded~~ corporation would not necessarily ~~have~~ be in a conflict of interest ~~in~~ when acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. A lawyer acting for a friend or family member may ~~have~~ be in a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

A lawyer's sexual or close personal relationship with a client may also conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. A primary risk is that the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

Sole practitioners who practise in association with other lawyers in cost-sharing or other arrangements should consider whether a conflict would exist if two lawyers in ~~an~~ the association represent clients ~~in~~ on opposite sides of a dispute. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client as well. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts and other organizations.

A dual role may result in a conflict of interest or other problems because it may

- affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- it may obscure legal advice from business and practical advice,
- it may invalidate the protection of lawyer and client privilege, and or
- it has the potential of disqualifying the lawyer or the law firm from acting for the organization.

Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider Rule 6.03 (Outside Interests and Practice of Law).

While subrule (2) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Acting Against Current Clients

2.04 (3) Subject to subrules (4) and (5), A a lawyer must not represent a client whose immediate legal interests are directly adverse to the immediate legal intereststhose of a current client, —even if the matters are unrelated, –unless both clients consent.

Commentary

As defined in these rules, consent means fully fully-informed and voluntary consent after disclosure. Consent must either be in writing or recorded in writing and sent to the client. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time to permit a genuine and independent decision. A lawyer must also take reasonable steps to ensure that the client understands the matters disclosed.

For a discussion of the issue of acting against current clients see *R. v. Neil,* 2002 SCC 70. The Supreme Court of Canada reaffirmed its bright-line test discussed in *R. v. Neil*, and provided additional guidance on how it is to be applied in *Strother v. 344920 Canada Inc.*, 2007 SCC 24.

In that case, the Court provides context in which to distinguish a commercial interest from a legal one. Binnie, J states at para 55:

> The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. This is not to say that commercial interests can *never* be relevant. *The American Restatement* offers the example of two business competitors who seek to retain a single law firm in respect of competing applications for a single broadcast licence, i.e. a unique opportunity. The *Restatement* suggests that acting for both without disclosure and consent would be improper because the subject matter of both retainers is the same licence (*Restatement (Third) of Law Governing Lawyers*, vol. 2, at § 121 (2000)). The lawyer's ability to provide even-handed representation is put in issue. However, commercial conflicts between clients that do not impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact.
> [emphasis in original]~~The consent of a client described in this rule may be express or inferred. A lawyer should record in writing the basis for inferring the consent of a client. It may be reasonable to infer such consent when:~~
>
> - ~~the matters are unrelated;~~
> - ~~the lawyer has no relevant confidential information arising from one client that might reasonably affect the other;~~
> - ~~the parties affected have commonly consented to lawyers acting against them in unrelated matters; and~~
> - ~~the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the legal interests of the other.~~
>
> ~~In the case of a sophisticated client, such as a government, financial institution, publicly traded or similarly substantial company, or entity with in-house counsel, a lawyer need not provide the client with a written record of the basis for inferring consent where the lawyer has advised the client in a written retainer letter at the outset of the retainer that consent to represent a client whose interests are directly adverse to the immediate legal interests of the current client will be inferred when the four conditions set out above have been met.~~

~~The~~ An attempt to create conflicts of interest for purely tactical reasons, for example by consulting multiple lawyers ~~on behalf of a client or as in-house counsel~~ in order to prevent them from representing another client, is contrary to the requirement in Rule 6.02(1) to act in good faith with all persons with whom a lawyer has dealings and is likely to undermine public confidence in the profession and the administration of justice. A lawyer must not engage in this improper practice or assist a client in doing so.

~~Concurrent Representation~~Acting against Current Clients without express consent

2.04 (4) A ~~law firm~~lawyer may represent a client whose immediate legal interests are directly adverse to those of a current client without the express consent of one or both of the clients concerned if all of the following conditions apply:

(a) the matters involved are unrelated;

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other;

(c) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel that has commonly consented to lawyers acting for and against them in unrelated matters; and

(d) the lawyer reasonably believes that he or she is able to represent that client without adversely affecting the immediate legal interests of the other.

~~act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:~~

~~(a) disclosure of the advantages and disadvantages of the firm so acting has been made to each client;~~

~~(b) each client consents after having received advice from a lawyer independent of the firm;~~

~~(c) it is in the best interests of the clients that the firm so acts;~~

~~(d) each client is represented by a different lawyer at the firm;~~

~~(e) appropriate screening mechanisms are in place to protect confidential information; and~~

~~(f) the law firm withdraws from the representation of all clients if a dispute that cannot be resolved develops between the clients.~~

~~Commentary~~

~~Concurrent representation, as distinguished from joint retainers as discussed below, permits law firms to act for a number of clients in a matter, for example, competing bids in a corporate acquisition, in which the clients' interests are immediately divergent and may conflict, but the clients are not in a dispute. A law firm may agree to act in such circumstances provided the requirements of the rule are met. In particular, the clients are to be fully apprised of and understand the risks associated with the arrangement.~~

~~In some situations, although all the clients would consent, the law firm should not accept a concurrent retainer. For example, in a matter in which one of the clients was less sophisticated or more vulnerable than the other, acting under this rule would be undesirable because the less sophisticated and more vulnerable client may later regret his or her consent and perceive the situation as having been one in which the law firm~~

~~gave preferential and better services to the other client.~~

Acting against Current Clients with advance agreement

2.04 (5) A lawyer may represent a client whose immediate legal interests are directly adverse to those of another current client who has agreed in advance, provided that

(a) the matters involved are unrelated,

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other~~.~~, and

(c) if the client is not a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel, the client has obtained independent legal advice on the subject.

Acting Against Former Clients

2.04 (~~5~~6) Unless the former client consents, a lawyer must not act against a former client in ~~or against persons who were involved in or associated with a former client in a matter in which the lawyer represented the former client~~:

(a) ~~in~~ the same matter,

(b) ~~in~~ any related matter, or

(c) ~~except as provided by subrule (6), in~~ any ~~new~~ other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client,~~obtained from the other retainer relevant confidential information~~.

~~.~~

Commentary

~~It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter. Generally this~~ This Rule ~~would~~ prohibits a lawyer from attacking ~~the~~ legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

~~**2.04 (6)** If a lawyer has acted for a former client and obtained confidential information relevant to a new matter, a partner or associate of the lawyer may act in the new matter against the former client if:~~

~~(a) the former client consents to the lawyer's partner or associate acting; or~~

2.04 (7) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's ~~law~~ firm may act against the former client in the new matter, if the firm establishes, in accordance with subrule (21), that it is ~~in the interests of justice~~reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
The guidelines at the end of ~~the Commentary to subrule (26)~~Appendix D regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Joint Retainers

2.04 (~~7~~8) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary
Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced~~.~~. This is especially so when one of the clients is less sophisticated or

more vulnerable than the other. The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with subrule (8).

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (~~7~~8). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (~~9~~10).

2.04 (~~8~~9) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (~~9~~10) When a lawyer has advised the clients as provided under subrules (~~7~~8) and ~~2.04~~(~~8~~9) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (~~10~~11) Except as provided by subrule (~~11~~13), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

(a) refer the clients to other lawyers; or

(b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

(i) no legal advice is required; and

(ii) the clients are sophisticated.

2.04 (12) If the contentious issue referred to in subrule (11) is not resolved, the lawyer must withdraw from the joint representation.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (~~11~~13) Subject to this rule, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

This rule does not relieve the lawyer of the obligation, when the contentious issue arises, to obtain the consent of the clients ~~when~~ if there is or is likely to be a conflicting interest, or ~~when~~ if the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

~~**Acting for Borrower and Lender**~~

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (7) to (11), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in subrule (6) to the lending client before accepting the retainer,

(b) provide the advice described in subrule (7), or

(c) obtain the consent of the lending client as required by subrule (8), including confirming

~~the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.~~

~~**Commentary**~~

~~Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.~~

~~Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.~~

Limited representation

2.04 (14) In subrules (14) to (17) **"limited legal services"** means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter.

2.04 (15) A lawyer must not provide limited legal services if the lawyer is aware of a conflict of interest and must cease providing limited legal services if at any time the lawyer becomes aware of a conflict of interest.

2.04 (16) A lawyer may provide limited legal services notwithstanding that another lawyer has provided limited legal services under the auspices of the same not-for-profit organization to a client adverse in interest to the lawyer's client, provided no confidential information about a client is available to another client from the not-for-profit organization.

2.04 (17) If a lawyer keeps information obtained as a result of providing limited legal services confidential from the lawyer's partners and associates, the information is not imputed to the partners or associates, and a partner or associate of the lawyer may

(a) continue to act for another client adverse in interest to the client who is obtaining or has obtained limited legal services, and

(b) act in future for another client adverse in interest to the client who is obtaining or has obtained limited legal services.

Conflicts ~~from~~ Arising as a Result of Transfer Between Law Firms

Application of Rule

2.04 (~~17~~18) In ~~this~~ subrules (18) to (26):

"client", ~~in this subrule, bears the same meaning as in the Definitions chapter, and also~~ includes anyone to whom a lawyer owes a duty of confidentiality, ~~even if no~~whether or not a solicitor-client relationship exists between them, in addition to those included in the definitions part of this Code;

"confidential information" means information that is not generally known to the public obtained from a client ~~that is not generally known to the public~~; and

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship,

(b) in a partnership,

(c) in an arrangement for sharing space,

(d) as a law corporation,

(e) in a government, a Crown corporation or any other public body, and

(f) in a corporation or other body;

(g) in a Multi-Disciplinary Practice (MDP);

"lawyer" means a member of the Society, and includes an articled student enrolled in the Law Society Admission Program;

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

Subrules (18) to (26) apply to lawyers transferring to or from government service and into or out of an in-house counsel position, but do not extend to purely internal transfers in which, after transfer, the employer remains the same.

Subrules (18) to (26) treat as one "law firm" such entities as the various legal services units of a

government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each such unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent.

See the definition of **"MDP"** in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.~~The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.~~

2.04 (~~18~~19) ~~This rule~~Subrules (18) to (26) ~~applies~~ apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

Subrules (18) to (26) are intended to regulate lawyers and articled law students who transfer between law firms. They also impose a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rules and with the duty not to disclose confidences of clients of:

(a) the lawyer's firm, or

(b) other law firms in which the non-lawyer staff have worked.

2.04 (~~19~~20) Subrules (~~20~~21) ~~to~~ and (22) do not apply to a lawyer employed by the federal~~, a~~ or provincial or ~~a~~ territorial ~~Attorney~~ attorney ~~General~~ general or ~~Department~~ department of ~~Justice~~ justice who~~, after transferring from one department, ministry or agency to another,~~ continues to be employed by that ~~Attorney~~ attorney ~~General~~ general or ~~Department~~ department of ~~j~~Justice after transferring from one department, ministry or agency to another.

~~**Commentary**~~

~~The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.~~

~~**Lawyers and support staff —** This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.~~

~~**Government employees and in-house counsel —** The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.~~

~~**Law firms with multiple offices —** This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.~~

~~Law~~ Firm Disqualification

2.04 (2021) If the transferring lawyer actually possesses ~~relevant~~ confidential information relevant to a matter referred to in subrule (19)(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm can establish~~es~~, in accordance with subrule (22), when called upon to do so by a party adverse in interest, that

(i) it is reasonable that its representation of its client ~~in the interests of justice that it act~~ in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy and timing of the measures taken ~~to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur~~under subparagraph (ii);

(B) the extent of prejudice to ~~any party~~the affected clients; and

(C) the good faith of the ~~parties~~former client and the client of the new law firm; and

~~(ii) the availability of suitable alternative counsel; and~~

~~(iii)~~(ii) ~~issues affecting the public interest.~~it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

Commentary

Appendix D may be helpful in determining what constitutes "reasonable measures" in this context.

Issues arising as a result of a transfer between law firms should be dealt with promptly~~.~~. A lawyer's failure to promptly raise any issues identified may prejudice clients and may be considered sharp practice.~~The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.~~

Continued Representation not to Involve Transferring Lawyer

~~**2.04 (21)** For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.~~

2.04 (22) If the transferring lawyer actually possesses ~~relevant~~ information relevant to a matter referred to in subrule (19)(a) respecting the former client, but that information is not confidential information ~~but~~ that may prejudice the former client if disclosed to a member of the new law firm~~,~~:

~~(a) the lawyer must execute an affidavit or solemn declaration to that effect, and~~

the new law firm must

notify its client ~~and the former client or, if the former client is represented in the matter, the former client's lawyer,~~ of the relevant circumstances and ~~the firm's~~its intended action under ~~this rule~~subrules (18) to (26)~~., and~~

~~(i)~~

~~(ii) deliver to the persons notified under subclause (i) a copy of any affidavit or solemn declaration executed under clause (a).~~

~~**Transferring Lawyer Disqualification**~~

2.04 (23) Unless the former client consents, a transferring lawyer ~~referred~~ to whom ~~in~~ subrule (~~20~~21) or (22) applies must not:

(a) participate in any manner in the new law firm's representation of its client in ~~the~~ that matter; or

(b) disclose any confidential information respecting the former client.

2.04 (24) Unless the former client consents, members of the new law firm must not discuss ~~with a transferring lawyer referred to in subrule (20) or (22)~~ the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer to whom subrule (21) or (22) applies.

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (7) or (~~17~~18) to (26) may apply to a ~~tribunal~~ court of competent jurisdiction for a determination of any aspect of those subrules, or seek the opinion of the Society on the application of those subrules.

Due Diligence

2.04 (26) A lawyer must exercise due diligence ~~to ensure~~ in ensuring that each ~~lawyer~~ member and employee of the lawyer's law firm, ~~each non-lawyer partner and associate,~~ and each other person whose services the lawyer has retained

(a) complies with subrules (~~17~~18) to (26), and

(b) ~~including~~ does not ~~disclosing~~ disclose confiden~~tial information~~ces of clients of

(i) the firm, and ~~or~~

~~(i)~~(ii) ~~any o~~another law firm in which the person has worked.

~~**Commentary**~~

~~**MATTERS TO CONSIDER**~~

~~When a law firm ("new law firm") considers hiring a lawyer or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which:~~

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

(b) the interests of the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("former client") that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with subrule (20)(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

~~Alternatively, if the new law firm applies under subrule (25) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of subrule (20)(b). Ideally, this process should be completed before the transferring person is hired.~~

~~B. If no conflict exists~~

~~Although the notice required by subrule (22) need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.~~

~~The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.~~

~~If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.~~

~~A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (25) for a determination of that issue.~~

~~C. If the new law firm is not sure whether a conflict exists~~

~~There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.~~

~~REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION~~

~~As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:~~

~~(a) when the transferring lawyer actually possesses confidential information respecting a~~

former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (20)(b), particularly clause (v). Only when the entire firm must be disqualified under subrule (20) will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The current matter should be discussed only within the limited group that is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised

    (a) that the screened lawyer is now with the new law firm, which represents the current client, and

    (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened lawyer should use associates and support staff different from those working on the current matter.

In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Conflicts with Clients

2.04 (27) A lawyer must not perform any legal services if it would reasonably be expected that the lawyer's professional judgment would be affected by the lawyer's or anyone else's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary

Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this subrule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

2.04 (28) The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under subrule (27).

Commentary

Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyers Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies.

Whether or not insurance coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Insurance Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing Business with a Client

~~**Definitions**~~**Independent legal advice**

2.04 (~~27~~29) In subrules (~~27~~29) to (~~41~~44), when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who

~~**"independent legal advice"** means a retainer in which:~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client,~~ has no conflicting interest ~~with respect to the client's transaction~~in the matter~~,~~.

2.04 (30) A lawyer giving independent legal advice under this Rule must:

(~~b~~a) ~~the client's transaction involves doing business with~~

~~(i) another lawyer, or~~

~~(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,~~

~~(c) the retained lawyer has advised~~ advise the client that the client has the right to independent legal representation~~,~~ ;

(~~d~~b) ~~the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,~~

~~(e) the retained lawyer has explained~~ explain the legal aspects of the ~~transaction~~ matter to the client, who ~~appeared~~ appears to understand the advice given~~,~~ ; and

(~~f~~c) ~~the retained lawyer informed~~ inform the client of the availability of qualified advisers in other fields who would be in a position to ~~give an opinion to~~advise the client ~~as to the desirability or otherwise of a proposed investment~~ on the matter from a business point of view~~.~~ ;

~~**"independent legal representation"** means a retainer in which~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and~~

~~(b) the retained lawyer will act as the client's lawyer in relation to the matter;~~

Commentary

A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflicting interest in the matter to act for the client in relation to the matter.

If a client elects to waive independent legal representation and to rely on independent legal advice only, the ~~retained~~ lawyer retained has a responsibility that should not be lightly assumed or perfunctorily discharged.

Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

~~**"related persons"** means related persons as defined in the *Income Tax Act* (Canada); and~~

~~**"syndicated mortgage"** means a mortgage having more than one investor.~~

2.04 (~~28~~31) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

~~This provision applies to any transaction with a client, including:~~

~~(a) lending or borrowing money;~~

~~(b) buying or selling property;~~

~~(c) accepting a gift, including a testamentary gift;~~

~~(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;~~

~~(e) recommending an investment; and~~

~~(f) entering into a common business venture.~~

Commentary

This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted~~.~~. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (~~29~~32) Subject to subrule (~~30~~33), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's ~~written~~ consent.

Commentary

If the lawyer does not choose to ~~make disclosure of~~disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (~~32~~35).

2.04 (~~30~~33) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (~~31~~34) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the

loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (~~32~~35) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (~~33~~36) Subject to subrule (~~31~~34), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (~~34~~37) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (~~35~~38) Except as provided by subrule (~~36~~39), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (~~36~~39) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a ~~non-profit~~non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (~~27~~29) to (~~36~~44) (Doing Business with a Client); and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

2.04 (~~37~~40) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (~~38~~41) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (~~39~~42) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (~~40~~43) A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (~~41~~44) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

APPENDIX C — REAL PROPERTY TRANSACTIONS

Application

1. This Appendix does not apply to a real property transaction between corporations, societies, partnerships, trusts, or any of them, that are effectively controlled by the same person or persons or between any of them and such person or persons.

Acting for parties with different interests

2. A lawyer must not act for more than one party with different interests in a real property transaction unless:

   (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,

   (b) the transaction is a simple conveyance, or

   (c) paragraph 8 applies.

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in rule 2.04 (8) to (13).

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

   (a) the value of the property or the amount of money involved,

   (b) the existence of non-financial charges, and

   (c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary

The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

   (a) the payment of all cash for clear title,

   (b) the discharge of one or more encumbrances and payment of the balance, if any,

in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit.

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

The following are examples of transactions that must not be treated as simple conveyances:

(h) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless subparagraph (f) applies, or

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage.

A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2, the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

Unrepresented parties in a real property transaction

7. If one party to a real property transaction does not want or refuses to obtain independent legal representation, the lawyer acting for the other party may allow the unrepresented party to execute the necessary documents in the lawyer's presence as a witness if the lawyer advises that party in writing that:

(a) the party is entitled to obtain independent legal representation but has chosen not to do so,

(b) the lawyer does not act for or represent the party with respect to the transaction, and

(c) the lawyer has not advised that party with respect to the transaction but has only attended to the execution and attestation of documents.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7, it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for him or her to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

APPENDIX D — CONFLICTS ARISING AS A RESULT OF TRANSFER BETWEEN LAW FIRMS

Matters to consider when interviewing a potential transferee

1. When a law firm considers hiring a lawyer or articled student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, *before transfer,* whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm that the transferring lawyer is leaving, and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

   During the interview process, the transferring lawyer and the new law firm need to identify, first, all cases in which:

   (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client,

   (b) the interests of these clients in that matter conflict, and

   (c) the transferring lawyer actually possesses relevant information respecting that matter.

   When these three elements exist, the transferring lawyer is personally disqualified from representing the new client unless the former client consents.

   Second, they must determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm.

   If this element exists, then the transferring lawyer is disqualified unless the former client consents, and the new law firm is disqualified unless the firm takes measures set out in this Code to preserve the confidentiality of information.

   In Rules 2.04 (18) to (26), "confidential" information refers to information not generally known to the public that is obtained from a client. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

   In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not disclose client confidences during the interview process itself.

Matters to consider before hiring a potential transferee

2. After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

(a) **If a conflict does exist**

If the new law firm concludes that the transferring lawyer does possess relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, then the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(i) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or

(ii) the new law firm complies with Rule 2.04 (21).

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under Rule 2.04 (25) for an opinion of the Society or a determination by a court that it may continue to act, it bears the onus of establishing the matters referred to in Rule 2.04 (21). Again, this process must be completed before the transferring lawyer is hired.

An application under Rule 2.04 (25) may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under Rule 2.04 (25) that is intended to provide informal guidance to applicants.

The circumstances referred to in Rule 2.04(21)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account.

(b) **If no conflict exists**

If the new law firm concludes that the transferring lawyer possesses relevant information respecting a former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must notify its client "of the relevant circumstances and its intended action under Rule 2.04(18) to (26).

Although Rule 2.04(22) does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, absent such consent, the transferring lawyer must not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that, if disclosed, may prejudice the former client.

A former client who alleges that the transferring lawyer has such confidential information may apply under Rule 2.04(25) for an opinion of the Society or a determination by a court on that issue.

(c) **If the new law firm is not sure whether a conflict exists**

There may be some cases in which the new law firm is not sure whether the transferring lawyer possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

Reasonable measures to ensure non-disclosure of confidential information

3. As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:

(a) if the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Rather, the new law firm that seeks to implement reasonable

measures must exercise professional judgement in determining what steps must be taken "to ensure that there will be no disclosure to any member of the new law firm."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

Adoption of all guidelines may not be realistic or required in all circumstances, but lawyers should document the reasons for declining to conform to a particular guideline. Some circumstances may require extra measures not contemplated by the guidelines.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm," the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of Rule 2.04(21)(b).

GUIDELINES:

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.

4. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

5. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

   (a) that the screened lawyer is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

6. Unless to do otherwise is unfair, insignificant or impracticable, the screened lawyer should not participate in the fees generated by the current client matter.

7. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.

8. The screened lawyer should use associates and support staff different from those working on the current client matter.

Table of Concordance Between BC Code and *Professional Conduct Handbook*

BC Code Rule	***Professional Conduct Handbook* Rule**
Definitions	No similar definitions
2.04(1)	Chapter 6, Rules 1 to 3
2.04(2)	Chapter 6, Rules 1 to 3
2.04(3)	Chapter 6, Rule 6.3
2.04(4)	Chapter 6, Rule 6.4
2.04(5)	No similar rule
2.04(6)	Chapter 6, Rule 7
2.04(7)	No similar rule
2.04(8) to 2.04(13)	Chapter 6, Rules 4, 5 & 6
2.04(14) to 2.04(17)	Chapter 6, Rules 7.01 to 7.04
2.04(18) to 2.04(26) & Appendix D	Chapter 6, Rules 7.1 to 7.9 and Appendix 5
2.04(27)	Chapter 7, Rules 1 & 2
2.04(28)	No similar rule
2.04(29)	No similar rule
2.04(30)	No similar rule
2.04(31)	Chapter 7, Rule 3
2.04(32)	Chapter 7, Rules 2 to 5
2.04(33)	Chapter 7, Rules 2 & 5
2.04(34)	Chapter 7, Rule 4
2.04(35)	No similar rule
2.04(36)	No similar rule

2.04(37)	No similar rule
2.04(38)	No similar rule
2.04(39)	No similar rule
2.04(40)	Chapter 7, Rule 2
2.04(41)	Chapter 7, Rule 2
2.04(42)	No similar rule
2.04(43)	Chapter 8, Rule 19
2.04(44)	No similar rule
Appendix C	Appendix 3
Appendix D	Appendix 5

Table of Concordance Between *Professional Conduct Handbook* and BC Code

***Professional Conduct Handbook* Rule**	**BC Code Rule**
Chapter 6, Rule 1 to 3	2.04(1) & 2.04(2)
Chapter 6, Rule 6.3	2.04(3)
Chapter 6, Rule 6.4	2.04(4)
Chapter 6, Rule 7	2.04(6)
Chapter 6, Rule 7	2.04(6)
Chapter 6, Rules 4, 5 & 6	2.04(8) to 2.04(12)
Chapter 6, Rules 7.01 to 7.04	2.04(14) to 2.04(17)
Chapter 6, Rules 7.1 to 7.9 & Appendix 5	2.04(18) to 2.04(26) & Appendix D
Chapter 7, Rule 1 & 2	2.02(27, 32, 38, 40, 41),
Chapter 8, Rule 19	2.04(43)

Draft Code of Professional Conduct for British Columbia Conflicts Provisions

Acting against Current Clients without express consent

2.04 (4) A lawyer may represent a client whose immediate legal interests are directly adverse to those of a current client without the express consent of one or both of the clients concerned if all of the following conditions apply:

(a) the matters involved are unrelated;

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other;

(c) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel that has commonly consented to lawyers acting for and against them in unrelated matters; and

(d) the lawyer reasonably believes that he or she is able to represent that client without materially adversely affecting the representation of the other.

Memo

The Law Society of British Columbia

To	Benchers
From	Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date	June 7, 2011
Subject	**Appointment of non-lawyers to Law Society regulatory committees**

At the April meeting the Benchers resolved to pursue a number of governance issues, some of which can be resolved with amendments to the Law Society Rules without a referendum vote of the members. One issue that the Benchers were prepared to pursue was the appointment of non-lawyer members to regulatory committees of the Law Society. That issue can be resolved by adopting a series of similar amendments to the rules governing the individual committees. Those amendments can be made by a resolution of the Benchers (by a 2/3 majority) without recourse to a referendum of the members.

This is the portion of the material before the Benchers relevant to this issue:

> ### *1. Appointment of non-lawyer non-Bencher members of public to regulatory committees*
>
> Under the current Rules, membership in the Discipline Committee, Credentials Committee, Practice Standards Committee and Special Compensation Fund Committee are limited to current Benchers and lawyers. All other Committees are open to the membership of anyone appointed by the President.
>
> This excludes from the key regulatory functions of the Law Society all members of the general public, including Life Appointed Benchers and many retired judges. Given that the Benchers are now prepared to have non-lawyer non-Benchers sitting on hearing panels, they may be willing to consider such persons as members of the regulatory committees.
>
> The Benchers can change this restriction by amending the Rules that govern the composition of those Committees.

The current Rule governing the appointment of members of committees other than the regulatory committees is Rule 1-47:

Committees of the Benchers

1-47 Subject to these Rules, the President may

(a) appoint any person as a member of a committee of the Benchers, and

(b) terminate the appointment.

Rule 1-47 makes any person eligible for appointment to a Law Society Committee, subject to restrictions elsewhere in the Rules. By removing restrictions in each of the rules governing the Credentials, Practice Standards, Special Compensation Fund and Discipline Committees that limiting membership to lawyers and Benchers, the general rule will apply to those committees.

The attached amendments and suggested resolution are drafted to bring about that effect. The Act and Rules Subcommittee has reviewed the attached draft and, if the Benchers are inclined to make the change in eligibility for Committees, the Subcommittee recommends the amendments as appropriate to that end. The Executive Committee has also reviewed the draft amendments and resolved to refer them to the Benchers.

LAW SOCIETY RULES

PART 1 – ORGANIZATION

Division 2 – Committees

Committees of the Benchers

1-47 Subject to these Rules, the President may

(a) appoint any person as a member of a committee of the Benchers, and

(b) terminate the appointment.

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Credentials Committee

Credentials Committee

2-24 (1) For each calendar year, the President must appoint a Credentials Committee, including ~~consisting of~~

~~(a)~~a chair and vice chair, both of whom must be Benchers, ~~, and~~

~~(b) other Benchers and lawyers.~~

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a ~~lawyer or Bencher~~person to the Credentials Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 2 – Practice Standards

Practice Standards Committee

3-10 (1) For each calendar year, the President must appoint a Practice Standards Committee, ~~consisting of~~ including

~~(a)~~a chair and vice chair, both of whom must be Benchers, ~~, and~~

~~(b) other Benchers and lawyers.~~

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a ~~lawyer or Bencher~~ person to the Practice Standards Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

Division 5 – Special Compensation Fund

Special Compensation Fund Committee

3-29 (1) For each calendar year, the President must appoint a Special Compensation Fund Committee, ~~consisting of~~including

~~(a)~~a chair and vice-chair, both of whom must be Benchers, ~~, and~~

~~(b) other Benchers and lawyers.~~

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a ~~lawyer or Bencher~~ person to the Special Compensation Fund Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

(4) Despite subrules (1) to (3), the President must appoint members to the Special Compensation Fund Committee so that the majority of the Committee consists of Benchers at all times.

LAW SOCIETY RULES

Subcommittees

3-34 (1) The Special Compensation Fund Committee may establish one or more subcommittees and, on matters referred to a subcommittee by the Committee, the subcommittee has the power and authority of the Committee except the power and authority delegated to the Committee under Rule 3-32 to make the final determination on a claim.

(4) A subcommittee must consist of an odd number of persons and may consist of one person.

(5) A subcommittee must be chaired by a Bencher who is a lawyer.

(6) All ~~Benchers and lawyers~~ persons are eligible to be appointed to a subcommittee.

PART 4 – DISCIPLINE

Discipline Committee

4-2 (1) For each calendar year, the President must appoint a Discipline Committee, ~~consisting of~~ including

~~(a)~~a chair and vice chair, both of whom must be Benchers, ~~, and~~

~~(b) other Benchers and lawyers.~~

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a ~~lawyer or Bencher~~ person to the Discipline Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

(4) Any function of the Chair of the Discipline Committee under this Part may be performed by the Vice Chair if the Chair is not available for any reason, or by another Bencher member of the Committee designated by the President if neither the Chair nor the Vice-Chair is available for any reason.

LAW SOCIETY RULES

PART 1 – ORGANIZATION

Division 2 – Committees

Committees of the Benchers

1-47 Subject to these Rules, the President may

(a) appoint any person as a member of a committee of the Benchers, and

(b) terminate the appointment.

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Credentials Committee

Credentials Committee

2-24 (1) For each calendar year, the President must appoint a Credentials Committee, including a chair and vice chair, both of whom must be Benchers.

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a person to the Credentials Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

PART 3 – PROTECTION OF THE PUBLIC

Division 2 – Practice Standards

Practice Standards Committee

3-10 (1) For each calendar year, the President must appoint a Practice Standards Committee, including a chair and vice chair, both of whom must be Benchers.

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a person to the Practice Standards Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

Division 5 – Special Compensation Fund

Special Compensation Fund Committee

3-29 (1) For each calendar year, the President must appoint a Special Compensation Fund Committee, including a chair and vice-chair, both of whom must be Benchers.

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a person to the Special Compensation Fund Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

(4) Despite subrules (1) to (3), the President must appoint members to the Special Compensation Fund Committee so that the majority of the Committee consists of Benchers at all times.

Subcommittees

3-34 (1) The Special Compensation Fund Committee may establish one or more subcommittees and, on matters referred to a subcommittee by the Committee, the subcommittee has the power and authority of the Committee except the power and authority delegated to the Committee under Rule 3-32 to make the final determination on a claim.

(4) A subcommittee must consist of an odd number of persons and may consist of one person.

(5) A subcommittee must be chaired by a Bencher who is a lawyer.

(6) All persons are eligible to be appointed to a subcommittee.

PART 4 – DISCIPLINE

Discipline Committee

4-2 (1) For each calendar year, the President must appoint a Discipline Committee, including a chair and vice chair, both of whom must be Benchers.

LAW SOCIETY RULES

(2) The President may remove any person appointed under subrule (1).

(3) At any time, the President may appoint a person to the Discipline Committee to replace a Committee member who resigns or otherwise ceases membership in the Committee, or to increase the number of members of the Committee.

(4) Any function of the Chair of the Discipline Committee under this Part may be performed by the Vice Chair if the Chair is not available for any reason, or by another Bencher member of the Committee designated by the President if neither the Chair nor the Vice-Chair is available for any reason.

REGULATORY COMMITTEE APPOINTMENTS

SUGGESTED RESOLUTION:

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

1. In Rule 2-24:

(a) By rescinding subrule (1) and substituting the following:

(1) For each calendar year, the President must appoint a Credentials Committee, including a chair and vice chair, both of whom must be Benchers.

(b) In subrule (3), by striking the phrase "the President may appoint a lawyer or Bencher***" and substituting the phrase "***the President may appoint a person***".***

2. In Rule 3-10:

(a) By rescinding subrule (1) and substituting the following:

(1) For each calendar year, the President must appoint a Practice Standards Committee, including a chair and vice chair, both of whom must be Benchers.

(b) In subrule (3), by striking the phrase "the President may appoint a lawyer or Bencher***" and substituting the phrase "***the President may appoint a person***".***

3. In Rule 3-29:

(a) By rescinding subrule (1) and substituting the following:

(1) For each calendar year, the President must appoint a Special Compensation Fund Committee, including a chair and vice chair, both of whom must be Benchers.

(b) In subrule (3), by striking the phrase "the President may appoint a lawyer or Bencher***" and substituting the phrase "***the President may appoint a person***".***

4. In Rule 3-34(6), by striking the phrase "All Benchers and lawyers are eligible***" and substituting the phrase "***All persons are eligible***".***

5. In Rule 4-2:

(a) By rescinding subrule (1) and substituting the following:

(1) For each calendar year, the President must appoint a Discipline Committee, including a chair and vice chair, both of whom must be Benchers.

(b) In subrule (3), by striking the phrase "the President may appoint a lawyer or Bencher***" and substituting the phrase "***the President may appoint a person***".***

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Memo

The Law Society of British Columbia 2010

To Benchers

From Jeffrey G. Hoskins, QC, for Act and Rules Subcommitee

Date June 7, 2011

Subject **Executive Committee election rule**

At the April meeting, the Benchers resolved to pursue a number of governance issues, some of which can be resolved with amendments to the Law Society Rules without a referendum vote of the members. One of these is the rule governing the election of the Executive Committee. It was suggested that the current rule, which requires all Benchers to vote for three candidates for election to the Committee, should be replaced with one that allowed Benchers to vote for *up to* three candidates.

This is the portion of the material before the Benchers relevant to this issue:

> ### *2. Election of Executive Committee*
>
> The current Rule 1-39(11)(b) provides as follows:
>
> (11) If a vote is required for an election under this Rule,
>
> (b) a ballot must be rejected unless it contains votes for the same number of candidates as there are positions to be filled, and
>
> As a result, Benchers are compelled to vote for three candidates, even if they have a preference for only one or two. This is unlike the rules in any other Law Society election or in public elections such as local government elections in British Columbia. Aside from the restriction on civil liberties, since all votes count the same in the final result, the result of the election can be affected.
>
> There is no requirement for a referendum of members for the Benchers to change the rules governing the election of the Executive Committee.

Attached is a simple draft amendment to give effect to that change, which the Act and Rules Subcommittee has reviewed and recommend to the Benchers as a means of giving effect to the change. The Executive Committee has also reviewed the proposed amendment.

PART 1 – ORGANIZATION

Division 1 – Law Society

Elections

Election of Executive Committee

1-39 (1) The Benchers must elect 3 Benchers to serve as members of the Executive Committee for each calendar year.

(11) If a vote is required for an election under this Rule,

(a) it must be conducted by secret ballot,

(b) a ballot must be rejected ~~unless~~ if it contains votes for ~~the same number of~~ more candidates ~~as~~ than there are positions to be filled, and

(c) when more than one Bencher is to be elected, the candidates with the most votes, up to the number of positions to be filled, are elected.

PART 1 – ORGANIZATION

Division 1 – Law Society

Elections

Election of Executive Committee

1-39 (1) The Benchers must elect 3 Benchers to serve as members of the Executive Committee for each calendar year.

(11) If a vote is required for an election under this Rule,

(a) it must be conducted by secret ballot,

(b) a ballot must be rejected if it contains votes for more candidates than there are positions to be filled, and

(c) when more than one Bencher is to be elected, the candidates with the most votes, up to the number of positions to be filled, are elected.

EXECUTIVE COMMITTEE ELECTION

SUGGESTED RESOLUTION:

BE IT RESOLVED to rescind Rule 1-39(11)(b) and substitute the following:

(b) a ballot must be rejected if it contains votes for more candidates than there are positions to be filled, and

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Chapter 4, Rule 6: Dishonesty, crime or fraud of client

June 10, 2011

Purpose of Report: **Discussion and Decision by Benchers**

Prepared by: **Ethics Committee**

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date June 2, 2011

Subject **Chapter 4, Rule 6: Dishonesty, crime or fraud of client**

The recent case of *Abakhan & Associates Inc. v Braydon Investments Ltd*., 2009 BCCA 521 (the *Botham* case) has created a problem in connection with Chapter 4, Rule 6 of the Professional Conduct Handbook (the "Handbook").

Chapter 4, Rule 6 of the Handbook provides:

> "Dishonesty, crime or fraud of a client
> 6 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.[3]"

The recent *Botham* case in the BC Court of Appeal held that the words in section 1 of the *Fraudulent Conveyance Act* (the "Act") "by collusion, guile, malice or fraud" no longer perform a meaningful function and should be struck. In other words as long as there is an intent, dishonest or not, to delay and hinder a creditor the conveyance can be set aside. In the *Botham* case there was evidence that the transaction was done for tax purposes but it was also done to separate the assets of an entity entering into a new venture so that the assets would not be available for the benefit of creditors of the new venture. The plaintiff at trial conceded that there was no dishonest intent or any intent to defraud creditors in connection with the conveyance. The case is attached.

The lawyers for the defendant developed a complex plan to separate assets and ensure favourable tax treatment. There was no deception or dishonesty on the part of the client or the lawyer.

Despite the fact that there was no dishonesty the transaction was held to be a fraudulent conveyance within the meaning of the Act. The implication for a B.C. lawyer is that a lawyer who assists a client in a matter that is not dishonest, a crime or fraud but is found to be a fraudulent conveyance as determined by the *Botham* case is exposed to findings of professional misconduct. As worded, Chapter 4, Rule 6 prohibits a lawyer from assisting a client despite the fact that no dishonesty is involved. The Ethics Committee does not believe this is the intent of Chapter 4, Rule 6.

Other jurisdictions dealing with the issue make reference to dishonesty, crime and fraud but not to a fraudulent conveyance.

The Law Society of Upper Canada in Rule 2 (5) of the Rules of Professional Conduct provides:

"(5) When acting for a client a lawyer shall not (a) knowingly assist in or encourage any dishonesty fraud, crime or illegal conduct;"

The Law Society of Alberta in Chapter 9, Rule 11 of the Code of Professional Conduct provides:

"11 A lawyer must not advise or assist a client to commit a crime or fraud".

The Model Code of Professional Conduct of the Federation of Law Societies Rule 2.02(7) provides:

"202(7). When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment".

The CBA in Chapter 1, Rule 5(g) of the Code of Professional Conduct provides:

"5 illustrations of conduct that may infringe the Rule (and often other provisions of this Code) include:
(g) knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly, or illegally"

The American Bar Association in Rule 8.4(c) of its Model Rules provides:

"8.4 It is professional misconduct for a lawyer to:
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"

The Ethics Committee proposes that the Benchers align our rules with those of other jurisdictions by deleting the words "including a fraudulent conveyance, preference or settlement" from Rule 6. A copy of the revised rule is attached.

Attachments:

- Botham case
- Revised Chapter 4, Rule 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Abakhan & Associates Inc. v. Braydon Investments Ltd.,***
2009 BCCA 521

Date: 20091124
Docket: CA036607

Between:

Abakhan & Associates Inc., the trustee of the estate of Botham Holdings Ltd., a bankrupt

Respondent
(Plaintiff)

And

Braydon Investments Ltd.

Appellant
(Defendant)

Corrected Judgment: The text of the judgment was corrected at para 39, page 11 on February 2, 2010.

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, November 14, 2008
(*Abakhan & Associates Inc. v. Braydon Investments Ltd.*, S077051)

Counsel for the Appellant:	G.K. Macintosh, Q.C., S. Hern
Counsel for the Respondent:	R.A. Millar, L. Sulek
Place and Date of Hearing:	Vancouver, British Columbia September 24, 2009
Place and Date of Judgment:	Vancouver, British Columbia November 24, 2009

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] Braydon Investments Ltd. (“Braydon”) appeals from the order of the Supreme Court of British Columbia pronounced 14 November 2008, holding the transfer of assets from Botham Holdings Ltd. (“BHL”)

to Braydon, pursuant to an agreement made 31 October 2005, to be void and of no effect as against the plaintiff Abakhan, the trustee in bankruptcy of BHL.

[2] Following a trial on affidavit evidence under Rule 18A, the learned summary trial judge held that one purpose of the asset transfer was to put BHL's assets out of reach of its creditors, and the transfer was therefore a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, 1996, R.S.B.C. c.163. The trial judge held this to be so, despite the fact that BHL's and Braydon's principal, William Botham, had no dishonest intent, or *mala fides*, and acted on professional advice to effect legitimate business purposes.

[3] I respectfully agree with the conclusion of the learned summary trial judge, and would dismiss the defendant's appeal.

II. Facts

[4] The background leading to the asset transfer of 31 October 2005 was described by the learned trial judge this way:

> [3] Mr. William Botham was the directing mind of BHL. That company had been incorporated many years earlier and had accumulated substantial worth such that its equity in real property was worth approximately $20 million at the time of the Transaction. The shareholders in BHL were Mr. Botham and the Botham Grandchildren's Trust (the "Family Trust"), although that changed after the Transaction to include Braydon.
>
> [4] Mr. Botham was also the directing mind of Braydon. Braydon was incorporated on October 25, 2005. The shareholders of Braydon were Mr. Botham and the Family Trust.
>
> [5] In 2004, BHL sold a substantial real estate asset at a profit. BHL therefore paid a large amount of capital gains tax.
>
> [6] In 2005, Mr. Botham was looking for an opportunity to invest the funds realized by BHL's sale of its real estate asset. He had discussions with a friend, Jordan Welsh, who had had many years' experience in the car leasing business. He encouraged Mr. Botham to invest in a new business, involving the selling and leasing of motor vehicles.
>
> [7] Mr. Welsh proposed that they form a new business called "JW Auto Group" and acquire a portfolio of leased vehicles from a failed business, Totem Ford.
>
> [8] The proposed investment would have the tax benefit of generating capital cost allowance claims. This would enable BHL to obtain refunds of capital gains tax which it had previously paid.
>
> [9] However, BHL could only claim this tax benefit if it became a general partner in the new business, and only if the new business were its major source of revenue.
>
> [10] As a general partner of JW Auto Group, however, BHL would be responsible for any debts incurred by the partnership. But BHL had substantial assets which far exceeded what Mr. Botham wished to invest in the new venture.

[5] William Botham was advised that he could both protect BHL's assets from creditors' claims, and qualify for the tax benefits of capital cost allowance claims by transferring BHL's assets to a new corporation, Braydon, and using BHL to invest as a general partner in JW Auto.

[6] The mechanisms for achieving these ends were complicated, and are reviewed in the trial judge's

reasons at paras. 17-27. An intermediary company, Silverspoon Developments Limited (SSDL) was used in the transaction. The trial judge said the transaction was summarized by BHL and William Botham's solicitor as follows:

> 1. Bill Botham and a family trust sold to Braydon preferred shares of Botham Holdings Ltd., having a redemption value, in total, of $18,700,000. The redemption values track the fair market value of the real estate owned by BHL. Thus, at this step in the reorganization, Braydon owned preferred shares of BHL, having a redemption value of approximately $18,700,000.
> 2. BHL sold its real estate to Braydon for consideration which included assumption of debt owing to third parties of approximately $4,300,000, and a promissory note of approximately $12,100,000, plus preferred shares having a redemption value of approximately $6,900,000; at this point, BHL had virtually no debt, had a promissory note in the amount of $12,160,000 from Braydon and preferred shares having an aggregate redemption value of $6,900,000.
> 3. The preferred shares of Braydon owned by BHL were redeemed for a promissory note of approximately $6,900,000.
> 4. The preferred shares of BHL owned by Braydon were then redeemed and a promissory note for approximately $18,000,000 was issued by BHL in favour of Braydon, representing the redemption proceeds.
> 5. The promissory notes were then cancelled off against each other.
> 6. In the end result, Braydon owed approximately $350,000 to BHL as the promissory notes differed by that amount; Braydon and Silverspoon used their rights of offset to cancel that note against the amounts to Silverspoon owing by BHL as a partner of JW Auto Group.

[7] The effect of the transaction was described as follows:

> On October 31, 2005, two months after the Partnership [JW Auto] had been formed and commenced operations, BHL and Braydon completed the BHL-Braydon Transaction. While the BHL-Braydon Transaction is complicated in its structure, and required a substantial number of transitional documents, its effect was to transfer all of BHL's assets to Braydon, without triggering capital gains tax on the disposition, and leaving BHL with effectively no assets except for BHL's interest in the Partnership, which...had a nominal or negative value.

[8] The trial judge recorded:

> [30] At the time of the transaction, October 31, 2005, BHL did have several creditors. Its indebtedness to AIG exceeded $4 million. It owed SSDL $5.2 million. It was the guarantor of indebtedness to the Bank of Montreal of $2.1 million.
>
> [31] Ultimately, BHL's investment in JW Auto Group was a failure. Within seven months, as of May 31, 2006, the partnership had operating losses of more than $5 million. By May 2007, both the partnership and BHL were assigned into bankruptcy. Creditors' claims currently exceed $20 million.

[9] William Botham admitted on his examination for discovery at Q. 333 that:

> Q. ... The purpose and intent and effect of the transaction was to make sure that the assets of BHL were removed from BHL so that creditors of JW Auto couldn't have access to them to satisfy their claim?
>
> A. That's what I understood.

[10] However, the plaintiff conceded that William Botham had no "dishonest intent" or any intent to "defraud" creditors. And in addition to his wish to protect his and his family's assets, William Botham also testified that the asset transfer was done in order to take advantage of the tax free rollover available under s. 85 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1.

[11] The trial judge concluded that the asset transfer was a fraudulent conveyance. He said:

> [77] Based on the foregoing, I find that BHL did engage in a fraudulent conveyance, despite Mr. Botham's lack of dishonest intent. A transaction which is the result of an honest intent to defeat one's creditors is precisely one of the situations caught by the *Fraudulent Conveyance Act*.
>
> [78] I have also considered the defendant's argument that the plaintiff's position, if accepted, would place judge-made restrictions on a taxpayer's right to avail him or herself of s. 85 tax-free rollovers under the *Income Tax Act* and on the right of a corporation to redeem shares under ss. 77 and 79 of the *Business Corporations Act*.
>
> [79] I disagree. These statutory provisions do not provide a license to engage in transactions which are counter to the *Fraudulent Conveyance Act*. ...

[12] The judge held that the defendant had no defence under s. 2 of the *Act*:

> [80] There are three parts to this defence. It requires that the disposition be made (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud. The defence does not apply in the case at bar. I find that there was no good consideration which passed from Braydon to BHL for the assets. At the end of the Transaction, BHL was left with virtually no assets while Braydon had obtained $19 million in assets. The Transaction was clearly not in good faith based on the direct evidence of Mr. Botham's intent with regards to BHL's assets. Finally, given that Mr. Botham was the directing mind of both Braydon and BHL, it cannot be said that the transferee had no notice or knowledge of the fraud.

[13] He accordingly concluded that the transaction was void and of no effect.

III.

[14] The issue on this appeal is whether the learned summary trial judge erred in setting aside the 31 October 2005 transaction as a fraudulent conveyance. More precisely, the question may be framed as whether a transfer of property made with a view to protecting assets from creditors, present or future, if made honestly, without moral blameworthiness, and for other legitimate business purposes, is prohibited by the *Fraudulent Conveyance Act*.

IV. The Parties' Positions

A. The Appellant Braydon

[15] Braydon says the learned trial judge erred both in fact and law in holding the transfer of assets from BHL to Braydon to be a fraudulent conveyance.

[16] The appellant says the legal error was in interpreting s. 1 of the *Fraudulent Conveyance Act* as requiring only an intent in the transferor to put assets out of the reach of creditors. The appellant says that a

fraudulent or dishonest intent must be proven. The appellant points to the language of s. 1 in the *Act* which renders void a disposition made to "delay, hinder or defraud" creditors "by collusion, guile, malice or fraud".

[17] The appellant says the section has been interpreted, correctly, to mean that there must be "*mala fides*" in the intent of the transaction: See *Westinghouse Canada Limited v. Caldwell* (1979), 31 C.B.R. (N.S.) 276 (B.C.S.C.) at p. 282; *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.* (1995), 15 B.C.L.R. (3d) 254 (C.A.) at paras. 23, 35 and 36; and *Mandryk v. Merko* (1971), 19 D.L.R. (3d) 238 (Man. C.A.) at pp. 241-242. Here the appellant says the trial judge erred in holding that an "honest intent to defeat ones creditors" was, as a matter of law, an intent sufficient to meet the requirements of s. 1.

[18] The appellant also says the trial judge erred in fact in finding that the plaintiff had proven the intent proscribed by s. 1. The appellant says that on the whole of the evidence William Botham's intent was an honest and prudent one, to take advantage of the tax benefits provided by the "rollover" plan devised by his professional advisors. The appellant says that by focusing on William Botham's answers on his examinations for discovery to questions 395 and 396 where he agreed that the "whole motivation" behind the transfer was to "ensure that creditors wouldn't get the assets of the estate", the trial judge ignored or failed to give effect to the whole of the evidence which showed Mr. Botham's "innocent and reasonable intentions in engaging in the rollover".

[19] As expressed in the appellant's factum: "... the plan was to empty an old company of its assets unrelated to auto leasing, and use the old company for the partnership rather than incorporate a new one, because using the old company allowed for a tax benefit".

[20] The appellant says that if a new company controlled by Mr. Botham had been incorporated and used as the general partner there would be no question of a fraudulent conveyance. They say that is so because, first, there would have been no conveyance and, secondly, there could be nothing fraudulent in engaging in a partnership by way of a private, limited liability company. By extension, this argument appears to be that effecting the same intention by way of a conveyance cannot, therefore, be considered fraudulent. The appellant contends that what was done in this case is no different and no more "fraudulent" than what has routinely been done by persons seeking to limit personal liability by incorporation. (citing C.R.B. Dunlop, *Creditor-Debtor Law in Canada,* looseleaf, Toronto (Carswell, 1995, 2nd ed.) at 592.

[21] The appellant distinguishes the facts of this case from others where a fraudulent intent has been found because at the time of the asset transfer no creditor had an outstanding demand against BHL that it could not satisfy. Neither BHL nor JW Auto were under any financial pressure from which a fraudulent intent could be inferred. The appellant says the transfer of assets in the rollover was not "voluntary" but was rather for "valuable" consideration, and that while the "nature" of BHL's assets changed as a result of the transfer, its net financial position did not.

[22] The appellant submits that no creditors of JW Auto relied on the asset holdings of BHL in deciding to advance credit to JW Auto and that no creditors of BHL were prejudiced by the asset transfer. The appellant further contends that its asset transfer to Braydon following redemption of Braydon's preferred shares was a

bona fide payment to a creditor.

[23] The appellant therefore contends that, in any event, its conduct falls within the defence to an allegation of a fraudulent conveyance afforded by s. 2 of the *Act*, in that the transfer was for good consideration, made in good faith, and made to a person (William Botham was the directing mind of Braydon as well as BHL) who had no notice or knowledge of any collusion or fraud.

B. The Respondent's Position

[24] On the question of how to construe s. 1 of the *Fraudulent Conveyance Act*, counsel for the respondent says the words "collusion, guile, malice or fraud" add little or nothing to the meaning of the section. The respondent says the only intent necessary to contravene the section is the intent to put assets out of the reach of one's creditors. If there is an intent to delay or hinder a creditor's rights, the transfer is void as against the creditor. The respondent says that even if the transferor has other legitimate intentions, so long as one intent is to put assets out of a creditor's reach, that is sufficient to void the disposition. So the respondent says despite the fact that BHL (through William Botham) intended to obtain a tax advantage from the deal, the transfer is nonetheless a contravention of s. 1 if its intent and effect is to defeat creditors' claims.

[25] The respondent says the meaning attributed by the trial judge to the words of s. 1 is consistent with a long line of cases, both in British Columbia and elsewhere. Counsel says there was no legal error in the judge's interpretation of s. 1.

[26] As to whether the appellant had an intention prohibited by s. 1, the respondent says that is a question of fact on which this Court should defer to the judge's findings unless the appellant establishes a palpable and overriding error. Here the respondent says there was ample evidence, including the admissions of William Botham himself, on which the proscribed intent could be found.

[27] The effect of the transfer was to place all of BHL's real estate assets in the hands of Braydon. BHL was left with the preferred shares it acquired as consideration for the real estate transfer. And in addition, BHL was left with the debts it owed previously to CFI, Shamrock and the Bank of Montreal, as well as its indebtedness to SSDL as a result of the transaction. BHL also became liable, as a general partner, to all of JW Auto's creditors.

[28] The respondent says it is no answer for the appellant to say that no creditor was pressing for payment at the time of the transfer, and that it is wrong to say that no creditor was prejudiced by the transfer. The fact is that the real assets were put out of reach of BHL's creditors, and that they were prejudiced because it was far more difficult to execute against the preferred shares than it would have been to execute against the real estate.

[29] The respondent concedes that it would have been perfectly lawful for BHL to limit its liability by incorporating a new company to invest in JW Auto. But, the respondent points out, that is what BHL explicitly decided not to do because of its desire to obtain both limited liability and tax advantages.

[30] The respondent says that the defence available to transferors under s. 2 of the *Fraudulent Conveyance Act* is not available to the appellant on the facts of this case. To say, as the appellant suggests, that the transfer to Braydon was payment to an existing creditor, has no air of reality. Braydon was created for the sole purpose of receiving BHL's assets. The consideration for the transfer, even if "good consideration", was by no means of the same nature or quality as the assets Braydon received. In the result, Braydon ultimately paid nothing and BHL was left with nothing of value.

[31] In any event, the respondent says the transfer could not be said to be in good faith because the controlling mind of both BHL and Braydon was William Botham, and his intent to defeat BHL's creditors must also be attributed to Braydon. And for the same reason, Braydon is fixed with notice of BHL's improper intent (see *Chan v. Stanwood*).

[32] The respondent says that neither legitimate business goals, nor tax or estate planning advantages can excuse a fraudulent conveyance. That is especially so here where the only "estate planning" achieved by the transaction was to protect BHL's assets from its creditors.

V. The Provisions of the Statute

[33] The *Fraudulent Conveyance Act*, R.S.B.C. 1996, c.163, provides, in full:

> **Fraudulent conveyance to avoid debt or duty of others**
>
> **1** If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> (a) a disposition of property, by writing or otherwise,
>
> (b) a bond,
>
> (c) a proceeding, or
>
> (d) an order
>
> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.
>
> **Application of Act**
>
> **2** This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.
>
> [Emphasis added.]

VI. Analysis

[34] The defendant points to the words in s. 1, "... by collusion, guile, malice or fraud ..." as showing a clear legislative requirement for a morally blameworthy intent, or *mala fides*, on the part of the transferor in order to constitute the conduct proscribed by the *Act*.

[35] Here, the plaintiff conceded and the trial judge found that William Botham had no "dishonest intent". The question, then, is whether the mere intent to delay or hinder creditors is sufficient or whether *mala fides*

must be established under s. 1 of the *Act*.

A. Legislative History

[36] It is generally acknowledged that the fraudulent conveyance statutes enacted in British Columbia have their roots in the *Statute of Elizabeth*, 1571 (13 Eliz. 1), c.5. In a feasibility study written for the Uniform Law Conference of Canada, Civil Law Section (August, 2004), Professor C.R.B. Dunlop wrote:

> [6] English law on fraudulent conveyances dates back to the Middle Ages, but the first comprehensive attempt at prohibition may be the *Fraudulent Conveyance Act, 1571,* usually referred to as the Statute of Elizabeth. The Statute sought to avoid "feigned, covinous and fraudulent" transfers of land and personalty entered into with the intent to "delay, hinder or defraud creditors and others" of their just and lawful claims. S. 2 provided that such conveyances should be "clearly and utterly void, frustrate and of no effect" as against "creditors and others" whose claims might be delayed by such conveyances. S. 6 contained the important proviso that the Act did not extend to a conveyance for "good consideration" entered into bona fide and without notice of the fraud. The Statute of Elizabeth on its face created a criminal offence, but the courts quickly saw its potential as the foundation for a civil action to avoid fraudulent conveyances of exigible property by debtors. Since 1571, the courts have been active in creating a large and complex body of law which purports to interpret the Statute but which in reality constructs a new right in "creditors and others" to challenge and avoid fraudulent conveyances.

[37] The *Statute of Elizabeth* was, in Dunlop's view, "... intended primarily to create a crime, not a civil cause of action" (at para. 36).

[38] The first *Fraudulent Conveyance Act* in British Columbia was enacted in 1897 (R.S.B.C. 1897, c. 86). It adopted the language of the *Statute of Elizabeth,* including the words "contrived of malice, fraud, covin, collusion or guile". The original B.C. statute also included, in s. 3, the penal provision of the *Statute of Elizabeth*, imposing penalties and forfeitures for the fraud, including imprisonment.

[39] The penal provision remained in the British Columbia statute through successive amendments and re-enactments until it was formally repealed by the Legislature in 1987 (*Miscellaneous Statute Amendment (No.2) Act,* S.B.C. 1987, c. 43).

[40] The penal provision of the 1960 *Act* was contained in s. 3, which concluded with the words:

> ... and also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize.

[41] In 1965, the constitutionality of this legislation was challenged. In *Allison & Burnham Concrete Ltd. v. Mountain View Construction Ltd. et al*, 54 D.L.R. (2d) 67 (B.C.S.C.); [1965] B.C.J. No. 157, Mr. Justice Ruttan said:

> 14 Section 3 then imposes penalties and forfeitures for the fraud and concludes with these words: "... and also, being thereof lawfully convicted, shall suffer imprisonment for one-half year without bail or mainprize."
>
> 15 There is no doubt that the portion just quoted from s. 3 of the Act is beyond the jurisdiction of a Provincial Legislature. It refers to a criminal process resulting in a term of imprisonment and as such is entirely within the jurisdiction of the Federal Government in criminal law. In *R. v. Smith*

(1852), 6 Cox C.C. 31 at p. 37, Maule, J., had this to say about the identical words as they appear in the English statute:

> It surely could never be contended that the meaning of the statute is, that when such a court has given judgment for the damages, it should proceed to award to the defendant the punishment of imprisonment for half a year. The humanity of our law has established a clear distinction between civil and criminal proceedings, and this act of Parliament cannot be supposed to sanction so anomalous a course as that. It is obvious that by some means or another, imprisonment is to be awarded after a proper conviction before a recognised tribunal. How then can that be done, otherwise than by indictment?

16 This section, of course, would never be invoked in criminal prosecutions for the same subject-matter is covered in the *Criminal Code* of Canada. But I do not agree with counsel for the defendant that because the statute has ventured to legislate in part in the field of criminal law the whole statute is therefore "in pith and substance" to be deemed a criminal one and therefore *ultra vires in toto*. Mr. Vogel cites the Alberta decision of *Connors v. Egli*, [1924] 2 D.L.R. 59, 20 A.L.R. 205, [1924] 1 W.W.R. 1050, where it was held by the Alberta Court of Appeal that s. 3 of the statute is criminal law and the ground having been occupied by the *Criminal Code* of Canada, is not now in force in the Province of Alberta.

[42] Ruttan J. concluded that while the imprisonment portion of s. 3 was "clearly within the scope of criminal law and invalid in a provincial statute, the remainder of s. 3 is clearly a matter of civil suit and therefore *intra vires* the Provincial Legislature." (at para. 18, citations omitted).

[43] Despite this declaration of invalidity, the British Columbia statute retained a penal provision in the 1979 revision. Section 3 of the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c.142 provided:

> A fraudulent disposition under this Act is an offence punishable on conviction by 6 months imprisonment.

[44] Finally, in 1987 the Provincial Legislature repealed ss. 2 and 3 of the *Fraudulent Conveyance Act*, R.S.B.C. 1987, c.43.

[45] The repeal of ss. 2 and 3 of the *Act* left remaining s. 1 and what had been s. 4. They now appear as ss. 1 and 2 of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c.163, quoted in full above at para. 34.

[46] As is evident, the words in s. 1 "... by collusion, guile, malice or fraud ..." remain in the *Act* to the present time.

B. Case Law

[47] The appellant relies heavily on two British Columbia decisions as support for its submission that a dishonest or quasi-criminal intent in the transferor is required before a conveyance may be set aside under s. 1.

[48] In *Westinghouse Canada Limited v. Caldwell*, *Hickman* (1979), 31 C.B.R. (N.S.) 276 (B.C.S.C); [1979] B.C.J. No. 604, Taylor J., applying the provisions of the 1960 version of the *Act* said at p. 282:

> ... A careful reading of the legislation as a whole discloses an intention to visit with criminal as well as civil consequences transfers of property which have been contrived so as to "delay, hinder or

> defraud" creditors and "other persons". It not only declares such conveyances void as against persons thereby "disturbed, hindered, delayed or defrauded" but condemns the parties responsible for such transactions to six months imprisonment and also to substantial monetary penalties. Thus the conduct at which the statute is aimed is conduct deserving of criminal sanction. It deals, albeit somewhat more broadly, with the offence now described in s. 350 of the Criminal Code, R.S.C. 1970, c. C-34, which carries a maximum sentence of two years' imprisonment.
>
> Insofar as it forms a valid part of the law of British Columbia, the Fraudulent Conveyances Act may be regarded as providing a civil remedy to those persons who have been the victims of conduct of a criminal, or at least quasi-criminal, character designed to defeat creditors. There must, it seems, be mala fides in the intent of the transaction.
>
> [Emphasis added.]

[49] The underlined paragraph was quoted, with apparent approval, by this Court in *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.* (1995), 15 B.C.L.R. (3d) 254 (C.A.) at para. 23.

[50] I would make the following observations about these two judgments. In *Westinghouse*, the learned judge concluded that the *Act* was aimed at providing a remedy for victims of conduct that was criminal or quasi-criminal in nature and that "*mala fides* in the intent" was, therefore, a necessary element. This conclusion is clearly based on the presence of the penal provision which formed part of the 1960 statute that he was applying.

[51] It does not appear that the decision of Mr. Justice Ruttan in *Allison & Burnham Concrete Ltd.* was drawn to the attention of the Court in *Westinghouse*. If the learned judge there had had his mind directed to the earlier judgment, and to Ruttan J.'s declaration that the imprisonment portion of s. 3 was *ultra vires* the province, he could not have relied on it to support his reasoning.

[52] Similarly, in *First Royal Enterprises*, the Court was apparently not made aware of the judgment in *Allison & Burnham Concrete Ltd.* The Court there was applying the 1979 version of the *Fraudulent Conveyance Act* which retained the imprisonment provision in s. 3. There is no indication in the judgment that the imprisonment portion of s. 3 had been declared *ultra vires* in 1965.

[53] I am therefore of the view that neither *Westinghouse* nor *First Royal Enterprises* can be considered as sound authority for the proposition that a dishonest intent, or *mala fides*, is necessary to the application of s. 1 of the *Act*. In any event, with the repeal of s. 3 in 1987, such authority would no longer be applicable to the modern *Act.*

[54] Counsel for the appellant referred to *Havel v. Galemar Holdings Ltd. and Fabbro* (1981), 36 O.R. (2d) 348 (H.C.J.), but I do not read that case as authority for the proposition that anything more than an intent to defeat creditors is required in order to render a transfer void under the equivalent Ontario statute.

[55] Counsel for the appellant also relied extensively on *Mandryk v. Merko* (1971), 19 D.L.R. (3d) 238 (Man. C.A.). As I understand the judgment in *Mandryk*, the Court held that the intent required to render a transfer void was the intent to defeat creditors; that such an intent could be inferred from evidence of the transaction and other circumstances; that the direct evidence of the transferor must be considered; and that

any inference or "presumption" to be drawn from the effect of the transfer was not conclusive.

[56] I do not read *Mandryk* as holding that a subjectively dishonest or fraudulent state of mind in the transferor is required to render the transfer void. In simple terms, the action in *Mandryk* failed because the plaintiff failed to prove, as a matter of fact, the transferor's intent to delay, defeat or hinder his creditors.

[57] In considering what meaning, if any, is to be given to the words "by collusion, guile, malice or fraud" in s. 1, it is instructive to consider the substantial body of authority holding it unnecessary to establish *mala fides* on the part of the transferor to commit fraud. The focus in the case law has been on the provision of a civil remedy for creditors disadvantaged by the conduct of their debtors.

[58] In *Freeman v. Pope* (1870), L.R. 5 Ch App 538, Lord Hatherley stated at pg. 540 that the principle on which the *Fraudulent Conveyance Act* is based is "that persons must be just before they are generous, and that debts must be paid before gifts can be made". As a result, if the necessary effect of a conveyance was to defeat, hinder or delay the creditors, that necessary effect was to be considered as showing an intention to do so. Such intention was sufficient to establish a fraudulent conveyance.

[59] *Freeman* was applied in *Mackay v. Douglas* (1872) L.R. 14 E.Q. 106, where Vice-Chancellor Malins said at p. 120:

> ... It is not at all necessary to shew that a man had any fraudulent intent in making a settlement as the law is now settled. ... The statute speaks of cases where the creditors "are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded," and it is not necessary to shew an intention to do that, because if the settlement must have that effect the Court presumes the intention and will attribute it to the settlor. ... So I dare say that Mr. *Douglas* had no fraudulent intention, according to his view, in making the settlement, and that he thought it a prudent thing to protect his wife and children. But in doing that he has, within the meaning of this statute, committed a fraudulent act, because, going into trade, he was taking away the only property which would be available for his creditors.

[60] In this Province, there are several cases articulating the intent required by s. 1 to render a disposition void. In *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.* (1995), 34 C.B.R. (3d) 241, 1995 CanLII 740 (B.C.S.C.), Madam Justice Baker said:

> 25 In essence, a fraudulent conveyance is a transfer of an interest in property which is made with the intention, and which has the effect, of hindering or impairing the right of a creditor or other person to satisfy a claim against the transferor. It is not necessary for the person seeking relief to show that the transferor was insolvent at the time the transfer was made, and the applicant need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made: *Re Skinner* (1960), 27 D.L.R. (2d) 74 (B.C.S.C.).
>
> 26 All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others: *Canadian Imperial Bank of Commerce v. Ash* (1964), 47 D.L.R. (2d) 620 (B.C.S.C.); *Canadian Imperial Bank of Commerce v. Boukalis* (1987), 11 B.C.L.R. (2d) 190 (C.A.).

[61] In *Jaston & Co. v. McCarthy* (1996), 41 C.B.R. (3d) 212, 1996 CanLII 2982 (B.C.S.C.), Mr. Justice K. Smith said much the same thing:

> 85 The plaintiffs' case on this claim is made out on the testimony of Mr. and Mrs. McCarthy. Each testified that their intention was to distance the shares in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd. from potential claims by clients of Mr. McCarthy's notary practice. That intention resulted, they say, from advice they received at a notaries' convention to shelter their assets from such claims because of a reduction in the limit of third party liability insurance available to notaries. Thus, the transfer of these shares was not *bona fide* but was made for the purpose of avoiding future claims of creditors.
>
> 86 It is sufficient to fix the defendants with liability if they foresaw potential creditors who might be defeated by the conveyance: *Newlands Sawmills Ltd. v. Bateman*, 31 B.C.R. 351, [1922] 3 W.W.R. 649, 70 D.L.R. 165 (C.A.), appl'd *Canadian Imperial Bank of Commerce v. Boukalis* (1987), 11 B.C.L.R. (2d) 190 (C.A.), at p. 196; *Bank of Montreal v. Kelliher* (1980), 36 C.B.R.) (N.S.) 205 (B.C.S.C.) at p. 210. On their own evidence they foresaw such creditors here.
>
> [Emphasis added.]

[62] In *Sykes (Re)* (1998), 156 D.L.R. (4th) 105, 48 B.C.L.R. (3d) 169 (C.A.), McEachern C.J.B.C. cited the remarks of Mr. Justice Gonthier in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 at 365, as follows:

> However, the other provincial statutes all refer to some sort of "conveyance" or "disposition "of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and *their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors*. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects as required by provincial statutory interpretation legislation ... I agree with the following observation by Professor Dunlop in Creditor-Debtor Law in Canada (2nd ed. 1995), at p. 598, that the purpose of fraudulent conveyance legislation:
>
> > ... is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally. [Emphasis added by Gonthier J.]
>
> [Italic emphasis added by this Court.]

[63] In *Chan v. Stanwood*, 2002 BCCA 474, 6 B.C.L.R. (4th) 273, Madam Justice Newbury, giving the judgment of this Court, noted the differences in the intent required between cases where consideration for a transfer was inadequate or nominal, and those where "valuable" consideration had passed. She said:

> 20 The Commission's report also stated, however, that the significance of consideration lies both in its relation to the *intention* behind the transaction and in relation to its effect. Where the consideration is inadequate or nominal, a creditor need only show that the *Transferor* intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the *transferee* actively participated in the fraud. As stated by this court in *Meeker Cedar Products Ltd. v. Edge* (1968), 68 D.L.R. (2d) 294 (B.C.C.A.) (aff'd at (1968), 1 D.L.R. (3d) 240 (S.C.C.)):
>
> > ... it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice of knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless it be proved that the purchase was actually privy to the fraud, *i.e.*, a party to carrying out the fraudulent intention and purpose. [at 299; emphasis added.]

> 21 Where valuable consideration has passed, then, the focus is not on the sufficiency of that consideration but on the intentions of both parties to the transaction. The trial judge rightly stated at para. 36 of her Reasons that in this case, the intention of the holding companies must be taken to have been the intention of the Stanwoods. Further, she found it was clear on the evidence that the Stanwoods had intended to delay and defeat their creditors by exchanging their exigible assets for shares which were "not effectively exigible".
>
> 22 I agree with these conclusions. ... Although exigible in theory, the various restrictions and obstacles placed in the way of any 'unfriendly' holder meant that in fact they were not worth executing against. The exchange of exigible assets for the Preferred shares delayed, hindered or defrauded the Chans – and did so by design. This "design" or "purpose" constitutes the "fraudulent intent" required by the *Act* ...

[64] Most recently, in *Royal Bank of Canada v. Clarke*, 2009 BCSC 481, Madam Justice Griffin said:

> [21] I am bound by the authorities that have clearly held that it is unnecessary to show any dishonest intention, other than the intention to move the property out of reach of potential creditors, for the *Act* to apply: *Jaston & Co. v. McCarthy* (1996), 41 C.B.R. (3d) 212 (B.C.S.C.) as cited in *Abakhan* at para. 75.

[65] In my respectful opinion, a review of the case law amply demonstrates that a dishonest intent, or *mala fides*, is not necessary to avoid a transaction under s. 1 of the *Act*.

C. Principles of Statutory Interpretation

[66] The guiding principle of statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

[67] Mr. Justice Gonthier in *Royal Bank of Canada v. North American Life Assurance Co.* (*supra*) said that the fraud provisions in provincial statutes "are clearly remedial in nature". The cases reviewed above support the remedial purpose of the legislation. They have essentially ignored the words "by collusion, guile, malice or fraud".

[68] In Springman, M.A. et al, *Fraudulent Conveyances And Preferences,* looseleaf, Toronto (Carswell, 2009), the learned author comments on the inclusion of the words "by collusion, guile, malice or fraud" in s. 1 of the B.C. Statute. The learned author says:

> Furthermore, the addition of the concepts of "collusion, guile, malice or fraud," arguably as a way of adding some flesh to the earlier description of the transferor's intent, is also interesting. But would the addition of these concepts mean that a disposition, etc. with the intent "to delay, hinder or defraud," but somehow not animated by "collusion, guile, malice or fraud", would be immune from impeachment under the Act? And if the response is that, in the very nature of things, the transferor could never have the intent "to delay, hinder or defraud" without "collusion, guile, malice or fraud" being involved, then what is the value of the latter words? Perhaps there are simply too many words used to describe the legislators' more simple purpose here. At the very least, s.1 would seem to leave itself open to a host of possible arid arguments. [Footnote 23 at 1-13 to 1-14]

[69] In the period when dispositions under the *Act* attracted penal consequences, it was at least arguable that a dishonest intention in the transferor was a necessary element of the prohibited transaction.

[70] However, for many years, and certainly since the repeal of the penal provisions in 1987, the purpose and scheme of the B.C. *Fraudulent Conveyance Act* has been to provide a civil remedy to creditors. Its purpose is to protect creditors where property dispositions by debtors "... were effected for the purpose of defeating the legitimate claims of creditors" per *Sykes* (*supra*). As a result, the words "by collusion, guile, malice or fraud" no longer perform a meaningful function in the text.

[71] Thus, as stated in *Sullivan on the Construction of* Statutes, 5th ed. (Markham: LexisNexis, 2008) at pp. 178-179, in circumstances where:

> ... courts encounter words in a legislative text for which no satisfactory interpretation can be offered ... courts may strike out the offending language if the text makes sense without it. ... In effect, the court must conclude that the words to be struck perform no meaningful function in the text, contrary to the presumption against tautology; their presence is simply a mistake.

[72] The *Act* not only makes sense after removal of these words, but accords with the modern purpose and scheme of the *Act*. Therefore, the words "by collusion, guile, malice or fraud" should be struck.

[73] The only intent now necessary to avoid a transaction under the modern version of the *Act* is the intent to "put one's assets out of the reach of one's creditors" (per *RBC v. Clarke*). No further dishonest or morally blameworthy intent is required.

D. Proof of Intent

[74] Intent is a state of mind and a question of fact.

[75] For example, in *Mackay v. Douglas* (*supra*), Malins, V.C. said (at p. 120) that where a disposition had the effect of hindering or delaying or defeating creditors, "the Court presumes the intention and will attribute it to the settlor". That was held to be sufficient proof of the intent even though Mr. Douglas apparently gave evidence and "had no fraudulent intention". Mr. Douglas thought he had made a settlement of property as "a prudent thing to protect his wife and children" (p. 120). Despite this, it was held to be a fraudulent conveyance.

[76] In *Ocean Construction* (*supra*), Baker J. said this about proof of fraudulent intent:

> 27 Fraudulent intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding the transaction. Where some consideration has flowed from the transferee to the transferor, the court may consider the adequacy of the consideration in relation to the issue of intent, since a transfer at an undervalue raises suspicions about motive. Inadequate consideration may be considered to be a badge of fraud.

[77] In that case, the controlling mind of the defendant company, Mr. Lee, gave evidence as to the debtor's solvency, which the court did not accept (para. 37). The transfer was held to be void based on the inference drawn from the transfer itself and other circumstances (para. 39) despite Mr. Lee's evidence to the contrary.

[78] In *Jaston v. MCarthy* (*supra*) the defendants testified that their intention to protect assets was based on advice concerning potential risks arising from reduced insurance coverage (para. 85). The Supreme Court of British Columbia held that the defendants contravened the prohibition in s. 1 because they foresaw that potential creditors might be defeated by the impugned conveyance.

[79] In *Chan v. Stanwood* (*supra*) the intent to delay or defeat creditors was inferred at trial from evidence that "exigible assets" were exchanged "for shares" which were "not effectively exigible". The defendants' intent to put assets beyond the reach of their creditors was inferred from the effect of the transaction, and despite the fact that the defendants acted on professional advice.

[80] In many of the cases cited there is no direct evidence of the grantor's intent. Intent could only be proven by drawing an inference from the grantor's conduct, the effect of the transfer or other circumstances. However, in some cases where the grantor has given evidence, there may be direct evidence of his intent and the question of proof then turns on the weight or credit given to the direct evidence, viewed in light of the other circumstances and the inferences to be drawn.

VII. Application of the Law to the Facts of This Case

[81] Having established that the intent to delay or hinder creditors is sufficient under s. 1 of the *Act,* it is now necessary to assess the trial judge's finding that the disposition in this case was a fraudulent conveyance.

[82] The trial judge found that on the whole of the evidence, Mr. Botham had the requisite intent to delay and hinder creditors. He stated:

> [65] Proof of intent to defeat or delay creditors typically requires drawing inferences from the circumstances surrounding the transaction. However, it is not necessary in this case to draw an inference at all. Here, there is direct evidence of the intent of Mr. Botham and his solicitors. Mr. Botham's answers on examination for discovery and in his affidavit make his intent patently clear:
>
> 395. Q. Okay. Well here's my suggestion. This BHL - Braydon transaction had nothing to do with estate planning unless you would say that the protection of your assets from claims of creditors is part of estate planning?
>
> A. That I could agree with.
>
> 396. Q. All right. And the whole motivation behind the BHL - Braydon transaction again was to ensure that creditors wouldn't get assets of the estate?
>
> A. Yes.
>
> [66] The letter from Owen Bird dated October 31, 2005 describes the objectives and purpose of the Transaction as follows:
>
> 1. Move the real property of BHL to a new company ("Newco") to ensure that BHL's real property and other assets are not exposed to its new leasing venture; and
> 2. Limit the activities and gross revenue of BHL to its interest in the JW Auto Group partnership.
>
> *[emphasis added]*
>
> [67] In his affidavit sworn October 3, 2007 in Action No. S076370, Mr. Botham stated:

> ...I did not want to cause BHL to go into the partnership with the nine properties at risk of execution by creditors of the partnership.
>
> [68] In the same affidavit Mr. Botham deposed that it was not his "objective...to deprive creditors of any remedies against BHL... ." However, this statement is inconsistent with all of the evidence in this case and cannot be accepted.
>
> [69] For these reasons, it is not necessary to attempt to draw an inference. Mr. Botham's evidence, taken as a whole, is conclusive as to his intent to defeat BHL's creditors and must result in the finding that the Transaction was a fraudulent conveyance.

[83] As a result, the trial judge concluded:

> [77] Based on the foregoing, I find that BHL did engage in a fraudulent conveyance, despite Mr. Botham's lack of dishonest intent. A transaction which is the result of an honest intent to defeat one's creditors is precisely one of the situations caught by the *Fraudulent Conveyance Act*.

[84] Counsel for the appellant argues that the judge made a palpable and overriding error in relying on Mr. Botham's evidence on examination for discovery. He argues that those answers suggest that Mr. Botham and BHL had only one intention, namely to protect the assets from creditors' claims. He argues that there was other evidence of Mr. Botham's legitimate business purposes, namely to gain the benefit of the s. 85 tax rollover. Counsel for the appellant placed much emphasis on the facts that the appellant was pursuing a prudent and legitimate business strategy in attempting to take advantage of the capital cost allowance claims available under s. 85 of the *Income Tax Act,* and in attempting to limit his liability when investing in the new venture, JW Auto.

[85] Such arguments do not establish a palpable and overriding error. As this Court put it in *Chan v. Stanwood,* "the question in every case is whether it was carried out 'to delay, hinder or defraud creditors and others of their just and lawful remedies'." While Botham may have been pursuing other business objectives, such as trying to obtain tax advantages, it is nevertheless clear that he had the intent to put BHL's assets beyond the reach of JW Auto's creditors. This is what the trial judge found, stating:

> BHL entered into the partnership with Mr. Welsh at a time when BHL had substantial assets. As a partner, BHL was responsible for all debts incurred by the partnership. BHL then acted to shelter its assets from the claims of present and future creditors of the partnership. BHL did this by transferring its assets to Braydon, a related company, for little to no consideration. (para. 81).

[86] This is a clear finding of fact that is supported by the evidence. The trial judge's findings cannot be characterized as palpable and overriding errors.

[87] There is also no dispute that the *effect* of the transfer was to delay and hinder the creditors of BHL, both present and future. Section 1 captures transfers intended to defeat the rights of creditors and "others," which includes future creditors: *Canadian Imperial Bank of Commerce v. Bukalis* (1987), 34 D.L.R. (4th) 481, 11 B.C.L.R. (2d) 190 (C.A.) at 484. As a general partner of JW Auto, BHL was, as the trial judge found, "responsible for all debts incurred by the partnership." Therefore, by transferring its assets to Braydon, BHL was not only hindering its creditors, but was hindering the present and future creditors of JW Auto. As the trial judge found, at para. 81, creditors' claims currently exceed $20 million.

[88] The appellant also argues that it is legitimate to limit the assets which one puts at risk in a business venture, otherwise corporations would be illegal. However, the trial judge correctly found, at para. 81 of his reasons, that while BHL could have limited its liability by incorporating a new corporation, it made the explicit choice not to do so. It would have been legitimate for BHL to limit its liability in the new venture by incorporating a new corporation to act as the general partner in JW Auto. However, Botham and BHL wanted to achieve two objectives, one being to limit liability and the other being to obtain the tax advantages under s. 85 of the *ITA*. By incorporating a new corporation, it was possible to limit liability, but it would not have been possible to obtain the tax advantages. Therefore, Botham and BHL made the choice to try to achieve both the limited liability and tax advantages by transferring the assets of BHL out of the company and into Braydon. As the appellant states in its factum, "...the plan was to empty an old company of its assets unrelated to auto leasing, and use the old company for the partnership rather than incorporate a new one, because using the old company allowed for a tax benefit." However, in doing this and in choosing not to incorporate a new company, BHL engaged in a fraudulent conveyance.

[89] Finally, the trial judge cannot be said to have made a palpable and overriding error in his factual findings relating to the defence in s. 2. The trial judge stated:

> [80] There are three parts to this defence. It requires that the disposition be made (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud. The defence does not apply in the case at bar. I find that there was no good consideration which passed from Braydon to BHL for the assets. At the end of the Transaction, BHL was left with virtually no assets while Braydon had obtained $19 million in assets. The Transaction was clearly not in good faith based on the direct evidence of Mr. Botham's intent with regards to BHL's assets. Finally, given that Mr. Botham was the directing mind of both Braydon and BHL, it cannot be said that the transferee had no notice or knowledge of the fraud.

[90] In my view, there was evidence on which the judge could properly find that none of the elements in s. 2 had been established. While the parties disagree on appeal as to whether or not there was good consideration, it does not affect the disposition because Braydon cannot establish the other two elements under s. 2. As the trial judge stated, because Botham controlled both BHL and Braydon, his knowledge and intent to delay and hinder BHL's creditors must be imputed to both corporations.

[91] I would dismiss the appeal.

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Groberman"

CHAPTER 4

AVOIDING QUESTIONABLE CONDUCT,
INCLUDING IMPROPER COMMUNICATIONS

Dishonesty, crime or fraud of client

6. A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.[3]

FOOTNOTES:

3. A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should make inquiries of a client who:

   (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or

   (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

.

DISHONESTY, CRIME OR FRAUD OF CLIENT

SUGGESTED RESOLUTION (HANDBOOK):

BE IT RESOLVED to amend Chapter 4, rule 6 of the Professional Conduct Handbook by striking the phrase "dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.***" and substituting "***dishonesty, crime or fraud.***"***

REQUIRES SIMPLE MAJORITY OF BENCHERS VOTING

The Law Society of British Columbia

INTERIM REPORT OF THE DISCIPLINE GUIDELINES TASK FORCE:
CONDUCT ASSESSMENT & DISPOSITION GUIDELINES

For: The Benchers
Date: June 2011

Herman Van Ommen
Stacy Kuiack
Anna Fung, Q.C.
David Crossin, 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

CONTENTS

1. Executive Summary

The attached *Conduct Assessment and Disposition Guidelines* (the "Guidelines") are presented for adoption by the Benchers. The Discipline Guidelines Task Force has developed these Guidelines in accordance with its mandate, to assist members of the Discipline Committee in reaching appropriate and consistent dispositions of the professional conduct matters that come before them.

In the course of its work the Task Force considered whether to develop a two-dimensional grid or classification system linking types of misconduct to specific disciplinary responses. The Task Force concluded, however, that the grid approach would not amount to a sufficiently fine-grained system, capable of considering each matter on its merits and taking account of all relevant circumstances.

Instead, the Task Force has opted for a set of guidelines with a systematic framework for analysis that can bring regularity to the assessment of disparate individual cases. The framework involves an express "Citation Threshold," which is a new policy-level development for the Law Society of British Columbia. In these Guidelines, the Task Force attempts to promote reasoned and principled decisions by setting out a list of characteristic and potentially relevant circumstances and inviting the Discipline Committee to consider *all relevant circumstances* together with the important characteristics of each potential disciplinary response.

The approach of the Task Force has been to develop a process for guiding the exercise of the Discipline Committee's discretion with references to broad principles, such as: a regard for the public interest in the effective regulation of the profession, a preference for consistent and principled decisions, a direction to consider and apply progressive discipline where appropriate, and an awareness that Citations are appropriate for provable discipline violations unless an alternative disciplinary action is consistent with the public interest and is a more effective regulatory response in the circumstances.

Throughout its work the Task Force has been aware that these Guidelines are a tool for the assistance of the Discipline Committee. Particularly as these are the first such Guidelines recommended for the Discipline Committee, it is reasonable to expect that they may be refined and improved in the future, in light of experience with their use and constructive criticism. These Guidelines are proposed as a good and pragmatic beginning, to provide the Discipline Committee with a reference resource it has previously lacked and to assist in the effective regulation of the profession.

2. Introduction

The Discipline Guidelines Task Force began its work in early 2010, after being created in response to a perceived need for an examination of aspects of the Law Society's regulatory processes. The Taskforce has previously recommended policies on investigation abeyances and the publication of Conduct Reviews, both of which were adopted by the Benchers.

With the transition into 2011, there has been one change in the Task Force membership, as David Crossin, Q.C. has replaced John Hunter, Q.C. The other Task Force members remain Anna Fung, Q.C., Stacy Kuiack, and Herman Van Ommen (Chair).

The original mandate for the Task Force, adopted by the Benchers, included the following specific task:

> To review the function and processes of the Discipline Committee and to make recommendations regarding the guidance and information that may be provided to members of the Discipline Committee to assist them in reaching appropriate and consistent dispositions of the professional conduct matters before them.

The Guidelines presented with this memorandum represent the Task Force's response to this particular aspect of their mandate.

3. Guidelines or Grid?

In accordance with its mandate, the Discipline Guidelines Task Force has attempted to create some guidance for members of the Discipline Committee, to assist them in reaching appropriate and consistent dispositions of the professional conduct matters placed before them. In approaching this task, the Task Force was initially faced with the question of what form such guidance should take.

The Task Force was aware of significant and well-motivated support for the idea that it might be particularly useful if a misconduct classification "grid" could be created, associating specific types of misconduct with appropriate disciplinary outcomes or ranges of disciplinary outcomes. Upon significant reflection the Task Force concluded that attempting to provide guidance through the construction of such a grid was unlikely to be fruitful. Essentially, the number of significant variables occurring across the range of cases within a single conduct "type" undermines the usefulness of the classification itself.

Even where all may agree that a particular type of misconduct is serious by its own nature, for example a breach of undertaking, the variation between the cases that might fall within that classification requires that the Discipline Committee have access to the full range of available disciplinary actions. There may be an undeniable and relevant difference in the character of the conduct involved in two breach of undertakings cases. In one case the undertaking may be clear, well understood, and appropriate to the circumstances; the breach may be knowing and intentional, irreparably damaging, and motivated by a reckless desire to advance the client's interest at any cost. In another case, there may be a significant question as to whether a binding undertaking was in fact created; there may have been little or no appreciation by the lawyer of whether a breach of undertaking was at risk. Upon the lawyer's reflection, in a cooperative and timely manner, the issue may have been addressed and rectified at the lawyer's expense and with no resulting harm to the affected parties. The matter may even have been self-reported by the lawyer who was potentially in breach. While these two examples are chosen to suggest opposite ends of a spectrum, even within a single type of potential misconduct, it is difficult, if not impossible, to provide in advance a reliably exhaustive

list of the different ways in which potentially relevant circumstances may be combined within a given case. When the Task Force considered further that a single referral to the Discipline Committee may involve any number of different conduct issues in combination, and that any number of instances of potentially problematic conduct may be covered in a single investigation, the prospect of constructing a useful two-dimensional grid to connect types of misconduct with specific disciplinary outcomes appeared very remote.

Having concluded that a simple grid approach was not the solution to the task of providing meaningful assistance to members of the Discipline Committee, the Task Force turned its efforts to the construction of a set of Guidelines that would be of assistance in the appropriate assessment and disposition of professional conduct matters. In approaching the construction of the Guidelines, the Task Force has kept in mind the need for each case to be evaluated on its own merits and the fact that any guidance for the Committee should not fetter its proper discretion.

4. The Guidelines

In the process of creating the Guidelines, three significant aspects began to take shape. The first aspect is reflected in a few broad principles, which the Task Force recognized as important for informing the Discipline Committee's approach to its tasks. The second aspect is a framework for analysis. The proposed framework is intended to promote appropriate consistency in Discipline Committee decisions, including potential Citations, through a systematic approach to conduct assessment. The recommended approach involves a specific focus on a "Citation Threshold" (akin to a "charge approval standard") and an opportunity to consider, in light of all relevant circumstances, whether the public interest in the administration of justice would be better served if an alternative disciplinary response were chosen instead of a Citation. The third aspect includes express guidance on some of the kinds of considerations that may go into an assessment of "all relevant circumstances." Also included is a description of some of the salient aspects of the full range of disciplinary responses available, which the Discipline Committee may consider when it is selecting the appropriate response for a given case.

a. Some Broad Principles

The first four sections of the Guidelines bring some focus on the need for the Discipline Committee:

i. to have regard for the public interest in the effective regulation of the legal profession,
ii. to make consistent decisions on a principled basis and avoid arbitrariness,
iii. to consider treating a lawyer's successive instances of problematic conduct as progressively more serious, but
iv. to avoid the presumption that the seriousness of the conduct is the starting place for a determination of whether a Citation may be warranted and required as a response to the lawyer's conduct in the circumstances.

b. A Framework for Analysis

The framework for analysis suggested in the Guidelines (beginning with section 5: Citation Threshold) is as follows:

- Would the alleged conduct amount to a discipline violation?
- If the alleged conduct would amount to a discipline violation, is there sufficient admissible evidence to satisfy the "Citation Threshold" (described below) of *a reasonable prospect of the lawyer receiving an adverse determination following a hearing*?
- If the alleged conduct would amount to a discipline violation and the Citation Threshold is satisfied on the admissible evidence, would an alternative disciplinary outcome be consistent with the public interest and a more effective regulatory response to the lawyer's conduct?

i. Conduct Amounting to a Discipline Violation

The first step in the analysis is simply to determine whether the alleged conduct may warrant a disciplinary response. Whether the conduct actually calls for a disciplinary response and, if so, what kind of response, are questions dealt with later in the analysis. Consequently, an initial assessment of the seriousness of the alleged conduct is not involved in *the beginning* of the analysis. Task Force members came to the view that the introduction of a subjective element, such as an assessment of seriousness, too early in the analysis would threaten the framework's ability to promote consistent and principle-based results. The notion of a *discipline violation* as conduct that may warrant a disciplinary response is taken from the Law Society Rules (eg. Rules 3-5(2), 4-21 and 4-22). A "discipline violation" is described in the Guidelines in the following terms: "a breach of a provision of the *Legal Profession Act*, the Law Society Rules, or the Professional Conduct Handbook, including any conduct unbecoming." This description accords with the use of the term in the Law Society Rules.

ii. The Citation Threshold

If the alleged conduct would amount to a discipline violation, the next part of the analysis is analogous to the Crown's charge approval standard. Roughly speaking, the question is: can we prove it? This part of the analysis involves an evaluation of the availability and admissibility of potential evidence. In practice, the issue of the Citation Threshold would be addressed in the Opinion Memorandum from investigating staff and the Discipline Committee would usually have an opportunity to discuss it with Discipline Counsel.

The precise terms in which the Citation Threshold is expressed may be extremely important. After considerable discussion, the Task Force has agreed that the appropriate Citation Threshold is: a "reasonable prospect" that the lawyer would receive an adverse determination at hearing (i.e. there is a reasonable prospect that the Citation would be made out). The standard of proof at a regulatory hearing is proof on the balance of probabilities and the burden of proof generally rests on the regulatory authority.

The Guidelines specify that the "reasonable prospect" itself may be less than a balance of probabilities. In other words, the decision to issue a Citation *does not require* the assessment that an adverse result for the lawyer is more likely than not to be proven at hearing. The Citation Threshold is set at this level to make allowance for certain foreseeable situations. For example, there may be cases where the outcome hinges to a significant extent on witness credibility, but where it is difficult to know how the witnesses and the lawyer will perform in the crucible of a hearing and under cross-examination. There may be other situations where there is some uncertainty as to the admissibility of specific evidence, but where it is clear that if the evidence is admissible then an adverse determination is a highly probable result. In some cases, the alleged conduct may be of such significance that it is in the public interest for a hearing to proceed, the evidence weighed, and a written decision issued, even though an adverse determination seems no better than a 50-50 proposition at the outset. The setting of the Citation Threshold in terms of "a reasonable prospect" is intended to allow the Discipline Committee sufficient latitude to make the decisions it needs to make in these difficult situations. However, the Citation Threshold as described in the Guidelines does not contemplate exceptions. If the Discipline Committee's determination is that there is *no reasonable prospect* of achieving an adverse determination at hearing, then in accordance with the Guidelines *a Citation would not be issued*.

Quite apart from exactly where the Citation Threshold is set and the terms in which it is expressed, the fact that a particular Citation Threshold is recognized and given precise expression is an important development. The conversation between the Discipline Committee and Discipline Counsel, regarding an assessment of the risks and potential results of proceeding to a hearing, may be a crucial element in the Committee's decision process. Agreeing on a Citation Threshold sets the terms of such conversations in advance, such that each participant has an opportunity to gain confidence and experience with the standards employed, and each can rely on coming to future similar conversations to discuss the same standards in the same terms. The propensity for this standard language to lead to greater consistency in the Discipline Committee's Citation decisions will strengthen the Law Society's efforts to regulate the

profession in the public interest and increase process fairness for the lawyers who may be potential respondents.

At the same time, an understanding of the Citation Threshold should clarify the limits on what conclusions, if any, may be drawn from a particular hearing where a Citation is not made out. The Law Society can be expected to gather the best evidence available and to make its case as persuasive as the evidence will allow. However, the Citation Threshold suggests that in some cases the Law Society may need to proceed to hearing despite some risk that the Citation will not be made out. And if, in those cases, the Citation is not made out, there need be no negative reflection on either the Discipline Committee or Discipline Counsel in the performance of their respective roles.

In passing, it is noteworthy that the adoption of a Citation Threshold would be a new step for the Law Society of British Columbia, which has never previously specified its Citation Threshold or settled the issue of how it should be expressed. In recommending a Citation Threshold, the Task Force is advocating that the Law Society take a step that many other regulators across the Country have already taken. The list of regulatory agencies with express analogous thresholds includes: the College of Physicians and Surgeons of British Columbia, the College of Teachers of British Columbia, and the Law Societies of Alberta, Saskatchewan, Upper Canada, and Nova Scotia.

A determination that the Citation Threshold is met in a given case means that in the view of the Discipline Committee the alleged conduct would amount to a discipline violation and that there is a reasonable prospect that a Citation regarding the conduct would be proven at hearing. However, even at this stage, the question of whether the Citation should be issued has yet to be determined.

iii. The Most Effective Action Consistent with the Public Interest

The question of whether a Citation should be issued or whether some alternative disciplinary response should be preferred involves a consideration of *all relevant circumstances* of the matter in light of an understanding of the characteristics and significance of each of the available disciplinary alternatives. If the Discipline Committee concludes that the lawyer's conduct amounts to a reasonably provable discipline violation, then any disposition of the matter less than a Citation must be in the public interest and provide a more effective outcome. For example, in some cases a Conduct Review may be judged to be a more effective educational tool that would provide a better result than a hearing, with respect to the lawyer's future conduct and the value of the lawyer's practice, to clients and to the practice of law in British Columbia.

c. All Relevant Circumstances

It is probably trite to say that the Discipline Committee should consider each case on its merits and consider all relevant circumstances in coming to an appropriate disposition of each matter. The Guidelines address the Committee's obligations in this regard in two different ways. First, the various subsections of Section 8 set out a number of characteristic and potentially relevant circumstances, combinations of which might weigh either for or against an alternative disciplinary outcome, depending on their applicability or inapplicability in an individual case. Second, sections 9 through 13 list the available disciplinary responses and attempt to set out a number of their salient characteristics, which may be relevant to choosing the most effective response for a given case.
The list of potentially relevant circumstances is intended to be suggestive and not exhaustive, as it expressly allows for "Other Considerations," which may not be specifically described. If the Guidelines are adopted and used, the Discipline Committee and Law Society staff may discover other characteristic circumstances that could be added to the list. As this is the first incarnation of these Guidelines it is reasonable to expect that experience with using them may lead to their review and revision, as needed, at future intervals. There is no attempt to rank the relative importance of the listed circumstances. They are simply set out so that they may be applied where they fit and where they may assist in promoting a reasoned and fair basis for the disposition of a given matter.

Similarly, it is possible that the offered characterizations of the various disciplinary responses may be subject to improvement in light of some experience with using the Guidelines. In all aspects, the Guidelines are intended as a tool for the Discipline Committee and tools can be improved when they are found wanting. The view of the Task Force is that this set of Guidelines should be an improvement over the existing lack of guidelines and should be seen as a reasonable step along a path of continued improvement.

5. Notable Research and Consultation

In the course of its consideration of the issues discussed in this memorandum the Discipline Guidelines Task Force had the benefit of earlier research on the "charge approval standards" or "Citation Thresholds" that have been used by a number of Crown and regulatory agencies from across Canada.

Other law societies indicated that they did not have written conduct assessment guidelines for their counterparts to our Discipline Committee. Consequently, the work of the Task Force on these Guidelines has been largely original conceptual engineering and drafting, as opposed to an evaluation of the work of others. The Task Force has drawn on the experience of its members, as current and former members of the Discipline Committee. Consultation with the current Discipline Committee has involved providing a draft of the Guidelines and the Committee's attempt to use them in complaint evaluation at a recent meeting. Members of the Discipline Committee offered many helpful comments and a number of their ideas have been incorporated in the attached version of the Guidelines. Discipline Counsel have been consulted, particularly on the

Citation Threshold issue, and the Law Society's Chief Legal Officer has been attending the Task Force meetings and taking an active part in the discussions.

The Task Force also had the benefit of comments from Geoffrey Gomery, after he had an opportunity to review a draft version of the Guidelines.

6. Recommendation

The Discipline Guidelines Task Force recommends for adoption by the Benchers the *Conduct Assessment and Disposition Guidelines* attached hereto.

CONDUCT ASSESSMENT AND DISPOSITION GUIDELINES

TABLE OF HEADINGS

I. PREAMBLE

The purpose of the guidelines set forth in this document is to guide the members of the Discipline Committee in their evaluation and disposition of the various professional conduct matters referred for that Committee's assessment. These guidelines should be used as an aid and reference to balance and inform the deliberations of the Discipline Committee. The guidelines do not restrict the discretion of the Discipline Committee and do not prescribe limits on what circumstances may be relevant or what facts may be determinative in a given case.

II. SOME GENERAL GUIDELINES

1. The Public Interest

The Discipline Committee's assessment and disposition of investigations referred for its review should have regard for the public interest in the effective regulation of the profession and should be consistent with these guidelines.

2. Consistency

The Discipline Committee should strive for consistency in its decisions. Consistency requires that decisions be made on a principled basis and not be made arbitrarily, capriciously or in an ad hoc manner. The underlying principles stated in these guidelines should guide the Discipline Committee in exercising its discretion in a consistent manner.

3. Progressive Discipline

The Discipline Committee should consider and apply progressive discipline, whereby the Committee's successive reviews of relevantly similar conduct by the same lawyer result in a more significant disciplinary response. In addition, a pattern of failing to fulfill a lawyer's professional responsibilities may also warrant more significant disciplinary responses on successive referrals to the Discipline Committee.

4. Seriousness of Conduct

While the most serious misconduct must attract a Citation, Citations should not be reserved exclusively for such misconduct. Any provable discipline violation (i.e. a breach of a provision of the *Legal Profession Act*, the Law Society Rules, or the Professional Conduct Handbook, including any conduct unbecoming) might warrant a Citation. However, a given provable discipline violation may not require a Citation, if an alternative disciplinary response is consistent with the public interest and would be a more effective response to the lawyer's conduct than the issuance of a Citation (see paragraphs 6 and 7(c) following).

5. Role of Discipline Committee

The Discipline Committee should read opinions prepared by investigating counsel (internal or external) with a critical eye. In doing so, the Committee needs to exercise its independent judgment and:

a) consider whether the relevant evidence has been gathered and assessed;

b) evaluate the strength of evidence gathered and needed in each case having regard to issues of admissibility and overall credibility of the evidence and the disciplinary outcome(s) being considered;

c) ensure the relevant issues have been addressed.

III. A FRAMEWORK FOR ANALYSIS

6. Citation Threshold

In considering whether a lawyer's conduct may warrant a Citation, the Discipline Committee should first have regard to whether the Citation Threshold is met in the circumstances. The Citation Threshold will be met where:

(a) the lawyer's alleged conduct amounts to a discipline violation; and

(b) having regard to the available admissible evidence, there is a reasonable prospect that the lawyer would receive an adverse determination at a hearing. A conclusion that there is a reasonable prospect does not require a conclusion that an adverse determination is more likely than not.

7. Assessing Complaints/Potential Citations

If the Discipline Committee concludes that the Citation Threshold has been met, it should go on to consider whether an alternative disciplinary outcome would be in the public interest and a more effective response to the lawyer's conduct. In determining consistency with the public interest, however, the Discipline Committee should have regard to the fact that a Citation is the Law Society's most public disciplinary process.

8. Alternative Disciplinary Outcomes

(a) The range of alternative disciplinary outcomes includes Conduct Review, Conduct Meeting, Conduct Letter from the Chair of the Discipline Committee, and No Further Action.

(b) Where the Discipline Committee determines that the Citation Threshold is not met in the circumstances of a particular matter, it may direct an alternative disciplinary outcome.

(c) Even where the Citation Threshold may be met in the circumstances of a particular matter, the Discipline Committee may choose an alternative disciplinary outcome, where it is in the public interest and a more effective disposition of the matter.

IV. POTENTIALLY RELEVANT CIRCUMSTANCES

9. An Open-Ended List

The following factors or circumstances, alone or in combination, may be relevant to the Discipline Committee's assessment of whether an alternative disciplinary outcome should be preferred instead of a Citation in a particular matter:

(a) Deterrence:

(i) The lawyer's conduct requires the specific and/or general deterrence provided by publication of a written decision and disciplinary sanctions following a hearing; or

(ii) The desire for specific and/or general deterrence may be addressed sufficiently through direct communications with the lawyer and/or a summary publication following a Conduct Review.

(b) Experience:

(i) The lawyer was only recently called to the bar; or

(ii) The lawyer has been called for some years and has significant practice experience.

(c) Record:

(i) The lawyer has practiced for a significant period of time with no significant conduct concerns; or

(ii) The lawyer has been the subject of other recent complaints and professional conduct concerns.

(d) Support:

(i) The lawyer lacks supervision or other supportive professional relationships; or

(ii) The lawyer is supervised by a senior practitioner or has supportive relationships with other lawyers and ready access to informal advice on professional conduct issues.

(e) Knowledge:

(i) There was a significant misunderstanding or lack of understanding component leading to the lawyer's problematic conduct; or

(ii) The lawyer appears to have acted despite understanding the nature and significance of his or her problematic conduct.

(f) Voluntariness:

(i) There were involuntary or health-related factors leading to the lawyer's problematic conduct; or

(ii) The lawyer's conduct was voluntary and free from the effects of addiction, ill health, and duress.

(g) Conduct After the Fact:

(i) The lawyer has, in a timely manner, voluntarily self-reported or acknowledged his or her error, accepted responsibility, and offered a genuine apology; or

(ii) The lawyer has been resistant, evasive or less than candid in responding and communicating in the course of the Law Society's investigation.

(h) Resulting Harm:

(i) The lawyer's conduct resulted in significant harm to the interests of a client, to one or more members of the public, to the reputation of the legal profession, or to the administration of justice; or

(ii) The lawyer's conduct did not result in the suffering of a significant harm.

(i) Recompense:

(i) Where possible, the lawyer has taken positive steps to remedy any loss or damage caused by his or her conduct; or

(ii) The lawyer has made no recompense in respect of the consequences of his or her conduct.

(j) Remediation:

(i) Where potential repetition of the problematic conduct could be avoided by changes in the practices of the lawyer or his or her staff, such changes have been implemented; or

(ii) The lawyer does not appear to have changed any practices to prevent a repetition of the problematic conduct.

(k) Risk:

(i) There appears to be little risk that the lawyer will engage in further problematic conduct; or

(ii) There appears to be significant risk that the lawyer will engage in further problematic conduct.

(l) Rehabilitation Prospect:

(i) An alternative disciplinary outcome is likely to provide a superior rehabilitation or remedial result; or

(ii) An alternative disciplinary outcome is unlikely to have a significant effect on the lawyer's future conduct.

(m) Other Considerations:

Other relevant factors or circumstances as determined by the Discipline Committee.

V. DISCIPLINARY OUTCOMES

10. Citation

The issuance of a Citation results in the Law Society's most public and transparent disciplinary process. Salient characteristics of the Citation include the following elements:

(a) A Citation that is issued and not rescinded leads to a hearing, at which the allegations about the lawyer's conduct and any required facts must be proven or admitted, before disciplinary action may be ordered;

(b) In addition to facing a potential costs assessment, a lawyer who receives an adverse determination upon the hearing of a Citation may be subject to one or more of the following disciplinary actions:

(i) a reprimand;

(ii) a fine;

(iii) a suspension;

(iv) disbarment.

11. Conduct Review

The Conduct Review is the most significant of the alternative disciplinary outcomes. Its salient characteristics include the following elements:

(a) Conducted by a subcommittee that must include at least one lawyer and must be chaired by a Bencher or Life Bencher;

(b) May provide an opportunity for a complainant to discuss his or her views and concerns with the subcommittee;

(c) Provides an opportunity for face-to-face communication between the subcommittee and the lawyer regarding the conduct in question and any issues of concern;

(d) Provides an opportunity for the subcommittee to test and confirm the lawyer's understanding of the issues of concern to the Discipline Committee;

(e) May provide a more effective remedial or rehabilitative opportunity to manage the lawyer's conduct in the legal profession (in contrast with a Citation and hearing process);

(f) Results in the subcommittee's written report to the Discipline Committee, which may then direct that no further action be taken, that a Citation be issued, that the Conduct Review be rescinded in favour of a different alternative disciplinary outcome, or that the lawyer be referred to the Practice Standards Committee;

(g) Unless subsequently rescinded, is reflected in the lawyer's "Professional Conduct Record," which may be considered at the disciplinary action determination phase of a subsequent hearing involving the same lawyer;

(h) Unless subsequently rescinded, will likely be reflected in a summary publication, issued to the profession and made available to the public without naming the lawyer.

12. Conduct Meeting

In contrast with the Conduct Review, the Conduct Meeting is a less serious alternative disciplinary outcome. Its salient characteristics include the following elements:

(a) Conducted by one or more Benchers or lawyers;

(b) When a Conduct Meeting is directed, the complainant (where applicable) is informed and provided with a general explanation of what a Conduct Meeting is; the complainant does not meet with the lawyer in question and the person(s) conducting the Conduct Meeting;

(c) Aside from the notice to a complainant of the fact that a Conduct Meeting has been directed, there is no publication of the Conduct Meeting by the Law Society, the Conduct Meeting is held in private, and neither the fact of the Conduct Meeting nor any record of the Conduct Meeting, nor any record of the Law Society's investigation of the matter is recorded in the lawyer's "Professional Conduct Record";

(d) Provides a direct opportunity for education and deterrence for the subject lawyer but not for the broader legal community;

(e) Provides an opportunity for face-to-face communication between the person(s) conducting the Conduct Meeting and the lawyer regarding advice on conduct and any issues of concern;

(f) Provides an opportunity for the person(s) conducting the Conduct Meeting to test and confirm the lawyer's understanding of the issues of concern to the Discipline Committee;

(g) May provide a more effective remedial (educational) or rehabilitative opportunity to manage the lawyer's conduct in the legal profession (in contrast with a Citation and hearing process);

(h) A Conduct Meeting is necessarily a final disposition of a matter, but does not result in a written report to the Discipline Committee.

13. Conduct Letter from the Chair

Like the Conduct Meeting, the Conduct Letter from the Chair ("Conduct Letter") is also a less serious alternative disciplinary outcome than the Conduct Review. The Conduct Letter's salient characteristics include the following elements:

(a) Issued in the name of the Chair of the Discipline Committee, to confirm that the matter has been reviewed by the Committee, to express the Committee's concerns regarding the matter, but also to confirm that no further action (beyond issuance of the Letter) will be taken in the matter;

(b) When a Conduct Letter is issued, the complainant (where applicable) receives notice of the Discipline Committee's direction and a copy of the Conduct Letter;

(c) Aside from the notice and copy of the Conduct Letter to a complainant, there is no publication of the fact or content of the Conduct Letter by the Law Society and neither the fact nor the content of the Conduct Letter, nor any record of the Law Society's investigation of the matter, is recorded in the lawyer's "Professional Conduct Record";

(d) A copy of a Conduct Letter is placed on the lawyer's "Personal File" with the Law Society;

(e) Provides an opportunity for an expression of the Discipline Committee's concerns in circumstances where it is determined that face-to-face communication is not needed;

(f) A Conduct Letter is necessarily a final disposition of a matter and, in contrast with a Conduct Review, a Conduct Letter does not result in a subsequent written report to the Discipline Committee.

14. No Further Action

(a) Under Rule 4-4 of the Law Society Rules, the Discipline Committee also has the option of directing that a matter be concluded with no further action taken, where it determines that the circumstances of the matter do not warrant any disciplinary action.

(b) A record of the complaint, though, along with the Discipline Committee's decision, is retained by the Law Society.

(c) Although a direction for no further action does not impose any further disciplinary process, the investigation and complaint referral processes may have an impact on the future conduct of the subject lawyer.

Memo

The Law Society of British Columbia

8000

To Benchers

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

Date June 6, 2011

Subject **Rules governing complaints investigations**

In 2010 the Benchers approved several requests for amendments to the *Legal Profession Act* intended to enhance the ability of the Law Society to fulfill its public interest mandate. Prominent among them was the suggestion that the powers available to the Law Society to investigate complaints against lawyers ought to be more fully spelled out in the *Legal Profession Act* and Law Society Rules. It now appears that no amendments to the *Legal Profession Act* can reasonably be expected before the 2012 legislative session.

In the meantime, the Benchers have heard and approved a plan to change and enhance the way that the Law Society approaches investigations of complaints and discipline matters. Prominent among the changes, which are now well into the implementation phase, is a change away from a method of investigation that is largely paper-based and toward a more proactive approach involving oral interviewing techniques in many cases.

The current rules governing complaints investigation are based in the methods in use at the time that the Benchers adopted them, and are not conducive to the changes now being introduced. For example, Rule 3-5(7) requires that lawyers responding to complaints do so in writing. That will not be useful in requiring a lawyer under investigation to respond to a complaint in the context of an oral interview.

While awaiting the requested legislation, which was designed to support the plan to upgrade Law Society investigation methods, it is possible to ensure that the Law Society is able to fulfill its mandate through its regulatory function by upgrading and clarifying the rules on complaints investigation.

This paper proposes amendments to the rules governing investigations by

- requiring lawyers to cooperate with a Law Society investigation;
- clarifying that investigations may be conducted by means other than the exchange of written correspondence;

- enabling investigators to require lawyers to answer questions and produce records and to enter lawyers' offices to further the investigation;

- expressly require lawyers to provide information and records that are privileged or confidential to Law Society investigators;

- curing some anomalies and inadequacies in the current rule.

A draft amended Rule 3-5, in both clean and redlined versions, is attached along with a suggested resolution to give effect to the proposed changes. The Act and Rules Subcommittee has considered these changes and recommends them to the Benchers for adoption.

BACKGROUND

The provisions of the *Legal Profession Act* and the Law Society Rules concerning investigations of complaints against lawyers are relatively cryptic.

The authority to receive and investigate complaints is found in section 26 of the *Legal Profession Act*:

> **Complaints from the public**
>
> **26** (1) A person who believes that a lawyer, former lawyer or articled student has practised law incompetently or been guilty of professional misconduct, conduct unbecoming a lawyer or a breach of this Act or the rules may make a complaint to the society.
>
> (2) The benchers may make rules authorizing an investigation into the conduct or competence of a lawyer, former lawyer or articled student, whether or not a complaint has been received under subsection (1).

The current rule giving effect to section 26(2) is Rule 3-5:

> **Investigation of complaints**
>
> **3-5** (1) Subject to subrule (2), the Executive Director may, and at the instruction of a member of the Discipline Committee must, investigate the complaint to determine its validity.
>
> (2) The Executive Director may decline to investigate a complaint or other matter, if the Executive Director is satisfied that the complaint or matter
>
> (a) is outside the jurisdiction of the Society,
>
> (b) is frivolous, vexatious or an abuse of process, or

(c) does not allege facts that, if proved, would constitute a discipline violation.

(3) The Executive Director must deliver to the lawyer a copy of the complaint or, if that is not practicable, a summary of it.

(4) Despite subrule (3), if the Executive Director considers it necessary for the effective investigation of the complaint, the Executive Director may delay notification of the lawyer.

(5) When acting under subrule (3), the Executive Director may decline to identify the complainant or the source of the complaint.

(6) The Executive Director may require the lawyer to whom a copy or summary of the complaint has been delivered under subrule (3) to respond to the substance of the complaint.

(7) The lawyer's response under subrule (6) must be

(a) in writing and, unless the Executive Director permits otherwise, signed by

(i) the lawyer personally,

(ii) a director of the law corporation, if the complaint is about a law corporation, or

(iii) counsel for the lawyer or law corporation, and

(b) delivered to the Executive Director as soon as practicable and, in any event, by the date set by the Executive Director.

(8) After receiving a response from the lawyer, the Executive Director may deliver to the complainant a copy of the response or a summary of it, subject to solicitor and client privilege and confidentiality.

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

This rule is not long on detail and does not enumerate the powers of Law Society investigators to obtain information and records from the lawyer who is the subject of the investigation.

This is the stated intent of the *Legal Profession Act* amendment that the Act and Rules Subcommittee proposed and the Benchers adopted:

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.

The materials before the Benchers included extracts from the *Law Society Act* of Ontario and the BC *Securities Act* as possible models for amendments to the *Legal Profession Act*. A copy of the materials pertaining to this aspect of section 26 is attached for your reference.

PROPOSED CHANGES

1. Requirement to cooperate with Law Society investigation

The proposed amendments replace subrule (6) with one that would require lawyers to cooperate with Law Society investigations and respond to the complaint and other requests fully and substantively.

A similar obligation currently exists in the *Professional Conduct Handbook*, as a result of recent additions arising out of the initiative on ungovernability. There are also numerous decisions finding that lawyers must cooperate with Law Society investigations. This most often occurs in the context of failure to respond to Law Society correspondence, but the principle is the same for failure to cooperate in other circumstances. Many cases have quoted this passage from *Law Society of BC v. Dobbin*, [1999] LSBC 27 (most recently, the Benchers on review in *Law Society of BC v. Welder*, 2011 LSBC 6):

> ... If the Law Society cannot count on prompt, candid, and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

Last year, the Ontario Superior Court of Justice had this to say in *Wise v. Law Society of Upper Canada*, (2010), 318 DLR. (4th) 606:

> It is well recognized that to ensure the effective discharge of the responsibilities of professional regulators, every professional has an obligation to co-operate with the self-governing body. (authorities omitted)

Putting this provision in the Law Society Rules would serve to emphasize the importance that the Society places on the duty to cooperate and the seriousness with which it views a

failure to cooperate. It would make it easier for investigators to enlist the cooperation of reluctant lawyers by pointing out the Law Society Rule requiring it.

This would also allow the flexibility to proceed against a failure to cooperate as a breach of the Law Society Rules and to use the summary hearing process where that is appropriate. The greater speed with which a summary hearing can proceed would make it more difficult to derail or greatly delay an investigation by obstructionism.

2. Powers of investigators

The Benchers have approved the Law Society requesting amendments to section 26 that would give the Benchers the express authority to make rules similar to provisions in section 49.3(2) of the *Ontario Law Society Act*:

> **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.

There does not seem to be a compelling reason why these powers could not be given to investigators in advance of the express powers being legislated. The Benchers recently invoked the general rule-making authority in section 11 of the *Legal Profession Act* in adopting Rule 3-7.1 *[Extraordinary action to protect public]*, which allows three Benchers to suspend or restrict the practice of a lawyer who is the subject of an investigation before a citation is issued. That was done notwithstanding that section 39 of the *Legal Profession Act* establishes the condition that the Discipline Committee must authorize a citation before a lawyer can be suspended under that section.

In addition, it appears that the Courts are prepared to permit law societies great leeway in investigations of allegations of misconduct in order to fulfill their mandates of protecting the public interest in the legal system. For example, the Supreme Court of Canada had this to say in *Pharmascience Inc. v. Binet*, [2006] 2 SCR 513 at para. 36:

> The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public.
>
> In this context, it should be expected that individuals with not only the power, but also the duty, to inquire into a professional's conduct will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged.

The proposed amendments include a new subrule (6.1) that would empower the Executive Director (staff), when conducting an investigation of a complaint, to require the production of records and require a lawyer to answer questions or cause his or her staff or agents to answer questions and to enter a lawyer's place of business to conduct the investigation. These are derived from the provisions of the Ontario Act governing the Law Society. In addition, because of the intended shift toward oral interviews as an investigative technique, the draft subrule includes specific reference to attending an interview when required by the Executive Director.

The requested legislative amendments include extending powers of Law Society investigators to compel individuals who are not lawyers, former lawyers or articled students to attend, give evidence under oath and produce records and enforce the compulsion by applying to the Supreme Court for a contempt order. Those things are beyond the jurisdiction of the Law Society Rules and must await the legislative amendments.

3. Response to complaint not necessarily in writing

As mentioned above, it is currently the intention of the professional regulation department that more investigations should include an interview of the lawyer concerned, and perhaps others. The present Rule 3-5(7) requires that all responses to complaints be in writing. It then proceeds to allow the Executive Director the discretion not to require that the response be signed by the lawyer or his or her counsel. The suggestion is that the lawyer cannot be relieved of the need to respond in writing so that the investigation can proceed in the form of an interview of the lawyer.

In the proposed amendments, the lawyer's duty to respond to a complaint and to any other requests made by the Executive Director appears in subrule (6), which also requires that the lawyer respond "in the form specified by the Executive Director." This would allow investigators to require a response in the course of an oral interview, even though it would not be in writing.

Subrule (7), then, is amended to continue the requirement for a signature on any response that is made in writing.

The current subrule (7)(c) allows a lawyer to respond to the Law Society through counsel and does not require the lawyer to personally sign the response. There is a practical concern that, when a lawyer provides a response through counsel, the lawyer may very easily distance himself or herself from that response. As a result, the lawyer cannot be effectively cross-examined because he or she did not personally create the document. The draft amendment would delete paragraph (c).

4. Privileged and confidential material must be produced

The Ontario *Law Society Act* includes this provision:

> **Disclosure despite privilege**
>
> **49.8**(1) A person who is required under section 42, 49.2, 49.3 or 49.15 to provide information or to produce documents shall comply with the requirement even if the information or documents are privileged or confidential.

The proposed amendments add a new subrule (10) to Rule 3-5 that would expressly give investigators in BC the power to require that lawyers provide information or produce records that are privileged or confidential. In the BC context, this rule would give regulatory voice to the law as stated by the Court of Appeal in *Skogstad v. Law Society of BC*, 2007 BCCA 310. In that case Chiasson, JA, writing for the Court, held:

> [18] On a plain reading of s. 88(1) [of the *Legal Profession Act*] there would be no violation of solicitor-client privilege if the member were to answer the question put to him by counsel for the Law Society. He would be "deemed conclusively not to have breached any duty or obligation" to the client.
>
> [19] The client remains protected pursuant to ss. 88(2) and (3). The former imposes solicitor-client privilege on the recipient of the information and the latter prohibits disclosure of the information except for purposes contemplated by the Act or the Law Society Rules. The Rules provide that privileged information must not be disclosed in any reasons given as a result of disciplinary proceedings and ss. 88(4)-(6) provide for the maintenance of privilege if court proceedings were to follow.
>
> [20] In my view, s. 88 legislatively addresses the required balancing of the protection of solicitor-client privilege and the supervision and maintenance of the integrity of the legal profession. A lawyer is free to provide required information to the Law Society and the privilege of the client is maintained intact.

> [21] The legislation makes no distinction between the investigative and hearing stages of the disciplinary process.

It follows that, if the lawyer is not precluded from disclosing privileged or confidential information or documents to the Law Society, when he or she is otherwise required to disclose it, the privilege or confidentiality makes no difference to that obligation.

Again it would be to the benefit of the Law Society if investigators were able to point to a positive obligation in the Rules, rather than have to rely on the common law.

5. Single Bencher cannot order an investigation

Rule 3-5(1) includes an anomalous provision that allows individual members of the Discipline Committee to direct that staff conduct an investigation, even when the professionals who manage investigations are not inclined to do so. This goes against the Law Society's values in Bencher-staff relations and the delegation of operational matters to the Executive Director and staff. Potentially it could divert resources from other priorities on the say so of just one individual.

The proposed amendments would remove the authority of a single member of the Discipline Committee to order an investigation, but keep that expressly within the oversight function of the Discipline Committee as a whole.

6. Other improvements to language

Subject to some exceptions, each subrule should be a complete sentence that can be read on its own without reference to those that precede and follow it. Subrule (3) contains a reference to "the lawyer" without an apparent antecedent. The draft inserts "who is the subject of a complaint" so that it is immediately apparent to which lawyer it refers.

In the current subrule (6), "respond to the substance of the complaint" has long been a problem in that there is no guidance as to what responding to the substance of the complaint means. As explained above, the amendments replace subrule (6) with a provision that more fully describes the obligation of a lawyer to cooperate with a Law Society investigation. In an effort to make lawyers who are the subject of a complaint more aware of what the Law Society expects of them, the proposal uses a paraphrase of a phrase used by the Barristers' Society of Nova Scotia: "respond fully and substantively" to the complaint and other requests.

The current subrule (9) deals with the ability of the Executive Director (staff) to attempt to resolve complaints by means of mediation or other informal methods. That is inconsistent with the topic of the rest of Rule 3-5, and the heading "Investigation of

complaints". In that position, the possibility of mediated resolution may be overlooked or confused with means of extracting information to further an investigation. Either would defeat the purpose of the provision. The draft proposes to move it to a separate Rule 3-5.1.

The requirement to respond to a complaint "as soon as practicable", which now appears in subrule (7)(b) becomes misplaced with the amendment of that subrule to apply only to those responses that are required to be in writing. In the draft, it is moved to the new subrule (10), which applies to all requirements to provide information or produce records under Rule 3-5.

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.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Investigation of complaints

3-5 (1) Subject to subrule (2), the Executive Director may, and ~~at~~ on the instruction of ~~a member of~~ the Discipline Committee must, investigate ~~the~~ a complaint to determine its validity.

(2) The Executive Director may decline to investigate a complaint ~~or other matter,~~ if the Executive Director is satisfied that the complaint ~~or matter~~

(a) is outside the jurisdiction of the Society,

(b) is frivolous, vexatious or an abuse of process, or

(c) does not allege facts that, if proved, would constitute a discipline violation.

(3) The Executive Director must deliver to the lawyer who is the subject of a complaint a copy of the complaint or, if that is not practicable, a summary of it.

. . .

(6) A lawyer must cooperate fully in an investigation under this Division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director

(a) to the complaint, and

(b) to all requests made by the ~~The~~ Executive Director in the course of an investigation.~~may require the lawyer to whom a copy or summary of the complaint has been delivered under subrule (3) to respond to the substance of the complaint.~~

(6.1) When conducting an investigation of a complaint, the Executive Director may

(a) require production of files, documents and other records for examination or copying,

(b) require a lawyer to

(i) attend an interview,

(ii) answer questions and provide information relating to matters under investigation, or

(iii) cause an employee or agent of the lawyer to answer questions and provide information relating to the investigation,

(c) enter the business premises of a lawyer

(i) during business hours, or

LAW SOCIETY RULES

(ii) at another time by agreement with the lawyer.

(7) Any written ~~The lawyer's~~ response under subrule (6) must be

~~(a) in writing and, unless the Executive Director permits otherwise,~~ signed by

(~~i~~a) the lawyer personally, or

(~~ii~~b) a director of the law corporation, if the complaint is about a law corporation.~~, or~~

~~(iii) counsel for the lawyer or law corporation, and~~

~~(b) delivered to the Executive Director as soon as practicable and, in any event, by the date set by the Executive Director.~~

(8) ~~After receiving a response from the lawyer, t~~The Executive Director may deliver to the complainant a copy or a summary of ~~the~~ a response received from the lawyer ~~or a summary of it~~, subject to solicitor and client privilege and confidentiality.

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

(10) A lawyer who is required to produce files, documents and other records, provide information or attend an interview under this Rule must comply with the requirement

(a) even if the information or files, documents and other records are privileged or confidential, and

(b) as soon as practicable and, in any event, by the time and date set by the Executive Director.

Resolution by informal means

3-5.1 The Executive Director may, at any time, attempt to resolve a complaint through mediation or other informal means.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Investigation of complaints

3-5 (1) Subject to subrule (2), the Executive Director may, and on the instruction of the Discipline Committee must, investigate a complaint to determine its validity.

(2) The Executive Director may decline to investigate a complaint if the Executive Director is satisfied that the complaint

(a) is outside the jurisdiction of the Society,

(b) is frivolous, vexatious or an abuse of process, or

(c) does not allege facts that, if proved, would constitute a discipline violation.

(3) The Executive Director must deliver to the lawyer who is the subject of a complaint a copy of the complaint or, if that is not practicable, a summary of it.

. . .

(6) A lawyer must cooperate fully in an investigation under this Division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director

(a) to the complaint, and

(b) to all requests made by the Executive Director in the course of an investigation.

(6.1) When conducting an investigation of a complaint, the Executive Director may

(a) require production of files, documents and other records for examination or copying,

(b) require a lawyer to

(i) attend an interview,

(ii) answer questions and provide information relating to matters under investigation, or

(iii) cause an employee or agent of the lawyer to answer questions and provide information relating to the investigation,

(c) enter the business premises of a lawyer

(i) during business hours, or

(ii) at another time by agreement with the lawyer.

(7) Any written response under subrule (6) must be signed by

(a) the lawyer personally, or

(b) a director of the law corporation, if the complaint is about a law corporation.

(8) The Executive Director may deliver to the complainant a copy or a summary of a response received from the lawyer, subject to solicitor and client privilege and confidentiality.

(10) A lawyer who is required to produce files, documents and other records, provide information or attend an interview under this Rule must comply with the requirement

(a) even if the information or files, documents and other records are privileged or confidential, and

(b) as soon as practicable and, in any event, by the time and date set by the Executive Director.

Resolution by informal means

3-5.1 The Executive Director may, at any time, attempt to resolve a complaint through mediation or other informal means.

COMPLAINTS INVESTIGATIONS

SUGGESTED RESOLUTION:

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

1. In Rule 3-5:

(a) By rescinding subrules (1) to (3) and substituting the following:

(1) Subject to subrule (2), the Executive Director may, and on the instruction of the Discipline Committee must, investigate a complaint to determine its validity.

(2) The Executive Director may decline to investigate a complaint if the Executive Director is satisfied that the complaint

(a) is outside the jurisdiction of the Society,

(b) is frivolous, vexatious or an abuse of process, or

(c) does not allege facts that, if proved, would constitute a discipline violation.

(3) The Executive Director must deliver to the lawyer who is the subject of a complaint a copy of the complaint or, if that is not practicable, a summary of it.

(b) By rescinding subrules (6) to (9) and substituting the following:

(6) A lawyer must cooperate fully in an investigation under this Division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director

(a) to the complaint, and

(b) to all requests made by the Executive Director in the course of an investigation.

(6.1) When conducting an investigation of a complaint, the Executive Director may

(a) require production of files, documents and other records for examination or copying,

(b) require a lawyer to

(i) attend an interview,

(ii) answer questions and provide information relating to matters under investigation, or

(iii) cause an employee or agent of the lawyer to answer questions and provide information relating to the investigation,

(c) enter the business premises of a lawyer

(i) during business hours, or

(ii) at another time by agreement with the lawyer.

(7) Any written response under subrule (6) must be signed by

(a) the lawyer personally, or

(b) a director of the law corporation, if the complaint is about a law corporation.

(8) The Executive Director may deliver to the complainant a copy or a summary of a response received from the lawyer, subject to solicitor and client privilege and confidentiality.

(10) A lawyer who is required to produce files, documents and other records, provide information or attend an interview under this Rule must comply with the requirement

(a) even if the information or files, documents and other records are privileged or confidential, and

(b) as soon as practicable and, in any event, by the time and date set by the Executive Director.

2. By adding the following Rule:

Resolution by informal means

3-5.1 The Executive Director may, at any time, attempt to resolve a complaint through mediation or other informal means.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Annual Report of the Law Society of British Columbia Equity Ombudsperson Program for the Term January 1, 2010 to December 31, 2010

For: The Benchers
Date: April 21, 2011

Purpose of Report: For Information

Prepared by: Anne Bhanu Chopra, Equity Ombudsperson, LSBC
B. Comm., MIR, LL.B

TABLE OF CONTENTS

PREFACE

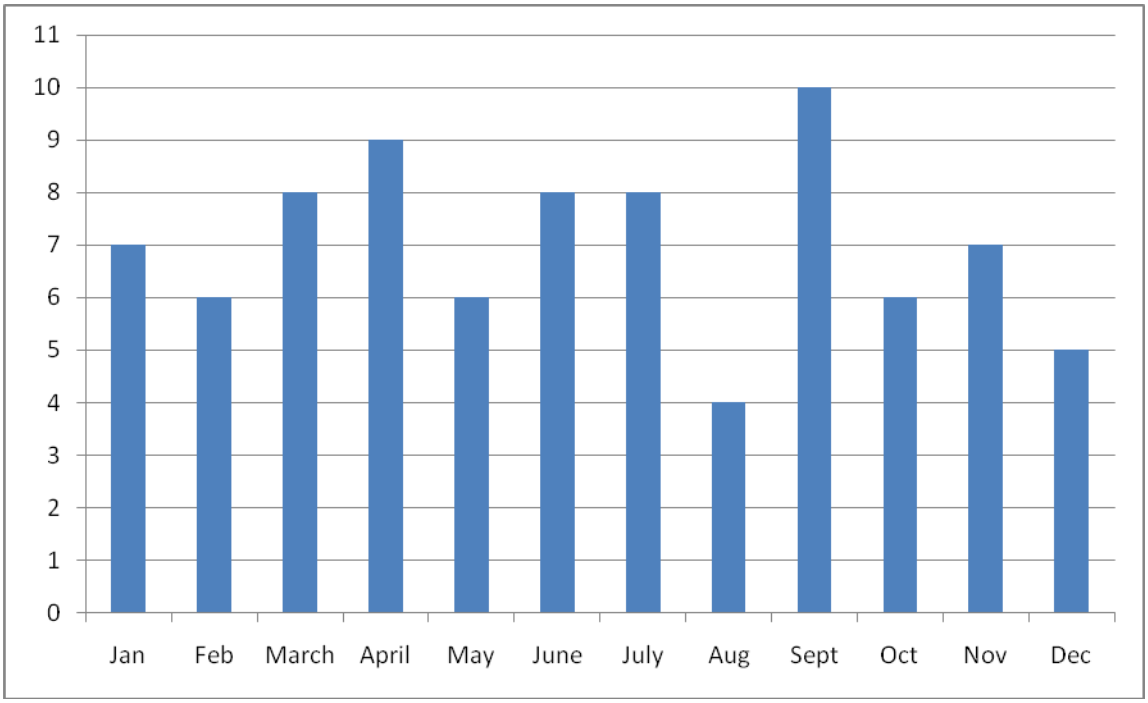
The following report is prepared by the Equity Ombudsperson on an annual basis and disseminated to the Law Society of British Columbia for information purpose. Should the reader have any questions about the report or comment contained in same, please feel free to email the Equity and Ombudsperson at achopra1@novuscom.net.

A. OVERVIEW OF NEW CONTACTS

1. The Law Society of British Columbia (the "Law Society") Equity Ombudsperson Program (the "EOP" or "Program") received 84 calls from individuals during the reporting period (January 1 to December 31, 2010). These were calls from individuals with a new matter. Of the 84 calls, 56 of these new contacts were within the Mandate (as defined below) of the Program. Further, each caller may have contacted the Program on the new matter, on a number of occasions. As a result, the total number of contacts made with the EOP during this period was 260 contacts. (See Table 2 and 3 for information on the total contacts made with the Program.)

2. The below Table 1, displays the distribution of the 84 new contacts made with the EOP, during the reporting period:

TABLE: 1



[1] Mandate = Calls from lawyers, articling students, staff dealing with issues arising from the prohibited grounds of discrimination, including workplace harassment.

3. The means of initial contact deployed by these callers is distributed as follows: 4 (4%) made in person 73 (87%) used the telephone to make their initial contact, 6 (7%) used email and 1 (%) used regular mail.

4. Further, of the 84 new contacts with the Program, 79 (94%) were made by women and 5 (6%) were made by men.

5. The following Table 2 notes the contacts made with the EOP since 2006 and the geographic distribution in British Columbia:

TABLE 2: CONTACTS : 2006-2010

GEOGRAPHIC DISTRIBUTION:

	2006	2007	2008	2009	2010
Total Contacts[1]:	286	297	275	258	260
Vancouver (Lower Mainland):	121	142	133	128	135
Victoria:	78	65	68	64	65
Outside (Lower Mainland /Victoria)	49	34	41	32	32
Outside the Mandate[2]:	38	56	33	34	28

NOTE:

[1]Contacts = All email, phone, in person, fax and mail contacts made with the EOP. Some contacts may have resulted in more than one issue.

[2]Outside Mandate= callers are from the public and/ or lawyers dealing with issues not within the Mandate of the EOP.

6. The following Table 3 identifies the profile of the caller (based on position, gender and size of firm) since 2006:

TABLE 3: PROFILE DISTRIBUTION OF CALLS IN MANDATE

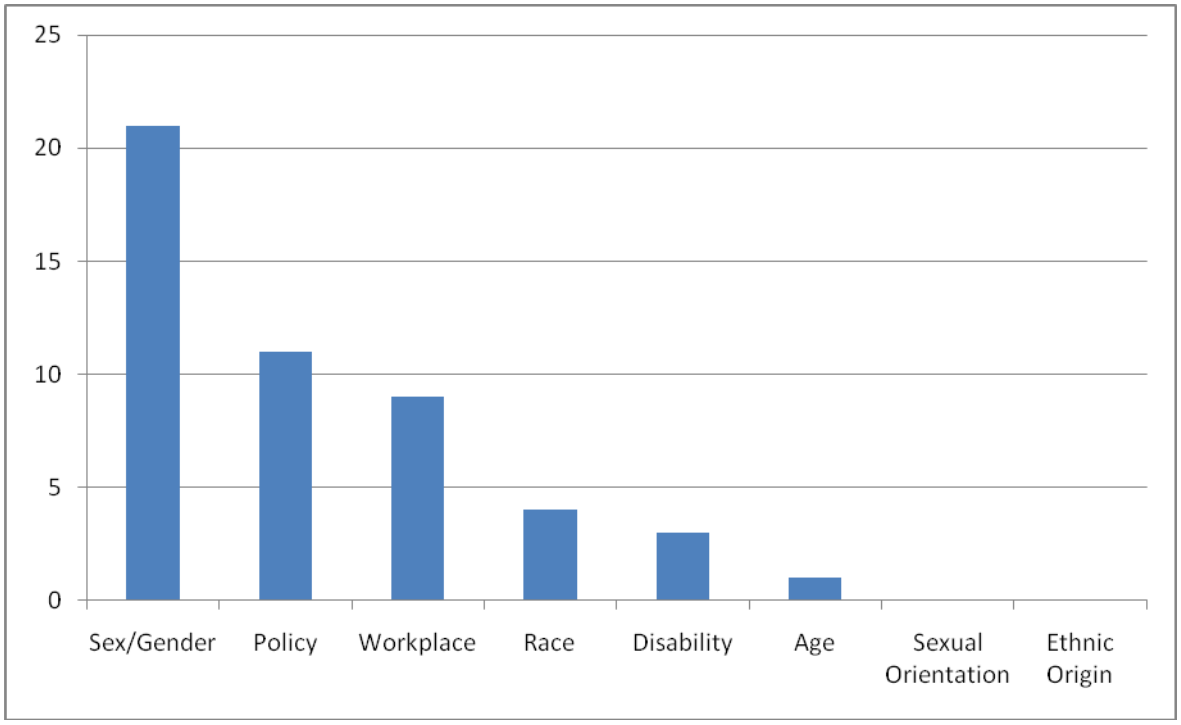
Profile Distribution:	**2006**	**2007**	**2008**	**2009**	**2010**
Associates	50	55	56	53	58
Partners	60	58	43	38	26
Students	12	8	13	11	16
Articling Students	58	49	51	50	58
Support Staff	68	71	79	72	74
Females	168	164	170	178	191
Males	80	77	72	46	41
SIZE OF FIRM IN (PERCENT %)					
Small	(1-10)	45%	39%	42%	51%
Medium	(10-50)	29%	35%	32%	20%
Large	(50 +)	26%	23%	24%	29%

7. The writer notes there has been 9 % increase in calls from small firms and a 12 percent decrease in calls from medium sized firms.

B. OBSERVATIONS AND NARRATIVE EXAMPLES OF THE CALLERS WITHIN THE MANDATE:

1. Table 4 below, displays the grounds of discrimination which were raised in the complaints from the callers: sex/gender, disability, race, religion, age, ethnic origin, sexual orientation, policy and workplace/personal harassment:

TABLE: 4



2. It is interesting to note the following observations:

- Of the 56 contacts, (89%) 50 individuals made human rights based discrimination or harassment and workplace harassment complaints against lawyers. Of these complaints, they were made as follows: 24% associates, 9% partners, 28% articling students 9% law students and 30% support staff; and
- Nine (9) of the 50 complaints (18%) from within the legal profession were made by the complainant in reference to their employment or a job interview experience.
- The writer notes there has been 5(%) percent increase in calls from complaints in regards to questions being asked in the articling interview.

3. During this period, the EOP received a number of complaints, based on the above grounds. The following examples may assist the reader in appreciating the types of complaints received by the EOP:

<u>Based on sex/gender:</u>

- Two women complained that the maternity policies were not available to them once they advised the firm they were pregnant.

- Two female lawyers complained that there was personal harassment and abuse once the firm became aware that they were pregnant.

- Three female articling students were asked inappropriate questions during the articling process (with regards, to marital status, sexual preferences and whether they planned to have a family)

Based on disability:

- One individual complained that she had to disclose information on a past disability (which was irrelevant to her current condition and performance) and this disclosure made the process into the LSBC challenging and difficult.

- Two individuals had similar complaints and the same were from medium sized firms: the individuals were not given support once the firm learned of a potential long term illness/disability-- the firm stopped giving them work .

Based on race:

- A junior female lawyer of colour complained about racial type jokes that were about her personal life.

- One female and one male law student complained that they were asked inappropriate questions about her race and status during a job interview by a law firm.

Based on personal/workplace harassment:

- Two individuals complained that their principal or a senior lawyer was making degrading and humiliating remarks in front of clients and support staff to the lawyers involved.

C. SERVICES PROVIDED TO CALLERS

Table 5 below, denotes the services provided to the caller. These services are advertised on the LSBC website and pamphlets are provided when the Equity Ombudsperson delivers presentations.

TABLE: 5	
CALLER:	**SERVICES PROVIDED:**
LAW FIRM	

	• Advise them of their obligations under the Human Rights Act and the Law Society Professional Conduct Handbook • Confidentially assist them with the particular problem, including discussing strategies, obligations and possible training. • Provide information to firm on education seminars or training workshops
COMPLAINANT	• Listen to the complainant and provide safe haven for their story. • Assist in identifying the issues the complainant is dealing with. • Provide the complainant with their options, (internal complaints process in their firm, formal complaint process, mediation, litigation and the Human Rights Tribunal) including any costs, references for legal representation, remedies which may be available and time limits for the various avenues, as relevant. • Mediation is offered to the complainant, where feasible. To date, only informal mediation sessions have taken place. (Please note, the EOP was asked in this 2010 period to provide, on two occasions in-person/informal type of mediations). • Provide the complainant information on resources, such as Interlock and LAP, as relevant. • Direct them to relevant resource materials available from other organizations, including the Law Society and the BC Human Rights Tribunal.
GENERAL INQUIRES	Providing the inquirer with information about the: • EOP mandate • Services offered by the EOP • a information seminar • on the EOP • Reporting and Statistics gathered by the EOP
CALLER (outside Mandate)	• All callers outside the mandate are re-directed. Minimum time is consumed by the caller. • The EOP has a detailed voice mail on the phone, to act as a screener of the calls. • The EOP does not assist these callers beyond the initial contact.

D. SUMMARY OF CALLERS

In summary, Table 6 notes the distribution of all the issues, as raised by a caller, within the Mandate, during this period:

TABLE 6: ISSUE DISTRIBUTION

Issues addressed:	2006	2007	2008	2009	2010
1. Information:					
a) General Information:	21	25	27	24	30
b) Office Policy Concerns:	18	16	13	14	16
2. Discussion/Request:					
a) Article, Training or Presentation	31	37	28	26	14
3. Discuss specific issue or concern:					
Discrimination					
a) Gender	15	20	21	17	24
b) Racial	20	16	13	12	14
c) Disability	33	21	17	16	10
d) Sexual Orientation[1]	n/a	n/a	n/a	0	0
Harassment					
a) Sexual harassment:	65	6	64	59	60
b) Workplace harassment:	39	43	40	37	38
Policy					
a) Leave policy:	14	21	17	18	15
b) Other policies:	12	6	2	1	2
Inappropriate questions asked in the interview process[2]:				6	9

1 New Category-2009

E.

[2] New Category in 2010

MARKETING ACTIVITIES

1. The Equity Ombudsperson Program is included under the Law Society website under member support.

2. Articles and Information pieces are included in the Benchers Bulletin periodically, to promote the Program.

3. The EOP continues to makes contact with various organizations. The EOP has emphasized organizations, which have a high number of paralegal/legal assistants as these groups are in need of the Program and there remains a lack of awareness of the same.

4. Continued dissemination of contact information about the Program is provided to the various organizations so that there is increased awareness and referrals to the Program. The types of organizations include: LEAF, Capilano College, LAP, WLF/CBA, Interlock, University of Victoria and University of British Columbia (law school).

F. EDUCATIONAL/TRAINING ACTIVITIES

1. The Program aims to provide ongoing support on education on respectful workplace issues. With that goal in mind, articles and speaking engagements are conducted, and an informational brochure is distributed at events and upon request.

2. The educational engagements at which the Program was discussed and brochures distributed:

- Benchers Bulletin Information Article;
- Brochures distributed at the LEAF Breakfast;
- Presented the Role of the Equity Ombudsperson for PLTC, Victoria;
- Presented the Role of the Equity Ombudsperson for PLTC, Vancouver;
- Disseminated Equity Ombudsperson brochures to women lawyers at the AGM of WLF/CBA, Mentoring Program Orientation/WLF, PLTC, UBC, and U of VIC; and
- Attended a number of the Benchers Meetings, so as to be available to meet with the Benchers, as requested.

3. Only one of request was made for training, and the EOP provided information and discussed the caller's options.

G. OBJECTIVES ACHIEVED DURING 2010

1. The following are the objectives achieved by the Equity Ombudsperson in 2010:

- To raise awareness of the Equity Ombudsperson Program;
- To provide general support/ education to the legal profession in British Columbia about respectful workplace issues;
- To receive and handle individual concerns and complaints about discrimination and harassment;
- To provide consultation on workplace policies and initiatives, as requested;
- To continue to disseminate the Equity Ombudsperson informational brochure;
- To follow-up on contacts made through seminars, presentations, the confidential phone line, fax, e-mail and post-office box;
- To exchange information with provincial Equity Ombudsperson counterparts and other equity experts with the other law societies;

- To closely work with Susanna Tam, Staff Lawyer, Policy and Legal Services, so there is enhanced communication between the Equity Ombudsperson and the Law Society.

- To serve as liaison/ resource for the Law Society's Equity and Diversity Advisory Committee so as to ensure and encourage exchange of information.

H. TRAVEL OBJECTIVE:

The EOP determined that it would attempt, in each calendar year to ensure that it expanded the physical presence of the Program throughout British Columbia, by travelling to different areas of B.C. During the term of this Report, travel outside the Lower Mainland consisted of only Victoria, Burnaby and Surrey. The EOP communicated and made effort with two groups to increase the rate of participation, to facilitate travelling to Kelowna and Nanaimo. However, this effort resulted in little success this year. There was insufficient anticipated enrolment for the sessions and /or the group in question did not proceed with the planned event. The writer advises, that the two trips to Burnaby and Surrey were a result of two independent law firm requests for the EOP to attend at their firm (in person) to address firm issues.

Currently, the EOP is working on possible initiatives in Kelowna with the Kelowna Bar and the CBA, with reference to Nanaimo.

I. RECOMMENDATIONS FOR 2011

I commend the LSBC for taking a more practical and tangible approach to issues on Equity and Diversity. Specifically, I note the work of the Equity and Diversity Advisory Board with reference to their efforts to obtain funding to set up a mentoring program for aboriginals. It is my hope and recommendation that once this is set up, that we can also set up a program for lawyers with disabilities.

I thank the Equity and Diversity Advisory Committee for their work and the individuals who have

Assisted the EO in the preparation of this Report, specifically, Susanna Tam, Staff Lawyer, Policy

and Legal Services and Michael Lucas, Manager, Policy & Legal Services.

Presented to the Board on January 2009

J. APPENDIX A

Background

The Law Society of British Columbia (the "Law Society") launched the Discrimination Ombudsperson program in 1995, the first Canadian law society to do so. It is now referred to as the Equity Ombudsperson Program, (the "Program") to reflect its pro-active and positive approach. The purpose of the program was to set up an informal process at arms-length to the Law Society, which effectively addressed the sensitive issues of discrimination and harassment in the legal profession as identified in the various gender and multiculturalism reports previously commissioned by the Law Society.

In the past thirteen years, the Program has been challenged with funding. Accordingly, it has undergone a number of reviews and revisions to address program efficiency, cost-effectiveness and the evolving understanding of the needs of the profession. In 2005, ERG Research Group ("ERG") was retained to conduct an independent study of the Program. ERG concluded that the complainants who accessed the Program "were overwhelmingly satisfied with the way the complaint or request was handled."

The Program has been divided into the following five (5) key functions:

1. Intake and Counseling: receiving complaints from, providing information to, and discussing alternative solutions regarding complaints with members, articled students, law students and support staff working for legal employers;

2. Mediation: resolving complaints informally with the consent of both the complainant and the respondent;

3. Education: providing information and training to law firms about issues of harassment in the workplace;

4. Program Design: at the request of a law firm, assisting in the development and implementation of a workplace or sexual harassment policy; and

5. Reporting: collecting statistics on the types of incidences and their distribution in the legal community, of discrimination or harassment and preparing a general statistical report to the Law Society, on an annual basis.

The original intention of the Law Society was to apportion these key functions among several parties, as follows:

A. The Ombudsperson would be responsible for: 1. Intake and Counselling and 5. Reporting

B. A Panel of Independent Mediators would be responsible for: 2. Mediation

C. The Law Society and the Ombudsperson would both be responsible for: 3. Education and 4. Program Design

From a practical perspective, the above responsibilities have not been apportioned to the intended parties.

With regard to education, the Law Society is not actively involved, other than to distribute model policies on demand. Further, from an operational side, it has become quite evident that it is very impractical to call on mediators from a roster. When a situation demands attention, it is on an expedited and immediate basis. Further, no evidence exists to date that there is a need for a mediator on a regular basis. For example, over the last two years mediators were called on four occasions but they were unavailable due to various reasons: delay in returning the call; a conflict made them unable to represent the client; one did not have the capacity to take the work; and another was on vacation. Accordingly, it was concluded that it was challenging to retain a qualified mediator with the requisite expertise, in an appropriate length of time. The costs and inefficiencies to retain a mediator to address highly stressed, emotional and potentially explosive situations was also a concern and consequently the Ombudsperson has been directly handling the conflict by using her mediation skills. As a result, all components of the Program are currently being handled, primarily, by the Ombudsperson.

i) **Description of Service since 2006**

The Equity Ombudsperson:

- provides confidential, independent and neutral assistance to lawyers, support staff working for legal employers, articling students and clients who have concerns about any kind of discrimination or harassment. The Ombudsperson **does not** disclose to anyone, including the Law Society, the identity of those who contact her about a complaint or the identity of those about whom complaints are made;

- provides mediation services to law firms when required to resolve conflict or issues on an informal and confidential basis;

- is available to the Law Society as a general source of information on issues of discrimination and harassment as it relates to lawyers and staff who are engaged in the practice of law. From a practical perspective, the Ombudsperson is available to provide information generally, where relevant, to any Law Society task force, committee or initiative on the forms of discrimination and harassment;

- delivers information sessions on the Program to PLTC students, law students, target groups, CBA sub-section meetings and other similar events;

- provides an annual report to the Law Society. The reporting consists of a general statistical nature in setting out the number and type of calls received;

- liaises with the Law Society policy lawyer, Susanna Tam, in order to keep her informed of the issues and trends of the Program; and

- provides feedback sheets for the Program to callers who have accessed the service.

ii) **Objective of the Program**

The objective of the Program is to resolve problems. In doing so, the Equity Ombudsperson maintains a neutral position and does not provide legal advice. She advises complainants about the options available to them, which include filing a formal complaint with the Law Society or with the Human Rights Tribunal; commencing a civil action, internal firm process, or having the Ombudsperson attempt to resolve informally or mediate a discrimination or harassment dispute.

The Equity Ombudsperson is also available to consult with and assist any private or public law office, which is interested in raising staff awareness about the importance of a respectful workplace environment. She is available to assist law firms in implementing office policies on parental leave, alternative work schedules, harassment and a respectful workplace. She can provide educational seminars for members of firms, be available for personal speaking engagements and informal meetings, or can talk confidentially with a firm about a particular problem. The services of the Equity Ombudsperson are provided free of charge to members, staff, articling students and law students.

Equity Ombudsperson programs have been a growing trend among Canadian law societies since 1995. Currently the Law Societies of British Columbia, Alberta, Manitoba, Ontario and Saskatchewan have Equity Ombudsperson type positions. The Nova Barristers' Society has a staff Equity Officer who fulfills a similar role.

As these law societies have established and publicized these services, it has assisted staff and lawyers, from a practical perspective, to access information and resources to assist them in learning about their options, so that they are in a position to consider and take the appropriate steps to deal with the issues of discrimination and harassment. Further, the establishment of the Program continues to send a positive and powerful reminder to the legal profession about the importance of treating everyone equally, with respect and dignity. Achieving this goal is crucial to ensure a respectful and thriving legal profession.

12000

→ TO: BILL MC FOR BOARDER INFO

THE LAW FOUNDATION OF BRITISH COLUMBIA

1340–605 Robson Street, Vancouver,
British Columbia, V6B 5J3 Canada
FAX 604/688-4586 • Phone 604/688-2337

May 30, 2011

Mr. Tim McGee
CEO and Executive Director
Law Society of BC
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear ~~Mr. McGee~~ Tim:

Re: Pro Bono Law in British Columbia

I am writing to report to you on the use of the Law Society's pro bono funds in 2010. This report details funds advanced during the year, as opposed to grants made during the year. This, I believe, provides a more accurate picture of funding activities as some grants are made covering multiple years (for example, a grant might be made in 2007 which provides funding to an organization for the period 2007 to 2010).

As you know, the Law Foundation has, since 2001, been funding pro bono activities of the legal profession in the province. It has supported, together with the Law Society and the Canadian Bar Association, the development of Pro Bono Law BC, which in 2010 merged with the Western Canada Society to Access Justice. It has funded a variety of projects related to pro bono activities, including the development of the pro bono web site, the development of a poverty law training program for pro bono lawyers, the creation of a disbursement fund to pay for the disbursements incurred by lawyers doing pro bono cases, non-profit law seminars and the development of a cross referral system for pro bono service providers.

At the Benchers meeting of November 10, 2006, the Benchers of the Law Society passed a motion authorizing an annual payment to the Law Foundation of 1% of the general fund portion of the annual practice fee to be distributed to organizations offering pro bono services to the public. In 2010, the amount received by the Law Foundation was $137,660.

Prior to 2006, the Law Foundation had funded a total of approximately $200,000 per year towards pro bono activities and committed to continuing to fund at least this amount out of its own, non-Law Society funds, in the future.

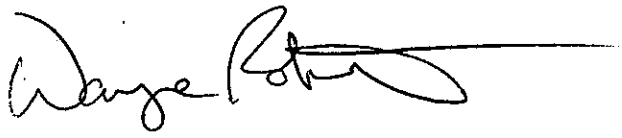
I am pleased to report to you that, in 2010, with this support from the Law Society, the Law Foundation was able to provide funding totalling $568,384 to pro bono organizations (if you include the Law Students Legal Assistance Program at UBC (LSLAP) and the Law Centre at the University of Victoria (UVic) the figure grows to $1,095,104, with those two programs receiving $166,920 and $359,800 respectively). Breakdowns of funding to, and statistics from, pro bono organizations in 2010 are attached.

As you will see from the attached statistics, there are a significant number of lawyers involved in pro bono activities in the province. There are a significant number of clients served. The profession can be proud of the pro bono contribution its members make.

On behalf of the Law Foundation, I want to thank you and the Benchers of the Law Society for your support of this important initiative.

I trust you will find the above in order. If you have any questions or comments, I can be reached at wrobertson@tlfbc.org or 604-688-7360.

Yours truly,



Wayne Robertson
Executive Director

cc: Bill McIntosh, Manager, Executive Support

W:\PROJECTS\Pro Bono Report to Law Society\ltr McGee Pro Bono Feb 11.doc

Pro Bono Projects and Programs **funded in 2010**:

Access Pro Bono Society of BC
- $292,500 Operating Grant
- $15,000 Non Profit Law Seminars 2009; and
- $42,857 Civil Chambers Pro Bono Duty Counsel Project Extension

Western Canada Society to Access Justice:
- $75,000 Access Justice Pro Bono Clinic Enhancement Project

Salvation Army (SA): $50,000 Pro Bono Program

Multiple Sclerosis Society (MS): $50,000 Volunteer Legal Advocacy Program

Pro Bono Students Canada – UBC (PBS-UBC): $24,360 Community Placement Project

Pro Bono Students Canada – UVic (PBS-UVic): $18,667 Student Placement Program

Statistics
Pro Bono Activities by Lawyers and Law Students in British Columbia
2010

Total number of lawyers participating in formal Pro Bono programs:

SA	*APB	MS	LSLAP	Total
300	544	37	80	961

Number of lawyers volunteering in clinics:

SA	*APB	LSLAP	Total
232	498	80	810

Number of lawyers volunteering on roster programs:

*APB	MS	Total
46	37	83

Number of law students volunteering:

LSLAP	UVic	PBS-UBC	PBS-UVic	Total
200	42	48	45	290

Number of clinic locations:

SA	*APB	LSLAP	Total
23	92	23	138

Total number of clients served by clinics:

SA	*APB	LSLAP	UVic	Total
1,900	3,438	2,509	1,779	9,626

Number of clients served by roster programs:

*APB	MS	Total
159	27	186

Number of community organizations served:

PBS-UBC	PBS-UVic	Total
24	11	35

Number of lawyers volunteering on the Civil Chambers Pro Bono Duty Counsel project (APB) : 64

Number of clients served by the Civil Chambers Pro Bono Duty Counsel project: 258

* all numbers for APB reflect the period April 1, 2010 - December 31, 2010