The Law Society of British Columbia

AGENDA

MEETING: Benchers

DATE: Friday, July 15, 2011

TIME: **7:30 a.m.** Continental breakfast
8:30 a.m. Meeting begins

PLACE: **Bencher Room**

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 June 18, 2011 meeting** • Draft minutes of the regular session • Draft minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
2	**Act & Rules Subcommittee: Amendments to Rule 4-43 (investigations of books and accounts)** • Memorandum from Mr. Hoskins for the Act & Rules Subcommittee	Tab 2 p. 2000
3	**Act & Rules Subcommittee: Amendments to Rule 5-4 (cross-examination of applicant or respondent)** • Memorandum from Mr. Hoskins for the Act & Rules Subcommittee	Tab 3 p. 3000
4	**External Appointments: Appointments to the Board of Directors of the Legal Services Society and the QC Appointments Advisory Committee** • Memorandum from the Executive Committee	Tab 4 p. 4000
5	**For Bencher Approval: Finance Committee Recommendations for Changes to the Executive Limitations** • Memorandum from the Finance Committee	Tab 5 p. 5000
REGULAR AGENDA		
6	**President's Report** • Written report to be distributed electronically prior to meeting	
7	**CEO's Report** • Written report to be distributed electronically prior to meeting	
8	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	

GUEST PRESENTATION		
9	**Rural Education and Access to Lawyers Initiative (REAL): Funding** Presentation by CBABC Secretary Treasurer Kerry Simmons and Executive Director Caroline Nevin • May 20, 2011 letter from Ms. Simmons to Mr. LeRose	Tab 9 p. 9000
2009-2011 STRATEGIC PLAN IMPLEMENTATION *(FOR DISCUSSION AND/OR DECISION)*		
10	**2011 Advisory Committees: Mid-year Updates** Mr. Brun, Ms. Lindsay, Ms. O'Grady and Mr. Vertlieb to report • Reports from the Access to Legal Services, Equity and Diversity, Independence and Self-Governance and Lawyer Education Advisory Committees	Tab 10 p. 10000
2012-2014 STRATEGIC PLAN DEVELOPMENT *(FOR DISCUSSION AND/OR DECISION)*		
11	**2012-2014 Strategic Planning** Mr. McGee and Mr. Lucas to report • Memorandum from Mr. Lucas	Tab 11 p. 11000
OTHER MATTERS *(FOR DISCUSSION AND/OR DECISION)*		
12	**Finance Committee: Approval of 2012 Fees** Mr. LeRose to report • Report from the Finance Committee	Tab 12 p. 12000
13	**Commitment to "Complete the Ladder Cycle" from Candidates for Benchers' Nomination for Second Vice-President: for Discussion** Mr. Vertlieb to report • Memorandum from the Executive Committee	Tab 13 p. 13000
14	**Cloud Computing Working Group** Mr. Hume to report • Final Report from the Cloud Computing Working Group	Tab 14 p. 14000
15	**Family Law Task Force: Best Practice Guidelines** Ms. Hickman to report • Final Report from the Family Law Task Force	Tab 15 p. 15000

FOR INFORMATION ONLY		
16	**FLSC Council Update** Mr. Hume to report • FLSC President's Report to the Law Societies (Council Meeting – June 2011)	Tab 16 p. 16000
IN CAMERA SESSION		
17	**LSBC Litigation Report** Ms. Armour to report • Report on LSBC Litigation Outstanding at June 30, 2011	Tab 17 p. 17000
18	**Bencher Concerns**	

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Saturday, June 18, 2011

PRESENT:

Gavin Hume, QC, President
Bruce LeRose, QC, 1st Vice-President
Art Vertlieb, QC, 2nd Vice-President
Haydn Acheson
Rita Andreone
Satwinder Bains
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
Nancy Merrill
David Mossop, QC
Suzette Narbonne
Thelma O'Grady
Lee Ongman
Gregory Petrisor
David Renwick, QC
Claude Richmond
Alan Ross
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Kenneth Walker

ABSENT: Kathryn Berge, QC

STAFF PRESENT:

Deborah Armour
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Alan Treleaven
Adam Whitcombe

GUESTS:

The Honourable Barry Penner, QC, Attorney General of BC
Allan Fineblit, QC, Chief Executive Officer, Law Society of MB
Jonathan Herman, Chief Executive Officer, Federation of Law Societies of Canada
John Hunter, QC, Federation of Law Societies of Canada Council Representative
Ronald MacDonald, QC, President, Federation of Law Societies of Canada
Darrel Pink, Executive Director, Nova Scotia Barristers' Society
Stephen Raby, QC, President-elect, Law Society of AB
Don Thompson, QC, Executive Director, Law Society of AB
Frederica Wilson, Director, Policy and Public Affairs, Federation of Law Societies of Canada

Mr. Hume welcomed the Honourable Barry Penner, QC, Attorney General of BC, the representatives of the Federation of Law Societies, the Law Societies of Alberta., Manitoba, Saskatchewan and Upper Canada, and the Nova Scotia Barristers' Society.

Mr. Penner extended greetings on behalf of the province and thanked the Benchers for their hospitality. Mr. Penner reported that 15 bills were passed in the Spring 2011 legislative session, and advised that planning for the fall 2011 legislative session is well advanced.

Mr. Penner noted that the proposed new *Family Law Act* is a key government priority for the fall session, and aligns with various Law Society initiatives to enhance access to legal services. The Honourable Attorney General confirmed that the government will likely delay implementation of a related plan for regulating family lawyers by six to nine months, pending completion and launch of various communication and continuing legal education initiatives.

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on May 13, 2011 were approved as circulated.

Consent Resolutions

The following resolutions were passed unanimously and by consent.

2. Act & Rules Subcommittee: Proposed Amendments

a. Rules Governing Appointments to Regulatory Committees (allowing non-lawyer, non-Bencher appointments)

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".

b. Rule 1-39 (Executive Committee Elections)

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

3. Professional Conduct Handbook: Amendments to Chapter 4, Rule 6 (Fraudulent Conveyances)

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."

REGULAR AGENDA – for Discussion and Decision

4. 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. May 18, 2011 (Law Society Legislative Amendments Package Update)

Mr. Hume reported that he and Mr. McGee recently met with John Les, Parliamentary Secretary to the Premier for a productive discussion of the Law Society's pending package of requested amendments to the *Legal Profession Act*.

b. May 19, 2011(Access to Justice Forum)

Mr. Hume reported on his attendance at a weekly meeting of the Access to Justice Forum Steering Committee. He noted that a subcommittee has been struck to develop content for the

forum to be held this fall: the Law Society's Michael Lucas (Manager, Policy & Legal Services) and Doug Munro (Staff Lawyer) have been appointed to the subcommittee.

c. May 20, 2011 (Regional Bar Admission and Call Ceremony)

Mr. Hume reported on his attendance at a bar admission and call ceremony in New Hazelton, BC with Bencher Kathryn Berge, QC, Kamloops, appointed Bencher Benjimen Meisner, Life appointed Bencher Patrick Kelly and Life Bencher Ronald Toews, QC.

d. June 6-7, 2011 (Federation of Law Societies of Canada)

Mr. Hume reported on his attendance in Ottawa at a Federation Council meeting (June 6) and at a Federation Model Code of Conduct Standing Committee.

5. CEO's Report

In Mr. McGee's absence, Mr. Hume provided highlights of the CEO's monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

a. 2012 Budget and Fees

b. 2010 Annual Review

c. Recruiting for New Hearing Panel Pools

d. Core Process Review Recommendations Implementation - Electronic Documents and Records Management

e. Communications and Media

f. Policy for Law Society Participation in Charity Events

g. Thank You – PLTC Teachers

6. Report on Outstanding Hearing and Review Reports

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

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

7. Discipline Guidelines Task Force Recommendations

Mr. Van Ommen, chair of the Discipline Guidelines Task Force, briefed the Committee on the Task Force's Interim Report (at page 5000 of the meeting materials), including the *Conduct Assessment and Disposition Guidelines* (the Guidelines), prepared for recommendation to the Benchers. Mr. Van Ommen advised that the Task Force's proposed Guidelines are being issued following a significant consultation process. He noted that, rather than advocating a rigid association of categories of misconduct with specific disciplinary responses, the Guidelines propose a principle-based approach, taking account of

relevant circumstances while evaluating each case on its own merits. Mr. Van Ommen noted in particular the inclusion of the following principles:

- the application of progressive discipline where appropriate
    - the idea that it may be appropriate for a lawyer to receive more significant disciplinary responses if the lawyer's conduct results in a series of referrals to the discipline committee
        - i.e. conduct meeting / conduct review / citation
- the concept of public interest paramountcy
    - the Discipline Committee's decisions should be made in the public interest
    - where a discipline violation can be proven, any measure less than the issuance of a citation must be consistent with the public interest
- the adoption of a citation threshold taking into account evidence and proof
    - is there a reasonable prospect that the lawyer would receive an adverse determination following a hearing?
    - Law Society staff will focus on the availability and admissibility of potential evidence throughout the conduct of the file

Mr. Van Ommen thanked Staff Lawyer Lance Cooke for his excellent work in supporting the task force's deliberations and leading the drafting of its report. Mr. Van Ommen also acknowledged the valuable contributions of the members of the task force: Bencher David Crossin, QC (2011), Past-President Anna Fung, QC (2010-2011), appointed Bencher Stacy Kuiack (2010-2011) and Past-President John Hunter, QC (2010).

Mr. Van Ommen moved (seconded by Mr. Crossin) that the Benchers accept the Interim Report of the Discipline Guidelines Task Force and adopt the *Conduct Assessment and Disposition Guidelines* contained therein.

The key points made in the ensuing discussion were:

- the Guidelines should be implemented as soon as practically possible and then reviewed in a couple of years
- future iterations of the Guidelines should address the interplay of the Discipline and Practice Standards Committees and their protocols
- the Guidelines should be communicated to the profession and to the public

The motion was carried.

Mr. Crossin noted that the task force's report and guidelines reflect the synthesis of wide-ranging and valuable input from task force members and others, made possible by Mr. Van Ommen's leadership as task force chair.

Mr. Van Ommen moved (seconded by Mr. Kuiack) that the Discipline Guidelines Task Force be dissolved.

The motion was carried.

OTHER MATTERS (FOR DISCUSSION AND/OR DECISION)

8. Act & Rules Subcommittee: Proposed Amendments to Rule 3-5 (Investigation of Complaints)

Mr. Getz briefed the Benchers on proposed amendments to Rule 3-5, referring them to Mr. Hoskins's memorandum (at page 8000 of the meeting materials) for explanation of the purpose and intended result of the proposed amendments to the rules governing investigations:

- 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

Ms. Armour advised that the proposed amendments to the Rules dovetail well with the purpose and effect of the *Conduct Assessment and Disposition Guidelines*: making investigations more robust and fair, and clarifying the Law Society's current investigative authority. Ms. Armour also noted that the proposed Rules amendments comprise a subset of proposed amendments to the *Legal Profession Act*, which were submitted to the provincial government last year and which the Society understands are unlikely to come before the Legislature until 2012.

Mr. Getz moved (seconded by Ms. Andreone) that the Benchers adopt the suggested resolution set out at pages 8016-8017 of the meeting materials (Appendix 2 to these minutes).

The motion was carried by more than a two-thirds majority of the Benchers present.

9. Election of Benchers' Nominee for 2012 Second Vice-President: Candidates' Entry Deadline

Mr. Hume reported that to date Jan Lindsay, QC is the sole Bencher to have declared her candidacy for election as the Benchers' nominee for 2012 Second Vice-President-elect. Mr. Hume then confirmed that in the absence of additional candidates, a motion to declare Ms. Lindsay's acclamation was in order.

Mr. LeRose moved (seconded by Ms. O'Grady) that Westminster County Bencher Jan Lindsay, QC be acclaimed as the Benchers' nominee for 2012 Second Vice-President-elect, to be presented as such at the Law Society's 2011 Annual General Meeting.

The motion was carried.

FOR INFORMATION ONLY

10. Federation of Law Societies of Canada (FLSC) Reports

a. FLSC 2011 Update

CEO Jonathan Herman presented the Benchers with an overview of FLSC's structure, noting that as a creation of its member law societies, the Federation serves as their collective branch office and exists at their pleasure. Mr. Herman also noted the strong contributions of the Law Society and its representatives to the leadership, governance and policy work of the Federation.

President Ronald MacDonald, QC also acknowledged the valued contributions of the Federation's member societies and their representatives, thanking Mr. Hume in particular for his contributions to the implementation of the Model Code of Conduct. Mr. MacDonald thanked the Law Society for its hospitality and congratulated the Benchers and staff on the value of yesterday's policy workshop (*The Future of Legal Regulation in British Columbia*), describing the session as demonstration of the potential for growth in Canadian legal regulation.

Mr. MacDonald outlined the Federation's current priorities as including:

- development of national standards for admission of new lawyers, accreditation of foreign-trained lawyers, Common law degrees, and discipline of practising lawyers
- enhanced national access to legal services
- completion of a major reorganization of CanLII
- maintaining active liaison with the international legal community (particularly the International Bar Association) on behalf of Canadian law societies

Mr. MacDonald closed by describing the Federation as a legal microcosm of Canada itself: a voluntary, diverse, commonality, coming together to develop the best possible way to regulate Canadian lawyers in the public interest.

b. FLSC Council Update

Mr. Hume briefed the Benchers as the Law Society's member of the Federation Council, reporting on the June 6, 2011 Council meeting in Ottawa.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

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The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

June 18, 2011

Introduction

My report this month includes updates on a number of ongoing matters as well as some encouraging news on the media front. I will not be attending the Bencher meeting this month as I will be attending my son Fraser's high school graduation that morning. If you have any questions or comments on anything in my report please don't hesitate to let me know.

1. 2012 Budget and Fees

The Finance Committee, chaired by Bruce LeRose, QC, met three times during May and June to review the proposed 2012 Law Society budgets and member fees. The meetings included a detailed review of the main expense items by category as well as an analysis of management's revenue assumptions and projections for 2012. The Committee also heard from representatives from the Lawyers Assistance Program and Courthouse Libraries BC, two major external organizations that receive sustaining funding through the Law Society. This year the Committee also heard from representatives of the CBABC branch regarding the REAL (Rural Education and Access to Lawyers) program regarding the future plans and funding needs of that program.

The Committee has concluded its work and its recommendations will be presented to the Benchers at the July 2011 Benchers' meeting.

2. 2010 Annual Review

The Law Society's 2010 Annual Review has been distributed electronically to all members and is now available on our website. Electronic copies will be circulated to interested parties, all provincial MLAs, and Law Society staff shortly. In consideration of cost-savings and our environmental footprint, the Annual Review is only available in electronic form this year.

The 2010 Annual Review includes:

- Highlights of the year – the core process review, our event in support of Aboriginal lawyers and law students, new governance policies, and more
- Strategic goals update – 95% of our strategic plan is either complete or in progress
- An evaluation of core regulatory operations – we met or exceeded almost all of the targets in our key performance measures

If you have not yet had an opportunity to read the Annual Review, I encourage you to do so. We welcome your feedback at rcrisanti@lsbc.org.

3. Recruiting for New Hearing Panel Pools

We have received a tremendous response to our advertisements seeking lawyer and non-lawyer applicants to participate in our Hearing Panels. To date, over 130 lawyers have applied, and a subcommittee of the Executive Committee (chaired by our President, Gavin Hume, QC and staffed by Jeff Hoskins, QC, Tribunal and Legislative Counsel) has narrowed down the applicants to between 25 and 30. The number of non-lawyer applications is growing hourly, with nearly 200 applications received as of June 10. The closing date for those interested is June 30.

The subcommittee will meet early in July to finalize the lawyer list and to work out a method for narrowing down the non-lawyer applicants. The subcommittee should have a final recommendation for both lawyer and non-lawyer candidates by the August 25 Executive Committee meeting.

4. Core Process Review Recommendations Implementation - Electronic Documents and Records Management

As I mentioned in my April 2011 CEO report, a major finding of the Core Process Review was that we rely heavily on the creation, storage and retrieval of data, and on the exchange of relevant, accurate information across our various departments, but that we do not have an integrated system for information management to support that need.

In response, we created an internal working group co-chaired by Adam Whitcombe, Chief Information and Planning Officer, and Jeanette McPhee, Chief Financial Officer, which has been charged with developing an information management solution for the Law Society. The first phase of the project is a detailed needs analysis and the working group has retained KPMG to assist with this. KPMG has reviewed more than 1,500 pages of Law Society policies, manuals and technical documents and completed two full days of interviews with managers and staff. Based on the review and interviews, KPMG is preparing a report that will be completed this month, with a final report expected by June 30, 2011. The report is expected to provide an information management analysis along with recommendations regarding solutions and next steps.

Following receipt of the report, senior management will review the recommendations and are expected to move to the second phase of the project, involving identification of solution providers and development of a

detailed implementation plan, in the fall of this year and into 2012. I will continue to keep the Benchers updated on developments as we move forward with this project.

5. Communications and Media

The Law Society will host its annual Law and the Media workshop on June 22, 2011. This year's workshop will explore the legal implications of social media and other "new" media technology for journalism and will feature panelists that include Kim Bolan, Vancouver Sun reporter; media lawyers Dan Burnett and Robert Anderson, QC; the Honourable Mr. Justice Geoffrey Gaul, BC Supreme Court Judge; and Theresa Lalonde, social media trainer and CBC Radio and TV reporter. For the first time, we will offer the workshop at the Law Society in the Benchers Room and it will be offered to journalists throughout the province via teleconference.

We have been the beneficiaries of positive comments from a number of sources in recent weeks, including a national newspaper editorial, comments from key media personalities and responses to our forays into alternative media (Twitter and RSS feeds). Of particular note is the following article by Mitch Kowalski:

> British Columbia's Law Society has always seemed to me to be the most progressive in terms of service to its members and its attitude of making the legal profession function better. Ontario has a great deal to learn from B.C. in this regard.
>
> Now LSBC is calling for non-lawyers to be part of disciplinary and other hearings. Currently in B.C., like other provinces, non-lawyers are appointed to the Law Society's governing body (called Benchers), so this new movement to having non-lawyer non-bencher appointments is quite radical and refreshing.
>
> Good luck B.C.! I look forward to watching the results of this experiment.
>
> Kowalski, Mitch. ""Non-lawyers to judge British Columbia lawyers" *Financial Post* 3 June 2011: n. page. Web.

In general, the Law Society has been acknowledged for being progressive, effective and working in the public interest. Some, but not all, of the comments were related to our invitation to the public to apply to our hearing panel pools. This sentiment was enhanced by Gavin Hume, QC's related interviews with CBC Radio, which were very well done.

The Law Society has been recognized for communications excellence by the International Association of Business Communicators for last June's Aboriginal networking event, Inspiring Stories Connecting Future Leaders. Specifically, the award has been given to Dana Bales, Communications Officer, and Susanna Tam, Staff Lawyer, Policy & Legal Services. Congratulations to Dana and Susanna!

6. Policy for Law Society Participation in Charity Events

The Law Society receives numerous requests to participate in charity events throughout the year, and, where the event aligns with the Law Society's mandate and/or strategic goals, we are pleased to support those events by purchasing a table or tickets.

In order to ensure a strong, visible Bencher presence at the charity events that the Law Society supports, we have adopted a new policy for participation. Before purchasing a table or tickets for an event, Diana Papove, Project Coordinator, will canvass the Benchers to see who is available to attend and will only purchase a table if it can be filled. Where only individual tickets to an event are available, Diana will arrange for tickets for those Benchers who have confirmed they can attend the event.

7. Thank You – PLTC Teachers

Thank you to the following Benchers and Life Benchers who taught Professional Responsibility to PLTC on May 27, 2011:

Vancouver:
Anna K. Fung, QC
Gavin Hume, QC
David Mossop, QC
Thelma O'Grady
Alan Ross
Gordon Turriff, QC

Victoria:
Richard Margetts, QC
Richard Stewart, QC

Timothy E. McGee
Chief Executive Officer

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

Memo

The Law Society of British Columbia

To Benchers

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

Date July 4, 2011

Subject **Privacy provisions in Rule 4-43**

The Problem

As Rule 4-43 reads there is potentially some interpretation ambiguity that it would be desirable to resolve. The policy concept behind the work of the Mirror Imaging Working Group recognized that making an electronic copy of computer records very often results in the capture of both relevant records and irrelevant private/personal records. In light of this, a process was required to reduce the chance that the LSBC was accessing personal information that is not relevant to the investigation of the lawyer. A means of adjudicating claims of privacy interest in material that is copied in the course of the investigation was also mandated.

Rule 4-43(1.1)(b) requires an order under the rule to provide for a method of resolving disputes related to an order made under this Rule. This is broader than establishing the intended process that would give Law Society investigators access to information relevant to the investigation but not electronic records that contain private information that is not relevant to the investigation. Arguably, it requires a process for all records and for all disputes. This unnecessarily complicates the process.

The Solution

Attached are clean and redlined versions of proposed amendments to improve the current Rule as amended in December 2010. The Act and Rules Subcommittee recommends that the amendments be adopted. Also attached is a suggested resolution to give effect to the proposed changes.

The attached draft addresses the shortcomings of the current Rule as follows:

- In subrule (1), the phrase "in the possession of" is removed to make the description of the relevant electronic records parallel to the description of the general records: "of the lawyer or former lawyer," which has long been part of

Rule 4-43. This phrase also leaves out electronic records belonging to the lawyer but not in his or her immediate possession;

- Subrule (1.1) is intended to make it clear that copying and production of electronic records is to take place before any questions of privacy and relevance are considered;

- Subrule (1.1) puts the discussion in the form of a request from the subject lawyer;

- The request pertain to a specific record or records, and exclusion is only available for records that are both personal and irrelevant to the investigation;

- Subrule (1.2) gives a little structure to the request process, requiring that it be made in writing and within seven days of the commencement of the investigation;

- Subrule (1.3) limits the requirement to provide a dispute resolution process to those 4-43 orders that permit copying of electronic records;

- The phrase "evaluating and adjudicating exclusion requests" replaces "resolving disputes", making the process appear less contentious than the previous language would suggest.

JGH
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Attachments: draft rule amendments
suggested resolution

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Investigation of books and accounts

4-43 (1) If the chair of the Discipline Committee reasonably believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer, including, if considered desirable in the opinion of the chair, all electronic records ~~in the possession~~ of the lawyer or former lawyer.

(1.1) When electronic records have been produced or copied pursuant to an ~~An~~ order under this Rule, the lawyer concerned may request that a specific record be excluded from the investigation on the basis that it contains personal information that is not relevant to the investigation.~~must provide for~~

(1.2) The lawyer must make a request under subrule (1.1) in writing to a person designated under subrule (2) within 7 days of receiving a copy of the order under this rule.

(~~a~~1.3) An order under this rule that permits the production or copying of ~~the protection of the privacy interests of any person in~~ electronic records ~~produced or copied under this Rule that are not related to the matter under investigation, and~~

~~(b)~~ must provide for a method of ~~resolving disputes related to an order made under this Rule~~evaluating and adjudicating exclusion requests made under subrule (1.1).

(2) When an order is made under subrule (1),

(a) the Executive Director must designate one or more persons to conduct the investigation, and

(b) the lawyer or former lawyer concerned must

(i) immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence regardless of the form in which they are kept,

(ii) provide any explanations that the persons designated under paragraph (a) require for the purpose of the investigation,

(iii) assist the persons designated under paragraph (a) to access, in a comprehensible form, records in the lawyer's possession or control that may contain information related to the lawyer's practice by providing all information necessary for that purpose, including but not limited to

(A) passwords, and

(B) encryption keys, and

(iv) not alter, delete, destroy, remove or otherwise interfere with any book, record or account within the scope of the investigation without the written consent of the Executive Director.

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Investigation of books and accounts

4-43 (1) If the chair of the Discipline Committee reasonably believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer, including, if considered desirable in the opinion of the chair, all electronic records of the lawyer or former lawyer.

(1.1) When electronic records have been produced or copied pursuant to an order under this Rule, the lawyer concerned may request that a specific record be excluded from the investigation on the basis that it contains personal information that is not relevant to the investigation.

(1.2) The lawyer must make a request under subrule (1.1) in writing to a person designated under subrule (2) within 7 days of receiving a copy of the order under this rule.

(1.3) An order under this rule that permits the production or copying of electronic records must provide for a method of evaluating and adjudicating exclusion requests made under subrule (1.1).

(2) When an order is made under subrule (1),

(a) the Executive Director must designate one or more persons to conduct the investigation, and

(b) the lawyer or former lawyer concerned must

(i) immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence regardless of the form in which they are kept,

(ii) provide any explanations that the persons designated under paragraph (a) require for the purpose of the investigation,

(iii) assist the persons designated under paragraph (a) to access, in a comprehensible form, records in the lawyer's possession or control that may contain information related to the lawyer's practice by providing all information necessary for that purpose, including but not limited to

(A) passwords, and

(B) encryption keys, and

(iv) not alter, delete, destroy, remove or otherwise interfere with any book, record or account within the scope of the investigation without the written consent of the Executive Director.

FORENSIC COPYING

SUGGESTED RESOLUTION:

BE IT RESOLVED to rescind Rule 4-43(1) and (1.1) and substitute the following:

(1) If the chair of the Discipline Committee reasonably believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer, including, if considered desirable in the opinion of the chair, all electronic records of the lawyer or former lawyer.

(1.1) When electronic records have been produced or copied pursuant to an order under this Rule, the lawyer concerned may request that a specific record be excluded from the investigation on the basis that it contains personal information that is not relevant to the investigation.

(1.2) The lawyer must make a request under subrule (1.1) in writing to a person designated under subrule (2) within 7 days of receiving a copy of the order under this rule.

(1.3) An order under this rule that permits the production or copying of electronic records must provide for a method of evaluating and adjudicating exclusion requests made under subrule (1.1).

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Memo

The Law Society of British Columbia

To Benchers

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

Date July 4, 2011

Subject **Cross-examination of witnesses under Rule 5-4**

Rule 5-4 and section 41 of the *Legal Profession Act* permit a hearing panel to order that a respondent to a citation or an applicant for enrolment, call or reinstatement give evidence in the hearing. That rule is seldom used, but when it has been used in the past, it has sometimes become an issue whether Law Society counsel is entitled to cross-examine the witness as of right, or if it is necessary to establish that the witness is hostile. Under the new Supreme Court Civil Rules, a party may call an opposing party as a witness on proper notice and payment of the required fees, and the opposing party may be cross-examined as of right. It is a reasonable assumption that the opposing party will be hostile, at least in the sense of adverse in interest.

It seems reasonable for the Law Society Rules to make that assumption and indicate that a respondent or applicant subject to an order under Rule 5-4 may be cross-examined by Law Society counsel.

Attached are clean and redlined versions of a draft amendment that would accomplish that end. The Act and Rules Subcommittee has considered the proposed amendment and recommend its adoption to the Benchers. A suggested resolution that would have that effect is also attached.

Background

Section 41(2) of the *Legal Profession Act* allows a panel to make an order to require an applicant or respondent, or a person in authority in a respondent law corporation, to give evidence or produce files and records. This is the provision:

Panels

41 (2) A panel may order an applicant or respondent, or a shareholder, director, officer or employee of a respondent law corporation, to do either or both of the following:

(a) give evidence under oath or by affirmation;

(b) at any time before or during a hearing, produce all files and records that are in the possession of that person and that may be relevant to a matter under consideration.

Rule 5-4 reproduces much of the content of the section, I suppose to keep it with other procedural provisions in the Rules. This is that provision.

Compelling witnesses and production of documents

5-4 A panel may

(a) compel the applicant or respondent to give evidence under oath, and

(b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that are in the applicant's or respondent's possession or control that may be relevant to the matters raised in the citation.

Suggested amendment

The attached rule amendments and resolution would broaden the Rule to apply to people associated with a law corporation to make it consistent with the section.

Although the rule otherwise applies to applicants for admission, etc., paragraph (b) refers to records "that may be relevant to the matters raised in the citation," leaving out an application forming the basis for a credentials hearing. The draft rule amendment adds a reference to matters raised by an application.

While "in" may be the correct preposition in the case of a citation, since the Law Society must prove what is alleged within the four corners of the citation, in the case of credentials, it is fair to say matters raised "by" the application because the scope of the inquiry is much broader. The Law Society may raise issues that are only suggested by the application.

A subrule is added to resolve the controversy over whether the witness can be cross-examined from the outset.

JGH
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Attachments: draft rule amendments
suggested resolution

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Compelling witnesses and production of documents

5-4 (1) In this Rule **"respondent"** includes a shareholder, director, officer or employee of a respondent law corporation.

(2) A panel may

(a) compel the applicant or respondent to give evidence under oath, and

(b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that are in the applicant's or respondent's possession or control that may be relevant to the matters raised by the application or in the citation.

(3) A person who is the subject of an order under subrule (2)(a) may be cross-examined by counsel representing the Society.

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Compelling witnesses and production of documents

5-4 (1) In this Rule **"respondent"** includes a shareholder, director, officer or employee of a respondent law corporation.

(2) A panel may

(a) compel the applicant or respondent to give evidence under oath, and

(b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that are in the applicant's or respondent's possession or control that may be relevant to the matters raised by the application or in the citation.

(3) A person who is the subject of an order under subrule (2)(a) may be cross-examined by counsel representing the Society.

CROSS-EXAMINATION

SUGGESTED RESOLUTION:

BE IT RESOLVED to rescind Rule 5-4 and substitute the following:

Compelling witnesses and production of documents

5-4 (1) In this Rule **"respondent"** includes a shareholder, director, officer or employee of a respondent law corporation.

(2) A panel may

(a) compel the applicant or respondent to give evidence under oath, and

(b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that are in the applicant's or respondent's possession or control that may be relevant to the matters raised by the application or in the citation.

(3) A person who is the subject of an order under subrule (2)(a) may be cross-examined by counsel representing the Society.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Memo

The Law Society of British Columbia 4000

To: The Benchers

From: The Executive Committee

Date: July 6, 2011

Subject: Recommendations for Bencher Appointments to the Legal Services Society Board of Directors and the QC Appointments Advisory Committee

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1. Legal Services Society (LSS) Board of Directors

Law Society member, appointed by: Benchers, after consultation with CBABC Executive

Current Appointments	Term Allowance	Number of Terms Already Served	Date First Appointed	Expiry Date
David Crossin, QC	2 years per term, maximum of 6 years	1	9/7/2007	9/6/2011
Thomas Christensen	2 years per term, maximum of 6 years	0	9/7/2009	9/6/2011

Background

The terms of David Crossin and Tom Christensen on the LSS Board of Directors expire on September 6, 2011. Mr. Crossin is completing his second two-year term and recently was elected Chair of the Board of Directors. Mr. Christensen is completing his first two-year term and currently is a member of the Executive Committee and Stakeholder Engagement Committee, and recently was elected Vice-Chair of the Board of Directors.

Both Mr. Crossin and Mr. Christensen

- are eligible for re-appointment to the LSS Board
- have expressed their willingness to accept another two-year term if re-appointed
- would be welcomed by the LSS Board and senior management if re-appointed.

Letters of recommendation for and biographies of Mr. Crossin (Tabs 1a and 1b) and Mr. Christensen (Tabs 2a and 2b) have been sent to Mr. Hume and are attached.

Assessment

The credentials of Mr. Crossin and Mr. Christensen are well-known to the Committee and to the Benchers. From their respective letters of recommendation:

Mr. Christensen

[T]he Legal Services Society is facing significant challenges in meeting demand for services. Per capita legal aid funding from government is lower than it was 15 years ago and is far below the national; average. In these circumstances the board feels that the reappointment of Mr Christensen would add an important element of continuity and a specific expertise that will support the board's commitment to effective governance of the Legal Services Society and its priority of building political support for better funding.

Mr. Crossin

[T]he Legal Services Society faces significant challenges as it struggles to provide much needed services to low- income people in BC with provincial funding that is significantly below Canada's per capita average. That said the Board continues to press forward with a number of strategic initiatives that are intended to support greater efficiency and effectiveness in the justice system and to build a broader base of support for legal aid funding. Mr. Crossin is directly engaged in these efforts and his re-appointment will permit the Society to secure the benefit of his leadership for the next two years.

Executive Director Mark Benton, QC has advised that Mr. Christensen and Mr. Crossin scored highly in their recently completed LSS Board performance reviews, have skill sets, experience and leadership qualities ideally suited to LSS's governance and strategic needs, and enjoy the full confidence of LSS senior management.

That both Mr. Crossin and Mr. Christensen are willing to continue to serve in leadership roles on this important board in the current difficult environment is telling. That the LSS Board and senior management cite such specific and valuable aspects of their experience and leadership in welcoming their re-appointment, and that they have both recently been elected to senior leadership roles by their LSS Board colleagues is persuasive.

Recommendation

With the support of the Executive Committee of the Canadian Bar Association, BC Branch, the Executive Committee recommends that the Benchers re-appoint Mr. Crossin and Mr. Christensen to the LSS Board of Directors for two-year terms effective September 7, 2011.

2. QC Appointments Advisory Committee (Bencher Appointment)

Background

Each year the President and another member of the Law Society appointed by the Benchers participate in an advisory committee that reviews all applications for

appointment of Queen's Counsel, and recommends deserving candidates to the Attorney General. The Benchers' usual practice, on the Executive Committee's recommendation, is to appoint the First Vice-President.

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

Recommendation

The Executive Committee recommends that the Benchers appoint First Vice-President LeRose to join President Hume as the Law Society's representatives on the 2011 QC Appointments Advisory Committee.

Legal Services Society

Providing legal aid in British Columbia since 1979

Suite 400
510 Burrard Street
Vancouver, BC V6C 3A8

Tel: (604) 601-6000
Fax: (604) 682-0914
www.lss.bc.ca

Executive Office

June 10, 2011

Mr. Gavin Hume, QC
President
THE LAW SOCIETY OF BRITISH COLUMBIA
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Sir:

Re: Renewal of David Crossin's appointment for a further two year term to the Legal Services Society ("LSS") Board of Directors

As you may be aware, E. David Crossin QC's appointment as a member of the Board of the Legal Services Society ("LSS") expires September 6, 2011. I have spoken to Mr. Crossin and he has advised me that he is prepared to accept a further two year appointment to the LSS Board. I am pleased to recommend that Mr Crossin's appointment be renewed.

Mr Crossin is an active member of the Board and has just been appointed Chair of the Board of Directors. In his four years on the Board he has served as Vice-Chair and as a member of the Executive, Finance and Stakeholder Engagement committees. He brings the expertise and perspective of a seasoned practitioner to the Board's deliberations and both his contribution to Board deliberations and his advice to the Executive Director are significant assets to the society. In the role of Chair and previously as Vice-Chair, he has demonstrated the commitment and the leadership necessary for the Society's success.

As you know the Legal Services Society faces significant challenges as it struggles to provide much needed services to low- income people in BC with provincial funding that is significantly below Canada's per capita average. That said the Board continues to press forward with a number of strategic initiatives that are intended to support greater efficiency and effectiveness in the justice system and to build a broader base of support for legal aid funding. Mr. Crossin is directly engaged in these efforts and his re-appointment will permit the Society to secure the benefit of his leadership for the next two years.

I would be pleased to discuss this request with you further and trust that Law Society officials will not hesitate to contact Ms. Gulnar Nanjijuma (gulnar.nanjijuma@lss.bc.ca, 604.601.6138) with any questions they might have.

Thank you for your ongoing support and encouragement.

Yours truly,

Tom Christensen
Vice-Chair – LSS Board of Directors

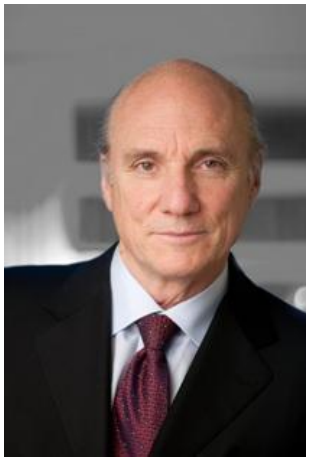
Cc: Caroline Nevin, Executive Director, CBA
Mark Benton, Executive Director
Bill McIntosh, Manager, Executive Support, The Law Society of BC
Gulnar Nanjijuma, Assistant Corporate Secretary

Legal Services Society

British Columbia
www.legalaid.bc.ca

E. David Crossin, QC

Chair, LSS Board of Directors
Chair, Executive Committee



Biography of E. David Crossin, QC

Regularly rated as leading counsel in the areas of criminal defence by Best Lawyers in Canada, E. David Crossin, QC, joined the partnership of Sugden, McFee & Roos LLP in 2007.

David's practice consists primarily of criminal defence, but he is also frequently retained by the Attorney General in criminal matters. He has also acted in numerous commercial, administrative, and securities-related matters and has appeared as counsel in all levels of court, including the Supreme Court of British Columbia, the Court of Appeal of British Columbia, and the Supreme Court of Canada.

Called to the British Columbia bar in 1977, David is a Fellow of the American College of Trial Lawyers and is currently an elected Bencher of the Law Society of British Columbia. David also teaches a variety of courses for Continuing Legal Education.

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Fax: (604) 682-0914
www.lss.bc.ca

Executive Office

June 10, 2011

Mr. Gavin Hume, QC
President
THE LAW SOCIETY OF BRITISH COLUMBIA
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Gavin,

Re: Renewal of Tom Christensen's appointment to the Board of Legal Services Society ("LSS") for a further two year term

As you may be aware, Tom Christensen's appointment as a member of the Board of the Legal Services Society ("LSS") expires September 6, 2011. I have spoken to Mr. Christensen and he has advised me that he is prepared to accept a further two year appointment to the LSS Board. I am pleased to recommend that Mr Christensen's appointment be renewed.

Mr Christensen is an active member of the Board, serves as Vice-Chair, is a member of the Executive Committee and is Chair of the Stakeholder Engagement Committee. He brings substantial expertise in the area of government decision-making along with the perspective of a seasoned practitioner from outside the Lower Mainland. His contribution to Board work and his advice to the Executive Director are significant assets to the Society. In my experience Mr. Christensen role has demonstrated the commitment and the leadership necessary for the Society's success.

As you know the Legal Services Society is facing significant challenges in meeting demand for services. Per capita legal aid funding from government is lower than it was 15 years ago and is far below the national; average. In these circumstances the board feels that the re-appointment of Mr Christensen would add an important element of continuity and a specific expertise that will support the board's commitment to effective governance of the Legal Services Society and its priority of building political support for better funding.

I would be pleased to discuss this request with you further and trust that Law Society officials will not hesitated to contact Ms. Gulnar Nanjijuma (Gulnar.nanjijuma@lss.bc.ca, 604.601.6138) with any questions they might have.

Thank you for your ongoing support and encouragement.

Yours truly,

E. David Crossin
Chair – LSS Board of Directors

Cc: Caroline Nevin, Executive Director, CBA
Mark Benton, Executive Director
Bill McIntosh, Manager, Executive Support, The Law Society of BC
Gulnar Nanjijuma, Assistant Corporate Secretary

Legal Services Society

British Columbia
www.legalaid.bc.ca

Tom Christensen

Vice-Chair, LSS Board of Directors
Member, Executive Committee
Chair, Stakeholder Engagement Committee

Biography of Tom Christensen

Tom Christensen, from Vernon, has a broad range of experience as a lawyer, including appearances for family law and child protection clients funded by the Legal Services Society and acting for the federal Crown. He was a Member of the Legislative Assembly for Okanagan–Vernon from 2001 to 2009, and in that time served as the Minister of Education, the Minister of Aboriginal Relations and Reconciliation, and as the Minister of Children and Family Development. Tom has a strong history of community involvement serving on numerous local boards. He is currently a director with the Junction Literacy Centre in Vernon and a director of the Southern Interior Development Initiative Trust.

He brings to the board extensive experience both in public policy development and in working with leaders from First Nations and government to resolve problems collaboratively.

Memo

The Law Society of British Columbia 5000

To Benchers

From Finance Committee

Date July 5, 2011

Subject **Executive Limitations – Recommended Changes**

General Fund Net Assets (reserve)

During this year's budget review, the Finance Committee considered what level of net assets (reserve) was appropriate for the General Fund operations. The current executive limitation provides for a reserve of at least $500,000. While this amount might have been appropriate in 1994 when the current executive limitation was established, the Finance Committee was of the view that the executive limitation required updating. The current level of net assets or reserve (excluding TAF and capital allocation) is $5.3 million. This level of net assets allows the General Fund to fully fund the operations during the year, without borrowing from LIF.

The Executive Limitation Part 2.C.3 provides:

> *" the CEO must ensure that Law Society budgeting:*
>
> *3. in the General Fund …*
>
> *(b) results in the reserve being at least $500,000 at the end of any fiscal year;"*

The Committee recommends the following change as it most closely aligns the required amount of net assets with the objective of eliminating General Fund intra-year borrowing. Stating a specific dollar amount or a specific number of months of operating expenses may result in either increasing the practice fee to meet the executive limitation, or require ongoing revision of the executive limitation, rather than addressing the objective of eliminating intra-year borrowing by the General Fund.

The Committee recommends the following:

> *" the CEO must ensure that Law Society budgeting:*
>
> *3. in the General Fund …*
>
> *(b) results in sufficient net assets (excluding TAF and capital allocation net assets) to avoid the need to use short-term borrowing to finance General fund operations outside of the operating year."*

TAF Net Assets (reserve)

The Finance Committee was also of the view that the executive limitations should document the Benchers' direction regarding how to account for and use the Trust Administration Fee (TAF) and should also define an appropriate level of TAF net assets.

The current Bencher direction is that TAF revenue should be fully segregated and allocated to fund Trust Assurance department costs, with surpluses to be transferred to Part B Insurance funding.

The Finance Committee thought that the appropriate level of TAF net assets is six months of Trust Administration program operating expenses due to the volatility of TAF transactions, the delay in receiving the fees for up to two months after each quarter end, and the lead time required to communicate any necessary TAF change.

The Finance Committee recommends the following addition to the Executive Limitations in Part 2.C.3:

" the CEO must ensure that Law Society budgeting:

3. in the General Fund …

(c) ensures that Trust Administration Fee (TAF) revenue is accounted for separately from other revenues and is allocated to fund Trust Assurance program costs and then TAF net assets, until the TAF net assets have reached an amount equal to six months of Trust Assurance program costs. Any additional TAF revenue above this level must then be allocated to Part B insurance funding.

THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

May 20, 2011

Law Society of British Columbia
845 Cambie Street
Vancouver, BC V8B 4Z9

Attention: Bruce Le Rose, First Vice-President and Chair, Finance Committee

Dear Sir,

The Canadian Bar Association – BC Branch (CBABC) invites the Law Society of British Columbia to partner with it to fund the continuation of the successful Rural Education and Access to Lawyers (REAL) Initiative in 2012 when the current funding expires.

Background

As you know, the LSBC took an extensive look at the statistics that reflected the problems with the retention of lawyers in rural areas of British Columbia. The aging of the bar across the province was recognized by everyone in the legal profession to be an upcoming access to justice crisis as senior lawyers in smaller towns prepared to retire or downsize their practices, but were not finding young lawyers to come to small centres to replace them and serve the community.

To address this issue, CBABC proposed REAL, an initiative to attract second-year law students to the practice of law in smaller centres and to assist solo and small firms with advertising, hiring, and funding those positions. The Law Foundation of BC provided three years of funding for the initiative, the key components of which are

a) Summer student costs for a 3 month placement at a monthly rate of $3000 - $3500;

b) a Regional Careers Officer who raises awareness of the underlying issues, promotes the project across Canada and facilitates the application and selection process between students and firms; and

c) local and county bar expenses for promotional, materials and law school events, and Regional Career Officer travel.

REAL has been a resounding success. In 2009, the first summer of the program, REAL placed 11 students in towns which fit into the criteria of <100,000 population and a >500 per lawyer ratio. The positive experience of both students and firms that summer led to great word-of-mouth promotion of the initiative whereby participating firms encouraged

their colleagues to participate and also expressed their own interest for another student. Slowly, we also saw a shift in perception of small firm practice among law students.

In 2010, 21 students were placed and the rural bar became an enthusiastic partner in REAL. REAL students came from across Canada and from foreign law schools; often these were BC students who went elsewhere to train but sought a summer job at home.

In 2011, a further 21 students are about to start their summer positions. Some firms now request less funding from REAL and are able to contribute to the student costs or make contributions in kind such as accommodation, as their confidence in the Initiative grows.

Throughout the Initiative, Michael Litchfield has held the position of Regional Careers Officer, full time in the first year and part-time thereafter. His responsibilities have included the management of the Initiative and the collection of statistics about the participants' satisfaction with REAL and the offers of articles made to students. The statistical information that we are gathering will inform the legal regulators, law schools, and funders in British Columbia, as well as our own internal advocacy planning processes as we move into the next decade. This fall will be the first opportunity to determine how many of the 2009 summer cohort are staying in smaller communities after being called to the Bar.

The Initiative is also supported by the REAL Oversight Committee whose members include a diverse representation of the profession: rural and urban, newly-called and long-experienced. The Career Development Officers of UBC and UVic law schools are members as is Tom Fellhauer, the current LSBC appointee to the Committee. This Committee receives periodic reports on the progress of the Initiative and provides oversight and varying perspectives to ensure continued success and compliance with our funder obligations.

There is no doubt that REAL is the profession's concrete, purposeful and effective response to the aging of the profession and the shortage of lawyers in rural communities. It supports solo and small firm practices, seeks to continue access to justice in rural communities, and helps to shift the perspective of students in law school about the practice of law in rural communities.

Future Funding

Although the CBABC's initial request for funding from the Law Foundation of BC was for a five year program, due to the downturn in the economy, the Law Foundation of BC was able to provide three years of funding. In 2010, the Law Foundation of BC confirmed that further funding could not be made available for 2012 or beyond, and actively encouraged and supported an application for a National REAL program, funded by the Access to Justice Fund which funds national initiatives.

The CBABC's letter of interest was accepted by the Access to Justice Fund and we were invited to provide further information through a Letter of Intent which was submitted in October 2010. Consideration of that application will be given this summer.

The National REAL program would fund students throughout the country and would be managed by a Careers Officer based in British Columbia. All branches of the CBA support the application and will assist in the promotion of National REAL.

The key difference between National REAL and BC's REAL Initiative is that British Columbia would likely have **five** funded positions rather than the **twenty-one** it currently enjoys.

Partnerships

Accordingly, the CBABC is planning for two scenarios, one where National REAL is established and the second where it is not.

Supplementing National REAL

Should National REAL be funded, we propose that the LSBC and CBABC partner to provide funding for ten further spaces. This cost is estimated to be $100,000 per year and would be shared equally between the partners.

The additional spaces will sustain the efforts to

- Bring law students to smaller centres thus helping the public access legal advice and information closer to their own home;

- Support solo and small firm practitioners to identify and hire students, and support their investment in providing quality training;

- Raise awareness in BC's law schools about the quality of practice and role of a lawyer in smaller centres.

BC's REAL Initiative

In the event that National REAL is not funded at all, we propose that the REAL Initiative continue in British Columbia with ten funded spaces as referred to above plus a part-time Regional Careers Officer (RCO) and a modest promotional budget.

This cost, estimated at $150,000 per year, would again be shared equally by LSBC and CBABC. Promotional materials and legacy materials ("how-to" guides) created during the 2009-2011 stage would continue to be used. Some elements of the existing program (such as travel of the RCO to communities to conduct in-person visits and to Western Canadian law schools) would not be continued, but may be funded through one-time partnerships with local and county bar associations or the law schools.

The feedback from law firms participating in the current Initiative indicates that the RCO is an important benefit to firms and an essential component of the success of REAL.

In a small firm or sole practitioner's office where lawyers provide legal advice to a community desperately in need of more lawyers, there is very little time for "extras" such as contacting law schools, developing a posting, receiving applications and selecting students, determining a salary, and assisting the student to arrange to move in, addition to the time required to provide training and mentorship. There is no time to figure out what other economic development programs there may be to assist with the funding for students.

The RCO assists law firms significantly by making those tasks easier or taking on some entirely. The structure and system that the RCO has developed allows the law firm to focus on training the student and ensuring a positive experience such that the student will return.

Next Steps

The CBABC believes that the REAL Initiative is making a difference within the profession and within the communities it serves. It highlights an important issue and helps to better inform law students about their options for practice and directs them to an area where there is a significant need.

The CBABC will seek funding from Provincial Council in September once the outcome of the National REAL application is known.

Understanding that the LSBC is in budget planning for 2012 now, we are presenting this information to you at this time. We are able to share with you any further information you require and invite Jeannette McPhee to contact Joanne Silver at the CBABC office.

We would also appreciate an opportunity for me to address the Benchers, perhaps at the July meeting, to persuade them of the merits of the proposal and answer any questions. Please contact me directly at 250-385-1411 to discuss this opportunity.

Thank you for your consideration.

Sincerely,

Kerry L. Simmons
Secretary-Treasurer, CBABC
Chair, REAL Oversight Committee

cc. Tom Fellhauer, Bencher LSBC
Jeanette McPhee, Chief Financial Officer, LSBC
Joanne Silver, Director of Membership and Public Affairs, CBABC

The Law Society of British Columbia

Mid-Year Report: Access to Legal Services Advisory Committee

For: The Benchers

Date: July 15, 2010

Art Vertlieb, QC (Chair)
Glen Ridgway, QC (Vice-Chair)
Haydn Acheson
David Mossop, QC
Johanne Blenkin
Wayne Robertson, QC
Anthony Vecchio

Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **Access to Legal Services Advisory Committee**

Policy and Legal Services Department
Doug Munro 604-605-5313

PURPOSE OF THE REPORT

The mid-year report of the Access to Legal Services Advisory Committee ("Committee") has two main purposes. The first part of the report sets out the work the Committee has engaged in from January to July. The second part of the report sets out the Committee's recommendations regarding the development of the 2012-2015 Law Society Strategic Plan.

JANUARY-JULY MEETING OVERVIEW

Due to the high profile nature of access to justice, both in British Columbia and around the world, a decision was made to increase the number of times the Committee meets. The Committee met each Thursday before Bencher day.

The Committee's primary duty in 2011 is oversight of the work that arose from the Delivery of Legal Services Task Force Report (October 2010). The work arising from the Task Force report fell to the following groups:

- The Credentials Committee has overseen the proposed rule amendments to expand what articled students are permitted to do. This work then went to the Act and Rules Subcommittee and was considered by the Benchers at their May 13, 2011 meeting. During this time, the Committee received regular updates as part of its monitoring function. The rules have been amended by the Benchers, with a September 1, 2011 implementation date;
- The Ethics Committee is responsible for changes to the *Professional Conduct Handbook* regarding expanded roles for paralegals. For the first part of 2011, the Ethics Committee has been focused on the Federation Model Code. The Ethics Committee will commence reviewing aspects of the Delivery of Legal Services Report at its July meeting;
- A Litigation Subgroup was created to liaise with the British Columbia Court of Appeal and the Provincial Court of British Columbia regarding expanded roles for articled students and paralegals. The Litigation Subgroup consists of Anthony Vecchio, who reports to the Committee, Marina Pratchett, QC and Jim Vilvang, QC. Meetings were held with the British Columbia Supreme Court and the Provincial Court. Other participants in the meetings included, Art Vertlieb, QC, Gavin Hume, QC, Haydn Acheson, Ken Walker, Michael Lucas and Doug Munro. Discussions have been productive, and the Courts have identified some topics that they felt would be of assistance to their determination as to whether to permit expanded advocacy roles for paralegals, including issues surrounding certification or some measure equivalent to direct certification. The meetings with the courts are ongoing, and some of the work led to the Family Law Task Force getting involved in the analysis.
- The Family Law Task Force was asked to assist the Litigation Subgroup in designing a rough-proposal of a pilot project for enhanced roles for paralegals in

court. This work arose from the dialogue with the Supreme Court, but has the potential to have broader application. As of the date this report was drafted, that work is ongoing.

- A Solicitors Subgroup was created to draft best practice guidelines for lawyers supervising paralegals performing enhanced functions. The Subgroup consists of Mr. Ridgway, who reports to the Committee, Ralston Alexander, QC, and Christine Elliott. The Solicitors Subgroup drafted a set of guidelines, which have been shared with the courts for input, and have been provided to Jack Olsen to facilitate the work of the Ethics Committee. It is important that the draft guidelines be synchronized with the work of the Ethics Committee. Until we have amended the *Professional Conduct Handbook,* it would be premature to publish guidelines for supervising paralegals performing enhanced functions.

The efforts to advance expanded roles for paralegals and articled students are ongoing. The Committee hopes that by the end of the year, the expansion of paralegal functions in the solicitors' side of practice, and the expansion of articled student roles will be operational. The work with the courts will likely take longer.

Other matters

In addition to overseeing the work arising from the Delivery of Legal Services Task Force, the Committee continued its monitoring function. This included a monthly review of news materials, largely from British Columbia and Canada about access to justice matters.

Because of the importance of moving ahead with its primary work, the Committee shelved the idea of exploring new issues at this time. The Committee makes some observations regarding the Strategic Plan later in this report, and expects that in the second half of 2011 it will have more time to consider what the Law Society should be doing beyond the paralegal project.

In May the Committee held a special meeting and was pleased to have Leonard Doust, QC and Ian Mulgrew in attendance. Mr. Doust attended to speak with the Committee about the report of the Public Commission on Legal Aid. As the Benchers are aware, the report sets out a series of recommendations regarding how the delivery of legal aid can be improved in British Columbia. The Benchers also heard from Mayland McKimm, QC during his presentation about potential ways to improve legal aid in British Columbia.

Mr. Doust provided an overview of his experiences as Commissioner. He flagged a couple concepts that he felt were worth pursuing. Some of these concepts have already been identified by the Benchers, but they are worth reiterating.

First, Mr. Doust felt it was important to advance the proposition that legal aid is an essential public service, every bit as important as health care. He felt that the relationship between having legal assistance and accessing social benefits was real, and that in the absence of legal assistance many people are denied access to the basic necessities of life.

Mr. Doust felt it is important for the Law Society and other stakeholders to unite and work together to determine a shared vision for legal aid and make the case to government.

In order to better make the case for legal aid, Mr. Doust felt an economic analysis of the benefits of being represented, and the costs of self-representation are important. This concept is a variation on the idea that presently exists on the Law Society's Strategic Plan (Initiative 1-4), and which is discussed in more detail elsewhere in this report. The critical point is that Mr. Doust independently arrived at the view that the Benchers have already endorsed, that developing an economic analysis of the benefits of the justice system (or as Mr. Doust categorized it, legal aid) is central to convincing government of its importance. It would also be persuasive to the public.

Mr. Mulgrew has been writing about the courts and lawyers for many years and the Committee appreciated the opportunity to have him come and share his perspectives about the challenges facing British Columbians, and what the Law Society might do to improve access to justice. Mr. Mulgrew shared Mr. Doust's views, save that he was of the opinion that our focus should be on convincing political policy makers, rather than convincing the public, of what the future of legal aid needs to look like. Mr. Mulgrew felt the Law Society has a role to play, with other organizations such as the Legal Services Society and the Law Foundation, to form a multi-stakeholder task force to explore what the future should look like and quantify the benefits of legal aid.

The Committee was very impressed by the insight Mr. Mulgrew brought to the issues surrounding access to justice. A difficulty that can often arise in discussing a topic like access to justice is that the participants in the discussion form a closed circle of individuals with similar backgrounds and experience. In many instances the participants are lawyers, judges and academics. The opportunity to hear from a journalist with many years of experience covering legal issues, and communicating the concepts to the public, allowed the Committee to consider the issues it has been grappling with from a different perspective. Mr. Mulgrew's observations enriched the Committee's appreciation of how the public might view legal aid and access to justice issues in general.

Economic Analysis

At the January meeting, the Committee asked Ms. Blenkin to take Mr. Munro's place on the subgroup that is analyzing the potential for an economic analysis of the justice system. Mr. Robertson and Mark Benton, QC, continued on in the subgroup.

This topic has been reported to the Benchers on a number of occasions. There has been some interest in the topic from both Sauder School of Business and SFU. Part of the challenge has been to try and narrow the topic of a cost benefit analysis of the justice system to something that can be measured and still be beneficial.

The task of the Committee is to better identify the scope and potential cost of such a project and to report to the Benchers, with the idea that the Law Society, the Law

Foundation and the Legal Services Society (the latter two through a joint fund) will fund the economic analysis project.

Three potential ideas that are being discussed, but which require further refinement, are:

1. An analysis of what happens when trials can't proceed, perhaps by virtue of insufficient resources such as sheriffs. This would be a study internal to the formal justice system. Similarly, such a study might look at the cost benefit of small claims versus other ADR models.
2. An analysis of the cost benefit of funding legal aid, similar to the Perryman Study in Texas. This type of study often contains assumptions that make it vulnerable to attack, so further consideration is required before such an approach could be recommended.
3. A sophisticated analysis of the cost benefit of the justice system versus other systems, such as health care. This would likely be very complex, and as with other economic analyses can have difficulty measuring "value" as opposed to merely "cost".

Part of the challenge is trying to identify the proper scope of a question to be studied in order to arrive at a meaningful and defensible project. These efforts are ongoing.

The Law Foundation has a steering committee that has approved moving ahead with a research project, but the particulars will have to be worked out and when the particulars are better understood, the Access to Legal Services Committee will report to the Benchers with a recommendation regarding participating in the development and funding of the project.

It is likely that the Committee will recommend that Strategy 1-4 of the current Strategic Plan roll into the new plan, perhaps with revised wording once we have properly articulated the scope of the initiative.

STRATEGIC PLAN 2012-2014

At its June meeting, the Committee discussed whether the 2012-2014 Strategic Plan should carry over strategic goal #1 of the current plan, or whether that goal should be modified. The current goal is "Enhancing access to legal services" and the supporting commentary reads:

> Protecting the public interest in the administration of justice requires the Law Society to work toward improving the public's access to legal services. Providing assurance about the competence and conduct of lawyers, who are able to advise clients independently of other interests, is a hollow goal if people cannot afford to retain such lawyers. Developing strategies to improve the public's ability to obtain affordable legal advice is a priority item.

The Committee believes that the goal of "Enhancing access to legal services" should be carried over to the 2012-2014 Strategic Plan.

Access to justice, achieved through access to legal services, aligns with the Law Society's public interest mandate. Over the last decade, the Law Society has dedicated considerable resources to access to justice. This has led to initiatives such as being the first Law Society in Canada to create rules for unbundling, to the recent work of expanding roles for paralegals and articled students. In recent years access to justice has become an increasing concern for governments, courts and regulators, and is receiving a higher media profile. The Committee believes the Law Society has an important role to play in advancing the discussion about access to legal services, and crafting practical solutions in the public interest. Along with being a model regulator, improving access to justice / legal services is central to what the Law Society should be committed to.

It is the understanding of the Committee that the discussion of the Strategic Plan in July is focused on the high level concept of what *goals* the Law Society should have. In anticipation of when the discussion moves on to involve consideration of *strategies* to advance those goals, the Committee had a preliminary discussion of strategies.

There are three potential strategies that the Committee discussed. The Committee believes the first two strategies bear serious consideration by the Benchers. The third is one the Committee has not entirely come to terms with, and it is listed here for sake of being complete.

***Potential Strategy #1*:** Working with government to better align shared objectives regarding the public interest in access to justice / legal services.

The access to justice challenges that society faces are complex and will require numerous, coordinated responses. In many instances there will be a shared objective by government, the Law Society, and other interested parties. There is merit in identifying common ground and working cooperatively to engage in meaningful reform, to improve the public's access to legal services and justice.

The Committee recognizes that there will be circumstances where interests diverge and the Law Society will pursue initiatives that the government is not interested in supporting and *vice versa*. However, for matters of common concern where consensus can be found the public interest favours a collaborative approach.

While first and foremost the Committee views this as the right thing to do in order to enhance access to justice, there are ancillary benefits from developing good relationships with government, particularly the Ministry of the Attorney General.

***Potential Strategy #2*:** Enhancing public communication / collaboration.

As has been noted, most recently at the Benchers' Retreat, Law Society discussions on some topics lack input from the public. The Committee believes there is value in enhancing public communication and collaboration. This is not necessarily an "access to justice" issue, as much as a process issue for certain initiatives. However it is categorized, the Committee believes it is worth consideration by the Benchers for inclusion in the 2012-2014 Strategic Plan. Some thought will have to be given to what the object of such communication and collaboration is. It might include better educating the public on certain topics and initiatives. It might include an opportunity for the public to comment of consultation papers. It might include an opportunity for the public to provide input on its perspective of issues that are central to strategic initiatives.

***Potential Strategy #3*:** Facilitate lawyer participation in LSBC initiatives to enhance access to legal services.

As noted, the Committee has not fleshed out what this might entail. In broad strokes, the concept is to focus inquiries about access to legal services specifically at lawyers, and in particular to find ways to increase lawyer participation in Law Society initiatives. An example might be follow up work on unbundling and, down the road, expanding roles for paralegals and articled students. In essence, how to ensure policy development does not wither from disuse.

RECOMMENDATION

The Access to Legal Services Advisory Committee **recommends** that the Goal of "Enhancing access to legal services" be carried forward to the 2012-2014 Strategic Plan.

When the Benchers discuss strategies for the next Strategic Plan, the Committee **recommends** potential strategies 1 and 2 (above) be given serious consideration.

The Law Society of British Columbia

Equity and Diversity Advisory Committee 2011 Mid-Year Report

For: Benchers

Date: June 30, 2011

Robert Brun, QC (Chair)
Catherine Sas, QC (Vice-Chair)
Thelma O'Grady
Patrick Kelly
June Preston
Elizabeth Hunt
Jennifer Chow
Karen Whonnock

Purpose of report:	**Information**
Prepared on behalf of:	**Equity and Diversity Advisory Committee**

Susanna Tam
Policy and Legal Services
604-443-5727

EQUITY AND DIVERSITY ADVISORY COMMITTEE
2011 MID-YEAR REPORT

PURPOSE OF REPORT

This report reviews the 2011 work to date of the Equity and Diversity Advisory Committee, identifies key issues and presents priority considerations to the Benchers for strategic planning purposes. The Advisory Committee met in January and March 2011, and held a joint meeting with the CBABC Equality and Diversity Committee in May 2011.

ADVANCING THE STRATEGIC PLAN 2009-2011

The Equity and Diversity Advisory Committee has a number of responsibilities within the Law Society's 2009-2011 Strategic Plan. With respect to the goal of "enhancing access to legal services", the Advisory Committee is responsible for providing advice on improving the retention of rate of lawyers in the profession. This strategic objective includes examining issues related to the retention of Aboriginal lawyers and women lawyers. With respect to the goal of "enhancing public confidence in the legal profession", the Advisory Committee is responsible for effective data-gathering to inform equity and diversity issues.

Supporting Aboriginal Lawyers

The Law Society continues to look for opportunities to support Aboriginal lawyer organizations in their networking and outreach efforts. For example, the Law Society sponsored both the CBABC Aboriginal Lawyers Forum's speed mentoring event and PLTC information session. The Law Society also sponsored a reception to kick off an online auction in support of the CBABC Aboriginal Law Student Scholarship Trust. Most recently, the Law Society was pleased to sponsor a number of Aboriginal lawyers from northern communities to attend a National Aboriginal Day event co-hosted by the Legal Services Society and the Justice Institute of BC.

The Law Society has also developed a proposal to work with Aboriginal lawyer groups and organizations to build a collaborative mentoring initiative for Aboriginal lawyers throughout the province. This initiative aims to create a more inclusive environment by supporting community-building within the Aboriginal bar and within the legal profession. The initiative will be founded on research regarding best practices related to mentoring, and on an assessment of the range of mentoring needs of Aboriginal lawyers. This proposal has the support of the Indigenous Bar Association, the CBABC Aboriginal Lawyers Forum and the Legal Services Society's Aboriginal Program.

The Equity and Diversity Advisory Committee is also developing a business case for enhancing diversity and retaining Aboriginal lawyers in the profession, based on recent

research which indicates the underrepresentation of Aboriginal and visible minority lawyers in BC.

Retaining Women Lawyers

The Equity and Diversity Advisory Committee continues to follow up on recommendations made by the former Retention of Women in Law Task Force. The Advisory Committee continues to look for opportunities to promote the business case for retaining women lawyers and monitors the maternity leave benefit loan program and the equity ombudsperson program. The Law Society has also launched an equity webpage to bring together equity-related resources, including the business case, model policies and information about the equity ombudsperson program.

The Advisory Committee is considering the development of a change of status survey to gather information about lawyer career changes, particularly for women lawyers. The Advisory Committee is working with other law societies on the possibility of sharing survey questions, or a common survey, in order to gather comparable data between jurisdictions.

The Advisory Committee is currently assessing the feasibility of extending the *Justicia* project to BC. *Justicia* is the Law Society of Upper Canada's think tank working to develop initiatives to retain women lawyers, which has been very successful and well-received. Feedback in BC to date has been positive and a number of firms have indicated their interest in possibly participating in a BC version.

Understanding Lawyer Demographics

The Advisory Committee has long identified the need for accurate data regarding the demographics of the profession in BC. Without baseline measures and benchmarks, the Law Society is unable to measure progress regarding equity and diversity or make effective policy decisions.

The Advisory Committee has completed a draft demographic report regarding the participation of Aboriginal and visible minority lawyers in BC, based on analysis of 2006 census data. The findings of this report will form the foundation of the business case for diversity. Staff is currently working with the communications department regarding publication considerations, and developing a communications strategy for the report. Communications staff has recommended that the report be held until it can be released in conjunction with the upcoming business case, as the two initiatives are closely linked.

The Advisory Committee continues to monitor the Aboriginal self-identification data from the Annual Practice Declaration. The Advisory Committee is also considering proposing the addition of other demographic self-identification questions. The CBABC Equality and Diversity Committee has asked the Law Society to prioritize this issue and supports additional questions. Staff is currently working with other law societies to consider the possibility of shared or common questions, to increase comparability of data across jurisdictions.

TAKING LEADERSHIP FOR A REPRESENTATIVE PROFESSION

In addition to its strategic plan responsibilities, the Advisory Committee continues to monitor equity and diversity initiatives from other jurisdictions and has identified a number of key areas to pursue:

- Communicate diversity values – continue to seek opportunities to effectively promote the Law Society's commitment to diversity and to profile equity issues in publications such as the Benchers' Bulletin;

- Increase Bencher diversity – consider strategies to help enhance Bencher diversity by encouraging women, Aboriginal and visible minority lawyers to campaign for Bencher positions;

- Build partnerships – continue to work with other interested organizations including the CBABC Equality and Diversity Committee.

The Advisory Committee has also been participating in the Law Societies Equity Network (LSEN), a network of policy lawyers and equity ombudspersons from various law societies, including the Law Society of Upper Canada, the Barreau du Quebec, the Nova Scotia Barristers' Society, and the law societies of Alberta, Manitoba and Saskatchewan. The LSEN is organized under the umbrella of the Federation of Law Societies of Canada and is currently chaired by BC. The LSEN has identified a number of areas for collaboration, including demographic data-gathering in particular.

CONSIDERING THE NEXT STRATEGIC PLAN 2012-2014

The Advisory Committee recommends that the next strategic plan continue to include the strategy of improving the retention of lawyers, women lawyers and Aboriginal lawyers in particular. The Advisory Committee further recommends that effective data-gathering also be included in the next strategic plan. Accurate data, properly interpreted, is essential to evidence-based policy and decision-making related to diversity issues.

The Advisory Committee is recommending the following initiatives related to these strategic objectives.

- Supporting Aboriginal Lawyers – The Advisory Committee recommends that the Law Society support the development of the proposed collaborative mentoring initiative for Aboriginal lawyers. The Advisory Committee further recommends that the Law Society establish a full-time staff lawyer position to support Aboriginal lawyers and students, given the resolutions passed at the 2009 Annual General Meeting related to increasing the participation of Aboriginal lawyers;

- Retaining Women Lawyers – depending on recommendations arising from the feasibility assessment, the Advisory Committee recommends that the Law Society implement *Justicia* in BC;

- Understanding Lawyer Demographics – the Advisory Committee recommends that the Law Society add further demographic questions to the APD.

In addition to these initiatives related to existing strategic objectives, the Advisory Committee recommends that the strategic plan also include an initiative to enhance Bencher diversity by encouraging women, Aboriginal and visible minority lawyers to campaign for Bencher positions. The Advisory Committee recognizes that women, Aboriginal and visible minority lawyers may need to be recruited for other participation with the Law Society, such as committees and task forces, before considering Bencher positions.

The Advisory Committee further recommends that the issue of aging of the profession be considered for the next strategic plan, outside of equity and diversity initiatives. The Advisory Committee recognizes that this issue has a number of policy and regulatory impacts and that an effective response needs to be coordinated across organizational departments and functions.

CONCLUSION

The Equity and Diversity Advisory Committee has worked hard to build a foundation for supporting Aboriginal lawyers and to build momentum for retaining women lawyers, and strongly recommends that the Law Society continue to focus on these key issues. As well, the Advisory Committee has now developed a snapshot of diversity in the legal profession to serve as a baseline, and strongly recommends that the Law Society continue to gather demographic data to measure progress and to monitor emerging trends. Encouraging women, Aboriginal and visible minority lawyers to engage with and advance to leadership with the Law Society will further enhance the Law Society's role in ensuring that the public is well-served by an inclusive and representative profession.

The Law Society of British Columbia

Independence and Self-Governance Advisory Committee: Mid-Year Report

For: The Benchers
Date: June 30, 2011

Jan Lindsay, Q.C., Chair
Haydn Acheson, Vice-Chair
Leon Getz, Q.C.
Herman Van Ommen
Claude Richmond
Craig Dennis
Hamar Foster
Cam Mowatt

Purpose of Report:	**Information**
Prepared on behalf of:	**The Independence and Self-Governance Advisory Committee**
	Michael Lucas **Manager, Policy and Legal Services** **604-443-5777**

Independence and Self-Governance Advisory Committee – Mid-Year Report

I. Introduction

The Independence and Self-Governance Committee is one of the four advisory Committees appointed by the Benchers to monitor issues of importance to the Law Society and to advise the Benchers in connection with those issues. From time to time, the Committee is also asked to analyse the policy implications of Law Society initiatives, and may be asked to develop recommendations for or policy alternatives regarding such initiatives.

The mandate of the Committee is to monitor developments on issues affecting the independence and self-governance of the legal profession and the justice system in BC. The Committee reports on those developments to the Benchers on a semi-annual basis. This is the mid-year report of the Committee, prepared to update the Benchers on the deliberations by the Committee to date in 2011 and to assist with the commencement of the development of the Law Society's next Strategic Plan.

This year, the Committee was also tasked with examining "Alternative Business Structures" and developing a report outlining a preliminary position for consideration by the Benchers later in 2011, which is described in Strategy 1-2b of the Law Society's current Strategic Plan.

II. Overview

As the Committee states at each opportunity, lawyer independence is a fundamental right of importance to the citizens of British Columbia and Canada. It is not a right that is well understood and, the Committee suspects, neither are the consequences of it being diluted or lost. Canadians are generally fortunate that they live in a society that recognizes the importance of the rule of law. The rule of law, through which everyone – including government – is subject to and held accountable by the law, is best protected by lawyers who operate and are regulated independent of government. Self-governance must therefore be vigilantly monitored to ensure that the obligation of self-governance is not lost.

Access to independent lawyers is therefore also of considerable importance. Citizens are best able to protect their rights and know their responsibilities through lawyers whose principal duty to is to represent their client's interests. This requires lawyer independence and self-governance. The Rule of Law would become much less robust if this protection were to be inaccessible to the majority of the population.

The Law Society must continue to deliver a clear message about the importance that independent lawyers play in the protection of rule of law. It is important to deliver this message in clear language that can be easily understood by the.

III. Topics of Discussion January – July 2011

With the above in mind, the Committee has to date met on February 1, May 11 and June 27. Given its specific task, it has understandably focused most of its energies on examining the literature on Alternative Business Structures and developing a position for the benchers to consider. A first draft report was reviewed in May, and further work is underway. The Committee's report will be completed in the fall.

The Chair of the Committee and Mr. Lucas had an opportunity in April to meet with representatives from "Lawyers Without Borders (Canada)," and to hear first-hand from a lawyer from Colombia about the difficulties and dangers of practising law in that country.

The Committee has also continued to monitor items in accordance with its mandate. In particular:

1. Regulatory Developments in other Jurisdictions

The Committee continues to follow the progress of the restructuring of the regulation of the legal profession in other jurisdictions, most notably in England and Wales and Australia. The relationship between the Legal Services Board and the "front-line regulators" such as the Bar Council and Law Society continues to develop. The President of the Law Society of England and Wales warned last year of a "looming threat to the profession's independence," noting that the proximity of the Legal Services Board to government could threaten the independence of the legal profession. The Chair of the Legal Services Consumer Panel also warned of threats to the independence of the profession arising from the close relationship between the government and the LSB. However, these concerns do not seem to have changed the direction of developments in England.

The Committee has monitored the efforts in Australia to create a national regulatory model for the legal profession, noting with some concern that the majority of the make-up of the proposed National Legal Services Board would be comprised of appointments by the host Attorney General, and also noting that board members can be terminated at any time by the host Attorney General "for unsatisfactory performance." A National Legal Services Commissioner would also be created, appointed by the host Attorney General on recommendation by the Standing Committee of Attorneys General ("SCAG"), who could also be terminated by the host Attorney General for unsatisfactory performance, but interestingly only after consulting with the SCAG. The Committee understands however that not all States may be in agreement with the proposal. The model has been criticised by the judiciary. The Committee will continue to monitor developments.

The Committee has also noted that changes seem to be coming to the regulation of lawyers in Ireland. Media reports suggest that the government plans to merge the Competition Authority with the National Consumer Agency and to create a stronger

agency in defence of consumers. The legal profession is not alone. Rather, all professions that are viewed as "closed shops" are targeted. The stated goal is to increase competition and make the market better for consumers. Interestingly, part of the impetus for this appears to come from the EU – IMF Memorandum of Understanding with the Irish government relating the "bail-out" package Ireland required.

The Committee will continue to monitor these interesting developments.

2. Developments concerning the Regulation of Professionals and Others

The Committee will continue to review the regulation of other professional bodies and other groups in British Columbia, as well as the issues that affect them that might be relevant to self-governance. In particular, the Committee has noted the creation by the government of a civil oversight board for police complaints as a result of recommendations in the Braidwood Report arising from the events surrounding the death of Robert Dziekanski. The Committee believes that the implementation and early practices of this organization merit close attention.

3. Incursions on the Rule of Law and Lawyer Independence Elsewhere

The Committee has been monitoring events in other countries where the rule of law and lawyer and judicial independence seem to be in some jeopardy. In particular the Committee has been monitoring events in China, where there have been several stories that call into question the health of the rule of law in that country, and that demonstrate the lack of lawyer independence. The Chair of the Committee, as mentioned above, had an opportunity to hear firsthand about the practice of law and its associated dangers in Colombia. Other areas of the world that bear monitoring on this subject include Zimbabwe, Venezuela, Belarus, and Russia.

While it is obvious that the Law Society is not in a position to fix problems existing elsewhere, it is important to understand the events or history that have given rise to the systems in place in some of these countries, which ought to better inform us should concerns develop in British Columbia. From time to time, as the Committee comes across stories exhibiting gross violations of the rule of law or lawyer or judicial independence in other jurisdictions, the Committee will advise the Executive Committee for that Committee's consideration about whether the Law Society should make some public comment.

IV. Recommendations Concerning Strategic Planning

Recognizing that the Law Society will be creating a new strategic plan over the next months, the Committee understands that it should identify for that process the items that it believes merit consideration as strategic priorities and initiatives for the organization. The Committee recognizes that it is premature to consider the priorities in any detail until the goals of the Law Society are debated and the general strategic direction of the organization based upon those goals has been settled. However, it may be useful for the Benchers to know what the Committee, in its advisory and monitoring capacity, considers

to be important for the organization's strategic success in relation to the topic it has been tasked with monitoring.

The Committee believes that lawyer independence is integral to the protection of the Rule of Law. It continues to advocate that the Law Society should consider the effect that all programs and initiatives of the Law Society will have on lawyer independence and self-regulation before such programs or initiatives are implemented. The Committee is pleased that this recommendation is one that has generally been well-accepted by the Law Society over the past years.

The Committee is also pleased that strategic initiatives that it has recommended have been integrated into the current Strategic Plan. In particular, the Committee notes that Initiatives 1-2b, 2-2, 2-3 and 3-4a all had their genesis from recommendations developed by the Committee, and it is pleased to see that the initiatives have either been completed or are well on their way to being so.

For the current planning process, the Committee has considered the following:

1. Examination of Insurance

On the presumption that enhancing public confidence in the regulation of the legal profession, or something like that, will remain a goal of the organization, the Committee believes that examining whether the divergent interests of the Law Society as a whole and the Law Society operating through its insurance department poses any concern to the promotion and preservation of lawyer independence and effective self-governance of lawyers.

The Committee has debated this topic over the past years. The debate was not about any concern that the Committee has in the operation of the insurance program as a stand-alone program. Rather, the issue of debate concerned the divergent interests and duties of the Law Society as a whole and the Law Society acting as an insurer of lawyers, having noted in particular that the incursions on lawyer independence and self-governance in other jurisdictions arose, at least in part, due to an apparent loss of public confidence that the regulating body was acting first and foremost in the public interest. In 2007 and again in 2008, the Committee recommended that the benchers consider whether to debate and analyse the divergence of primary duties that the Committee identified exists arising from the operation of an insurance program within the auspices of a regulatory body. The Committee has recommended that this examination be contained as an initiative contained within the Strategic Plan in the past, and continues to do so.

2. Education

The Committee has noted that the rule of law is often talked about, and in fact appears not infrequently in media articles. It is almost invariably cited in a favourable light, and commentators and politicians like to extol its benefits. How to protect the rule of law is never discussed. Its continuation in Canada usually is taken for granted.

The Committee believes that the Law Society would be well advised to develop some initiatives to educate the public about not just the importance of the rule of law in the context of the Canadian legal system, but what protections exist to ensure its protection. Protection of the public interest in the administration of justice requires the public to understand what interests are being protected, and why it is important to do so. Otherwise, important principles are at risk of being eroded simply because their importance is not well understood. The Law Society could create, as a strategy toward an organizational goal of protecting the rule of law, an education strategy, under which it could create specific initiatives toward that strategy. Three examples are:

(a) Engaging in dialogue with the Ministry of Education to include the subject in high school education

In 2007 the Committee recommended and the benchers approved the development of an initiative to produce materials, aimed at high school students, explaining the importance and value to society of having independent lawyers. This was manifested through the creation of a video in which the importance of having independent lawyers was described through a short instructive vignette. A lesson plan accompanied the video, and this has been distributed to high schools around the province. It is not, however, part of the required curriculum in the school system. The Committee suggests that the Law Society include in its plan an education strategy concerning the Rule of Law and lawyer independence, and that the Society develop initiatives through which such a strategy can be realized.

(b) Media Initiatives

As explained above, the media often writes positively about the rule of law and its benefits to nations that adhere to this principle. Making the connection to the principles of lawyer and judicial independence that protect the rule of law should assist the media to better understand the rationale for self-regulation within the legal profession. It does not mean that the media will necessarily accept self-regulation without skepticism, but it may lead to a better understanding of the principles that the Law Society aims to protect through its regulatory and policy-making functions. The Committee suggests that a media symposium focusing on the rule of law be considered for some opportune time.

The Committee has also posited the idea that it would be advisable to prepare notes on salient issues concerning lawyer independence and self-governance as a cornerstone for the Rule of Law for use in the event an occasion presents itself for the development of articles or “Op-Ed” pieces in media. This may be more of an operational item than a matter for strategic planning purposes, but the Committee presents it for consideration.

(c) Academic-level support

In its March 2008 Report, the Committee outlined the case for lawyer independence as a necessary component of the rule of law. The Committee has noted a lack of academic writing in support of independence and self-governance and has thought about whether commissioning such a study would be a worthwhile exercise. Mr. Turriff attended a conference in London England in 2010 on lawyer regulation at which a number of academics were present. A follow up conference is to be held in Michigan later in 2011 at which Mr. Turriff will again attend. At the London conference, it was reported that there was little, if any, commentary (besides that of Mr. Turriff) concerning the value of lawyer independence. The Committee suggests that the Law Society consider commissioning an "academic" paper about the value of the principle of lawyer independence and self-regulation. The Committee has reviewed Professor Woolley's recent paper entitled "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" and recognizes that it may partially answer this proposed initiative. The Committee intends to review the various points raised in the paper and determine how the Law Society compares to some of the proposals advanced by Professor Woolley.

The Committee has also considered the advisability of preparing a comparative study of Law Society regulatory processes to the processes in jurisdictions that have lost self-regulation as being a useful tool to demonstrate why circumstances in British Columbia might be different, and that why solutions from other jurisdictions may not be relevant or necessary here.

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The Law Society of British Columbia

2011 Mid-Year Report: Lawyer Education Advisory Committee

For: The Benchers

Date: July 15, 2011

Thelma O'Grady, Chair
Joost Blom, QC, Vice-Chair
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Purpose of Report: **Discussion and Decision**

Prepared on behalf of Lawyer Education Advisory Committee:

Alan Treleaven, Director, Education and Practice
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INTRODUCTION

The Lawyer Education Advisory Committee mandate is to:

(a) monitor developments affecting the education of lawyers in BC,
(b) report to the Benchers on a semi-annual basis on those developments,
(c) advise the Benchers annually on priority planning and respective issues affecting the education of lawyers in BC, and
(d) attend to such other matters as the Benchers or the Executive Committee may refer to the advisory committee from time to time.

This is the Committee's 2011 mid-year report to the Benchers. It comprises two parts: Part 1 reports on Committee activities this year to date, and Part 2 outlines Committee recommendations for the Law Society 2012-14 Strategic Plan.

PART 1 - COMMITTEE ACTIVITY UPDATE FOR JANUARY TO JULY 2011

Part 1 updates the following key Committee priorities for 2011:

(a) review the continuing professional development program,
(b) professionalism and advocacy projects,
(c) continuing professional development credit for pro bono service,
(d) continuing professional development credit for mentoring,
(e) reconcile the qualifications required to provide different types of legal service.

(a) Review the Continuing Professional Development Program

This is the third year of the continuing professional development ("CPD") program. The Committee is conducting a comprehensive review of the CPD program, and will report to the Benchers in September or October with recommendations, in time to ensure that any changes are in place effective January 1, 2012 for three years.

The Committee surveyed lawyers in the spring to assess the CPD program. Of the 1,419 lawyers who participated in the survey, 78% agreed that continuing education should be mandatory for lawyers, with more than half agreeing that the annual requirement is likely to strengthen the quality of legal services that BC lawyers provide their clients. The results show that the overall assessment of the program has been very positive.

(b) Professionalism and Advocacy Projects

Strategies 3-2 and 3-3 of the 2009 - 2011 Strategic Plan focus on initiatives to educate lawyers on the topic of professionalism and to improve advocacy skills. The Committee presented two sets of recommendations at the December 10, 2010 Bencher meeting.

(i) Professionalism Project

The two recommendations originated with the work of the Professionalism Education Working Group. The Benchers approved the following recommendations.

Recommendation 1

That the Law Society provide the Proposed Content Guideline and the sample resources template on undertakings, together with information on how they might be employed, to the Continuing Legal Education Society of BC, the Trial Lawyers' Association of BC, the BC branch of the Canadian Bar Association, and BC's law schools;

Update: The Content Guideline and the sample resources template on undertakings have been provided to the CLE Society, CBA, and Trial Lawyers' Association. The Law Society will once again participate in the annual fall UBC and University of Victoria law school professional responsibility programs, and plans to introduce the Content Guideline and sample resources template on undertakings. There has also been a preliminary discussion with Thompson Rivers University law school.

Recommendation 2

That six months later the Law Society meet with the Continuing Legal Education Society of BC, the Trial Lawyers' Association of BC, the BC branch of the Canadian Bar Association, and BC's law schools, and again periodically, to evaluate how effective this approach is in promoting the development of courses and resources in professionalism and ethics, and to collaborate strategically on next steps.

Update: Follow-up discussions are underway with the CLE Society, CBA and Trial Lawyers' Association, and will take place in the fall with the law schools.

(ii) Advocacy Project

The 7 recommendations originated with the Advocacy Education Working Group.

Recommendation 1 was that *the Law Society endorse and encourage exploration of the establishment of a new advocacy organization for BC lawyers with a mandate similar to the Advocates' Society in Ontari*o.

The Benchers referred this recommendation to the Committee for further consideration.

Update: The Committee will report on Recommendation 1 by December 2011.

The Benchers approved recommendations 2 through 7, which relate to improving lawyers' advocacy skills:

Recommendation 2

That the Law Society endorse the development of an online advocacy skills training "toolkit" as a consolidated resource and guide for supporting and enhancing the oral advocacy skills and performance of BC lawyers, and that Courthouse Libraries BC and the CLE Society of BC be approached to explore developing this initiative.

Update: The Law Society has met with Courthouse Libraries BC and the CLE Society, and work is ongoing.

Recommendation 3

That the Law Society expand its promotion of the CPD mentoring program, including the focus on advocacy skills.

Update: The Law Society Communications Department is assisting in developing an effective promotional strategy for the CPD mentoring program, to include utilizing the Law Society website and the *Benchers Bulletin*. CBA and Law Society staff worked on a feature on mentoring for the June 2011 *BarTalk.*

Recommendation 4

That the Law Society approach the Access Pro Bono Society of BC to discuss the feasibility of Access Pro Bono introducing a pro bono civil duty counsel program in Small Claims Court.

Update: Staff met with Access Pro Bono to discuss the proposal. Access Pro Bono is interested in furthering the initiative, and will report to the Law Society on how the Law Society might assist Access Pro Bono to introduce a pilot project. Access Pro Bono indicated that a pilot project could potentially be rolled out as early as January 2012.

Recommendation 5

That the Law Society encourage the development of a province-wide roster of senior counsel to be available by telephone to assist inexperienced lawyers with advocacy basics during a trial.

Update: Law Society staff met with the CBABC staff to discuss the development of the roster. The CBA's Practice Advisory Panel service is available to all lawyers, although non-CBA members cannot access the resource online without first contacting the CBA. In the fall of 2011, the CBA will update its Practice Advisory Panel list and issue a call for more volunteers. The CBA has offered to contact the Trial Lawyers' Association to discuss working together to develop a broad-based roster of senior lawyers who would be available to assist lawyers throughout the province.

Once the CBA has updated its Practice Advisory Panel list, the practice resources area of the Law Society website can include a link to the CBA Practice Advisory Panels.

Recommendation 6

That the Law Society contact the Crown and the Provincial Court judiciary to discuss their reintroducing the Crown Counsel advocacy training program.

Update: In discussions with Crown Counsel, the Crown has been co-operative and understands the need to support the development of advocacy skills in junior lawyers. Crown Counsel formed a small working group to discuss the proposed initiative but decided to recommend against it at this time because resources are not available to support the scheduling, training and supervision required. On a positive note, the Law Society was asked not to forget about this initiative for the future and, accordingly, the Committee has directed staff to bring the issue forward again for discussion in two years.

Recommendation 7

That the Law Society develop a vigorous communication campaign to encourage law firms and senior lawyers to "take a junior to court".

Update: The Law Society's Communications Department is working to develop an effective promotional strategy, including utilizing the Law Society website and the *Benchers Bulletin*. The promotional strategy will be rolled out in the latter half of 2011.

(c) Continuing Professional Development Credit for Pro Bono Service

In 2009 the Benchers approved the following recommendation of the Access to Legal Services Advisory Committee: "The Benchers should direct the Lawyer Education Advisory Committee to consider whether lawyers who provide pro bono through clinic and roster programs should be able to claim a portion of that time toward the ethics / professional responsibility component of Continuing Professional Development ("CPD"). Because CPD requires a lawyer to spend at least two hours a year on matters of ethics and professional responsibility, the Lawyer Education Advisory Committee should consider whether there is a need to limit how many of the 12 hours of CPD may be met by providing pro bono."

In 2010 the Committee considered whether pro bono service ought to be accredited for CPD, and deferred making a recommendation to the Benchers until the Committee reports to the Benchers in 2011 in the context of its full CPD review. The Committee's CPD report to the Benchers will include an analysis and recommendation.

(d) Continuing Professional Development Credit for Mentoring

The mentoring program came into effect on January 1, 2010, and is being monitored by the Committee. The program permits both mentors and mentees to obtain CPD credit.

Mentoring applications have been modest in number, and mainly from within law firms. The Committee considers mentoring to be one of the most effective ways to provide support and guidance to lawyers, and is including new recommendations on mentoring in its upcoming CPD report to Benchers.

(e) Reconciling the Qualifications Required to Provide Different Types of Legal Services

On March 4, 2011 the Benchers considered the following issue.

> *Are there some legal services that require a general background in legal education, but may not require a full Bachelor of Laws (or Juris Doctor) degree? The [former Futures] Committee concluded in 2008 that it is in the public interest to expand the range of service providers who are adequately regulated concerning training, accreditation and conduct. The work done to date concerning paralegals is one aspect of the Futures Committee's recommendations, but there are other things that could be considered concerning reconciling the level of qualification required to provide differing types of legal services.*

The Benchers asked the Lawyer Education Advisory Committee to present a preliminary report by the end of 2011 so that direction can be provided for this issue in the next strategic plan. The Committee will report to the Benchers by the year-end.

PART 2

COMMITTEE RECOMMENDATIONS FOR THE NEXT STRATEGIC PLAN

These are the Committee recommendations, for Bencher consideration and prioritization.

1. Review the Continuing Professional Development Program

Review the CPD program in time for any changes to be in place beginning in 2015.

The review would consider harmonizing the BC requirements with other provinces and territories, to reflect increasing inter-jurisdictional mobility of lawyers. Such recommendations could include a role for the Federation of Law Societies.

2. Review the Law Society Relationship with and Expectations of the CLE Society

The Law Society, CBA, and UBC and University of Victoria law schools established the CLE Society in 1976. Although the Law Society relies primarily on the CLE Society to provide effective, accessible, affordable education for lawyers, the Law Society has not formally reviewed its relationship with and expectations of the CLE Society since the CLE Society's founding 35 years ago. The Law Society as guardian of the public interest and regulator of lawyers should examine the effectiveness of lawyer education and other support services in fulfilling the key function of supporting professional competence.

The review would complement the current Law Society and Law Foundation joint review of Courthouse Libraries BC.

The review would include consideration of:

(i) the CLE Society role in providing effective, accessible, affordable education, taking into account:
- its relationship with, and the role of, Courthouse Libraries BC in providing legal information services,
- the activity of other principal legal information providers such as the CBA and Trial Lawyers' Association,
- rapid changes in the practice of law,
- rapid changes in the role of technology,
- impact of lawyer mobility in Canada,
- the move toward national standards in governance of the legal profession.

(ii) the Law Society's relationship with the CLE Society, including the extent, if any, to which the CLE Society might be accountable to the Law Society for fulfilling its role, and the related effectiveness of the CLE Society governance model,

(iii) whether and to what extent the Law Society might also provide continuing education,

(iv) whether the Law Society is in a position of conflict as the regulator of CPD and as:
- a provider of some continuing legal education, and
- a governing member of the CLE Society and Courthouse Libraries BC.

The Committee also recommends that the Benchers consider whether such a review would be carried out by a specially mandated Task Force or by the Committee.

3. BC Code of Conduct Education

The Law Society of Manitoba provides, free of charge, mandatory education for all lawyers on its new *Code of Professional Conduct*, which is based on the Federation of Law Societies' new *Model Code*. Nova Scotia is introducing mandatory online self-assessment for all lawyers and articling students to ensure comprehension of the new *Code*, and is offering educational programs, including a session at the Society's Annual Meeting. The Law Society of Upper Canada provides free continuing education in professional ethics and practice management to enable lawyers to meet the annual three hour CPD requirement in those subjects, and to regulate quality in professional ethics and practice management programming.

What education should be in place for BC lawyers as the Law Society implements the new *BC Code of Conduct*? Would the education be voluntary or mandatory? Who would be the provider? Would there be quality control? Would it be free of charge? Would the venues include the Law Society's Annual General Meeting, by web cast?

The Ethics Committee would have an important role in identifying content.

Such an initiative would not be entirely novel in BC. For years the Law Society conducted annual loss prevention seminars for the entire profession, free of charge and with a professional liability insurance premium credit.

4. Admission Program Review: PLTC and Articling

The Federation of Law Societies is developing national admission standards, which will impact the Admission program, including PLTC and articling. Law societies' adoption of the national admission standards will present an opportunity, and probably a necessity, to review and make recommendations relating to all aspects of the Admission Program.

The Committee recommends that, on adoption of national admission standards, there be a comprehensive review of the Admission Program, including formulation of proposals relating to the Professional Legal Training Course and articling program.

The Committee also recommends that the Benchers consider whether such a review would be carried out by the Committee, the Credentials Committee or a specially mandated Task Force.

5. Articling and Access to Legal Services in Rural Communities

There are growing concerns about availability of lawyers in rural and smaller communities. Should the Law Society develop initiatives to utilize and support articling students to enhance delivery of legal services in rural and smaller communities? Such initiatives may be within the mandate of the Access to Legal Services Advisory

Committee, working with the Credentials Committee, and would also relate to the goals of the CBA's REAL program, which promotes summer law student employment in rural and smaller communities.

6. Articling and Pro Bono

Should the Law Society develop initiatives to encourage articling students to provide *pro bono* legal services, perhaps in a rotation in a public interest or *pro bono* program or organization, or in Provincial Court? Such initiatives may be within the mandate of the Access to Legal Services Advisory Committee, working with the Credentials Committee.

7. Law School Education and Enhancing Law Student Practice Skills

Should the Law Society consult with BC law schools to support development of initiatives for enhancing law students' practical skills in law school, such as by expanding the availability of clinical or co-op programs? Such a recommendation would complement but not modify the new Federation standards for accrediting law degrees.

Memo

The Law Society of British Columbia

11000

To The Benchers

From Michael Lucas

Date July 5, 2011

Subject **Strategic Planning – Introduction for 2012 – 2014 Planning**

INTRODUCTION AND MISSION

In 2008, the Law Society began a process to create a three year strategic plan. Considerable effort was made to create a plan that was relevant to the organization and that would serve as the road map for policy development over the ensuing three year period. To achieve this, the various Law Society committees were asked to identify priorities from which the Benchers identified the matters of highest importance to the organization. After the Benchers had discussed how to prioritize these matters of importance, the Executive Committee identified three themes under which the matters that seemed to be the most urgent could be grouped. Those "themes" became the three principal goals of the Plan, and the initiatives that the Benchers agreed were of the highest priority became strategies and initiatives through which the goals could be realized.

Benchers, Committees and staff have worked diligently over the past three years to address the initiatives and strategies identified in the Plan. A copy of the 2009 – 2011 Plan updated to identify our accomplishments has been circulated to the Benchers with the agenda materials.

As we approach the conclusion of the current Plan, the Benchers need to consider the creation of the next Strategic Plan.

THE PROCESS

Strategic planning is undertaken to help an organization focus its resources on the right goals. It guides the organization in what it does and why it does it by prioritizing the resources of the organization to the things that matter.

At this meeting, the Benchers will start the process of building the Law Society's next Strategic Plan. The Benchers will have the opportunity to consider our organizational goals, and review initiatives or strategies (listed below) that have been identified from past planning exercises but not included in the final version of the current Strategic Plan. The Benchers will also have the benefit of the Advisory Committees' mid-year reports, which identify issues the Benchers might consider for inclusion in the next strategic plan. There may be other items that will come from other sources within the organization.

In September, the Benchers will be given a summary of all the issues that have been identified for general discussion about which issues should be included in the next Strategic Plan. Staff will then consider resourcing and staffing issues for the priority issues identified, and present a report to the Executive Committee.

In December, the Benchers will consider the recommendations from the Executive Committee about the next strategic plan and have the opportunity to approve a 2012 – 2014 Strategic Plan based on those recommendations.

THE MANDATE OF THE LAW SOCIETY EXPRESSED AS ORGANIZATIONAL GOALS

The strategic plan should reflect the mandate of the Law Society. Section 3 of the *Legal Profession Act* requires the Law Society:

> (a) to uphold and protect the public interest in the administration of justice by
> (i) preserving and protecting the rights and freedoms of all persons,
> (ii) ensuring the independence, integrity and honour of its members, and
> (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
>
> (b) subject to paragraph (a)
> (i) to regulate the practice of law, and
> (ii) to uphold and protect the interests of its members.

Last fall, however, the Benchers agreed to seek an amendment to section 3 that would move the requirement "to regulate the practice of law" into subparagraph (a) and remove the requirement "to uphold and protect the interests of its members," conflating aspects of that requirement into subparagraph (a)(iii). The proposed wording of the amendment sought is:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
> (a) preserving and protecting the rights and freedoms of all persons,
> (b) ensuring the independence, integrity, honour and competence of lawyers,
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and applicants for call and admission,
> (d) regulating the practice of law, and
> (e) supporting and assisting lawyers in fulfilling their responsibilities in the practice of law.

Expressing the language of the mandate through organizational goals helps focus on aspirational outcomes which will better inform choices around strategies that will allow the Law Society to discharge its mandate. Expressing the mandate as organizational goals might look like the following:

1. **Enhance public confidence in the administration of justice**
   This is encompasses both the notion of public confidence in legal professionals as well as confidence that the principles of fundamental justice – the "rights and freedoms of all persons" – are being looked after;

2. **Be a model professional regulatory body**
   This is obviously a core function of the Law Society as described in s. 3 and reflective of the vision to be a leading regulator;

3. **Establish appropriate standards for admission to and continued practice in the legal profession and to ensure that programs exist to aid applicants and legal professionals to meet those standards**
   This addresses matters found in s. 3(a)(iii);

4. **Promote and improve access to legal services**
   This would also address the requirement to protect the rights of citizens by improving their ability to access legal services to address their rights and to obtain effective advice concerning their legal responsibilities.

The organizational goals are obviously important to a strategic plan because strategies can then be developed to allow the Law Society to achieve those goals. When the strategies are known, particular initiatives can be created to implement the strategies. The initiatives will form the real work of the strategic plan.

MATTERS THAT HAVE BEEN IDENTIFIED FOR CONSIDERATION IN THE PAST

A number of issues have been identified for consideration as initiatives or strategies for the next strategic plan when the current Plan has been reviewed at the end of each year. Some of those matters will be identified in Advisory Committee reports, but it may be useful to list them in this memorandum, and relate them to the organizational goals described above.

- **Aging of the legal profession**

  Responding to this issue would advance Goal 4 above by ensuring access to legal services in areas that are currently served by an aging demographic of lawyers. It would of course require the development of specific initiatives through which that strategy could be pursued.

- **Examination of the rationale or purpose of the Admission Program**

  This topic would be a strategy advancing Goal 3 above. Again, specific tasks or initiatives would be identified about how to achieve this strategy. For instance, a task force might be created to examine issues relating to articling, or to PLTC.

- **Role of the Law Society as Regulator and Insurer**

  This topic would advance Goal 2 above by looking at whether model professional regulator can both enforce professional conduct standards in the public interest while also defending alleged breaches of the standard of care in the interest of lawyers.

- **Study to analyze the benefits of the public right to an independent lawyer**

  This topic would advance Goal 1 by providing research and support for need for lawyer independence as part of our system for administering justice."

- **Independent oversight**

  This topic would advance Goal 2 by assessing models of regulatory oversight. Developing (or, perhaps, even implementing) a specific model of oversight for consideration would be a specific task or initiative contained within this strategy.

- **Governance**

  This topic would also advance Goal 2 by ensuring the Law Society has an effective organizational structure. Examining governance models would be a specific initiative.

NEXT STEPS

For the July meeting, the Benchers are asked to focus on three questions:

1. Are the four organizational goals described above the right goals for the Law Society?

2. On a preliminary examination, what are the most important issues or matters arising from the Advisory Committee Reports?

3. On a preliminary examination, what are the most important issues or matters arising from the "carry over" matters listed above?

In September, the Benchers will be presented with the issues that have been identified within the organization as issues that should be considered for planning purposes. This will include items such as those listed above, as well as new ideas from Advisory Committees or from other sources. They can be classified as strategies or as initiatives. Work will begin at that meeting toward prioritizing, from the perspective of the Benchers, the various issues identified.

The Law Society of British Columbia

2009 – 2011 Strategic Plan

For: The Benchers

Date: July 5, 2011

Purpose of Report: Decision

Prepared on behalf of the Executive Committee

INTRODUCTION

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

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

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

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

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

PRINCIPAL GOALS

The three principal goals of this Strategic Plan are:

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

These goals are set out below, together with a description of the strategies to pursue the goals and the initiatives being undertaken to implement each one. Collectively, these goals, strategies and initiatives constitute the Law Society's Strategic Plan for 2009 – 2011.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 1: Enhancing access to legal services

Protecting the public interest in the administration of justice requires the Law Society to work toward improving the public's access to legal services. Providing assurance about the competence and conduct of lawyers, who are able to advise clients independently of other interests, is a hollow goal if people cannot afford to retain such lawyers. Developing strategies to improve the public's ability to obtain affordable legal advice is a priority item. Finding ways to reduce the impacts of financial barriers to accessing legal services is of considerable importance and underlies the purpose of this goal. The following items were identified as desired outcomes through which the goal of enhancing access to legal services may be achieved.

Strategy 1–1

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

Initiative 1–1

The Delivery of Legal Services Task Force has been created to identify the existing knowledge base and gaps in information that would be required for the Benchers to discuss the substantive policy issues around the scope of practice, develop a plan for acquiring the information that is missing, through (for example) consultations, surveys or other studies. The Task Force reported on the information identification issues to the Benchers in 2009.

After engaging in additional consultation as may be required, the Task Force will work in 2010 toward making recommendations about whether and how the delivery of competent legal services might be improved in a number of ways. This might be done through increasing public awareness of available legal resources and information or providing greater certainty and reliability regarding the cost of legal services. It might also involve increasing the availability of effective and affordable legal services in areas of greatest public need, including determining under what circumstances people other than lawyers might be allowed to provide legal services in circumstances that are not currently permitted.

Status – June 2011

The Benchers approved the Task Force's Final report in October 2010. The Task Force has been discontinued, and the Access to Legal Services Advisory Committee has oversight of the remaining tasks. The present status of the work is as follows:

- *The Benchers adopted recommendations of the Credentials Committee regarding expanded roles for articled students, with a September 1, 2011 implementation date;*
- *The Ethics Committee will be reviewing recommendations of the Delivery of Legal Services Task Force starting in July to determine what changes to the Professional Conduct Handbook are necessary;*
- *A Litigation Subgroup was created to liaise with the British Columbia Court of Appeal and the Provincial Court of British Columbia regarding expanded roles for articled students and paralegals. More recently the Family Law Task Force has joined this work to identify the parameters of a potential pilot project for paralegals appearing before the Supreme Court. Consultations with the courts are ongoing;*
- *A Solicitors Subgroup has drafted a set of best practice guidelines for lawyers supervising paralegals and provided it to the Ethics Committee for their consideration. Until we have amended the Professional Conduct Handbook, it would be premature to publish guidelines for supervising paralegals performing enhanced functions.*

Strategy 1–2

Find ways to reduce the impact of financial barriers to accessing justice.

Initiative 1–2a

The Law Society will approach the Attorney General to discuss potential supplemental funding for legal aid and the justice system through amendments to the *Class Proceedings Act,* the *Civil Forfeiture Act* and the *Unclaimed Property Act*.

Status – June 2011

A letter was sent to the Attorney General in this regard, and this initiative has therefore been completed.

Initiative 1-2b

Alternate Business Structures ("ABSs"), by which legal services are offered through business structures differing from the standard partnership or sole-proprietorship model, have been identified in other jurisdictions as a way of reducing the cost of legal services, thereby increasing the affordability of access to legal services. However, concerns have also been identified that ABSs may adversely affect the core values of the legal profession, including the duty of loyalty to a client.

The Law Society will examine the literature on ABSs and develop a preliminary position concerning the subject.

Status – June 2011

The Independence and Self-Governance Advisory Committee has examined this subject and has considered a draft Report. A final Report will be delivered to the Benchers in the fall of 2011.

Strategy 1–3

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

A high attrition rate combined with a growing population and the continued complexity of legislation, regulation, and common law demonstrates a need to ensure that legally trained professionals will continue to be available to provide legal advice. Moreover, business models that do not encourage segments of the lawyer population, including women lawyers and Aboriginal lawyers, to remain in practice not only discourage some lawyers from practising law, but cause law firms to lose legal talent, reducing their own effectiveness and further diminishing access to justice. Public confidence in the justice system is enhanced by ensuring that the profession does what it can to retain a diversity of lawyers. The Benchers identified the following two initiatives to accomplish the desired outcome.

Initiative 1–3a(i)

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

Following up on a recommendation of the Retention of Women in Law Task Force, a task force has been created to prepare a business case for the retention of women in private practice.

This Initiative was completed in 2009. The recommendations contained in the Task Force's final report will be followed up through staff and/or the Equity and Diversity Advisory Committee.

Status – June 2011

The business case was adopted by the Benchers in July 2009.Staff continues to follow up with former Task Force recommendations aimed at improving the retention of women in the profession. Some of these recommendations have been implemented or substantially implemented (Recommendations 1 and 2) while others require further consideration (Recommendations 3 and 5). The Advisory Committee has recommended that a feasibility assessment be conducted regarding the possible development of a "Think Tank" for British Columbia (Recommendation 4).

Initiative 1-3a(ii)

The Retention of Women in Law Task Force recommended that the Law Society consider developing a think tank in BC, modeled after the *Justicia* project developed in Ontario, to address methods of improving the retention of women in private practice.

The Law Society will therefore conduct a feasibility assessment of a *Justicia BC* project to determine the level of interest of firms in working together with the Law Society to develop resources to retain and advance women lawyers in private practice.

Status – June 2011

This work is currently underway and to date feedback has been positive.

Initiative 1–3b

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

Aging in the profession is already an issue in many rural communities in the province, and barring unforeseen events, is expected to continue or worsen. It is of less concern at present in larger centres, but this may be expected to change in coming years. The Equity and Diversity Advisory Committee will review and work to define issues arising in connection with the aging of the legal profession, including the identification of what information on the subject currently exists as well as what information may need to be obtained through external

consultation and research, and will make recommendations in 2010 concerning how the issue may be advanced as a strategic priority in the future.

Status – June 2011

While aging of the legal profession continues to be an issue of concern, the Benchers have recognized that it will not be possible to fully analyze the issue and to develop strategies to address it by the end of 2011, and will therefore defer the matter to the next Strategic Plan.

Initiative 1-3c

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

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

Status – June 2011

The Advisory Committee is currently developing a business case for enhancing diversity and retaining Aboriginal lawyers, founded on recent demographic data which indicate that Aboriginal lawyers are significantly underrepresented in the profession. The business case will also include current best practices related to lawyer retention.

Initiative 1-3d

Develop and deliver initiatives to support Aboriginal lawyers and students.

The initiatives will address specific barriers to lawyer retention as identified by research, and will include initiatives to address the lack of access to mentors, networks and role models. The Law Society will also consider what additional resources are needed in order to advance the strategic objective of enhancing the retention of Aboriginal lawyers.

Status – June 2011

The Advisory Committee has developed a proposal to work with Aboriginal lawyer groups and organizations to build a collaborative mentoring initiative for Aboriginal lawyers throughout BC. The initiative will be founded on best practices research related to mentoring, and on an assessment of the range

of mentoring needs of Aboriginal lawyers. The initiative will begin with a consultation phase.

Strategy 1-4

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

Status – June 2011

The Sauder School of Business at the University of British Columbia has been approached in connection with this initiative and has expressed an interest in it. The Access to Legal Services Advisory Committee has identified professors who are interested in a cost benefit analysis of the justice system. The discussion has revealed that the topic is too complex as originally envisioned, however, and the Committee is in dialogue to try and determine how the project might be more narrowly defined while not losing the intended benefit. The Law Foundation of British Columbia and the Legal Services Society have a joint research fund, and on their end there is approval to move forward but the challenge of identifying the proper question remains. It is hoped that collectively a framework analysis can be agreed upon within 2011 and the Committee will report to the Benchers once a consensus approach emerges.

STRATEGIC PLAN FOR 2009 – 2011

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

Public confidence in the ability of the Law Society to effectively regulate the competence and conduct of lawyers is critical in order for the Society to fulfill its mandate. It is also of critical importance in order to maintain the public's right to retain independent lawyers. The Benchers identified several desirable outcomes through which the goal of enhancing public confidence may be achieved.

Strategy 2–1

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

Initiative 2–1

Through the Discipline Committee, a staff group has been created to examine a series of projects to reduce the number of complaints that complaints-prone lawyers receive. It is currently anticipated that options will be presented to the Benchers for consideration in early 2009, and if approved, necessary rule changes would be prepared implementation would take place soon after.

Status – June 2011

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

The Benchers considered "ungovernability" and referred to the Act and Rules Subcommittee consideration and development of rules and possible Professional Conduct Handbook amendments. Rule 4-35(5) has been passed and changes to the Handbook were completed in November, 2010.

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

The staff group continues work on developing criteria for referral of lawyers to the Discipline Committee on the basis of their complaints history and referring lawyers who are Practice Standards graduates to the Discipline Committee if the lawyer repeats conduct of concern. The staff group has identified several other projects for consideration including practice reviews for client satisfaction and mentorship considerations. The work of this group is now primarily operational, and it will continue.

Strategy 2–2

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

Initiative 2–2

Regulatory oversight or review boards exist in British Columbia in connection with the health professions, and have been created in some foreign jurisdictions in connection with the legal profession. Whether such boards improve public confidence is under debate. Is there a method to enhance the public confidence in the Law Society's decision making processes that does not run contrary to the fundamental constitutional principle of, and public right to, lawyer independence?

This issue formed the substantive policy program at the Benchers' June 2009 retreat. The Executive Committee discussed this topic at its September 2009 meeting and determined that the Law Society would best focus on regulatory oversight models that incorporated voluntary external review or review incorporating the Ombudsman's processes. The Committee instructed staff to develop this topic further for presentation to the Benchers at a later date, expected in the spring of 2010.

Status – June 2011

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

models was presented to the Executive Committee in November 2010, from which recommendations were made and presented to the Benchers in March 2011.

The initiative itself has therefore been completed, although staff will develop a follow up concept paper in 2011.

Strategy 2–3

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

Initiative 2–3

Effective self-regulation requires the Law Society to fulfill its mandate first and foremost in the public interest, and requires public confidence. Recognizing that other lawyer regulatory bodies in Canada and elsewhere address this issue differently than in British Columbia, options for the creation or appointment of hearing panels can be developed for the Benchers to allow for a consideration of whether there are ways to enhance confidence in the processes and decisions of hearing panels.

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

Status – June 2011

The recommendations made by the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers were adopted at the July Benchers meeting. Rule changes and further policy decisions concerning the process of appointments have been approved. Advertisements for tribunal members (both lawyer and public) have recently been distributed.

The initiative has therefore been completed.

Strategy 2–4

Effective data gathering to inform equity and diversity issues.

Initiative 2–4

The Law Society must understand and address systemic barriers faced by members of the public needing legal services and members of the profession on the basis of gender, ethnicity, race, disability and sexual orientation in order to demonstrate leadership in building a more representative profession. However, it is unwise to develop initiatives in the absence of relevant data. Through the Equity and Diversity Advisory Committee, the Law Society will develop strategies for gathering appropriate demographic data on the profession and assess such data to inform the development of initiatives to promote equity and diversity.

Status – June 2011

The Equity and Diversity Advisory Committee has completed a draft demographic report regarding the participation of Aboriginal and visible minority lawyers in BC, based on analysis of 2006 Census data. Staff is currently working with the communications department regarding publication considerations, and developing a communications strategy for the report. Communications staff recommends that the report be held until it can be released in conjunction with the upcoming business case, as the two initiatives are very closely linked. The initiative has therefore been completed, and the data gathered will be used for future policy determinations.

Strategy 2–5

Develop and propose legislative amendments to improve lawyer regulation.

Initiative 2–5

Effective regulation and public confidence depend a great deal on having adequate tools to fulfill the Law Society's mandate. The *Legal Profession Act* has not been substantively amended for a decade. Given the particular legislative cycle, 2009 is a year in which the Law Society should consider if any amendments to legislation are needed to improve the Law Society's ability to meet its objects and duties. Together with advice from government relations consultants, the Act and Rules Subcommittee will consider whether any particular amendments are warranted at this time to achieve this outcome.

Status – June 2011

The Benchers approved amendments to the Act *as recommended by the Act and Rules Subcommittee*. *A request for amendments has been made to the Attorney General's Ministry.*

The initiative has therefore been completed.

Strategy 2–6

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

In late 2007, the Competition Bureau published its "Study on Self-Regulated Professions", which identified several issues of concern, from the Bureau's point of view, with the regulation of the legal profession. The Federation of Law Societies commissioned an article authored by Professors Iacobucci and Trebilcock that critiqued the Bureau's study, and this has been forwarded to the Bureau. Substantive responses to specific items identified remains a desirable outcome, as described in the following initiatives.

Initiative 2–6a

Reconsidering rules relating to multi-disciplinary partnerships.

Issues relating to multi-disciplinary partnerships have been extensively debated by the Benchers, and therefore a great deal of research and consideration has already been applied to this topic. The Ethics Committee is currently considering the issue and will be presenting its conclusions to the Benchers, likely in the spring of 2009.

Status – June 2011

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

Initiative 2–6b

Enhancing lawyer mobility.

Through the Federation of Law Societies, all law societies in Canada have agreed to a National Mobility Agreement which facilitates the mobility of lawyers within Canada. Recently, one of the last items to be considered – mobility between members of the Barreau du Québec and members of common-law law societies – has been addressed. Rule changes will need to be approved to implement the agreement reached on this issue. The Act and Rules Subcommittee will consider appropriate rules and present them to the Benchers for approval, which is expected happen in early 2010.

Status – June 2011

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

Initiative 2–6c

Modernising provisions relating to advertising.

Consideration of possible changes to provisions relating to lawyers' advertising is under consideration by the Ethics Committee. Also, through the Federation of Law Societies, draft model rules on advertising are being prepared. The Ethics Committee will make recommendations to the Benchers in connection with these matters in 2009.

Status – June 2011

This Initiative has been completed. The Ethics Committee presented its recommendations on this subject to the Benchers, and the Benchers approved changes to provisions relating to advertising in the Professional Conduct Handbook in May 2009.

Initiative 2–6d

Reconsidering policies regarding referral fees.

The Competition Bureau recommendations concerning referral fees were related to multi-disciplinary partnerships, which have now been addressed by the benchers. A general reconsideration of policies regarding referral fees is currently an item for consideration by the Ethics Committee, who may make recommendations to the Benchers at a later date depending on the outcome of that consideration.

Status – December 2010

The Ethics Committee has had this matter on its agenda for consideration, and has debated and made recommendations on fee sharing in the context of multi-disciplinary partnerships. The Committee considered fee sharing in June 2011, and noted that while there may be future merit for reconsideration of the fee sharing rule by the Federation of Law Societies in the context of its

continuing review of the Model Code, for present purposes no action on the issue was required at this time.

The initiative is therefore completed.

Strategy 2-7

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

Initiative 2-7

The timely and effective handling of complaints concerning the professional conduct or competence of lawyers resulting in appropriate disposition and sanction (as necessary) is an integral responsibility of the Law Society.

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

A staff group will also examine operational processes in connection with complaints and hearings to determine if improved operational procedures, staffing resources or the use of technology exist by which improvements to the timely, thorough, fair and appropriate dispositions of complaints and hearings can be made.

Status – June 2011

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

In September the Benchers adopted the abeyance policy first presented in the Discipline Guidelines Task Force's interim report to the Benchers on July 9, 2010. In November the Benchers adopted the Task Force's recommendations regarding the publication of Conduct Review summaries.

In June 2011, the Task Force presented its final report, in which it recommended that Guidelines to assist the Discipline Committee with its task of evaluating professional conduct matters and directing appropriate disciplinary responses be adopted. The Benchers adopted the Guidelines on June 18, 2011.

This initiative has now been completed.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 3: Effective public and lawyer education.

This goal may be divided into two parts. One is to ensure that lawyers who provide legal services are competent to do so. The public interest in the administration of justice is significantly diminished if lawyers are not competent, and the Law Society must make efforts either to ensure that lawyers obtain and retain pertinent information to improve, or at least maintain, competence. The other is to ensure that the public understands how the legal system in Canada works, and how concepts that may be less well understood or even taken for granted integrate within the legal system to provide for important public rights.

Past priority initiatives such as the Continuing Professional Development (CPD) initiative, were developed to address the first part of the education goal. Initiatives such as the public forums and the high school education unit on judicial and lawyer independence were developed to address the "public education" part of the goal. The policy development of each of those initiatives is now complete, and they will remain as operational items for the Law Society.

The Benchers have identified the development of the following items as desired outcomes through which the education goal may be accomplished. Each item will be considered by the Lawyer Education Advisory Committee who will, as appropriate, develop initiatives, or options for initiatives, to be considered by the Benchers.

Strategy 3–1

Design and implement a plan to support the mentoring of lawyers.

Initiative 3–1

Mentoring is a time-honoured method through which lawyers can be educated by other lawyers who possess certain relevant skills or experience. When the CPD Program was approved for implementation, "mentoring," was not included as an approved CPD activity. A promise was made to consider developing criteria for a program that would address the requirements of the CPD program. A mentoring program is expected to be presented to the Benchers for consideration in the spring of 2009.

This Initiative was completed in 2009.

Status – June 2011

The Lawyer Education Advisory Committee developed and presented a mentoring program to the Benchers, which the Benchers adopted at their May

2009 meeting. Rules necessary to implement the program were approved by the Benchers in November 2009. The program was implemented commencing January 1, 2010.

Strategy 3–2

Develop and implement initiatives to more effectively educate lawyers on the topic of professionalism.

Initiative 3–2

Professionalism lies at the heart of lawyering, yet from an education perspective it is not a topic that receives much dedicated attention. Development of initiatives that would focus on the issues of principle and values that inform or underlie specific rules of professional conduct would fill a sizable void in the education options available to lawyers, and would assist lawyers in meeting the requirements of the CPD program. An examination of programs available in other jurisdictions, together with the development of options for such programs in British Columbia, for consideration by the Benchers will be a worthwhile initiative to achieve the goal of effective education.

Status – June 2011

The Report of the Professionalism Working Group was presented to the Benchers in December 2010 and the recommendations were approved. The Lawyer Education Advisory Committee is following up to ensure the implementation of the recommendations as required.

Strategy 3–3

Develop and implement initiatives to improve advocacy skills for lawyers.

Initiative 3–3

Advocacy is a particular lawyering skill. While it is a skill most commonly associated with barristers, effective advocacy skills are equally relevant to solicitors. Advocacy is however a subject on which there are few dedicated courses available. To achieve the goal of effective lawyer education, the Lawyer Education Advisory Committee will examine initiatives relating to the teaching of advocacy skills and present options to the Benchers for consideration.

Status – June 2011

The report of the Advocacy Working Group was presented to the Benchers with recommendations in December 2010, six of which were accepted. The Lawyer Education Advisory Committee is following up to ensure the implementation of the recommendations as required. One recommendation was referred back to the working group for further consideration, and the Lawyer Education Advisory Committee will address that issue in 2011.

Strategy 3–4

Educate the public regarding the legal system on a variety of levels.

Initiative 3–4a

The Law Society is developing an instructional video for use in high schools. This will be completed and rolled-out in 2009.

Status – June 2011

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

Initiative 3–4b

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

Status – June 2011

This initiative has been completed. Mr. Turriff has now completed his tour.

Initiative 3-4c

The Law Society will approach the law schools within the Province to enquire about establishing a program in which a presentation takes place early in the school year at which a Bencher and Law Society staff lawyer informs students about access to justice issues and opportunities in order to promote engagement by future lawyers in

criminal, family and poverty law, as well as about the possibilities of working in smaller communities.

Strategy 3-5

The Law Society will consider qualification standards or requirements for differing types of legal services. Are there some types of legal services that could be offered without the provider qualifying as a lawyer, and if so, what qualifications would be appropriate or required?

Initiative 3-5

The Lawyer Education Advisory Committee will prepare by the end of 2011 a preliminary report to give some context to and direction on the issue.

Status – June 2011

Work will be commencing on this initiative shortly.

The Law Society of British Columbia

2012 Fees and Budgets
Improving Regulation

Presentation to:
Benchers
July 15, 2011

2012 Overview

The Law Society of British Columbia

- The Finance Committee reviewed and considered budgets for General Fund, Special Compensation Fund and the Lawyers Insurance Fund at three meetings in May and June
- Executive Committee reviewed the overall fee proposal at its July meeting
- Overall mandatory fee increase of 3.1%
- Law Society portion of General Fund Fee increased by $104, relating mainly to staff market based salary adjustments, enhanced regulation department and hearing panel membership expansion
- Special Compensation Fund assessment reduced from $5 to $1
- Lawyers Insurance Fund assessment remains at $1,750
- Trust Administration Fee remains at $10
- CanLII contribution increased from $32.25 to $34.71
- LAP increased by $4 to $60
- No change in Advocate, Federation of Law Societies or Courthouse Library of BC fees or Pro Bono percentage

2012 Fee Recommendations

The Law Society of British Columbia

	2012	2011	Difference	%
General Fund Fee – Law Society portion	$ 1,503.17	$ 1,399.04	$ 104.13	7.4%
Federation of Law Societies	$ 20.00	$ 20.00	$ -	-
CanLII	$ 34.71	$ 32.25	$ 2.46	7.6%
Pro Bono Contribution	$ 15.03	$ 14.35	$ 0.68	4.8%
Law Society Fee	$ 1,572.91	$ 1,465.64	$ 107.27	7.3%
CLBC Fee	$ 180.00	$ 180.00	$ -	-
LAP Fee	$ 60.00	$ 56.00	$ 4.00	7.1%
Advocate Subscription	$ 27.50	$ 27.50	$ -	-
Total Practice Fee	$ 1,840.41	$ 1,729.14	$ 111.27	6.4%
Special Fund Assessment	$ 1.00	$ 5.00	$ (4.00)	
Total Practice Fee and Special Fund	$ 1,841.41	$ 1,734.14	$ 107.27	6.2%
Insurance Assessment	$ 1,750.00	$ 1,750.00	$ -	-
Total Mandatory Fee (excluding taxes)	**$ 3,591.41**	**$ 3,484.14**	**$ 107.27**	**3.1%**

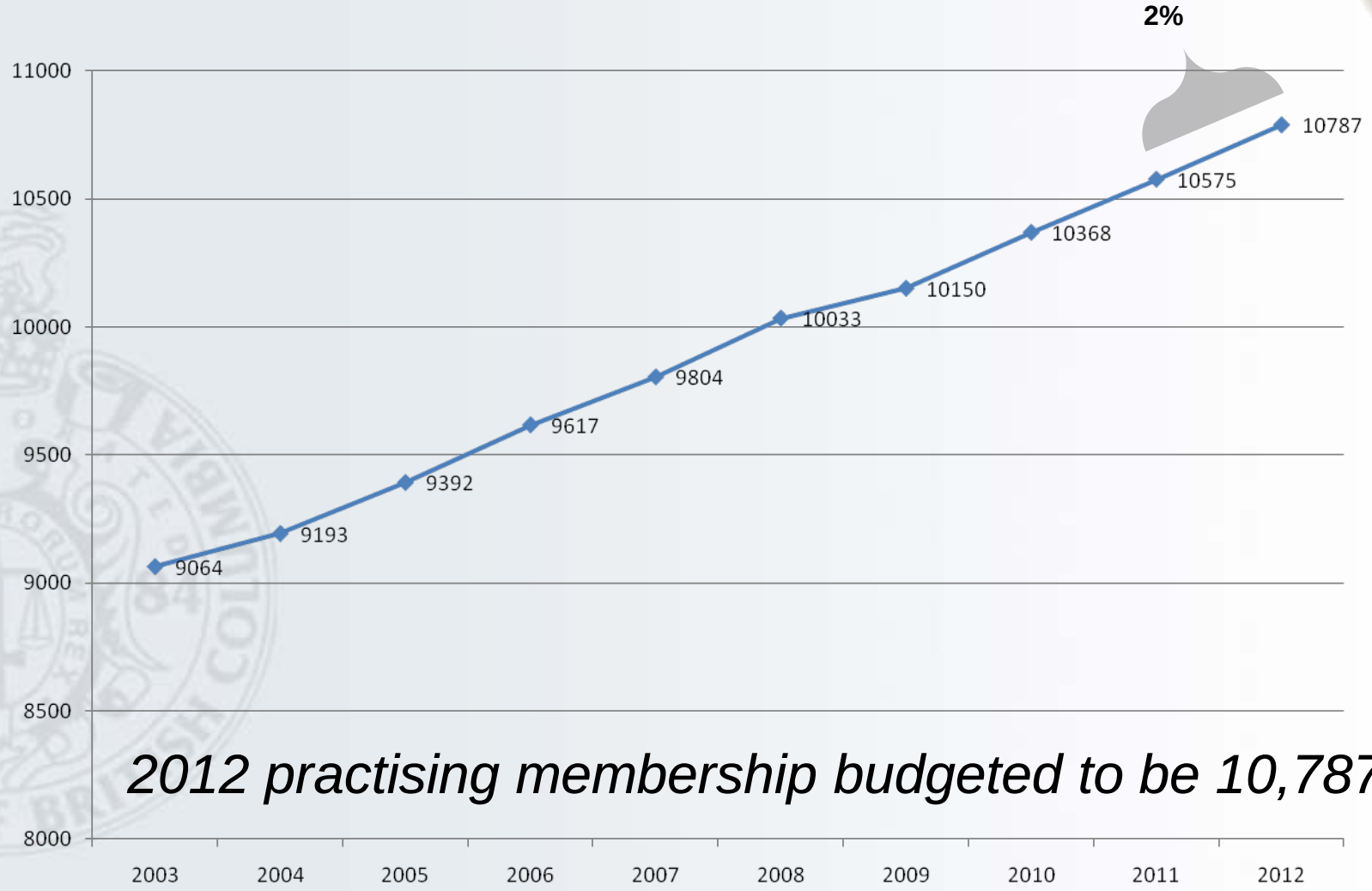
2012 General Fund Overview

The Law Society of British Columbia

- Zero based budgeting process, full management participation
- Deliver core regulatory programs and meet KPMs
- Continued support of Law Society Strategic Plan and Priorities, including $75,000 Bencher committee contingency budget
- Focused investment in regulatory mandate and related programs
- Practising membership increases by 2% from 2011 projection to 10,787 members
- Full implementation of Bencher approved 2011 Regulatory staffing plan and hearing panel membership
- General Fund reserve $5.3 million (excluding TAF and capital allocation) at December 2010, reasonable levels for cash management
- Over the last five years (2008 – 2012), the General Fund practice fee has increased an average of only 3% per year (excluding forensic accounting transfer)

Practising Membership Projection

The Law Society of British Columbia

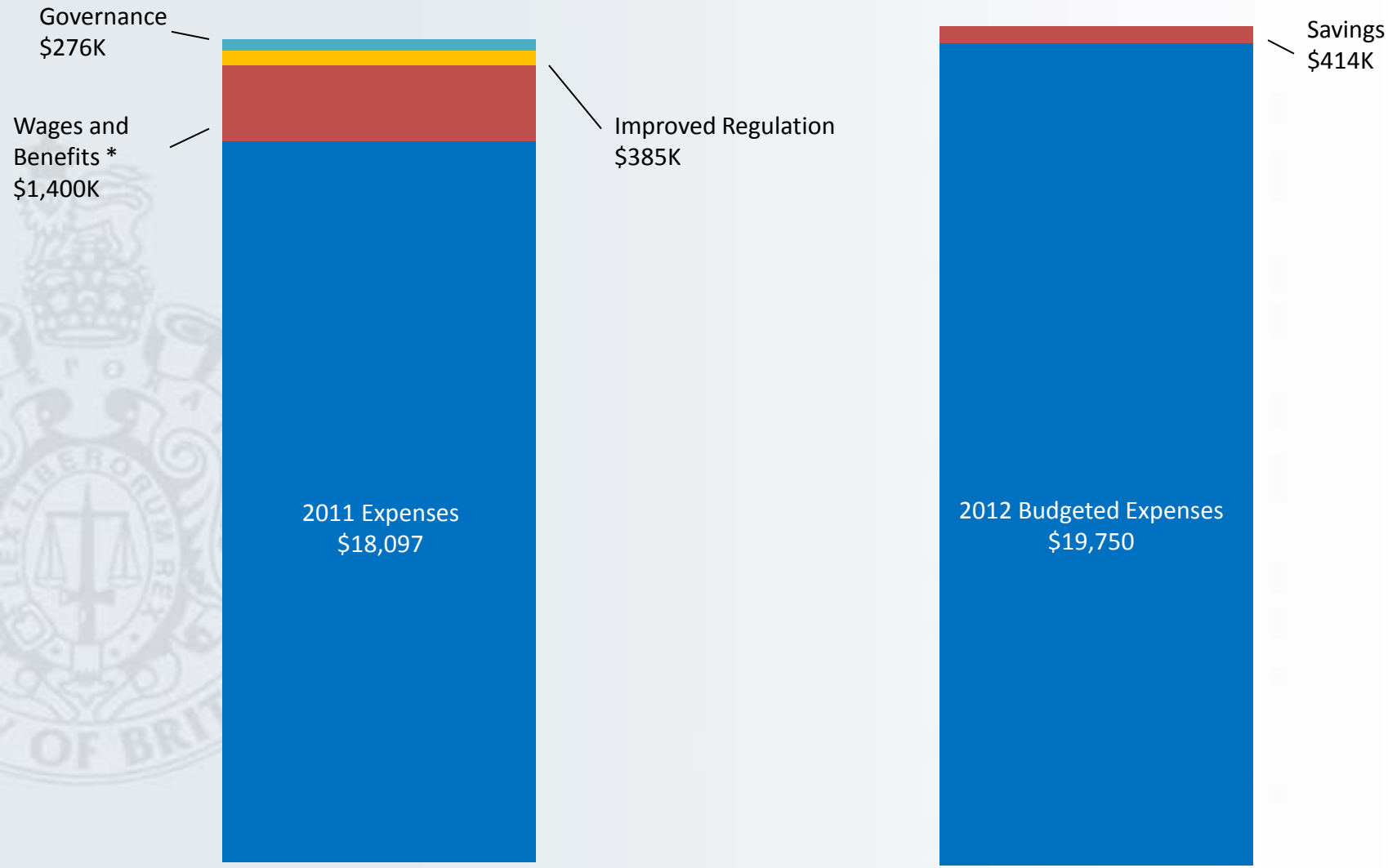


2012 practising membership budgeted to be 10,787

Components of Operating Expense Increase

('000's)

The Law Society of British Columbia



* Includes $200K of internal cost allocation changes, not an expense increase

Market Compensation and Benefits

- The Executive Limitations require that "the Executive Director must establish current compensation and benefits consistent with the geographic or professional market for the skills employed"
- Law Society aims to maintain compensation at the 50th percentile (P50) for comparable positions in this marketplace
- 2012 salary adjustment year based on bi-annual market salary benchmarking for non-union staff
- Salary costs includes 2011/2012 collective agreement salary increases, which are consistent with increases for non-union staff
- Staff salary costs are 70% of general fund expenses

The Law Society of British Columbia

Improved Regulation

- Goals are to significantly reduce timelines and ensure effective investigations and disciplinary actions
- Bencher approved regulation staffing plan included in 2012 budget
- Enhanced intake processes to provide efficiencies
- Reduced file loads to allow for faster turnaround
- Significant changes in investigative techniques including interviewing lawyers and witnesses
- Increase in external counsel fees included in 2012 budget to improve timelines, backfill vacancies, deal with conflicts, reflect increased rates and provide expertise where required

Employee Recognition and Performance Management

The Law Society of British Columbia

- Current employee recognition program funding does not provide material recognition of high performance
- P50 compensation philosophy does not provide differential compensation for high performing individuals
- Current maximum employee recognition available ranges from $500 for extra effort to $2,000 for leading a strategic project across the Law Society
- Goal of the program is to recognize, motivate, retain and reward high performance of Law Society, departments and individuals
- 2012 budget provides for increased employee recognition funding
- Enhanced program will include more meaningful monetary recognition tied to concrete results and objective measurement of high performance of Law Society, departments and individuals

The Law Society of British Columbia

Governance

- In accordance with Bencher decisions regarding public and non-Bencher participation hearing panels, adjustments have been made to the 2012 budget

- 2012 budget includes travel, per diems and training costs associated with lawyer and non-lawyer participation in hearing panels

- 2012 budget includes costs for Aboriginal mentoring project and governance review

The Law Society of British Columbia

Savings

- Electronic distribution of Benchers Bulletin and Members Manual provides $155,000 in savings through reduction in print and distribution costs
  - Half the lawyers now receiving Law Society publications do so electronically
  - Inherent subsidy of print publications by portion of membership
  - Members who want print copies will pay a fee expected to be in the range of $25 to $35 annually for each publication
  - Practice fee as presented would need to be increased $15 if this initiative is not implemented
- Savings in paper supplies, file storage and stationery through staff driven ‘green’ initiatives
- Reduction in forensic accounting costs through better trust accounting compliance
- Travel savings related to reducing Bencher meetings from ten to nine per year

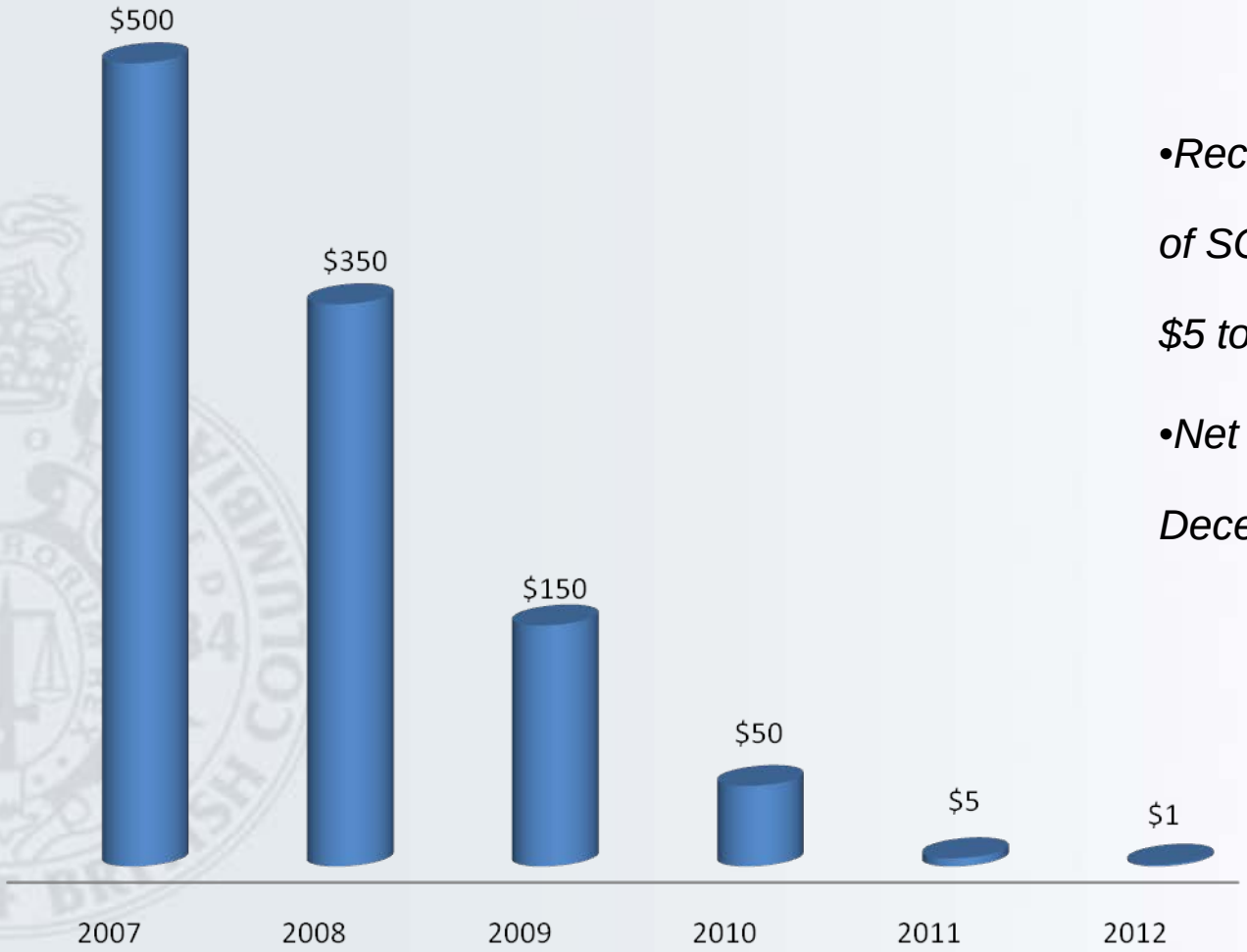
TAF Budget and Projections

The Law Society of British Columbia

	Revenue			Total	Net	Cumulative
	Matters	Rate	Total	Expense	Inc (Def)	TAF Reserve
2010 Actual	236,486	$ 10.00	$ 2,364,862	$ 2,269,989	$ 94,873	$ 221,683
2011 Budget	250,000	$ 10.00	$ 2,500,000	$ 2,393,644	$ 106,356	$ 328,039
2012 Budget	**250,000**	**$ 10.00**	**$ 2,500,000**	**$ 2,468,301**	**$ 31,699**	**$ 359,738**

- Trust assurance program funded by $10 TAF
- TAF revenue currently $2.4 million
- No use of TAF reserve required in 2010
- TAF reserve at minimal levels
- No use of reserve expected in 2011 and 2012
- Assume TAF transaction levels relatively stable

Decrease 2012 SCF Assessment



- *Recommend $4 reduction of SCF assessment from $5 to $1* for 2012*
- *Net asset balance at December 2010 - $830,000*

* Nominal fee and reserve required by the Legal Profession Act

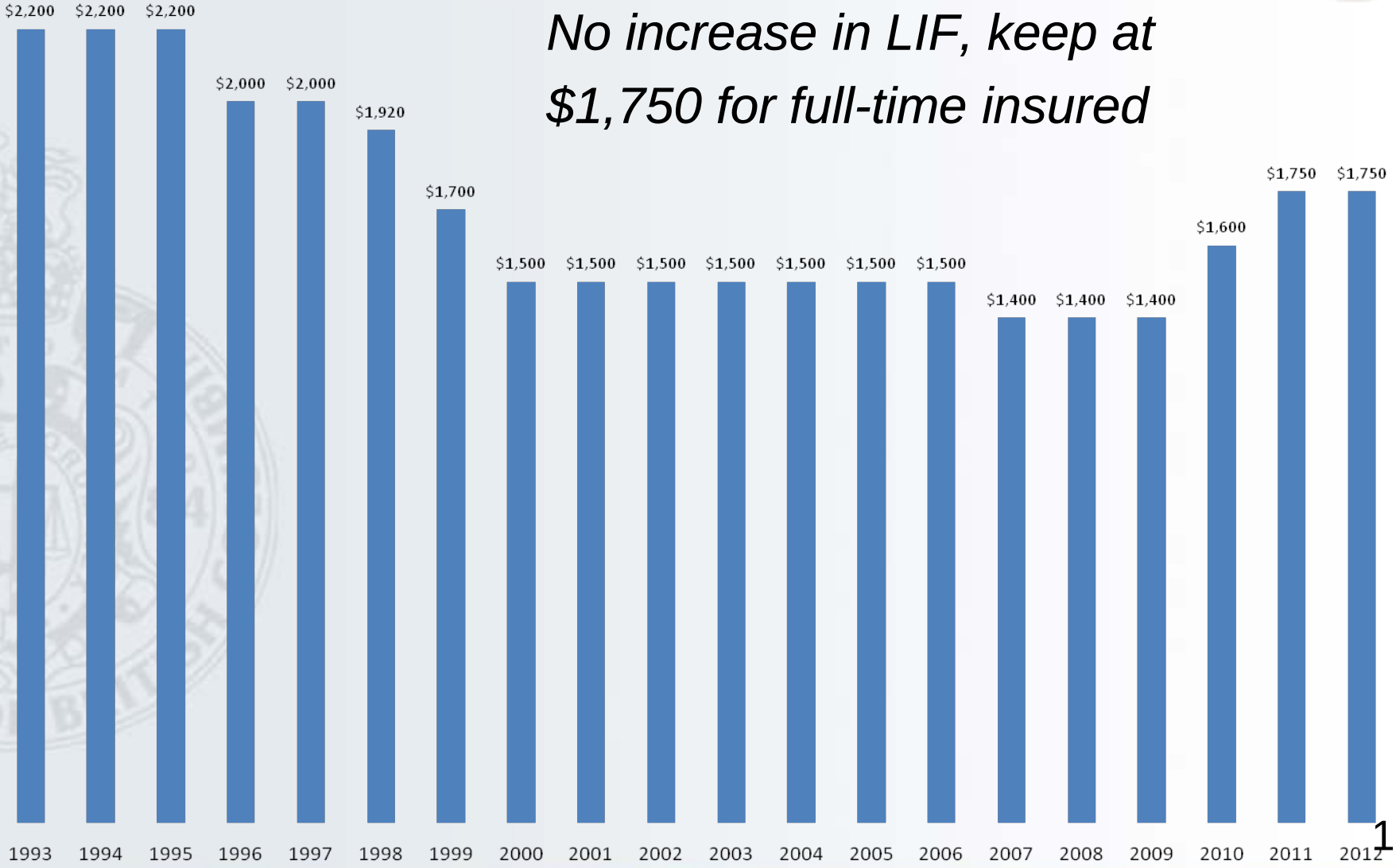
2012 LIF Assumptions

- Claims frequency in 2009 and 2010 is increased from 2008 by 12% due to recession. Frequency for 2011 trending similar
- Claims severity has increased from $17m in 2009 to $22m in 2010 and is expected to level off
- During 2010, long term investment portfolio recovered from 2008 market downturn, assume 6% return for 2012
- New operating expenses include market-based salary adjustments, one staff, provision for “stop-loss” coverage
- LIF reserve at December 31, 2010, $45 million
- Recommend LIF assessment remain at $1,750

The Law Society of British Columbia

2012 LIF assessment

No increase in LIF, keep at $1,750 for full-time insured



The Law Society of British Columbia

RESOLUTIONS

General Fund

The Law Society of British Columbia

Be it resolved that:

The Benchers recommend to the members at the 2011 Annual General Meeting a practice fee of $1,840.41 commencing January 1, 2012, consisting of the following amounts:

General Fund	$1,503.17
Federation of Law Societies	20.00
CanLII	34.71
Pro Bono Contribution	15.03
CLBC	180.00
LAP	60.00
Advocate	27.50
Practice Fee	$1,840.41

Lawyers Insurance Fund

The Law Society of British Columbia

Be it resolved that:

- the insurance fee for 2012 pursuant to section 30(3) of the Legal Profession Act be fixed at $1,750;
- the part-time insurance fee for 2012 pursuant to Rule 3-22(2) be fixed at $875; and
- the insurance surcharge for 2012 pursuant to Rule 3-26(2) be fixed at $1,000.

Special Fund

Be it resolved that the Special Compensation Fund Assessment for 2012 be set at $1.00.

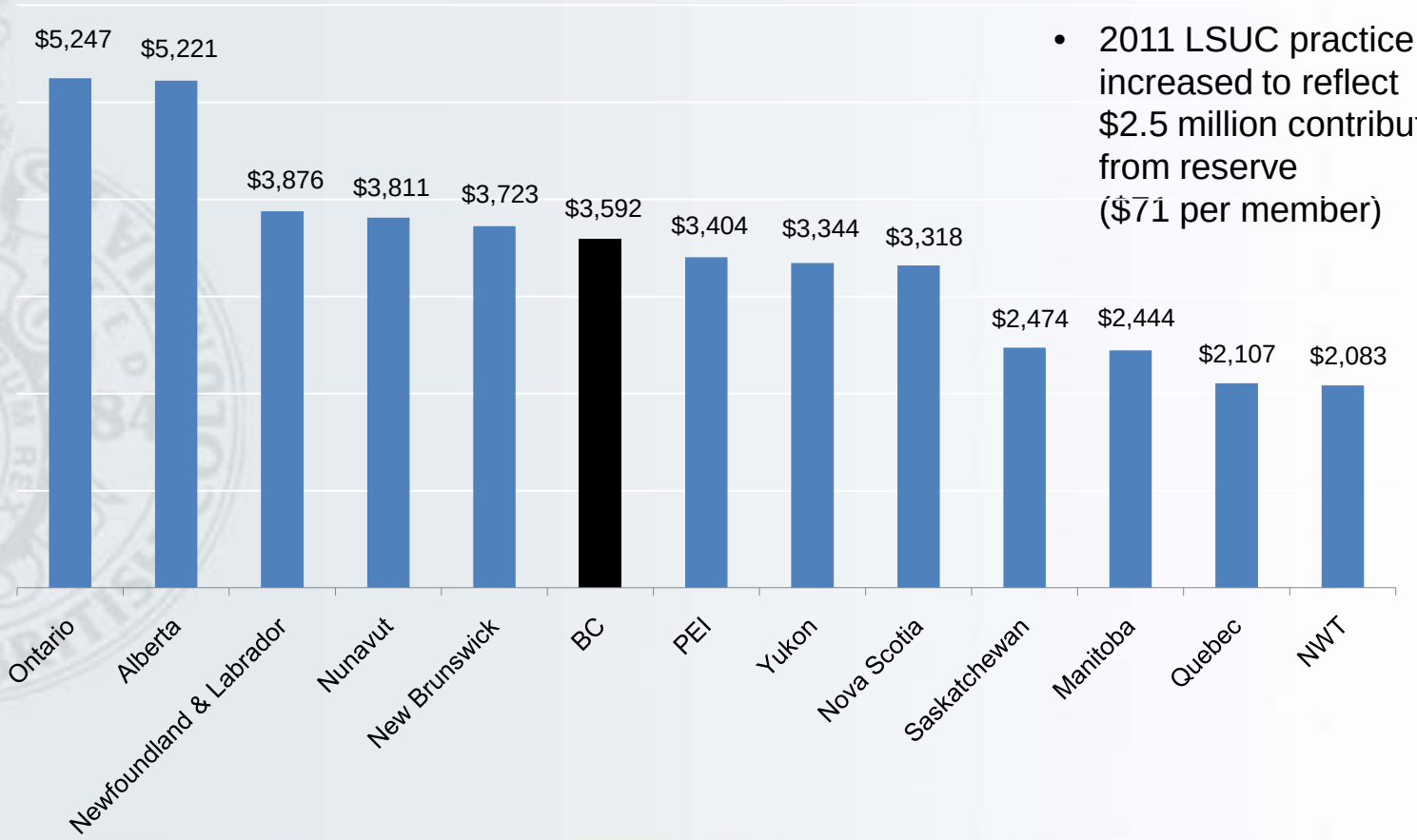
The Law Society of British Columbia

APPENDICES

Mandatory Fee Comparison (Full Time Practising Insured Lawyer)

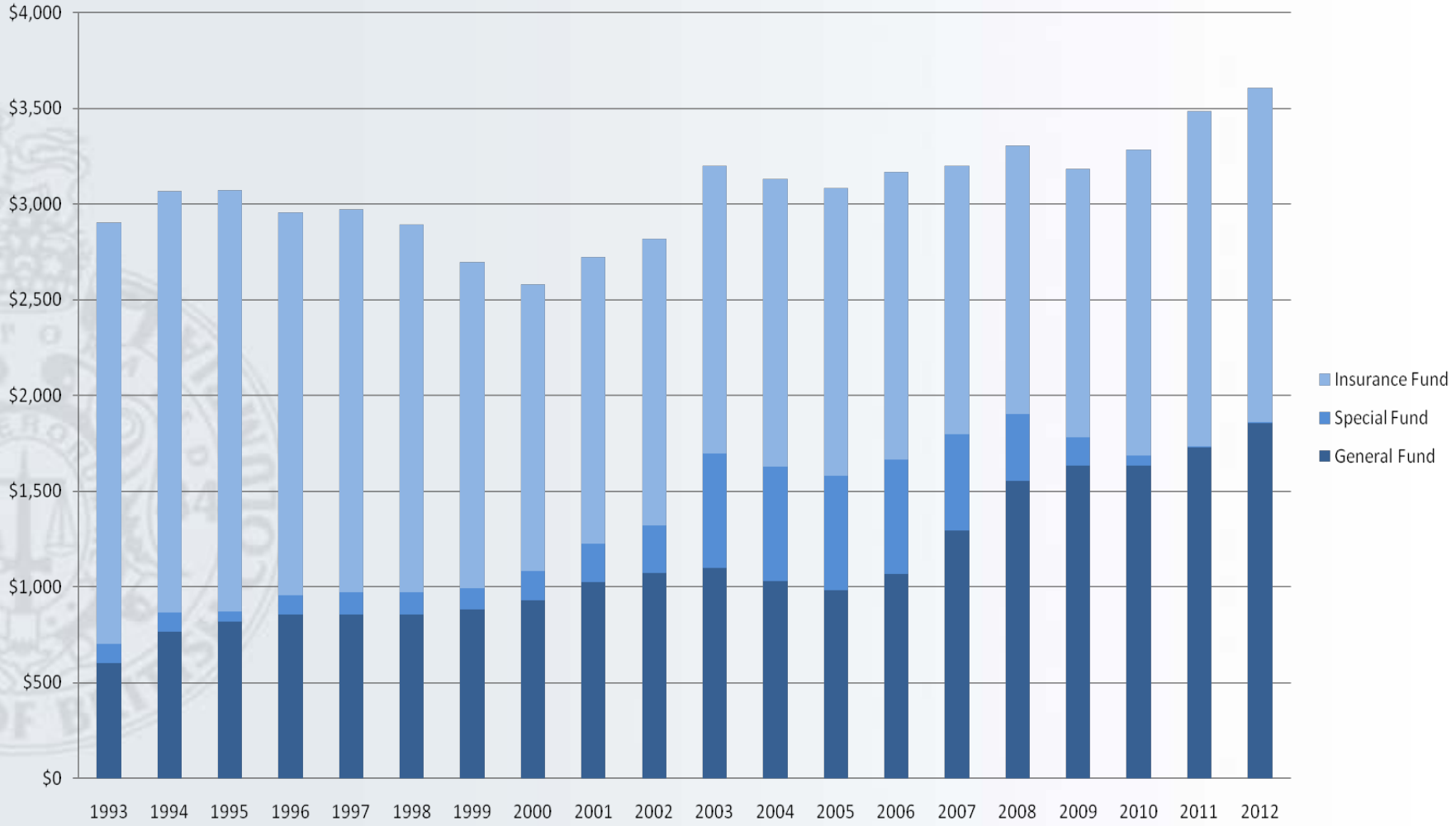
The Law Society of British Columbia

- 2012 LSBC practice fee compared to 2011 LSUC and LSA practice fees, adjusted by 3%
- 2011 LSUC practice fee increased to reflect $2.5 million contribution from reserve ($71 per member)



Total Fee Comparison Year Over Year

The Law Society of British Columbia



The Law Society of British Columbia

THE LAW SOCIETY OF BRITISH COLUMBIA
DRAFT OPERATING BUDGET (excluding capital/depreciation)
For the Year ended December 31, 2012
GENERAL FUND SUMMARY

	2012 Budget	2011 Budget	2010 Actual	2012B vs 2011B Variance	%	2012 Budget FTEs	2011 Budget FTEs	Approved FTE	New FTE	
GENERAL FUND REVENUES										
Membership fees	15,513,134	14,153,145	12,971,989							
PLTC and enrolment fees	1,002,250	937,500	1,010,802							
Electronic filing revenue	750,000	568,300	606,931							
Interest income	345,250	375,000	315,036							
Other revenue	1,245,518	1,097,544	1,379,492							
TOTAL GENERAL FUND REVENUES	**18,856,152**	**17,131,489**	**16,284,251**	**1,724,663**	**10.1%**					
GENERAL FUND EXPENSES										
Benchers Governance	1,647,117	1,554,866	1,404,006			0.15	0.15	-	-	
Corporate Services	3,223,311	2,832,157	2,646,519			22.50	22.50	-	-	
Credentials & Practice	3,429,232	3,266,832	3,100,870			34.16	32.16	-	2.00	*
Executive Services	1,881,424	1,885,982	1,821,174			19.85	19.85	-	-	
Policy and Legal Services	1,866,777	1,665,115	1,529,672			10.30	10.50	(0.20)	-	
Regulation	7,701,872	6,892,502	6,475,709			59.40	55.00	4.40	-	
TOTAL GENERAL FUND EXPENSES	**19,749,733**	**18,097,454**	**16,977,950**	**1,652,279**	**9.1%**	**146.36**	**140.16**	**4.20**	**2.00**	
GENERAL FUND NET CONTRIBUTION	**(893,581)**	**(965,965)**	**(693,699)**	**72,384**		**146.36**	**140.16**	**4.20**	**2.00**	
Net Building (845 Cambie) Income (1)	**893,580**	**960,702**	**712,578**	**(67,122)**		**2.00**	**2.00**	**-**	**-**	
GENERAL FUND NET CONTRIBUTION (Inc Bldg)	**(0)**	**(5,263)**	**18,879**	**5,263**		**148.36**	**142.16**	**4.20**	**2.00**	
Trust Assurance Program										
Trust Administration Fee Revenue	2,500,000	2,500,000	2,364,862	-	0.0%					
Trust Administration Department	2,468,301	2,393,644	2,269,989	74,657	3.1%					
Net Trust Assurance Program	**31,699**	**106,356**	**94,873**	**(74,657)**		**17.60**	**17.60**	**-**	**-**	
TOTAL NET GENERAL FUND & TAP CONTRIBUTION	**31,699**	**101,093**	**113,752**	**(69,394)**						

Notes:

(1) This line represents the profit of operating the building at 845 Cambie.

***** **1 - Credentials / Practice Standards**
1 - Summer Law Student Program

The Law Society of British Columbia

2012 Capital Expenditures

- 2012 capital expenditures part of the 10 year capital plan
- $176 capital allocation is included in the Practice Fee
  (includes 845 Cambie building loan repayment)
- No change required

Operations	Computer hardware, software and phone replacement	$315,000
	Equipment, furniture and fixtures replacement	$98,000
845 Cambie St.	Workspace Improvements – 6/7/8 Reception areas	$405,000
	Workspace Improvements – Other	$200,000
	Building maintenance – Emergency power upgrade, lighting upgrades, parking garage, parking elevator)	$830,000
	Total	$1,848,000

The Law Society of British Columbia

The Law Society of British Columbia - Special Compensation Fund
Statement of Revenue and Expense
For the Year ended December 31, 2012

	2012 Budget	2011 Budget	2012B vs 2011B Variance
Revenue			
Annual assessment	10,787	52,500	
Recoveries	-	250,000	
	10,787	302,500	(291,713)
Expense			
Audit	9,000	9,000	
Claim and costs	538,000	-	
Counsel and forensic audit fees	40,000	70,000	
Miscellaneous	1,000	1,000	
	588,000	80,000	508,000
Net contribution	(577,213)	222,500	(799,713)
Net assets - Beginning of year	1,052,856	830,356	
Net assets - End of year	475,643	1,052,856	

The Law Society of British Columbia

The Law Society of British Columbia - Lawyers Insurance Fund

Consolidated Statement of Revenue and Expense

For the Year ended December 31, 2012

	2012 Budget	2011 Budget	2012/2011 Budget Variance	%	2012 Budget FTEs	2011 Budget FTEs	FTE Change
Revenue							
Annual assessment	13,601,650	13,292,078					
Investment income, 2012 includes FV adjustments	6,207,270	1,000,000					
Other income	62,000	35,000					
	19,870,920	14,327,078	5,543,842	38.7%			
Insurance Expense							
Actuaries, consultants and investment brokers' fees	421,080	482,080					
Allocated office rent	147,395	148,102					
Contribution to program and administration costs of General Fund	1,568,901	1,525,765					
Legal	20,000	20,000					
Office	947,138	640,837					
Premium taxes	12,367	12,259					
Actuarial provision for claim payments	14,812,660	14,314,000					
Provision for ULAE	53,000	200,000					
Salaries, wages and benefits	2,755,440	2,469,634					
	20,737,981	19,812,677	925,304	4.7%			
Loss Prevention Expense							
Contribution to co-sponsored program costs of General Fund	701,366	710,840					
Total Expense	21,439,347	20,523,517	915,830	4.5%			
Net Contribution	(1,568,427)	(6,196,439)	4,628,012		23.25	22.05	1.20

Capital Costs – 10 year plan

The Law Society of British Columbia

	TOTAL	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
INFORMATION TECHNOLOGY											
Computer Hardware	1,713,500	197,365	117,040	148,465	120,690	279,940	170,000	170,000	170,000	170,000	170,000
Computer Software	1,004,900	107,300	29,600	146,000	85,000	137,000	100,000	100,000	100,000	100,000	100,000
System Upgrades	-	-	-	-	-	-	-	-	-	-	-
Phone System	355,000	10,500	10,500	10,500	10,500	260,500	10,500	10,500	10,500	10,500	10,500
OPERATIONS											
Equipment, Furniture & Fixtures	1,604,450	98,450	195,000	135,000	135,000	205,000	135,000	135,000	208,000	208,000	150,000
Subtotal	4,677,850	413,615	352,140	439,965	351,190	882,440	415,500	415,500	488,500	488,500	430,500
845 BUILDING											
Base Building/Tenant Improvements	5,368,320	830,500	321,900	944,443	396,585	206,354	423,784	447,319	597,436	600,000	600,000
Workspace Improvements	4,217,500	604,500	640,000	343,000	860,000	345,000	225,000	300,000	300,000	300,000	300,000
Subtotal	9,585,820	1,435,000	961,900	1,287,443	1,256,585	551,354	648,784	747,319	897,436	900,000	900,000
TOTAL CAPITAL PLAN - 845 Cambie	14,263,670	1,848,615	1,314,040	1,727,408	1,607,775	1,433,794	1,064,284	1,162,819	1,385,936	1,388,500	1,330,500
Number of members (FTEs)		10,787	10,837	10,887	10,937	10,987	11,037	11,087	11,137	11,187	11,237
Capital Levy		176	176	176	176	176	176	176	176	176	176
Remainder from prior yrs available		0	(450,103)	(356,831)	(668,127)	(850,990)	(851,071)	(472,843)	(184,350)	(110,174)	(29,762)
Current Year AFB Collection		1,898,512	1,907,312	1,916,112	1,924,912	1,933,712	1,942,512	1,951,312	1,960,112	1,968,912	1,977,712
Total Capital Levy Available		1,898,512	1,457,209	1,559,281	1,256,786	1,082,723	1,091,441	1,478,469	1,775,762	1,858,738	1,947,950
$500,000 building loan repayment		(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)	(500,000)
Capital expenditures as above		(1,848,615)	(1,314,040)	(1,727,408)	(1,607,775)	(1,433,794)	(1,064,284)	(1,162,819)	(1,385,936)	(1,388,500)	(1,330,500)
Cumulative Over/(Under) funded		(450,103)	(356,831)	(668,127)	(850,990)	(851,071)	(472,843)	(184,350)	(110,174)	(29,762)	117,450

Capital loan of $1 million authorized

Memo

The Law Society of British Columbia

13000

To: The Benchers

From: Bill McIntosh, for the Executive Committee

Date: July 6, 2011

Subject: Commitment to "Complete the Ladder Cycle" from Candidates for Benchers' Nomination for Second Vice-President

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The Executive Committee has discussed this matter and directed that it be placed before the Benchers for consideration at your July meeting. The relevant minute of the Committee's June 2, 2011 meeting provides:

> **11. Undertaking by Benchers' Nominee for Second Vice-President Not to Seek Judicial Appointment: Policy Discussion**
>
> Mr. Vertlieb outlined his view that candidates for the position of Benchers' nominee for Second Vice-President-elect should be asked to commit to make every reasonable effort to complete the terms of Second Vice-President, First Vice-President and President. More particularly, Mr. Vertlieb suggested that candidates for the position of nominee for Second Vice-President elect be asked to make a commitment comparable to that imposed on candidates for the position of the Law Society's member of the Federation of Law Societies Council:
>
> > The Council member, as a condition of accepting the position, will agree to make genuine efforts to complete the full term and then, if offered, to accept and complete the term on the FLSC Executive Committee ladder. More particularly, the Council member will not accept a judicial appointment or other position that requires withdrawing from Council.[1]
>
> Following discussion the Committee directed that this matter be placed before the Benchers at their July meeting for consideration.

[1]Terms of Reference for LSBC Member of FLSC Council, page 2 (approved by the Executive Committee at their September 16, 2010 meeting).

The Law Society of British Columbia

LSBC Member of the Federation of Law Societies of Canada Council

TERMS OF REFERENCE

To: **Benchers and Life Benchers**

From: **Executive Committee**

Date: **September 16, 2010**

LSBC Member of the Federation of Law Societies of Canada Council

TERMS OF REFERENCE

Background

The Federation of Law Societies of Canada (FLSC) is the national coordinating body of Canada's 14 law societies mandated to regulate Canada's 95,000 lawyers and Quebec's 3,500 notaries. The Federation is the common voice of Canada's law societies on a wide range of issues critical to the protection of the public and the rule of law, including solicitor-client privilege, the importance of an independent and impartial judiciary, and the role of the legal profession in the administration of justice. The Federation is governed by a national Council that includes a representative from each of the 14 member law societies.

Appointment

1. All current elected and Life (elected) Benchers are eligible to be nominated and to serve as LSBC's FLSC Council Member, provided that they are members in good standing.

2. The Benchers appoint LSBC's Council member from the pool of nominees presented by the Executive Committee.

3. The Executive Committee manages the appointment process, which includes:

   - setting the term of appointment (generally a period of three years, unless the Executive Committee directs otherwise);

   - inviting and reviewing nominations;

   - preparing a pool of nominees from the nominations received for the Benchers' consideration; and

   - notifying the nominees and FLSC of the Benchers' appointment decision.

4. The Council member, on completing a first term, may be considered by the Executive Committee to be appointed by the Benchers for one further term.

   Note that Appendix 3, section 2 of the Bencher Governance Policies applies: "Law Society appointments to any position will normally be up to a total period of six years, provided that other considerations relating to that particular appointment may result in a shortening or lengthening of this period. An initial appointment to a position does not carry with it an expectation of automatic reappointment for up to six years."

Service

1. The Council member, as a condition of accepting the position, will agree to make genuine efforts to complete the full term and then, if offered, to accept and complete the term on the FLSC Executive Committee ladder. More particularly, the Council member will not accept a judicial appointment or other position that requires withdrawing from Council.

2. If the Council member is or becomes a Life Bencher, or is defeated in a Bencher election, the Council member will complete the full term of the Council appointment.

3. The Council member will strive to:
    - attend all FLSC Council meetings (currently three in person and one telephone meeting per year)
    - report after each Council meeting to the Benchers at their next meeting, and where appropriate, to the Executive Committee at their next meeting
    - provide supporting documentation received from FLSC to LSBC as appropriate to ensure that LSBC is fully informed about national initiatives and the FLSC agenda
    - attend Benchers meetings to facilitate this obligation and answer questions
    - attend all FLSC Conferences (currently semi-annual)
    - obtain instructions from LSBC, where necessary regarding matters on the FLSC agenda
        - which instructions may come from the President in consultation with the First Vice-President, Second Vice-President and the CEO, or the Executive Committee, or the Benchers
        - Bencher approval will generally be obtained for matters touching on regulatory issues such as rule or policy changes, and financial commitments
    - remain fully informed about the work of LSBC and in particular, the Benchers' strategic priorities and current issues[i]
    - where appropriate, use such information to inform the work of the Council and manage Council's expectations regarding LSBC's ability to deal with FLSC agenda issues
    - as appropriate, convey LSBC 's desire for FLSC to achieve certain objectives
    - facilitate an exchange of information between LSBC and other law societies on matters of common interest
    - participate fully in the national deliberations and work of whatever Council committee(s) the Council member may join

[i]Therefore the Council member will be included in the distribution of agendas and supporting materials (including *in camera*) for Benchers and Executive Committee meetings.

The Law Society
of British Columbia

REPORT OF THE CLOUD COMPUTING WORKING GROUP

Date: July 15, 2011

Gavin Hume, QC (Chair)
Bruce LeRose, QC
Peter Lloyd, FCA
Stacy Kuiack

Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **Cloud Computing Working Group**

Policy and Legal Services Department
Doug Munro 604-605-5313

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WHAT ARE THE BENCHERS BEING ASKED TO CONSIDER?

The Benchers are being asked to adopt a series of recommendations that fall into three categories. One of the recommendations is to publish guidelines to assist lawyers in performing due diligence when deciding whether or not to use a third party service provider for electronic data storage and processing (including "cloud computing" [1]). The second category of recommendations relates to changes to the Law Society Rules and resources to ensure the Society's regulatory function keeps pace with certain technological changes. The third category of recommendations relates to methods to improve lawyers' (and law students) understanding of their obligation to use technology in a manner consistent with lawyers' professional responsibilities.

Lawyers face certain risks when using cloud computing, and cloud computing creates certain challenges for regulatory bodies. Some of these risks are unique to cloud computing, but others are not. Among the issues that require consideration by the Benchers are:

[1] "Cloud computing" is defined in Appendix 2.

- What due diligence and precautions must a lawyer engage in when entrusting records to a third party service provider for storage and/or processing?
- Given that cloud computing can store a lawyer's records in multiple jurisdictions, including outside Canada, what factors should lawyers consider in deciding whether or not to use the technology (e.g. Preserving client confidentiality and privilege, maintaining custody and control of trust records, complying with Law Society investigations that require record disclosure, ensuring records storage outside the jurisdiction is consistent with provincial and federal laws, such as personal information protection legislation, etc.)?
- Given that cloud computing can store a lawyer's records in multiple jurisdictions, including outside Canada, what challenges does this create for the Law Society in performing its regulatory functions, including:
    - Trust regulation and audits;
    - Professional Conduct and Discipline investigations;
    - Custodianships.
- Given the manner in which cloud computing stores data, what implications are there for evidentiary issues? Does this mode of computing affect the ability to collect metadata and/or forensic auditing data?

The Benchers are being asked to take an approach modeled on lawyer regulation, rather than attempting to regulate an emerging technology.

PURPOSE OF THE REPORT

The purpose of this report is to identify the risks associated with lawyers using electronic data storage and processing, accessed remotely over a network (like the Internet), particularly circumstances where those services are provided by a third party vendor, and to suggest how lawyers can use those technologies/services while still meeting their professional obligations.

The privilege of practising law comes with professional obligations and those obligations extend to the use of technology. If a lawyer is unable to meet his or her professional obligations when using a given type of technology or service provider, the lawyer should not use the technology or service provider when acting in a professional capacity. In order to determine whether a particular technology or service provider is acceptable, a lawyer must engage in due diligence. This report suggests some factors designed to assist lawyers in performing their due diligence (see **Appendix 1**). The report also makes recommendations regarding the Law Society's regulatory rules and processes to facilitate efficient and effective investigations in the face of emerging technologies.

Technological change tends to outpace the law. In the regulatory context this can lead to ambiguities regarding rights and obligations and can create gaps in the regulatory process, all of which can increase the public risk. This report considers lawyers using electronic, remote data storage and processing. The main focus of the report is on

lawyers using what is commonly termed "cloud computing", but the report has broader application. In approaching the topic the Working Group considered cloud computing to entail electronic data processing and/or storage accessed over the a network such as the Internet. The more detailed description the Working Group favours is the NIST Definition of Cloud Computing[2] (see **Appendix 2**). There is a great deal being written about cloud computing every day. The selected bibliography is a starting point for some of this discussion, but readers should bear in mind that the field will continue to develop, and due diligence will require keeping pace with emerging standards and legislation.

Lawyers have professional obligations with respect to managing their clients' information. These obligations include the need to preserve confidential and privileged information, and also the requirement to comply with personal information protection legislation. In addition to these obligations, lawyers are subject to the regulatory authority of the Law Society. This includes the requirement to immediately make available records for copying when faced with a 4-43 order, records during a 3-79 compliance audit, practice records during a custodianship and during a practice standards inquiry. When a lawyer uses cloud computing his or her ability to comply with these obligations may be affected. This report analyses the responsibilities of lawyers, and the regulatory authority of the Law Society, in light of technology that in some instances places lawyers' records on servers that are in the possession of third party vendors and which may be located in foreign jurisdictions.

In analyzing these issues the Working Group applied certain principles, including:

- Lawyers must engage in due diligence to ensure they can meet their professional obligations while using technology for any work that may attract solicitor and client confidentiality and/or privilege;
- The due diligence lawyers must perform when considering the use of a particular technology includes due diligence with respect to the service provider of that technology as well as with respect to the technology itself;
- Any changes to the *Legal Profession Act,* the Law Society Rules, and the *Professional Conduct Handbook* must protect the public interest to ensure the public is confident lawyers are discharging their professional obligations and are being effectively regulated;
- Technological change is neither good nor bad; it presents positive opportunities as well as risks;
- The Law Society regulates lawyers, not the development of technology. Where possible, any rules and policies should strive to be technology neutral and directed towards the responsibilities of lawyers;

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[2] Peter Mell and Tim Grance, Version 15, 10-7-09, available at: http://csrc.nist.gov/groups/SNS/cloud-computing/ (Accessed December 2, 2010). Anyone looking for a thorough, one stop overview of cloud computing may wish to read, Lee Badger, Tim Grance, Robert Patt-Corner and Jeff Joas, NIST, *Draft Cloud Computing Synopsis and Recommendations* (Special Publication 800-146: May 2011).

- Cloud computing is already in use by lawyers and members of the public. It is reasonable to assume its use will only continue to grow.[3]

Cloud computing is subject to considerable hype, and many authors have commented as to its scope and meaning. The seeming ubiquity of the term, in advertizing and media, and the wide range of applications people use in daily life that rely on cloud computing, make it easy to take a laissez-faire attitude towards its adoption. While it is perfectly acceptable for a teenager to uncritically embrace "The Cloud" to create a virtual shrine to Justin Bieber, the same does not hold true for a lawyer dealing with confidential and privileged information. As Jansen and Grance caution:

> *As with any emerging information technology area, cloud computing should be approached carefully with due consideration to the sensitivity of data. Planning helps to ensure that the computing environment is as secure as possible and is in compliance with all relevant organizational policies and that data privacy is maintained.*[4]

The Working Group is of the view that this cautionary note is apposite.

The Working Group accepts that the use of cloud computing and similar technologies already is occurring, and its continued growth is likely. The Working Group believes that what is required is a clear set of practice guidelines to assist lawyers in determining whether to use certain forms of technology or service providers. While the responsibility to perform due diligence and the final determination as to the suitability of a particular technology or service will lie with lawyers to make, the Working Group believes that guidelines will assist lawyers in performing their due diligence.

In addition, the Law Society requires clear and effective rules to deal with lawyers (or law firms) who are unable (or unwilling) to comply with Law Society investigations in a timely manner by virtue of the technology and services the lawyers use. Lawyers must not be allowed to subvert the regulatory function of the Law Society by pointing to a technological or jurisdictional limitation of the technology the lawyers use for data storage and processing.

The Working Group recognizes that just as cloud computing will continue to evolve, the regulation of professionals using the technology and regulation of the service providers will continue to evolve. As such, this report represents a first step into this area. Time and experience will tell whether the right balance has been struck. The Law Society

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[3] In addition to the considerable amount of money that corporations like IBM, Microsoft, Google, etc. are putting into cloud computing technology, the issues arising from the technology are being discussed by the United States Government, the American Bar Association Commission on Ethics 20/20, privacy commissioners, etc. (see the selected bibliography attached to this report).

[4] Wayne Jansen and Timothy Grance, NIST *Guidelines on Security and Privacy in Public Cloud Computing* (Draft Special Publication 800-144: January 2011) at p. vi.

needs to be open to revisiting concepts that don't work, particularly concepts that place the public at unacceptable risk of harm.

OVERVIEW OF THE ISSUES

The foundational rules that govern the relationship between lawyers and their clients, and lawyers and their regulator, were developed in a paper world. Some of the rules have changed over time in order to reflect changes in technology. For example, historically when the Law Society investigated a lawyer the lawyer had to turn over his records. With the advent of photocopiers, technology facilitated the ability to make copies of records, rather than removing the originals. Rules were modified to reflect this. Most recently the Law Society amended its Rules to facilitate the copying of computer records, while establishing a method to protect the reasonable expectation of privacy that might attach to certain records stored on a hard drive.[5] The inquiry into cloud computing arose from that work. As a matter of policy, the Benchers have also been engaged in initiatives to move the organization towards electronic models of record keeping and to embrace "Green" initiatives. The Working Group was mindful of this while engaging in its analysis.

Lawyers have professional obligations. These obligations include the duty to preserve client confidences and privilege, as well as the duty to comply with the Law Society's investigative function. The issue of how a lawyer stores and processes business records affects a lawyer's ability to discharge these duties. Modern technology allows for data to be processed and stored remotely from a lawyer's workplace. In some cases the lawyer may be storing data on servers the firm owns and operates, and in some instances that work will be contracted out to service providers.

Remote data storage and processing are not new phenomena. Lawyers have been using record storage companies for some time. Before the advent of the personal computer, mainframe computing provided a form of remote data processing. Email transits data across third party systems. Many issues will be the same when it comes to records stored in a warehouse and records stored on third party servers. Foremost are the issues of trust and security.[6]

The Working Group did not assume that trust and security were more or less reasonable when using a third party contractor for storage of digital records over paper records. However, lawyers must bear in mind that once records are networked, the risks of

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[5] See, the Law Society of British Columbia, *Forensic Copying of Computer Records by the Law Society* (October 2009).

[6] See, for example, Robert Gellman, World Privacy Forum, "Privacy in the Clouds: *Risks to Privacy and Confidentiality from Cloud Computing*", (February 23, 2009); Bruce Schneier, "Be careful when you come to put your trust in the clouds" (The Guardian: June 4, 2009).

breach change and as such the risk analysis is different.[7] With respect to risk management, Jansen and Grance observe: "Establishing a level of trust about a cloud service is dependent on the degree of control an organization is able to exert on the provider to provision the security controls necessary to protect the organization's data and applications, and also the evidence provided about the effectiveness of those controls."[8]

These foregoing issues suggest, in light of the nature of the records lawyers store with third parties, that due diligence is an important part of any determination as to whether a lawyer should use particular services. In this context "due diligence" would include ensuring proper contractual safeguards are in place.

Cloud computing also creates challenges for regulatory bodies.[9] The Law Society is the regulatory body of a self-governing profession. Whether one views self-governance as a privilege or a right, self-governance in the public interest requires that the Law Society have effective means to investigate complaints against lawyers. The *Legal Profession Act* and Law Society Rules establish a range of powers for the Law Society, and place obligations on lawyers, with respect to investigations. These powers include the authority for the Law Society to copy a lawyer's records, and the obligations include the lawyer being required to immediately produce the records for copying on request.[10] Lawyers also have professional obligations to keep records secure and to maintain them for certain periods of time (often many years). Cloud computing can affect both the Law Society's investigative functions and a lawyer's ability to comply with the investigative function and meet their record keeping obligations. Similarly, cloud computing can affect the Lawyers Insurance Fund in its efforts to defend a claim against a lawyer's professional liability insurance.

When data is stored on third party servers, particularly when those servers are in foreign jurisdictions, it is difficult (and perhaps in some instances impossible) to get an immediate copy of the records. When records are paper the Law Society can photocopy them. When records are resident on a local storage device like a hard drive, the Law Society can make a forensic copy of them. In both these scenarios, best evidence can be preserved. When the records are stored on a remote server accessed over the Internet, the Law Society might be able to access the records (if it has certain information), but efforts to copy the record may result in the loss of metadata and relational data that can be important to an investigation. Likewise, printing the electronic records will also result in a loss of that data.[11] In addition, from a technological standpoint, it may take

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[7] For a discussion of data breeches and the incidence of attacks on networks versus insider breeches, see, Verizon Business Risk Team, "2008 Data Breach Investigations Report".

[8] Footnote 4, at p. 18.

[9] See, Gellman at fn. 6.

[10] See, for example, Law Society Rules 4-43, 3-79.

[11] "Loss" here refers to loss as a result of the format migration as opposed to the issue of whether the data is still resident on a server.

longer to copy a lawyer's records over the Internet than it does to make a forensic copy of the hard drive on which those records are stored. The Working Group considered how the Law Society can carry out its mandate in the face of cloud computing, and how lawyers can meet their obligations to immediately provide records to the Law Society for copying during investigations.

ANALYSIS OF THE ISSUES

Jurisdictional Issues

Jurisdictional issues are central to any analysis of cloud computing.[12] In many cases the cloud services a lawyer in British Columbia will use will have its servers located in another jurisdiction. In some instances, the servers will be in multiple jurisdictions, either because the service provider has multi-jurisdictional operations or has subcontracted services to providers that operate in other jurisdictions. This makes it very difficult to ascertain where a user's data is located.[13]

There are several problems with lawyers having their business records stored or processed outside British Columbia. Lawyers have a professional obligation to safeguard clients' information to protect confidentiality and privilege. When a lawyer entrusts client information to a cloud provider the lawyer will often be subjecting clients' information to a foreign legal system. The foreign laws may have lower thresholds of protection than Canadian law with respect to accessing information. A lawyer must understand the risks (legal, political, etc.) of having client data stored and processed in foreign jurisdictions.

Because confidentiality and privilege are rights that lie with the client, the Working Group considered whether a lawyer should not unilaterally make a decision to subject the client's information to unreasonable risk of access. When a client retains a lawyer and provides the lawyer with personal information, it is unlikely the client has contemplated that the lawyer will be storing that information in a foreign jurisdiction. The proposed Due Diligence Checklist includes some recommended best practices for dealing with personal information.

Much has been made of the invasive powers of the USA PATRIOT Act and the risks associated with using cloud providers that have servers located in the United States or that are owned by corporations that are subject to US law. There are some that

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[12] The challenges of jurisdiction are raised in most articles on cloud computing. See, for example, Gellman at fn. 6; ARMA International's hot topic, *Making the Jump to the Cloud? How to Manage Information Governance Challenges*, (2010); European Network and Information Security Agency, Cloud Computing: Benefits, risks and recommendations for Information Security (November 2009).

[13] Chantal Bernier, Assistant Privacy Commissioner of Canada, "Protecting Privacy During Investigations" (March 17, 2009).

downplay the risk associated with the PATRIOT Act on the basis that the chance of personal data being accessed is not high.[14] The Working Group observes that one cannot properly analyze risk by only looking at the likelihood of an event occurring. A proper risk analysis also requires tracking the magnitude of harm should the risk materialize. Because of the importance of solicitor and client confidentiality and privilege, any lawyer who is performing a risk analysis of using third parties to process and store data needs to consider both the likelihood of the clients' information being accessed and the potential consequences of that access.

The Working Group also notes that in the American context, the PATRIOT Act is only one issue. It is estimated that there are over 10,000 agencies in the United States that are able to access information stored with third parties by way of a subpoena without notice, rather than a warrant.[15] Cloud providers may also have servers in countries other than the United States. A proper risk analysis by a lawyer requires a broader analysis than merely looking at the PATRIOT Act.

Another jurisdictional issue the Working Group considered is the implication of extra-jurisdictional data storage/processing on the ability of the Law Society to carry out its regulatory functions. As a self-governing profession, lawyers are subject to regulatory oversight by the Law Society. The Law Society is required to consider every complaint against lawyers.[16] In some instances complaints lead to investigations that require the Law Society to access and copy a lawyer's records. Lawyers are required to comply with Law Society Orders for the production and copying of records. In circumstances where a lawyer refuses to comply, or where the records are held by a third party who refuses to comply, the Law Society would have to proceed by way of s. 37 of the *Legal Profession Act* to have the records seized. In the case of cloud computing, *seizure* of the records is not likely possible, so the Working Group recommends seeking an amendment to s. 37 that allows for the court to order copying records as an alternative. The purpose of such an amendment is for greater clarity. The Working Group believes that the self-governing capacity of the profession needs to be preserved and that technological evolutions do not negate the Law Society's regulatory authority any more than they extinguish legal rights and obligations. The challenge becomes finding a means by which lawyers may make use of new technology while still being able to comply with their professional responsibilities.

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[14] See, for example, The Treasury Board of Canada, "Frequently Asked Questions: USA PATRIOT ACT Comprehensive Assessment Results" at http://www.tbs-sct.gc.ca/pubs_pol/gospubs/tbm_128/usapa/faq-eng.asp#Q3 (Accessed February 7, 2011).

[15] See the separate submissions of Albert Gidari, Partner, Perkins Coie LLP and James X. Dempsey, Vice President for Public Policy, Center for Democracy & Technology, to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties (May 5, 2010), Hearing on Electronic Communications Privacy Act Reform.

[16] Law Society Rules, Rule 3-4. Rule 3-5 sets out the circumstances where complaints must be investigated, or where there is discretion.

With respect to the challenges of complying with regulatory and legal requirements, Jansen and Grance write:

> Use of an in-house computing center allows an organization to structure its computing environment and to know in detail where data is stored and what safeguards are used to protect the data. In contrast, a characteristic of many cloud computing services is that detailed information about the location of an organization's data is unavailable or not disclosed to the service subscriber. This situation makes it difficult to ascertain whether sufficient safeguards are in place and whether legal and regulatory compliance requirements are being met. External audits and security certifications can to some extent alleviate this issue, but they are not a panacea.[17]

The Working Group recognized that the Law Society regulates lawyers, not third party providers or their technology. Absent going to court, the Law Society does not have the statutory authority to compel cloud service providers to provide access to and copies of lawyers' business records. This required the Working Group to consider how access to records, including their timely preservation and copying could be achieved through the medium of lawyer regulation.

How the technology affects lawyers' ability to discharge their professional responsibilities

There are a number of technological issues associated with cloud computing. This report does not attempt to be exhaustive in this respect. As noted, the intention of the Working Group is that any rule reforms state principles in as technology-neutral a manner as possible. The Working Group considered technology issues through two principle lenses. The first was how the technology might affect lawyers' ability to discharge their professional responsibilities. The second was how the technology might affect the Law Society's ability to carry out its regulatory function.

There are several ways in which cloud computing affects lawyers' ability to discharge their professional responsibilities. A central issue is that Rule 3-68 of the Law Society Rules states:

> 3-68 (0.1) In this Rule, "records" means the records referred to in Rules 3-60 to 3-62.

[17] Footnote 4 at p. 14.

> (1) A lawyer must keep his or her records for as long as the records apply to money held in trust and, in any case, for at least 10 years.
>
> (2) A lawyer must keep his or her records at his or her chief place of practice in British Columbia for as long as the records apply to money held in trust and, in any case, for at least 3 years.
>
> (3) A lawyer must protect his or her records and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure.
>
> (4) A lawyer who loses custody or control of his or her records for any reasons must immediately notify the Executive Director in writing of all the relevant circumstances.

A lawyer who uses cloud computing for trust accounting purposes will likely be off-side this rule by virtue of where the records are stored. The Working Group observes that many lawyers using closed systems that their firm controls will also be off-side this rule by virtue of the requirement that the records be stored at the lawyer's chief place of practice. There are many good reasons to locate a firm's servers outside the chief place of practice, however. In fact, it might constitute a best practice in some instances from a data risk management perspective (cooling systems, fire protection, cost, data backup, etc.). In considering Rule 3-68 the Working Group analyzed whether the rule was a relic of a paper paradigm and considered what the essential elements of the rule should be by asking what the rule's purpose is.

The Working Group is of the view that the two critical issues are:

- The Law Society's ability to access and copy the required records in a timely manner; and
- Lawyers' ability to discharge their obligations under 3-68(3) and (4).

If the Law Society can access remotely stored records on demand, and those records are sufficient for the purposes of the audit and investigative function of the Law Society, does it matter if the records are stored at the "chief place of practice" or elsewhere in British Columbia? Record storage outside the jurisdiction raises operational issues, but the core question is whether the "chief place of practice" requirement remains defensible.

The "chief place of practice" requirement is called into question when records are stored remotely in electronic form. The critical question is whether the records are available on demand at the time of request and in a format acceptable to the Law Society. Essentially, for electronic records, the location the record is stored is less important than the ability of the lawyer to produce the record on demand in an

acceptable form. The Working Group recommends that the Act and Rules Subcommittee craft a provision for electronically stored records that reflects this reality. Electronic records should be capable of being stored outside the chief place of practice provided the lawyer can make the records available at the time of request in an acceptable format (eg. print or PDF). The "records" covered in Rule 3-68(1) should be retained for 10 years from the final accounting transaction on the file.

As a separate matter, the Working Group notes that it is possible to read Rule 3-68(2) to mean that the record must be stored from three years from when there is no longer money in trust, or alternatively for as long as money is held in trust and for at least three years. At some point the Act and Rules Subcommittee, as part of its general review of the Rules may wish to consider this issue.

The requirement that the records be stored in the chief place of practice exposes a logical problem with the rules. Rule 3-59(2) sets out the formats in which a lawyer must keep accounting records. Rule 3-59(2)(c) allows lawyers to keep accounting records in "an electronic form that can readily be transferred to printed form on demand." The chief place of practice requirement means that a lawyer who stores accounting records on a hard drive at his or her office, can meet the requirements of Rule 3-59 by printing a copy. A lawyer whose servers are located across town may have the technological capacity to print the records pursuant to Rule 3-59(2)(c) but could be off-side Rule 3-68(2). This is not easily defensible. While there are interpretation ambiguities (Rule 3-68 only applies to Rules 3-60 to 3-62) and practical challenges with remote storage, the key issue is whether the content of a print record is acceptable.

The Working Group believes that the chief place of practice requirement should be removed for electronic accounting records, and that the emphasis should be on the electronic accounting records being made available on demand in an acceptable format. While a paper record will be sufficient in some cases, in other cases it will not. The Working Group is of the view that the Law Society should have the discretion to require the metadata (or data that establishes a forensic accounting trail) associated with electronic records (including accounting records). While the authority to copy records under Rule 3-79 and 4-43 will include the authority to copy metadata, Rule 3-59(2)(c) fails to recognize that in some circumstances the Law Society may require more information than is contained in the print record.

The Working Group also heard from the Trust Regulation Department that Rule 3-68 should include reference to Rule 3-59, as the latter includes general accounting records that may be important to an investigation. The Working Group recommends making this change as it should be non-controversial.

Security

Rule 3-68(3) required the Working Group to consider what constitutes "reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure."

In addition to the requirement in Rule 3-68(3), lawyers have the duty to protect client confidences. The *Professional Conduct Handbook*, Chapter 5 states:

1. A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature of the source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court.
2. A lawyer shall take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information.
3. A lawyer shall not disclose the fact of having been consulted or retained by a person unless the nature of the matter requires such disclosure.
4. A lawyer shall preserve the client's secrets even after the termination of the retainer, whether or not differences have arisen between them.

Any time a lawyer entrusts a client's records to a third party, the obligations set out above may be put at risk. The requirement to take all reasonable steps to ensure the privacy and safekeeping of clients' confidential information supports the need for due diligence and contractual safeguards.

Security of records is a critical issue for a lawyer to resolve when choosing a third party service provider, including a cloud provider. There are too many variables with respect to security for the Working Group to make a blanket statement as to whether cloud computing is sufficiently secure. Jansen and Grance set out a useful list of security pros and cons of cloud computing.[18] As part of their due diligence, lawyers need to understand the security measures associated with the storage and processing of their records. This caution is not limited to the use of cloud providers.

A cloud can be public, private, community or hybrid.[19] Each of these models affects the degree of control the user has over the environment. In addition to this, there are vast differences in the resources of various providers and users. A large firm with a

[18] Footnote 4 at pp. 8-12.
[19] See Appendix 2.

dedicated IT staff may be able to create better data security by operating its systems in-house than a sole practitioner might be able to manage. The sole practitioner might experience a considerable security upgrade by having IT services managed by a specialist provider. These variables bring the issue back to the importance of due diligence on the part of the lawyer or law firm when it comes to managing its records and outsourcing services.

Because of the complex variables and case-by-case nature of security risk analysis, the Working Group did not feel it could assert that cloud computing is more safe or less safe than traditional computing. What is required is for individual lawyers and law firms to assess the security risks associated with their existing records management systems[20] as well as any new system they intend to use. As the Verizon Risk Report notes, networked data may be subject to more attacks but this does not necessarily correlate to a greater number of data breaches.[21] Insider attacks can have devastating consequences. Insider attacks can occur within a traditional firm as well as one that uses cloud computing, so lawyers should not assume that their records are necessarily more vulnerable when they are stored with a cloud provider. A consideration with respect to third party providers, however, is that lawyers do not vet the employees of the third party service providers they use. Having a better understanding of the security checks, access rights and restrictions the third party provider places on accessing the lawyers' business records is important. A data breach with a cloud provider could compromise vast amounts of client information, and lawyers need to take reasonable steps to guard against this risk. Trust is not a given when dealing with service providers.

"Custody or Control" of accounting records

The Working Group analyzed the requirement under Rule 3-68(4) that a lawyer who loses custody or control of his or her accounting records must immediately notify the Executive Director of the circumstances. In particular, the Working Group considered whether custody was lost when the records were stored on a third party system.

The Working Group considered whether the phrase "custody or control" should be synonymous with "possession" for the purpose of Rule 3-68(4). In some respects the interpretation challenge can be tied to the concept that the records in 3-68(4) would be considered to be paper records stored at the chief place of practice. Once one accepts that the records may be electronic, and the servers may be off-site, "custody or control" requires a different analysis.

The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 has a "custody or control" requirement in s. 3(1). The Working Group discussed Order 02-30, which dealt with a situation where the University of Victoria had an arrangement to

[20] "Records management" is used here to include storage, processing, retention and access.
[21] Footnote 7. This may change as more data moved to cloud systems.

store records for the separate entity, the University of Victoria Foundation. The Foundation was not a public body and therefore its records did not fall under the scope of the Act. The University is a public body, so if the records could be found to be under the custody or control of the University, an access application could be made for the records pursuant to s. 3(1).

While decisions of the Privacy Commissioner are not binding on the Benchers for the purpose of interpreting Rule 3-68, they can be informative. Order 02-30 can be used to support a line of argument that the mere fact records are stored with a third party would not always mean that the lawyer has lost custody of them. It would seem to depend on what the third party is able to do with the records, what their responsibilities are regarding the documents, and how the documents are integrated into other records systems would also affect things. In the context of cloud computing this could be used to argue that the terms of service are critical to the issue of custody. It could also be used to argue that a private cloud better supports the concept of custody by the lawyer than a public cloud where the storage is commingled with other records. However, the requirement that the cloud provider secure the documents suggests responsibility for their "safekeeping, care, protection, or preservation"[22] and therefore custody might lie with the cloud provider.

The Working Group is of the view that provided a lawyer ensures through contractual safeguards that custody or control of his or her records does not pass to a third party, that the lawyer can use a third party for the storage or processing of those records. If the lawyer is unable to access those records and provide them on demand during a compliance audit or Law Society investigation, however, the lawyer may be found to have lost custody or control of the records.

Records Retention

Lawyers have record retention obligations. Some of these obligations are driven by limitation periods, which will mean that different files have to be retained for different periods of time. Given how digital data is stored, particularly in a cloud system, the issues associated with retaining "a file" can be complex and lawyers need to turn their minds to how they can meet these requirements.

Rule 3-68 establishes a series of retention requirements for trust accounting files. A review of that rule demonstrates that a lawyer may have retention obligations of 10 years or more with respect to trust records. In addition to retention obligations for trust records, there is the issue of malpractice claims. The Law Society guidelines for file

[22] See Order 02-30, paragraph 23.

destruction,[23] set in consultation with the Lawyers Insurance Fund, help ensure that a lawyer's file still exists when a negligence claim or potential claim is made. The Working Group discussed this issue with the Lawyers Insurance Fund, as noted later in this report.

Another example of the need for proper records management flows from the *Professional Conduct Handbook*, Chapter 10, Rule 8:

> 8. Upon withdrawal, the lawyer must immediately:
> (e) take all reasonable steps to assist in the transfer of the client's file.

If the lawyer does not have a good practice management system in place, particularly when the lawyer is using third party data storage for electronic records, transferring the client file in a timely and complete manner may prove difficult.

Records management is a complex enterprise in a paper world. In the digital world there are greater complexities. In simple terms, records management in the digital world is complicated by the ease with which the records can be copied and disseminated, evolutions in hardware and software can make archived data inaccessible, and spoliation of digital data can occur.[24] A complete analysis of digital records management is beyond the scope of this report. However, lawyers are required to understand how to manage their records (regardless of the storage medium) to ensure they are meeting their records keeping obligations

Records management can be complicated when dealing with cloud providers. Many commentators have asked the question, what happens if the cloud provider goes bankrupt or ceases to operate?[25] Data back-up and escrow agreements might be insufficient safeguards without access to the application software necessary to decode the stored data. In addition, do the cloud providers maintain the data for the period of time a lawyer is required to retain it? What assurances can the cloud provider give that the data will be available in a comprehensible form on request by the lawyer or the Law Society?[26] How will a lawyer know that data that is supposed to have been destroyed, has been destroyed?

The Working Group is of the view that lawyers cannot assume that their business records will be properly archived and maintained by a third party service provider, whether operating a cloud service or otherwise. Lawyers have a positive obligation to

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[23] Law Society of British Columbia, "Closed Files: Retention and Disposition", at http://www.lawsociety.bc.ca/page.cfm?cid=2001&t=Client-Files (last accessed: June 2, 2011).
[24] A good starting point for understanding these issues is The Library of Congress, Digital Preservation: http://www.digitalpreservation.gov/.
[25] Jansen and Grance, fn. 4, Gellman fn. 6 at p. 16.
[26] For example, the Law Society might be named the custodian of the practice by the court, thereby stepping into the shoes of the lawyer or firm to operate the practice.

ensure proper records management systems are in place. This obligation extends to ensuring that any third party record storage provider is keeping the data archived in an accessible format, available on demand. This includes having a means to audit compliance.

How the technology affects the Law Society's ability to carry out its regulatory function

Cloud computing technology can have serious implications for regulatory bodies.[27] As discussed, the jurisdictional component is part of the challenge. Regulatory bodies have limited jurisdictional reach, and when records are stored and processed outside the geographical reach of the regulatory body, and by third parties who are not subject to regulation, the regulatory authority can be challenged.

The effect of the jurisdictional limitation is such that, in order to carry out certain essential investigatory functions, an organization like the Law Society would have to seek a court order and then have that court order enforced in a foreign jurisdiction. This introduces delay, increased cost, and uncertainty into the regulatory process. These challenges can adversely affect the public perception of the legal profession's capacity to self-regulate in the public interest. The increased costs would ultimately be borne by the profession as a whole in the form of higher fees. Ironically, these higher fees could off-set some of the cost savings realized through the adoption of cloud computing.

In addition to jurisdictional challenges, the technology can impact the regulatory function. The Law Society has the authority to copy records, including computer records. When a lawyer is faced with an order allowing the Law Society to copy records, the lawyer must *immediately* produce the records and make them available for copying.[28] When the records are stored on cloud services, a lawyer's ability to comply with these rules can be affected as can the Law Society's ability to copy the records.

With paper records, the Law Society can easily make copies. With records stored on hard drives, the Law Society has rules that allow it to make forensic copies of the hard drive. In the latter case, the Law Society also has established a process by which personal information that is not relevant to the investigation can be protected so the Law Society is not accessing it. When the records necessary for an investigation are stored on third party servers the ability of the Law Society to copy those records is compromised.

In order to access the records, the Law Society would require the lawyer to provide the password and information necessary to locate the records. An unscrupulous lawyer

[27] See Gellman fn. 6 at 22, Bernier fn. 13 re forensic investigations.
[28] Law Society Rules, Rule 4-43 and 3-79.

would have a much easier time hiding records in the cloud than on a hard drive in his or her office. But even if the Law Society has access to the records, the ability to copy the records may be challenged. If the cloud uses proprietary software, any copy of the information will need access to that application software in order to render the copied information comprehensible.[29] Some cloud providers may provide data copies to users who are migrating data from the cloud, but this will often be in a flat file format such as an Excel spreadsheet. The consequence of this is that relational data that can be important to an investigation will be lost.[30] With a forensic copy of a hard drive the Law Society's forensic expert can testify as to the authenticity of the record at the time the copy was made. With copying data from the cloud, the forensic expert cannot make that claim because, amongst other reasons, the act of copying the logical file alters the data (as opposed to copying the physical file when making a forensic copy). This has implications for evidentiary standards.

The Working Group discussed the forensic copying issues with the Law Society's external computer consultant, the Trust Regulation staff and the Practice Management Advisor. While it would be possible to make a logical file copy by accessing the cloud, a physical copy could not be made. Metadata would be lost, as would the ability of the expert to testify that the record had not been altered. The Working Group considered that metadata is a record that the Law Society is entitled to collect. Metadata has proven to be an important part of some investigations.

The Working Group discussed the possibility that the adoption of cloud computing would revert the investigatory process back to the days of paper records in some respects. This was a challenging part of the analysis. On the one hand, an argument can be made that no investigatory process is perfect and that the Law Society used to be able to investigate lawyers before there was metadata. On the other hand, technology now allows for metadata to be part of the investigation, assisting investigators in proving that a lawyer has fraudulently altered records after the fact. In some respects eliminating the use of new investigatory technology would be like asking the police to stop using radar guns to catch speeding drivers.

The Working Group believes it is essential that the third party service providers lawyers use for electronic data processing and storage are able to provide the Law Society records that include metadata. At the very least the rules should provide the Law Society the discretion to require that metadata, or authenticated forensic investigation data that meets the evidentiary standards for electronic disclosure before a superior court, be provided on demand. It is the lawyer's responsibility to ensure the services he or she uses supports Law Society investigations and audits.[31]

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[29] David Bilinsky and Matt Kenser, Introduction to Cloud Computing (ABA TechShow 2010).

[30] This relational data could include creation and modification dates for documents.

[31] "Demand" in this case would be subject to the proper process, such as a 4-43 order. This would also allow the standard to evolve over time to keep pace with best practices.

The Working Group recognizes that the potential exists that the Law Society will have to copy records held by third party service providers in a manner that does not, at present, constitute best evidence. This is because data stored on the cloud may be located in many locations and the Law Society will not be able to make forensic copies of the servers the data is stored on. Lawyers should not be allowed to use a technology that prevents the Law Society from obtaining forensic copies of electronic records and then claim the copied records fall short of the best evidence standard. As such, the Working Group recommends that a rule be created that would allow the Law Society to rely on the copied record as being best evidence and place the onus on the lawyer to provide the forensic copy if the lawyer wishes to present "better evidence". This rule should be limited to circumstances where the Law Society is unable to make a forensic copy of the devices on which the records are stored because the Law Society is either unable to locate or access the storage devices to make a forensic copy.

Potential impact on Rule 4-43

Following the report of the Mirror Imaging Task Force in 2008, the Law Society revised Rule 4-43 to create a process to protect personal information. The balance that was sought recognized that the Law Society has the authority to copy computer records and investigate lawyers, but the process of making a forensic copy of computer records can capture irrelevant personal information. In light of this, the Law Society created a process to allow irrelevant personal information to be identified and segregated, so it was not accessed by the Law Society. Cloud computing creates a situation where that process might not be able to be followed.

The reason that the 4-43 process for segregating personal information might not be able to be followed with cloud computing is that it is unlikely that the Law Society will be able to make forensic copies of the servers that store a lawyer's records. The copying process will be different. This may mean that the Law Society will end up copying and accessing records that contain irrelevant personal information. The Working Group is of the view that this is a risk the lawyer bears by choosing to use cloud computing. It is not an excuse to refuse to comply with a Law Society investigation.

While it will be important for the Law Society to take reasonable efforts not to access irrelevant personal information stored with a cloud provider during the course of an investigation, the level of protection contemplated under 4-43 may be impossible to meet. As such, the Working Group recommends rule 4-43 be amended to recognize the process for protecting personal information during investigations is subject to the lawyer using a record keeping system that supports such a process. If the lawyer uses a system that prohibits the Law Society from segregating such information in a practical manner, the lawyer does so at his or her own risk that such information may be inadvertently accessed during the investigation.

Ensuring Authorized Access to Records

The concept of records being stored and processed outside of British Columbia presents conceptual challenges to some of the operational processes of the Law Society. One area of particular concern is custodianships. In circumstances where a lawyer has died or become incapable of carrying on his or her practice, the Law Society will obtain an order of the court that empowers the Law Society to step in as custodian of that lawyer's practice. This essentially puts the Law Society in the shoes of the lawyer, and the Law Society may use the lawyer's records for the purpose of carrying on the practice, and may also engage in an investigation of the records.[32]

If a lawyer uses cloud computing and a custodian is appointed, the Law Society faces the possibility of arriving at an office that has no records and no evidentiary trail as to where those records are located. This creates risk to the public.

In addition to custodianships, there can be circumstances where a lawyer refuses to comply with a Law Society investigation, such as a 4-43 order or a 3-79 compliance audit. When the records are not available for copying because they cannot be located, this creates risk to the public. In these instances the Law Society has processes to suspend the lawyer, but that does not solve the problem of not possessing records that may be important for protecting the public interest.

The Working Group discussed potential solutions to these risks. However, because the likelihood and consequences of these risks are difficult to predict, the Working Group preferred monitoring the development of lawyers using this technology to see whether further steps are required by the Law Society. **Appendix 3** highlights some concepts the Working Group briefly canvassed. These concepts do not form part of the recommendations in this report. Rather, they are concepts that might merit consideration in the future should the recommendations in this report prove inadequate for protecting the public interest. If the concepts set out in Appendix 3 are considered in the future, they would have to be analyzed fully to consider both the operational appropriateness and feasibility of the concepts, as well as the general appropriateness of the concepts.

Lawyers Insurance Fund Issues

Cloud computing could result in file material that is either unavailable, or available only through a court order, if stored in a foreign jurisdiction. The Working Group asked the Lawyers Insurance Fund how these problems might impact its ability to manage claims.

[32] See the *Legal Profession Act*, Part 6, and the Law Society Rules, Part 6.

The Lawyers Insurance Fund noted that a lack of file material, regardless of the reason, could compromise its ability to investigate and defend a claim, as well as its ability to compensate victims of lawyer theft (if the Law Society's ability to discover thefts was impaired). Cloud computing might also result in some additional costs being incurred if a court order in a foreign jurisdiction was required in order to access records. However, assuming that lawyers take reasonable steps to safeguard against lost data in terms of third party storage and processing of records, the risk will be minimal.

The Lawyers Insurance Fund also provided some general observations. They agreed with the concept that lawyers should be required to meet records retention obligations while using cloud computing or other emerging technologies. As noted, the Law Society has set guidelines for file destruction that the Lawyers Insurance Fund has helped establish, and adherence to these guidelines will help ensure that a file still exists when a negligence claim is made.

They also noted that lawyers' use of technology, including cloud computing, creates other risks such as data breaches. If a lawyer or client suffers a loss as a result, these are not losses arising out of the lawyer's negligent provision of legal services and are not covered by the professional liability insurance policy. Because of this, lawyers will want to consider how best to manage these risks. Steps might include:

- Obtaining informed client consent for the use of the services;
- Requiring the service provider to indemnify the lawyer for any claims the lawyer faces as a result of using the service; and
- Buying insurance on the commercial market to cover risks such as data breaches.

The Working Group encourages lawyers to consider the risks highlighted by the Lawyers Insurance Fund as part of the due diligence and risk management lawyers should perform when determining whether to use third party data storage and processing.

CONCLUSION

Technological change occurs at a breakneck pace. This creates challenges for law-makers and regulatory bodies, but it also presents challenges for professionals who are required to adhere to codes of conduct. When considering the topic of cloud computing, the Working Group rejected the knee-jerk reaction to prevent lawyers from using the technology because it introduces risks and challenges. All technology and business models present risks and challenges. In addition, the Working Group is of the view that the proper role of the Law Society is to regulate lawyers, not attempt to regulate technology. What this means is that lawyers should be allowed to use emerging technologies, provided the lawyer is able to comply with his or her professional responsibilities while using the technology. Cloud computing is no

different. It is for this reason that the Working Group did not attempt to set up regulatory models that are contingent on the type of cloud service that is being used.

The challenge for lawyers becomes understanding the risks associated with the technology or service they are using. This can be a daunting task, particularly if there are barriers to keeping pace with technological change. In some cases generational differences will make the adoption and understanding of new technology a challenge, in other cases the lawyer will lack the resources to stay on top of technological issues. Despite these challenges, lawyers still have professional and legal duties that they owe to their clients, disclosure requirements in litigation, and obligations owed to their regulator. These duties do not disappear in the face of new technology. Rather, it is the lawyer's responsibility to ensure their use of technology and business models comply with these obligations. Failure to do so may lead to serious legal and regulatory consequences, including revocation or suspension of the lawyer's licence to practice law.

There are some instances where a set of rules has become archaic or unworkable, and in those cases it is proper for the law-maker or regulator to consider the policy behind the rules and to modernize the rules. Some suggestions have been made in this report to accomplish that objective. In other instances the underlying obligation is of such central importance that the rules should not be weakened in order to facilitate the use of new technology. A lawyer's obligation to protect confidential and privileged information is an example of the latter. The professional obligations a lawyer has does not preclude the lawyer from using emerging technology; rather, it requires the lawyer to take steps to ensure he or she can use the technology in a manner that is consistent with his or her professional obligations.

The Working Group believes that the proper approach for dealing with lawyers using third party storage and processing of records, including cloud computing, is to provide lawyers due diligence guidelines and best practices. The purpose of the document is to assist lawyers in using records storage and processing services in a manner that is consistent with the lawyer's professional obligations. The responsibility of choosing an adequate service provider lies with the lawyer, as does the risk. Lawyers should ensure their contract of services address these issues.

In addition to creating due diligence guidelines and best practices, the Working Group also makes a series of recommendations to modernize the Law Society Rules to deal with the challenges cloud computing presents to the Law Society as regulator. These recommendations reflect an effort to allow lawyers to use a promising technology to deliver legal services, while ensuring proper safeguards exist to protect the public. These recommendations may need to be amended in the future and it is important that the Law Society monitor how this technology affects lawyers' ability to meet their professional obligations. Experience will tell whether the public is sufficiently protected or if further steps are required.

RECOMMENDATIONS

Recommendation 1: The Law Society should adopt and publish the attached due diligence guidelines for lawyers using third party electronic data storage and processing (see **Appendix 1**).

Recommendation 2: In order to ensure the Law Society's regulatory process keeps pace with evolutions in data storage and processing technology, and to ensure the audit process remains robust, the Act and Rules Subcommittee should draft rules that capture the following concepts:

1. Rule 3-68(0.1) should include reference to Rule 3-59 in order to facilitate the Trust Regulation Department auditing and investigation of accounting records;
2. Rule 3-68 should be amended to remove reference to the "chief place of practice" requirement with respect to electronic records, and instead should require that electronic records be made available at the time of request in a format acceptable to the Law Society (the Law Society should publish guidelines as to what the Trust Regulation Department requires as an acceptable format);
3. The general retention period in Rule 3-68(1) should be 10 years from the final accounting transaction;
4. There should be a general rule regarding records in electronic form that gives the Law Society the discretion to accept copies of those electronic records in paper or another form;
5. There should be a general rule regarding records in electronic form that the Law Society has the discretion to require the lawyer to provide the meta data associated with those records;
6. There should be a general rule that requires lawyers to ensure their electronic records are capable of meeting the prevailing electronic discovery standards of a British Columbia superior court;
7. The Act and Rules Subcommittee should determine how to incorporate the following trust rule requirements:
    (a) If monthly reconciliations are prepared and stored electronically, the reconciliation must show the date it was completed. Each of the monthly reconciliations must be available with appropriate back up documentation and not overwritten by the system.

    (b) If billing records are stored electronically, they must include the creation date as well as any modification dates.

    (c) All accounting records must be printable on demand in a comprehensible format (or exported to acceptable electronic format (ie. PDF)) and available for at least 10 years from the final accounting transaction. If the

member scans all his supporting documentation such as 3rd party documents like bank statements the full version meaning all the pages front and back even if there it is blank page.

(d) A sufficient "audit trail" must be available and printable on demand in a comprehensible format (this should be a requirement of all accounting software whether it's in the cloud or a stand-alone program such as ESILAW or PCLAW etc.).

(e) Audit trail transaction reports must be complete, showing all postings into the software with specifically assigned transactions that correspond chronologically with dates etc.

(f) Cash receipts must always be retained in hard copy.

(g) Ability of system to provide creation dates, what changes were made, and how often the documents (i.e. Word, Excel and/or Adobe) were changed. Ensuring that metadata information is not lost when stored on a cloud.

(h) Ability for LSBC to have view only access & printing access to all items stored on cloud (I.e. emails, documents, accounting records) when required. This does not derogate from any rule that allows the Law Society to copy a record or have that record provided on request. The purpose is to allow for a forensic investigation that does not alter the underlying record.

8. There should be a rule that recognizes, in circumstances where the Law Society has had to copy electronic records held by a third party, the Law Society may rely on the copies as best evidence and the onus is on the lawyer to provide a forensic copy of those records if the lawyer wishes to dispute the quality of the evidence.
9. The Act and Rules Subcommittee should consider, as part of future revisions to the *Legal Profession Act,* amending s. 37 to permit orders for copying or duplication of records, as an alternative to "seizing" records.

Recommendation 3: For the purposes of interpreting Rule 3-68(4), and subject to the other recommendations in this report, if a lawyer ensures through contractual safeguards that custody or control of his or her records does not pass to a third party, the lawyer can use a third party for the storage or processing of those records. If the lawyer is unable to access those records and provide them on demand during an audit or Law Society investigation, however, the lawyer may be found to have lost custody or control of the records, which may lead to disciplinary consequences.

Recommendation 4: In circumstances where the Law Society Rules require a lawyer to either provide the Law Society the lawyer's records or make copies of the records available to the Law Society, and the lawyer either refuses to comply, or is unable to comply by virtue of having used a service provider that does not make the records available in a timely fashion, the lawyer should be suspended until such time as the lawyer complies with the disclosure requirements under the Law Society Rules. The Act and Rules Subcommittee should consider whether this requires creating a new administrative suspension rule, or proceeding by way of Rule 3-7.1. In circumstances where the lawyer is suspended, the Law Society should consider seeking a court order for a custodianship in order to protect the public and ensure the suspended lawyer's clients continue to be served.

Recommendation 5: The Law Society should encourage the CBA BC Branch and CLE BC to include as part of future courses on cloud computing (or similar technology), information about the best practices and Law Society Rules.

Recommendation 6: The Ethics Committee should review its ethics opinions regarding the use of third party service providers and update them to address the concerns arising from the use of cloud computing, or similar technology.

Recommendation 7: Law Schools and PLTC should teach students that lawyers' have an obligation to ensure their use of technology is consistent with their professional obligations.

Recommendation 8: The Law Society's Trust Regulation Department, and the Professional Conduct and Investigation Department, when dealing with investigations involving a lawyer who uses cloud computing, should identify circumstances in which the approach proposed in this report is failing to protect the public interest, in the event modifications to the policy and rules is necessary for the Law Society to fulfill its public interest mandate. Because technology will continue to develop, and standards will emerge, it is important to ensure the Law Society keeps pace with these changes, and staff will play an important role in keeping the Benchers apprised of the potential need for amendments to the policies and rules recommended in this report.

Recommendation 9: The Practice Advice group should modify their resources to reflect the recommendations in this report. This may involve creating checklists to better assist lawyers.

Recommendation 10: Because cloud computing is an emerging technology, the Law Society should ascertain whether any lawyers who use cloud computing are willing to have the Trust Assurance Department determine whether their system meets the present requirements, and the investigators determine whether the system meets the requirement for a 4-43 investigation. This would not be for the purpose of endorsing a

particular system. It would be for the purpose of identifying any concerns to ensure the Law Society's auditing program can address cloud computing.

Recommendation 11: Because cloud computing stores records in a manner where the Law Society may not be able to make forensic copies of hard drives, or segregate irrelevant personal information that is stored in the cloud, Rule 4-43 should be amended to make it clear that the process for protecting personal information during investigations is subject to the lawyer using a record keeping system that supports such a process. If lawyers choose to use systems that do not support that process, they do so at their own risk, and the Law Society may end up having to collect or access personal information that is irrelevant to an investigation.

ACKNOWLEDGEMENTS

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APPENDIX 1

DUE DILIGENCE CHECKLIST[33]

A lawyer must engage in due diligence when using a third party service provider or technology for data storage and/or processing. The purpose of the due diligence is to ensure that the lawyer is able to fulfill his or her professional responsibilities while using a particular service provider or technology. The due diligence may also assist the lawyer as a matter of business risk management. Although these guidelines are designed to assist lawyers in determining whether to use electronic data storage and processing that is accessed over a network, such as the Internet (cloud computing), lawyers may find some of these factors useful in performing due diligence with respect to data storage and processing that does not use cloud based technologies. These guidelines assume the National Institute for Standards and Technology definition of cloud computing, as amended from time to time.[34]

This checklist also contains a section for privacy considerations. It is important to note that while the Law Society views the approach contained in Part B as acceptable the Privacy Commissioner may have a different perspective. The approach in Part B adopts concepts from the Alberta *Personal Information Protection Act*. It is not prescriptive.

If a lawyer uses third party data storage and processing that locates the clients' records outside of British Columbia, the lawyer should advise the client of this fact so the client can determine whether or not to use the lawyer. It is optimal to memorialize the client's consent in a written retainer.

PART A: GENERAL DUE DILIGENCE CHECKLIST

- Lawyers must ensure that the service provider and technology they use support the lawyer's professional obligations, including compliance with the Law Society's regulatory processes. This may include using contractual language to ensure the service provider will assist the lawyer in complying with Law Society investigations.

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[33] Some of these factors are also raised by commentators on cloud computing, including from the following sources: Wayne Jansen and Timothy Grance, NIST Guidelines on Security and Privacy in Public Cloud Computing (Draft Special Publication 800-144: January 2011); the North Carolina State Bar "Proposed 2010 Formal Ethics Opinion 7, *Subscribing to a Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*" (April 15, 2010), "Proposed 2011 Formal Ethics Opinion 6, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*"; Robert J.C. Deane, *Cloud Computing – Privacy and Litigation Discovery Issues* (Borden Ladner Gervais seminar: 2011)

[34] Special Publication 800-145 (Draft) , January 2011.

- Lawyers are strongly encouraged to read the service provider's terms of service, service level agreement, privacy policy and security policy. Lawyers must ensure the contract of service adequately addresses concerns regarding protecting clients' rights and allowing the lawyer to fulfill professional obligations. Ensure the contract provides meaningful remedies. At a minimum consideration should be given to the following:

    - Lawyers must take steps to ensure the confidentiality and privilege of their clients' information is protected. Clear contractual language should be used to accomplish this objective.

    - Lawyers should try to ascertain where the data is stored/hosted. Consider the political and legal risks associated with data storage in foreign jurisdictions. The lawyer must consider whether he or she can comply with British Columbian and Federal laws, such as laws governing the collection of personal information, when using third party service providers (see Part B).

    - Who owns the data? Confidentiality and privilege are rights that lie with the client. Lawyers must ensure ownership of their clients' information does not pass to the service provider or a third party.

    - What happens if the service provider goes out of business or has their servers seized or destroyed?

    - On what terms can the service provider cut off the lawyer's access to the records?

    - Will the lawyer have continuous access to the source code and software to retrieve records in a comprehensible form? Consider whether there is a source code escrow agreement to facilitate this.

    - How easily can the lawyer migrate data to another provider, or back to desktop applications?

    - Who has access to the data and for what purposes?

    - What procedural and substantive laws govern the services? What are the implications of this?

    - Does the service provider archive data for the retention lifecycle the lawyer requires?

    - Are there mechanisms to ensure data that is to be destroyed has been destroyed?

  - What are the lawyer's remedies for the service provider's non-compliance with the terms of service, service level agreement, privacy policy or security policy?

  - Ensure the service provider supports electronic discovery and forensic investigation. A lawyer may need to comply with regulatory investigations, and litigation disclosure, in a timely manner. It is essential that the services allow the lawyer to meet these obligations.

- What is the service provider's reputation? This essentially requires the lawyer to assess the business risk of entrusting records to the service provider. Lawyers should seek out top quality service providers.

- What is the service provider's business structure? Lawyers must understand what sort of entity they are contracting with as this affects risk.

- Does the service provider sell its customer information or otherwise try and commoditize the data stored on its servers?

- Lawyers should strive to keep abreast of changes in technology that might affect the initial assessment of whether a service is acceptable. Services, and service providers, may become more or less acceptable in light of technological and business changes.

- What security measures does the service provider use to protect data, and is there a means to audit the effectiveness of these measures?

- A lawyer should compare the cloud services with existing and alternative services to best determine whether the services are appropriate.

- If using a service provider puts the lawyer off-side a legal obligation, the lawyer should not use the service. For example, there may be legislative requirements for how certain information is stored/secured.

- Lawyers should establish a record management system, and document their decisions with respect to choosing a cloud provider. Documenting due diligence decisions may provide important evidence if something goes wrong down the road.

- Consider the potential benefits of a private cloud for mission critical and sensitive data, along with information that may need to be stored within the jurisdiction.

With respect to certain trust records, the Trust Regulation Department at the Law Society of British Columbia recommends the following as *best practices*:

1. All bank reconciliations (for all trust and general bank accounts) should be printed the same date it was completed and stored in hard copy;

2. A full and complete trust ledger should be printed in hard copy at the close of each client file matter and stored in hard copy;

3. A master billings file should always be maintained in hard copy;

4. Have a disaster recovery plan in case the cloud provider shuts down. Regularly back up all files and records in possession of the member. Store backup files in a fire safe, safety deposit box;

5. All Members should print off or export to electronic file (i.e. pdf) all accounting records required by Division 7 Rules on an ongoing basis and store locally;

6. If client files are stored electronically, all key documents supporting transactions and key events on the file must be printable on demand in a comprehensible format (or exported to acceptable electronic format (ie PDF) and available for at least 10 years from the date of the final accounting transaction.

The Lawyers Insurance Fund notes that there may be data breaches and other risks in using a particularly technology, including cloud computing, that may lead to losses by lawyers and clients. These are not risks to which the professional liability insurance policy responds, so lawyers will want to consider the risks and how best to protect themselves as part of their due diligence. Steps that might be taken include:

- A lawyer should obtain informed client consent for the use of the services;
- A lawyer should require the service provider to indemnify the lawyer for any claims the lawyer faces as a result of using the service; and
- A lawyer should consider buying insurance on the commercial market to cover risks such as data breaches.

PART B: PRIVACY CONSIDERATIONS

Lawyers need to ensure that their process for collecting, retaining and using personal information complies with the applicable legislation. If the lawyer is dealing with private sector collection of personal information, it is possible that the BC *Personal Information Protection Act,* SBC 2003, c. 36, or the federal *Personal Information Protection and Electronic Documents Act,* SC 2000, c. 5 will apply, or both may. Jurisdiction may be overlapping, and lawyers should aim for the higher standard. It is also possible that the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 (FIPPA) will

apply. For example, the lawyer may perform contract work for a public body that entrusts the lawyer with personal information the public body has collected. FIPPA, subject to certain exceptions, prohibits personal information that is collected by a public body from being stored or accessed outside Canada.[35] If a lawyer is using cloud computing, they need to understand the obligations that attach to that data before they collect it in order to ensure they are complying with privacy legislation. Understanding where the data is stored and/or accessed takes on increased importance.

Lawyers may be collecting, retaining and using personal information from a number of sources including employees and clients. If a lawyer is using data storage outside of Canada it is recommended that the lawyer advise the individual at the commencement of the relationship. In the case of prospective clients, this could occur during the conflict checking process. It is important for an individual to know before the personal information is collected that it is being stored/processed outside of Canada.

It is important to remember that there are obligations with respect to the collection, use and retention of personal information. Some of this personal information may also attract solicitor and client privilege. A lawyer has a professional obligation to protect solicitor and client privilege that overlays the legislative requirement for dealing with personal information. The checklist below may be sufficient for personal information, but may fall short of the requirements for protecting information that is governed by confidentiality and privilege. A lawyer must understand the nature of the information they are collecting, using and retaining and ensure appropriate safeguards are in place. The checklist also draws on concepts from the Alberta *Personal Information Protection Act,* SA 2003, c. P-6.5 (AB PIPA) which articulates a high standard.

Step 1:
Lawyers should review their privacy policy and determine whether it supports the use of the service contemplated (eg. cloud computing). It is possible that the privacy policy is out of date. It is also possible that the law firm will have collected a considerable amount of personal information that the firm is now contemplating storing in a manner not addressed at the time it was collected.

Step 2:
Lawyers must identify which legislation governs the information they are collecting.

Public sector:
If the personal information is governed by FIPPA, the lawyer must ensure the information is only stored or accessed within Canada, unless one of the exceptions is

[35] FIPPA, Section 30.1.

met. It may be necessary to set up a separate system to address this sort of information.

Private sector:
While personal information may be stored or processed outside of British Columbia, it is essential to take steps to protect the personal information. Consider the following:

- The lawyer must enter into a data protection arrangement with the service provider that ensures equivalent levels of data protection as are required in BC/Canada;[36]

- Where data is being processed, consent is not required;

- Consent is required if the personal information is being disclosed for a secondary purpose (consider the risk here regarding confidential and privileged information);

- Because of the openness principle, notice should be given to the client that data will be processed outside Canada. At a minimum, notice should include alerting the client to the potential that a foreign state may seek to access the data for "lawful access" purposes;[37]

- The purpose of notice is to alert the client to the risk that their personal information may be accessed by a foreign government;

- The lawyer's policy and practices must indicate:[38]

    - The countries outside Canada where the collection, use and disclosure will occur;

    - The purposes for which the service provider has been authorized to collect, use or disclose the personal information.

- Before or at the time of collecting or transferring personal information to a service provider outside Canada, the lawyer must notify the individual:[39]

    - Of the way to obtain access to written information about the lawyer's policies and practices regarding service providers outside Canada; and

[36] See PIPEDA Case Summary No. 313.
[37] See s. 4.8 of Schedule A of PIPEDA.
[38] AB PIPA, s. 6(2).
[39] AB PIPA, ss. 13.1(1) and (2).

- The name or position of a person who is able to answer the individual's questions about the collection, use, disclosure or storage of personal information by the service providers outside Canada.

- While the notification does not require information about the countries outside Canada, the privacy policy should contain this information.

APPENDIX 2 - Definition of Cloud Computing.

Source: National Institute of Standards and Technology, U.S. Department of Commerce, Special Publication 800-145 (Draft), Peter Mell and Timothy Grance, *The NIST Definition of Cloud Computing (Draft),* January 2011.

> Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model promotes availability and is composed of five essential characteristics, three service models, and four deployment models.
>
> Essential Characteristics:
>
> *On-demand self-service.* A consumer can unilaterally provision computing capabilities, such as server time and network storage, as needed automatically without requiring human interaction with each service's provider.
>
> *Broad network access*. Capabilities are available over the network and accessed through standard mechanisms that promote use by heterogeneous thin or thick client platforms (e.g. mobile phones, laptops, and PDAs).
>
> *Resource pooling.* The provider's computing resources are pooled to serve multiple consumers using a multi-tenant model, with different physical and virtual resources dynamically assigned and reassigned according to consumer demand. There is a sense of location independence in that the customer generally has no control or knowledge over the exact location of the provided resources but may be able to specify location at a higher level of abstraction (e.g. country, state, or datacenter). Examples of resources include storage, processing, memory, network bandwidth, and virtual machines.
>
> *Rapid elasticity.* Capabilities can be rapidly and elastically released to quickly scale in. To the consumer, the capabilities available for provisioning often appear to be unlimited and can be purchased in any quantity at any time.
>
> *Measured Service.* Cloud systems automatically control and optimize resource use by leveraging a metering capability [fn omitted] at some level of abstraction appropriate to the type of services (e.g., storage,

processing, bandwidth, and active user accounts). Resource usage can be monitored, controlled, and reported, providing transparency for both the provider and consumer of the utilized service.

Service Models:

Cloud Software as a Service (SaaS). The capability provided to the consumer is to use the provider's applications running on a cloud infrastructure. The applications are accessible from various client devices through a thin client interface such as a web browser (e.g., web-based email). The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, storage, or even individual application capabilities, with the possible exception of limited user-specific application configuration settings.

Cloud Platform as a Service (PaaS). The capability provided to the consumer is to deploy onto the cloud infrastructure consumer-created or acquired applications created using programming languages and tools supported by the provider. The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly application of hosting environment configurations.

Cloud Infrastructure as a Service (IaaS). The capability provided to the consumer is to provision processing, storage, networks, and other fundamental computing resources where the consumer is able to deploy and run arbitrary software, which can include operating systems and applications. The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, deployed applications, and possibly limited control of select networking components (e.g., host firewalls).

Deployment Models:

Private cloud. The cloud infrastructure is operated solely for an organization. It may be managed by the organization or a third party and may exist on premise or off premise.

Community cloud. The cloud infrastructure is shared by several organizations and supports a specific community that has shared concerns (e.g., mission, security requirements, policy, and compliance considerations). It may be managed by the organizations or a third party and may exist on premise or off premise.

Public cloud. The cloud infrastructure is made available to the general public or a large industry group and is owned by an organization selling cloud services.

Hybrid cloud. The cloud infrastructure is a composition of two or more clouds (private, community, or public) that remain unique entities but are bound together by standardized or proprietary technology that enables data and application portability (e.g., cloud bursting for load balancing between clouds).

APPENDIX 3

The material in Appendix 3 represents three concepts that the Working Group discussed, but did not resolve. The concepts arose out of a recognition that in some instances, such as a custodianship, the Law Society will require access to a lawyer's records and the use of cloud computing might create impediments to such access. At this point, however, the Working Group does not believe these concepts merit recommendation. The concepts may prove unnecessary, and in any event there are operational and policy considerations that would have to be worked through to determine whether any of the concepts is appropriate or necessary. To undertake that analysis at this point seemed disproportionate to the potential risk. Experience will determine whether these concepts, or other concepts, require consideration in the future. This appendix is included for greater disclosure of the Working Group's analytical process, and does not constitute a recommended course of action.

Potential Solution #1: Requiring lawyers to use a password manager and provide the master password

One option the Working Group discussed was to require lawyers who use cloud computing to use a password manager and to provide the Law Society the password for the password manager. How this would work is that the password manager would store all the passwords for the services the lawyer was using. The Law Society would have the password to that repository. In the example of a custodianship, the Law Society would use the password to the password manager to access the passwords for the various services the lawyer used. This would allow the Law Society to identify the services being used and review the lawyer's records and carry on the practice.

In discussing this concept, the Working Group was cognizant that such a rule would place a considerable amount of power in the Law Society's hands. With the password to the password manager, the Law Society could access all of a lawyer's records. Doing so would obviously be inappropriate save as allowed by law. As such, any consideration of such a model would require a process to ensure due process was followed. For example, it might require a custodian order or a finding by a hearing panel that the lawyer had failed to comply with a Rule 4-43 order. In addition to a due process, it would also require robust security measures on the part of the Law Society. The Society would have to establish a system that protected the passwords from being improperly accessed. The Working Group considered that any such system should also have an audit function, and be subject to an annual reporting requirement to indicate the number of times it was accessed and following which due process.

Potential Solution #2: Requiring lawyers to enter into three party contracts with the Law Society and the Service Provider

Another option the Working Group considered was requiring lawyers to enter into three-party contracts with the Law Society and any cloud provider. The contract would include a requirement for the cloud provider to provide the Law Society access to the records. This would, again, be subject to due process such as a custodian order or a hearing panel decision. The Working Group understands that a three-party contract is similar to the approach of the Chambre des Notaries du Quebéc.

The three-party contract held a certain amount of appeal to the Working Group compared to the password manager concept, particularly because the Law Society does not become a repository of critical information like passwords. However, lawyers may use many cloud providers and these relationships can spring up quite suddenly; they are not like entering a lease for office space. As such, the lawyer may be in an *ad hoc* process of entering into contracts and getting the Law Society involved. This is administratively burdensome. In addition, it is likely that the larger cloud providers (eg. Amazon, Google, IBM, etc.) would not enter into such contracts.

Potential Solution #3: **Creating a Law Society "cloud" for lawyers**

Another option that the Working Group discussed was the idea of the Law Society operating a cloud service dedicated for lawyers. The Working Group did little more than sketch out the concept, as it would require an operational analysis that is beyond the scope of the Working Group.

The idea of a dedicated cloud service for lawyers, operated by the Law Society has some merit. It would allow for the service to be located in British Columbia, thereby eliminating the jurisdictional concerns. One possibility the Working Group considered was a federal cloud for lawyers, operated cooperatively by the law societies throughout Canada. This might allow for the servers to be located in jurisdictions other than British Columbia, while still avoiding some of the concerns arising from data storage in foreign jurisdictions.

If the concept of a law society operated cloud, dedicated for lawyers, is to be considered in earnest, it would be important to create a business structure that was independent from the regulatory branch of the Law Society. The Working Group recognized that the Law Society's investigatory function requires due process to access a lawyer's records, and if the Law Society were operating a cloud service it would have to create proper safeguards to ensure Law Society staff were unable to access the records stored on the service unless proper process had first been followed (eg. A 4-43 order, a custodian order, etc.).

The idea of a Law Society run cloud service would not be a quick solution to the challenges associated with cloud computing, but if the technology proves to be such that the Law Society's ability to protect the public is compromised because it cannot carry out its investigatory functions in the face of cloud computing, the idea might require serious consideration in the future. Cloud computing does not provide a safe harbor from regulatory oversight.

The three "potential solutions" needn't be viewed as mutually exclusive options. Some combination of the three might provide workable solutions. Any future consideration of these concepts would require an analysis of the operational feasibility and appropriateness of the concepts.

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Memo

The Law Society of British Columbia

15000

To Benchers

From Doug Munro

Date June 28, 2011

Subject **Family Law Task Force Report**

The Family Law Task Force is reporting out on its mandate to develop, in collaboration with the CBA, best practice guidelines for lawyers practising family law. The report represents the conclusion of the Task Force's original mandate. The Task Force has since been tasked with two other discrete projects, so it will need to continue past this report.

In addition to the report, the Task Force includes slides from the presentation of the report to the CBA Provincial Council by David Dundee, who chaired the CBA working group that developed the best practice guidelines in coordination with the Task Force.

DM

/Attachments

The Law Society of British Columbia

Report of the Family Law Task Force: Best Practice Guidelines for Lawyers Practising Family Law

For: The Benchers

Date: July 15, 2011

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Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **Family Law Task Force**

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PURPOSE OF THE REPORT

The Benchers are being asked to endorse the appended Best Practice Guidelines for Lawyers Practising Family Law (the "Guidelines": **Appendix**) and for their publication as a practice resource. The intention is that the Guidelines represent an aspirational standard, and are not intended to constitute a Code of Conduct.

BACKGROUND

The Benchers of the Law Society of British Columbia, at their January 26, 2007 meeting, struck the Family Law Task Force, with the following mandate:

> (a) determine whether an amendment to the *Professional Conduct Handbook* is necessary;
>
> (b) determine whether a code of conduct or guidelines for family lawyers is necessary, and if so whether it should be mandatory or voluntary, and who should be responsible for developing it; and
>
> (c) report back to the Benchers with its conclusions.

The decision to strike the Task Force arose following consideration by the Benchers of the opinions of the Access to Justice Committee, the Ethics Committee, the Independence and Self-governance Committee, and the Family Law Working Group, respecting the recommendations in the Ministry of the Attorney General, "A Code of Practice for Family Lawyers", Discussion Paper, March 2006, and Recommendation 36 of BC Justice Review Task Force, "A New Justice System for Families and Children", May 2005. Recommendation 36, suggested in part:

> that the Law Society of BC recognize the changing roles and duties of family law lawyers and develop a Code of Practice for Family Lawyers to give guidance in the balancing of a lawyer's partisan role with the potential harm it may cause to other family members, especially children.

The Family Justice Reform Working Group report was a consensus report. The Family Law Task Force reported on their initial mandate at the May 2, 2008 Benchers' meeting. That report made the case for the Law Society to develop best practice guidelines for lawyers practicing in the area of family law. The Benchers adopted the report and modified the Task Force's mandate to read: "That the Family Law Task Force, in collaboration with the CBA, develop guidelines for the practice of family law lawyers."

The CBA BC Branch established a working group to help carry out the task of developing best practice guidelines and the Task Force held a series of meetings to advance the project. Along the way, delays have occurred. Since being charged with that mandate, the Task Force has been called upon on three occasions to provide input to the Benchers on developments in the area of family law, most notably the British Columbia Supreme Court Family Rules, and the review of the *Family Relations Act.* These tasks

brought with them a measure of delay for the Task Force and also occupied the time of the members of the CBA working group that the Task Force was liaising with on best practice guidelines.

Early on in the discussions it was determined that the best approach was for the CBA working group to run with the initial drafting and seek feedback from the Task Force. The view was that to the extent the guidelines had the broadest buy-in, the more beneficial they would be. Given that it was guidelines that were being created, and not a code of conduct, the Task Force felt this approach was appropriate. The CBA working group performed a lot of heavy lifting on the project and in the fall of 2009 provided a draft for discussion.

The initial draft of the CBA working group revealed a divergence in approaches inasmuch as the draft purported to set out guidelines for lawyers, judges and litigants. The Task Force does not mean to suggest that the concepts contained in the sections relating to judges and litigants are unimportant, but the Task Force had concerns about Law Society endorsed guidelines being broader than guidelines for lawyers. The CBA working group expressed the view that input from the judiciary is critical to the development of a final product. This led the Task Force to conclude that, despite the potential merit in the CBA working group's approach, the Task Force's mandate was narrower and that it was necessary to focus on generating a set of best practice guidelines for lawyers and complete its work on its primary mandate.

The Task Force advised the CBA working group of its decision. To its credit, the CBA Working Group agreed to segregate the component of the draft document that dealt with lawyers and to present it at the CBA Provincial Council meeting on June 18, 2011, with the understanding that the CBA working group would ultimately attempt to incorporate the Guidelines into a document with broader application (i.e. also addressing litigants and the courts).

The Task Force expresses its appreciation for all of the hard work undertaken by the CBA working group, and its responsiveness to the Task Force's request to finalize the "lawyer" component of best practice guidelines. The CBA working group has done much of the heavy lifting on bringing the Guidelines to pass, and remained flexible and open to input. The Task Force commends the CBA working group for their efforts, which lead to the Guidelines being adopted almost unanimously[1] at the CBA Provincial Council meeting.

RECOMMENDATION

The Family Law Task Force recommends that the Benchers endorse the Guidelines as aspirational standards for lawyers practising family law, to be included for publication in the Law Society's practice resources.

[1] The Task Force understands that only one vote was cast against adopting the Guidelines.

APPENDIX:
BEST PRACTICE GUIDELINES FOR LAWYERS PRACTICING FAMILY LAW

Lawyers involved in a family law dispute should strive to ensure it is conducted in the following manner:

1. Lawyers should conduct themselves in a manner that is constructive, respectful and seeks to minimize conflict and should encourage their clients to do likewise.[2]
2. Lawyers should strive to remain objective at all times, and not to over-identify with their clients or be unduly influenced by the emotions of the moment.
3. Lawyers should avoid using inflammatory language in spoken or written communications, and should encourage their clients to do likewise.
4. Lawyers should caution their clients about the limited relevance of allegations or evidence of conduct.
5. Lawyers should avoid actions that have the sole or predominant purpose of hindering, delaying or bullying an opposing party, and should encourage their clients to do likewise.
6. Lawyers cannot participate in, and should caution their clients against, any actions that are dishonest, misleading or undertaken for an improper purpose.
7. Lawyers should keep their clients advised of, and encourage their clients to consider, at all stages of the dispute:
    a. the risks and costs of any proposed actions or communications;
    b. both short and long term consequences;
    c. the consequences for any children involved; and
    d. the importance of court orders or agreements.
8. Lawyers should advise their clients that their clients are in a position of trust in relation to their children, and that
    a. it is important for the client to put the children's interests before their own; and
    b. failing to do so may have a significant impact on both the children's well-being and the client's case.
9. Lawyers should advise their clients of and encourage them to consider, at all stages of the dispute, all available and suitable resources for resolving the dispute, in or out of court.

[2] Lawyers are not obliged to assist persons who are being disrespectful or abusive.

Best Practice Guidelines for Family Law

David C. Dundee

Kerry L. Simmons

Divorce Law as It Used to Be…

"A lawyer is never entirely comfortable with a friendly divorce, anymore than a good mortician wants to finish his job and then have the patient sit up on the table. "

– **Jean Kerr**

A New Justice System for Children and Families

- Family law is distinct from other areas of law and the lawyers and judges working in this area must adopt roles, functions and values that are compatible with the needs of families.(p8)

- Society has a strong interest in preserving a working relationship between separated parents. This interest should translate into an obligation on the part of family lawyers to minimize conflict and to promote cooperative methods of dispute resolution in all appropriate cases. (p106)

White Paper on Family Relations Act Reform

- Family Law is Unique (subtitle)

- There has been growing recognition that family law disputes are fundamentally very different from other civil conflicts.

- This means that to the extent possible, the proposed statute will be drafted to help support non-court processes. (p3)

The Supreme Court Family Rules 1-3(1)

- The object of these … Rules is to
- (a) help parties resolve the legal issues in a family law case fairly and in a way that will
  - (i) take into account the impact that the conduct of the family law case may have on a child, and
  - (ii) minimize conflict and promote cooperation between the parties, and
- (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

CBABC Working Group Goals

- Promote professionalism in family practice
- Reduce the emotional temperature in family cases
- Form a permanent Bench/Bar committee to promote and evolve a family justice “culture”

Resolution (UK) – from their website

- Resolution… is an organisation of 5700 lawyers who believe in a constructive, non-confrontational approach to family law matters.

- The cornerstone of membership of Resolution is adherence to the Code of Practice, which sets out the principles of a non-confrontational approach to family law matters. The principles of the code are widely recognised and have been adopted by the Law Society as recommended good practice for all family lawyers

Conclusions

- Family practice *is* different
- For the good of the profession, the public, and our members, the Branch should take a lead role in both celebrating and defining that difference
- The guidelines represent widely accepted best practices.
- The guidelines and the Bench/Bar committee will be significant tools in evolving a new “culture” of family justice and practice

President's Report to the Law Societies

Council Meeting – June 2011

From: **Ronald J. MacDonald, Q.C., President**
Federation of Law Societies of Canada

To: **All Law Societies**

Date: **June 17, 2011**

I am pleased to report on the highlights of the Council meeting of the Federation of Law Societies of Canada (the "Federation") held on June 6, 2011 in Ottawa, Ontario.

COUNCIL MEETING

1. The meeting was attended by the thirteen Council members appointed by the Federation's member law societies, together with the Federation President, President-elect and Past-President. One Council member sent his regrets.

Key Deliberations

2. Council members focused on three matters: Access to legal services, Federation priorities and Council's vision for the Federation, and governance policies.

(a) ***Access to Legal Services.*** Jeff Hirsch, Council member for Manitoba, reported on the work of the Federation's Standing Committee on Access to Legal Services which he chairs. The Committee has begun to compile an inventory of initiatives being undertaken by law societies. He is also the Federation's representative to the Chief Justice of Canada's National Action Committee on Access to Justice which is led by Justice Thomas Cromwell of the Supreme Court. Justice Cromwell was a guest of Council at the meeting.

Justice Cromwell described the role of the Action Committee as fostering engagement of participants in the justice system in a strategic approach to access to justice. He emphasized the need for players in the justice system to work cooperatively. He noted that the Action Committee serves as a forum to find groups or coalitions to move forward with projects.

The ensuing roundtable discussion with Council and Justice Cromwell touched on a number of access to justice and access to legal services ideas. Points included the need for engaging in a variety of initiatives (many of which are already being worked on by law societies) rather than attempting a "one-size-fits-all" approach.

(b) ***Priorities and the Future of the Federation***. This portion of the meeting consisted of three parts: (i) a discussion of the core centres of activity for the next version of the Federation; (ii) a reflection on the matters discussed at the Federation's conference in March around models of regulation of the legal profession and (iii) the next steps for refining the Federation's Strategic Plan.

There was a consensus among Council members that the Federation should focus on the core activities which arose from the March priorities discussion at the last Council meeting. These are (i) national regulatory affairs management, (ii) policy and issues management and (iii) communications and information management. It was understood that resources are currently at their capacity and that meeting expectations for the Federation to carry out these priorities would require additional financial and staff resources. It was also agreed that the Federation, through its Council and the CEOs, needed a well-articulated communications plan in order to justify to law societies an additional contribution of resources to the Federation. Accordingly, the Executive and management were tasked with developing a more detailed projection of the extent of resources which would be required, and to do so in consultation with law society CEOs.

The meeting then turned to a discussion around models of regulation of the profession and the extent to which exploration of the topic should be made a priority. Council was reminded that a key conclusion of the Federation conference held in March was that bar leaders should be open to learning lessons from other systems and should consider borrowing, where appropriate, ideas that will further enhance public confidence in what law societies do while keeping in mind the need to preserve the independence of the profession.

Discussion points included the need to focus first on allocating resources to priority activities at the national level aimed at avoiding duplication of effort by member law societies. In addition, efforts should be directed toward national standards and developing key performance indicators, with a particular focus on standards in areas of vulnerability, such as discipline and complaints. A number of Council members felt that there may be a role for the Federation to play around a voluntary national compliance mechanism perhaps by implementing audit, ombudsperson, or oversight tools. There was also a consensus that the Federation should not allow the issues of consumer complaints and the involvement of non-lawyers in matters of oversight to fall off the national agenda.

Turning to the Strategic Plan, Council members made suggestions about how it could be refined in light of recent discussions about priorities. Council will determine in March 2012 to whether to engage in a full review of the Strategic Plan.

(c) ***Governance Policies***. Council members continued their discussion, which began in March, about their own roles and the balance between their independent fiduciary responsibilities to the Federation, and their role as representatives of the interests of the law societies which appointed them. There was a consensus that as a rule, most decisions of Council ought not to require instructions from law societies. It was agreed that by exception, instructions would need to be obtained such as when the raising of the levy was involved. There was emphasis on the policies being a true reflection of a federated model and ensuring that Council's role includes an ongoing process of consensus development throughout the country before matters are voted upon.

Reports

3. Council members received status reports since March 2011 about the following significant Federation initiatives:

(a) ***National Committee on Accreditation***. The NCA's mandate is to assess the legal education and professional experience of individuals whose legal credentials were obtained outside of Canada, or in a civil law program in Quebec, and who wish to be admitted to a common law bar in Canada. It is expected that the NCA will assess the credentials of over 1,000 applicants this year and administer over 3,500 examinations in 16 subjects at testing sites in nine countries around the world. Since March, applicants have written over 1,000 examinations. The work of the newly created NCA Examinations policy committee has begun its work. Work to align NCA assessment policies with national requirements for the Canadian common law degree will begin in the Fall.

(b) ***National Admission Standards Project***. The Federation continues its work toward creating national competency standards for admission to the legal profession in Canada. A steering committee is chaired by Don Thompson, the CEO of the Law Society of Alberta. Law society personnel have developed a working document and a task force drawn from the profession has been established to refine that work. The task force met in May and June 2011. Once the competencies profile is ready in draft it will be subject to a validation process involving a large survey sample of the profession in the Fall. In addition, a working group is making progress on developing good character standards which are expected to be ready at the same time as the competency standards.

(c) ***Standing Committee on the Model Code of Professional Conduct.*** This Committee has met several times since March, including an in-person meeting on June 7, 2011 and its work has focused exclusively on matters relating to the conflicts of interest rule which was referred to it by Council. Further consideration of the rule is expected to continue over the summer.

(d) ***Implementation of National Requirements for Common Law Degrees***. The national requirements for Canadian common law degree programs were approved in 2010 and recommendations are being finalized this summer by the Implementation Committee chaired by Tom Conway, Council member for Ontario. Mr. Conway urged that once the recommendations are made known to law societies, they undertake an early consideration and approval process as time is of the essence to establish the mechanism for law schools to comply with the new national requirements.

(e) ***Ad Hoc Committee on New Law Degree Programs*** In February 2011, the Federation approved the applications of for approval of new law degree programs at Thompson Rivers University in British Columbia and Lakehead University in Ontario. Most law societies have now formalized their own approvals of these programs. The Committee has received a new application for approval of a common law degree program at the Université de Montréal and is now studying the application.

(f) ***CanLII***. CanLII is the Federation's free online search engine for primary legal information in Canada. Its database includes laws from all Canadian jurisdictions and almost 1,000,000 court and administrative tribunal decisions. In March 2011, the CanLII Board hired Colin Lachance as CanLII's new, full-time President effective April 11, 2011. In May, CanLII and the Federation applied for leave to intervene in SOCAN v. Bell, an important copyright matter before the Supreme Court of Canada which will touch upon the meaning of .research. under the *Copyright Act*. Leave to intervene was granted in June. Mr. Lachance also participated in a conference of the Canadian Association of Law Libraries in May.

Other Matters

4. ***President's Report***. I reported about my active travel schedule to law societies, as well as my participation at the Bar Leaders Conference of the International Bar Association in Warsaw in May. In June, I led Executive-level meetings with the Canadian Bar Association, the Department of Justice and the Public Prosecution Service of Canada. As well, I had productive and cordial meetings with Canada's Minister of Justice, Rob Nicholson, and the Chief Justice of Canada, Beverly McLachlin where access to justice themes were of particular interest.

5. ***CEO's Report***. The CEO of the Federation, Jonathan Herman, provided an update on the financial health of the Federation after three quarters of its financial year ending June 30, 2011 and projected that the organization will end the year on budget with a small surplus. Efforts have intensified to launch important new communications tools. A completely revamped public website is at its final testing stage and an intranet service will be operational before the end of summer.

6. ***National Mobility with the Chambre des notaires du Québec***. In March 2010, the Federation and its member law societies took an important step in concluding arrangements for reciprocal mobility between members of the Barreau du Québec and those in common law jurisdictions. The Canadian Legal Advisor category of law society membership has been or is in the process of being implemented across Canada. At our meeting, Council approved a draft Addendum to the Quebec Mobility Agreement to extend the national mobility regime to include Quebec notaries. The draft has been referred to law societies for their ultimate approval and execution. As this is a matter of importance to the Chambre des notaries du Québec, a separate request for prompt approval is being sent by me to law society Presidents in this regard.

7. ***Anti-Money Laundering Litigation***. John Hunter, Q.C., the President-elect of the Federation and legal counsel to the Federation in its litigation with the federal government around anti-money laundering rules, reported *in camera* about the week-long hearing of the case before the British Columbia Supreme Court in May of this year. We now await the judge's decision.

8. ***Territorial Mobility Agreement***. The Federation received a request from our three territorial law societies that the Territorial Mobility Agreement be renewed. I confirmed that the matter has been referred to the National Mobility Policy Committee for consideration.