The Law Society of British Columbia

Agenda

Benchers

Date: Friday, January 25, 2013

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

Location: Bencher Room, 9th Floor, Law Society Building

Recording: ***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure an accurate record of the proceedings.***

OATH OF OFFICE:

The Honourable Lance Finch, Chief Justice of British Columbia, will administer an oath of office (in the form set out in Rule 1-1.2) to President Art Vertlieb, QC, First Vice-President Jan Lindsay, QC, Second Vice-President Kenneth Walker, and Kootenay County Bencher Lynal Doerksen.

CONSENT AGENDA:

Items on the consent agenda are 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.

Item	Topic	Time (min)	Speaker	Materials	Action
1	Call to Order	1	President		
2	Consent Agenda • Minutes of December 7, 2012 meeting • Family Law Task Force Recommendations: o Amendments to Law Society Rules and *Code of Professional Conduct* ▪ Introductory Memorandum from Mr. Hoskins; ▪ Memorandum from Mr. Hoskins for the Act and Rules Subcommittee; ▪ Memorandum from Ethics Committee • Non-practising and retired members as designated paralegals • Tariff of costs for credentials hearings	1	President	pg. 2100 pg. 2200 pg. 2300 pg. 2400	Decision Decision Decision Decision

Item	Topic	Time (min)	Speaker	Materials	Action
3	Lawyers Assistance Program – Update	30	Derek LeCroix, QC		Information
4	Approval of the Federation National Competency Profile - Report of the Credentials Committee and the Lawyer Education Advisory Committee	15	Gregory Petrisor	pg. 4000	Discussion and decision
5	Submission to CBA Access to Justice Project	15	Bill Maclagan	pg. 5000	Discussion and decision
6	Nominations to 2013 Finance Committee	5	Nominators	pg. 6000	Decision
7	2012-2014 Strategic Plan Implementation Update (TBC)	10	President/CEO		Information Oral report
8	President's Remarks	15	President		Information Oral report (update on key issues and set stage for their discussion at meeting)

Item	Topic	Time (min)	Speaker	Materials	Action
9	CEO's Remarks	15	CEO	(*To be circulated at a later date*)	Information Written and oral report (update on key issues and set stage for their discussion at meeting)
10	2011 Regulatory Plan: Implementation Update	15	CLO	(*To be circulated at a later date*)	Information
11	Council of the Federation of Law Societies of Canada: Report by the Law Society's Council Representative	10	Gavin Hume, QC	pg. 11000	Information Oral report
12	Report on Outstanding Hearing & Review Reports	5	President	(*To be circulated at the meeting*)	Information
13	For Information Only • Bencher Election Working Group: Interim Report and Recommendations • Report to the Federation Council on Quebec Mobility by Catherine Walker, QC, Chair of the Federation's National Mobility Policy Committee • Law Society Response to the Provincial Government's White Paper on Justice Reform			pg. 13100 pg. 13200 pg. 13300	Information Information Information

Item	Topic	Time (min)	Speaker	Materials	Action
14	*In camera* – Report on Law Society of BC Litigation Outstanding at December 31, 2012	10	CLO	pg. 14000	Information
15	*In camera* – Ratification of 2013 – 2015 Collective Agreement	10	President	(*To be circulated at a later date*)	Decision
16	*In camera* – Bencher concerns	10	President/CEO		Information/ Discussion
17	2 p.m. Referral to Benchers under Rule 4-40: Participating Benchers have been notified			(*To be circulated at a later date*)	Decision

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, December 07, 2012

Present:

Bruce LeRose, QC, President
Art Vertlieb, QC, 1st Vice-President
Jan Lindsay, QC 2nd Vice-President
Rita Andreone, QC
Kathryn Berge, QC
David Crossin, QC
Thomas Fellhauer
Leon Getz, QC
Miriam Kresivo, QC
Bill Maclagan
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Lee Ongman
Greg Petrisor
David Renwick, QC
Phil Riddell
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Ken Walker
Tony Wilson
Barry Zacharias
Haydn Acheson
Satwinder Bains
Stacy Kuiack
Peter Lloyd, FCA
Ben Meisner
Claude Richmond

Absent: Vincent Orchard, QC

Staff Present:

Tim McGee
Deborah Armour
Robyn Crisanti
Jeffrey Hoskins, QC
Bill McIntosh
Ben Hadaway
Jeanette McPhee
Doug Munro
Alan Treleaven
Michael Lucas
Jack Olsen
Lance Cooke

Guests:
Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Johanne Blenkin, Chief Executive Officer, Courthouse Libraries BC
Jay Chalke QC, Assistant Deputy Minister, Ministry of Justice and Attorney General
Dean Crawford, Vice-President, CBABC
Lynal Doerksen, 2013 Bencher-elect for Kootenay County
Ron Friesen, CEO, Continuing Legal Education Society of BC
Gavin Hume, QC, the Law Society's Representative on the Council of the Federation of Law Societies of Canada
Jamie Maclaren, Executive Director, Access Pro Bono
Sharon Matthews, QC, Past-President, CBABC
Caroline Nevin, Executive Director, CBABC
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Jeremy Schmidt, Executive Coordinator, Faculty of Law, University of British Columbia
Derek LaCriox, QC, Executive Director, Lawyers Assistance Program
Heather Raven, Associate Dean, Faculty of Law, University of Victoria

CONSENT AGENDA

1. Minutes of October 26, 2012 Meeting

The minutes of the meeting held on October 26, 2012 were approved as circulated.

2. Minutes of Bencher Decision at October 27, 2012 Governance Retreat

The minutes of the meeting held on October 27, 2012 were approved as circulated.

3. Act & Rules Subcommittee : Amendment to Rule 5-6 (Public Hearing)

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules effective January 1, 2013 as follows:

1. ***In Rule 5-6, by rescinding subrules (1), (2), (4) and (5) and substituting the following:***

   (1) Every hearing is open to the public, but the panel or review board may exclude some or all members of the public in any circumstances it considers appropriate.

(2) On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:

(a) an order that specific information not be disclosed;

(b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

(4) Except as required under Rule 5-7 *[Transcript and exhibits]*, when a hearing is proceeding, no one is permitted to possess or operate any device for photographing, recording or broadcasting in the hearing room without the permission of the panel or review board, which the panel or review board in its discretion may refuse or grant, with or without conditions or restrictions.

(5) When a panel or review board makes an order under this Rule or declines to make an order on an application, the panel or review board must give written reasons for its decision

2. In Rule 5-12, by adding the following subrule:

(4) If the review board finds that there are special circumstances and hears evidence under section 47(4) of Act, the Rules that apply to the hearing of evidence before a hearing panel apply.

4. Act & Rules Subcommittee: Amendment to Rule 5-10 (Time to Pay)

BE IT RESOLVED to amend the heading of Law Society Rule to: "Extension of time or variation of condition."

5. Act & Rules Subcommittee: Rescission of Rules Concerning the Special Compensation Fund

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

1. In Rule 2-49, by rescinding subrule (1) (f) (iv);

2. By rescinding Rules 3-28 to 3-42 effective on proclamation of section 20 of the Legal Profession Amendment Act, 2012.

6. Act & Rules Subcommittee: Amendments to various Rules Referencing the *Professional Conduct Handbook*

BE IT RESOLVED to amend the Law Society Rules effective January 1, 2013 as follows:

1. ***In Rules 1-1.2 (1), 1-50, 2-14.1 (1), 2-19 (4), 2-22.2 (1), 2-23.2 (1) and (2), 2-23.7 (1) and (2) and 2-23.9 (1), by striking "and the Professional Conduct Handbook" wherever it appears and substituting "***and the *Code of Professional Conduct*"***;***

2. ***In Rule 2-9.2, by rescinding subrule (1) and substituting the following:***

   (1) In this Rule, **"designated paralegal"** means an individual permitted under rule 5.01 *[Supervision]* of the *Code of Professional Conduct* to give legal advice and represent clients before a court or tribunal.***;***

3. ***In Rule 2-15(4) by striking "***and *Professional Conduct Handbook*" ***and substituting "***and *Code of Professional Conduct*"***;***

4. ***By rescinding the preamble to Rule 2-21 and substituting the following:***

   2-21 A practitioner of foreign law who is not a member of the Society must do all of the following when engaging in any marketing activity as defined in the *Code of Professional Conduct*, rule 3.02 *[Marketing]*:***;***

5. ***In Rule 2-23.7,***

   (a) by rescinding subrule (2) (c) (ii) and substituting the following:

   (ii) under the supervision of a practising lawyer, as required under the *Code of Professional Conduct*, rule 5.01 *[Supervision]*.***; and***

   (b) in subrule (3) by striking "or the *Professional Conduct Handbook****" and substituting "***or the *Code of Professional Conduct****";***

6. ***By rescinding Rule 3-19 and substituting the following:***

   3-19 A lawyer must not advertise any specialization, restricted practice or preferred area of practice except as permitted in the *Code of Professional Conduct*, rule 3.03 *[Advertising nature of practice]*.***;***

7. ***By rescinding Rule 9-1 (c) and substituting the following:***

   (c) contrary to the *Code of Professional Conduct*, rule 3.02 *[Marketing]*".***;***

8. ***By rescinding Rule 9-14 and substituting the following:***

   9-14 A limited liability partnership must not use a name contrary to the *Code of Professional Conduct*, rule 3.02 *[Marketing]*.***;***

AND BE IT FURTHER RESOLVED, should the numbering of the Code of Professional Conduct be changed, to change the numbers of provisions of the Code of Professional Conduct referred to in this resolution accordingly.

REGULAR AGENDA – for Discussion and Decision

7. President's Report

Mr. LeRose briefed the Benchers on various Law Society matters, including:

a. **2013 Executive Committee Election**

On December 5, 2012, three Benchers were elected to the 2013 Executive Committee: David Crossin, QC (County of Vancouver), Nancy Merrill (County of Nanaimo) and Herman Van Ommen, QC (County of Vancouver).

b. **Five Highlights of 2012**

i. Passage of the *Legal Profession Amendment Act, 2012*

ii. Adoption by the Benchers of the Federation Model Code's Conflicts rules, and of the *Model Code of Professional Conduct of BC* (the BC Code), to take effect on January 1, 2013

iii. Adoption by the Benchers of resolutions permitting enhanced services to be delivered by designated paralegals, effective January 1, 2013

iv. Review of Law Society governance by the Governance Review Task Force and the Benchers, with the Task Force's final report and recommendations to be presented at today's meeting

v. Formation and first meeting of the Legal Service Provider Task Force, as tangible steps toward the enhancement of accessibility of legal services to British Columbians

c. Presentation of the President's Pin

Mr. LeRose presented the Law Society President's Pin to 2013 President Art Vertlieb, QC.

d. Introduction of the CBABC Vice-President

Sharon Matthews, QC, Past President of the Canadian Bar Association, BC Branch (CBABC), introduced Dean Crawford as CBABC's 2012-2013 Vice President and designated representative at Law Society of BC Bencher meetings in 2013.

8. CEO's Report

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

1. **Operational Updates**

   - *Project Leo*
   - *New Employee Recognition and Rewards Program*
   - …

9. Report on Outstanding Hearing & Review Reports

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

10. Presentation by Legal Services Society Board Chair, David Crossin, QC

Legal Services Society Board Chair, David Crossin, QC delivered a presentation to the Benchers. A transcript of Mr. Crossin's remarks is attached as Appendix 2 to these minutes.

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

11. Strategic Plan Implementation Update

Mr. LeRose referred the Benchers to Tab 11 of the meeting materials for an update on the implementation status of the 2012 – 2014 Strategic Plan as at December 12, 2012.

12. Governance Review Task Force Final Report

Mr. LeRose outlined the review process pursued by the Governance Review Task Force over the past year. He thanked the task force members (Haydn Acheson, Rita Andreone, QC, Stacy Kuiack, Bruce LeRose, QC (Chair), Jan Lindsay, QC, Peter Lloyd, FCA, Art Vertlieb, QC for their dedication and commitment. Mr. LeRose acknowledged the valuable assistance provided by Watson Advisors Inc, particularly Elizabeth Watson, QC and Katie Armitage, and by Law Society staff, particularly Tim McGee, Adam Whitcombe and Bill McIntosh.

Mr. LeRose referred the Benchers to Tab 12 for the Final Report of the Governance Review Task Force, and particularly to the Recommendations section, commencing at page 12013.

Mr. Crossin moved (seconded by Mr. Lloyd) that the Benchers accept the Final Report of the Governance Review Task Force, and adopt the recommendations contained therein.

The motion was carried unanimously.

13. Year-end Reports from the 2012 Advisory Committees

a. Report from the Access to Legal Services Advisory Committee

Mr. Stewart briefed the Benchers as Committee Chair on the work of the Access to Legal Services Advisory Committee in 2012, outlining that Committee's recommendations for 2013 and referring to the report at page 13000 for details. Discussion followed.

b. Report from the Equity and Diversity Advisory Committee

Ms. O'Grady briefed the Benchers as Committee Chair on the work of the Equity and Diversity Advisory Committee in 2012, outlining that Committee's recommendations for 2013 and referring to the report at page 13011 for details. Discussion followed.

c. Report from the Rule of Law and Lawyer Independence Advisory Committee

Ms. Berge briefed the Benchers as Committee Chair on the work of the Rule of Law and Lawyer Independence Advisory Committee in 2012, outlining that Committee's recommendations for 2013 and referring to the report at page 13017 for details. Discussion followed.

d. Report from the Lawyer Education Advisory Committee

Ms. O'Grady briefed the Benchers as Committee Chair on the work of the Lawyer Education Advisory Committee in 2012, outlining that Committee's recommendations for 2013 and referring to the report at page 13024 for details. Discussion followed.

OTHER MATTERS – For Discussion and/or Decision

14. Recommendation to Benchers to Adopt Changes to BC Code prior to Implementation on January 1, 2013

Mr. Getz reported as Chair of the Ethics Committee regarding the Committee's recommendation that the Benchers adopt a number of changes to the *Code of Professional Conduct of British Columbia* (the BC Code), to be effective on the BC Code's implementation date of January 1,

2013. He referred the Benchers to the Committee's report at page 14000 for background, and particularly to pages 14012 – 14014 for a "redline" outline the recommended changes (Appendix 3 to these minutes).

Mr. Getz moved (seconded by Mr. Zacharias) that the Benchers adopt the Ethics Committee's recommendations for changes to the BC Code (as set out in Appendix 3), to be effective on the BC Code's implementation date of January 1, 2013.

The motion was carried unanimously.

15. Proposal to Re-number the *Code of Professional Conduct of British Columbia* (the BC Code)

Mr. Getz briefed the Benchers regarding the Federation's plans for re-numbering its *Code of Professional Conduct* (the Model Code), and regarding the Ethics Committee's recommendation that the BC Code be re-numbered along the lines proposed for the Model Code, with minor revisions concordant with the various amendments made to the provisions of the Model Code in formulating the BC Code. Mr. Getz noted that the next week the Federation Council will be asked to approve the proposed re-numbering of the Model Code.

Mr. Getz moved (seconded by Mr. Crossin) that Mr. LeRose be authorized as President of the Law Society to approve the re-numbering of the BC Code as recommended by the Ethics Committee, or to decline to approve such re-numbering, depending on the decision made by the Federation Council regarding re-numbering the Model Code.[1]

The motion was carried unanimously.

Mr. Olsen noted that the re-numbered BC Code is to be posted to the Law Society website by end of the year. CLEBC CEO Ron Friesen confirmed that the re-numbered version of the BC Code should be incorporated into CLEBC's training materials before BC Code programming is rolled out in January.

16. White Paper on Justice Reform: Considering the Law Society's Response

Mr. LeRose introduced this matter and referred the Benchers to page 16000 for a memorandum by Mr. Lucas and Mr. Munro, outlining the Provincial Government's White Paper on justice reform entitled *A Modern, Transparent Justice System*. Mr. LeRose advised that the Law Society has been invited to comment on the White Paper, and referred to page 16001 for four questions, noting that the Benchers' discussion of those questions is hoped to frame the Society's response to the White Paper:

[1] The Federation Council has approved the proposed scheme for re-numbering the Model Code, and Mr. LeRose has approved the BC Code version of that scheme.

1. **Should the Law Society be supportive of the general vision/plan set out the in the White Paper?**

2. **Should the Law Society seek to participate in the process going forward, including participation at the Justice Summit?**

3. **Should the Law Society recommend that the Justice and Public Safety Council consist of participants beyond merely government?**

4. **Is the Law Society able to contribute any expertise to the considerations and actions identified by the government in the White Paper?**

Key comments made during the ensuing discussion are summarized below.

1. **Should the Law Society be supportive of the general vision/plan set out in the White Paper?**

- There was consensus that the Law Society can and should contribute to the Provincial Government's efforts to enhance access to justice for British Columbians

2. **Should the Law Society seek to participate in the process going forward, including participation at the Justice Summit?**

- Some Benchers questioned whether the Law Society would be invited to participate in the Justice Summit
  - Assistant Deputy Minister Chalke confirmed that the Law Society would be invited to any Justice Summit
- Other Benchers cautioned against endorsing the Justice Summit process too readily or unreservedly, especially at this formative stage

3. **Should the Law Society recommend that the Justice and Public Safety Council consist of participants beyond merely government?**

- There was strong consensus that participation in the Justice and Public Safety Council should extend beyond government
- Several Benchers made the point that given the White Paper's confirmation of strategic planning as a key element of the Council's mandate, the Law Society's participation in the Council is necessary and important

- Acting Attorney General Jay Chalke, QC noted
    - the Provincial Government is committed to early progress and to relationship-building in supporting the Council's work
    - the Law Society's input regarding the Council's membership and participation will be welcome as this judicial reform process progresses
    - this reform process entails introducing collaborative spirit and practice into the behaviour of BC's justice system and its players, whose identity and history is grounded in the pursuit and protection of independence

4. Is the Law Society able to contribute any expertise to the considerations and actionsidentified by the government in the White Paper?

- There was consensus that the Law Society can and should contribute the benefit of its operational experience and expertise
    - particularly in the areas of systems design, information management and communication

Mr. LeRose thanked the Benchers and Mr. Chalke for their comments. Mr. LeRose confirmed that the Law Society's written response to the White Paper will be prepared for the Benchers' review and comment, prior to submission to the Provincial Government by December 31, 2012.

17. Law Corporation Name Format: Unlimited Liability Companies ("UCLs")

Mr. LeRose briefed the Benchers, noting the Executive Committee's unanimous support for the recommendations set out in the Committee's memorandum to the Benchers at page 17000:

> The Executive Committee recommends that the Act & Rules Subcommittee be directed to draft a rule or rule amendment enabling the Executive Director to issue law corporation permits to companies registered as ULCs and named, in accordance with the *Business Corporations Act*, without including the word "corporation" in the corporate name. More specifically, the Executive Committee recommends that in the case of proposed law ULCs that are deemed by the Executive Director to be acceptable for registration, the words "Law ULC" be included in the corporate name in place of the words "law corporation," as the latter is contemplated in section 82(1)(b) of the *Legal Profession Act*.

Ms. Andreone moved (seconded by Mr. Van Ommen) that the Benchers adopt the recommendations of the Executive Committee, as set out in the Committee's memorandum to the Benchers at page 17000.

The motion was carried.

18. Law Society Privacy Review Report: Bencher Considerations

Mr. LeRose introduced this matter, acknowledging the leadership of Past-President Gavin Hume, QC in building support during 2011 for a review of the Law Society's internal privacy policies and practices.

Mr. McGee briefed the Benchers. He noted that one of the initiatives proposed in the Enterprise Risk Management Plan adopted by the Benchers in December 2011was an independent review of the Law Society's internal privacy policies and practices. That review has now been completed under Mr. Hoskins's leadership, and has resulted in the presentation of a detailed report and recommendations (page 18005) by the privacy consultants retained by the Law Society. Mr. McGee advised that management is developing a plan for implementing the consultants' recommendations, noting that this matter is operational and as such do not require the Benchers' direct engagement.

Mr. McGee then reported on two issues requiring the Benchers' consideration:

1. Benchers' access to confidential information via their current access to the entire Law Society premises

2. Security of Law Society electronic information

Mr. McGee referred to the memorandum at page 18000 for details, and to page 18001 for management's recommendation, provided with the unanimous support of the Executive Committee:

> We suggest, with the support of the Executive Committee, that the unassailable best privacy practice by the Law Society would be to restrict Bencher card access to the parking lot and the ninth floor. Access to any other floor (with the exception of the areas otherwise open – namely reception on the sixth and eighth floors during business hours) would involve meeting with staff on a prearranged and accompanied basis.

Ms. Berge moved (seconded by Mr. Zacharias) that the Benchers adopt the "best privacy practice" approach, as recommended by management and the Executive Committee, and as set out at page 18001.

Key points raised in the ensuing discussion were:

- Benchers have a fiduciary duty to protect the confidentiality of information to which they may be exposed in relation to their access to the Law Society's physical premises

    - that fiduciary duty extends to the risk of Benchers' unintentional breach of privacy protocols

- the proposed "best privacy practice" does not ban or prevent Benchers' access to secure areas of the Law Society premises, it simply requires that Benchers be invited and escorted when they visit such secure areas

- there is a "tail wagging the dog" aspect to the proposed "best privacy practice"

- the principles of what Bs should and should not see should be articulated in a clear, succinct privacy protocol should be developed to articulate the principles governing Benchers' appropriate access to Law Society information

The motion was carried unanimously (with one abstention).

On the second matter of security of Law Society electronic information, Mr. McGee confirmed that the Executive Committee will address the issues and then report to the Benchers with recommendations in 2013.

19. Election of an Appointed Bencher to the 2013 Executive Committee

Mr. Meisner announced that the appointed Benchers have selected Stacy Kuiack to represent them on the 2013 Executive Committee.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

WKM
2012-12-29

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

December 7, 2012

Introduction

In this report I have provided updates on a few important operational initiatives which we have undertaken in 2012. Several additional items are already covered in the regular Bencher meeting agenda for this month (i.e. the Privacy Review Report and the Strategic Plan Implementation update) and so I will not include those items here. This report does include highlights of the annual conference of the International Institute of Law Association Chief Executives (IILACE) which I attended in Hong Kong in October.

As this is my last report to the Benchers for 2012 I would like to take this opportunity, on behalf of all of the staff of the Law Society, to wish you and your families all the very best for a safe and enjoyable holiday season.

1. Operational Updates

Project Leo

Project Leo was launched in late 2011 to implement one of the key recommendations of the Core Process Review. The project was to design, develop and implement a new, organization wide integrated information management tool. The reason this project is so important is that how we create, manage, share and store information is at the heart of all we do at the Law Society. This has been the largest and most complex undertaking of its kind in the history of the Law Society. It has been guided by a dedicated project team led by Robyn Crisanti, Manager, Communications and Public Affairs, and has involved thousands of persons hours of work in 2012 involving the team and virtually all staff in one way or another.

I am pleased to report that our new online information management system is in now in beta testing with a cross-departmental user group and modifications are being made to ensure the system is ready to “go live” in January of the New Year. Like any major change management project the official launch is an important milestone but alone does not ensure its success. We are concurrently developing extensive training programs for staff including support materials and a help desk to ensure that the change to a new, improved way of doing things is fully supported.

New Employee Recognition and Rewards Program

At the beginning of 2012, management committed to reviewing and considering our performance management process and how it ties into our approach to rewards and recognition at the Law Society. A cross-departmental working group was struck to consider our existing program, review other models in a variety of organizations, consult with experts in the field and last but not least, survey our employees to obtain their input and

ideas. By mid-year the working group had completed all of its planned background work and management held a dedicated one day retreat to review the findings and provide direction to the working group on priorities for a new, redesigned program.

This fall the working group has been busy designing a new program based upon all the data and input it has received. Management Board has met several times to review and help refine the new program so that it will best meet our needs in the years ahead. Our goal is to complete the work and review the new plan with the Executive Committee early in the New Year and to share the plan with the Benchers at the meeting in January. Our goal is to have the new program in place for staff for the year 2013.

I am very excited about the degree of innovation reflected in the new program and I look forward to presenting it to you. I am confident that it will better serve our goal of supporting a performance based culture and encouraging participation and positive engagement among our employees.

Review of Key Performance Measures Targets

Earlier this year the Benchers delegated to the Executive Committee the task of working with Management Board to undertake a review of the Key Performance Measures with a view to determining whether what is being measured and the targets for measurement remain relevant and appropriate. This exercise is distinct from that performed annually by the Audit Committee, which reviews actual results under the KPMs and coordinates the reporting of those results to the Benchers.

I can report that Management Board undertook a full review of the Key Performance Measures based upon the direction from the Benchers. An interim report was recently presented to and discussed in detail with the Executive Committee. With the agreement of the Committee we will be completing the review and finalizing a report and recommendations pending the receipt of final results for the year 2012 in late January. The reason for this deferral is that some recommendations for change will be influenced by the results which will be posted for 2012. Rather than speculate on those results, the Committee agreed that it would be best to have the actual data in hand when completing the review.

2. 2012 Annual Employee Survey

We recently conducted our seventh annual employee survey, and I'm pleased to report that we received a record participation rate of 84%. Results are being compiled and will be reviewed with staff early in the New Year. As in past years, the survey results will be available to the Benchers and Ryan Williams, President of TWI Surveys Inc., the survey administrators, will be at

the January Bencher meeting to provide an overview of the results, and to respond to any questions or comments which you may have.

3. 2012 International Institute of Law Association Chiefs (IILACE) Conference – Hong Kong

Attached to this report as Appendix "A" is my report on the highlights of the IILACE conference I attended in Hong Kong in October. You may also be interested in reviewing the compilation of the conference presentations that will be posted shortly to the Bencher Resources section of the Law Society website, under "Meetings." Benchers can access Bencher Resources via the Lawyer Login section of the main page of the Law Society website.

I would be happy to discuss any aspect of my report and to answer any of your questions at the meeting.

4. United Way Campaign

This year's United Way Campaign (organized by Chair Andrea Brownstone, Manager, Investigations, Monitoring & Enforcement and a team of dedicated staff volunteers) was an outstanding success. Fundraising events included a coin-drive, silent auction, online bingo, a pancake breakfast and the opportunity to fly "Super Bruce" into a colleague's office. Thanks to the tremendous efforts of Andrea and her team, and the overwhelming participation of staff, we exceeded our campaign goal by $4,000 and perhaps more importantly we increased our donor participation rate by 32%.

The United Way consistently recognizes the Law Society as a leading organization of its size in committing to helping others in need. We are justifiably proud of that well earned recognition.

5. Update re Collective Bargaining with PEA

Members of the Law Society Steering Committee for the recently completed collective bargaining sessions with the Professional Employees Union will be reviewing the status of the negotiations during the in-camera portion of the meeting.

Timothy E. McGee
Chief Executive Officer

International Institute of Law Association Chief Executives - 2012 Annual Conference – Hong Kong

Conference Highlights

Delegates and Program

This year's conference held in Hong Kong from October 17 – 20, 2012 brought together the Chief Executive Officers of law regulatory and representative bodies from 23 countries around the world including Canada, USA, England, Ireland, Scotland, Australia, New Zealand, Germany, Norway, Sweden, Netherlands, Africa, Hong Kong, Korea and Japan. In all there were 41 delegates to the conference who collectively regulate and or represent over 1.8 million lawyers around the world.

This year the conference had two distinct "streams" for presentation and discussion – an external focus on how the legal profession is changing around the world and an internal focus on the major challenges and responses to managing our respective organizations. Because we were in Hong Kong we also had a fascinating session on the political and legal landscape existing and evolving between Honk Kong and the Peoples Republic of China (PRC). I have summarized the highlights from some of those sessions below.

1C2S

The acronym "1C2S" stands for "One Country, Two Systems". It is increasingly becoming part of the vernacular when referring to the relationship between capitalist Hong Kong and communist PRC. That relationship is unique in the world and appears to be a brilliant compromise of differing political and legal traditions and priorities.

Hong Kong essentially operates autonomously from the PRC in matters of government, business, culture, education and the law. For example, the Government of Hong Kong makes its own currency, establishes its own monetary and fiscal policies, and administers its own tax system. The capitalist system and way of life in Hong Kong existing prior to the turn over to the PRC in1997 remains essentially unchanged.

The "Basic Law" is the constitutional document for Hong Kong and it enshrines many of the principles and fundamental rights that we associate with modern democracies. For example Hong Kong residents enjoy freedom of speech, travel, association, religion, and the freedom to form and join trade unions. The right to vote and to confidential legal

advice and access to the courts are both guaranteed by the Basic Law in a bill of rights as is the right not to be discriminated against on the basis of race, religion or language. The laws of the PRC are not applicable to Hong Kong except for a very few relating to use of the national flag and emblems.

Hong Kong today continues to operate under a common law system and precedents from the English courts and other common law jurisdictions are persuasive in Hong Kong's courts. Judges are appointed by an independent commission without political involvement and since 1997 there have been more than 1,000 reported cases interpreting the Basic Law. The Court of Final Appeal of Hong Kong is the court of final jurisdiction and more than ten eminent judges from other common law jurisdictions including the UK and Australia have been appointed as non-permanent judges of that court.

So, where does the PRC fit into this picture? The government of the PRC in Beijing has authority over all foreign political affairs of Hong Kong and for its military and its defense. There is a garrison of the army of the PRC based in Hong Kong but they are not permitted to interfere with local affairs or to been seen outside the garrison in uniform.

We learned that there is a growing and thriving interaction between lawyers from the PRC and those in Hong Kong. Today PRC lawyers represent approximately 10% of the total number of registered foreign lawyers in Hong Kong. The Law Society of Hong Kong and the Hong Bar Association are very active with the All China Lawyers Association (from the PRC) in promoting professional development sessions and secondments of lawyers to each jurisdiction.

The clear message we received was that 1S2C will inevitably nurture conflicts but that closer interaction between lawyers and regulatory and association bodies in both jurisdictions is helping to minimize those potential conflicts and is setting an example of how two quite distinct systems can not only coexist but thrive.

All Roads Lead to Better Access to Legal Services

I have chosen this as the default heading to report on a number of different sessions at the conference because it became apparent that the issue of how to improve access to affordable legal services was at the heart of most of the presentations in the "external" stream of conference topics.

It was impressive for most of us to realize that this issue is front and center for law regulators and associations around the world. What I learned at the conference is that the responses to this issue among our group fall basically into two distinct but related

categories. Specifically, there are initiatives being taken at an enterprise or firm level, such as alternative business structures/multi-disciplinary practices and initiatives at an individual or personal level, such as expanding the scope of practice for non lawyers. I have highlighted some of the more interesting developments in each of these areas below.

Alternative Business Structures/Multi-Disciplinary Practices

Since the introduction of alternative business structures ("ABS") in the UK earlier this year, the Solicitors Regulation Authority had granted 33 licenses through October with that number expected to double by year end. The range of firms granted licenses spans the established high-profile brand firms in London to sole practitioners in small towns. A major corporation in Britain that caters to services for seniors has announced its intention to enter the ABS market to offer wills estate planning, probate and conveyancing. The expectation is that more insurers will be seeking ABS status and offering lower cost, one-stop shopping for consumers.

It is still too early to say whether this development will achieve one of its stated legislative policy goals, which is to permit service providers more flexibility in establishing business models that support the provision of more readily available, lower cost legal services. Clearly, most observers are in a wait and see mode. However, there were more optimists than pessimists on this question at the IILACE conference. A significant simmering problem appears to be how privilege will be protected in multi-disciplinary practice situations. For example, we heard that a major multi-disciplinary practice ("MDP") with an accounting division has been ordered to hand over extensive client information to the tax authorities in Britain because it was wrong in its assumption that because the accounting division was part of an MDP with lawyers those files would attract a legal privilege. We were told many lawyers are gearing up to argue that case.

In Australia, approximately 20 MDPs are currently providing legal services. These are generally small firms combining locally to provide one-stop shopping for professional services combining legal services, on the one hand, with immigration or accounting and business services, on the other. Indications are that these entities are successfully meeting a demand in the market not being filled by stand-alone law firms. Apparently, internal economies of business scale are leading to lower cost services to consumers.

Australia is also home to two law firms that are listed on the Australian Stock Exchange. Most notable of these is the firm Slater and Gordon. That firm has attracted millions of dollars worth of equity capital and has used that leverage to acquire many law firms at home and abroad. Some commentators say this strategy

will fail because current indicators of return on investment are weak. Others say that this is a short term view and that any start-up will experience this negative return for some period of time while it solidifies its earnings power. Whatever the case for shareholders, has this development lead to better access to affordable legal services for consumers? In other words, has access to this capital caused the service providers to translate that into lower cost services or simply build a war chest for mergers and acquisitions? The right answer is that is too early to tell but we learned at the conference that most who follow this say the potential for positive change through this structure is significant and not to be ignored.

Perhaps the most interesting comment on the topic of economic issues and access to legal services came from the German delegate. He said that the affordability of legal services wasn't as big an issue in his country compared to others. He explained that German law mandates low fees for certain types of legal cases and legal matters. Those matters are usually related to services to individuals connected to their personal rights. Bigger cases and those involving corporate clients are not subject to these limits. He indicated there was little opposition to this regime and German lawyers thrive under it.

Expanding the Scope of Practice for Non-Lawyers

While the developments around alternative business structures focus on the firm as the vehicle of change to assist with improving access to legal services, more and more jurisdictions are approaching the issue at a personal level focusing on authorizing non-lawyers to provide legal services under certain conditions.

I briefed the conference on the Law Society of BC's initiatives in this area dealing with paralegals and articling students. Rob Lapper, QC, CEO of the Law Society of Upper Canada of outlined that Law Society's Ontario paralegal licensing regime. These Canadian initiatives attracted much interest and support among the delegates. However, we learned that the reason many countries were not pursuing these avenues today was a lack of confidence in their respective regulatory capacities to set standards, accredit, and provide quality assurance for new entrants. While the group agreed those were legitimate concerns the overwhelming consensus was that those challenges were less daunting and more addressable than the unknown consequences of a burgeoning world of MDPs.

The concerns expressed over regulatory capacity to handle new, non-lawyer entrants were allayed somewhat by the delegate from the State of Washington. She described the ground breaking decision of their state Supreme Court to create a Limited License Legal Technician designation. This designation will allow non-lawyers with certain levels of training to provide specific assistance to litigants. She

noted that in a state where financial support for the court system and legal aid services is notoriously low funding was nonetheless made available for staff and resources to assist in the development and ongoing administration and support of the Limited License Legal Technician program. We learned this investment was approved because it is expected not only to enhance access in the short term but also because it is expected to provide “down stream” financial benefits by eliminating or reducing inefficiencies and cost throughout the court process caused by unrepresented litigants. Like most of the other access centered initiatives we discussed at the conference this too will be watched to see whether it lives up to its billing.

A Few Must Haves for Successful Organizations

A number of topics were covered in the “internal” stream of the conference program. I have described a few here in the context of those which are most relevant to the Law Society of BC.

A long term strategic plan (minimum three years duration) which identifies the most important objectives for the organization over the specified period was considered by all to be an indispensable tool for organizational success. Some organizations, however, were still struggling to agree on what those priorities should be. Regular reporting on progress against the plan is also essential.

A second valuable tool is a stable and sustainable funding model. Some organizations struggle because of a lack of discipline or accountability for creating balanced budgets or using reserves to fund day to day operations. The right question is “What funds do we need to properly fulfill our mandate?” not “What funds do we have and how can we spend them?”

Not surprisingly, an important tool for organizational success was a healthy degree of transparency in communicating and reporting performance and results. This was particularly so for the public interest regulators. The conundrum for some organizations was that while they had good communications capabilities they had no consistent or relevant performance measures to report against year over year. Having a consistent set of key performance measures to report on annually was viewed as very valuable.

There was a strong consensus among regulators and associations alike that stakeholder relations is a very important but widely ignored or underemphasized part of our institutional behavior. Law organizations in European countries such as Germany, Sweden and Denmark seem most committed and experienced in this area while North

American and UK organizations seem to be more reactive or prone to issue management instead of relationship building.

IILACE Executive

IILACE operates under an organizational charter which restricts membership to those who are the chief executives of law regulatory or law association organizations around the world. Current membership in IILACE is approximately 50. The executive of IILACE is comprised of an Executive Committee of seven elected from the membership. The officer positions of IILACE are President, Vice President and Secretary Treasurer; these positions are also elected by the membership and constitute a “ladder”. The President serves a two year term.

I have served on the IILACE Executive Committee for three years, and have been the Secretary –Treasurer for the past two. At the Hong Kong conference I was confirmed as Vice President for 2013 and will become President of IILACE commencing in October 2014, God willing.

It is a small but engaged organization and provides me a useful line of sight into emerging issues affecting the legal profession and its regulation as well as an opportunity to compare notes first hand with those that do my job or something similar in countries around the world. I appreciate the Law Society’s continuing support of my involvement with IILACE.

Legal Services Society

Providing legal aid in British Columbia since 1979

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The Law Society and Legal Aid
David Crossin, QC, Chair, The Legal Services Society
Speech to the Law Society of BC Benchers, December 7, 2012

Thank you very much for allowing me, on behalf of the Legal Services Society, to take what will really be just be a few moments of your time this morning.

I want to take this opportunity to let you know, just in a very general way, how the Legal Services Society is approaching the difficulties we all know exist in our justice system. But mostly, I want to simply remind you of legal aid and the importance we place on the support of the Law Society.

As you may know, our strategic plan over the last few years has focused on justice reform and not simply paying lawyers to go to court. Funding presents challenges. Fewer and fewer lawyers take legal aid cases. When I did a legal aid case 22 years ago, I was paid 80 dollars an hour. Now that same case pays 84 dollars an hour. Achieving more bang for our buck meant seeking to solve people's legal problems by creating pathways to early resolution and not simply staying on a process track leading directly to conducting a trial. In this regard, in addition to the Attorney General seeking the advice of Mr. Cowper, the Attorney General actually commissioned two reports. The Legal Services Society was asked by the Attorney General, at the same time, to provide the Legal Services Society advice, from our perspective, on ways in which legal aid could be used to make the justice system more effective.

Our report, *Making Justice Work*, is the result of a long-term strategy established by the Legal Services Society board over the past six years. It identified justice reform as the key to ensuring the long-term survival of legal aid.

The Legal Services Society has been invited to meet to discuss our recommendations with a number of elected officials, government staff and law-related organizations. I have attended many of those meetings; [the Legal Services Society's Executive Director Mark Benton] has attended all of those meetings.

Justice reform is crucial because systemic delays and the cost of court appearances make it more expensive for us to deliver the service from year to year to year. We also see how justice system inefficiencies and the lack of advice and representation services prevent people from resolving their legal issues in a timely manner. For instance, our First Nation population make up about five or six per cent in British Columbia. And the relationship of our First Nations with our justice system continues to present, as you well know, vexing problems. That five per cent represents about 25 per cent of our criminal referrals and that percentage is jacked up significantly in child apprehension cases. We spend a good deal of time striving to effectively access those communities in order to deal with potential legal problems before those individuals are simply enveloped in the process fraught with delay and inefficiencies. Delays, as you also know, simply make things more unbearable and lead to demands on

the justice and the social service and health care sectors. Delays in process and delays in resolution often mean, in our world, the sick and the addicted and the disenfranchised and the desperate just wait and get worse. That's why our focus is on access and reform.

I'd like to remind you that the Legal Services Society is uniquely positioned to offer advice on justice reform and access to justice. We are independent of government and we see more facets of our legal institutions than most other organizations. We are involved with criminal defendants, family litigants, new immigrants, we are a legal education provider, an out-of-court problem solver, we are a fee payer, we are a trial manager, and more and more, a justice policy advisor. And while our focus is on providing services for people with low incomes, our broader goal is to improve access to justice for all British Columbians.

The Legal Services Society asks for your help and support, but mostly your voice concerning the strategy. The duty as Benchers, as you know, is set out in s. 3 of the *Legal Profession Act*: "to uphold and protect the public interest in the administration of justice" with reference, as you know, to particular aspects. The Law Society, as an organization, also focuses on s. 15 of the Act which begins with the words: "no person, other than a practising lawyer, is permitted to engage in the practice of law, except…."

We know what [BC's Chief Justice Lance Finch] had to say about the effect of s. 15 in a speech to the Canadian Bar Association:

> …members of the Law Society of British Columbia, have a monopoly on the practice of law…. It must be apparent that regardless of the purpose identified for maintaining a monopoly, the effect of the monopoly itself can only be to restrict supply and increase cost.

The public appreciates, in my submission, and I know this table appreciates, that where a profession enjoys a monopoly in providing what is effectively an essential service, the profession has a duty to attempt to ensure that the services are available to all citizens; not just those the profession wants to serve or those that can afford the fees. The Legal Services Society believes that the Law Society can, and should, lead in this area and to challenge itself on the vital issues of justice reform. Make no mistake, the Law Society is seen by the bar and by the judiciary and by the public as an organization that can, and should, lead the profession in this regard.

One of Canada's most senior barristers, David Scott, said in a speech last year at the University of Ottawa:

> As a profession, we are a monopoly…. In such circumstances, it would be odd indeed if we were free to say that the needs of the public can only be met by our membership, even if the public cannot afford us….Obviously, in such circumstances, there is a concomitant obligation to provide access to our services in order to ensure a fair and reasonable application of the rule of law.

As Mr. Scott sees it, and I think he's right, our monopoly carries with it a duty to structure our profession for the benefit of all citizens. And that duty is not simply a professional obligation – it is a fundamental component of the rule of law. And in the view of the Legal Services Society, that is what s. 3 is all about – the duty to uphold the rule of law.

Structuring our profession for the benefit of the public is a grander concept than simply ensuring the "the public will have better access to legal services," which is quite properly a part of the Law Society's strategic plan. But in the view of the Legal Services Society, the vision ought to be bigger. The Legal Services Society believes that the profession must ensure the justice system is designed around the needs of citizens and not the needs of lawyers and judges. Consequently, the Legal Services Society is of the view that the justice system must focus on outcomes not process. Our report to the Attorney General – *Making Justice Work* – provides a good overview of this issue and makes recommendations. With the greatest of respect, we think those recommendations are worth an endorsement by the Law Society.

The Legal Services Society invited input from the Law Society when it was preparing its report to the Attorney General. We value your insight. You are the leaders of our profession and the guardians of the public interest. The Society received no response, but we realize the Benchers have a full plate. When our report was released, with the report of Mr. Cowper, in fact at the same press conference, the Law Society issued a press release saying it was studying Mr. Cowper's recommendations. We were hopeful mention would be made of *Making Justice Work*.

We ask the Law Society to work with us concerning issues associated with legal aid, to take an official and sustaining stand on the importance of legal aid in the public interest.

My term [as a director and chair of the Legal Services Society's board] is up pretty soon, but I would urge you to collaborate with the Legal Services Society in the years to come. You all know Mark Benton. He has become a key player concerning justice system issues not merely on the national stage, but on the international stage. In my view, he's an important and highly regarded point person on the Justice Access Committee chaired by [Supreme Court of Canada Justice Thomas Cromwell]. He has the support of an excellent staff. He has the support of the board that, like this table, consists of many non-lawyers who bring a first-rate, constructive insight into the issues we face in our justice system. Like our appointed Benchers, the board ensures that those of us immersed in the justice system in our daily lives don't just sit around in our own bathwater when it comes to assessing ourselves and what the public really needs.

You are familiar with the remarks of [the Governor General] His Excellency, the Right Honourable David Johnston at last year's Canadian Bar Association [conference in Halifax]. He said that lawyers have a social contract with society. He said:

> We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal.

The Legal Services Society believes this. They also believe the voice of the Law Society, on the importance of legal aid, must be heard loudly, clearly, and often by the profession and by the public. The Legal Services Society wants you to know that we will work with you to transform that voice into action.

Thank you.

A. Rule 2.02 (7) Dishonesty or Fraud by Client

2.02 (7) When acting for a client, a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud~~., including a fraudulent conveyance, preference or settlement.~~

B. Rule 2.03 (2.1): Lawyers' obligation to claim privilege when faced with requirement to surrender document

2.03 (2.1) A lawyer who is required, under federal or provincial legislation~~,~~ to produce a document or provide information that is or may be privileged must, unless the client waives the privilege, claim solicitor-client privilege in respect of the document.

Commentary
A lawyer who is required by law or by order of a court to disclose a client's affairs must not disclose more information than is necessary.

C. Rule 2.04 (32): Lawyer acquires shares in lieu of fees:

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

D. Rule 3.01 of the Model Code: Making Legal Services Available

No additions necessary.

E. Rule 5.01 (3.3): Supervision

Commentary
~~The~~ Law Society Rule~~s~~ 2-9.2 limit~~s~~ the number of designated paralegals performing the enhanced duties of giving legal advice and appearing in court or before a tribunal.

F. Rules 5.01 (4 to 6): Real Estate Assistants

5.01 (4) In subrules (4) to (6),

"purchaser" includes a lessee or person otherwise acquiring an interest in a property;

"sale" includes lease and any other form of acquisition or disposition;

"show," in relation to marketing real property for sale, includes:

(a) attending at the property for the purpose of exhibiting it to members of the public;

(b) providing information about the property, other than preprinted information prepared or approved by the lawyer; and

(c) conducting an open house at the property.

5.01 (5) A lawyer may employ an assistant in the marketing of real property for sale in accordance with this chapter, provided:

(a) the assistant is employed in the office of the lawyer; and

(b) the lawyer personally shows the property.

5.01 (6) A real estate marketing assistant may:

(a) arrange for maintenance and repairs of any property in the lawyer's care and control;

(b) place or remove signs relating to the sale of a property;

(c) attend at a property without showing it, in order to unlock it and let members of the public, real estate licensees or other lawyers enter; and

(d) provide members of the public with preprinted information about the property prepared or approved by the lawyer.

G. Rule 6.01 (1): Regulatory Compliance

6.01 (1) A lawyer must:

(a) reply promptly and completely to any communication from the Law Society;

(b) provide documents as required to the Law Society;

(c) not improperly obstruct or delay Law Society investigations, audits and inquiries;

(d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;

(e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and

(f) otherwise comply with the Law Society's regulation of the lawyer's practice.

H. Rule 6.01 (4): Encouraging Client to Report Dishonest Conduct

6.01 (4) A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

I. Rule 6.08(1) Commentary: Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary
Under Condition 4.1 of the Lawyers' Compulsory Professional Liability Insurance Policy, a lawyer is contractually required to give written notice to the insurer immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could reasonably be expected to be the basis of a claim or suit covered under the policy. This obligation arises whether or not the lawyer considers the claim to have merit. Subrule (2) imposes an ethical duty to report to the insurer. Subrule (1) should not be construed as relieving a lawyer from the obligation to report to the insurer before attempting any rectification.

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D. Rule 3.01 of the Model Code: Making Legal Services Available

No additions necessary.

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Commentary
Law Society Rule 2-9.2 limits the number of designated paralegals performing the enhanced duties of giving legal advice and appearing in court or before a tribunal.

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The Law Society of British Columbia

Reply to: Bruce LeRose, QC

May 16, 2012

Mr. Bill Basran
Regional Director General
Justice Canada
Robson Court 900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Dear Mr. Basran:

Re: Canada Revenue Agency: Notices of Requirement Delivered to Lawyers Pursuant to Section 231.2 of the *Income Tax Act*

***Donell v. G.J.B. Enterprises Inc.* 2012 BCCA 135**

We are writing further to past correspondence and discussions between the Law Society and your office concerning the issuance of Notices of Requirement delivered to lawyers pursuant to s. 231.2 of the *Income Tax Act*.

As you know, we have been unable to reach a consensus surrounding this issue. It is, we understand, the Canada Revenue Agency's ("CRA") view that the sort of documents that CRA routinely seek from lawyers pursuant to such Requirements (copies of cheques and trust ledgers) are not privileged and therefore must be produced by a lawyer. In the event that CRA is required to obtain a compliance order compelling the lawyer to produce the documents, the Department of Justice has said that it may seek costs against the lawyer for the application.

We have said that because any privilege always belongs to the client, the decision whether to claim privilege must always be made by the client and not the lawyer, regardless of the lawyer's view about the validity of a potential claim of privilege by the client. It is the role of the court to decide the issue of privilege, not the role of the lawyer who has custody of the document. While such documents are usually not privileged, they may be in some circumstances. A lawyer (where acting on instructions of the client to claims privilege, or in circumstances where the client cannot be found) is discharging professional obligations to preserve any claim of privilege that may exist and should not be subjected to costs where the matter is brought before a court.

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Recently, the Court of Appeal decided the case of *Donell v. G.J.B. Enterprises Inc.*. While this is not a tax case, the records that were being sought by the receiver were trust ledgers. The court ultimately held that those ledgers were not privileged and should be produced. However, in its reasons for judgment, the court provided some useful guidance on the law that, we believe, is particularly relevant to the issues that we are dealing with.

The Court of Appeal noted that *Maranda v. Richer* [2003] 3 S.C.R. 193 did not do away with the distinction between facts and communications, nor did it hold that entries in a lawyer's trust account ledgers are presumptively privileged. However, the Court of Appeal held that *Maranda* does mandate that such entries *must* be considered in light of any connection between them and the solicitor client relationship and what transpires within it.

As stated above, in the *Donell* case the receiver was seeking the production of trust ledgers. The majority for the Court said:

> "Generally, such documents record facts, not communications, and are not subject to solicitor client privilege *but I would not favour a blanket endorsement of the automatic production of such records*. In my view, while the analysis in *Maranda* did not dispose of the distinction between facts and communications, *it requires the court to ensure that entries on trust ledgers do not contain information that is ancillary to the provision of legal advice*." (emphasis added)

The majority of the Court then adopted the reasoning of the Alberta Court of Appeal in *Wyoming Machinery Co. v. Roch* 2008 ABCA 433, a case to which the Law Society has referred in previous correspondence with you. The majority in *Donell* concluded that whether the financial records of a lawyer are subject to solicitor client privilege depends on an assessment of the connection between the record in issue and "the nature of the relationship in question."

Consequently, while financial records of lawyers are not presumptively subject to solicitor client privilege insofar as they represent records of actions or facts, it is quite clear that they should not be produced automatically solely for that reason. The majority of the Court in *Donell* rejects the proposition that the issue of privilege can be decided simply on the basis of the nature of the documents in issue in the absence of judicial determination to determine whether they arise out of the solicitor client relationship and what transpires within it.

We continue to expect lawyers to have full and frank discussions with their clients about whether or not a claim of privilege should be made given the circumstances relating to the particular records sought. It is, however, ultimately the client's decision to make. Where the client cannot be found, it must be viewed as improper for a lawyer, in the absence of instructions, to in effect waive any ability for the client (should he or she ever be found) to make that determination. While CRA has in the past said that the sort of records that they are seeking are not privileged, the Court of Appeal has now made it clear that while such documents are not presumptively privileged, there should be no blanket endorsement of the automatic production of such records.

An application by CRA for a compliance order appears to be one way for a court to consider these matters. Given the decision in *Donell*, however, we seek your agreement that it would be improper to seek costs against a lawyer for not automatically producing the records as requested by the CRA, thereby preserving the ability for the court to make the determination as required.

We look forward to hearing from you at your early convenience.

Yours truly,

Bruce LeRose, QC
President

The Law Society of British Columbia

Memo

To: Benchers

From: Jeffrey G. Hoskins, QC

Date: December 27, 2012

Subject: **Amendments to Law Society Rules and *Code of Professional Conduct* as recommended by Family Law Task Force and approved by the Benchers**

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1. In October 2012 the Benchers received and approved the report of the Family Task Force regarding qualifications for lawyers to act as family law mediators and arbitrators and parenting coordinators under the new Family Law Act, which will take effect March 18, 2013. That report made a number of recommendations, some of which involved changes to the Law Society Rules or the *Code of Professional Conduct*, which will be in effect before the new legislation is effective.

2. The recommendations have been considered by both the Ethics Committee, which has responsibility for changes to the *Code of Professional Conduct*, and the Act and Rules Subcommittee, which has responsibility for changes to the Law Society Rules.

3. I attach two memoranda, one from each of the Ethics Committee and the Act and Rules Subcommittee, addressing changes that the two groups recommend to the Benchers to implement the recommendations of the Family Law Task Force, previously approved by the Benchers.

4. The full text of the report from the Family Law Task Force is appended to my memo on behalf of the Act and Rules Subcommittee for your reference.

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Attachments: memo from Ethics Committee, Dec 14, 2012
memo for Act and Rules Subcommittee, Dec 27, 2012

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: November 7, 2012
Subject: **Family Law Task Force recommendations – implementation of Rule changes**

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1. I attach the report of the Family Law Task Force, which was adopted by the Benchers at the September meeting. The recommendations of the Task Force begin at page 7 of the report. I also attach an extract from the Benchers minutes in which the Benchers approve the recommendations. Several of the recommendations entail amendments to the Rules to implement. It is intended that the rules be in place for the proclamation of the new *Family Law Act* on March 18, 2013.

2. In addition, I attach redlined and clean versions of draft rule amendments and new rules to give effect to the recommendations. Lastly, I include a suggested resolution that would give effect to the changes, which the Act and Rules Subcommittee recommends to the Benchers for adoption.

3. Please note that, although the Task Force made some specific recommendations as to the requirements for lawyers to act as family law mediators, arbitrators and parenting coordinators, the proposed amendments give the Credentials Committee the authority to adopt the recommendations and the discretion to alter them in the future without the need for a rule amendment.

4. By adopting the recommendations of the Task Force, the Benchers referred to the Act and Rules Subcommittee the task of considering a legislative amendment to give the Benchers the express authority to regulate lawyers acting as arbitrators and parenting coordinators. The current section 29 authorizes the regulation of practising lawyers as mediators, but not when they act as arbitrators of parenting coordinators. Nonetheless, until a specific amendment is obtained, the Benchers can rely on the very broad general rule-making authority contained in section 11 of the *Legal Profession Act*.

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Attachments: report of Task Force
Bencher minute extract
suggested resolution

The Law Society of British Columbia

QUALIFICATIONS FOR LAWYERS ACTING AS ARBITRATORS, MEDIATORS, AND/OR PARENTING COORDINATORS IN FAMILY LAW MATTERS

September 7, 2012

Family Law Task Force

Carol Hickman, Q.C., Chair
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Prepared for: Benchers

Prepared by: Family Law Task Force / Doug Munro

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TASK FORCE PROCESS

The Family Law Task Force was formed in 2006 with a mandate to develop best practice guidelines for lawyers practicing family law. While discharging its work on the original mandate, the Task Force was charged with a series of additional responsibilities, including developing qualifications for lawyers acting as family law arbitrators.

The Ministry of Justice[1] approached the Law Society about whether it would be prepared to establish qualifications for lawyers acting as family law arbitrators. The reason for this request stemmed from the Ministry's efforts to modernize the *Family Relations Act.* Bill 16, the *Family Law Act*[2] embodies several principles, including a culture shift to try and resolve more family disputes out of the court system when appropriate. In order to ensure the public is properly protected, the issue of qualifications for family law arbitrators needed to be addressed.

As its work progressed the Task Force realized it also needed to consider qualifications for lawyers acting as family law mediators and/or parenting coordinators (qualifications for lawyers acting as family law arbitrators, family law mediators, and parenting coordinators are collectively referred to as "Family Law ADR Qualifications"). At the July 13, 2012 meeting the benchers approved the following, amended, mandate for the Task Force:

> *The mandate of the Family Law Task Force is to develop for recommendation to the Benchers practice standards for lawyers who are acting as family law arbitrators, family law mediators, and/or parenting coordinators.*[3]

In addition to consultations with staff at the Ministry of Justice, the Task Force sought input from other Law Societies in Canada to ascertain the approach in each province of regulating lawyers acting as family dispute resolution professionals.

The Task Force consulted with the following external organizations and individuals: Glen Bell (of

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[1] At that time it was the Ministry of the Attorney General.
[2] The *Act* comes into force March 18, 2013.
[3] Although the mandate used the language "practice standards" what was meant is minimum entry level requirements for a lawyer to engage in family law arbitration, family law mediation, and/or parenting coordination. It does not refer to best practice guidelines or rules necessary for performing the work on a day to day basis.

the British Columbia Arbitration and Mediation Institute), Trudi Brown, Q.C., Lawrence Kahn, Q.C.; Peter Altridge and Renee Collins Goult (of Mediate BC); John-Paul Boyd, Craig Neville and Stephanie Fabbro (of BC Parenting Coordinators' Roster Society); Phillip Epstein, Q.C. and Lorne Wolfson.

The Task Force also consulted with various Law Society staff, committees and task forces, including: Ralston Alexander, Q.C. (Chair), John Hunter, Q.C., Jerry McHale, Q.C. and Jeff Hoskins, Q.C. (in their capacity as members and staff of the ADR Task Force); Jan Lindsay, Q.C. (Chair), Kensi Gounden and John Nalleweg (in their capacity as Chair and staff supporting the Practice Standards Committee); Thelma O'Grady, Q.C. (Chair) and Alan Treleaven (in their capacity as Chair and staff supporting the Lawyer Education Advisory Committee); Andrea Brownstone, Manager, Investigations, Monitoring and Enforcement; Michael Lucas, Manager of Policy and Legal Services; and Lesley Small, Manger Credentials and Licensing.

From the inception of this project the Task Force has enjoyed very helpful discussions with staff at the Ministry of Justice, including Nancy Carter, Darryl Hrenyk and Jodi Roach. The family law reforms that the government has undertaken are the product of many years of hard work and throughout this process the policy group at the Ministry of Justice has engaged in comprehensive and meaningful consultation. The Task Force commends them for their efforts and their openness to input along the way.

The constituency of the Family Law Task Force has changed since its inception. The Task Force gratefully acknowledges the participation of former bencher, The Honourable Judge Patricia Bond,[4] and life-bencher Patricia Schmit, Q.C. for their contributions to the development of this topic.

EXECUTIVE SUMMMARY

In 2009 the Law Society was approached by the Ministry of the Attorney General to determine whether the Law Society would create Family Law ADR Qualifications.[5] The request formed part

[4] Judge Bond's contributions pre-date her appointment to the Provincial Court of British Columbia.

of the government's reform of the family law system in British Columbia, which included modernizing the *Family Relations Act* with Bill 16, the *Family Law Act.* The *Family Law Act* will allow for regulations to be established for family dispute resolution professionals.

This report provides an analysis of what the appropriate Family Law ADR Qualifications are, in light of the government reform in the area of family law. The report recommends that before lawyers are permitted to act as family law arbitrators, family law mediators and/or parenting coordinators they satisfy certain criteria. The criteria in each area include specific alternative dispute resolution skills training, training in recognizing and dealing with family violence, and targeted continuing professional development. In addition, the report recommends experience requirements for family law arbitrators and parenting coordinators, while eliminating the existing three year experience requirement for family law mediators under Law Society Rules, rule 3-20. The report recommends that the oversight function of Family Law ADR Qualifications be moved from the Practice Standards Committee to the Credentials Committee, and that rule 3-20 be amended to reflect that change. In addition it is recommended that Law Society Rules, rule 3-20, be expanded to include family law arbitration and parenting coordination.

[5] While the initial request related to family law arbitration, the topic expanded to include mediation and parenting coordination.

RECOMMENDATIONS

Recommendation 1: Lawyers acting as family law arbitrators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

3. A minimum of 40 hours approved training in how to conduct an arbitration. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct an arbitration;

    d. The statutory framework of arbitration;

    e. Family dynamics;

    f. Administrative law principles governing arbitrations.

4. A minimum of 14 hours of approved training in family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

5. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

Recommendation 2.1: The Task Force recommends that the current approved course requirements for lawyers acting as family law mediators be amended to require the following:

1. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;

2. A minimum of 80 hours of approved mediation skills training. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct a mediation;

    d. The statutory framework of mediation;

    e. Family dynamics;

    f. A minimum of 10 hours of role playing scenarios.

3. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Recommendation 2.2: Abolish the Law Society Rules, rule 3-20(1)(a) requiring three years of legal practice to qualify as a family law mediator.

Recommendation 2.3: The Task Force recommends the following approach to grand parenting existing family law mediators:

1. Lawyers who, as of the date the new rule 3-20 is approved, meet the family law mediator requirements under the current rule 3-20 will have until January 1, 2014 to ensure they meet the training requirements for family law mediators recommended in this report;

2. Courses taken to meet the current rule 3-20 requirement and any courses taken since qualifying count towards these requirements;

3. As of the adoption of this report, all lawyers who wish to qualify in the first instance to act as family law mediators must meet the requirements contained in this report;

4. Staff will determine how to implement the reporting requirement and the Law Society will provide notice to the profession regarding the required standards and how to report compliance.

Recommendation 3: The Task Force recommends that lawyers acting as parenting coordinators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the parenting coordination function in a fair and competent manner. This family law experience must include considerable experience dealing with high conflict families with children;

3. A minimum of 40 hours of approved parenting coordination training, which must include:

    a. Parenting coordination skills training and theory;

    b. Dealing with high conflict families and individuals;

    c. Child development, interviewing children, and the effects of separation and divorce on children;

    d. The effects of separation and divorce on adults.

4. The minimum approved training qualifications of a family law arbitrator, which include:

    a. A minimum of 40 hours training in how to conduct an arbitration. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

iii. How to conduct an arbitration;

iv. The statutory framework of arbitration;

v. Family dynamics;

vi. Administrative law principles governing arbitrations.

5. The minimum approved training qualifications of a family law mediator, which include:

    a. A minimum of 80 hours of mediation skills training. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

        iii. How to conduct a mediation;

        iv. The statutory framework of mediation;

        v. Family dynamics;

        vi. A minimum of 10 hours of role playing scenarios.

6. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

7. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

Recommendation 4: The Credentials Committee can set criteria for approved courses for lawyers acting as family law arbitrators, family law mediators, or parenting coordinators. In exercising its authority to assess courses the Credentials Committee should be guided by the substantive minimum requirements set out above.

Recommendation 5: The Task Force recommends that the Law Society should alert lawyers of

the obligation in s. 8 of the Family Law Act to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

Recommendation 6: The Task Force recommends that lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators be required to record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory.

Recommendation 7: The Task Force recommends that the Act and Rules Subcommittee assist the benchers in seeking a consequential amendment to the Legal Profession Act to make it clear that the Law Society may make rules for the governing of lawyers acting as alternative dispute resolution professionals.

Recommendation 8: The Task Force recommends that the Ethics Committee be asked to develop for inclusion in the BC Code the requirements for written agreements for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. These provisions will include the present protections regarding avoidance of conflicts of interest, recommendations regarding the need for independent legal advice, and the requirement for a written agreement as are now set out in Appendix 2 in relation to lawyers acting as mediators.

An additional point to be added to this new provision is that if a lawyer's role changes from one where the lawyer acts as a facilitator of consensual resolution to one where the lawyer acts as a decision maker, the lawyer must clearly specify in writing the nature of the change in function and when the lawyer will begin to exercise the change. The written agreement between the lawyer and the parties must confirm that such changes in function will be specified in writing. For example: a lawyer may conduct a process designed to be a mediation-arbitration. When the mediation portion of the process fails, the lawyer puts on the arbitrator hat and the lawyer should confirm that shift in role in writing.

The Ethics Committee should attempt to have the amendments to the BC Code in place by March 18, 2013.

BACKGROUND AND FORMAT OF THIS REPORT

The Law Society has a history of developing policy with respect to alternative dispute resolution. In 1984 the benchers established a series of rules for lawyers acting as family law mediators. Those rules are embodied in Law Society Rules, rule 3-20. Over the years the Practice Standards Committee, with the assistance of the Family Law Mediation Subgroup, has reviewed applications of lawyers seeking standing as family law mediators, making rulings on the approved course of studies and assessing equivalencies. More recently, the Alternative Dispute Resolution Task Force produced a consultation paper in May 2007 that contains 38 recommendations regarding ADR.[6]

In this report the Family Law Task Force analyzes and makes recommendations regarding Family Law ADR Qualifications. The report starts with a general overview of criteria used by the Task Force and then explores in separate sections the question of the appropriate qualifications for family law arbitration, family law mediation and parenting coordination.

THE ISSUE

The government of British Columbia is in the process of reforming the family law justice system. The reforms include modernizing the *Family Relations Act* with the new *Family Law Act*, which comes into force March 18, 2013. The reforms embody a policy shift designed, amongst other things, to diffuse the adversarial nature of family law disputes and to see more family law disputes resolved out of court. The *Family Law Act* allows the government to set education and training requirements for family dispute resolution professionals by way of regulation.[7] The government will establish qualifications for non-lawyer family dispute resolution professionals.

As part of the object of fostering greater use of alternative dispute resolution, the Ministry of the Attorney General requested that the Law Society consider developing qualifications for lawyers acting as family law arbitrators. As noted, the scope of the project grew to include consideration of family law mediation and parenting coordination. The issue considered in this report is whether the Law Society should create Family Law ADR Qualifications, and if qualifications are to be

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[6] Available at http://www.lawsociety.bc.ca/page.cfm?cid=99&t=Committee-and-Task-Force-Reports ("ADR Task Force Report").
[7] Section 245(1)(c).

created, what they should be.

EVALUATION CRITERIA

In evaluating the merit of implementing Family Law ADR Qualifications there are a range of factors the benchers should consider. This section of the report details evaluation criteria considered by the Task Force.

Public Interest

The main question the Task Force considered is whether Family Law ADR Qualifications are in the public interest.

In some respects, family law arbitration and parenting coordination are still in their infancy in British Columbia. This provides an opportunity to consider qualifications from the view of what should be built, rather than what needs to be fixed, in order to protect the public interest in the administration of justice. With respect to family law mediation, in 1984 the Law Society was the first law society to establish rules relating to family law mediation. Family law mediation has evolved considerably over the past 28 years, and in light of the impending legislative change and general reform in family law, it is time to review the Law Society's qualifications and consider whether they remain appropriate.

When the public retains a professional they expect several things including that the professional is competent to provide the services that are offered. Lawyers are trained through law school, admission programs, and articles, to develop base line competencies to practice law. Generally, this training does not teach one how to perform ADR functions, however. So while experience in practicing law can be important, it is an insufficient criteria on which to ensure a lawyer possesses certain essential information to conduct family law arbitrations or mediations or to act as a parenting coordinator. The public interest suggests that additional, targeted training is necessary.

When the benchers adopted qualifications for lawyers acting as family law mediators they recognized that mediation differs from the traditional practice of law, and that family law

mediation in particular requires discrete qualifications in order to protect the public. Although arbitration and parenting coordination differ from mediation, there is value in being consistent with respect to the need for qualifications to better protect the public.

Although the focus of the Task Force was to consider Family Law ADR Qualifications for lawyers, it believes it is important to make some observations about qualifications for non-lawyer family law arbitrators.

The Task Force understands that the government will consider what education and training requirements non-lawyer family law dispute resolution professionals must possess. The Task Force views this as important. The public interest factors that justify the need for standards for lawyers acting as family law arbitrators apply as much, if not more so, to non-lawyers. Non-lawyer dispute resolution professionals are not uniformly regulated[8] or covered by mandatory insurance. While some individuals will possess backgrounds that are relevant to matters that can arise in family disputes, others will not. As such, it is critically important that non-lawyer dispute resolution professionals are subject to rigorous education and training requirements. The government may also wish to consider what dispute resolution processes are available to people who are not pleased with the competence of their non-lawyer dispute resolution professional, including requiring membership in certain organizations.

The Task Force also understands that the British Columbia government may be precluded, to some degree, by the Agreement on Internal Trade ("AIT"), to impose such restrictions on non-lawyer arbitrators when similar restrictions do not exist in other provinces. It encourages the government to resolve any ambiguity regarding application of the AIT with its other signatories prior to March 18, 2013.

Cost and Benefit

Because the Law Society will investigate complaints against lawyers acting as dispute resolution

[8] While family law arbitrators in Ontario are required to meet the Ministry of the Attorney General standards, there is not a dedicated regulatory body for which mandatory membership is required. It is also possible to obtain membership in organizations such as Mediate BC and Mediation Canada, which would require compliance with membership standards of those organizations.

professionals, the presence of qualifications should not increase operational costs of the Law Society. The analysis of complaints may vary in the presence of a set of rules that establish qualifications (e.g. if a lawyer was acting as a family law mediator without having met the requirements), but the extent to which that would affect budgeting (if at all) is difficult to quantify.

Whereas the issue of potential costs is ambiguous, the Task Force is of the view that the benefits that flow from qualifications are more tangible and therefore more determinative of the value of adopting qualifications. The Task Force raised the general issue of regulatory oversight of lawyers performing ADR roles and understands that staff in the Professional Regulation and the Policy and Legal Services Departments will review the issue. That topic lies outside the Task Force's general mandate, however, so it is raised but not explored in this report.

Public Relations

The Task Force is of the view that establishing Family Law ADR Qualifications will have positive public relations implications. This is somewhat speculative, as it may be the case that the public assumes the Law Society already sets such requirements. It is also possible that as family law ADR continues to develop, particularly where there are both lawyers and non-lawyers occupying the field, the public will expect lawyers to be held to entry requirements that are as high (if not higher) than the entry requirements of non-lawyer family dispute resolution professionals. The Task Force is of the view that positive public relations is a potential benefit, but the more important question is whether it is in the public interest to set Family Law ADR Qualifications.

Government Relations

The Task Force anticipates adopting Family Law ADR Qualifications will result in positive government relations. The government has invested considerable time and resources in developing reforms in the area of family law, and has identified the need for entry level qualifications. The benchers have identified the importance of finding ways to work with government, when and as appropriate, to address matters of shared concern. The Task Force is of the view that the recommendations in this report are responsive to a government need and are consistent with Initiative 3-1(a) of the 2012-2014 Strategic Plan: *Identify, establish and build on relationships with the Ministry of the Attorney General and other government ministries, the Courts, and non-*

governmental stakeholders.

Program Impacts

Developing Family Law ADR Qualifications will impact existing departments and programs. The most likely impact is on the Credentials Department. This is predicated on the benchers accepting that the oversight of Law Society Rules, rule 3-20 more properly rests with the Credentials Committee than the Practice Standards Committee (as discussed later in this report). Staff will have to develop systems and processes to implement these changes. As with any such systems changes the impact will likely be greater at the beginning of the implementation process and eventually become the normal part of operations.

It was recognized that if the Practice Standards Committee's jurisdiction to consider applications for standing as a family law mediator were expanded to include lawyers acting as family law arbitrators and parenting coordinators that the Practice Standards Committee would see an increased workload. At present the Practice Standards Committee receives assistance from the Family Law Mediation Subcommittee regarding applications for an exemption to the entrance requirements under rule 3-20. If family law arbitration and parenting coordination are included, then it would be necessary to either reconstitute the Family Law Mediation Subcommittee to ensure it also had expertise in the areas of family law arbitration and parenting coordination, or to create additional subgroups. An alternative is that the Credentials Committee might establish the general criteria and leave the operational application to staff to administer, similar to the CPD process. This would require the Act and Rules Subcommittee to structure a revised rule 3-20 to authorize such an approach.

During this discussion consideration was also given to the feasibility of requiring family law experience as a qualification for acting as a family law arbitrator and/or parenting coordinator. The Task Force considered a range of options, including a certain amount of hours per year or a percentage of practice requirement (discussed in more detail later). A concern about the practical application of such a requirement arose and it was strongly suggested that it would be administratively impractical to review applications and determine how much family law experience was enough (both qualitatively and quantitatively). The preferred approaches are set

out in the sections on arbitration and parenting coordination.

The consultation ultimately led to a wider discussion amongst staff and managers about shifting the administration function from the Practice Standards Committee to the Credentials Committee because the qualifications are entry level requirements and not "practice standards" *per se.*

Legality

In analyzing the issue of Family Law ADR Qualifications, the legal issue the Task Force identified is the potential application of the AIT to the establishment of standards.

The AIT is an agreement signed by the provinces and the federal government to eliminate barriers to the free flow of goods and services and people throughout Canada. The AIT limits the ability to impose "material additional training, experience, examinations or assessments as part of the certification process." In order to impose such requirements, a party would have to have evidence that an individual who is certified in another province "lacks a critical skill, area of knowledge or ability required to perform" those services in British Columbia.[9]

The Task Force was concerned about proceeding to develop Family Law ADR Qualifications that differ materially from standards in other provinces, without first getting a sense of how the Ministry of the Attorney General views the application of the AIT to the issue of qualifications for lawyers acting as family law arbitrators.

The feedback the Task Force received was that it should not be a problem for the Law Society to establish Family Law ADR Qualifications that varied materially from requirements in other provinces.

Equity and Diversity

The Task Force does not believe the creation of Family Law ADR Qualifications directly implicate the Law Society's Equity and Diversity initiatives. That having been said, the Law Society should remain mindful of whether the qualifications have the unintended consequence of creating

[9] See, AIT Article 708.

systemic barriers to equal participation by lawyers based on prohibited grounds of discrimination. In particular it is important that the qualifications do not create barriers to equal participation by women lawyers, members of minority cultural groups and Aboriginal lawyers.

The Task Force consulted with Susanna Tam (former Equity and Diversity staff lawyer). With respect to education in family dynamics and domestic violence, Ms. Tam noted the importance of ensuring such training was also sensitive to cultural factors, in particular at the intersection of culture and domestic violence. Education service providers should be mindful to ensure their training includes current thinking regarding minority groups and Aboriginals with respect to family dynamics and domestic violence.

Transparency and Disclosure

The proposed Family Law ADR Qualifications are not expected to affect the Law Society's approach to transparency and disclosure.

OPTIONS

There are two main options available to the benchers:

1. Adopt the recommended qualifications in this report;

2. Suggest alternative qualifications for adoption;

ANALYSIS OF THE ISSUE AND OPTIONS: FAMILY LAW ARBITRATION

The Task Force makes the following recommendations regarding lawyers acting as family law arbitrators:

Recommendation 1: Lawyers acting as family law arbitrators must meet the following

qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

3. A minimum of 40 hours approved training in how to conduct an arbitration. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct an arbitration;

    d. The statutory framework of arbitration;

    e. Family dynamics;

    f. Administrative law principles governing arbitrations.

4. A minimum of 14 hours of approved training in family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

5. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements

An overview of family law arbitration

There are several ways to view the issue of entry level qualifications for lawyers acting as family law arbitrators.

The Task Force started considering this issue by acknowledging that it was the intention of the government to modernize the *Family Relations Act.* It was understood that a likely consequence of the legislative reform is that a regulatory framework for individuals acting as family dispute

resolution professionals would be developed. Because the Law Society regulates an independent legal profession, the initial analysis led the Task Force to the conclusion that the Law Society is the appropriate organization to determine whether Family Law ADR Qualifications are required and, if they are necessary, to set those qualifications.

The practice of family law arbitration is largely unregulated. By this the Task Force means that there is not a dedicated regulatory body that oversees and sets qualifications for family law arbitrators. In the absence of such a body, there is no regulated baseline that establishes the *indicia* of competency, nor is there a mandatory insurance program. The cost and the risks associated with picking the wrong arbitrator are borne solely by the public and in the case of family law disputes, often by people who are facing considerable emotional and economic hardship. Consequently, members of the public cannot turn to a single source to resolve problems with their arbitrator.

The courts have jurisdiction to review arbitral decisions. Theoretically, the market (if operating efficiently) can lead to competent arbitrators getting work while weeding out less competent arbitrators.[10] Organizations that set requirements for *certified* arbitrators can establish coursework and criteria for people who wish to hold themselves out as *certified* and meet a higher standard. The development of voluntary certification requirements has the potential to influence market forces and over time become the *de facto* requirements.

The issue of regulatory oversight is complicated by the fact that the Law Society will regulate lawyers acting as family law arbitrators, whereas non-lawyer family law arbitrators are not necessarily regulated. There are a range of potential consequences to this.

If the Law Society establishes qualifications for lawyers acting as family law arbitrators, such qualifications will provide guidelines for the profession to assist them in discharging their arbitral function in a competent manner. This will be beneficial to both the public and the legal profession.

Qualifications will allow the public to ensure lawyer-arbitrators they choose for family disputes

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[10] If the resolution of family disputes is eventually going to play out with greater frequency outside the court room, however, the Task Force suggests that greater certainty of public protection is desirable.

have met criteria designed to establish entrance level competency. Qualifications will also allow the public to better compare the services of non-lawyer arbitrators and lawyer-arbitrators. The presence of qualifications also reduces the chance of confusion because the Law Society sets requirements for lawyers acting as family law mediators; the absence of requirements for lawyers acting as family law arbitrators might appear inconsistent.

Family law is a somewhat unique area of law, in which several areas of law intersect. Family law disputes can involve issues of property, family dynamics and violence, and require consideration of the best interests of children. Family law disputes are often emotionally charged. Having specialized training can assist lawyers to ensure they have the proper tools to act as arbitrators of family disputes. In addition, not all lawyers will come to family law arbitration with the same background, so having a level of uniform training would ensure that all lawyers acting as family law arbitrators have been exposed to certain concepts.

The presence of qualifications also assists government in developing qualifications for non-lawyer arbitrators. This has several potential benefits. It may facilitate positive government relations by assisting the government in developing policy in an important area of public need. It can also have a positive impact on the public perception of the administration of justice, which is a matter of importance to government and the Law Society.

If family law arbitration is to function as an alternative to court proceedings, it needs to deliver on more than the promise of lower cost – it must also be delivered by competent professionals who are accountable for the quality of their services. The public will not necessarily distinguish the discrete area of family law arbitration from the broader justice system context. As such, public confidence in the system as a whole can be positively or negatively affected by the public perception of family law arbitrators.

As a starting point the Task Force explored the requirements for lawyers acting as family law mediators.[11] Before a lawyer can practice as a family law mediator he or she must meet the

[11] Law Society Rules, rule 3-20. The analysis of family law mediation is set out in greater detail in the next section of the report.

education and experience requirements of rule 3-20. The Task Force viewed this rule as informative but not binding on the approach to take with respect to arbitration. Instead the Task Force asked the following questions:

1. Should there be an experience requirement for lawyers wishing to act as family law arbitrators? If yes, how much and why?

2. Should there be an educational requirement for lawyers wishing to act as family law arbitrators? If yes, what and why?

A. Should there be an experience requirement for lawyers wishing to act as family law arbitrators? If yes, how much and why?

Determining whether to apply an experience requirement was a difficult part of the Task Force's analysis. Although there is a 3 year practice requirement for lawyers acting as family law mediators, there have been calls in the mediation community for the elimination of that requirement.[12] Some will argue that one develops competency as a mediator or arbitrator through carrying out mediations and arbitrations. It is suggested that engaging in the regular practice of law does not, through the mere passage of time, imbue a lawyer with the necessary competencies of a mediator or arbitrator. Others will argue that the experience of practicing law will provide a lawyer a greater understanding of procedural and substantive law that may be relevant to taking on an arbitral role. There is an analytic discipline that takes time to develop and, given arbitrators' responsibilities, experience provides an additional safeguard for protecting the public.

The Task Force observes that other Law Societies do not set special qualification requirements for lawyers acting as family law arbitrators. The Task Force consulted with the discipline administrators at other Law Societies and was advised that complaints against lawyers acting as arbitrators would likely be dealt with through the lens of conduct unbecoming a lawyer and that

[12] Including the Law Society's ADR Task Force. This is discussed in more detail in the section on family law mediators.

there were not special requirements.

The absence of qualifications in other Law Societies is not determinative of whether qualifications are appropriate in British Columbia. In some instances, such as unbundling of legal services, the Law Society of British Columbia has led the call for reform. In other instances the Law Society has embraced approaches taken in other provinces.

The arguments in favour of an experience requirement include:

1. Arbitration requires skills similar to acting as a judicial officer. Judges require 10 years of experience as a lawyer before being able to sit as a judge.[13] If family law arbitration is to function as a viable alternative to court, arbitrators should face similar requirements;

2. An experience requirement allows time for a lawyer to develop legal skills;

3. Specific family law experience is also desirable, given the complex issues that can arise in family law disputes as well as the high value society places on protection of children;

4. With experience comes a heightened understanding of professional ethics and judgment.

The arguments against an experience requirement include:

1. Just because a lawyer has practiced for a certain number of years it does not mean the lawyer has developed competencies relevant to family law or administrative law. A lawyer who spends five years solely practicing family law may be better suited from an experience perspective to act as a family law arbitrator than a lawyer with 10 years experience who merely dabbles in family law.

2. An experience requirement restricts the pool of available lawyer arbitrators. The restricted pool may have several unintended consequences, including:

   a. The potential to drive up the cost of the services;

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[13] *Judges Act*, R.S.C. 1985, c. J-1, s. 4.

b. The potential to make the pool of available family law arbitrators less diverse (to the extent women and lawyers from minority groups might leave the profession before their 10th year of practice in greater numbers);

c. The restriction may create distortions between the market for lawyers acting as family law arbitrators and non-lawyers. A non-lawyer arbitrator cannot have an experience requirement, unless non-lawyer arbitrators are limited to defined categories of professionals. A potential consequence is that a much larger pool of non-lawyer arbitrators could exist, and it would be more difficult for lawyer arbitrators to offer competitive services with non-lawyer arbitrators, thereby limiting the public's choice of services.

3. The AIT might restrict the Law Society's ability to impose an experience requirement because an experience requirement leaves a lawyer with no proactive steps to develop competence as an arbitrator other than waiting for time to pass.[14]

4. Some lawyers who have practiced for less than 10 years may already be providing family law arbitration services, and the imposition of this requirement would adversely affect their practice.

5. With respect to requiring lawyers to have family law specific experience, if the requirement was set too high it could prevent lawyers who operate a general practice from participating. This might have unintended consequences, particularly in smaller communities where lawyers tend to have more diverse practices than their counterparts in large urban centres.

The Task Force considered recommending specific experience in family law and explored how such experience might be defined and measured. The Task Force considered recommending an hour requirement in family law spread out over five of the past seven years in order to provide flexibility to lawyers who were on parental leave and/or subject to a disability that prevented them from working full time. An alternative was to require a certain percentage of time dedicated to the

[14] Conversations with Ministry of Justice staff led to the conclusion that this was not likely a problem.

practice of family law. The more the Task Force discussed these concepts, the more concerned it became about the practical application of such measures. A real concern arose that the application and vetting process would get mired in an analysis of how much of a lawyer's practice was dedicated to the type of family law that would have likely exposed the lawyer to the relevant issues. Ultimately the Task Force preferred an approach similar to Chapter 3, Rule 1 of the *Professional Conduct Handbook* which requires:

> 1. With respect to each area of law in which a lawyer practices, he or she must acquire and maintain adequate:
>
>   a. Knowledge of the substantive law;
>
>   b. Knowledge of the practices and procedures by which that substantive law can be effectively applied.[15]

The Task Force recommends that family law experience be required but the mechanism for assessing it should be left to the individual lawyer to determine whether he or she possesses the adequate skills, knowledge and experience in family law to arbitrate disputes in a fair and competent manner.

On balance, the Task Force recommends an experience requirement for the following reasons:

1. Acting as an arbitrator should require similar experience requirements as acting as a judge;

2. To the extent an object of the new *Family Law Act* is to direct family disputes to settlement through processes outside the court, and arbitration is encouraged, it becomes important to ensure the quality of arbitrators is comparable to the quality of judges;

3. The public is unlikely to distinguish a lawyer as arbitrator from a lawyer as lawyer, and therefore incompetent lawyer arbitrators can reflect poorly on the legal profession as a whole and have an adverse impact on the public confidence in the administration of justice;

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[15] 1(c) refers to "skills to represent the client's interests effectively"

4. A lawyer acting as a family law arbitrator must be satisfied he or she has acquired sufficient knowledge, skills and experience relevant to family law to carry out the arbitral function in a fair and competent manner;

5. Public protection – on balance, decisions will be more skillful, balanced and of greater benefit to the public.

B. Should there be an educational requirement for lawyers wishing to act as family law arbitrators? If yes, what should the requirement be and why?

The Law Society does not set any special education requirements for lawyers acting as arbitrators. So the question of whether lawyers acting as family law arbitrators need special education required the Task Force to ask whether family law arbitration should be treated differently from commercial arbitration.

As a general proposition, once lawyers are called to the Bar the Law Society does not restrict areas of practice. The *Professional Conduct Handbook* flags the professional obligation of lawyers to be satisfied of their competence to take on matters, but no specialized training is required. There are some notable exceptions:

1. The small firm practice course. Lawyers who are entering a firm of four or fewer lawyers are required to take the small firm practice course.[16] The course is designed to assist small firm practitioners in setting up their practices in a manner that better serves the public. The course serves the dual purpose of protecting the public through targeted training, while helping lawyers identify the pitfalls and challenges that are prevalent in operating a small firm or sole practice;

[16] See Law Society Rules, rules 3-18.1 and 3-18.2.

2. Continuing professional development. The continuing professional development program requires each lawyer to take at least 12 hours of professional development each year, including at least 2 hours of ethics and professional responsibility;

3. Lawyers wishing to act as family law mediators are subject to the following course requirements:

1.Completion of the five-day Family Law Mediation course of the Continuing Legal Education Society of BC (prior to 2009); or

2.Completion of the Family Mediation Level I and Family Mediation Level II courses of the Continuing Legal Education Society of BC (starting 2009); or

3.Completion of the following:

(a) Mediation Level I at the Justice Institute, and

(b) any one of the following Family Dynamics courses held at the Justice Institute:

(i) CORR 605: Family Violence

(ii) FAM 103: Effects of Separation and Divorce on Adults

(iii) FAM 104: Effects of Separation and Divorce on Children,

and

(c) Day V of the Family Law Mediation Course (prior to 2009), or the Law Society requirements day of Family Mediation Level II (starting 2009), each provided by the Continuing Legal Education Society of BC.[17]

The Practice Standards Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without the practice experience requirement.

[17] Courses approved by the Practice Standards Committee April 2, 2009.

In the case of qualifications for lawyers acting as family law arbitrators, the Task Force believes qualifications are going to be developed so the real question is who should develop the requirements and what they should be. There are three main reasons the Task Force has come to this conclusion:

1. The Ministry of Justice asked the Law Society to consider developing qualifications for lawyers acting as family law arbitrators. The Ministry has expressed an intention to establish requirements for dispute resolution professionals. The Ministry has indicated it expects the Law Society to establish requirements that are consistent with the requirements that will be developed for non-lawyers.

2. In Ontario the Ministry of the Attorney General sets qualifications for family law arbitrators. The Ontario qualifications include a requirement that lawyers acting as arbitrators take 14 hours of training in screening for domestic violence and power imbalances.[18] Apart from the issue of whether the requirements in Ontario are adequate, the fact is that the government set the requirements for lawyers, rather than the Law Society of Upper Canada. As noted above, the Task Force is of the view the Law Society of British Columbia should set qualifications for lawyer arbitrators. While the benchers may reject the recommendation of the Task Force that such qualifications are desirable, it is possible the government would then feel obligated to set requirements. In light of this, the Task Force does not believe the option of maintaining the *status quo* is desirable.

3. Family law dispute resolution presents challenges that are either unique to family law or more prevalent and which require special sensitivities. These include: the heightened emotional nature of family disputes; the potential presence of children and the attendant concerns that arise in such circumstances; the potential existence of domestic violence and power dynamics in a family that can affect the proper resolution of a dispute. For much the same reason as the Law Society recognized special rules for family law

[18] See http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/training.asp. Non-lawyer family arbitrators must also complete 30 hours of training in Ontario family law.

> mediation are justified, the Task Force believes that qualifications for family law arbitration are justified.

With respect to screening for domestic violence it is important to note that Bill 16 (the *Family Law Act*) establishes the following requirements for family dispute resolution professionals:

> 8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect
>
> (a) the safety of the party or a family member of that party, and
>
> (b) the ability of the party to negotiate a fair agreement.
>
> (2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must
>
> (a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and
>
> (b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

The definition of "family dispute resolution professional" includes:

> (a) a family justice counselor;
>
> (b) a parenting coordinator;
>
> (c) a lawyer advising a party in relation to a family law dispute;
>
> (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
>
> (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the

arbitrator meets the requirements set out in the regulations;

(f) a person within a class of prescribed persons;

Section 8 of the *Family Law Act* required the Task Force to consider the necessity of training in family violence for lawyers acting in any of the capacities listed above. With respect to lawyers acting as family law arbitrators, mediators or parenting coordinators, the issue of training in domestic violence is addressed in each section of the report. With respect to lawyers practicing family law in general, domestic violence training is addressed in the section "Other Matters". The Task Force did not discuss training for family justice counselors as they are employees of government and as such may be subject to additional training requirements by their employer.

Recognizing that the *Family Law Act* requires screening for family violence the Task Force considered whether the present level of coverage under Rule 3-20 is sufficient. While the Task Force is of the view that the 21 hour CORR 605 Family Violence course would be adequate it does not believe that the approximately 5 hours of family violence training obtained through the Continuing Legal Education BC Family Law Mediation I and II are sufficient in length. The Task Force understands, however, that Continuing Legal Education BC will be exploring a longer training session that addresses issues of family violence.

After much consideration the Task Force concluded that 14 hours of training in family violence should be required. The Credentials Committee should have the discretion to identify other acceptable service providers and courses. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process. As noted, in Ontario lawyers acting as family law arbitrators are required to take 14 hours of training in screening for domestic violence and power imbalances. Requiring British Columbia lawyers acting as family law arbitrators to take 14 hours of training in family violence is consistent with that requirement.

ANALYSIS OF THE ISSUE AND OPTIONS: FAMILY LAW MEDIATION

The Task Force makes the following recommendations with respect to lawyers acting as family law mediators:

Recommendation 2.1: The Task Force recommends that the current approved course requirements for lawyers acting as family law mediators be amended to require the following:

1. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner;

2. A minimum of 80 hours of approved mediation skills training. Course work should include:

    a. Theory and skills training;

    b. Drafting;

    c. How to conduct a mediation;

    d. The statutory framework of mediation;

    e. Family dynamics;

    f. A minimum of 10 hours of role playing scenarios.

3. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process.

Recommendation 2.2: Abolish the Law Society Rules, rule 3-20(1)(a) requiring three years of legal practice to qualify as a family law mediator.

Recommendation 2.3: The Task Force recommends the following approach to grand parenting existing family law mediators:

1. Lawyers who, as of the date the new rule 3-20 is approved, meet the family law mediator requirements under rule 3-20 will have until January 1, 2014 to ensure they meet the training requirements for family law mediators recommended in this report;

2. Courses taken to meet the current rule 3-20 requirement and any courses taken since qualifying count towards these requirements;

3. As of the adoption of this report, all lawyers who wish to qualify in the first instance to act as family law mediators must meet the requirements contained in this report;

4. Staff will determine how to implement the reporting requirement and the Law Society will provide notice to the profession regarding the required standards and how to report compliance.

In 1984 the Law Society adopted rules for lawyers acting as family law mediators. Those rules reflected what were held to be acceptable minimal standards at the time, taking into account the fact that family law mediation was a fledgling field of practice. In the years that followed, family law mediation has developed considerably: much more mediation is occurring; its value as part of a network of solutions for family law disputes is better understood and accepted and the sort of training that is available has grown. Along the way there have been the additional developments, such as the founding of organizations dedicated to the training and certification of family mediators.[19]

For its part, the Law Society struck an ADR Task Force in 1998. The ADR Task Force produced a consultation paper in 2007 that identified 38 recommendations in the area of ADR, with particular focus on the area of mediation. The ADR Task Force also made recommendations regarding relationship mediation. While the Task Force recognizes that the report has not been adopted by the benchers, it gave full consideration to the depth of research, consultation and thought that went into the drafting of the report. The Task Force considered the history of family law mediation and its evolution since 1984 and asked whether the requirements set out in Law

[19] Such as Family Mediation Canada (1985) and Mediate BC Family Roster (2002).

Society Rules, rule 3-20 are sufficient or if they need to be changed to better reflect the prevailing standards.

An important distinction to bear in mind when comparing the Law Society's requirements for lawyers acting as family law mediators and the standards of Family Mediation Canada or the Mediate BC Family Roster is that the Law Society requirements reflect minimum qualifications for lawyers to engage in family law mediation, whereas the requirements of the other organizations reflect minimum entrance requirements to rosters or certified rosters. In addition, Family Mediation Canada and Mediate BC also have non-lawyer mediators as part of their rosters. This provides ground for distinguishing between the standards of the three organizations as the qualifications serve different functions.

An example of the distinction between qualifications can be found in the entrance requirements for the Mediate BC Family Roster, which can be achieved through one of two streams.[20] Applicants to the Roster who are certified by Family Mediation Canada can gain admittance through the first stream. Other applicants require a mix of training and experience. The experience requirement is 200 hours of mediation over 20 or more family mediations in the past five years (as a mediator, co-mediator, or co-mediator in an approved practicum). What this means is that one has to have mediated family disputes before one can become a roster member. The Law Society Rules, rule 3-20 does not require lawyers to have mediated family disputes. In fact, rule 3-20 is the prerequisite to be able to perform family mediations in the first place.[21]

Despite the different functions of the requirements of the Law Society and Family Mediation Canada and the Mediate BC Family Roster, the Task Force analyzed the requirements of each organization to consider what the appropriate qualifications are for British Columbia lawyers. In doing so, the Task Force considered a range of factors including:

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[20] See http://www.mediatebc.com/Resources-for-Mediators/About-the-Rosters/Family-Roster-Admission.aspx.

[21] The Task Force alerted staff at the Ministry of Justice to the paradox that would be created by making membership in the Mediate BC Family Roster a qualification to acting as a family law mediator when membership in that roster can require as a qualification completion of 200 hours of acting as a mediator in at least 20 family law mediations. A similar paradox is created with respect to Family Mediation Canada which requires either completion of an approved mediation practicum or completion of at least 10 fee paid private family mediations or 10 family mediations in an approved structure (see, Family Mediation Canada, "Practice Certification and Training Standards" section 5.3(c)(i) and (ii)). This is a matter Mediate BC, Family Mediation Canada, and the Ministry of Justice may wish to discuss.

1. What is the appropriate level of training to establish minimum practical knowledge to conduct a family mediation?

2. Should training in assessing domestic violence be required?

3. What experience requirement, if any, should apply (either as a practicing lawyer or as a mediator of non-family disputes)?

4. Should targeted continuing professional development in mediation be required?

5. If the Law Society changes its existing requirements for family law mediators, how should the issue of grand parenting existing family law mediators be dealt with?

Throughout the discussion the Task Force considered what is the proper balance between fostering access to mediators while reducing the risk of harm to the public? The Task Force was concerned with maximizing access to justice while ensuring the quality of the dispute resolution process was not compromised.

1. *What is the appropriate level of training to establish minimum practical knowledge to conduct a family mediation?*

When the Law Society initially explored qualifications for family law mediation, 40 hours of ADR mediation training was considered an acceptable standard. In its consultation report the ADR Task Force observed that an increase in the 40 hour (approximate) training requirement in family mediation appears to be rising. Rather than make a recommendation the ADR Task Force left it to the benchers with input from the Family Law Mediation Subcommittee to determine the appropriate standard. The Family Law Task Force is of the view that the prevailing minimum requirement has continued to evolve since the ADR Task Force completed its research and that a minimum of 80 hours of mediation skills training better reflects the minimum requirement.

The Task Force considered a number of factors in arriving at the 80 hour qualification, including input from representatives of the Mediate BC Family Roster and members of the ADR Task Force. The feedback was that the current approved courses fall short of the acceptable requirement. As the field of family mediation has developed, training programs have evolved and expanded. Part

of the value in increasing the training requirement to 80 hours is that it provides greater opportunity to engage in family mediation role playing scenarios. The Task Force was advised that role playing provides critical exposure to essential skill development and the current training program approved under rule 3-20 falls short in this regard. The Task Force considered that training in role playing can function as an alternative to the experience requirement in mediation training.

The Task Force discussed how much of the training should be required to be in role playing and the feedback it received was that a minimum of 10 hour was desirable. In order not to reduce the current content of the minimum course requirements, adding a minimum role playing content further supports the need to increase the approximately 50 hours of course work.

The Mediate BC Family Roster requires a minimum of 80 hours of mediation skills training. Family Mediation Canada requires considerably more training. Membership in each organization reflects having attained a more specialized requirement and it is recognized that historically people have carried out family mediations without necessarily having achieved those requirements. It is justifiable for the Law Society to set alternative qualifications for lawyers acting as family law mediators. Both Family Mediation Canada and the Mediate BC Family Roster require experience conducting family mediations as a condition of admission. Eighty hours of mediation training is a more modest requirement, yet the Task Force believes an appropriate one for acquiring a minimum level of knowledge in the basics of acting as a family law mediator (the necessity of family violence training is set out below).

2. *Should training in assessing domestic violence be required?*

The course of study approved by the Practice Standards Committee[22] for lawyers acting as family law mediators provides two paths of qualification. In path one a lawyer will have taken approximately five hours of training in domestic violence. In path two, if the lawyer chooses the

[22] Practice Standards Committee meeting, April 2, 2009.

optional course CORR 605 Family Violence the lawyer will have received 21 hours of training in domestic violence. It is possible in path two to receive no training in family violence screening.

As noted in the analysis of family law arbitration, section 8 of the *Family Law Act* imposes obligations on family law dispute resolution professionals to assess whether family violence is present and the potential consequences to the safety of a party or family member and the fairness of the dispute resolution process.

For the same reasons as articulated with respect to lawyers acting as family law arbitrators the Task Force is of the view that a minimum of 14 hours of training in screening for family violence is a necessary pre-requisite for lawyers to act as family law mediators. The training should be taken through courses of study approved by the Credentials Committee.

3. *What experience requirement, if any, should apply (either as a practicing lawyer or as a mediator of non-family disputes)*

At present, Law Society Rules, rule 3-20(1)(a) requires three years full-time practice (or part-time equivalents) for lawyers wishing to act as family law mediators. The experience requirement has been the subject of much criticism. The ADR Task Force consultation report includes the recommendation that the Law Society "Abolish the rule requiring three years of legal practice to qualify as a family law mediator" (Recommendation 30). The Task Force discussed the experience requirement with representatives of the ADR Task Force and the Mediate BC Family Roster.

The main argument against the general experience requirement is that the necessary experience requirement for acting as a mediator is developed through the practice of conducting mediations. While one might acquire relevant knowledge through the practice of law one does not develop the necessary skills to act as a mediator. Therefore the experience requirement is viewed as a false equivalency. The Task Force discussed whether it would make any difference for the experience to be targeted to family law experience, but the same issue arises. While lawyers who deal with family law disputes would have a better grounding in procedural and substantive family law issues they would not, by virtue of that experience, acquire experiential knowledge of how to conduct mediations in a competent manner.

The Task Force then considered whether one should have some general experience as a mediator before being able to conduct family law mediations. While this has some more appeal than viewing general legal experience as a suitable pre-requisite it presents certain problems. A main concern with this is that the realities of many practices is that lawyers who conduct commercial mediations, labour mediations, etc. are not necessarily going to transition to family mediations. Nor, for that matter, are lawyers who deal in family law disputes necessarily going to structure their practices to conduct a series of mediations outside the area of family law in order to reach a threshold level of mediation experience required to conduct family mediations.

Ultimately the Task Force was persuaded by the Recommendation 30 of the ADR Task Force consultation report that the three year experience requirement in rule 3-20(1)(a) be abolished.

4. *If the Law Society changes its existing standards for family law mediators, how should the issue of grand parenting existing family law mediators be dealt with?*

As part of its analysis the Task Force considered how the Law Society should deal with lawyers who have met the existing requirements under rule 3-20. If the benchers approve the recommendations in this report the basic training requirements for lawyers to qualify as a family law mediator will increase approximately 44 hours, depending on the course of study.[23]

The Task Force considered several things in assessing how to deal with grand parenting existing family law mediators. First and foremost the Task Force was guided by asking what training is necessary to protect the public interest in the administration of justice. A secondary consideration was to establish a transitional process that is both fair and practical. The Task Force acknowledges that no single approach is perfect. Some lawyers will have been conducting family law mediations for years, whereas others will have little or no experience. Similarly, the courses lawyers will have taken will vary. The solution needs to be administratively feasible.

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[23] The Task Force is recommending 80 hours of ADR training in mediation skills and 14 hours of training in family violence. The current approved course of study is approximately 50 hours, which can include anything from 0-21 hours in family violence training depending on the courses the lawyer-mediator took to qualify.

Any grand parenting process therefore needs to take into account the risk to the public, the administrative feasibility of the Law Society implementing the requirement, and whether the requirements constitute unnecessary hardship on lawyers who qualify under the present rule.

While there is a gap between the existing requirements and the qualifications proposed in this report, the Task Force does not view this as a hardship because many family law mediators will have continued to take courses related to family law mediations (including, perhaps, courses on family violence). As such, many lawyers will have already met the proposed requirements. For those who have yet to meet the new requirements, the Task Force does not view the requirement to catch-up to the new standard as onerous. To the extent the new qualifications better reflects current best practices, it is in the public interest to require family law mediators to meet the requirement.

The Task Force preferred requiring lawyers who are family law mediators to indicate to the Law Society by January 1, 2014 that they meet the education and training requirements for family law mediators contained in this report. The Task Force leaves it to staff to determine how best to create a system that facilitates such reporting by lawyers.

ANALYSIS OF THE ISSUE AND OPTIONS: PARENTING COORDINATION

The Task Force makes the following recommendations with respect to lawyers acting as parenting coordinators.

Recommendation 3: The Task Force recommends that lawyers acting as parenting coordinators must meet the following qualifications:

1. 10 years of current practice experience, or experience as a judge or master;

2. A lawyer must possess sufficient knowledge, skills and experience relevant to family law to carry out the parenting coordination function in a fair and competent manner. This family law experience must include considerable experience dealing with high conflict families with children;

3. A minimum of 40 hours of approved parenting coordination training, which must include:

    a. Parenting coordination skills training and theory;

    b. Dealing with high conflict families and individuals;

    c. Child development, interviewing children, and the effects of separation and divorce on children;

    d. The effects of separation and divorce on adults.

4. The minimum approved training qualifications of a family law arbitrator, which include:

    a. A minimum of 40 hours training in how to conduct an arbitration. Course work should include:

        i. Theory and skills training;

        ii. Drafting;

        iii. How to conduct an arbitration;

        iv. The statutory framework of arbitration;

        v. Family dynamics;

        vi. Administrative law principles governing arbitrations.

5. The minimum approved training qualifications of a family law mediator, which include:

    a. A minimum of 80 hours of mediation skills training. Course work should include:

i. Theory and skills training;

ii. Drafting;

iii. How to conduct a mediation;

iv. The statutory framework of mediation;

v. Family dynamics;

vi. A minimum of 10 hours of role playing scenarios.

6. A minimum of 14 hours of approved training in screening for family violence. The training should include skills for identifying, evaluating and managing family violence and issues of power dynamics in particular relation to the dispute resolution process;

7. Relevant courses taken to meet the current rule 3-20 requirement and any relevant courses taken since qualifying count towards these requirements.

The third category of family dispute resolution professional the Task Force considered is parenting coordinators. The BC Parenting Coordinators' Roster Society defines parenting coordination as:

> … a child-focused dispute resolution process for separated families. Parenting coordinators are experienced family law lawyers, counselors, social workers and psychologists who have special training in mediating and arbitrating parenting disputes, and in helping separated parents recognize the needs of their children.[24]

Because parenting coordinators are often dealing with high conflict individuals they require specialized skills and training.

Parenting coordination is a relatively new field of practice in Canada. Parenting coordinators can be selected by agreement of the former couple or appointed by the court. Because of the potential

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[24] See http://www.bcparentingcoordinators.com/ (last accessed August 8, 2012).

for parenting coordinators to be appointed by the court there are additional considerations. First, it is possible that neither of the people required to use the parenting coordinator will be pleased with that decision. Second, it is essential that the court is able to rely on the professionalism and skills of the parenting coordinators. Third, and perhaps most importantly, parenting coordination by definition involves children and the model is focused on child-centric solutions. While it is possible to mediate and arbitrate family disputes that do not involve children, it is impossible to act as a parenting coordinator regarding disputes that do not involve children.

The three factors set out above each speak to the requirement that parenting coordinators possess both a high degree of specialized training but also significant experience.

Parenting coordinators are often dealing with individuals who are unable to reach agreement on a wide range of daily matters. To the outside observer the disagreements will range from real issues of concern, such as which school within a district a child should attend, to matters that a rational observer would see as trivial (such as arguing over the need/ability to pick up the child 10 minutes before the scheduled time). Unfortunately, some high conflict individuals will fight over most everything. In light of this, parenting coordinators play an invaluable role in keeping high conflict individuals from flooding the courts with arguments over the interpretation of a court order. These high conflict individuals are also often the people who run through the money for counsel and then become serial self-represented litigants.

Parenting coordinators assist high conflict individuals in resolving disputes regarding court orders or agreements made between the former couple. In circumstances where the parenting coordinator is unable to lead the former couple to a consensual resolution of the dispute, the parenting coordinator can shift roles and become a decision maker, imposing a resolution on the former couple.

By their nature, parenting coordinator appointments are usually long term, often one to two years. The duration of the agreement can influence the relationship dynamic between the former couple and between the former couple and the parenting coordinator. Sometimes the parenting coordinator will resolve matters in one side's favour whereas other matters will be resolved the other way. This relationship dynamic requires that parenting coordinators have nuanced skills and

training to deal with high conflict individuals over time in order to continue to ensure disputes are resolved with the best interests of the children. In an optimal case a parenting coordinator can begin to shift how the former couple views the purpose of resolving disputes to the child-oriented focus.

In light of the information received during discussions with the government and representatives of the Parenting Coordinator Roster Society, the Task Force concluded that lawyers acting as parenting coordinators require the training of both family law arbitrators and mediators, as well as some discrete training on parenting coordination and dealing with high conflict individuals and families. In addition, an experience requirement comparable to arbitrators is required and experience in family law, including experience dealing with high conflict families and individuals is a desirable qualification. The Task Force recognizes that it is setting the bar of entry high. The Task Force engaged in lengthy discussion about the need to increase access to legal services while ensuring proper protection of the public. The Task Force erred on the side of greater training and experience mainly because of the presence of children in high conflict disputes and the particular vulnerability of children. Lawyers taking on dispute resolution functions that are expressly targeted at children should meet a high standard of skills training and experience. In addition, the need for the court to rely on lawyers acting as parenting coordinators speaks to a higher standard.

Although the Task Force believes more stringent qualifications are appropriate for parenting coordinators, it is concerned about the potential for the cost of these services to get out of reach of the ordinary British Columbian. An unintended but likely consequence of requiring 10 years practice experience and a considerable amount of dispute resolution training is that the cost of services of the parenting coordinator will go up. Because the parenting coordinators are dealing with high conflict individuals, this can exacerbate the cost. The Task Force was concerned that parenting coordination might become a dispute resolution service reserved for the wealthy.

To the extent the government intends to move more family law disputes out of court, particularly the types of disputes that parenting coordinators deal with, serious thought needs to be given to providing funding for these services. Whether that funding occurs through the Legal Services Society with a sum ear-marked for parenting coordination, or through funding family justice counselors or through another model all together is a matter for the government to consider.

Government should be encouraged to start those deliberations before the *Family Law Act* comes into force.

OTHER MATTERS

1) Which committee should have oversight of the qualification requirements?

At present, the Practice Standards Committee has oversight of qualifications for family law mediators, pursuant to Law Society Rules, rule 3-20. The review of qualifications for family law dispute resolution professionals provided an opportunity to consider whether the Practice Standards Committee is the proper home for such oversight.

The conclusion was that the qualifications recommended in this report are not practice standards; they are entry level qualifications. This provided an opportunity to consider whether the Credentials Committee is the more logical home for this. At the staff and managerial level a discussion took place which led to the conclusion that the Credentials Committee is the more logical home for this function. In addition to requiring a change to rule 3-20 it would also require shifting the Family Law Mediation Subcommittee to operate under the Credentials Committee. Consideration would also have to be given by the Credentials Committee whether to reconstitute that subcommittee so it had some expertise on family law arbitration and parenting coordination, or if additional subcommittees need to be constructed.

Recommendation 4: The Credentials Committee can set criteria for approved courses for lawyers acting as family law arbitrators, family law mediators, or parenting coordinators. In exercising its authority to assess courses the Credentials Committee should be guided by the substantive minimum requirements set out above.

2). *Family violence screening training for lawyers advising a party in relation to a family law dispute*

As noted above, the *Family Law Act* includes in its definition of dispute resolution professionals "lawyer advising a party in relation to a family law dispute." What this means is that come March

18, 2013 any lawyer who advises a party in relation to a family law dispute will have to adhere to the family violence screening provisions in s. 8 of the *Family Law Act.* The Task Force considered whether this should require a mandatory 14 hours of training in family violence screening or if lawyers should be alerted to the existence of the requirement in s. 8 of the *Family Law Act* and be strongly encouraged to take a course in family violence screening in order to ensure they possess the necessary skills to screen for family violence.

The Task Force concluded that rather than requiring lawyers acting in the traditional role of counsel to take courses in family violence screening, the Law Society should alert lawyers to the obligation under s. 8 of the *Family Law Act* and in very strong terms encourage lawyers to ensure they possess the required skills, knowledge and training to properly discharge their obligation under the Act. Lawyers should be trusted to take this obligation seriously, as they would any statutory obligation. If, over time, the regulatory process of the Law Society demonstrates lawyers are not properly screening for domestic violence and managing family law disputes with an acceptable understanding and sensitivity to family violence, the benchers should revisit this decision to determine whether mandatory family violence training is required.

The Task Force recognizes that some might argue that, with respect to screening for family violence, the *Family Law Act* does not distinguish between lawyers acting as alternate dispute resolution professionals and lawyers acting in their traditional capacity advising clients. In many respects the decision to treat family violence training in traditional lawyer-client relationships as a strongly recommended best practice and not a requirement is based on the pragmatic challenge of trying to impose mandatory training on all lawyers who do any amount of family law.

The Task Force was concerned that introducing mandatory violence screening training for all family dispute resolution professionals would place considerable strain on limited resources. The Task Force preferred integrating the requirement into the three areas of family law ADR discussed in this report and make a strong suggestion to all other lawyers engaged in family law matters to take such training as well. The hope is that over time a sufficient degree of knowledge and sensitivity to issues of family violence would develop, such that the policy objectives underlying the *Family Law Act* would be met. Given the particular vulnerability of people in families where domestic violence is present, however, the Task Force recommends that the Law Society remain

vigilant to ensure lawyers are adequately discharging their duties under the Act.

Recommendation 5: The Task Force recommends that the Law Society should alert lawyers of the obligation in s. 8 of the Family Law Act to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

3. *Continuing Professional Development*

During its consultations the Task Force also asked whether continuing professional development targeted at ADR was desirable for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. The consistent feedback was that targeted continuing professional development is important. Family law ADR is a continuously evolving field and the Task Force expects best practices will continue to evolve following the coming into force of the *Family Law Act*.

The Task Force recognized that family law has several aspects that can make it unlike other forms of ADR. The relationship between parties to a family law dispute is highly personal, emotional, and even after a relationship has ended the parties to the dispute may need to have continuing contact with each other. The potential involvement of children also necessitates special considerations to ensure the best interests of children are being protected. Children can be particularly vulnerable, and to the extent ADR creates a more private form of dispute resolution it is essential that the dispute resolution professionals are alive to the justice system's evolving understanding of the needs of children.

The *Family Law Act* codifies a policy shift in the area of family law that reflects an evolving understanding of how family disputes are best handled. The Task Force was also guided by the requirement in Ontario that family law arbitrators need to take 10 hours of ongoing training over any two year period, of which 50% must involve training in domestic violence or power imbalance issues. It is incumbent, therefore, on lawyers engaged in family law dispute resolution to keep current with best practices through their continuing professional development.

In discussing CPD the Task Force was cognizant that the minimum CPD requirement of the Law Society is 12 hours a year with a minimum of 2 hours in matters pertaining to professional responsibility and ethics. The Task Force considered whether it should recommend increasing the minimum CPD hour requirement but concluded that is a matter better dealt with by the Lawyer Education Advisory Committee as part of its periodic consideration of the CPD program. Instead the Task Force concluded it should consider whether a minimum amount of family law dispute resolution CPD should be required and if so how much. In light of its consultations and for the reasons set out above the Task Force concluded that lawyers acting as family law arbitrators, family law mediators, or parenting coordinators should be required to record a minimum of 6 hours of approved CPD in alternative dispute resolution.

The Task Force sought input from Ms. O'Grady in her capacity as Chair of the Lawyer Education Advisory Committee and from Alan Treleaven, Director of Education and Practice. The Task Force acknowledges that due to the very tight timeframe required to generate this report, much of the consultation period fell over the course of the summer when various Law Society Committees do not meet. As such, if there is sufficient concern from members of the Lawyer Education Advisory Committee that targeted CPD for lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators is something that Committee wishes to discuss the benchers may wish to refer the question to the Advisory Committee. If that decision is made the referral should require the Lawyer Education Advisory Committee to report to the benchers with a recommendation before March 18, 2013 in order for the benchers to resolve the policy position in advance of the *Family Law Act* coming into force.

Recommendation 6: The Task Force recommends that lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators be required to record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory.

4. *Amending the Legal Profession Act*

The approach the government will take to family law dispute resolution professionals is to identify which organizations a person must be a member of in order to act as a family law arbitrator, family

law mediator and/or a parenting coordinator. This will require each of the organizations to be capable of investigating complaints about members.

Section 29(d) of the *Legal Profession Act* authorizes the benchers to make rules that "establish qualifications for and conditions under which practicing lawyers may practice as mediators." As alternative dispute resolution becomes more common, particularly if government policy continues to encourage its greater use, it is important to ensure there is no ambiguity in the *Legal Profession Act* with respect to the Law Society's authority to set standards for lawyers acting as alternative dispute resolution professionals.

Section 11(1) and (2) of the *Legal Profession Act* states:

> 11(1) The benchers may make rules for the governing of the society, lawyers, law firms, articled students and applicants, for the carrying out of this Act.
>
> (2) Subsection (1) is not limited by any specific power or requirement to make rules given to the benchers by this Act.

An argument exists that s. 11 is broad enough for the benchers to make rules for lawyers acting as arbitrators and parenting coordinators and that s. 29 should not be read to limit that authority to making rules for lawyers acting as mediators. In addition, the regulations to the *Family Law Act* will indicate the Law Society can establish qualifications for lawyers acting as dispute resolution professionals. However, room for argument remains despite the relatively clear language of s. 11(2) and the Task Force is of the view that any ambiguity should be removed.

Recommendation 7: The Task Force recommends that the Act and Rules Subcommittee assist the benchers in seeking a consequential amendment to the Legal Profession Act to make it clear that the Law Society may make rules for the governing of lawyers acting as alternative dispute resolution professionals.

5. The Need for Written Agreements

During its discussions of qualifications the Task Force attempted to consider the broader context of how family law dispute resolution services are delivered, while remaining mindful of the scope of

its mandate. One issue that the Task Force identified during discussions with staff at the Ministry of Justice, and which does not constitute qualifications *per se*, is the desirability of family law arbitrators, family law mediators, and parenting coordinators being required to have written agreements that set out the terms of the ADR process. Appendix 2, Rule 5 of the *Professional Conduct Handbook* establishes the requirements for an agreement to act as a family law mediators. The Task Force is of the view that similar provisions should be created for lawyers acting as family law arbitrators and parenting coordinators.

Recommendation 8: The Task Force recommends that the Ethics Committee be asked to develop for inclusion in the BC Code the requirements for written agreements for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. These provisions will include the present protections regarding avoidance of conflicts of interest, recommendations regarding the need for independent legal advice, and the requirement for a written agreement as are now set out in Appendix 2 in relation to lawyers acting as mediators.

An additional point to be added to this new provision is that if a lawyer's role changes from one where the lawyer acts as a facilitator of consensual resolution to one where the lawyer acts as a decision maker, the lawyer must clearly specify in writing the nature of the change in function and when the lawyer will begin to exercise the change. The written agreement between the lawyer and the parties must confirm that such changes in function will be specified in writing. For example: a lawyer may conduct a process designed to be a mediation-arbitration. When the mediation portion of the process fails, the lawyer puts on the arbitrator hat and the lawyer should confirm that shift in role in writing.

The Ethics Committee should attempt to have the amendments to the BC Code in place by March 18, 2013.

SUBSEQUENT STEPS

There are several subsequent steps that need to be taken following consideration of this report.

1. Following the benchers' discussion of the report on September 7, 2012, the Law Society should write to the Ministry of Justice indicating that the Law Society will create and implement Family Law ADR Qualifications by March 18, 2013.

2. The Act and Rules Subcommittee will have to draft rules to give the Credentials Committee the authority to identify acceptable courses of study and consider applications for lawyers engaged in family law ADR. These rules will need to be in place by March 18, 2013. This work should include consideration of whether s. 29 of the Act needs to be amended to provide a rule making authority for dispute resolution in general and not merely mediation.

3. The Ethics Committee will have to draft provisions for the *BC Code* that set out the requirement for lawyers acting as family law arbitrators and/or parenting coordinators to put their agreement in writing and identify the required elements of such agreements (to be consistent with the requirements for family law mediators).

4. Staff in the Policy and Legal Services Department, with input from the Professional Regulation Department, should assess the sufficiency of the Law Society's current regulatory process for dealing with complaints against lawyers performing ADR functions. If new policies are required, staff should alert the benchers to the issues and options.

5. The Family Law Task Force should remain operational until the December 2013 benchers' meeting. Members of the Task Force should attend family law section meetings to speak to the recommendations in the report and to alert lawyers to the family violence training obligations contained in s. 8 of the *Family Law Act.* If during those presentations serious concerns as to the appropriateness of the recommendations in this report arise, the Task Force should report back to the benchers to determine whether adjustments to the recommendations in this report are required. It is possible matters may arise subsequent to the *Family Law Act* coming into force on March 18, 2013 and keeping the Task Force

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, September 07, 2012

Present:
Bruce LeRose, QC, President
Art Vertlieb, QC, 1st Vice-President
Jan Lindsay, QC 2nd Vice-President
Kathryn Berge, QC
David Crossin, QC
Thomas Fellhauer
Leon Getz, QC
Miriam Kresivo, QC
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Lee Ongman
Vincent Orchard, QC
Greg Petrisor
Richard Fyfe, QC, Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
David Renwick, QC
Phil Riddell
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Ken Walker
Tony Wilson
Barry Zacharias
Haydn Acheson
Satwinder Bains
Stacy Kuiack
Peter Lloyd, FCA
Ben Meisner
Claude Richmond

Absent:
Rita Andreone, QC
David Crossin, QC
Bill Maclagan

Staff Present:
Tim McGee
Andrea Brownstone
Robyn Crisanti
Su Forbes, QC
Ben Hadaway
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Lesley Small
Alan Treleaven
Adam Whitcombe

9. Final Report of the Family Law Task Force: *Qualifications for Lawyers Acting as Arbitrators, Mediators, and/or Parenting Coordinators in Family Law Matters*

Mr. LeRose introduced Life Bencher Carol Hickman, QC as Chair of the Family Law Task Force. Ms. Hickman outlined the background of the task force and its work since 2006 in developing best practices for family law lawyers, in conjunction with the provincial government's reform of the family law system in BC. She advised that those reforms include replacement of the *Family Relations Act* with the *Family Law Act*, which has received Royal Assent and comes into force on March 18, 2013.

Ms. Hickman referred to the report at TAB 9 of the meeting materials (at page 9003) for the task force's current mandate (as amended and approved by the Benchers at their July meeting:

> *The mandate of the Family Law Task Force is to develop for recommendation to the Benchers practice standards for lawyers who are acting as family law arbitrators, family law mediators, and/or parenting coordinators.* (those standards are referred to in the task force report as "Family Law ADR Qualifications")

Ms. Hickman highlighted the task force's extensive consultation efforts and time challenges over the summer months, noting that the provincial government has requested the Law Society to submit its proposed Family Law ADR Qualifications by September 30, for incorporation into the regulations to be promulgated under the *Family Law Act*. She acknowledged the commitment to collaboration shown by members of the policy group at the Ministry of Justice. She also noted the dedication and hard work over the summer months by the members of the task force, and by staff lawyer Doug Munro.

Ms. Hickman reviewed each of the task force's eight recommendations, set out in the task force report (pages 9006 – 9010 of the meeting materials and Appendix 2 to these minutes).

Mr. Stewart moved (seconded by Ms. Berge) that the Benchers accept the Family Law Task Force Report and adopt its eight recommendations.

Ms. O'Grady moved (seconded by Mr. Orchard) that Recommendation 6 be amended

- to *recommend* rather than *require* that…lawyers acting as family law arbitrators, family law mediators, and/or parenting coordinators … record a minimum of six hours of continuing professional development per year in dispute resolution skills training and/or theory

In the ensuing discussion

- Ms. O'Grady (Chair that the Lawyer Education Advisory Committee) noted that
    - the Committee's support for the proposed amendment is a strong majority, but not unanimous
    - if the Benchers approve this amendment, the Committee will forthwith consult with family law organizations, family law mediators, and relevant educational providers to assess
        1. whether to move to a mandatory continuing professional development requirement, and
        2. if so, how the specifics of the requirement might be articulated to best meet the educational needs of family law arbitrators, family law mediators, and parenting coordinators.
    - the Committee would report back to the Benchers with its recommendations in time for the Law Society to formalize its requirements and processes before March 18, 2013
- Mr. LeRose noted that the Executive Committee met yesterday to review this matter
    - the Committee's support for the task force's recommendations, including Recommendation 6, is a strong majority, but not unanimous
- key issues raised by a various Benchers were
    - whether requiring six hours of annual CPD on the designated topics
        - maintains professional standards and public confidence
        - impairs access to legal services
        - is necessary in light of the *Family Law* Act's creation of new statutory powers for practitioners

The motion to amend Recommendation 6 was defeated.

Mr. Walker moved (seconded by Mr. Richmond) that Recommendation 1 be amended to reduce the required current practice experience from "10" to "3" years

In the ensuing discussion

- Mr. Walker noted his concerns that

- requiring 10 years of current practice experience would unduly restrict access to legal services
    - many family law disputes are not complex and do not warrant the cost of legal services provided by a lawyer with 10 years of experience
    - family law practitioners should be permitted to decide whether they have the requisite skills and practice experience
    - the market place should be permitted to determine the value of practitioners' services

- a "friendly amendment" to increase the required current practice experience from "3" to "5" years was proposed by Mr. Walker and accepted by the Benchers

The motion to amend Recommendation 1 was defeated.

Key issues raised by various Benchers in discussion of the main motion were

- judgment and experience
    - judgment comes with experience and judgment is vital in family law disputes
- importance of access to legal services
- importance of practice standards and professional regulation
- importance of the Law Society's credentialing oversight and flexibility in particular cases
- importance of public funding and support to enhancing access to legal services

The motion was carried.

Ms. Hickman noted the importance of Recommendation 5, particularly its consultation element:

> **Recommendation 5:** The Task Force recommends that the Law Society should alert lawyers of the obligation in s. 8 of the *Family Law Act* to screen for family violence. Lawyers who will be "advising a party in relation to a family law dispute" should be strongly encouraged to take courses in screening for family violence.

Mr. Stewart moved (seconded by Mr. Zacharias) that the mandate of the Family Law Task Force be extended through December 2013.

WKM
2012-10-12

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 3 – Specialization and Restricted Practice

Definitions

3-18.6 In this division

"course of study" means an educational program consisting of activities approved by the Executive Director for the purpose of qualifying as a family law mediator, arbitrator or parenting coordinator;

"professional development" means activities approved by the Executive Director for credit as professional development for family law mediators, arbitrators or parenting coordinators.

Family law ~~mediation~~ mediators

3-20 (1) A lawyer may act as a family law mediator only if the lawyer ~~has~~

(a) [rescinded]~~engaged in the full-time practice of law for at least 3 years or the equivalent in part-time practice~~

(a.1) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a mediator in a fair and competent manner, ~~and~~

(b) has completed a course of study in family law mediation approved by the Credentials~~Practice Standards~~ Committee~~.~~, and

(c) is in compliance with Rule 3-20.3(3).

(2) ~~The Practice Standards Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without qualifying under subrule (1)(a)~~[rescinded].

(3) A lawyer who has been accredited by the Society as a family law mediator may so state in any marketing activity.

(4) The Credentials Committee may allow a lawyer previously accredited by the Society as a family law mediator time in which to comply with any changes to the requirements under subrule (1)(b).

Family law arbitrators

3-20.1 (1) A lawyer may act as a family law arbitrator only if the lawyer

(a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of an arbitrator in a fair and competent manner,

(b) has, for a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or sat as a judge or master,

(c) has completed a course of study in family law arbitration approved by the Credentials Committee, and

(d) is in compliance with Rule 3-20.3(3).

(2) A lawyer who has been accredited by the Society as a family law arbitrator may so state in any marketing activity.

(3) The Credentials Committee may allow a lawyer who has previously acted as a family law arbitrator time in which to comply with any changes to the requirements under subrule (1)(c).

Parenting coordinators

3-20.2 (1) A lawyer may act as a parenting coordinator only if the lawyer

(a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a parenting coordinator in a fair and competent manner,

(b) has, for a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or sat as a judge or master, including considerable family law experience dealing with high conflict families with children,

(c) has completed a course of study in parenting coordination approved by the Credentials Committee, and

(d) is in compliance with Rule 3-20.3(3).

(2) A lawyer who has been accredited by the Society as a parenting coordinator may so state in any marketing activity.

(3) The Credentials Committee may allow a lawyer who has previously acted as a parenting coordinator time in which to comply with any changes to the requirements under subrule (1)(c).

Professional development for family law mediators, arbitrators and parenting coordinators

3-20.3 (1) The Credentials Committee may determine the minimum number of hours of professional development that is required of a family law mediator, arbitrator or parenting coordinator in each calendar year.

(2) The requirements under subrule (1) may be different for each of family law mediators, arbitrators or parenting coordinators.

LAW SOCIETY RULES

(3) In each calendar year, a family law mediator, arbitrator or parenting coordinator must

(a) complete the required professional development, and

(b) certify to the Executive Director in a form approved by the Executive Director that the lawyer has completed the required professional development.

(4) Professional development completed under this rule may also be reported under Rule 3-18.3 if it meets the requirements of that rule.

(5) Despite subrule (3), a family law mediator, arbitrator or parenting coordinator need not complete the required professional development in a calendar year in which the lawyer has successfully completed the course of study required under Rules 3-20 to 3-20.2.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 3 – Specialization and Restricted Practice

Definitions

3-18.6 In this division

"course of study" means an educational program consisting of activities approved by the Executive Director for the purpose of qualifying as a family law mediator, arbitrator or parenting coordinator;

"professional development" means activities approved by the Executive Director for credit as professional development for family law mediators, arbitrators or parenting coordinators.

Family law mediators

3-20 (1) A lawyer may act as a family law mediator only if the lawyer

(a) [rescinded]

(a.1) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a mediator in a fair and competent manner,

(b) has completed a course of study in family law mediation approved by the Credentials Committee, and

(c) is in compliance with Rule 3-20.3(3).

(2) [rescinded].

(3) A lawyer who has been accredited by the Society as a family law mediator may so state in any marketing activity.

(4) The Credentials Committee may allow a lawyer previously accredited by the Society as a family law mediator time in which to comply with any changes to the requirements under subrule (1)(b).

Family law arbitrators

3-20.1 (1) A lawyer may act as a family law arbitrator only if the lawyer

(a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of an arbitrator in a fair and competent manner,

(b) has, for a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or sat as a judge or master,

(c) has completed a course of study in family law arbitration approved by the Credentials Committee, and

LAW SOCIETY RULES

(d) is in compliance with Rule 3-20.3(3).

(2) A lawyer who has been accredited by the Society as a family law arbitrator may so state in any marketing activity.

(3) The Credentials Committee may allow a lawyer who has previously acted as a family law arbitrator time in which to comply with any changes to the requirements under subrule (1)(c).

Parenting coordinators

3-20.2 (1) A lawyer may act as a parenting coordinator only if the lawyer

(a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a parenting coordinator in a fair and competent manner,

(b) has, for a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or sat as a judge or master, including considerable family law experience dealing with high conflict families with children,

(c) has completed a course of study in parenting coordination approved by the Credentials Committee, and

(d) is in compliance with Rule 3-20.3(3).

(2) A lawyer who has been accredited by the Society as a parenting coordinator may so state in any marketing activity.

(3) The Credentials Committee may allow a lawyer who has previously acted as a parenting coordinator time in which to comply with any changes to the requirements under subrule (1)(c).

Professional development for family law mediators, arbitrators and parenting coordinators

3-20.3 (1) The Credentials Committee may determine the minimum number of hours of professional development that is required of a family law mediator, arbitrator or parenting coordinator in each calendar year.

(2) The requirements under subrule (1) may be different for each of family law mediators, arbitrators or parenting coordinators.

(3) In each calendar year, a family law mediator, arbitrator or parenting coordinator must

(a) complete the required professional development, and

(b) certify to the Executive Director in a form approved by the Executive Director that the lawyer has completed the required professional development.

(4) Professional development completed under this rule may also be reported under Rule 3-18.3 if it meets the requirements of that rule.

(5) Despite subrule (3), a family law mediator, arbitrator or parenting coordinator need not complete the required professional development in a calendar year in which the lawyer has successfully completed the course of study required under Rules 3-20 to 3-20.2.

FAMILY LAW TASK FORCE

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules effective March 18, 2013 as follows:

1. By adding the following Rule:

Definitions

3-18.6 In this division

"course of study" means an educational program consisting of activities approved by the Executive Director for the purpose of qualifying as a family law mediator, arbitrator or parenting coordinator;

"professional development" means activities approved by the Executive Director for credit as professional development for family law mediators, arbitrators or parenting coordinators.

2. By rescinding Rule 3-20 and substituting the following:

Family law mediators

3-20 (1) A lawyer may act as a family law mediator only if the lawyer

(a.1) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a mediator in a fair and competent manner,

(b) has completed a course of study in family law mediation approved by the Credentials Committee, and

(c) is in compliance with Rule 3-20.3(3).

(3) A lawyer who has been accredited by the Society as a family law mediator may so state in any marketing activity.

(4) The Credentials Committee may allow a lawyer previously accredited by the Society as a family law mediator time in which to comply with any changes to the requirements under subrule (1)(b).

Family law arbitrators

3-20.1 (1) A lawyer may act as a family law arbitrator only if the lawyer

(a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of an arbitrator in a fair and competent manner,

(b) has, for a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or sat as a judge or master,

(c) has completed a course of study in family law arbitration approved by the Credentials Committee, and

(d) is in compliance with Rule 3-20.3(3).

(2) A lawyer who has been accredited by the Society as a family law arbitrator may so state in any marketing activity.

(3) The Credentials Committee may allow a lawyer who has previously acted as a family law arbitrator time in which to comply with any changes to the requirements under subrule (1)(c).

Parenting coordinators

3-20.2 (1) A lawyer may act as a parenting coordinator only if the lawyer

(a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a parenting coordinator in a fair and competent manner,

(b) has, for a total of at least 10 years, engaged in the full-time practice of law or the equivalent in part-time practice or sat as a judge or master, including considerable family law experience dealing with high conflict families with children,

(c) has completed a course of study in parenting coordination approved by the Credentials Committee, and

(d) is in compliance with Rule 3-20.3 (3).

(2) A lawyer who has been accredited by the Society as a parenting coordinator may so state in any marketing activity.

(3) The Credentials Committee may allow a lawyer who has previously acted as a parenting coordinator time in which to comply with any changes to the requirements under subrule (1)(c).

Professional development for family law mediators, arbitrators and parenting coordinators

3-20.3 (1) The Credentials Committee may determine the minimum number of hours of professional development that is required of a family law mediator, arbitrator or parenting coordinator in each calendar year.

(2) The requirements under subrule (1) may be different for each of family law mediators, arbitrators or parenting coordinators.

(3) In each calendar year, a family law mediator, arbitrator or parenting coordinator must

(a) complete the required professional development, and

(b) certify to the Executive Director in a form approved by the Executive Director that the lawyer has completed the required professional development.

(4) Professional development completed under this rule may also be reported under Rule 3-18.3 if it meets the requirements of that rule.

(5) Despite subrule (3), a family law mediator, arbitrator or parenting coordinator need not complete the required professional development in a calendar year in which the lawyer has successfully completed the course of study required under Rules 3-20 to 3-20.2.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To: Benchers

From: Ethics Committee

Date: December 14, 2012

Subject: **Appendix B of BC Code: Implementation of Family Law Task Force Recommendations**

You accepted the recommendations of the Law Society's Family Law Task Force at the September 2012 meeting. Recommendation 8 affects the Ethics Committee. It states:

> *Recommendation 8:* The Task Force recommends that the Ethics Committee be asked to develop for inclusion in the BC Code the requirements for written agreements for lawyers acting as family law arbitrators, mediators and/or parenting coordinators. These provisions will include the present protections regarding avoidance of conflicts of interest, recommendations regarding the need for independent legal advice, and the requirement for a written agreement as are now set out in Appendix 2 in relation to lawyers acting as mediators.
>
> An additional point to be added to this new provision is that if a lawyer's role changes from one where the lawyer acts as a facilitator of consensual resolution to one where the lawyer acts as a decision maker, the lawyer must clearly specify in writing the nature of the change in function and when the lawyer will begin to exercise the change. The written agreement between the lawyer and the parties must confirm that such changes in function will be specified in writing. For example: a lawyer may conduct a process designed to be a mediation-arbitration. When the mediation portion of the process fails, the lawyer puts on the arbitrator hat and the lawyer should confirm that shift in role in writing.
>
> The Ethics Committee should attempt to have the amendments to the BC Code in place by March 18, 2013.

"Appendix 2" referred to in the recommendation is now "Appendix B" of the BC Code.

The rationale for Recommendation 8 was the anticipated implementation of the new *Family Law Act* on March 18, 2013. That legislation includes provisions (Sections 14 to 19) dealing with "parenting coordinators."

The British Columbia Ministry of Justice describes the role of parenting coordinators under Section 15 as follows:

Section 15 establishes the general rules respecting when a parenting coordinators may act, how long the parenting coordinators may act for, and how parenting coordination ends.

- Parenting coordinators do not assist the parties in coming to agreement about their parenting arrangements; they help parents carry out their already determined parenting arrangements.

- A parenting coordinator may become involved by way of a written agreement or court order.

- This section allows judges to order parenting coordination whether or not the parties consent It is important to give judges the authority to require attendance because the couples who benefit most from this process usually have high levels of conflict and are unlikely to agree to attend.

- The term of a parenting coordination process is limited because it not designed to be permanent but to end when parents become able to resolve disagreements on their own.

The attached copy of an amended Appendix B is our attempt to fulfill the requirements of Recommendation 8 and we recommend its adoption.

Some of its major features are:

- It adds definitions of “family law arbitration” and “parenting coordination.” (section 1)

- It adds a definition of “dispute resolution process” that, for convenience, includes mediation, arbitration and parenting coordination. (section 1)

- It adapts “disqualifications” to include both arbitration and parenting coordination (section 2).

- It describes the common obligations lawyers face when acting as mediators, arbitrators or parenting coordinators and the participants are unrepresented (section 3). These obligations are adapted for the unique situation of a mediator, arbitrator and parenting coordinator from rule 7.2-9 of the BC Code which deals with the obligations of counsel when dealing with an unrepresented person.

- It describes the obligations of mediators and parenting coordinators separately from the obligations of arbitrators, since the obligations of arbitrators are slightly different from those of mediators and parenting coordinators. (sections 4 and 5)

- It identifies obligations for lawyers who may act as both mediators and arbitrators for the same issue, as well as describing the obligations of a parenting coordinator whose role may change from mediation to decision making. (sections 6 and 7)

Attachments:

- Draft amended Appendix B of BC Code.
- Family Law Task Force Report

[appB16Benchers(2)Dec14/12]

APPENDIX B — FAMILY LAW MEDIATION, ARBITRATION AND PARENTING COORDINATION

Definitions

1. In this Appendix:

"dispute resolution process" means the process of family law mediation, family law arbitration or parenting coordination;

"family law arbitration" means a process by which participants submit issues relating to their marriage, cohabitation, separation or divorce to an impartial person (the family law arbitrator) for decision;

"family law mediation"

(a) means a process by which participants attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation, divorce, children or finances, including division of assets , and

(b) includes, without limiting the generality of the foregoing, one or more of the following acts when performed by a lawyer acting as a family law mediator:

(i) informing the participants of and otherwise advising them on the legal issues involved,

(ii) advising the participants of a court's probable disposition of the issue,

(iii) preparing any agreement between the participants other than a memorandum recording the results of the family law mediation;

"parenting coordination" means a process by which an impartial person (the parenting coordinator), by agreement of participants or by court order, mediates a dispute with respect to the implementation of an agreement or a court order respecting the allocation of parenting time or parenting responsibilities, or contact with a child or makes a determination respecting that dispute that is binding on the participants;

"participant" means a person with issues relating to marriage, cohabitation, separation or divorce who has agreed to the intervention of an impartial person as family law mediator or arbitrator or parenting coordinator or is subject to a court order appointing such a person to assist in the resolution of such issues.

Disqualifications

2. (a) If a lawyer, or a partner, associate or employee of that lawyer has previously acted or is currently acting for any of the participants to a dispute resolution process in a solicitor-client relationship with respect to any matter that may reasonably be expected to become an issue during the dispute resolution process, that lawyer may not act as a family law mediator or arbitrator or parenting coordinator for any of the participants;

(b) If a lawyer has acted in a dispute resolution process for the participants, neither that lawyer nor any partner, associate or employee of that lawyer may act in a solicitor-client relationship for either participant against the other participant;

(c) If a lawyer, or a partner, associate or employee of that lawyer has acted in a dispute resolution process for the participants, neither that lawyer nor a partner, associate or employee of that lawyer may act for or against any person if to do so might require the lawyer to disclose or make use of confidential information given in the course of the dispute resolution process.

Obligations of family law mediator or arbitrator or parenting coordinator when participants unrepresented

3. A lawyer who acts as a family law mediator or arbitrator or parenting coordinator for participants who are unrepresented must:

(a) urge each unrepresented adult participant to obtain independent legal advice or representation, both before the commencement of the dispute resolution process and at any stage before an agreement between the participants is executed;

(b) take care to see that the unrepresented participant is not proceeding under the impression that the lawyer will protect his or her interests;

(c) make it clear to the unrepresented participant that the lawyer is acting exclusively in a neutral capacity, and not as counsel for either participant; and

(d) explain the lawyer's role in the dispute resolution process, including the scope and duration of the lawyer's powers.

Obligations of family law mediator or parenting coordinator

4. Unless otherwise ordered by the court, a lawyer who acts as a family law mediator or parenting coordinator and the participants must, before family law mediation or parenting coordination begins, enter into a written agreement that includes at least the following provisions:

   (a) an agreement that the lawyer, throughout the family law mediation or parenting coordination, is not acting as legal counsel for any participant;

   (b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant that is relevant to the issues;

   (c) an agreement that, subject to Rule 2.03(3), the family law mediation or parenting coordination is part of an attempt to settle the differences between the participants and that all communications between participants or between any participant and the family law mediator or parenting coordinator will be "without prejudice" so that no participant will attempt:

      (i) to introduce evidence of the communications in any legal proceedings, or

      (ii) to call the family law mediator or parenting coordinator as a witness in any legal proceedings;

   (d) an acknowledgment that the lawyer must report to the Director of Family and Child Services any instance arising from the family law mediation or parenting coordination in which the lawyer has reasonable grounds to believe that a child is in need of protection;

   (e) an agreement as to the lawyer's rate of remuneration and terms of payment;

   (f) an agreement as to the circumstances in which family law mediation or parenting coordination will terminate.

Obligations of arbitrator

5. A lawyer who acts as a family law arbitrator and the participants must, before the lawyer begins his or her duties as family law arbitrator, enter into a written agreement that includes at least the following provisions:

   (a) an agreement that the lawyer, throughout the family law arbitration, is not acting as legal counsel for any participant;

(b) an acknowledgment that the lawyer must report to the Director of Family and Child Services any instance arising from the family law arbitration in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(c) an agreement as to the lawyer's rate of remuneration and terms of payment,

Lawyer with dual role

6. A lawyer who is empowered to act as both family law mediator and family law arbitrator in a dispute resolution process must explain the dual role to the participants in writing and must advise the participants in writing when the lawyer's role changes from one to the other.

7. A parenting coordinator who may act as a family law mediator as well as determine issues in a dispute resolution process must explain the dual role to the participants in writing, and must advise the participants in writing when the lawyer's role changes from one to the other.

APPENDIX B — FAMILY LAW MEDIATION, ARBITRATION AND PARENTING COORDINATION

Definitions

1. In this Appendix:

"dispute resolution process" means the process of family law mediation, family law arbitration or parenting coordination;

"family law arbitration" means a process by which participants submit issues relating to their marriage, cohabitation, separation or divorce to an impartial person (the family law arbitrator) for decision;

~~(a)~~ **"family law mediation"**

(a) means a process by which ~~two adult persons ("~~participants~~")~~ attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation, ~~or~~ divorce, children or finances, including division of assets ~~;~~, and

(b) includes, without limiting the generality of the foregoing, ~~**"family law mediation"** includes~~ one or more of the following acts when performed by a lawyer acting as a family law mediator:

(i) informing the participants of and otherwise advising them on the legal issues involved,

(ii) advising the participants of a court's probable disposition of the issue,

(iii) preparing any agreement between the participants other than a memorandum recording the results of the family law mediation~~,~~

~~(iv) giving any other legal advice.~~;

"parenting coordination" means a process by which an impartial person (the parenting coordinator), by agreement of participants or by court order, mediates a dispute with respect to the implementation of an agreement or a court order respecting the allocation of parenting time or parenting responsibilities, or contact with a child or makes a determination respecting that dispute that is binding on the participants;

"participant" means a person with issues relating to marriage, cohabitation, separation or divorce who has agreed to the intervention of an impartial person as family law mediator or arbitrator or parenting coordinator or is subject to a court order appointing such a person to assist in the resolution of such issues.

Disqualifications

2. (a) If a lawyer, or a partner, associate or employee of that lawyer has previously acted or is presently currently acting for one or bothany of the participants to the mediation a dispute resolution process in a solicitor-client relationship with respect to any matter which that may reasonably be expected to become an issue during the family law mediationdispute resolution process, that lawyer may not act as a family law mediator or arbitrator or parenting coordinator for any of the participants.;

(b) If a lawyer has acted as in a family law mediator dispute resolution process for the participants, neither that lawyer, nor any partner, associate or employee of that lawyer may act in a solicitor-client relationship for either participant against the other participant.;

(c) If a lawyer, or a partner, associate or employee of that lawyer has acted as in a family law mediator dispute resolution process for the participants, neither that lawyer, nor a partner, associate or employee of that lawyer may act for or against any person where if to do so might require the lawyer to disclose or make use of confidential information given in the course of mediationthe dispute resolution process.

Obligations of family law ~~Mediator~~mediator or arbitrator or parenting coordinator when participants unrepresented~~'s duties~~

3. A lawyer who acts as a family law mediator or arbitrator or parenting coordinator for participants who are unrepresented must:

(a) urge ~~ensure that if agreement is reached between the participants and as a result the lawyer drafts a document representing the agreement reached, the lawyer actively encourages~~ each unrepresented adult participant to obtain independent legal advice or representation, both before the commencement of the dispute resolution process and at any stage before ~~executing the~~ an agreement between the participants is executed;~~.~~

(b) take care to see that the unrepresented participant is not proceeding under the impression that the lawyer will protect his or her interests;

(c) make it clear to the unrepresented participant that the lawyer is acting exclusively in a neutral capacity, and not as counsel for either participant; and

(d) explain the lawyer's role in the dispute resolution process, including the scope and duration of the lawyer's powers.

Obligations of family law mediator or parenting coordinator ~~Written agreement~~

4. Unless otherwise ordered by the court, a~~A~~ lawyer who acts as a family law mediator or parenting coordinator and the participants ~~with respect of whom the lawyer mediates shall~~must, before family law mediation or parenting coordination ~~commences~~begins, enter into a written agreement ~~which shall~~that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law mediation or parenting coordination, ~~process,~~ is not acting as legal counsel for ~~either~~ any participant~~,~~;

(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant ~~which~~ that is relevant to the issues~~being mediated,~~;

(c) an agreement that, subject to Rule 2.03(3), the family law mediation or parenting coordination ~~process~~ is part of an attempt to settle the differences between the participants and that all communications between ~~the~~ participants ~~and~~ or between ~~each~~ any participant and the family law mediator or parenting coordinator will be "without prejudice" so that no participant will attempt:

(i) ~~neither participant will attempt~~ to introduce evidence of the communications in any legal proceedings, or

(ii) ~~neither participant will attempt~~ to call the family law mediator or parenting coordinator as a witness in any legal proceedings~~,~~;

(d) an acknowledgment that the lawyer must report to the ~~Superintendent~~ Director of Family and Child Services any instance arising from the family law mediation or parenting coordination in which the lawyer has reasonable grounds to believe that a child is in need of protection~~,~~;

(e) an agreement as to the lawyer's rate of remuneration and terms of payment~~,~~;

(f) an agreement as to the circumstances in which family law mediation or parenting coordination will terminate.

Obligations of arbitrator

5. A lawyer who acts as a family law arbitrator and the participants must, before the lawyer begins his or her duties as family law arbitrator, enter into a written agreement that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law arbitration, is not acting as legal counsel for any participant;

(b) an acknowledgment that the lawyer must report to the Director of Family and Child Services any instance arising from the family law arbitration in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(c) an agreement as to the lawyer's rate of remuneration and terms of payment.

Lawyer with dual role

6. A lawyer who is empowered to act as both family law mediator and family law arbitrator in a dispute resolution process must explain the dual role to the participants in writing and must advise the participants in writing when the lawyer's role changes from one to the other.

7. A parenting coordinator who may act as a family law mediator as well as determine issues in a dispute resolution process must explain the dual role to the participants in writing, and must advise the participants in writing when the lawyer's role changes from one to the other.

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: December 27, 2012
Subject: **Non-practising and retired members as designated paralegals**

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1. The Credentials Committee recently considered the question of non-practising and retired members of the Law Society, who are required to give an undertaking not to engage in the practice of law, acting as designated paralegals under the new rules. Under those rules, designated paralegals are permitted, under the supervision of a practising lawyer, to do a number of things that amount to the practice of law, as defined in the *Legal Profession Act*.

2. The Credentials Committee is of the view that a non-practising or retired member who, for whatever reason, prefers to be employed as a designated paralegal ought to be permitted to do so without having to renounce his or her membership in the Law Society. It is difficult to see any risk to the public interest in that.

3. I attach for your information, the memorandum, without attachments, that was before the Credentials Committee at the time of the discussion.

4. This is the resolution adopted by the Credentials Committee on this question:

   IT WAS RESOLVED that non-practising and retired members ought to be permitted to be designated paralegals and that the matter be referred to the Act and Rules Subcommittee to draft a rule, releasing non-practising and retired members from their undertakings for this purpose. IT WAS FURTHER RESOLVED that non-practising and retired members ought to be permitted to be paralegals and that the matter be referred to the Ethics Committee for changes to the *Professional Conduct Handbook.*

5. I also attach a draft amendment to Rule 2-4.2 and a suggested resolution recommended by the Act and Rules Subcommittee to give effect to the recommendation. The suggested amendment adds this exception to the rule created in June 2012 to allow non-practising and

retired members to provide pro bono legal services without committing unauthorized practice of law.

JGH
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Attachments: memo Oct 26, 2012
draft
suggested resolution

The Law Society of British Columbia

Memo

To: Credentials Committee
From: Lesley Small
Date: October 26, 2012
Subject: **Paralegals and Designated Paralegals**

Background

In June 2012, the Benchers approved an expanded role for paralegals as well as new definitions that clarify what they can do.

Paralegals v. "Designated" Paralegals

The *Professional Conduct Handbook* now includes the following definitions in Chapter 12, Rule 2:

> **"designated paralegal"** means an individual permitted under rule 6 to give legal advice and represent clients before a court or tribunal
>
> **"non-lawyer"** means an individual who is neither a lawyer nor an articled student;
>
> **"paralegal**" means a non-lawyer who is a trained professional working under the supervision of a lawyer.

Issue

The above definitions would seem to preclude a non-practising or retired lawyer from acting as a paralegal or a designated paralegal. If the Committee agrees, it will be asked to consider whether to ask the Benchers to rectify the situation.

Discussion – Designated Paralegal

Designated paralegals are permitted to give legal advice and represent clients before a court or tribunal and they will be practising law as defined in s.1 of the *Legal Profession Act,* albeit under the supervision of a practising lawyer. Because non-practising and retired lawyers have provided an undertaking *not* to practise law, ought there be a change to the rules that would allow non-

practising and retired lawyers to be a designated paralegal, able to provide the services of a designated paralegal despite the undertaking? A solution would be a rule allowing non-practising and retired members to provide the services of a designated paralegal despite the undertaking.

If the Committee agrees that non-practising and retired lawyers ought to be permitted to be designated paralegals and practise law, it will also have to consider the impact on a subsequent return to practice application.

Up until now, the Committee has consistently resolved that non-practising, retired, and former lawyers who work as paralegals have not kept themselves current with substantive law and practice skills for the purposes of returning to practice under Rules 2-57 – 2-59. However, if an applicant for return to practice can demonstrate that they have engaged in the "practice of law" for an average of one day per week in the relevant time period, the applicant is entitled to return to practice without seeking the permission of the Credentials Committee.

Another consideration may be in relation to law students or National Committee on Accreditation ("NCA") candidates who work as designated paralegals before they area formally enrolled in the Law Society Admission Program. Ought they to receive credit toward their articling for work that they did as a designated paralegal? This is likely to be more common with NCA candidates who work at law firms while completing the requirements to obtain a Certificate of Qualification from the NCA.

Discussion - Paralegal

The definition of a paralegal is a "non-lawyer who is a trained professional working under the supervision of a lawyer". This may preclude a non-practising or retired lawyer since the definition of "lawyer" in the Law Society Rules is a "member of the Society", which includes non-practising and retired members.

If the Committee agrees that non-practising and retired lawyers ought to be permitted to be paralegals, the matter will need to be referred to the Ethics Committee for changes to the *Professional Conduct Handbook.*

A non-practising, retired or former lawyer working as a paralegal would not necessarily raise the same issues on a return to practice as these paralegals would not have engaged in the "practice of law".

Attachments

- Chapter 12 *Professional Conduct Handbook*
- Law Society Rules 2-57 – 2-59 dealing with returning to practice
- Law Society Rules 2-34, 2-36, and 2-37 that provide credit for articles in specific situations.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Members

~~Pro bono l~~Legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) *[Non-practising members]* or 2-4(2)(a) *[Retired members]*, a non-practising or retired member may

(a) provide pro bono legal services, or

(b) act as a designated paralegal under Rule 2-9.2.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Members

Legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) *[Non-practising members]* or 2-4(2)(a) *[Retired members]*, a non-practising or retired member may

(a) provide pro bono legal services, or

(b) act as a designated paralegal under Rule 2-9.2.

NON-PRACTISING AND RETIRED MEMBERS AS DESIGNATED PARALEGALS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 2-4.2 and substituting the following:

Legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) *[Non-practising members]* or 2-4(2)(a) *[Retired members]*, a non-practising or retired member may

(a) provide pro bono legal services, or

(b) act as a designated paralegal under Rule 2-9.2.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: December 27, 2012
Subject: **Tariff of costs for credentials hearings**

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1. In April 2012 the Benchers amended Rule 5-9 *[Costs of hearings]* and adopted a new Schedule 4 *[Tariff for Discipline Hearing and Review Costs]*. It was acknowledged at the time that a new formula for assessing costs of a credentials hearing would have to be developed. However, work on that project was not finalized, and the Benchers accepted the recommendation of the Act and Rules Subcommittee that the discipline formula and tariff not wait further for completion of the credentials tariff.

2. The Credentials Committee has now completed its work on costs and recommends a relatively simple resolution. The Credentials Committee decided to recommend the simplest process for costs for credentials hearings: an amount for each day or half day of hearing, plus reasonably incurred disbursements such as court reporter fees, witness fees and expenses, transcripts etc.

3. It was decided that costs for each day of hearing should be set at $2,000.00 and that a half-day of hearing should be set at $1,000, plus reasonably incurred disbursements.

4. The materials that were before the Committee are attached for your information. The resolution adopted by the Committee was this:

   IT WAS RESOLVED to recommend to the Act and Rules Subcommittee that the amount of security for costs be set at $2,000 for each full day of a hearing and $1,000, plus reasonably incurred disbursements, for a half day of hearing.

5. I attach draft amendments and a resolution recommended by the Act and Rules Subcommittee to implement the recommendations of the Credentials Committee.

6. In Rule 5-9 (1.1) and (1.2), “applicant” or “application” is added to “respondent” or “citation” to make the rule and Schedule 4 apply to credentials hearings and applicants in credentials hearings as well as to discipline hearings and respondents to citations.

7. Subrule (1.3) already applies to both credentials and discipline hearings, so it is not necessary to make any change to give effect to the recommendation that reasonable disbursements form part of costs in credentials hearings.

8. Subrule (1.4) (b) defines what amounts to a half-day of hearing, but in terms that only apply to units assigned in the Schedule for discipline hearings. It is proposed to amend that provision to allow for an “amount payable”, which would apply to the $2,000 per day and $1,000 per half-day recommended by the Credentials Committee.

9. The title of Schedule 4 currently refers to “Discipline Hearing and Review Costs”. The Subcommittee proposes to delete “Discipline”, which would show that it now applies to all hearings and reviews.

10. The Schedule itself only needs to be amended by adding a heading and a single line item, #24, for each day of hearing in credentials hearings. Rule 5-9 (1.4) (b) then applies to allow for a half-day amount of one-half of the amount for a full day.

JGH
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Attachments: memo Oct 26, 2012 with attachments
draft amendments
suggested resolution

The Law Society of British Columbia

Memo

To: Credentials Committee
From: Lesley Small
Date: October 26, 2012
Subject: **Tariff of Costs for Credentials Hearings**

The Committee has asked staff to develop a tariff of costs for Credentials Hearings that sets an amount for each day of hearing and assigns a range of units in order that the Panel can apply discretion to what the most appropriate order would be in the particular circumstances.

Law Society Rules

Prior to the adoption of the current Rule 5-9 to reflect the tariff of costs in Discipline Hearings, Rule 5-9 provided:

5-9 (0.1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1, and may set a time for payment.

(0.2) The Benchers may order that an applicant or respondent pay the costs of a review under section 47 of the Act, and may set a time for payment.

(1) In calculating the costs payable by an applicant or respondent, the panel or the Benchers may include part or all of one or more of the following:

(a) the cost of any investigation undertaken in relation to the applicant's application for enrolment, call and admission or reinstatement;

(b) the cost of an accounting, investigation or inspection of the respondent's practice, undertaken as part of the inquiry;

(c) a fee of $25 per witness, multiplied by the number of days the witness was required to remain in attendance at the hearing;

(d) reasonable travel and living expenses of a witness;

(e) the court reporter's fee for attendance at the hearing;

(f) the cost of a transcript of a hearing held under Part 2 or 4, if the Society would otherwise be liable for its cost;

(g) a fee of $750 for each part or full day of hearing;

(h) reasonable fees and disbursements of counsel appointed under Rule 2-63 or 4-20;

(i) any other amount, arising out of the investigation and hearing, for which the Society would otherwise be liable.

(2) If the legal assistance used by the Society is provided by an employee of the Society, costs may be awarded for that legal assistance in the amount that would have been payable if the Society had retained outside counsel.

(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(a) no adverse finding is made against the applicant;

(b) the citation is dismissed;

(c) the citation is rescinded after the hearing has begun.

(4) Costs deposited under Rule 2-62 must be applied to costs ordered under this Rule.

(5) An applicant must not be enrolled, called and admitted or reinstated until the costs ordered under this Rule or the Act are paid in full.

When the Committee is considering security for costs under Rule 2-62, the amount deposited cannot exceed an amount that is approximate to the amount that the panel could order to be paid under Rule 5-9. As a result, counsel for the law society normally suggest that security be set at around $2,500 per day, representing the court reporter`s fee for attendance at the hearing (Rule 5-9(e)), a fee of $750 for each part or full day of hearing (Rule 5-9(g)) and, reasonable fees and disbursements of counsel (Rule 5-9(b)).

The attached March 1, 2012 memorandum, provides some panel precedents relating to determining a reasonable amount for costs.

The current Rule 5-9(1.3) provides that the cost of disbursements that are reasonably incurred may be added to costs payable under this Rule. As a result, the simplest process would be to set an amount for each day or half day of hearing and disbursements, such as court reporter fees, witness fees and expenses, transcripts etc. can be added.

As a result, staff suggest that the amount for each day of hearing be set at $2,000 (in the normal course, this would equate to the fee of $750 for each part or full day of hearing and reasonable fees and disbursements of counsel of $1,250) and that a half day of hearing be set at $1,000 (the Discipline Tariff defines one day of hearing as including a day in which the hearing or proceeding takes two and one half hours or more) plus reasonably incurred disbursements.

Attachments

- Materials previously considered by the Committee at its meeting of March 1, 2012 with minute extract

The Law Society of British Columbia

Memo

To: Credentials Committee
From: Lesley Small
Date: March 1, 2012
Subject: **Tariff of Costs for Credentials Hearings**

Request

The Act and Rules Subcommittee has requested that the issue of Tariff of Costs for Credentials Hearings be considered by the Credentials Committee for any recommendations.

Background

At the *in camera* portion of their January 12, 2010 meeting, the Benchers considered a memorandum discussing costs awarded by hearing panels. Staff was asked to develop a proposal for a tariff. In December 2010, the Act and Rules Subcommittee considered a paper providing the rationale for creating and implementing a hearing costs tariff to be applied within the discretion of hearing panels and providing policy options for discussion. That memorandum dealt with costs arising in the discipline hearing process and did not address costs in relation to credentials hearings or other Law Society processes. Discipline counsel subsequently provided a further paper setting out a proposed costs tariff for citation hearings and s. 47 reviews. The tariff is based on Appendix B of the *Supreme Court Civil Rules* for party and party costs. A number of principles were followed in the development of the tariff and the "weighting" of various steps in the process. Discipline counsel also provided some sample bills of costs with a comparison to actual costs and to the application of the proposed tariff for consideration by the Act and Rules Subcommittee.

The Act and Rules Subcommittee approved the proposals in principle, but asked that it be reviewed with a view to proposing a parallel tariff to apply to credentials hearings.

Discussion

I attach a memorandum prepared for the Act and Rules Subcommittee on this issue for discussion by the Credentials Committee.

After reviewing the proposal submitted by Discipline counsel, it became evident that given the differences between the adversarial position taken in Discipline hearings and the inquiring nature of Credentials Hearings, it was advisable to consider whether there are different policy considerations or goals relating to Credentials Hearings before adopting the tariff model approved for Discipline Hearings.

Attachments

- February 2, 2012 memorandum to the Act and Rules Subcommittee
- January 24, 2011 memorandum from Jeffrey G. Hoskins, QC to the Act and Rules Subcommittee attaching:
    - January 21, 2011 memorandum from Michael Lucas, Maureen Boyd and Jackie Drozdowski to the Act and Rules Subcommittee
    - January 21, 2011 memorandum from Discipline Counsel to the Act and Rules Subcommittee with attachments

Options

1. Develop a tariff similar to that being proposed for Discipline Hearings that unit weights individual steps; or
2. Develop a tariff that sets an amount for each day of hearing and assign a range of units in order that the Panel can apply discretion to what the most appropriate order would be in the particular circumstances.

Recommendation

Having identified that Credentials Hearings are different in nature from Discipline Hearings, and recognizing that costs do not follow the event in the same way at Credentials Hearings as they do in more usual adversarial processes, Option 2 may result in a fairer apportionment of costs to applicants who are the subject of such Hearings.

The Law Society of British Columbia

Memo

To: Act and Rules Subcommittee
From: Lesley Small, *Manager, Member Services & Credentials*
Date: February 2, 2012
Subject: Tariff of Costs for Credentials Hearings

Introduction

The Act and Rules Subcommittee has previously considered that there should be a tariff of costs used in most, but not all, circumstances by hearing panels and the Benchers on a review. I understand that before amending Rule 5-9 in relation to discipline hearings (which currently provides for full recovery of costs), the Subcommittee asked that consideration also be given to a tariff for costs associated with Credentials Hearings.

Law Society Rules

As with Discipline hearings, the main rule dealing with hearing costs in the credentials hearing process is Law Society Rule 5-9:

Costs of hearings

5-9 (0.1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1, and may set a time for payment.

(0.2) The Benchers may order that an applicant or respondent pay the costs of a review under section 47 of the Act, and may set a time for payment.

(1) In calculating the costs payable by an applicant or respondent, the panel or the Benchers may include part or all of one or more of the following:

(a) the cost of any investigation undertaken in relation to the applicant's application for enrolment, call and admission or reinstatement;

(b) the cost of an accounting, investigation or inspection of the respondent's practice, undertaken as part of the inquiry;

(c) a fee of $25 per witness, multiplied by the number of days the witness was required to remain in attendance at the hearing;

(d) reasonable travel and living expenses of a witness;

(e) the court reporter's fee for attendance at the hearing;

(f) the cost of a transcript of a hearing held under Part 2 or 4, if the Society would otherwise be liable for its cost;

(g) a fee of $750 for each part or full day of hearing;

(h) reasonable fees and disbursements of counsel appointed under Rule 2-63 or 4-20;

(i) any other amount, arising out of the investigation and hearing, for which the Society would otherwise be liable.

(2) If the legal assistance used by the Society is provided by an employee of the Society, costs may be awarded for that legal assistance in the amount that would have been payable if the Society had retained outside counsel.

(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(a) no adverse finding is made against the applicant;

(b) the citation is dismissed;

(c) the citation is rescinded after the hearing has begun.

(4) Costs deposited under Rule 2-62 must be applied to costs ordered under this Rule.

(5) An applicant must not be enrolled, called and admitted or reinstated until the costs ordered under this Rule or the Act are paid in full.

(6) As an exception to subrule (5), the Credentials Committee may direct that an applicant be enrolled, called and admitted or reinstated even though costs ordered under this Rule have not been paid in full and may make the direction subject to any conditions that the Committee finds appropriate.

Credentials Hearings

When faced with an application for enrolment, reinstatement or call and admission, the Credentials Committee has three options under s. 19(2) of the *Legal Profession Act*:

1. Grant the application;

2. Grant the application subject to any conditions or limitations to which the applicant consents in writing, or

3. Order a hearing.

Section 19(3) provides that, where an applicant has been disbarred or resigned as a result of disciplinary proceedings, the Credentials Committee *must* order a hearing.

Pursuant to Rule 2-67, when a Credentials hearing is ordered, the onus is on the applicant to satisfy the panel on a balance of probabilities that the application has met the requirements of section 19(1) of the *Act*.

Section 22 of the *Legal Profession Act* sets out the relevant procedure for such a hearing, and the relevant rules are found in Rules 2-61 to 2-69 of the Law Society Rules (copy attached).

Pursuant to Rule 2-62, when a hearing is ordered, the Credentials Committee must set an amount to be deposited by the application as security for costs. In setting the amount to be deposited as

security for costs, the Credentials Committee may take into account the circumstances of the matter, including but not limited to, the applicant's ability to pay and likelihood of success in the hearing. Counsel for the Law Society recommends the appropriate amount of security for costs for individual applicants based on Rule 5-9 and the number of hearing days required and the applicant makes submissions relating to their ability to pay. Security must be deposited 15 days before the date set for hearing else the hearing is adjourned.

The Committee orders a hearing when it has serious concerns with regard to the character and fitness of the applicant and where it concludes that it cannot resolve those concerns without a hearing, where the evidence is given on oath and can be tested through cross-examination. The purpose of the hearing is that of an inquiry and not necessarily with the end goal of rejecting the applicant. As noted above, Rule 2-67 places the onus on the applicant to satisfy the panel on the balance of probabilities that the applicant has met the requirements of s. 19(1).

Current Situation

It is noted that in Discipline Hearings, the current practice is for Discipline Counsel to prepare a draft Bill of Costs that includes the "Actual Cost" and the "Amount Claimed". This practice is not typically followed in Credentials Hearings.

In determining a reasonable amount for costs sought, Hearing Panels in question consider the costs awards appropriate in the particular circumstances of their cases (see *Re: MacAdam*, 2006 LSBC 41, para. 7).

In *Law Society re: MacAdam*, the panel noted at para. 6:

> Since the onus of satisfying a Panel of the Applicant's fitness is on the Applicant, it seems unreasonable that the burden of the cost of the credentials hearing fall entirely on the Law Society unless it is clear to the Panel that a hearing was unnecessary and ought not to have been ordered. That is not the case here.

There are many instances of hearing panels in credentials matters making costs awards in circumstances in which an applicant's application had merit and the applicant was admitted. In *Re MacAdam,* the hearing panel stated at para. 7:

> The recent practice of Panels appears to have been either to direct that a successful Applicant for admission or reinstatement pay the costs of the Law Society in the amount posted for security for costs (see e.g. *Re Jodway*, 2005 LSBC 46 and *Re Davis*, 2005 LSBC 32) or to pay the costs in an amount equal to half the amount posted as security for costs (see e.g. *Re Cushner*, 2003 LSBC 18 and *Re Nigol*, 2006 LSBC 46). The cases I have cited do not contain any reasons for the costs determination, and I

> must assume the Panels in question considered the costs awards appropriate in the particular circumstances of their cases.

In *Re MacAdam*, the panel awarded costs in an amount equal to half the amount posted as security, representing costs of $1,500 for a one day hearing. In reaching that conclusion the panel took into account that the applicant was admitted, that it was a reinstatement applicant and not an initial admission hearing, that the applicant was frank in acknowledging the issues that led to the hearing and had made significant effort to overcome the problems of concern to the Credentials Committee.

In *Re: MacLeod*, a 2006 decision, Law Society counsel submitted at the hearing that in the circumstances of the case it would be exceptional for the Panel to refuse enrolment. The applicant was admitted. On the issue of costs, the panel noted that it was appropriate that the matter had gone to hearing and that the applicant should bear some of the costs but not to the same extent as if the application were without merit. The applicant was ordered to pay costs in the amount of $3,000 for the three day hearing.

Similarly, in *Re: Sandhu*, the applicant was admitted with conditions but ordered to pay costs of $4,700, representing the amount paid by the applicant as security for costs.

In circumstances in which an applicant was not admitted, costs have been awarded against the applicant in substantial amounts. In *Re: Applicant 1*, 2006 LSBC 08, the Law Society sought costs of $28,338.98 after a five day hearing. The hearing panel found that the Law Society's costs were reasonable and properly incurred. The panel, however, exercised its discretion in awarding costs, taking into account the applicant's financial situation while balancing that against the interests of the membership who must pay whatever costs are not paid by the applicant. The panel also recognized that the hearing length was extended due to the panel's request that further information from another jurisdiction be obtained and this warranted a reduction in costs. The panel awarded costs in the amount of $9,000.00.

Discussion

The Law Society does not always take a position at a Credentials hearing. Rather, it places the issues and evidence before the Panel, leaving it to the applicant to adduce evidence and make submissions concerning the evidence that will satisfy Panel that he or she has met the s. 19 requirements. The Law Society is not, by ordering a hearing, taking the position that the applicant should not be admitted. Rather, the hearing is ordered because the Committee cannot satisfy itself on the materials the applicant has provided that the s. 19 test has been met.

Given the differences between the adversarial position taken in Discipline hearings and the inquiring nature of Credentials Hearings, it may be advisable to consider whether there are different policy considerations or goals relating to Credentials Hearing before adopting the tariff model approved for Discipline Hearings. For example, because costs are usually ordered against

the applicant even if he or she is admitted, it cannot really be said that "costs follow the event." Moreover, because the Law Society does not always take a position at the hearing, and because hearings are not necessarily ordered so that the Law Society can seek to keep the applicant from obtaining membership, the purpose and conduct of Credentials hearings differs from Discipline hearings.

Consequently, approaching costs on Credentials hearings in the same manner as is done on Discipline hearings (which process more resembles the trial process) may not be advisable. Costs considerations on discipline matters have been dealt with partly to encourage settlement in advance of the hearing, and to encourage the parties to participate reasonably in the discipline process.

One cannot apply similar considerations to Credentials hearings. Sometimes a hearing cannot be avoided (where the applicant has been disbarred previously). Other times, the only way a hearing could be avoided is for the applicant to abandon his or her application (which would be unfair to the applicant). Because costs do not follow the event in Credentials hearings, breaking down all the identifiable aspects that arise on a hearing and seeking to address them in costs orders is less appropriate than in matters where costs do follow the event.

Instead, because a hearing is going to take place unless the applicant abandons the application, it may be more sensible to simply set one tariff item – that for each day of hearing – and assign a range of units in order that the Panel can apply discretion as to what the most appropriate order would be in the particular circumstances. The result would be an order that was considerably less than a full indemnity, more akin to an estimation of costs on a party and party basis on the cost of a hearing day.

Memo

The Law Society of British Columbia

To Act and Rules Subcommittee

From Jeffrey G. Hoskins, QC

Date January 24, 2011

Subject **Rule 5-9 and Schedule 4 – Tariff of Costs**

At the December 2010 meeting, the Subcommittee considered this issue and considered that there should be a tariff of costs to be used in most, but not all, circumstances by hearing panels and the Benchers on a review. This would require amendment to Rule 5-9, which currently provides for full recovery of costs.

I attach the memoranda, without attachments, that were before the Subcommittee at the December meeting, with some revisions based on the remarks of the Subcommittee at that meeting. I also attach a first draft of the Rule amendments, including a "Schedule 4" containing the provisions of the tariff table proposed by discipline counsel. While there was some discussion of clear guidelines for the exercise of discretion to depart from the prescribed tariff amounts, in this draft I have only provided for a discretion to increase amounts (should it also provide for decreased amounts?) when it is reasonable and appropriate to do so. Perhaps the Subcommittee could consider what more specific guidelines should apply, if any.

As requested by the Subcommittee, discipline counsel have provided some sample bills of costs with a comparison to actual costs and to the application of the proposed tariff. Two tables are attached containing that information, one in summary for and one in detail.

Memo

The Law Society of British Columbia

To The Act and Rules Subcommittee

From Michael Lucas, Maureen Boyd and Jackie Drozdowski

Date January 21, 2011

Subject **The Law Society's Hearings Process – Tariff of Costs**

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1. INTRODUCTION

At the *in camera* portion of their January 22, 2010 meeting, the Benchers considered a memorandum discussing costs awarded by hearing panels. Staff was asked to develop a proposal for a tariff. This paper provides the rationale for creating and implementing a hearing costs tariff (the "Tariff") to be applied within the discretion of discipline hearing panels and provides policy options for discussion.

The Benchers may make rules on costs in the Law Society's hearings process pursuant to section 46 of the *Legal Profession Act*. Rule 5-9 of the Law Society Rules is the main rule dealing with hearing costs in the discipline hearing process and includes a list of items that may be included in the calculation of costs at Rule 5-9(1).

As summarized in the January 2010 memorandum prepared by staff (copy attached), the current process is to seek costs of the hearing on a partial (rather than on a full) indemnity basis when the Law Society is successful. A detailed discussion of the history and policy considerations underlying cost awards is included in the January 2010 memorandum.

This memorandum deals with costs arising in the discipline hearing process and does not address costs in relation to credentials hearings or other Law Society processes.

2. LEGISLATIVE FRAMEWORK

Section 46 of the *Legal Profession Act* allows the Benchers to make rules respecting costs of a hearing:

Costs

46 (1) The benchers may make rules governing the assessment of costs by a panel, the benchers or a committee under this Act including

(a) the time allowed for payment of costs, and

(b) the extension of time for payment of costs.

(2) If legal assistance employed by the benchers is provided by an employee of the society, the amount of costs that may be awarded under the rules in respect of that legal assistance may be the same as though the society had retained outside counsel.

(3) The amount of costs ordered to be paid by a respondent or applicant under the rules may be recovered as a debt owing to the society and, when collected, the amount is the property of the society.

The main rule dealing with hearing costs in the discipline hearing process is Law Society Rules, Rule 5-9:

Costs of hearings

5-9 (0.1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1, and may set a time for payment.

(0.2) The Benchers may order that an applicant or respondent pay the costs of a review under section 47 of the Act, and may set a time for payment.

(1) In calculating the costs payable by an applicant or respondent, the panel or the Benchers may include part or all of one or more of the following:

(a) the cost of any investigation undertaken in relation to the applicant's application for enrolment, call and admission or reinstatement;

(b) the cost of an accounting, investigation or inspection of the respondent's practice, undertaken as part of the inquiry;

(c) a fee of $25 per witness, multiplied by the number of days the witness was required to remain in attendance at the hearing;

(d) reasonable travel and living expenses of a witness;

(e) the court reporter's fee for attendance at the hearing;

(f) the cost of a transcript of a hearing held under Part 2 or 4, if the Society would otherwise be liable for its cost;

(g) a fee of $750 for each part or full day of hearing;

(h) reasonable fees and disbursements of counsel appointed under Rule 2-63 or 4-20;

(i) any other amount, arising out of the investigation and hearing, for which the Society would otherwise be liable.

(2) If the legal assistance used by the Society is provided by an employee of the Society, costs may be awarded for that legal assistance in the amount that would have been payable if the Society had retained outside counsel.

(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(a) no adverse finding is made against the applicant;

(b) the citation is dismissed;

(c) the citation is rescinded after the hearing has commenced.

(4) Costs deposited under Rule 2-62 must be applied to costs ordered under this Rule.

(5) An applicant must not be enrolled, called and admitted or reinstated until the costs ordered under this Rule or the Act are paid in full.

(6) As an exception to subrule (5), the Credentials Committee may direct that an applicant be enrolled, called and admitted or reinstated even though costs ordered under this Rule have not been paid in full and may make the direction subject to any conditions that the Committee finds appropriate.

3. CURRENT SITUATION

The Law Society seeks costs on a partial indemnity basis with the goal being recovery of a reasonable portion of expenses and disbursements incurred. The partial indemnity model adopted by the Law Society encourages the parties to settle issues to reduce exposure to costs and allows discretion to award increased costs against a party for vexatious or reprehensible behaviour. Costs awards can be used to address unreasonable behaviour (i.e. specials costs for reprehensible behaviour or to discourage meritless defences). With the partial indemnity model, the profession as a whole bears some of the costs of hearings where the Law Society is successful (on Credentials hearings there is not full recovery of costs for successful applicants and there is little applicable law on costs awards for successful respondents).

In determining a reasonable amount for the costs sought, the current practice is for Discipline Counsel to prepare a draft Bill of Costs that includes the "Actual Cost" and the "Amount Claimed." Two examples of the Bills of Costs prepared by Discipline Counsel are attached for reference. To date, respondents have not questioned the rationale underlying the Bills of Costs prepared.

4. POLICY GOALS

Policy goals behind costs awards generally include indemnifying successful parties, encouraging parties to resolve issues, penalizing unreasonable behaviour and behaviour that increases costs, discouraging meritless claims and increasing accessibility.

The policy goals behind implementing a Tariff include simplifying the process to provide clarity, consistency, fairness and transparency in awarding costs. The goal behind allowing the hearing panel to apply the Tariff at its discretion is to allow for flexibility when faced with longer and more involved cases where the

Tariff may prove to be inadequate for recovering a reasonable portion of the expenses incurred by the Law Society and to allow for recovery of special costs where appropriate.

5. THE PROPOSED TARIFF

A memorandum regarding the proposed Tariff and a draft Tariff for discipline hearings and s. 47 reviews prepared by Discipline Counsel are attached for consideration by the Committee. The rationale behind the unit weighting in the Tariff is set out in the memorandum.

6. DISCUSSION – DISCRETIONARY, MANDATORY OR STATUS QUO

Status Quo

Rule 5-9 as it is now, contains what is essentially a tariff of costs without unit weighting which allows the hearing panel to use its discretion with respect to costs sought and which costs may be included in the calculation of costs. Costs of an investigation are rarely if ever claimed, except with respect to investigations pursuant to Rule 4-43. Discipline Counsel could proceed as they have been by preparing Bills of Costs with costs allowable under Rule 5-9(1) and continue to attempt to recover a reasonable amount of the costs incurred. Rule 5-9 would, however, have to be amended to conform to the current practice of seeking costs on a partial indemnity basis rather than on a full indemnity basis. Amending Rule 5-9 to include factors for hearing panels to consider when assessing costs regardless of whether or not the proposed Tariff is implemented should also be considered.

Discretionary use of the Tariff

Implementing the Tariff would provide a simple, clear and consistent approach to determining a reasonable amount for an order for costs. A Tariff used only at the discretion of the hearing panel would allow flexibility in making orders for costs. For example, in more complex proceedings or in proceedings where there has been undue delay, the hearing panel could determine that it is not appropriate to use the Tariff. If the Tariff is used as a guideline, the hearing panel will retain the discretion to adjust the amount of costs awarded based on relevant factors, which in some circumstances may include the determination that the respondent should be responsible for a higher portion of the costs, particularly where the higher costs flow from the respondent's conduct.

If the Law Society implements a Tariff that is applied at the discretion of the hearing panel, Rule 5-9 could be revised by setting out some general principles to clarify when the hearing panel is to set aside the Tariff and relevant factors for consideration when determining appropriate costs awards. Hearing panels would not apply the Tariff when a case is more complex or when special costs are appropriate. Applying the Tariff in all cases would sometimes result in inadequate costs recovery.

The hearing panel in *LSBC v. Racette* 2006 LSBC 29 (copy attached) considered the relevant factors on which to base an order for costs and set some of them out at para. 13:

> [13] This Panel has previously held that any order for costs should be based on a careful consideration of all relevant factors including:
>
> (a) the seriousness of the offence;
>
> (b) the financial circumstances of the Respondent;
>
> (c) the total effect of the Penalty, including possible fines and/or suspensions;
>
> (d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

Rule 5-9 could be revised to include the relevant factors for consideration by the hearing panel set out in *Racette*. Other factors could also be included and, for better clarity, (d) above could be reworded to refer to conduct of a party that results in the narrowing of issues or otherwise reduces the length of the hearing, which in turn reduces costs. The conduct of a party in relation to the number of times a matter is adjourned or the timing of adjournment could also be included in the list of relevant factors for consideration by hearing panels.

Mandatory use of the Tariff

Implementing a Tariff for mandatory use by hearing panels would to a certain extent fetter the discretion of the panels in proceedings where it would be reasonable and appropriate to recover a more substantial portion of the costs incurred than might be possible under the unit weighting process in the Tariff. There are certain circumstances in which it would be unreasonable to limit the costs sought to only that allowed by the Tariff.

7. OPTIONS

Option 1
Recommend amending Rule 5-9 to conform to the current practice of seeking costs on a partial indemnity basis and add relevant factors for consideration by hearing panels for assessing costs.

Option 2
Recommend adopting the Tariff for use at the discretion of hearing panels and revise Rule 5-9 to add relevant factors for consideration by hearing panels for assessing costs, and add clear guidelines for when the hearing panel is to depart from applying the Tariff.

Option 3
Recommend adopting the Tariff for mandatory use by hearing panels and revise Rule 5-9 accordingly.

JD
/Attachments

Memo

The Law Society of British Columbia

To Act and Rules SubCommittee

From Discipline Counsel

Date January 21, 2011

Subject **Tariff for Discipline Hearing and Review Costs**

At the January 22, 2010 meeting, the Benchers endorsed the concept of a costs tariff for hearings, and referred this matter to staff to develop a costs proposal.

Attachment 1 to this memo is a proposed costs tariff for citation hearings and s. 47 reviews, prepared by discipline counsel. The tariff is based on Appendix B of the *Supreme Court Civil Rules* for party and party costs.

A number of principles were followed in the development of the tariff and the "weighting" of various steps in the process, which are explained below.

The primary principle underlying the tariff is the use of costs awards to either reward or penalize certain behaviours of the parties. This use of costs awards was acknowledged by the Court of Appeal in *Skidmore v. Blackmore*, (1995), 2 B.C.L.R. (3d) 201, which case was referenced in the paper included in the January 2010 Bencher package. In that decision, the Court observed at para. 25 that:

> ... Costs can also be used to sanction behavior that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

This tariff is also intended to result in costs orders which are within the range of the costs orders made in hearings since June 2008, when counsel was instructed to seek counsel fees in the range of 30-40% of actual (calculated at $175 per hour), plus disbursements. However, the calculation of costs under the tariff may result in a significant variation, because of the way units are weighted to encourage or discourage certain behaviours.

Another key difference is that disbursements presently include a per diem panel fee of $750, which in this proposed tariff is incorporated into the unit value of the hearing cost (Item No. 13) rather than as a disbursement.

Finally, it is intended that Rule 5-9 will still retain the discretion of a panel to award costs which are reasonable and appropriate in the circumstances, including to award special costs where warranted.

The principle or policy goal underlying the unit weighting of various matters is set out below, as well as some general information.

1. Reduction of Use of Bencher Resources

The unit weighting of some items is intended to reward behavior which reduces unnecessary use of Bencher resources. Agreed Statements of Fact are weighted less heavily than a hearing day, even though they usually require a minimum of 15 hours to prepare, and often many more hours of counsel time where there are several allegations or the underlying facts are complex. Further, if an agreed statement of facts is prepared and delivered but not signed, a higher number of units is available than when an agreed statement of facts is reached and signed. This weighting is intended to provide a financial incentive to reach agreement on matters not in issue and thus reduce the length of hearings.

Similarly, the use of affidavits is encouraged, by lower unit weighting, which in turn should usually reduce the length of the hearing and minimizes the amount of Bencher time required to adjudicate a discipline matter, particularly where the respondent does not participate. Further advantages from the use of affidavits are: the minimizing of inconvenience and stress to witnesses, reducing the amount of disbursements (where travel is required) and also reducing any financial loss to a witness which may result from missing work to testify.

2. Timeliness of Response in Process

Benchers on hearing panels, witnesses and Law Society staff are all inconvenienced by respondents who fail to respond in the discipline process in a timely manner, such as failing to provide a timely response to draft agreed statements of fact, failing to sign the agreed statements of fact in a timely way when agreement has been reached and by making applications to adjourn close to the hearing date.

In order to provide an incentive to respondents to respond in a timely manner, higher costs are imposed in respect of untimely conduct:

- Three units are awarded if adjournment applications (Items No. 5 and 18) are made less than 14 days prior to the scheduled hearing, whereas only one unit is awarded if the application is brought more than 14 days prior to the hearing date.

- If an agreed statement of facts is signed more than 14 days prior to the hearing, the minimum number of units is five and the maximum is ten. However, if signed less than 14 days prior to the hearing, the minimum number of units is ten and the maximum is 20.

3. Heavier Weighting of Steps the Respondent Controls

In the weighting of individual steps, relatively greater unit values are placed on those steps which the Respondent controls or influences. For example, disclosure is a resource-heavy step for the Law Society, but one over which the Respondent has no control. Therefore, it is weighted less heavily than if weighted on the basis of the use of Law Society resources. It is also weighted relatively less heavily than items such as applications for particulars, adjournments, interlocutory applications and the number of days of hearing, all of which are matters over which the respondent exercises some control.

4. Encouragement of Resolution by Consent

There are a number of different ways that the proposed tariff encourages resolution by consent, including by the lower relative weighting for agreed statements of fact and by the proposed range for costs orders on Rule 4-22 dispositions.

In addition, on a s. 39 interim proceeding, units are only awarded if the hearing proceeds, so that there are no independent preparation costs if a hearing does not occur. By not having a separate tariff item for preparation costs, the Law Society effectively "waives" preparation costs where the respondent resigns or undertakes not to practice pending the resolution of the citation after a s. 39 proceeding has been authorized. This structure provides a financial incentive to a Respondent who acts reasonably (although it is doubtful that the Rule 5-9 as it is presently written permit recovery of preparation costs if no interim proceeding occurs).

As a hearing on the merits of the matter will invariably occur, the preparation costs are included in the per diem cost for the hearing.

Conversely, preparation costs are a separate item on interlocutory or preliminary motions, because it is not uncommon for respondents or their counsel to give notice of such applications to discipline counsel, then not bring the motion after resources have been expended by the Law Society to prepare for the application.

5. Encouragement of Resolution by Rule 4-22

Rule 4-22 resolutions are not included in the tariff, but rather it is proposed that costs be imposed on a "flat rate" basis in the amount between $0 and $3,500. Costs are almost invariably settled at staff level in Rule 4-22 dispositions, and this range roughly corresponds to existing practice, except that presently costs are always required.

There is an element of unfairness in invariably requiring the payment of costs. This unfairness arises because the discipline process (due to limitations in the statute) requires that the consent disposition be approved by a hearing panel. In some circumstances, a member may admit the facts and ask to resolve the matter by consent even prior to the citation being authorized, and many seek to make conditional admissions immediately following the authorization of the citation. In these circumstances, it may be unfair to always require a payment of costs.

6. Flat Rate for Summary Hearings

A flat rate is suggested for summary hearings, which is consistent with the stream-lined process. The amount suggested is based on the costs awards to date.

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Costs of hearings

5-9 (0.1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1, and may set a time for payment.

(0.2) The Benchers may order that an applicant or respondent pay the costs of a review under section 47 of the Act, and may set a time for payment.

(1) Subject to subrule (1.1), ~~In calculating the costs payable by an applicant or respondent,~~ the panel or the Benchers ~~may include part or all of one or more of the following:~~must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society.

~~(a) the cost of any investigation undertaken in relation to the applicant's application for enrolment, call and admission or reinstatement;~~

~~(b) the cost of an accounting, investigation or inspection of the respondent's practice, undertaken as part of the inquiry;~~

~~(c) a fee of $25 per witness, multiplied by the number of days the witness was required to remain in attendance at the hearing;~~

~~(d) reasonable travel and living expenses of a witness;~~

~~(e) the court reporter's fee for attendance at the hearing;~~

~~(f) the cost of a transcript of a hearing held under Part 2 or 4, if the Society would otherwise be liable for its cost;~~

~~(g) a fee of $750 for each part or full day of hearing;~~

~~(h) reasonable fees and disbursements of counsel appointed under Rule 2-63 or 4-20;~~

~~(i) any other amount, arising out of the investigation and hearing, for which the Society would otherwise be liable.~~

(1.1) If in the judgment of the panel or the Benchers, it is reasonable and appropriate for any party to a hearing or proceeding to recover costs greater than that permitted by the tariff in Schedule 4, the panel or the Benchers may so order. [up to some limit?]

(1.2) The cost of disbursements that are proper or reasonably necessary may/must be added to costs payable under the tariff.

LAW SOCIETY RULES

(1.3) In the tariff in Schedule 4,

(a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and

(b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units apply.

~~(2) If the legal assistance used by the Society is provided by an employee of the Society, costs may be awarded for that legal assistance in the amount that would have been payable if the Society had retained outside counsel.~~

(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(a) no adverse finding is made against the applicant;

(b) the citation is dismissed;

(c) the citation is rescinded after the hearing has begun.

...

SCHEDULE 4 – TARIFF FOR DISCIPLINE HEARING AND REVIEW COSTS

Item No.	Description	Number of Units
	Citation Hearing	
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10
2.	Proceeding under s. 39 and Rule 4-17 and any application to rescind or vary an order under Rule 4-19, for each day of hearing	30
3.	Disclosure under Rule 4-25	Minimum 5 Maximum 20

LAW SOCIETY RULES

4.	Application for particulars/ preparation of particulars under Rule 4-26	Minimum 1 Maximum 5
5.	Application to adjourn under Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	 1 3
6.	Pre-Hearing Conference	Minimum 1 Maximum 5
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	 Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20
8.	Preparation of affidavits	Minimum 5 Maximum 20
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30

LAW SOCIETY RULES

14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15
	s. 47 Review	
15.	Giving or receiving notice under Rule 5-15, correspondence, conferences, instructions, investigations or negotiations after Review initiated, for which provision is not made elsewhere	Minimum 1 Maximum 3
16.	Preparation and settlement of hearing record under Rule 5-17	Minimum 5 Maximum 10
17.	Pre-Review Conference	Minimum 1 Maximum 5
18.	Application to adjourn under Rule 5-19 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	 1 3
19.	Procedural or preliminary issues, including an application to admit evidence under Rule 5-19(2), per day of hearing	10
20.	Preparation and delivery of written submissions	Minimum 5 Maximum 15
21.	Attendance at hearing, per day of hearing, including preparation not otherwise provided for in the tariff	30
	Summary Hearings:	
22.	Complete hearing	$2,000

LAW SOCIETY RULES

	Hearings under Rule 4-22	
23.	Complete hearing, based on the following factors (a) complexity of matter; (b) number and nature of allegations; and (c) the time at which respondent elected to make conditional admission relative to scheduled hearing and amount of pre-hearing preparation required.	$0 to $3,500

Value of Units:

Scale A, for matters of ordinary difficulty: $100 per unit

Scale B, for matters of more than ordinary difficulty: $150 per unit

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Costs of hearings

5-9 (0.1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1, and may set a time for payment.

(0.2) The Benchers may order that an applicant or respondent pay the costs of a review under section 47 of the Act, and may set a time for payment.

(1) Subject to subrule (1.1), the panel or the Benchers must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society.

(1.1) If in the judgment of the panel or the Benchers, it is reasonable and appropriate for any party to a hearing or proceeding to recover costs greater than that permitted by the tariff in Schedule 4, the panel or the Benchers may so order. **[up to some limit?]**

(1.2) The cost of disbursements that are proper or reasonably necessary **may/must** be added to costs payable under the tariff.

(1.3) In the tariff in Schedule 4,

(a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and

(b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units apply.

(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(a) no adverse finding is made against the applicant;

(b) the citation is dismissed;

(c) the citation is rescinded after the hearing has begun.

...

LAW SOCIETY RULES

SCHEDULE 4 – TARIFF FOR DISCIPLINE HEARING AND REVIEW COSTS

Item No.	Description	Number of Units
	Citation Hearing	
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10
2.	Proceeding under s. 39 and Rule 4-17 and any application to rescind or vary an order under Rule 4-19, for each day of hearing	30
3.	Disclosure under Rule 4-25	Minimum 5 Maximum 20
4.	Application for particulars/ preparation of particulars under Rule 4-26	Minimum 1 Maximum 5
5.	Application to adjourn under Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	 1 3
6.	Pre-Hearing Conference	Minimum 1 Maximum 5
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	 Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20
8.	Preparation of affidavits	Minimum 5 Maximum 20

LAW SOCIETY RULES

9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30
14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15
	<u>s. 47 Review</u>	
15.	Giving or receiving notice under Rule 5-15, correspondence, conferences, instructions, investigations or negotiations after Review initiated, for which provision is not made elsewhere	Minimum 1 Maximum 3
16.	Preparation and settlement of hearing record under Rule 5-17	Minimum 5 Maximum 10
17.	Pre-Review Conference	Minimum 1 Maximum 5
18.	Application to adjourn under Rule 5-19 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	 1 3

LAW SOCIETY RULES

19.	Procedural or preliminary issues, including an application to admit evidence under Rule 5-19(2), per day of hearing	10
20.	Preparation and delivery of written submissions	Minimum 5 Maximum 15
21.	Attendance at hearing, per day of hearing, including preparation not otherwise provided for in the tariff	30
	Summary Hearings:	
22.	Complete hearing	$2,000
	Hearings under Rule 4-22	
23.	Complete hearing, based on the following factors (a) complexity of matter; (b) number and nature of allegations; and (c) the time at which respondent elected to make conditional admission relative to scheduled hearing and amount of pre-hearing preparation required.	$0 to $3,500

Value of Units:

Scale A, for matters of ordinary difficulty: $100 per unit

Scale B, for matters of more than ordinary difficulty: $150 per unit

Act & Rules Subcommittee Costs Comparison Table

Case Name	Actual Costs of the Law Society	Costs claimed by the Law Society	Costs ordered by the Hearing Panel	Costs calculated under the Tariff [+]
Lyons, 2008 LSBC 38	$10,460.00 $8,330.00 in counsel fees; $630.00 in disbursements; $1,500.00 in panel fees	$2,700	$2,700	89 Units @ $100 $8,900
Short,[1] 2009 LSBC 12 (incl. s. 39)	$24,221.94 $20,020 in counsel fees; $1951.94 in disbursements; $2,250 in panel fees	$7,000	$7,000	150 Units @ $100 $15,000
Power, 2009 LSBC 23	$9,763.38 $8,312.50 in counsel fees; $700.88 in disbursements; $750.00 in panel fees	$5,000	$5,000	55 Units @ $100 $5,500
Schauble, 2009 LSBC 32	$75,335.80 $61,792.50 in counsel fees; $9,793.30 in disbursements; $3,750.00 in panel fees	$32,000 (counsel fees reduced to approx. $18,537.75)	$32,000	215 Units @ $150 $32,250

[1] The amount of costs sought by the Law Society was reduced in light of the Respondent's personal circumstances, including a lengthy interim suspension as a result of his alcohol addiction.

5027

Blinkhorn. 2010 LSBC 08*	$146,343.25 $30,467.50 in counsel fees; $945.00 in disbursements; $2,250.00 in panel fees; $112,680.75 in audit fees & disbursements	$38,500 (counsel fees reduced to approx.$9,140.25; audit and audit disbursement fees reduced to approx. $26,166.08)	$37,000	153 Units @ $150 $22,800
Burgess. TBD	$8,642.50 $7,577.50 in counsel fees; $315.00 in disbursements; $750.00 in panel fees	$3,300 (counsel fees reduced to approx. $2,273.25)	$1,500	61 Units @ $100 $6,100

* The Respondent contended that the amount of $38,500 should be reduced somewhat, given the fact that the Law Society's bill contemplated a hearing at this stage of the matter of some two days' duration. In fact, the hearing lasted only a morning. Considering all the circumstances, and in particular the matters referred to as relevant in the decision in *Law Society of BC v. Racette*, 2006 LSBC 29 at paragraph [13] the hearing panel concluded that the Respondent should pay the Law Society $37,000 on account of its costs.

+ Under the Tariff, the Law Society claims 30 units per day of hearing – a minimum of $3,000 per day. Note that the $750 per diem panel fee is no longer recoverable under the Tariff.

Costs Tariff Worksheet - Lyons

Item No.	Description	Number of Units	Amount Claimed
	Citation Hearing		
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10	5
2.	Proceeding pursuant to s. 39 and Rule 4-17 and any application to rescind or vary an order pursuant to Rule 4-19, for each day of hearing	30	0
3.	Disclosure pursuant to Rule 4-25 (93 documents)	Minimum 5 Maximum 20	5
4.	Application for particulars/ preparation of particulars pursuant to Rule 4-26	Minimum 1 Maximum 5	0
5.	Application to adjourn pursuant to Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	1 3	0
6.	Pre-Hearing Conference	Minimum 1 Maximum 5	0
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20	15

8.	Preparation of affidavits	Minimum 5 Maximum 20	00
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10	0
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10	4
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10	0
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20	0
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30	60
14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15	0

Total Number of Units: 89

Unit Multiplier: $100

Total Costs Claimed: $8,900

5030

Costs Tariff Worksheet - Short

Item No.	Description	Number of Units	Amount Claimed
	Citation Hearing		
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10	5
2.	Proceeding pursuant to s. 39 and Rule 4-17 and any application to rescind or vary an order pursuant to Rule 4-19, for each day of hearing	30	30
3.	Disclosure pursuant to Rule 4-25 (98 documents)	Minimum 5 Maximum 20	5
4.	Application for particulars/ preparation of particulars pursuant to Rule 4-26	Minimum 1 Maximum 5	0
5.	Application to adjourn pursuant to Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date (2 adj.) ➢ If made less than 14 days prior to the scheduled hearing date (2 adj.)	1 3	8
6.	Pre-Hearing Conference	Minimum 1 Maximum 5	2
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20	15

8.	Preparation of affidavits	Minimum 5 Maximum 20	10
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10	0
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10	5
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10	0
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20	0
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30	60
14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15	10

Total Number of Units: 150

Unit Multiplier: $100

Total Costs Claimed: $15,000

Costs Tariff Worksheet - Power

Item No.	Description	Number of Units	Amount Claimed
	Citation Hearing		
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10	5
2.	Proceeding pursuant to s. 39 and Rule 4-17 and any application to rescind or vary an order pursuant to Rule 4-19, for each day of hearing	30	0
3.	Disclosure pursuant to Rule 4-25 (96 documents)	Minimum 5 Maximum 20	5
4.	Application for particulars/ preparation of particulars pursuant to Rule 4-26	Minimum 1 Maximum 5	0
5.	Application to adjourn pursuant to Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	1 3	0
6.	Pre-Hearing Conference	Minimum 1 Maximum 5	0
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20	15

8.	Preparation of affidavits	Minimum 5 Maximum 20	0
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10	0
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10	0
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10	0
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20	0
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30	30
14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15	0

Total Number of Units: 55

Unit Multiplier: $100

Total Costs Claimed: $5,500

5034

Costs Tariff Worksheet - Schauble

Item No.	Description	Number of Units	Amount Claimed
	Citation Hearing		
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10	10
2.	Proceeding pursuant to s. 39 and Rule 4-17 and any application to rescind or vary an order pursuant to Rule 4-19, for each day of hearing	30	0
3.	Disclosure pursuant to Rule 4-25 (6 indices – 323 documents)	Minimum 5 Maximum 20	15
4.	Application for particulars/ preparation of particulars pursuant to Rule 4-26	Minimum 1 Maximum 5	0
5.	Application to adjourn pursuant to Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	1 3	1 (no costs claimed for second adjournment sought by the Law Society)
6.	Pre-Hearing Conference	Minimum 1 Maximum 5	3
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20	20

8.	Preparation of affidavits	Minimum 5 Maximum 20	5
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10	0
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10	10
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10	0
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20	0
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30	150 (x 5 days)
14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15	0

Total Number of Units: 214

***Unit Multiplier:** $100 $150

Total Costs Claimed: $21,400 $32,100

* Arguably either difficulty.

5036

Costs Tariff Worksheet - Blinkhorn

Item No.	Description	Number of Units	Amount Claimed
	Citation Hearing		
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10	5
2.	Proceeding pursuant to s. 39 and Rule 4-17 and any application to rescind or vary an order pursuant to Rule 4-19, for each day of hearing	30	0
3.	Disclosure pursuant to Rule 4-25 (2 disclosures, total 913 documents)	Minimum 5 Maximum 20	20
4.	Application for particulars/ preparation of particulars pursuant to Rule 4-26	Minimum 1 Maximum 5	0
5.	Application to adjourn pursuant to Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	1 3	3 (no costs claimed for second adjournment sought by the Law Society)
6.	Pre-Hearing Conference	Minimum 1 Maximum 5	0
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20	20 (x 2 ASoF)

8.	Preparation of affidavits	Minimum 5 Maximum 20	0
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum 2 Maximum 10	4
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum 2 Maximum 10	10
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10	0
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20	0
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30	90 (x 3 days)
14.	Written submissions, where no oral hearing held	Minimum 5 Maximum 15	N/A

Total Number of Units: 152

*** Unit Multiplier:** $100 $150

Total Costs Claimed: $15,200 $22,800

* Arguably either difficulty.

Costs Tariff Worksheet - Burgess

Item No.	Description	Number of Units	Amount Claimed
	Citation Hearing		
1.	Preparation/amendment of Citation, correspondence, conferences, instructions, investigations or negotiations after the authorization of the Citation to the completion of the discipline hearing, for which provision is not made elsewhere	Minimum 1 Maximum 10	5
2.	Proceeding pursuant to s. 39 and Rule 4-17 and any application to rescind or vary an order pursuant to Rule 4-19, for each day of hearing	30	0
3.	Disclosure pursuant to Rule 4-25	Minimum 5 Maximum 20	5
4.	Application for particulars/ preparation of particulars pursuant to Rule 4-26	Minimum 1 Maximum 5	0
5.	Application to adjourn pursuant to Rule 4-29 ➢ If made more than 14 days prior to the scheduled hearing date ➢ If made less than 14 days prior to the scheduled hearing date	1 3	1 (no costs claimed for second adjournment sought by the Law Society)
6.	Pre-Hearing Conference	Minimum 1 Maximum 5	2
7.	Preparation of agreed statement of facts ➢ If signed more than 14 days prior to hearing date ➢ If signed less than 14 days prior to hearing date ➢ Delivered to Respondent and not signed	Min. 5 to Max. 15 Min. 10 to Max. 20 Min. 10 to Max. 20	10

8.	Preparation of affidavits	Minimum Maximum	5 20	0
9.	All process and correspondence associated with retaining and consulting an expert for the purpose of obtaining opinion(s) for use in the proceeding	Minimum Maximum	2 10	0
10.	All process and communication associated with contacting, interviewing and issuing summons to all witnesses	Minimum Maximum	2 10	5
11.	Interlocutory or preliminary motion for which provision is not made elsewhere, for each day of hearing	10		0
12.	Preparation for interlocutory or preliminary motion, per day of hearing	20		0
13.	Attendance at hearing, for each day of hearing, including preparation not otherwise provided for in tariff	30		30
14.	Written submissions, where no oral hearing held	Minimum Maximum	5 15	0

Total Number of Units: 58

Unit Multiplier: $100

Total Costs Claimed: $5,800

Minutes

The Law Society of British Columbia

Credentials Committee

Date: Thursday, March 1, 2012

Present: Kenneth M. Walker, Chair
Haydn Acheson
David W. Mossop, QC
Thelma J. O'Grady
C.E. Lee Ongman
Vincent R.K. Orchard, QC
David M. Renwick, QC
Patsy Scheer

Absent: Angela R. Westmacott
Gregory A. Petrisor, Vice-Chair
Satwinder Bains

Staff Present: Alan Treleaven
Geoff Howes
Irene Bihari
Lesley Small
Lynn Burns
Pamela Scheller

10. POLICY

(b) Tariff of Costs for Credentials Hearings

The Act and Rules Subcommittee has requested that the issue of Tariff of Costs for Credentials Hearings be considered by the Credentials Committee for any recommendations.

Discipline counsel had recently developed a proposal for a tariff dealing with Discipline Hearings.

After reviewing the proposal submitted by Discipline counsel, it became evident that given the differences between the adversarial position taken in Discipline hearings and the inquiring nature

of Credentials Hearings, it was advisable to consider whether there are different policy considerations or goals relating to Credentials Hearings before adopting the tariff model approved for Discipline Hearings.

IT WAS RESOLVED that staff develop a tariff that sets an amount for each day of hearing and assigns a range of units in order that Panel can apply discretion to what the most appropriate order would be in the particular circumstances and that the issue of tariff be considered at the next Credentials meeting.

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Costs of hearings

5-9(1.1) Subject to subrule (1.2), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or a citation.

(1.2) If, in the judgment of the panel or review board, it is reasonable and appropriate for the Society, an applicant or a respondent to recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4, the panel or review board may so order.

(1.3) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.

(1.4) In the tariff in Schedule 4,

(a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and

(b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units or amount payable applies.

(3) If no adverse finding is made against the applicant, the panel or review board has the discretion to direct that the applicant be awarded costs.

SCHEDULE 4 – TARIFF FOR ~~DISCIPLINE~~ HEARING AND REVIEW COSTS

Item No.	Description	Number of ~~Units~~units or amount payable
	Credentials hearings	
24.	Each day of hearing	$2,000

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Costs of hearings

5-9(1.1) Subject to subrule (1.2), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or a citation.

(1.2) If, in the judgment of the panel or review board, it is reasonable and appropriate for the Society, an applicant or a respondent to recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4, the panel or review board may so order.

(1.3) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.

(1.4) In the tariff in Schedule 4,

(a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and

(b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units or amount payable applies.

(3) If no adverse finding is made against the applicant, the panel or review board has the discretion to direct that the applicant be awarded costs.

SCHEDULE 4 – TARIFF FOR HEARING AND REVIEW COSTS

Item No.	Description	Number of units or amount payable
	Credentials hearings	
24.	Each day of hearing	$2,000

COSTS OF CREDENTIALS HEARINGS

SUGGESTED RESOLUTION:

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

1. In Rule 5-9

(a) by rescinding subrules (1.1) and (1.2) and substituting the following:

5-9 (1.1) Subject to subrule (1.2), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or a citation.

(1.2) If, in the judgment of the panel or review board, it is reasonable and appropriate for the Society, an applicant or a respondent to recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4, the panel or review board may so order.***; and***

(b) in subrule (1.4)(b), by striking "one-half the number of units applies.***" and substituting "***one-half the number of units or amount payable applies.***".***

2. In Schedule 4,

(a) by striking the title of the Schedule and substituting the following:

SCHEDULE 4 – TARIFF FOR HEARING AND REVIEW COSTS*;*

(b) by striking the heading of column 3 of the table and substituting* "Number of units or amount payable"*; and

(c) by adding the following rows to the table:

	Credentials hearings	
24.	Each day of hearing	$2,000

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

National Entry-Level Practice Competency Profile: Request for Bencher Approval

Lawyer Education Advisory Committee and Credentials Committee

January 25, 2013

Prepared for: Benchers

Prepared by: Lawyer Education Advisory Committee and Credentials Committee by Alan Treleaven, Director, Education and Practice

Request for Approval: National Entry-Level Practice Competency Profile

The Federation of Law Societies' of Canada Council has invited each law society to approve the *National Entry-Level Competency Profile for Lawyers and Quebec Notaries* ("Competency Profile"), pursuant to the following resolution:

> **RESOLVED**: to approve the Competency Profile on the understanding that implementation will be based on a nationally accepted implementation plan, and to support the development of that plan.

The Lawyer Education Advisory Committee and the Credentials Committee reviewed the Federation request and the proposed Competency Profile on December 6, 2012, and recommend that the Benchers approve the resolution.

Pursuant to the resolution, the recommendation that the Benchers approve the resolution is on the express understanding that adoption is subject to the development and law societies' approval of a consistent national plan for implementation. (The Lawyer Education Advisory Committee and the Credentials Committee have some modest, non-substantive stylistic drafting suggestions for the Federation, but for practical reasons do not suggest that the Competency Profile be amended).

Brief Background

The National Admission Standards project is under the auspices of the Federation of Law Societies of Canada, whose website provides the following information.

> The legal profession is increasingly mobile. Under the terms of a series of agreements with law societies, members of the legal profession may move with ease from one jurisdiction to another. With admission to one law society effectively permitting admission to every other Canadian law society, consistency in admission standards is desirable.
>
> The Federation has undertaken a major initiative on behalf of law societies to develop national standards for admission to the legal profession. The first phase of the project involved drafting a profile of the competencies required for entry to the profession and the standard for ensuring that applicants meet the requirement to be of good character. Implementation of the standards, including the identification of appropriate methods for

assessing whether applicants meet the standards, will be the focus of the second phase of the project.

The Federation has provided a package of materials to assist law societies in considering the proposed Competency Profile. The package includes the Competency Profile; a briefing note; a copy of the National Admission Standards Project Phase 1 Report, which provides detailed background information (the appendices are at http://www.flsc.ca/en/national-admission-standards/); a document exploring anticipated questions; and a draft resolution for law societies to consider in adopting the Competency Profile.

The Competency Profile was developed with the assistance of a Technical Advisory Committee (including Lynn Burns from BC), working with practitioners from across Canada under the guidance of a consultant specializing in credentialing. The Competency Profile was validated through a large-scale national survey of members of the profession to ensure it accurately reflects the knowledge, skills, and abilities required for new members of the profession to practice competently.

Next Steps

Later in 2013, the Lawyer Education Advisory Committee should move ahead with work on its assigned strategic initiative in the 2012 – 2014 Law Society Strategic Plan:

> … *ensure that Law Society of BC admission processes are appropriate and relevant, and work on national admission standards while considering the rationale and purpose of the overall BC admission program.*

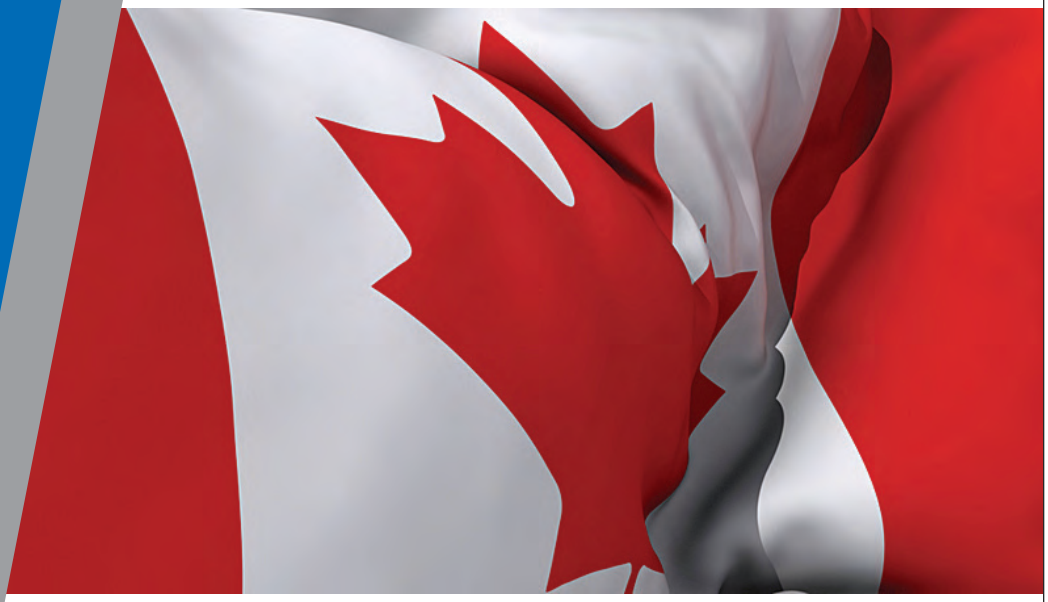
At the Federation level, the National Admission Standards Project Steering Committee is considering options for implementation of the admission standards, with the goal of achieving a high level of consistency and quality in national admission standards. (John Hunter, Tim McGee and Alan Treleaven are the National Steering Committee members from BC.) The Steering Committee has been instructed to account for the implications of each possible implementation option for law societies' current admission practices, and to consult with law societies in the process of developing implementation recommendations. Ultimately, law societies will be asked to approve how the admission standards will be implemented.

National Fitness and Suitability to Practise Standard

In addition, the National Steering Committee has been asked, working with a Technical Advisory Committee (including Lesley Small and Michael Lucas from BC), to draft a proposed *National Fitness and Suitability to Practise Standard*. The mandate includes consulting with law societies, and working toward submitting the proposed standard to Federation Council by June 2013. Work on the draft standard is ongoing, and the Federation plans to provide a consultation document to each law society.

4004

National Admission Standards Project



Briefing Note

October, 2012

FEDERATION OF LAW SOCIETIES OF CANADA • FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA •

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

NATIONAL ADMISSION STANDARDS BRIEFING NOTE

FROM : Don Thompson, Q.C., Chair, National Admission Standards Project

TO: Law Society benchers, leaders, and senior admissions staff

DATE : October 23, 2012

SUBJECT : National Entry-Level Competency Profile for Lawyers and Québec Notaries

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1. The adoption last month by the Council of the Federation of the National Entry-Level Competency Profile for Lawyers and Québec Notaries (the "Competency Profile") was the first step in the implementation of national standards for admission to the practice of law in Canada. The next step is for each law society to consider adopting the Competency Profile on the understanding that adoption is subject to the development and approval of a plan for implementation.

2. As promised by Federation President John Hunter in his letter to law society presidents earlier this month, the Steering Committee of the National Admission Standards Project has prepared materials addressing the many questions that are likely to arise as law societies move forward with the process of adopting the Competency Profile. Attached are a copy of the Competency Profile; a copy of the National Admission Standards Project Phase 1 Report (appendices to which are available at : http://www.flsc.ca/en/national-admission-standards/), which provides detailed background information on the project, a document exploring anticipated questions, and a draft resolution. It is our hope that these materials will assist each law society in considering adoption of the Competency Profile.

3. The decision to embark upon a project to develop national standards for admission to the practice of law in Canada reflected an important strategic priority identified by the Council of the Federation: the development and implementation of high, consistent and transparent national standards for the regulation of the legal profession. In launching the project, members of Council recognized that while there is much common ground in the admission standards and processes in place in Canadian law societies, significant differences do exist. With mobility — both as originally established through our mobility agreements and as now mandated by the labour mobility provisions of the *Agreement on Internal Trade* — admission to practice in one province or territory opens the door to admission in virtually every other jurisdiction in Canada. Coupled with the implementation of fair access to regulated professions legislation in three jurisdictions, differences in admissions practices may be difficult to justify as being in the public interest.

4. Identifying the essential competencies that applicants must possess to be admitted to the practice of law was a key element of the first phase of the National Admissions Standards Project. To ensure that the Competency Profile was developed in accordance with best practices we engaged a consultant, Professional Examination Service (PES), a non-profit organization with

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extensive experience in credentialing. Two consultants from PES have guided the work on the Competency Profile from the outset of the project. Senior admissions staff members from five lawsocieties also played a critical role in this work as members of a Technical Advisory Committee ("TAC").

5. The development of the Competency Profile drew not only on the expertise of our consultants and the members of the TAC, but also on that of members of the profession. Practitioners from across the country assisted with the drafting of the Competency Profile and also participated in a national validation survey of entry-level lawyers and Québec notaries designed to ensure that the competencies in the profile are those actually required of new practitioners. By adhering to best practices in the development of such profiles we can be confident that the Competency Profile approved by the Council of the Federation reflects the substantial legal knowledge, skills, and tasks that new members of the profession actually require when they begin the practice of law.

6. Although law societies are being asked to adopt the Competency Profile it is understood that adoption is conditional on agreement on a plan for implementation of national admission standards. In approving the Competency Profile the Council of the Federation also approved a process for exploring possible options for implementation, including the critical questions of what teaching and training will be provided and how candidates will be assessed to ensure that they meet the standards. In the coming months members of the Steering Committee of the National Admission Standards Project will be gathering information on possible implementation options and exploring the implications of each for law societies, future candidates, and the goal of achieving a high level of consistency in admission standards. The Steering Committee, the membership of which will be supplemented by two additional representatives at least one of whom will be a member of the Council, has been specifically instructed to take into account the implications of each possible implementation option for the current admission practices of the law societies in Canada. Consultation with law society leaders and senior staff will be a critical component in the process leading to recommendations on implementation.

7. The Steering Committee has also been directed to include with its recommendation a detailed roadmap of the process for implementation, a timeline for its work, a plan to manage the transition to national standards, and information on the resources, both local and national that will be required to manage the implementation process. The costs of exploring the options for implementation and developing a recommendation to Council will be covered by the Federation's existing budget.

8. More details on the development of the Competency Profile and on the process that will be undertaken to develop recommendations for implementation of the profile are contained in the attachments to this document. The Steering Committee has also developed a draft resolution for law societies to consider in adopting the Competency Profile.

9. It was clear at the national conference held in Vancouver last month that leaders of the law societies are enthusiastic about the move towards consistent national standards for admission and are anxious to play an active role in this next phase of the project. As we move forward with the next phase of the project members of the Steering Committee look forward to working closely with the law societies. To ensure that law societies remain well-informed about

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the progress of the project, we will be establishing a dedicated page on the Federation's intranet site. In addition we anticipate being in direct contact with law society leaders to ensure their views are taken into account as we explore the possibilities for implementation of national standards and work towards the development of a recommendation.

10. We look forward to working with you on this exciting project and invite you to share any thoughts or questions you may have about the project by contacting Steering Committee chairperson Don Thompson or the Federation's Senior Director, Regulatory and Public Affairs, Frederica Wilson, who also acts as manager of the National Admission Standards Project. Our contact information is set out below.

Contact:

Don Thompson, Q.C.
Executive Director
Law Society of Alberta
Email: Don.Thompson@lawsociety.ab.ca
Phone: 403.229.4710

Frederica Wilson
Senior Director, Regulatory and Public Affairs
Federation of Law Societies of Canada
Email: fwilson@flsc.ca
Phone: 613.783.7389

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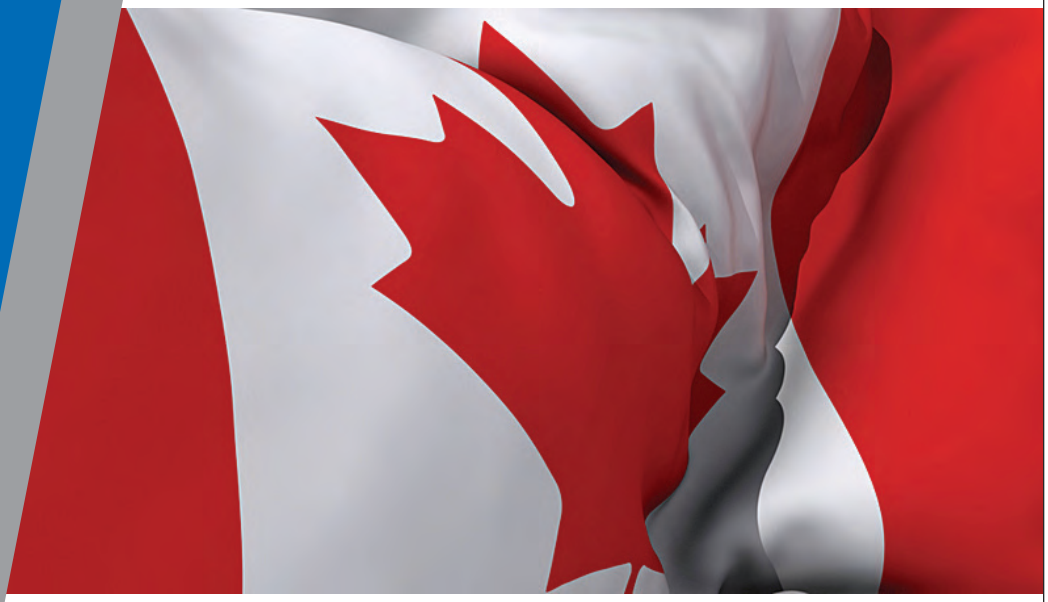
National Admission Standards Project



National Entry to Practice Competency Profile for Lawyers and Quebec Notaries

September, 2012

FEDERATION OF LAW SOCIETIES OF CANADA • FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA •

NATIONAL ENTRY TO PRACTICE COMPETENCY PROFILE FOR LAWYERS AND QUEBEC NOTARIES

1. SUBSTANTIVE LEGAL KNOWLEDGE

All applicants are required to demonstrate a general understanding of the core legal concepts applicable to the practice of law in Canada in the following areas:

1.1. Canadian Legal System

(a) The constitutional law of Canada, including federalism and the distribution of legislative powers
(b) The Charter of Rights and Freedoms
(c) Human rights principles and the rights of Aboriginal peoples of Canada and in addition for candidates in Quebec, the Quebec Charter of Human Rights and Freedoms
(d) For candidates in Canadian common law jurisdictions, key principles of common law and equity. For candidates in Quebec, key principles of civil law
(e) Administration of the law in Canada, including the organization of the courts, tribunals, appeal processes and non-court dispute resolution systems
(f) Legislative and regulatory system
(g) Statutory construction and interpretation

1.2 Canadian Substantive Law

(a) Contracts and in addition for candidates in Quebec: obligations and sureties
(b) Property
(c) Torts
(d) Family, and in addition for lawyers and notaries in Quebec, the law of persons
(e) Corporate and commercial
(f) Wills and estates
(g) Criminal, except for Quebec notary candidates
(h) Administrative
(i) Evidence (for Quebec notaries, only as applicable to uncontested proceedings)
(j) Rules of procedure
    i. Civil
    ii. Criminal, except for Quebec notary candidates
    iii. Administrative
    iv. Alternative dispute resolution processes

(k) Procedures applicable to the following types of transactions:
    i. Commercial
    ii. Real Estate
    iii. Wills and estates

1.3 Ethics and Professionalism

(a) Principles of ethics and professionalism applying to the practice of law in Canada

1.4 Practice Management

(a) Client development
(b) Time management
(c) Task management

2. SKILLS

All applicants are required to demonstrate that they possess the following skills:

2.1 Ethics and Professionalism Skills

(a) Identifying ethical issues and problems
(b) Engaging in critical thinking about ethical issues
(c) Making informed and reasoned decisions about ethical issues

2.2 Oral and Written Communication Skills

(a) Communicating clearly in the English or French language, and in addition for candidates in Quebec, the ability to communicate in French as prescribed by law
(b) Identifying the purpose of the proposed communication
(c) Using correct grammar and spelling
(d) Using language suitable to the purpose of the communication and the intended audience
(e) Eliciting information from clients and others
(f) Explaining the law in language appropriate to audience
(g) Obtaining instructions
(h) Effectively formulating and presenting well-reasoned and accurate legal argument, analysis, advice or submissions
(i) Advocating in a manner appropriate to the legal and factual context. This item does not apply to applicants to the Chambre des notaires du Québec
(j) Negotiating in a manner appropriate to the legal and factual context

2.3 Analytical Skills

(a) Identifying client's goals and objectives
(b) Identifying relevant facts, and legal, ethical, and practical issues
(c) Analyzing the results of research
(d) Identifying due diligence required
(e) Applying the law to the legal and factual context
(f) Assessing possible courses of action and range of likely outcomes
(g) Identifying and evaluating the appropriateness of alternatives for resolution of the issue or dispute

2.4 Research Skills

(a) Conducting factual research
(b) Conducting legal research including:
    i. Identifying legal issues
    ii. Selecting relevant sources and methods
    iii. Using techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues
    iv. Identifying, interpreting and applying results of research
    v. Effectively communicating the results of research
(c) Conducting research on procedural issues

2.5 Client Relationship Management Skills

(a) Managing client relationships (including establishing and maintaining client confidence and managing client expectations throughout the retainer)
(b) Developing legal strategy and advising client in light of client's circumstances (for example, diversity, age, language, disability, socioeconomic, and cultural context)
(c) Advising client in light of client's circumstances (for example, diversity, age, language, disability, socioeconomic, and cultural context)
(d) Maintaining client communications
(e) Documenting advice given to and instructions received from client

2.6 Practice Management Skills

(a) Managing time (including prioritizing and managing tasks, tracking deadlines)
(b) Delegating tasks and providing appropriate supervision
(c) Managing files (including opening/closing files, checklist development, file storage/destruction)
(d) Managing finances (including trust accounting)
(e) Managing professional responsibilities (including ethical, licensing, and other professional responsibilities)

3. TASKS

All applicants are required to demonstrate that they can perform the following tasks:

3.1 GENERAL TASKS

3.1.1 Ethics, professionalism and practice management

(a) Identify and resolve ethical issues
(b) Use client conflict management systems
(c) Identify need for independent legal advice
(d) Use time tracking, limitation reminder, and bring forward systems
(e) Use systems for trust accounting
(f) Use systems for general accounting
(g) Use systems for client records and files
(h) Use practice checklists
(i) Use billing and collection systems

3.1.2 Establishing client relationship

(a) Interview potential client
(b) Confirm who is being represented
(c) Confirm client's identity pursuant to applicable standards/rules
(d) Assess client's capacity and fitness
(e) Confirm who will be providing instructions
(f) Draft retainer/engagement letter
(g) Document client consent/instructions
(h) Discuss and set fees and retainer

3.1.3 Conducting matter

(a) Gather facts through interviews, searches and other methods
(b) Identify applicable areas of law
(c) Seek additional expertise when necessary
(d) Conduct legal research and analysis
(e) Develop case strategy
(f) Identify mode of dispute resolution
(g) Conduct due diligence (including ensuring all relevant information has been obtained and reviewed)
(h) Draft opinion letter
(i) Draft demand letter
(j) Draft affidavit/statutory declaration
(k) Draft written submission
(l) Draft simple contract/agreement
(m) Draft legal accounting (for example, statement of adjustment, marital financial statement, estate division, bill of costs)
(n) Impose, accept, or refuse trust condition or undertaking
(o) Negotiate resolution of dispute or legal problem
(p) Draft release
(q) Review financial statements and income tax returns

3.1.4 Concluding Retainer

(a) Address outstanding client concerns
(b) Draft exit/reporting letter

3.2 ADJUDICATION/ALTERNATIVE DISPUTE RESOLUTION

3.2.1. All applicants, except for applicants for admission to the Chambre des notaires du Québec, are required to demonstrate that they can perform the following tasks:

(a) Draft pleading
(b) Draft court order
(c) Prepare or respond to motion or application (civil or criminal)
(d) Interview and brief witness
(e) Conduct simple hearing or trial before an adjudicative body

3.2.2 All applicants are required to demonstrate that they can perform the following tasks:

(a) Prepare list of documents or an affidavit of documents
(b) Request and produce/disclose documents
(c) Draft brief

3.3. TRANSACTIONAL/ADVISORY MATTERS

3.3.1 Applicants for admission to the Chambre des notaires du Québec are required to demonstrate that they can perform the following tasks:

(a) Conduct basic commercial transaction
(b) Conduct basic real property transaction
(c) Incorporate company
(d) Register partnership
(e) Draft corporate resolution
(f) Maintain corporate records
(g) Draft basic will
(h) Draft personal care directive
(i) Draft powers of attorney

DRAFT RESOLUTION FOR LAW SOCIETIES

Background

In October 2009, the Council of the Federation of Law Societies of Canada (the "Federation") approved a project to develop national standards for admission to the legal profession (the "National Admission Standards Project") including a profile of the competencies required for admission to the profession.

In September 2012, in accordance with the recommendations of the National Admissions Standards Project Steering Committee, the Council of the Federation approved the competency profile attached as Appendix "A" (the "Competency Profile") as a national admission standard.

At the same time, the Council of the Federation approved a process to develop recommendations, in consultation with Canada's law societies, for a plan for implementation of the Competency Profile.

RESOLVED: to approve the Competency Profile on the understanding that implementation will be based on a nationally accepted implementation plan, and to support the development of that plan.

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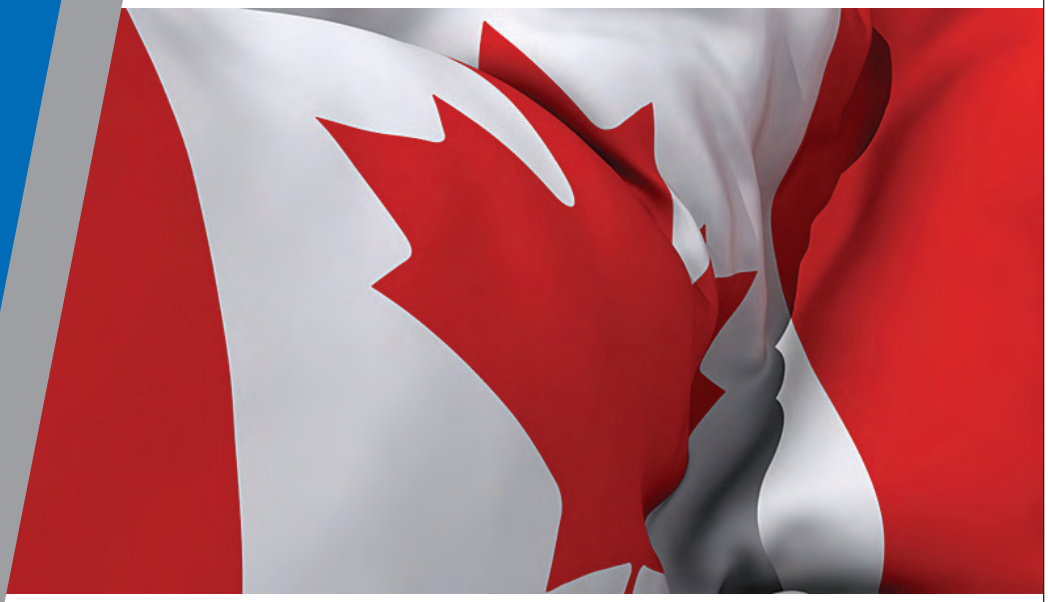
National Admission Standards Project



Frequently Asked Questions (FAQs)

October, 2012

FEDERATION OF LAW SOCIETIES OF CANADA • FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA •

National Admission Standards Project

Frequently Asked Questions (FAQs)

1. What is the National Admission Standards Project?

In October 2009 Council of the Federation approved a plan for a project to develop national standards for admission to the legal profession in Canada. Consistency in admission standards and candidate assessment were identified as key goals of the project.

The decision to embark upon a project to develop national standards for admission to the legal profession reflected an important strategic priority identified by Council and law society CEOs and ultimately incorporated into the Federation's strategic plan:

> *To develop and implement high, consistent and transparent national standards for Canada's law societies in core areas of their mandates.*

A key element of the first phase of the project was the identification of the competencies required for new members of the profession to practice competently. The drafting of a common standard for ensuring that applicants meet the requirement to be of good character is another key component of the National Admission Standards Project.

The project is overseen by a Steering Committee comprised of law society and Federation leaders and senior staff members. Senior admissions staff members from law societies across the country play an important role as members of a Technical Advisory Committee, while other law society staff members have been actively involved as members of the Good Character Working Group.

2. What motivated Canadian law societies to start a national admission standards project?

Probably the most compelling argument for consistent admission standards flows from the mobility of members of the legal profession in Canada. Since the signing of the National Mobility Agreement ("NMA") almost a decade ago, lawyers in Canada have been able to move with relative ease between jurisdictions. The Territorial Mobility Agreement and the Quebec Mobility Agreement ("QMA") brought the three northern jurisdictions and Quebec into the mobility regime. The recent addendum to the QMA extended mobility rights to Quebec notaries. Amendments to the labour mobility provisions of the Federal-Provincial-Territorial Agreement on Internal Trade ("*AIT*") have fundamentally altered the mobility landscape by rendering mutual recognition of professional licences mandatory.

Through the law societies' own rules and the recent legislative amendments to give effect to the changes to the *AIT*, admission to one law society effectively guarantees admission to all others (albeit on a restricted basis for members of the profession moving to or from Quebec). Although

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one of the underlying premises of the NMA was that the standards for admission in all Canadian jurisdictions were reasonably comparable, the reality is that there are some significant differences both in the standards and processes employed by each law society. The mobility of members of the profession between jurisdictions not only makes such differences difficult to justify, it makes them undesirable. In deciding to undertake the development of national admission standards Council recognized that common standards would provide each jurisdiction with the assurance that all legal professionals practising in their jurisdiction have met the same standards of competence regardless of where they are first licensed.

The implementation of fair access to regulated professions legislation in Manitoba, Ontario and Nova Scotia presented another reason for standardizing the criteria used to assess candidates for admission to the bar. Council recognized that with admissions standards and processes under scrutiny in these jurisdictions the existence of significant differences would be difficult to justify.

3. How was the National Entry-Level Competency Profile for Lawyers and Quebec Notaries developed?

To ensure that the National Entry-Level Competency Profile for Lawyers and Quebec Notaries (the "Competency Profile") was developed in accordance with best practices we engaged a consultant, Professional Examination Service (PES), a non-profit organization with extensive experience in credentialing. Two consultants from PES have guided the work on the Competency Profile from the outset of the project. Senior admissions staff members from five law societies also played a critical role in this work as members of a Technical Advisory Committee ("TAC").

The members of the TAC used the various competency profiles currently in use by law societies across the country as their starting point, creating an outline that organized the competencies into substantive knowledge, skills, and tasks categories. A Competency Development Task Force comprised of 11 practitioners in their first 10 years of practice from every region in the country, then fleshed out the profile over the course of a two-day meeting where members of the task force drafted a profile intended to reflect the tasks actually performed and the knowledge and skills actually required of general practitioners at the time for admission to the profession. This draft was then reviewed by 30 practitioners identified and recruited with the assistance of the law societies. As the competency profile is intended to be national in scope the draft profile was also reviewed by a small working group of representatives of the Barreau du Québec and the Chambre des notaires du Québec to ensure that it was reflective of the nature of legal practice in Quebec.

In accordance with best practices, the revised draft profile was then validated through a survey of entry-level lawyers and Quebec notaries. The survey was designed by our consultants with advice and input from the members of the TAC. Almost 7000 members of the profession who

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had been called to the bar within the past five years were invited to participate in the survey of those invited, 1187 or 17.2% did so. Respondents were asked to rate each individual competency on two scales: how frequently they performed or used the competency; and how serious the consequences would be if an entry-level practitioner in their area of practice did not possess or was unable to perform the competency. Information was also gathered on the respondents' practice areas and settings and year of call to the bar. The data from the survey was used to refine the competency profile to ensure that it accurately reflects the competencies required of new practitioners today.

By adhering to best practices in the development of such profiles we can be confident that the Competency Profile approved by the Council of the Federation reflects the substantial legal knowledge, skills, and tasks that new members of the profession actually require when they begin the practice of law.

4. What is the status of the Competency Profile?

The Competency Profile has been approved by the Council of the Federation as a national standard. The next step is for law societies to consider adoption of the Competency Profile on the understanding that adoption is subject to the development and approval of a plan for implementation.

5. What does it mean to adopt the Competency Profile?

Although law societies are being asked to adopt the Competency Profile it is understood that adoption is conditional on agreement on a plan for implementation of national admission standards. At this stage, adoption of the Competency Profile will not require law societies to make any changes to their admissions practices or programs.

In approving the Competency Profile the Council of the Federation also approved a process for exploring possible options for implementation, including the critical questions of what teaching and training will be provided and how candidates will be assessed to ensure that they meet the standards. In the coming months members of the Steering Committee of the National Admission Standards Project, assisted by members of the TAC, will be gathering information on possible implementation options and exploring the implications of each for law societies, future candidates, and the goal of achieving a high level of consistency in admission standards. The Steering Committee has been specifically instructed to take into account the implications of each possible implementation option for the current admission practices of the law societies in Canada. Consultation with law society leaders and senior staff will be a critical component in the process leading to recommendations on implementation.

The Steering Committee's recommendations will be submitted for approval to the Council of the Federation and will then be referred to the law societies for their approval.

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6. What will this cost and what is the timing?

As was the case with Phase 1 of the National Admission Standards Project, the costs of exploring the options for implementation and developing a recommendation to Council will be covered by the Federation's existing budget. There will be no additional cost to the law societies. The Steering Committee has been directed to include with its recommendation an assessment of the resources, both local and national that will be required to manage the implementation process.

The Steering Committee has also been requested to provide a detailed roadmap of the process for implementation, a timeline for its work, and a plan to manage the transition to national standards. Regular progress reports to Council and the law societies will also be provided by the Steering Committee. The first such report is expected before the March 2013 meeting of the Federation Council.

7. Where can I get more information?

More details on the development of the Competency Profile and on the process that will be undertaken to develop recommendations for implementation of the profile are available on both the intranet and public website of the Federation of Law Societies of Canada (http://www.flsc.ca/en/national-admission-standards/). Materials available on the website include:

- a copy of the National Admission Standards Project Phase 1 Report (without appendices), which provides detailed background information on the project,
- a copy of the National Entry to Practice Competency Profile for Lawyers and Quebec Notaries, approved by Federation Council on Sept.20, 2012,
- a copy of the National Entry to Practice Competency Profile Validation Survey Report, which summarizes the results of the nearly 7,000 new legal practitioners surveyed to validate the competency profile. Full survey results will also be available shortly online, and
- a profile of Professional Examination Service, a non-profit organization with extensive experience in credentialing.

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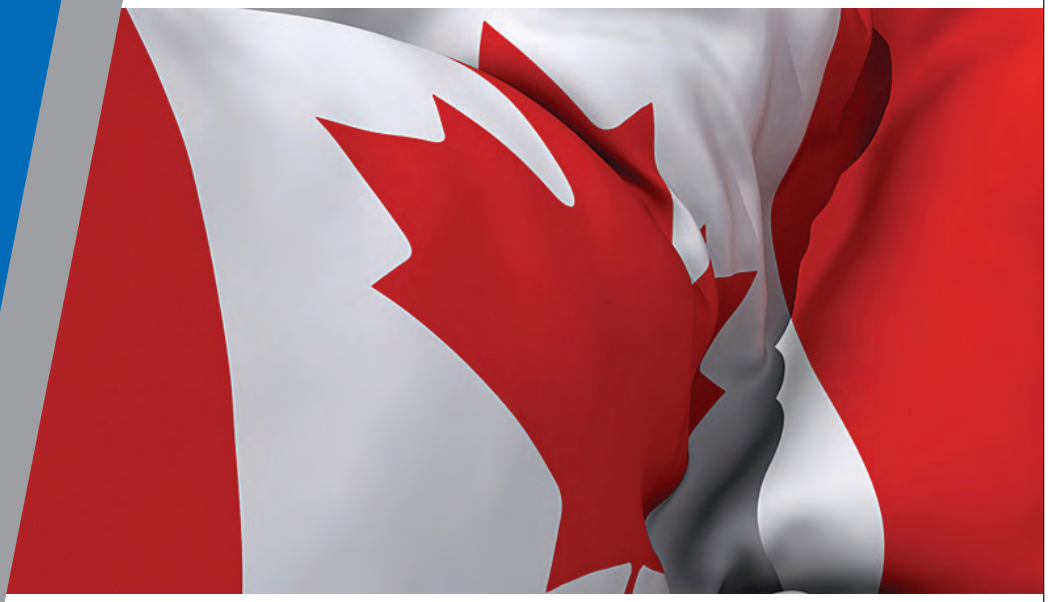
National Admission Standards Project



Phase 1 Report

September, 2012

FEDERATION OF LAW SOCIETIES OF CANADA • FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA •

Background

1. In October 2009 Council of the Federation approved a plan for a project to develop national standards for admission to the legal profession in Canada. Consistency in admission standards and candidate assessment were identified as key goals of the project.

2. The decision to embark upon a project to develop national standards for admission to the legal profession reflected an important strategic priority identified by Council and law society CEOs and ultimately incorporated into the Federation's strategic plan:

> *To develop and implement high, consistent and transparent national standards for Canada's law societies in core areas of their mandates.*

3. Probably the most compelling argument for consistent admission standards flows from the mobility of members of the legal profession in Canada. Since the signing of the National Mobility Agreement ("NMA") almost a decade ago, lawyers in Canada have been able to move with relative ease between jurisdictions. The Territorial Mobility Agreement and the Quebec Mobility Agreement ("QMA") brought the three northern jurisdictions and Quebec into the mobility regime. The recent addendum to the QMA extended mobility rights to Quebec notaries. Amendments to the labour mobility provisions of the Federal-Provincial-Territorial Agreement on Internal Trade ("*AIT*") have fundamentally altered the mobility landscape by rendering mutual recognition of professional licences mandatory.

4. Through the law societies' own rules and the recent legislative amendments to give effect to the changes to the *AIT*, admission to one law society effectively guarantees admission to all others (albeit on a restricted basis for members of the profession moving to or from Quebec). Although one of the underlying premises of the NMA was that the standards for admission in all Canadian jurisdictions were reasonably comparable, the reality is that there are some significant differences both in the standards and processes employed by each law society. The mobility of members of the profession between jurisdictions not only makes such differences difficult to justify, it makes them undesirable. In deciding to undertake the development of national admission standards Council recognized that common standards would provide each jurisdiction with the assurance that all legal professionals practising in their jurisdiction have met the same standards of competence regardless of where they are first licensed.

5. The implementation of fair access to regulated professions legislation in Manitoba, Ontario and Nova Scotia presented another reason for standardizing the criteria used to assess candidates for admission to the bar. Council recognized that with admissions standards and processes under scrutiny in these jurisdictions the existence of significant differences would be difficult to justify.

6. The project plan approved by Council recognized that consistency in admission standards should start with agreement on the criteria that applicants must meet. To that end two goals were identified for the first phase of the project: the drafting of a profile of the competencies ("Competency Profile") required upon entry to the profession and the drafting of a standard for ensuring that applicants meet the requirement to be of good character ("National Fitness and Suitability Standard"). As described later in this report, we anticipate that additional admission standards addressing training and assessment will be developed as these first standards are implemented.

7. The engagement of law society staff and volunteer leaders was identified as vital from the outset of the project. A great deal of expertise in the design and implementation of admissions policies and programs resides in the law societies; the project was designed to take advantage of this resource and to ensure the involvement of representatives from across the country. The project is overseen by a Steering Committee comprised of law society CEOs and volunteers – Don Thompson, Chair (Law Society of Alberta ("LSA")), Tim McGee (Law Society of British Columbia ("LSBC")), Alan Treleaven (LSBC), Michael Milani (Law Society of Saskatchewan ("LSS")), Allan Fineblit (Law Society of Manitoba ("LSM")), Robert Lapper (Law Society of Upper Canada ("LSUC")), Laurie Pawlitza (LSUC) (replacing Tom Conway), Lise Tremblay (Barreau du Québec ("Barreau")), Darrel Pink (Nova Scotia Barristers Society ("NSBS")), and Jonathan Herman, Federation CEO. President John Hunter has also been participating in the Steering Committee. Federation Senior Director Regulatory and Public Affairs, Frederica Wilson, is the project manager and additional support is provided by Daphne Keevil Harrold, Federation Policy Counsel.

8. Senior admissions staff members from five law societies – Lynn Burns (LSBC), Brenda Silver (LSM), Diana Miles (LSUC), Lise Tremblay (Barreau) and Frank O'Brien (Law Society of Newfoundland and Labrador ("LSNL")) - have played an important role in the project as members of the Technical Advisory Committee ("TAC"), providing invaluable input and practical guidance in the development of the Competency Profile. The TAC has also acted in an advisory capacity to the project Steering Committee. The law societies also participated actively in identifying and recruiting practitioners to work on the drafting of the profile as members of the Competency Development Task Force ("CDTF") and to act as independent reviewers of an initial draft.

9. Both credentialing and policy staff from several jurisdictions have also been involved in the work on the good character standard – Michael Lucas and Lesley Small (LSBC), Michael Penny and Angela Gallo-Dewar (LSA), Richard Porcher (LSM), Sophia Sperdakos and Naomi Bussin (LSUC) and Jackie Mullenger (NSBS).

Competency Profile

10. The identification of the essential competencies required upon entry to the legal profession is an important element in admission standards that are both fair and transparent. To assist in the drafting of the profile and in particular to ensure that the Competency Profile was developed in accordance with best practices we engaged Professional Examination Service ("PES"), a non-profit organization dedicated to excellence in credentialing. A profile of PES is attached as Appendix "A" to this report. Two consultants from PES have guided the work on the Competency Profile throughout this phase of the project.

11. Competency profiles setting out what applicants must know and be able to do already exist in Ontario, Quebec, the four western provinces and Nova Scotia. With the assistance of our consultants, members of the TAC worked with these existing profiles to create an outline of the competencies profile. This outline provided the basic structure of the profile, organizing the competencies into substantive knowledge, skills and tasks categories.

12. Working with the outline and structure provided by the TAC, the members of the CDTF, 11 practitioners in their first 10-years of practise from every region in the country, then fleshed out the profile. In the course of a two-day meeting in Ottawa, the CDTF drafted a profile intended to reflect the tasks actually performed and the knowledge and skills actually required of general practitioners at the time of admission to the profession. Thirty practitioners identified and recruited with the assistance of the law societies, reviewed and provided comments on the draft, which was then revised by the members of the CDTF during another in-person meeting.

13. As the Competency Profile is intended to be truly national in scope, applicable to both common law and civil law applicants, the draft profile was next reviewed by a small working group of representatives of the Barreau du Québec and the Chambre des notaires du Québec to ensure that it was reflective of the nature of legal practice in Quebec.

14. Consistent with accepted practices in developing such profiles, the revised draft profile was then validated through a survey of entry-level lawyers and Quebec notaries designed by PES with advice and input from the TAC. Almost 7,000 members of the profession called to the bar within the past 5 years were invited to participate in the survey. Respondents were asked to rate each individual competency on two scales: how frequently they performed or used the competency; and, the severity of consequences if an entry-level practitioner in their practice setting did not possess or was unable to perform the competency. Respondents also provided information on their practice areas and settings (private practice, public sector, solo practitioner, urban, rural, suburban etc.) and year of call to the bar. Of those invited to take the survey, 1187, or 17.2% did so, a rate consistent with return rates for other surveys of the profession. PES has advised that the rate is sufficient to provide statistically reliable data.

15. The task of reviewing the survey results to determine whether the individual competencies had been validated fell initially to the members of the TAC. To facilitate this review, PES broke the data down by jurisdiction, practice setting, location, and year of call. Determining whether an individual competency was validated involved analyzing the data to assess whether the competency was used or performed with sufficient frequency (once a month or less on average) in a sufficient number of jurisdictions and practice settings, and whether the respondents in a sufficient number of jurisdictions and practice settings deemed the consequences of failing to have or be able to perform the competency to be at least minimally serious.

16. The members of the TAC recommended that all competencies definitively validated using these criteria be included in the Competency Profile and that all of those clearly not validated be deleted. Applying the frequency and severity criteria a number of competencies were of indeterminate status, that is they met the threshold for severity of consequences, but not for frequency. Members of the TAC, under the guidance of our consultants, applied their judgment and subject-matter expertise to the empirical data to make recommendations to the Steering Committee on the inclusion or exclusion of each questionable competency. These recommendations and the supporting data were subsequently reviewed by the members of the Steering Committee. The final Competency Profile is attached as Appendix “B”. A summary of the survey data is attached as Appendix “C”.

17. The final Competency Profile is largely consistent with those profiles currently in use in various jurisdictions. It is divided into three sections: knowledge, skills and tasks. As with existing profiles, the majority of the competencies in the proposed profile relate to skills and the performance of specific tasks. The section on knowledge includes competencies related to the Canadian legal system, Canadian substantive law, procedural knowledge and knowledge of ethics, professionalism and professional responsibility. The profile does contain some substantive knowledge competencies not included in the national requirements for Canadian common law degree programs: the law of evidence, family law and the law of wills and estates all met the frequency and severity of consequences thresholds and so have been included in the profile. In considering the implementation of the profile one issue that will have to be addressed is where in the process leading to admission – law school, practical training, bar admission programs – each of the competencies would be acquired. In that process particular regard will have to be paid to the knowledge competencies not now included in the common law degree requirements. This may involve discussion with all of the relevant stakeholders, including representatives of the law schools.

18. A number of tasks included in the draft profile were not validated through the survey and the members of the TAC recommended they be deleted. In most cases these tasks were not validated in any jurisdiction. There were, however, a number of tasks that were validated by the Quebec notaries who responded to the survey, but were not otherwise validated. The tasks, which include such things as conducting a basic real estate transaction, drafting a basic will and drafting a power of attorney, are at the core of notarial practice in Quebec. The unique nature of notarial practice explains this disparity in the validation data. Given their importance to notarial practice in Quebec, all of these tasks have been left in the profile, but only for those candidates seeking admission to the Chambre des notaires.

19. The Steering Committee recommends that the Competency Profile attached as Appendix “B” be approved by Council as a national admission standard to be submitted to member law societies for their approval on the understanding that the approval is subject to the development and adoption of a plan for implementation. The process for considering implementation of the standard is discussed below.

Good Character Standard

20. Applicants for admission to the profession across Canada are required to be of “good character”, yet there is no agreed upon statement of exactly what an applicant must demonstrate to meet the requirement. Critics have argued that the standard is vague, difficult to define and apply, and creates uncertainty for applicants as a result. The drafting of a common good character standard is intended to remedy this by ensuring that the required elements of good character are clearly articulated and defensible.

21. A group of law society policy and credentialing counsel has been working to articulate the rationale for and the elements of the standard. The Working Group has also been asked to address the issue of fitness. Recognizing the importance of not confusing the two concepts (i.e. issues of medical fitness have nothing to do with an applicant’s character) the Working Group has concentrated first on good character. It anticipates beginning work on fitness in the fall.

22. Attached to this report as Appendix “D” is a draft framework for a *National Fitness and Suitability to Practise Standard* (“Draft Framework”). The use of “suitability” instead of “good character” reflects the concern over the ability to accurately define “character.” The Working Group is recommending that regulators move away from the notion of “character”, articulating in its place specific attributes, such as honesty, integrity and candour that members of the profession must possess and which together speak to the candidate’s suitability to practise law.

23. The Draft Framework opens with a statement of the principles that are relevant to assessing whether an applicant is suitable for the practice of law. The common mandate of the regulators to take reasonable measures to protect the public, set high ethical standards, and maintain public confidence in the profession are cited together with the essential expectations that the public has that members of the profession will act with honesty and integrity.

24. The over-arching principles are followed by a discussion of the factors relevant to an assessment of suitability. The Draft Framework identifies four key factors – respect for the rule of law and the administration of justice, honesty, governability and financial responsibility. The rationale for each is discussed and general guidance on the application of the factors is also included. The Draft Framework concludes with a discussion of the tools that can be used to gather information on suitability and guidance for investigations and hearings. A proposed standard questionnaire for use as an initial screening tool is attached to the Draft Framework as Appendix "1".

25. The Draft Framework is still a work in progress. In addition to addressing issues of fitness to practise, members of the working group have identified a need to add guidance on investigations and hearings. The Working Group has begun this work and expects to complete the draft in the late fall. The Draft Framework is being presented at this time for your information and will be circulated for consultation once it is complete.

Implementation of National Admission Standards

26. One of the primary motivations for Council's decision to undertake a project to develop national admission standards was the desire for consistency in admissions policies and procedures.

27. The project plan approved by Council contained the following statement of the goal of the project:

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

28. The mobility of members of the profession, particularly with the introduction of mandatory mutual recognition of credentials under the AIT, argues for a high degree of consistency in the standards applicants must meet for admission. Only by having consistent standards can each law society be assured that all members of the profession practising or licensed in their jurisdiction have demonstrated the same basic competence and suitability.

29. Approval of the national Competency Profile and a national fitness and suitability standard will be the first steps in achieving consistency. How the standards will be implemented, including the critical questions of what teaching and training will be provided and how candidates will be assessed to ensure they meet the standards, remain to be considered. This is the work of Phase II of the project.

30. Implementation of national admission standards may take many forms. Training may be developed and administered locally, nationally or through a combination of the two. Assessment may take the form of national, regional or local examinations or skills assessments, or some combination. The goal of consistency is unlikely to be met unless we agree to common assessment mechanisms, but the implementation of a common assessment mechanism may make possible the use of different teaching and training methods in different jurisdictions while achieving consistency in the outcome.

31. The existing admission processes in Canadian law societies share a number of essential features: all require that applicants have a law degree (a civil law degree in Quebec and a common law degree in the rest of the country); all require that applicants complete an articling or similar requirement; and all require applicants to successfully complete some form of assessment. But there are also many differences, perhaps the most significant of which relate to how and on what applicants are assessed; some law societies assess both skills and knowledge of substantive and procedural law, some test knowledge only, some use practical assessments, others rely exclusively on exams.

32. The Steering Committee recognizes that adoption of the Competency Profile as a national standard and consideration of the draft fitness and suitability standard will trigger many questions about implementation and the impact on the admission practices and processes of individual law societies. Before any recommendation on options for implementation can be made, the implications, advantages and disadvantages of each need to be fully explored and understood. Balancing this need for thoroughness is a recognition that a number of jurisdictions are under pressure to change their admissions programs, and we thus need to move quickly.

33. The Steering Committee recommends the following process for completion of the National Fitness and Suitability Standard and development of recommendations for the implementation of national admission standards:

(a) The Steering Committee be requested to complete the drafting of the National Fitness and Suitability Standard and be mandated to consult on the draft with the law societies with a goal to submitting the standard to Council for approval by June 2013;

(b) The Steering Committee be mandated to identify and explore the options for implementation of national admission standards, including options for teaching and training, and for mechanisms to ensure that all candidates meet the national standards, taking into account the implications of each option for law societies and future candidates and its likelihood to achieve a high degree of consistency in admissions;

(c) The Steering Committee be mandated to consult with leaders and senior law society staff as well as such other stakeholders as it sees fit on possible options for implementation;

(d) The Steering Committee be mandated to make a recommendation to Council on implementation of the national admission standards that includes a method for assessing compliance with the standards and addresses issues related to teaching and training of candidates;

(e) The Steering Committee be requested to include with its recommendation a detailed roadmap of the process for implementation, a plan to manage the transition to national standards, and identification of the resources (both national and local) that will be necessary to manage the implementation process;

(f) The membership on the Steering Committee be maintained with the addition of two new members, at least one of whom is a member of Council;

(g) The Steering Committee be requested to provide Council with an anticipated timeline for its work and to provide regular progress reports to Council and law societies, the first being provided no later than the March 2013 meeting of Council.

Stakeholder Engagement

34. Changes to standards for admission to the legal profession have the potential to have an impact on many different stakeholders. Law society leaders and staff, law deans and other members of the legal academy, law students, members of the profession and the public can all be expected to have an interest in the work of the National Admission Standards Project. The Steering Committee recognizes the importance of consulting with and keeping interested stakeholders informed.

35. As noted above, the law societies have been actively engaged since the outset of the project and this will continue in Phase II. In addition to the active involvement of many law society staff and other representatives, we have endeavoured to ensure that leaders and staff of the law societies have been kept informed about the content and progress of the project through letters from President John Hunter and, more recently, teleconferences with senior admissions staff and chairs of admissions and credentialing committees. These information sessions will continue throughout the project.

36. The development of the National Fitness and Suitability to Practise Standard (described above) will involve consultation with each law society, and it is likely that the views of other key stakeholders will also be sought. Consultation will also be an essential element in the identification and ultimate recommendation of options for implementation of the national standards. In addition, as work on implementation moves forward ensuring that the broader group of stakeholders is kept aware of the goals and progress of the project will be important.

Summary of Recommendations

37. The Steering Committee recommends that the Competency Profile attached as Appendix “B” be approved by Council of the Federation as a national admission standard.

38. The Steering Committee recommends that the Competency Profile be submitted to member law societies for approval on the understanding that the law societies’ adoption is subject to the development and adoption of a plan for implementation.

39. The Steering Committee recommends that the following process for completion of the National Fitness and Suitability Standard and development of recommendations for the implementation of national admission standards be approved by Council of the Federation:

(a) The Steering Committee be requested to complete the drafting of the National Fitness and Suitability Standard and be mandated to consult on the draft with the law societies with a goal to submitting the standard to Council for approval by June 2013;

(b) The Steering Committee be mandated to identify and explore the options for implementation of national admission standards, including options for teaching and training, and for mechanisms to ensure that all candidates meet the national standards, taking into account the implications of each option for law societies and future candidates and its likelihood to achieve a high degree of consistency in admissions;

(c) The Steering Committee be mandated to consult with leaders and senior law society staff as well as such other stakeholders as it sees fit on possible options for implementation;

(d) The Steering Committee be mandated to make a recommendation to Council on implementation of the national admission standards that includes a method for assessing compliance with the standards and addresses issues related to teaching and training of candidates;

(e) The Steering Committee be requested to include with its recommendation a detailed roadmap of the process for implementation, a plan to manage the transition to national standards, and identification of the resources that will be necessary to manage the implementation process;

(f) The membership on the Steering Committee be maintained with the addition of two new members, at least one of whom is a member of Council;

(g) The Steering Committee be requested to provide Council with an anticipated timeline for its work and to provide regular progress reports to Council and law societies, the first being provided no later than the March 2013 meeting of Council.

THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

October 5, 2012

Timothy E. McGee
Chief Executive Officer and Executive Director
The Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Mr. McGee:

Re: CBA Access to Justice Project: *Envisioning Equal Justice*

At its Canadian Legal Conference in August 2012, the Canadian Bar Association's Access to Justice Committee announced a project we're calling, *Envisioning Equal Justice*, designed to conquer barriers to sustainable improvement to access to justice in Canada, and develop potential solutions. The project addresses several recommendations in *Moving Forward on Legal Aid*, a report I wrote for the CBA in 2010. I am writing to tell you about the project, and invite your involvement as it unfolds.

The CBA has established five objectives to be advanced through the *Envisioning Equal Justice* initiative:

- develop a strategic framework for access to justice in Canada, including a more refined practical definition of what it is, with measurable indicators/standards/metrics to evaluate progress;
- encourage greater coordination of initiatives within that strategic framework;
- develop/revise CBA policies to support improvements in the public and private delivery of legal services;
- foster greater public ownership of access to justice issues; and
- develop tools for advocacy geared to improving publicly funded access to justice services, including legal aid.

I have a attached a description of the project which I invite you to share with interested colleagues.

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The CBA has been an active participant in the Supreme Court of Canada's Action Committee on Access to Justice in Civil and Family matters, chaired by Justice Thomas Cromwell, over the past several years. It is our expectation that the CBA initiative will complement and support the important work of the Action Committee, in particular by ensuring the Association and its members have the tools necessary to play their part in ensuring access to justice and bringing these resources to the table.

The CBA Committee has initiated a number of research projects to assist in the development of "building blocks" to achieve these objectives. Over the course of the next six months we will be seeking your input on various aspects of these building blocks. We will also be striving to find ways to change the conversation about access to justice, by making the conversation more inclusive and refocusing the dialogue based on what we have learned about access issues through this initiative. Throughout our work we will be continuing to look for ways in which we can enhance national strategic coordination to support our common goals of equal justice.

We will be holding a national Summit on Access to Justice, scheduled for April 25-27, 2013 in Vancouver, and invite you to save that date and join us there for further discussion on this important issue.

The Access to Justice Committee will be tabling its report at the 2013 Annual Meeting of CBA Council, held in conjunction with the Canadian Legal Conference in Saskatoon next August 18 – 20, 2013.

The Committee members and I would be pleased to discuss how we might collaborate on any of these initiatives, at your convenience. I realize that many organizations are also heavily involved in work to improve access to justice, and welcome ideas for coordinating and streamlining our respective efforts. Please feel free to also be in touch with the Project Director, Gaylene Schellenberg, at CBA's National Office (gaylenes@cba.org), if you have questions or require further information.

Yours truly,

Melina Buckley
Chair, Access to Justice Committee

November 15, 2012

Sent via mail

Melina Buckley
Chair, Access to Justice Committee
The Canadian Bar Association
500 – 865 Carling Avenue
Ottawa, ON K1S 5S8

Dear Ms. Buckley:

Re: CBA Access to Justice Project: *Envisioning Equal Justice*

Thank you for your letter dated October 5, 2012, and enclosed Project Description. I apologize for the delay in responding; I was away from the office until late October.

The Law Society of British Columbia would be pleased to participate in your planned April 2013 national Summit on Access to Justice. We will provide you with specific names of our representatives closer to the event date.

In the meantime, we will be happy to provide you with feedback on your proposed "building blocks" as you unroll them to the stakeholders.

Yours very truly,

Timothy E. McGee

/jac

cc: Art Verlieb, QC, First Vice-President
Law Society of British Columbia

Doug Munro, Staff Lawyer, Policy & Legal Services
Law Society of British Columbia

THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

"Tension at the Border": Pro Bono and Legal Aid

A Consultation Document prepared by the Canadian Bar Association's Standing Committee on Access to Justice

October 2012

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"Tension at the Border": Pro Bono and Legal Aid

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***Note**: This consultation document has been produced by the Canadian Bar Association's Standing Committee on Access to Justice for consultation only. It has not been approved by the CBA, and does not represent an official statement of CBA policy. It is intended to foster discussion. That discussion will be considered by the Committee in making its Final Report and recommendations to the CBA at the Canadian Legal Conference in August 2013.*

A. Introduction

This paper will consider the "tension at the border"[1] between publicly funded legal services, or legal aid, and services offered by the legal profession without charge, or pro bono legal services. This phrase is intended to capture several important issues surrounding the relationship between pro bono and legal aid.

For lawyers in private practice, there is often not a "bright line" between legal aid and pro bono work. Work on a legal aid file routinely involves a pro bono contribution, either because lawyers work for hourly rates that are significantly lower than what they normally charge, or continue work on a file after the legal aid plan stops paying for their work. It is also not uncommon for lawyers in private practice to prefer taking occasional pro bono files rather than dealing with the administrative requirements and constraints required by legal aid plans.

The primary focus of the paper will be the situation in Canada, but other jurisdictions are mentioned for comparison purposes. There is an increasing and widespread acknowledgement among justice system participants that the problem of unmet legal needs in Canada is serious and growing, and significant effort is being dedicated to finding creative new approaches to solve the problem. Certainly, both pro bono and legal aid are aspects of that discussion, and the legal profession is an important participant. One unfortunate response has been to point the blame and responsibility elsewhere – lawyers at governments, demanding new money for legal aid, or judges and governments at lawyers, demanding an undefined and seemingly unlimited amount of pro bono work. Underlying the finger pointing are uncertainty and confusion regarding key issues that require further discussion and analysis.

Many lawyers have responded to shortfalls in access to justice by volunteering legal services, either as individuals, by large law firms, or through pro bono organizations. While the legal profession is "stepping up" in significant ways, it cannot meet the huge demand alone. Nor, arguably, should it.

To what extent can the public's current unmet legal needs reasonably be addressed by pro bono work? If lawyers have a public duty to engage in pro bono work, either because of professional obligations or their monopoly on providing legal services, how much of that work can reasonably be demanded of volunteers? And, how sustainable is a social program that is increasingly reliant on the charity of a particular profession?

The questions don't stop there. If we know that legal services, including representation, are essential in some situations for a just result, then how can we justify some people not having that essential help when critical interests are at stake? While the profession has a role in meeting the

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1 This phrase is borrowed from the report on a roundtable in Victoria, Australia, discussed in *Moving Forward on Legal Aid*, by Melina Buckley (Ottawa: CBA, 2010). "The roundtable discussion noted that there is "tension at the border of legal aid and pro bono." The private legal profession has effectively subsidized and supported the legal aid system for many years through acting for reduced fees and doing extra unpaid work in legal aid cases. Anecdotal information suggests that in Victoria lawyers are becoming increasingly frustrated with the legal aid system, preferring on occasion to provide services at reduced fee or on a pro bono basis. Given the links between legal aid and pro bono services there is a need for a sounder working relationship between the two" (at 112). It should be noted that the profession also contributes to pro bono work in very deliberate ways, in addition to this type of pro bono that might be seen as incidental to legal aid work.

public's unmet legal needs, who but governments can ensure those essential services are consistently available through adequately funded legal aid programs?

We propose a new conversation and partnership between justice system participants, particularly legal service providers and governments. A principled discussion of what are truly essential legal services and who should be eligible for those services is required, with legal aid plans adequately funded to provide those services to the most vulnerable, low income populations. Pro bono work cannot and should not fill the entire void produced by government cuts to legal aid services. However, pro bono work and the many creative new approaches to deliver legal services now being explored can supplement government programs, to ensure that essential services to those not eligible for legal aid are available, and that options to enhance access to justice for the working poor and middle class are provided. As a genuine partnership between the Bar providing a predictable pro bono contribution, and governments adequately funding legal aid programs, equal justice could be a more realistic goal than it is currently.

B. Defining Pro Bono

Pro bono comes from the Latin term, *pro bono publico*, meaning "for the public good and for the welfare of the whole".[2] Over time, the phrase has become associated with the law, and specifically, the unpaid work that lawyers do. However, there are many different definitions of what actually constitutes pro bono work, and so the scope of the term is unclear.

Pro bono work is perhaps most often thought of as the efforts of a lawyer in providing free legal services to a client, just as that lawyer would provide services on a file for a paying client. The same obligations under lawyers' rules of professional conduct apply. Members of the profession may also supervise law students or others on a pro bono basis to provide legal services in alternative ways.

It is also commonly considered pro bono work when lawyers volunteer their work to advance the concerns of whole communities in an effort to achieve systemic improvements to the law and advance social justice. For example, in 2005 the CBA launched a constitutional challenge to the federal and B.C. governments, and the legal aid plan in B.C., for failing to adequately provide access to justice for low income people in that province. These efforts over a four year period were owed to the volunteer efforts of the CBA's test case counsel team, led by JJ Camp, Q.C. of Vancouver.[3]

According to the CBA's 1998 resolution, *Promoting a Pro Bono Culture in the Legal Profession*, lawyers work pro bono when they "voluntarily contribute part of their time without charge or at substantially reduced rates, to establish or preserve the rights of disadvantaged individuals; and to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations, or for the improvement of laws or the legal system."[4]

This more expansive definition would include other types of volunteer work done by lawyers, such as sitting on the Board of a legal aid provider or pro bono organization. It would also include "low bono" services where lawyers work for reduced pay, such as the amount they would earn if

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2 *Black's Law Dictionary*, 4th ed., s.v. "pro bono publico".

3 Other volunteer members of the CBA's test case counsel team were Sharon Matthews, Dr. Melina Buckley and Dr. Gwen Brodsky.

4 CBA Resolution 98-01-A. See, Standing Committee on Pro Bono; http://www.cba.org/CBA/groups/probono/

providing legal aid, or perhaps on a sliding scale for middle income clients. Finally, it might involve a financial contribution in lieu of pro bono service.

It could also include work further removed from providing services to low income people, such as volunteering with the law society, law foundation or a professional association. Some sources suggest the scope of pro bono might go so far as to include any unpaid work or services provided by a lawyer, even if totally unrelated to the law (such as a lawyer coaching a hockey team).[5]

While lawyers' involvement in their profession or their communities is without doubt commendable, to be most meaningful in the context of the proposals outlined later in this paper, pro bono work should be limited to the delivery of legal services to those who can't otherwise afford them, and have a direct connection to filling unmet legal needs.

C. Context for Pro Bono

Historically, lawyers have provided free legal help on occasion, in some circumstances. "Pro bono service can be traced to practices in the early Roman tribunals, medieval ecclesiastical courts, and to Scottish and English legal proceedings."[6] Bishops in the 12th century were required by scripture to assist indigent people with legal problems,[7] and subsequently required lawyers to provide services for spiritual, rather than monetary compensation.[8] English law required lawyers to represent the poor in the 15th century.[9]

Throughout the 20th century, lawyers have often provided free services, particularly for individuals who are members of their family, religious institution or community. A 1970s survey that found that two thirds of pro bono work lawyers were doing was for friends and relatives.[10] In addition, committed lawyers concerned about social justice have taken on test cases with the intention of achieving systemic change or asserting the rights or protections under the law of a certain group of people. For example, the Women's Legal Education and Action Fund (LEAF) has intervened in over 150 cases, using pro bono lawyers, to assert women's equality rights. [11]

Melina Buckley notes that "the legal profession has a long tradition of contributing its services to the community at no or reduced fees. The pro bono work of the profession pre-dates the rise of the modern, government-funded, organized legal aid system."[12] Before the creation of publicly funded

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5 See, Deborah L. Rhode, *Pro Bono in Principle and in Practice* (California: Stanford University Press, 2005) at 4, or Scott L. Cummings, "The Politics of Pro Bono" (2004) 52 UCLA L. Rev. 1 at 4.

6 Raj Anand with Steven Nicoletta, "Fostering Pro Bono Service in the Legal Profession: Challenges Facing the Pro Bono Ethic", paper prepared for the Chief Justice of Ontario's Advisory Committee on Professionalism, Ninth Colloquium on the Legal Profession, Toronto 2007.

7 Zino I Macaluso, "That's O.K., This One's on Me: A Discussion of the Responsibilities and Duties Owed by the Profession to do Pro Bono Publico Work" (1992) 26 U.B.C. L. Rev. at 6.

8 Lorne Sossin, "The Public Interest, Professionalism, and the Pro Bono Publico" (2008) 46 Osgoode Hall L.J. 131 at 135.

9 *Supra*, note 5 at 21.

10 Barbara A. Curran and Francis O. Spalding, *The Legal Needs of the Public: preliminary report of a national survey by the Special Committee to Survey Legal Needs* (Chicago: ABA, 1974).

11 http://leaf.ca/legal-issues-cases-and-law-reform/

12 Melina Buckley's 2009 original working draft, *Moving Forward on Legal Aid* (unpublished, available through CBA National Office) at 314.

and operated legal aid plans in the 1960s and 1 970s, some provinces offered a type of "legal aid" by organizing what we would now call a pro bono referral service for people who could not pay for legal counsel.[13] The profession was called upon to volunteer to be matched with those in need as an element of their professional responsibility.[14] In Canada, the first civil "legal aid" program was developed in Manitoba in 1937. The "Law Society of Manitoba set up a program through which poor clients could apply to a special committee for a certificate appointing a lawyer free of charge" and also use a "Poor Man's Lawyers Centre" staffed by volunteer lawyers".[15] A criminal version was established by the Law Society a decade later, again the first of its kind in Canada.[16] However, the problem in Manitoba and elsewhere where similar programs were subsequently established, was that fairly small numbers of lawyers volunteered and were soon overwhelmed by client demands, in addition to the organizations themselves being underfunded and often run by volunteers. These somewhat makeshift pro bono programs eventually proved to be unsustainable.[17]

Although there is clearly some overlap between legal aid and pro bono, they have developed out of somewhat different traditions. "Early pro bono work by private lawyers was largely based on two principles: charity and professionalism. The rise of legal aid, on the other hand, was based on a concept of rights – that is, people are entitled to legal information and assistance. Public funding is an essential part of a government legal aid scheme as, in theory, it removes the need to rely on the "charity" of the profession and it gives the system public accountability. However, a reliance on public funding means that the legal aid budget is limited, particularly in a climate of reduced government spending on services in general....".[18]

According to Ab Currie at the Research and Statistics Division of Justice Canada:

> Legal aid grew out of a pro bono system that prevailed in most provinces up to the mid-1960's. As an expression of professional responsibility, lawyers would take on a few cases per year at no charge for indigent people. Organized legal aid began in some provinces in the mid-1960's. By the early 1970's there were legal aid plans in every province and territory, and a federal program for sharing the cost of criminal legal aid with provinces and territories was in place. In the early 1970's federal funding became available for civil legal aid under the Canada Assistance Plan.[19]

By the 1990s, addressing the unmet legal needs of the poor was accepted as more of a government responsibility than a professional obligation.[20] As a public social service, legal aid provided help in a more systematic, equitable and efficient manner than the earlier pro bono efforts had achieved.

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13 Sossin, *supra*, note 8 at 135.

14 For example, the work of the Salvation Army in British Columbia, Needy litigants Committee in Alberta, a Law Society of Upper Canada project founded in 1951, and the Poor Man's Lawyers Centre in Manitoba.

15 See, Ron Perozzo,Q.C. (Chair), A Review of Legal Aid in Manitoba (Winnipeg: 2004) at 8. http://www.gov.mb.ca/justice/publications/pdf/le.galaidreviewfinal.pdf

16 *Ibid.*

17 Sossin, *supra*, note 8 at 8.

18 Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010) at 121.

19 Federal funding for civil legal is now said to be in a global transfer called the Canada Social Transfer (CST), though provincial governments have at times disputed that claim. See also, Ab Currie, "Some Aspects of Access to Justice in Canada", http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/op00_2-po00_2/b3.html

20 Sossin, *supra*, note 8 at 8.

People were eligible based on demonstrated financial need and a legal situation sufficiently serious to justify the public expenditure, as defined by provincial and territorial legal aid plans.

According to Professors Zemans and Monahan, in *From Crisis to Reform: A New Legal Aid Plan for Ontario*, a:

> kind of open-ended, demand-driven program was not uncommon in the 1960s and 1970s, when government revenues and budgets were constantly expanding. But in the more fiscally conscious 1990s, governments of all political stripes in Canada have come to assume that the vast majority of government programs must be operated on a fixed budget, and that those funding the service must have the ability to control their overall costs.[21]

Legal aid providers, offering legal representation through specialty clinics, certificates offered to private lawyers or by paying staff lawyers, have had to determine increasingly limited priority areas of coverage for increasingly impoverished clients, to meet limited budgets.

There has been a significant issue of disparity in coverage across Canada. This was exacerbated as a result of a change to federal support for civil legal aid in the mid-1990s, so that federal funding for civil legal aid was no longer linked to the amount a jurisdiction actually spent on those services, but rather included as part of a global transfer given to each province for several priority areas, initially including health and post-secondary education. In addition, a declining federal contribution through cost sharing agreements for criminal legal aid, and a general shift in economic climate, has meant that legal aid plans have been forced to make deep cuts since the mid-1990s. Most plans have decreased financial eligibility levels to access services to approximately social assistance levels, so people working a full time job at minimum wage would not qualify. In addition, they have narrowed the range of services that are provided, and in parts of the country, even services that would provide some representation by counsel in cases involving fundamental interests, such as to prevent homelessness, to maintain government benefits, or to fight for custody of children, are not provided. Some plans have also required client contributions or repayment.

With this added fiscal restraint, plans have come to rely heavily on lawyers to contribute time and money to the operations of the legal aid system, though that contribution may not always be called "pro bono" work as some payment is often involved. For example, certain plans have at times instituted "holdbacks", where the legal aid plan would keep a percentage of the amount owed to a lawyer on a legal aid file, and only pay it as the fiscal year ended if sufficient funds remained. Others cap paid hours for a legal matter below those often required, relying on lawyers to ask for more time, or complete the remaining hours on the file pro bono. All pay hourly rates for lawyers' time significantly lower than what the lawyers would normally charge, and sometimes at levels insufficient even to cover normal office overhead.[22]

There have been important changes and innovation in the services provided by legal aid plans in recent years. There is a marked trend away from providing legal representation and toward providing legal information, summary advice and self-help materials. This allows legal services to benefit more people, but may abandon the most vulnerable and marginalized populations who may not be capable of taking full advantage of those options and require actual representation.

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21 (Toronto: York University Centre for Public Law and Public Policy, 1997) at 1.

22 In New Brunswick, for example, lawyers on legal aid certificates are paid between $58.00/hour and $70.00/hour, depending on the type of legal matter and year of call.

Recent years have also brought about a significant expansion of organized pro bono. Pro Bono Students Canada was formed in 1996 and now operates out of 21 law schools across the country. In the last decade, formal pro bono organizations have been established in several provinces, providing an infrastructure and paid staff. Formal organizations now exist in 5 provinces; Ontario (Pro Bono Law Ontario),[23] B.C. (Access Pro Bono),[24] Alberta (Pro Bono Law Alberta),[25] Saskatchewan (Pro Bono Law Saskatchewan)[26] and Quebec (Pro Bono Quebec).[27]

These organizations generate and facilitate opportunities for lawyers and law students to provide pro bono legal services and increase awareness of the opportunities. The organizations supply administrative support, an intake and screening process to ensure that clients meet established financial criteria and need the type of assistance offered by the organization, and a roster of volunteer lawyers to be called upon as needed, or who regularly attend at a designated location. Once a client and lawyer are matched, the file might proceed as any other regular paying client file would proceed, or the lawyer or organization might offer assistance with only certain aspects of the file, or provide referrals, legal information or self-help materials.

In recent years, there has also been significant growth in pro bono departments within larger law firms in Canada, again providing support and structure to facilitate pro bono work supported by the firm. Some large firms second junior associates or articling students to legal aid offices or other projects.

These initiatives can be expected to build on those explored in other countries. In Australia, "law firms are building multi-tiered relationships with pro bono partners in the community, particularly with Community Legal Clinics (CLCs). These relationships rely on the following forms of legal support:

- Providing legal advice and representation to clients referred by CLCs;
- Providing legal advice to CLCs on particular matters that require specialized assistance;
- Researching and drafting law reform submissions, and undertaking general legal research;
- Seconding to CLCs full and part time law firm staff on a sessional or short-term basis;
- Preparing and updating Public Legal Education and Information materials;
- Advising about internal management issues (e.g. taxes, incorporation);
- Providing training and mentoring to community organizations and CLC lawyers;
- Supporting co-counsel arrangements; and
- Working with organizations towards particular law reform proposals."[28]

Many pro bono organizations are able to allow for more flexibility as to who qualifies for help than that allowed by legal aid programs. Gillian Marriot, Q.C., the Executive Director of Pro Bono Law

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23 http://www.pblo.org/

24 http://www.accessprobono.ca/. Access Pro Bono was created in 2010 when the Western Canada Society to Access Justice and Pro Bono Law of British Columbia merged.

25 http://www.pbla.ca/

26 http://www.pblsask.ca/pr obonoprograms.shtml

27 http://www.probonoquebec.ca/en/

28 See Buckley, *supra* note 12 at 292.

Alberta (PBLA) says that in her province, as a result of reduced funding, legal aid is intended for the poorest residents, limited services are provided, and users are expected to reimburse the Plan. Pro bono clinics have more lenient financial eligibility criteria, and broader and different areas of coverage, with significant discretion as to which cases will be accepted. This extends to the Volunteer Lawyer Service, a roster program operated by PBLA with capacity for conducting test case litigation using volunteer lawyers. Three kinds of clinics offer pro bono in the province. One is a model that incorporates staff lawyers who then rely on pro bono assistance from other lawyers, and those clinics are funded and sustainable as independent clinics. Second, PBLA organizes one day or limited engagement events, engaging members of the private bar to provide free direct service. The third is a duty counsel project staffed by volunteer lawyers that operates in the provincial court, Civil Claims Division.

D. Pro Bono as a Professional Responsibility

Various explanations are offered as to why lawyers should do pro bono work. These explanations include that lawyers have a professional duty to ensure access to justice and must respond to a clear and growing public need for legal help. A lawyer's contribution to pro bono is also said to balance the privilege of self-regulation and act as a counterpart to the monopoly lawyers enjoy on providing legal services.

In an address to the 2010 Pro Bono Conference of Canada, David Scott, Q.C., a founding member of Law Help Ontario, said:

> it is generally acknowledged that lawyers have a professional responsibility to contribute to effective access to justice for low income citizens. The obligation is cultural, associated with the unique positions which lawyers have occupied in the administration of justice. Occupying the field, and controlling the delivery of services as we do, we have traditionally recognized a responsibility to serve the public within reason, regardless of ability to pay.[29]

Some recognition of the important role of pro bono services is also found in provincial and territorial *Codes of Professional Conduct*. In 2010, Scott provided this summary:

> Rule 4 of Alberta's *Code of Professional Conduct* expresses the duty in positive terms, requiring that lawyers contribute to the profession's effort to make legal services available to all, regardless of ability to pay.[30] Ontario's pro bono rule is expressed in somewhat more hopeful terms, identifying the provision of pro bono services as part of "the best traditions of the legal profession." Saskatchewan's rule is similar in tone. The B.C. and Quebec *Codes of Professional Conduct* on the subject are more abstract than in Saskatchewan or Ontario.[31] All provinces have "embraced, in a variety of forms, the notion of broad-based access to justice through pro bono service."

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29 Address at 3rd Annual Pro Bono Conference, September 15-17, 2010, Calgary, Alberta.

30 *Ibid.* Note that since the time of Scott's article, the Alberta *Code* was amended. Rule 1.01 now refers to lawyers' duty to "uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions." The commentary to that Rule says lawyers are encouraged to address the Rule "by participating in legal aid and community legal services programs or providing legal services on a pro bono basis."

31 Note that some other provinces are silent with respect to a duty to provide pro bono services.

> In terms of statutory obligations, *Ontario's Law Society Act*, in section 4(1), speaks directly to the subject of access to justice, fixing the Society with a positive duty to "facilitate access to justice for the people of Ontario." Obviously, this is a mandatory requirement expressed with legislative force."[32]

In terms of the amount of pro bono hours that should be expected, both the ABA and the CBA have suggested that 50 hours per year is an appropriate amount of pro bono work per lawyer.[33] Pro bono work is included in Rule 6.1 of the ABA *Model Rules of Professional Conduct*, originally enacted in 1983, and revised in 1993 and 2002. It has now been adopted by several states in their rules of professional conduct. The Model Rule says:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and (b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.[34]

The CBA's 1998 resolution says:

> It is inherent in the professional responsibility of a legal practitioner to voluntarily contribute an identifiable part of time without charge or at substantially reduced rates:
>
> - to establish or preserve the rights of disadvantaged individuals;
> - to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations; or
> - for the improvement of laws or the legal system.
>
> Each member of the legal profession should strive to contribute 50 hours or 3% of billings per year on a pro bono basis.

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32 Scott, *supra*, note 29.

33 See, ABA Model Rule 6.1 http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html and CBA Resolution 98-01-A; http://www.cba.org/CBA/groups/pdf//98-01-A.pdf

34 *Ibid.*

> (The Canadian Bar Association should) take steps to encourage and promote this level of pro bono activity and to recognize pro bono efforts undertaken by members of the legal profession in Canada.[35]

Canada's formal pro bono organizations commonly stress two important principles, that they are assisting the profession in meeting a professional responsibility to provide pro bono services, and that they are not intended to replace an adequately funded public legal aid system.

For example, the Executive Director of Access Pro Bono in B.C., Jamie Maclaren says:

> Each pro bono organization — young or old — pursues the same basic mission: to increase access to justice through the provision of pro bono services to individuals of limited means. Each pro bono organization also operates according to the core principle that pro bono services should complement rather than substitute for a properly funded legal aid system.[36]

Likewise, Pro bono Law Saskatchewan's website says:

- pro bono services are meant to complement, not replace, an adequately funded legal aid system;
- pro bono service should be endorsed and encouraged within the profession as a professional responsibility shared by all in the profession.[37]

Lorne Sossin argues that the current arguments for pro bono in the public interest are confusing and lack coherence, and that the debate is "adrift" and "rudderless". He offers an alternate argument for pro bono, noting that public interest in pro bono is based on a framework of rule of law, access to justice and social justice arguments. Lawyers are the guardians of the rule of law and have a clear interest in ensuring that all have access to justice, but they are also dedicated to serving their own clients and making a living. If advancing the public interest is the goal, lawyers would need to consider whether providing service on a particular pro bono file will do that, before providing the client with pro bono legal representation or assistance.[38]

Pro bono work is frequently promoted by the profession for such reasons as that it is good for marketing, reputation and status in a firm, which Sossin notes run contrary to public service aspirations as essentially based on self-interest. While lawyers and pro bono organizations are certainly motivated by the desire to give back to their communities and help individuals in need, they also routinely offer reasons for the profession to engage in pro bono work based on self-interest. These include that engaging in pro bono can:

- change the public perception of the profession
- enhance the reputation of a firm
- expose lawyers to a broader range of clients and social justice issues
- help lawyers develop new marketable skills
- provide lawyers with a feeling of personal satisfaction in contributing to the social good

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35 *Ibid.*

36 Jamie Maclaren, "Integrating pro bono and legal aid" (October 30, 2009) *The Lawyers Weekly*.

37 http://www.pblsask.ca/about.shtml

38 Sossin, *supra*, note 8 at 147-158.

- improve retention and performance for law firms
- give young lawyers learning opportunities, and more legal skills
- allow law firms to recruit the best young lawyers.

David Scott similarly makes a "business case" to the profession as to why pro bono is in the self-interest of the profession. His argument is based on four points, firms need to meet their regulatory requirements for professional compliance, promote the best interests of their firm, meet their clients' needs, and elevate their firms' presence in the community.[39]

Scott L. Cummings suggests that rather than being an age old tradition, the concept of pro bono as a professional responsibility is actually relatively new. He notes that it was only first referred to in the ABA Model Rules of Professional Conduct as a "professional duty" in the 1980s.[40] Similarly, as discussed above, it was in 1998 that the CBA first referred to pro bono as a professional duty, as part of the implementation of recommendations from its Systems of Civil Justice Task Force Report.[41]

In addition, it has often been observed that an increased reliance on, and demand for organized pro bono services, along with recognition of pro bono work as a responsibility within lawyers' codes of professional conduct, has coincided with the erosion of public funds for legal aid programs. For example:

- Lorne Sossin says that "It is perhaps no coincidence that the rejuvenation of pro bono as an element of legal professionalism coincides with the demise of the profession's stewardship over legal aid", and "(i)ronically, the failure of legal aid schemes to meet the still growing needs of the poor may be seen as a catalyst for the rise of pro bono programs and organizations in the later 90 and early 2000s."[42] He also notes that pro bono has been particularly relevant when legal aid is unavailable, and that efforts for more developed and organized pro bono may undercut legal aid.[43]
- Jamie Maclaren says that "[t]he increasing vitality of Canada's pro bono organizations should, on the one hand, inspire considerable pride among Canadian lawyers, since it reflects a pervasive spirit of benevolence and a healthy respect for the rule of law. On the other hand, it should raise considerable concern over the inability or unwillingness of governments and the profession to make our justice system more accessible, more equitable and more efficient. The growing complexity of our judicial processes calls for substantial reform, but it is no coincidence that the current decline in access to justice parallels the gradual dismantling of legal aid in most provinces.[44]
- And, Melina Buckley says that "(c)utbacks in government support for legal aid programs have led to a substantial increase in pro bono activities in many countries and a move

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39 David Scott, Q.C., "Pro Bono Services by the Practicing Bar: The Business Case" (Address to Law Firm Managers, Petroleum Club, Calgary, Alberta, May 29, 2008).

40 Rhode, *supra*, note 5 at 4.

41 http://www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf

42 Sossin, *supra*, note 8 at 136.

43 *Ibid.*

44 Maclaren, *supra*, note 36.

toward greater organization and integration of pro bono programs within legal aid programs and/or the court system itself".[45]

E. Potential and Limits of Pro Bono

Regardless of the impetus for pro bono, the legal profession has embraced pro bono work as its contribution to assist with providing access to justice, and that contribution is steadily growing. Formal and informal pro bono organizations now exist across Canada, and assist thousands of clients each year.

In 2011, Pro Bono Law Alberta, in addition to the CBA-Alberta Branch, and Legal Aid Alberta, provided a coordinated response from the legal community to assist residents with the aftermath of wildfires at Slave Lake. Access Pro Bono in B.C. receives over 25,000 requests for assistance each year, and provides a Court of Appeal Roster program, among several other programs, providing free legal counsel to litigants in civil, criminal and family law appellate cases. Pro Bono Law Saskatchewan offers free legal clinics in locations across the province to those who qualify financially, and matters can be referred on to a Panel Program for legal representation if there is a match between the case and the expertise, capacity and geographic location of a volunteer lawyer. The CBA and Pro Bono Law Ontario have partnered to make legal counsel available for litigants seeking leave to take their cases to the Supreme Court of Canada. Pro Bono Law Ontario assisted 13,758 clients last year.[46] And, Pro Bono Quebec receives commitments of pro bono hours from law firms in the province, and puts them in a virtual "bank". As it receives a request for legal services, it chooses a firm to match the request, and dips into its bank for the required hours.

In the United States, pro bono has a much longer history than in Canada, and is "an integrated part of the American justice system. In fact, the ABA includes as among its stated goals, "to integrate pro bono representation into the system for delivering legal aid services to the poor."[47]

Melina Buckley notes that "pro bono efforts in the United States continue to expand and engage more private attorneys, providing greater levels of service. The federal funder, the Legal Services Commission (LSC) requires that each LSC-funded provider expend 12.5 percent of its LSC funding for private attorney involvement. There are also substantial efforts by both the ABA and state and local bar associations to increase pro bono activity among all segments of the practicing bar, including government attorneys and corporate counsel."[48] The judiciary plays a central and important part in encouraging and establishing pro bono efforts in the United States. A 2004 ABA survey found that 2/3 of respondents provided pro bono services, and 46% said that they met the ABA target of at least 50 hours of pro bono services per year.[49]

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45 Buckley, *supra*, note 12 at 111.

46 http://www.pblo.org/news/article.421092

47 Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from B.C. and Abroad* (Vancouver: SPARK B.C., 2004) at 59-60, cited in Buckley, *supra* note 8, at 305.

48 Buckley, *ibid.*

49 ABA Standing Committee on Pro Bono and Public Service, Supporting Justice II: A Report on the *Pro Bono* Work of America's Lawyers (Chicago: ABA, 2005) http://apps.americanbar.org/legalservices/probono/report2.pdf

While pro bono legal services certainly have the potential to enhance access to justice for clients, there are inherent limits to the capacity of pro bono work to address the unmet legal needs that currently exist in Canada.

First, pro bono programs may link lawyers who specialize in one area of law with a client requiring services in a completely different area, either with or without additional training. This can be inspiring and exciting for lawyers whose practices routinely involve little contact with clients, or with clients living in poverty. Law students are also used to provide legal assistance to clients needing pro bono services, generally though with qualified lawyers as supervisors. Law firms may assign junior associates to a pro bono file, at least partially because that junior will gain legal experience and knowledge while engaged in the work. Offering lawyers or students who are not knowledgeable in the area of law involved may well impact the quality of legal help offered. One response is that the underlying rationale of pro bono is that the good should not be the enemy of the best, in other words, that some legal help is better than none at all.[50]

Second, pro bono organizations may be limited in the populations they can assist, and as a private endeavour, there is less expectation that services will be available equally across a province, or for all those in similar circumstances with particular legal needs. For example, Law Help Ontario provides some actual legal representation, but only in two places in Ontario - Toronto and Ottawa - and not for litigants who need help with family law matters, which is the greatest area of need for civil legal assistance in the province.[51]

Third, as noted by Melina Buckley in *Moving Forward on Legal Aid*, there are ambiguities as to where legal aid should end and pro bono work begin. She reviews a study in Australia that divided legal work into three categories; publicly funded legal aid cases (mainly family and criminal law), legal aid "overflow" cases (those that should be funded but are not, like poverty law matters), and public interest or public benefit cases.[52] By far the biggest focus of pro bono efforts has been on the second, legal aid "overflow" cases. The study commented on continued disagreement about whether these cases should be dealt with on a pro bono basis, due to concern that as the private profession picks up these cases, it essentially lets governments "off the hook" of fulfilling their responsibilities to the public. Whether private lawyers should be filling the gap left by the reduction in legal aid was questioned, and some felt that doing so is counter-productive in that it may reduce the likelihood that more money will be injected into the system by government.

The discussants recognized that pro bono work plays an important role in the justice system and stressed that the profession has a commitment to doing work pro bono regardless of what is happening with legal aid. They also noted that many clients ineligible for legal aid will also not be able to get someone to take their case on a pro bono basis. They noted a significant area of unmet need for legal services that cannot be filled by pro bono efforts.[53]

Jamie Maclaren says that it is the uneasy "relationship between legal aid and pro bono that causes a regular conundrum for pro bono organizations. Wherever and whenever legal aid cuts are made,

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50 See discussion in Rob Atkinson, "A Social Democratic Critique of Pro Bono Publico Representation of the Poor: the Good as the Enemy of the Best" (2001) 9.1 *Journal of Gender, Social Policy and the Law* 142.

51 http://www.lawhelpontario.org/ See, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Legal Needs Project Steering Committee, 2010).

52 Buckley, *supra*, note 12 at 112.

53 *Ibid.*

pro bono organizations are compelled to fill the resulting vacuum by deploying pro bono services of an inherently less dependable nature than their forerunners. Though this strategy invariably succeeds in increasing access to justice by serving otherwise unmet legal needs in the short-term, it alleviates some political pressure on governments to maintain or increase legal aid funding, and it arguably weakens the legal service delivery system in the long-term."[54]

Considering both the potential and the inherent limits of pro bono, there are important distinctions as to what legal aid and pro bono work generally offer to the public. They can be complementary, but are often not interchangeable:

1. Legal aid responds to public demand for a certain kind of service. Pro bono is generally supply driven – how many lawyers in the area are available to help that day.
2. Legal aid plans, while particular to each province and territory, will ideally prioritize the most critical legal matters. Some pro bono organizations, again noting that there are significant differences across the country, decline the same cases, for example, family law, criminal law or domestic violence cases. Both deal with an unmanageable amount of unmet need, so also must determine what part of that need they can address. For example, Pro Bono Law Ontario's website states:

   > We CANNOT help you at the centre with: family law matters, criminal cases, human rights, landlord and tenant matters, etc. Please refer to our online resources for information that might be available in these areas.[55]

3. Legal aid plans have consistent and detailed criteria for assessing financial eligibility and which cases will be accepted. Pro bono may be available to a greater number of people, based on more flexible criteria in terms of both income and type of case.
4. Legal aid plans will refer eligible clients to a roster of lawyers specializing in the relevant area of law for that client, to a specialty clinic or to staff lawyers with practices limited to the relevant area of law. Pro bono organizations may refer clients to a lawyer or student without previous experience in the area of law at issue, sometimes offering training to that lawyer or student.
5. Although not without challenges, legal aid plans will attempt to provide coverage somewhat equitably throughout a province or territory. Pro bono organizations and large law firms may offer help depending on a readily available supply of lawyers, or resources to set up administrative support.
6. Legal aid plans determine public interest priorities in keeping with the public funding they receive and constitutionally mandated coverage areas. Pro bono organizations may determine public interest priorities based on input from the profession and/or those who fund or administer the necessary infrastructure for pro bono as to the services the profession can most efficiently offer.

F. Continuum of Service

Given the current economic and political climate, it is unrealistic to anticipate significant improvements to legal aid funding in the near future. Instead, the focus for public funding to increase access to justice seems likely to continue to be on providing services that can assist many

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54 Maclaren, *supra*, note 36.

55 *Supra*, note 23.

people, like web-based public legal information and self-help materials, and away from providing actual legal representation to those most desperate for assistance. Even essential legal needs will likely continue to be addressed inconsistently across the country. In the event that there was a renewed commitment to do more to adequately fund legal aid in Canada, certainly not all important legal services would likely be included and there would still be a gap between who is financially eligible for legal aid and who can afford to pay for their own lawyers for essential legal services.

To have greater clarity and certainty as to who is responsible for providing essential legal services, an initial important question is what services do we, as a society, consider "essential." If some services are considered essential, then it can be argued that they must be fairly awarded to all those who need them and qualify financially, and only governments can ensure that is what consistently happens.

The CBA's 1993 *Charter of Public Legal Services* dealt with the essential legal services as follows:

(a) **family law**, including child welfare matters where the state is involved as a party, custody and access, independent representation for children who have an interest apparently separate from the parents or guardian, proceedings to prevent or relieve domestic violence, maintenance proceedings, divorce and nullity proceedings, division of matrimonial property (subject to financial eligibility), paternity and adoption;

(b) **criminal law**, including all indictable offences, all summary conviction offences in which conviction is likely to lead to imprisonment or loss of means of earning a livelihood and other summary conviction cases where special circumstances exist which require counsel to ensure the fairness of the adversarial process; and all Crown appeals therefrom and conviction and sentence appeals by an Accused where there is apparent merit or a miscarriage of justice;

(c) **immigration matters**;

(d) **administrative law matters** which present real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, including Workers' Compensation, Welfare, Unemployment, Insurance, housing, pension, education, and human rights cases;

(e) **other civil matters** presenting real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, such as foreclosures, residential tenant evictions, uninsured motorists, Charter proceedings and other proceedings where a person is unable to retain counsel and the matter is not capable of being fairly resolved by other means.

It is also essential that public legal education and advice is available for all members of society in order for them to know, respect and exercise their legal responsibilities and rights, to prevent legal problems, and to help themselves to resolve legal problems without or with limited need for lawyers and courts.[56]

The issue of defining essential legal services is currently again being considered through the CBA's *Envisioning Equal Justice* project, under the heading of National Standards for Legal Aid. Reference to the results of research on that aspect of the project will inform this discussion in the coming months.

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56 Resolution 93-11-A.

As noted above, there is a certain lack of predictability as to what the public can expect of a pro bono organization, as it is often supply driven and the services provided vary significantly. Rather than looking to pro bono to replace all that should be provided through public funding, given the interests at stake and the vulnerability of the people who need help, narrowing the services and population to be served through pro bono would make the profession's contribution more targeted and achievable. For services that fall outside of the ambit of what and who can be publicly funded, the profession has shown that it can play an important role in filling the access to justice gap.

We see essential legal matters as falling on a continuum. Governments must be responsible for essential legal needs of the most impoverished, vulnerable and marginalized members of society. Essential legal needs for the most well off, on the other hand, can be addressed through the private market for legal services. Pro bono services can fill an important gap between the two extremes.

We suggest that for the justice system to operate as a coherent whole system, a structured and principled approach that clearly defines what are "essential" legal services is required. Providing those services to the poorest among us must be for governments to accomplish. Lawyers' fees are within the reach of those on the other end of the economic spectrum for their essential legal needs. Helping the working poor and middle class in the middle range with access to essential legal services, perhaps in new and innovative ways, would provide reasonable parameters for the profession's contribution.

Innovations include changes to law society restrictions to allow for limited scope representation or "unbundled" services. Changing the mindset where the only options are "full service" or "no service" creates new possibilities for collaboration, including public-private programming that is adaptable to urban, suburban, semi-rural and rural areas.[57] "It provides a potential referral outlet for legal aid overflow in the form of pro bono lawyers willing to carry on where legal aid lawyers have reached their mandatory limits. A legal aid lawyer, a pro bono lawyer and their common client could also work together to craft an efficient and neatly spliced series of unbundled tasks that takes advantage of their various proficiencies and capacities."[58]

G. Improving the Partnership

In *Moving Forward on Legal Aid*, Melina Buckley identifies two important trends in the area of pro bono work. These are:

- Greater integration between legal aid providers and pro bono schemes and individual law firms and the formation of multi-tiered ongoing partnerships between these entities; and
- A move toward quantifying the amount of pro bono work carried out including more American states making it mandatory for attorneys to report on pro bono activities.[59]

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57 Maclaren, *supra*, note 36.

58 *Ibid.*

59 Buckley, *supra*, note 12 at 111.

Jamie Maclaren asks:

> How then are pro bono organizations supposed to breathe life into the fundamental principle that pro bono services should complement rather than substitute for a properly funded legal aid system? The answer is likely implied by the principle itself: greater and closer integration of legal aid and pro bono. In most provinces, pro bono organizations operate in relative isolation from their legal aid counterparts. The pro bono organizations are much newer to the legal service field, and the potential fit of pro bono services within the greater and more established legal aid system is rarely obvious. Pro bono services are too often viewed as lesser substitutes for legal aid services, and hardly ever as vehicles for added value.
>
> Thankfully, new opportunities for greater integration between pro bono and legal aid are beginning to emerge.[60]

Maclaren suggests that law schools and Bar training courses could assist by educating students about areas of law that are relevant to both legal aid and pro bono practice. Such instruction would increase the capacity for young lawyers to provide pro bono services in support of legal aid, and lend credibility to the notion that pro bono service is a professional responsibility. It would provide low income clients with a broader, more flexible range of services. And, it would "benefit the profession by increasing the overall cost-efficiency of serving clients and by providing solid moral ground for the argument that governments should increase legal aid funding. The profession would then speak less from a position of self-interest, and more from a position of knowledge and investment."[61]

If an objective is to encourage a clearer division of responsibility, or a new partnership, between governments and the profession to address prioritized legal needs, the profession's contribution needs to be more capable of measurement and more predictable – less ad hoc and imprecisely defined – than at present. To add certainty about the profession's contribution, lawyers might routinely report their pro bono hours, with what constitutes pro bono being precisely defined. Voluntary reporting to lawyers' regulatory bodies is already common. But the information it yields may be less reliable and helpful than it might be, given different definitions of pro bono, subjective interpretations of what constitutes pro bono versus other charitable offerings, and inaccurate record keeping of time spent on pro bono files. On the other hand, a new partnership would also require that government contributions be subject to satisfactory national standards and stable designated funding.

In the US, some attention has been given to mandatory reporting of pro bono work. Seven states now have mandatory reporting, and 16 others have voluntary reporting. The ABA website provides a comprehensive list of arguments for and against mandatory reporting, and contrasts it with voluntary reporting.[62]

Even members of the profession who argue that providing pro bono is all lawyers' professional duty seem to generally prefer voluntary pro bono reporting to mandatory reporting. One major point of resistance is that mandatory reporting will eventually lead to mandatory pro bono

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60 Maclaren, *supra*, note 36.

61 *Ibid.*

62 http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html

requirements. However, David Scott has proposed consideration of mandatory pro bono service as a move that would simultaneously help law firms' bottom lines, and improve access to justice.[63] Richard Devlin has criticized the profession for not embracing its professional duty to provide pro bono services in a non-optional way. He suggests that in response to alarming cuts to legal aid, the legal profession should adopt a mandatory pro bono system, seeing pro bono not as a charitable donation, but as a professional obligation.[64] The profession, in partnership with government could treat legal aid as a social investment rather than a welfare benefit, given that it enables citizens to be less vulnerable and dependent, and more productive. This partnership would have the profession offering mandatory pro bono in return for the government's re-investment in legal aid.[65]

Lorne Sossin also says that the fact that "lawyers' engagement in pro bono activities is entirely discretionary, and any activity in which a lawyer seeks to engage for no compensation is treated similarly, is inconsistent both with a needs approach and a public duty approach." If the public interest is in a case, linking it to core principles of rule of law, access to justice, or social justice, then any scrutiny regarding income thresholds is misplaced. Public interest should be recognized through the regulatory process: public reporting requirements; rules of professional conduct; or other obligations.[66] Regulatory involvement could lead to a more refined sense of the contribution pro bono can make to advancing the public interest, and act as a catalyst for further pro bono efforts.

H. Conclusion

The extent of the public's unmet legal needs is now well recognized in Canada. Because public legal services are not constitutionally required of governments (except in certain limited types of cases), and the public has not generally demanded that access to justice be an integral part of Canada's social safety net, governments have been able to cut legal aid funding without significant political risk. The question as to how and who will fill the gap left by those cuts could be called the "elephant in the room", and something that governments and justice system participants are struggling to figure out. Much attention is being given to providing services useable for the general public, such as how to prevent legal disputes or foster early dispute resolution, information to the public about their legal options and rights to allow for more informed decision making, and "self help" materials for those who decide to pursue their cases through the court system. A triage approach to quickly identify the appropriate level of service in each case, and a team mentality to delivering legal services that brings in both lawyers and non-lawyers, are other important ideas.

The contribution of the legal profession is certainly part of any new comprehensive solutions, but cannot be the only answer. There needs to be more precision in terms of expectations, and reasonable limits to what is expected. An enhanced, more defined commitment by the profession must be accompanied by a corresponding firm commitment from public funders. Together, these contributions could create a more optimistic future for access to justice.

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63 Scott, *supra*, note 39.

64 Richard Devlin, "Breach of Contract?: The New Economy and the Ethical Obligations of the Legal Profession" (2002) 25 *Dalhousie Law Journal* 335 at 375.

65 *Ibid.*

66 Sossin, *supra*, note 8.

Discussion Questions

To assist the CBA Access to Justice Committee in developing recommendations in this area, we are seeking your feedback on the following questions:

1. **Is it appropriate to limit the definition of pro bono work to ensure a direct link to providing legal services and representation to the low and lower middle income populations?**
2. **Are you in favour of more precise ways of measuring the profession's contribution to ensure that contribution can be a predictable part of a comprehensive solution? Why or why not?**
3. **What are the truly essential legal services that should be provided through public funding for the lowest economic groups?**
4. **What role should the profession play in assisting other low to middle economic groups?**
5. **In what ways will proposing national standards for legal aid services and financial eligibility levels assist to resolve the "tension at the border"?**
6. **What are the essential elements of a partnership between governments and the legal profession to achieve a sensible distribution of responsibility for providing necessary legal services?**
7. **Do you support the goal of ensuring that the widest possible range of legal needs are addressed, including legal representation when required for a just outcome, and that public resources should be dedicated first to the most vulnerable populations?**

Please send your written responses by January 15 2013 to the attention of Access to Justice Project Director, Gaylene Schellenberg, at CBA National Office (gaylenes@cba.org; 1 800 267 8860 ext 139).

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Envisioning Equal Justice
An Initiative of the Canadian Bar Association

PROJECT DESCRIPTION

Objectives

The CBA has established five objectives to be advanced through the *Envisioning Equal Justice* initiative:

- develop a strategic framework for access to justice in Canada, including a more refined practical definition of what it is, with measurable indicators, standards and metrics to evaluate progress;
- encourage greater coordination of initiatives within that strategic framework;
- develop and revise CBA policies to support improvements in the public and private delivery of legal services;
- foster greater public ownership of access to justice issues; and
- develop tools for advocacy geared to improving publicly funded access to justice services, including legal aid.

Background

The CBA's Access to Justice Committee has identified several "tough" questions that have been inadequately addressed to date, and that we believe hinder progress to improve access to justice. For example, how can we recognize the different legal needs of low and middle income people in our various efforts? Can we be innovative to improve access to justice, without absolving governments of their role in providing legal aid? Is it possible to think about who should be eligible for legal aid in a principled way? How viable is a legal system that is increasingly dependent on volunteer efforts, and how much pro bono can lawyers reasonably provide? Can we foster a dispute resolution approach to solving legal problems? How do we insist that the federal government do its part for access to justice, and also demand concrete data to plan and evaluate access to justice innovations?

In addition to grappling with these questions, the project will address four barriers that the Committee believes currently impede sustainable and sustained improvement to access to justice.

Barrier 1: Lack of Political Profile

While public access to justice is a pressing and recognized problem for all organizations concerned about justice, no one "owns" this complex problem, and it has little political profile. Broader public engagement on access to justice would ensure the issue resonates with all Canadians. That public engagement will be necessary to create political pressure for change.

Barrier 2: Need for Improved Strategy and Coordination

Many organizations are dedicating a tremendous amount of energy and limited resources to new approaches to improve access to justice. How effective these innovations will be in the long term is unclear, and coordination between the various efforts is seriously lacking. The project will seek ways to be more strategic and coordinated in developing and implementing these initiatives.

Barrier 3: No Mechanisms for Measuring Change

At present, the access to justice problem is difficult to communicate about effectively, without common terminology or definitions. Progress is also hampered by the absence of a practical definition of success. Access to justice indicators, standards, and improved ability to measure and evaluate the various components of the justice system are critical to increasing performance and learning what actually works. Stronger empirical data, including about system costs, can play an important role in facilitating change.

Barrier 4: Shortfalls in Information

There are identifiable gaps in our knowledge as to what can improve access to justice, particularly with respect to both the public and private delivery of legal services and the interface between the two. These gaps also act as barriers to progress.

Strategies

The Committee will use three main strategies:

1. **Develop "building blocks" for change** – Sub-committees, each with representation from the Committee, are advancing various research and consultation components of the first aspect of the larger project, which is intended to address existing shortfalls in those areas. Essential aspects of the Committee's work to improve access to justice will be divided into six "building blocks".

   The building blocks are:

   - Access to Justice Metrics: A foundation for the change process
   - National Standards for Publicly-Funded Legal Services
   - Future Directions for Legal Aid Delivery
   - Tension at the Border between Pro Bono and Legal Aid
   - Underexplored Alternatives for Increasing Access to Justice for the Middle Class
   - Advocacy Tools to support the change process.

2. **Tell a new story, change the conversation** – Using the outcome of the "building blocks", the Committee will find a new way of telling the equal justice story, to build public engagement and broaden ownership of the issue. An important aspect of this work will be a national Summit on Access to Justice, scheduled for the end of April 2013 in Vancouver.

3. **Enhance national strategic coordination** – The Committee will build relationships and coordinate access to justice efforts. It will gather information and highlight innovative initiatives, and provide an annual report and quarterly updates, using the CBA's website.

Important Dates:

National Summit on Access to Justice - April 25-27, 2013 in Vancouver (details to be confirmed in late 2012)

Tabling *Envisioning Equal Justice* Report – Canadian Legal Conference, August 18 - 20, 2013 at TCU Place, Saskatoon, Saskatchewan.

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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Envisioning Equal Justice Summit: Building Justice for Everyone

Request for Workshop Proposals

Deadline: January 31, 2013

We invite you to submit a workshop proposal for the CBA's Envisioning Equal Justice Summit to be held in Vancouver April 25-27, 2013. The Summit is designed to bring together all components of the justice community to develop practical strategies, skills and tools for building a more just society through enhanced and effective access and approaches to resolving legal problems.

Participants will have 25 sessions to choose from organized into five streams:

1. **Legal Skills and Service Delivery Innovations**
2. **Program Design**
3. **Policy Development**
4. **Access to Justice Research**
5. **National Action Committee on Access to Justice in Civil and Family Matters**

Workshop programming will focus on innovative and creative ways that we can work together to address the current inequalities in access to justice. Proposals representing diverse perspectives geared to generating open dialogue about powerful new collaborative models to tackle inequities in the justice system are welcome.

Conference organizers have highlighted the following workshop themes:

- Enhancing Early Access, Assistance and Intervention
- Reorienting Legal Practices to Increase Access
- Skills and Tools to Ensure High Quality Pro Bono
- Innovations in Legal Aid Service Delivery
- Next Generation Approaches to Public Legal Education and Information
- Encouraging Public-private partnerships
- Taking Assistance to Unrepresented/Self-Represented Litigants to the Next Level

- Access to Justice Metrics
- Re-envisioning the Role of Courts
- Toward a Right to Counsel in Civil Matters
- Developments in Empirical Research and Methodology
- Enhancing Program Evaluation
- Toward a National Access to Justice Research Agenda

If possible, please relate your proposal to one of these themes.

Conference organizers will join individual proposals together to form workshop sessions. Workshop sessions are generally 1.5 hours long in total. Workshop presenters are strongly encouraged to propose an interactive approach to programming. We encourage approaches that highlight stimulating discussion and problem-solving rather than lecture formats.

Selection Procedure

Workshop proposals should include a one-paragraph description of the topic, approach and materials, with a short bio stating the proposed presenter's relevant experience. Please send your proposal by email to Gaylene Schellenberg: gaylenes@cba.org.

Workshop proposal submissions are due no later than **January 31, 2013**. We will confirm workshop programming and respond to all proposals by **February 28, 2013**.

We regret that we are unable to pay for workshop presenters' travel and other expenses. However, we do offer a reduced registration fee for presenters.

If you have any questions about workshop proposals, please contact Gaylene Schellenberg at the CBA National Office: gaylenes@cba.org.

Draft Reply: CBA Conference Pro Bono

1. Is it appropriate to limit the definition of pro bono work to ensure a direct link to providing legal services and representation to the low and middle income populations?

It is desirable to arrive at a consensus definition of "pro bono". The Law Society of British Columbia's Access to Legal Services Advisory Committee has been considering this issue, as part of a broader discussion of how to encourage greater participation in pro bono provision of legal services as well as developing ways to facilitate the delivery of pro bono. Its preliminary view is that while all forms of pro bono work are to be encouraged, the definition the Law Society should consider embracing is: "pro bono provision of legal services means providing legal advice or legal services to individuals of limited financial means without expectation of a fee or reward." Its definition excludes reduced rate services or services provided to organizations. The concept underlying the suggested definition is to identify the people in society who are most economically disadvantaged and to encourage lawyers to provide legal services to these people without expectation of a fee or reward. The Law Society's Access to Legal Services Advisory Committee prefers a narrow definition of "pro bono". In this respect, a narrow definition would not address the middle income populations. Other legal service innovations should be considered to reach that portion of the public.

2. Are you in favour of more precise ways of measuring the profession's contribution to ensure that contribution can be a predictable part of a comprehensive solution? Why or why not?

We are in favour of arriving at more precise ways of measuring the profession's contribution, but believe that first one must agree on a definition of pro bono legal services and, second, one must have the discussion as to whether the profession's part in arriving at a comprehensive solution is through the delivery of pro bono legal services. Having a better understanding of the types of pro bono work that the profession engages in, including areas of law and the nature of the clients to whom the services are provided, can better inform the access to justice debate. But that information, alone, does not generate a predictable element of a comprehensive solution because the measurement of past performance does not impose a future obligation. Without a clearly defined obligation, it is difficult to argue that a predictable element of a comprehensive solution has been identified. Predictability could arise through the mandatory provision of pro bono legal services, but the Law Society does not support that concept.

The better course is to identify the public need that is sought to be addressed through the provision of pro bono legal services. This need must be identified with sufficient certainty. The discussion should then consider who bears the responsibility for meeting this need. The responsibility may be shared. Some of the responsibility might lie with the profession. To the extent some of the responsibility lies with the profession, one then should consider the ways in which the profession can discharge its

responsibility. This might include a range of possibilities. The provision of pro bono legal services (as defined in step one) may be part of the approach.

3. What are the truly essential legal services that should be provided through public funding for the lowest economic groups?

Legal advice and legal representation services should be top tier, with legal information and public legal education and information rounding out the essential services to be prescribed through public funding.

The answer to what constitutes essential services requires determining what social value is sought to be advanced. It may be that some legal services are deemed so essential that they should be available to all members of the public through some form of public funding. This funding might operate on a sliding scale based on the means of the individual. The question is, if it is an *essential* societal value, who bears the responsibility of ensuring access to that service? Question #3 presupposes that the government is only responsible to provide essential legal services to those who are most economically disadvantaged. It is not true of health care and education, which are also essential public services.

If the focus is on those in the lowest economic groups, then the focus should be on matters where:

- The individual's liberty is at stake;
- Where the individual risks losing access to food, shelter and medical treatment;
- Special considerations are required where children are involved and where children's safety is at risk.

Part of the problem with the question as asked, is that it treats the public merely as economic groups, without consideration of broader social and demographic factors that may affect their ability to access essential legal services or enjoy equal treatment under the law. The essential legal services of a person with a physical disability might differ from a First Nation's woman living in poverty, to an individual suffering from foetal alcohol syndrome, to a recent immigrant, etc. In other instances the needs might be the same, despite these additional variables. Consider some of the findings in research such as Ab Currie, *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns* (April 2005) for a sense of how complex this question is. This question will resist easy classification.

4. What role should the profession play in assisting other low to middle economic groups?

The answer to this question depends on how the earlier questions are answered (assuming the approach we have suggested above is followed).

First and foremost, the profession should strive to provide access to competent and ethical legal services. The profession should embrace business models that reduce economic barriers to accessing

their services. The profession should be encouraged to provide pro bono legal services (as defined). In addition, the profession has a critical role to play in improving the quality of public legal education and information as well as improving public access to that information. Greater use of unbundled legal services, paralegals and articled students is also encouraged. Taken together, these suggestions could improve the affordability of legal services, thereby making them available to a broader range of economic groups.

5. In what ways will proposing national standards for legal aid services and financial eligibility levels assist to resolve the "tension at the border"?

We don't believe it will. The fact that there may be regional variances between legal aid services and financial eligibility levels does not necessarily mean that a uniform national standard is required. Whether a national standard could be developed is a discussion worth having, but it engages many governments with different political and budgeting realities. A national standard could therefore result in a "race to the bottom". Assuming proposed national standards became implemented standards, it would still not resolve the tension between legal aid and pro bono because the standards do not resolve the question of how to define pro bono and, once defined, determine what the profession's obligation is with respect to pro bono.

6. What are the essential elements of a partnership between governments and the legal profession to achieve a sensible distribution of responsibility for providing necessary legal services?

The essential element of any proposed partnership is that the legal profession must remain independent of governmental control. It must remain self-regulating. Any reforms must support the rule of law. Next, it is important to clearly define the object of any "partnership". What is the problem we are seeking to address? What legal services are necessary to address this problem? Then we need to consider how these necessary services are currently provided. This can lead to a discussion of what the government can do to improve its role in providing these services and what the profession can do to improve its role in providing these services. These discussions might involve concepts of legal aid funding, how the provision of pro bono legal services might be developed, legal process reform, law reform, or a range of other topics. It may be that each group has "responsibilities" that the other has the capacity to assist in improving the delivery of the necessary services.

7. Do you support the goal of ensuring that the widest possible range of legal needs are addressed, including legal representation when required for a just outcome, and that public resources should be dedicated first to the most vulnerable populations?

Yes, but some effort needs to be given to prioritize the range of legal needs. All else being equal, resources should be dedicated to assist the most vulnerable members of society, but this should not be a mathematic formula applied by rote. A vulnerable member of the public with a marginal legal need should not, by virtue of the vulnerability, trump a less vulnerable individual with a greater legal need. Some thought needs to be given to the values we are seeking to advance and a principled articulation of those values needs to be developed.

Memo

The Law Society of British Columbia

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To Benchers

From Bill McIntosh

Date January 2, 2013

Subject **Nominations to the 2013 Finance Committee at the January 25, 2013 Benchers Meeting**

The Benchers' Governance Policies call for the nomination of two elected Benchers (at least one of whom is not a member of the Executive Committee) and one appointed Bencher to each year's Finance Committee. By tradition those nominations are confirmed at the January Benchers meeting. If more than two elected Benchers or more than one appointed Bencher put their names forward, selection of the nominees is by secret ballot at the meeting.

Note that any Bencher, elected or appointed, may nominate himself/herself or another elected Bencher (s. 5(3) of the *Legal Profession Act*). Appointed Benchers may be nominated only by other appointed Benchers (Article F-9 (b) of the Benchers' Governance Policies).

To nominate yourself or another Bencher, email Clea Wells (cwells@lsbc.org) before January 25, or be prepared to present your nomination at the January 25, 2013 Benchers meeting upon the request of the Chair.

The Finance Committee normally meets three or four times during the fee and budget preparation process (June to September), and holds quarterly investment review meetings.

President's Report to the Law Societies

January 2013

From: **Gérald R. Tremblay, C.M., O.Q., Q.C., Ad.E, President**
Federation of Law Societies of Canada

To: **All Law Societies**

Date: **January 17, 2013**

It is an honour for me to serve as President of the Federation of Law Societies of Canada this year. Building on the leadership of Canada's law societies, the Federation continues to break new ground as it undertakes national initiatives which have as their ultimate purpose, serving the public interest. I am reminded every day that the Federation's work is the product of the contributions of many individuals drawn from the ranks of both elected leaders and staff of each of our member law societies.

Two months into my presidency, I wish to take this opportunity to report on key Federation activities, including my first Council meeting as President which was held on December 12, 2012.

KEY INITIATIVES

National Mobility

1. Eleven years after the signing of the National Mobility Agreement in 2002, I believe we are very close to reaching an important moment in the evolution of our mobility arrangements. There is currently a different way of treating legal credentials within Canada for mobility purposes depending on whether a lawyer is a member of a common law jurisdiction or a member of the Barreau du Quebec. This different treatment has been grounded in the belief that there are more differences than similarities between the legal training of lawyers in common law jurisdictions and Quebec, which is a civil law jurisdiction. Now, however, following the lead of the Bâtonnier of the Barreau du Quebec, Nicolas Plourde, many law society leaders have come to accept that the opposite is true - similarities in legal training far outweigh the differences, such that there ought not to be any obstacle for lawyers, whatever their Canadian legal training, from transferring seamlessly from one province or territory to another.

2. In fact, the National Mobility Agreement itself contemplated exactly this arrangement from the beginning. The Federation's National Mobility Policy Committee has been studying the implications for moving forward with a simpler mobility regime and at the December Council meeting, following an interim report, it was asked to deliver a draft agreement in early January for approval by Council and referral to the law societies. That work is now complete and law societies will have a recommended agreement to consider in the coming days. I want to thank Committee members for their hard work and diligence in arriving at its recommendation. Should law societies agree, and it is my sincere hope that they will, this arrangement will mark a turning point in how we view Canada's legal profession as one that can come together with common values to serve the public interest in a way which draws upon our Canadian diversity.

Model Code of Professional Conduct

3. The Federation's Model Code has been complete for over a year. As of today, it has been adopted in substance, if not to the letter, by six law societies, and is under consideration in the others. National mobility provides a principled and practical justification for the idea that the Canadian public should expect that lawyers everywhere should be governed by the same ethical standards.

4. We recognize that the Federation's Model Code is a living document and for that reason we established a Standing Committee on the Model Code to review and update its provisions, as appropriate. At our recent Council meeting, for example, Council approved a recommendation to amend the Model Code to allow for limited scope retainers, something which had been recommended by the Federation's Standing Committee on Access to Legal Services. Council also approved a revised numbering system to make the Model Code easier to search. The revised Model Code is available on the Federation's website.

5. As you know, the rule on conflicts of interest has been the focus of much discussion over the last few years. In December 2011, the Council approved the recommendation of the Standing Committee on the Model Code to adopt a rule and commentary on conflicts which protects the public interest. The Supreme Court of Canada will have an opportunity to consider the Federation's rule on January 24, 2013 when it hears an appeal in *CNR* v. *McKercher*, a matter which deals in part on the duty of lawyers not to represent a client whose immediate legal interests are adverse to those of a current client, even if the matters are unrelated, unless the clients consent. John Hunter, Q.C. will represent the Federation before the Court and explain the provisions which are set out in the Model Code on this subject.

National Admission Standards

6. National Mobility is also a factor in driving law societies to move toward with national admission standards. The Federation has for many years taken a common approach, on behalf of all law societies, for evaluating the credentials of internationally trained individuals who wish to practice in Canadian common law jurisdictions. The National Committee on Accreditation has seen a steady rise in the number of applicants who are choosing this route to join Canada's legal profession.

7. The last several years have seen important innovations previously thought too difficult to achieve. In 2010, Canada's law societies agreed on a uniform national requirement that graduates of Canadian common law programs must meet to enter law society admission programs. To ensure that these individuals have the required competencies when the national requirement comes into effect in 2015, the Federation's Common Law Degree Program Approval Committee has begun the process of assessing the existing common law programs. Law schools are asked to report on how their programs meet the national requirement or how non-compliant aspects will be brought into compliance by 2015.

8. In establishing the national requirement, and after consultation with the Deans of Canada's law schools, the Federation determined that it would be neither necessary nor appropriate to prescribe how individual law schools should teach the required competencies. The only exception is the requirement for a stand-alone course on professional responsibility. The Federation and its member law societies recognize the importance of academic freedom and the value of innovation and diversity in the teaching of law.

9. The Approval Committee will also be assessing proposals for new law degree programs to be offered by Canadian universities. The establishment of new law schools at Canadian universities is subject to the approval of the relevant provincial government authorities. For the sake of consistency and fair treatment, the Approval Committee takes exactly the same approach to evaluating proposed Canadian law degree programs as it does for existing ones. In 2012, the Approval Committee received an application by Trinity Western University to assess whether its proposed law degree program will meet the national requirement. The Approval Committee is currently considering that application.

10. At the heart of national admission standards are a competency standard and a good character standard. Last fall a national competency profile was submitted to the law societies for approval pending the adoption of a national implementation plan. Work on the implementation plan has now begun and it is an essential part of our work that law societies be engaged every step of the way. A number of law societies have already adopted the national competency profile, something which speaks well of our willingness to move forward together on this important initiative.

National Discipline Standards

11. The Federation is well into a two year pilot project to assess how well law societies are fulfilling their complaints handling and discipline procedures. There is no aspect of law society responsibility which engages more public attention and opportunity for public contact, so it is very important that we are always striving to manage these matters to the highest standards. I want to thank on your behalf all of the law society personnel who are leading this important initiative and look forward to reporting further as the project unfolds.

CanLII

12. I am pleased to report that the Council has approved the appointment of Me Dominic Jaar to the Board of Directors of CanLII. Me. Jaar hails from Montreal and is an expert in information technology management and will be an outstanding addition to the CanLII Board. CanLII continues to be a source of pride for the Federation and an essential legal research tool for members of the legal profession and the general public. At our December Council meeting, the Council approved the annual levy paid by law societies through the Federation on the basis of recommendations made to Council and circulated to law societies in September last year.

LAW SOCIETY AND EXTERNAL RELATIONS

13. I am also pleased to report that I attended, together with Federation CEO, Jonathan Herman, a meeting of the General Council of the Barreau du Québec on December 13, 2013. I appreciate how important it is for the leadership of the Federation to be present at law society functions and to explain our work. I look forward to many more opportunities of this sort throughout my term of office.

14. Also important are the occasions where the Federation is invited in an official capacity to represent and speak on behalf of all of Canada's law societies. I had the honour to do so at the Supreme Court of Canada at a ceremony welcoming Justice Richard Wagner to the Court. In December, John Hunter, Q.C. performed similar duties at a swearing-in of a new judge at the Tax Court of Canada in Vancouver, and this week, Marie-Claude Bélanger-Richard, Q.C. will do the same in Ottawa for judges being introduced to the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. She will represent me again before the Federal Court in St. John's in February.

15. Finally, I look forward to representing the Federation at international meetings of organizations that deal with many of the same issues and challenges we face as governors of the legal profession. Last November, I was pleased to attend the annual meeting of the Union internationale des avocats with then-President John Hunter, where I chaired a panel on the future of the legal profession.

Rapport du président aux ordres professionnels de juristes

Janvier 2013

Expéditeur : **Gérald R. Tremblay, C.M., O.Q., c.r., AD.E, président**
Fédération des ordres professionnels de juristes du Canada

Destinataires : **Tous les ordres professionnels de juristes**

Date : **Le 17 janvier 2013**

C'est un honneur pour moi d'assumer les fonctions de président de la Fédération des ordres professionnels de juristes du Canada cette année. En s'appuyant sur le rôle de leadership des ordres professionnels de juristes du Canada, la Fédération continue d'innover à mesure qu'elle entreprend des initiatives nationales qui ont pour but ultime de servir l'intérêt public. On me rappelle tous les jours que les travaux de la Fédération sont le fruit des contributions de nombreuses personnes issues des dirigeants élus et du personnel de chaque ordre professionnel de juristes membre de la Fédération.

Deux mois après avoir commencé à assumer la présidence de la Fédération, je souhaite profiter de cette occasion pour présenter un compte rendu des principales activités de la Fédération, y compris ma participation, le 12 décembre 2012, à la toute première réunion du Conseil en ma capacité de président.

LES PRINCIPALES INITIATIVES

La libre circulation nationale

1. Onze ans après la signature de l'Accord de libre circulation national en 2002, je crois que nous sommes sur le point d'atteindre un jalon important dans l'évolution de nos accords de libre circulation. Au Canada, les titres de compétences juridiques sont traités de façon différente aux fins de la libre circulation selon que l'avocat est membre d'un ordre professionnel de juristes ou du Barreau du Québec. Ce traitement différent s'est fondé sur la croyance qu'il existe plus de différences que de similitudes entre la formation juridique d'avocats habitant une province ou un territoire de *common law* et celle d'avocats habitant le Québec, une province de droit civil. Cependant, en suivant l'exemple du Bâtonnier du Barreau du Québec, Nicolas Plourde, bon nombre de dirigeants des ordres professionnels de juristes ont fini par accepter que le contraire est vrai, à savoir que les similitudes de la formation juridique l'emportent largement sur les différences, de sorte qu'il ne devrait pas y avoir d'obstacle pour les avocats, et ce, peu importe la formation juridique qu'ils ont reçue au Canada, qui souhaitent passer d'une province ou d'un territoire à un autre.

2. En fait, l'Accord de libre circulation national envisageait exactement un tel accord depuis le début. Le Comité de la politique en matière de libre circulation nationale de la Fédération se penche sur les implications d'aller de l'avant avec un régime de libre circulation plus simple et lors de la réunion du Conseil tenue en décembre dernier, par suite d'un rapport provisoire, on a demandé au Conseil de déposer un projet d'accord au début du mois de janvier pour approbation par le Conseil et en vue d'un examen par les ordres professionnels de juristes. Ces travaux étant maintenant terminés, les ordres professionnels de juristes auront à examiner un accord proposé au cours des prochains jours. Je tiens à remercier les membres

du Comité pour l'acharnement au travail et la diligence dont ils ont fait preuve afin d'en arriver à une recommandation. Si les ordres professionnels de juristes l'acceptent, et j'espère sincèrement qu'ils l'accepteront, cet accord marquera un point tournant dans la façon dont est perçue la profession juridique au Canada comme une profession misant sur des valeurs communes afin de servir l'intérêt public d'une façon qui met à contribution notre diversité canadienne.

Le Code type de déontologie professionnelle

3. Le Code type de la Fédération est terminé depuis plus d'un an. À compter d'aujourd'hui, il a été adopté quant au fond, sinon à la lettre, par six ordres professionnels de juristes, pendant que d'autres l'examinent actuellement. La libre circulation nationale fournit une justification fondée sur les principes et les pratiques de l'idée que le public canadien devrait s'attendre à ce que tous les avocats soient régis par les mêmes normes éthiques.

4. Nous reconnaissons que le Code type de la Fédération est un document évolutif et c'est pour cette raison que nous avons créé le Comité permanent sur le Code type de déontologie professionnelle qui reverra et actualisera les dispositions du Code type, s'il y a lieu. À titre d'exemple, lors de notre récente réunion du Conseil, le Conseil a approuvé une recommandation visant la modification du Code type afin de permettre les mandats à portée limitée, ce qu'avait proposé le Comité permanent sur l'accès aux services juridiques de la Fédération. Le Conseil a également approuvé une renumérotation révisée afin de faciliter la recherche électronique dans le Code type. Le Code type révisé est disponible depuis le site Web de la Fédération.

5. Comme vous le savez, la règle sur les conflits d'intérêts fait l'objet de bien des discussions depuis plusieurs années. En décembre 2011, le Conseil a approuvé une recommandation du Comité permanent sur le Code type de déontologie visant l'adoption d'une règle et des commentaires sur les conflits qui protègent l'intérêt public. La Cour suprême du Canada aura l'occasion de se pencher sur la règle de la Fédération le 24 janvier 2013, lorsqu'elle entendra l'appel CNR c. McKercher, un dossier qui porte en partie sur l'obligation des avocats de ne pas représenter un client dont les intérêts légaux immédiats sont contraires à ceux d'un client actuel, et même si les dossiers sont sans rapport, à moins d'avoir le consentement des deux clients. John Hunter, c.r., représentera la Fédération devant la Cour et expliquera les dispositions du Code type relatives à ce suet.

Les normes d'admission nationales

6. La libre circulation nationale est également un facteur qui incite les ordres professionnels de juristes à faire avancer les normes d'admission nationales. La Fédération adopte depuis plusieurs années une approche commune, pour le compte de tous les ordres professionnels de juristes, relativement à l'évaluation des titres de compétences des personnes ayant suivi une formation à l'étranger qui souhaitent exercer le droit dans une province ou un territoire de common law. Le Comité national sur les équivalences des diplômes de droit a assisté à une hausse du nombre de demandeurs qui optent pour ce chemin afin de joindre la profession juridique du Canada.

7. Les dernières années ont été marquées par d'importantes innovations qu'on croyait auparavant trop difficiles à réaliser. En 2010, les ordres professionnels de juristes du Canada ont convenu d'une exigence nationale uniforme à laquelle les diplômés des programmes d'études en common law canadiens doivent répondre afin de pouvoir s'inscrire au programme de formation professionnelle d'un ordre professionnel de juristes. Pour assurer que ces personnes possèdent les compétences requises lorsque l'exigence nationale entrera en

vigueur en 2015, le Comité d'agrément a entrepris le processus d'évaluation des programmes d'études en common law déjà existants. Les facultés de droit sont appelées à présenter un rapport expliquant comment leur programme répond à l'exigence nationale ou comment les aspects non conformes seront modifiés de façon à devenir conformes d'ici 2015.

8. Lorsqu'elle a établi l'exigence nationale, et après avoir consulté les doyens et doyennes des facultés de droit au Canada, la Fédération a déterminé qu'il ne serait ni nécessaire ni opportun de dicter comment les facultés de droit devraient enseigner les compétences requises. La seule exception est l'exigence relative à un cours consacré uniquement à la responsabilité professionnelle. La Fédération et ses ordres professionnels de juristes membres reconnaissent l'importance de la liberté de l'enseignement et l'utilité de l'innovation et de la diversité dans l'enseignement du droit.

9. Le Comité d'agrément évaluera également les nouveaux programmes d'études en droit que des universités canadiennes pourraient envisager d'offrir. L'établissement de nouvelles facultés de droit dans des universités canadiennes est assujetti à l'approbation des autorités compétentes des gouvernements provinciaux. Par souci d'uniformité et de traitement équitable, le Comité d'agrément adopte exactement la même approche pour évaluer les programmes d'études en droit canadiens proposés et pour évaluer les programmes déjà existants. En 2012, le Comité d'agrément a reçu une demande de l'Université Trinity Western qu'il évalue pour déterminer si le programme d'études en droit qu'elle propose répondra à l'exigence nationale.

10. Les nomes de compétence et de bonne moralité se trouvent au cœur des normes d'admission nationales. L'automne dernier, un Profil national des compétences fut soumis aux ordres professionnels de juristes pour approbation, en attendant l'adoption d'un plan de mise en œuvre national. Nous nous employons actuellement à élaborer un plan de mise en œuvre, en nous assurant de faire participer les ordres professionnels de juristes à toutes les étapes du processus. Plusieurs ordres professionnels de juristes ont déjà adopté le Profil national des compétences, ce qui témoigne de notre volonté de faire avancer ensemble cette importante initiative.

Normes de discipline nationales

11. La Fédération est bien engagée dans un projet pilote de deux ans visant l'évaluation de la façon dont les ordres professionnels de juristes mènent à bien leurs procédures de traitement de plaintes et de discipline. Comme on ne compte aucun autre aspect relevant de la responsabilité des ordres professionnels de juristes qui suscite davantage l'attention du public et qui donne l'occasion d'établir le contact avec le public, il est très important de toujours nous efforcer de gérer ces dossiers conformément aux normes les plus rigoureuses. Je tiens à remercier, en votre nom, le personnel de tous les ordres professionnels de juristes qui dirige cette importante initiative et j'ai hâte de vous faire rapport de l'évolution de ce projet.

CanLII

12. Je suis heureux d'annoncer que le Conseil a approuvé la nomination de Me. Dominic Jaar au conseil d'administration de CanLII. Originaire de Montréal, Me. Jaar est un expert en gestion des technologies de l'information et sera un précieux atout pour le conseil d'administration de CanLII. La Fédération est extrêmement fier du succès que connaît CanLII, un outil de recherche juridique indispensable pour les membres de la profession juridique, ainsi que pour les Canadiens et Canadiennes. Lors de sa réunion du mois de décembre, le Conseil a approuvé la cotisation annuelle que versent les ordres professionnels de juristes par le biais de la Fédération en fonction de recommandations formulées au Conseil et remises aux ordres professionnels de juristes en septembre 2012.

RELATIONS AVEC LES ORDRES PROFESSIONNELS DE JURISTES ET RELATIONS EXTÉRIEURES

13. Je suis également heureux d'annoncer que j'ai pris part, en compagnie de Jonathan Herman, premier dirigeant de la Fédération, à une réunion du Conseil général du Barreau du Québec tenue le 13 décembre 2013. Je sais à quel point il est important que les dirigeants de la Fédération prennent part aux activités des ordres professionnels de juristes et qu'ils expliquent nos travaux. J'espère pouvoir participer à beaucoup d'autres activités de ce genre durant mon mandat.

14. Les occasions où la Fédération est invitée à titre officiel à représenter tous les ordres professionnels de juristes du Canada et à parler en leur nom sont également importantes. J'ai eu l'honneur de le faire à la Cour suprême du Canada, à l'occasion de la cérémonie d'accueil de l'honorable Richard Wagner à la Cour. En décembre dernier, John Hunter, c.r., a exercé des fonctions similaires lors de l'assermentation d'un nouveau juge à la Cour canadienne de l'impôt à Vancouver, et cette semaine, Marie-Claude Bélanger-Richard, c.r., fera de même à Ottawa pour les juges qui seront présentés à la Cour d'appel fédérale, à la Cour fédérale et à la Cour canadienne de l'impôt. Elle me représentera à nouveau devant la Cour fédéral à St. John's en février.

15. En terminant, j'ai hâte de représenter la Fédération lors de réunions internationales d'organismes qui s'occupent de plusieurs des mêmes enjeux et défis auxquels nous sommes confrontés à titre de directeurs de la profession juridique. En novembre dernier, j'ai eu le plaisir de prendre part à l'assemblée annuelle de l'Union internationale des avocats avec le président alors en fonction John Hunter, dans le cadre de laquelle j'ai présidé un groupe d'experts sur l'avenir de la profession juridique.

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC
Date: January 15, 2013
Subject: **Interim report of the Bencher Election Working Group**

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1. Attached is the first of two reports to be made by the Bencher Election Working Group. The group was formed by the Benchers in 2011 and staffed by President Gavin Hume, QC with Life Benchers who were not seen to have a personal interest in the outcome of their deliberations.

2. The Benchers referred three issues to the working group. They can be briefly stated as follows:

   (1) Bencher turnover and whether it can or should be addressed by staggering elections. A sub-issue was added by the Executive Committee as to how best to make the transition to staggered elections.

   (2) The length of the Bencher term of office. Whether it should be extended from two years to three or more.

   (3) Bencher electoral districts. Should they be revised for either or both of

   - more equitable numerical representation, and
   - better grouping of like communities in the same district?

3. In this interim report, the Working Group addresses only issues (1) and (2), leaving issue (3) to a later time for fuller discussion and consultation throughout the province. A full report on that issue will be delivered to the Benchers at a later date in 2013.

4. As you will see from the report, the Working Group has specific recommendations with respect to issues (1) and (2). Both recommendations would require amendments to the Law Society Rules that require membership approval under section 12 of the *Legal Profession Act*. In order for that to be accomplished in 2013, the Working Group recommends that the

Benchers authorize a referendum of members in the late spring of 2013. Otherwise, the effect of the proposed reforms would not be felt until 2016.

5. The Executive Committee has referred the report to the Governance Committee for consideration and approved it for inclusion in the Benchers agenda for information only at this time.

JGH
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Attachments: Interim report of Bencher Election Working Group

The Law Society of British Columbia

Interim Report

Bencher Election Working Group

January 25, 2013

Prepared for: Benchers

Prepared by: Bencher Election Working Group

Brian J. Wallace, QC

Patricia Schmit, QC

Patrick Kelly

Jeffrey Hoskins, QC, staff support

Contents

INTERIM REPORT OF THE WORKING GROUP ON BENCHER ELECTIONS

I. EXECUTIVE SUMMARY

1. The Bencher Election Working Group was asked to review three issues involving the election and term of office for Benchers of the Law Society of British Columbia: the uneven turnover of new Benchers from year to year, the term of office that Benchers ought to serve after election or appointment, and the districts in which Benchers are elected. Although issues such as these have been raised and discussed in the past, there has been little change in this area since election of Benchers by district was introduced in 1955.

2. Two of these issues can be addressed with relatively simple and unobtrusive changes that we recommend be implemented at the first opportunity:

   - There is a problem with a large cohort of new Benchers being introduced every two years, with only one or two new Benchers in alternate years. This problem can be solved by electing an equal portion of Benchers every year. The portion depends on the term of office for Benchers.
   - The working group is of the view that a term of office of three years is appropriate for Benchers of the Law Society.

3. The third issue is more complicated, and we perceive that any solution to the problem is going to be difficult for some to accept. Resolution of the issue also ought to be considered in conjunction with the ongoing examination of Law Society governance issues. Governance issues were the subject of interim and final reports in 2012, and work will continue in 2013 with the appointment of a Governance Committee. The Working Group recommends that discussion toward resolution of the Bencher district issue begin in the near future.

II. BACKGROUND

A. EXECUTIVE/BENCHER RESOLUTIONS 2011

4. In April, 2011 the Executive Committee asked the Benchers to consider a number of governance issues. These issues ranged from the appointment of non-lawyers to Law Society committees to the system for electing Benchers and the term of office for which they are elected. They were divided into issues that the Executive Committee considered to be high and low priority and into issues that the *Legal Profession Act* requires the approval of the membership, and those that do not.

5. The Benchers approved the priorities assigned by the Executive Committee and referred most of the issues back to the Executive Committee for further action in accordance with the priority assigned. Three issues were considered sufficiently complex that they should be referred to a Task Force specially constituted to study the issues and report back to the Benchers with recommendations.

6. These are the three issues that were referred to a Task Force:

   (1) Bencher turnover and whether it can or should be addressed by staggering elections. A sub-issue was added by the Executive Committee as to how best to make the transition to staggered elections.

   (2) The length of the Bencher term of office. Whether it should be extended from two years to three or more.

   (3) Bencher electoral districts. Should they be revised for either or both of

   - more equitable numerical representation, and
   - better grouping of like communities in the same district?

7. It was suggested that, since each of these issues could be seen to involve the interests of the current Benchers in the Bencher electoral process, the working group to which the issues were to be referred should comprise individuals who, while experienced in Law Society matters, are not currently elected as Benchers. In consideration of that suggestion, the President at the time, Gavin Hume, QC, appointed a working group consisting entirely of Life Benchers, who are neither currently sitting Benchers nor, for that matter, eligible ever to be a candidate for election or appointment as a Bencher. The Bencher Elections Working Group is chaired by Brian J. Wallace, QC, a former President of the Law Society (then known as the "Treasurer"). The other members of the Task Force are Patricia Schmit, QC and Patrick Kelly. Staff support was provided by Jeff Hoskins, QC, Tribunal and Legislative Counsel, with the assistance of Ingrid Reynolds.

B. HISTORY

8. In 2003 the Benchers considered a number of Law Society governance issues that then required a referendum vote of all the members in order to adopt Rule amendments. It was agreed to ask the members of the Law Society to approve a series of questions in a referendum, including extending the term limits for Benchers, but the Benchers decided not to advance questions having to do with Bencher electoral districts, staggered elections or increasing the term of office.

9. In 2011 the Benchers again considered a number of governance issues. Three issues were referred to this working group. They are subject to section 12 of the *Legal Profession Act*, which requires that the membership endorse rule changes at a general meeting or in a referendum ballot before the Benchers can give them effect by amending the Law Society Rules. This requirement was included in the *Legal Profession Act* because the nature of these provisions gives the appearance that the self-interest of the Benchers is involved.

10. In order to dispel that appearance and give any proposals for reform more credibility with the membership voting in a subsequent referendum, the Benchers referred the three issues to a working group of individuals who are knowledgeable in Law Society matters and have been in a position of trust as Benchers in the past, but are not currently Benchers and therefore do not have a current personal interest in the outcome.

III. MANDATE

A. BENCHER TURNOVER

11. The first issue referred by the Benchers is the question of the uneven turnover of Benchers. The Working Group was charged with examining and evaluating the problem and making recommendations as to changes that may provide a solution, if required.

B. TERM OF OFFICE

12. The second issue for the Working Group's consideration is the term of office of Benchers. Under the current rules, all Benchers serve a two-year term, with a maximum of four and one-half terms, which means in most cases eight years in office as a Bencher. The Working Group is to consider whether two years continues to be the appropriate term of office in today's Law Society. If a change is to be made, that may involve an adjustment to the term limit, although the Benchers did not ask for a recommendation concerning the term limit other than to accommodate a change in the term of office.

C. BENCHER REPRESENTATION

13. The third issue relates to the number of lawyers in each of the nine Bencher electoral districts. The Working Group was asked to consider the vastly different numbers of lawyers per Bencher representing the various districts, whether the differences are a concern, and whether there may be other electoral districts, or alterations to the current ones, that would provide fairer representation. The Working Group's consideration of that issue will be the subject of its final report in 2013.

IV. BENCHER TURNOVER

14. Every two years, there is a general election of Benchers, the terms of Appointed Benchers come to an end, and several are replaced at the same time. In alternate years, an election is required to replace the out-going President and sometimes others who have left for one reason or another. The result is a very large number of inexperienced Benchers in alternate years and a very low number in other years.

15. These are the figures for the past decade:

YEAR	NEW BENCHERS
2002	13
2003	2
2004	8
2005	1
2006	11
2007	1
2008	5
2009	2
2010	10
2011	1
2012	7
2013	1

16. Operationally, this situation is inefficient in that the Law Society is required to dedicate a large number of staff hours per Bencher to the orientation and education of one individual in some years and, in other years, the logistics of orienting and training a large number of people is often a problem. There is also a risk to the quality of decision-making in having up to 42 per cent of the Board without experience for a period of time.

17. If the number of new Benchers could be averaged out, one would expect about four or five new Benchers annually.

18. One common way of mitigating the effects of high turnover of elected officials is to elect only a partial slate of candidates at each election, for overlapping terms, so that there is a carry-over when new members arrive. With two-year terms, the Rules could be amended to

call for the election of half of the elected Benchers each year. The provincial government could also be asked to appoint half of the Appointed Benchers each year. This is commonly referred to a "staggered" terms of office and "staggered" elections.

19. If the term of office for Benchers is changed to three years, then as close as possible to one-third could be elected and appointed each year.

20. An additional disadvantage of electing all Benchers at once is the large number of candidates that are involved and the large number of votes each member is required to make to fully exercise the franchise. This is especially so in the very large district of the County of Vancouver, where a minimum of 10 and a maximum of 13 Benchers must be elected in a full election. There have been up to 37 candidates in elections, with mean and median of 24.

21. The transition from full elections to partial staggered elections would have some manageable complexities. In the long run, though, this would have little effect on the Law Society administration of elections, in that the current Rules require at least one election on November 15 every year, to replace the outgoing President in off years.

22. The working group considered the effect that staggering elections may have on the collegiality of Benchers while in office. The cohort of new Benchers with whom a Bencher joins the group is important throughout the Benchers' terms in office. There was some concern that making the cohorts smaller and more frequent might affect the dynamic at the Bencher table. However, it was considered in the end that the change would not be sufficiently negative to outweigh the advantages of stability and continuity to be had from staggering elections. At the same time, it was recognized that the present system often provides a cohort of only one new Bencher in years when only the outgoing President is replaced. There is a value in providing a larger cohort for the otherwise single new Bencher.

V. TERM OF OFFICE

23. The current term of office for Benchers in British Columbia is two years. Several other Canadian law societies elect Benchers for longer terms. The Bencher term of office is three years in Alberta and Saskatchewan and four years in Ontario and Newfoundland and Labrador. See Appendix A for further details.

24. Frequency of election has its rewards in terms of involvement of the electorate, but it is also a distraction to elected officials to be perpetually, or at least frequently, up for re-election.

Staggered elections, if adopted would provide the desired level of involvement of the electorate without necessarily requiring Benchers to seek re-election frequently.

25. The working group considered what the optimum term of office would be. As it is currently, Benchers have said that they barely learn all that they need to know for the job before it is necessary to seek re-election. The working group noted that two years appears to be the low end of term of office among law societies in Canada and other professions in British Columbia. They also noted that elected officials in government generally serve for longer terms, with municipal government in British Columbia serving for three years and federal and provincial governments normally lasting about four years.

26. The working group observed that very few Benchers serve only one term in office. See Appendix C. Even fewer are rejected by the voters when attempting to return for a subsequent term. Outside of the Lower Mainland, in fact, incumbent Benchers are rarely opposed for re-election. There does not seem to be a high value in the opportunity to remove a Bencher at an early date that needs to be preserved with a short term of office.

27. The group considered four years to be too long, but two years to be too short for many purposes. They chose to recommend the middle solution of three-year terms. This would make the term for elected and appointed Benchers the same as that for Benchers elected to the presidential "ladder", who serve one year each at President and First and Second Vice-President.

28. If the term of office was increased to three years, this would require an amendment to the term limit, which is currently eight years for most Benchers, with an adjustment for fairness to those Benchers who are elected or appointed to complete a term of office begun by another Bencher who is unable to finish the term. Presumably the term of office would have to be increased to nine years, with a similar adjustment to deal with partial terms.

VI. IMPLEMENTATION AND TRANSITION

Process for considering reforms

29. The working group recommends that the Benchers put forward the reforms increasing the term of office for Benchers and staggering elections for consideration by the membership of the Law Society at the earliest opportunity.

30. These two proposed reforms will require the approval of the membership of the Law Society under section 12 of the *Legal Profession Act*. Under that section, approval can be given either in a referendum of all members or in a general meeting.

31. It is our view that the reforms ought to be implemented in time for the general election scheduled for November 2013. The next opportunity would not take effect for a further two years, which means it would not affect the election and appointment of Benchers until the end of 2015. Since the Annual General meeting is generally held in the fall of the year, which would be too late in the year to implement the proposed changes, we recommend that the Benchers authorize a referendum of all members to be held in the late spring of 2013.

32. Following a positive decision of the members on either or both of the recommendations, the Benchers would then have to adopt amendments to the Law Society Rules to give effect to the decisions. That would require time for staff, working with the Act and Rules Subcommittee and in consultation with this working group, to develop the appropriate changes. Generally, a call for nominations for the November election is mailed by the Law Society in mid-September. In order for that notice to include notice of changes to the method of election, the Benchers would have to ratify rule changes before that time.

Transition issues

33. Transition should not be a major problem. All the terms of office of current Benchers not on the ladder will expire at the end of 2013. Those who are elected to carry on beginning January 1, 2014 can be elected for a term of office different from the existing two years without difficulty.

34. A transition to staggered elections would be manageable but more complicated. To start that system, there would have to be an election at which some Benchers are elected for terms that differ from other Benchers. For example, if the two-year term of office were retained, in order to establish a system where roughly half of the Benchers were elected each year, the initial election would require half of the Benchers elected to one-year terms, while the other half were elected to two-year terms. A year later, the one-year term seats could be filled for two years, and the system would continue from there.

35. Similarly, if the term of office were increased to three years, the initial election would require one-third elected for one year, one-third for two years and one-third for three years.

A year later, the one-year seats would be filled for three-year terms, and another year after that, the two-year seats would be filled for three-year terms, and the system would continue.

36. The hardest part of making the transition would be deciding which positions would be filled for which term. In multiple member districts, the voters could decide. The higher the vote, the longer the term. For example, if the County of Vancouver were electing 12 Benchers to start a staggered three-year term system, the top four candidates would be elected for three years. Numbers 5 to 8 would be elected for two-years, and numbers 9 to 12 would be elected for one year.

37. There will be some districts in which the Benchers to be elected cannot be evenly divided either in two for a two-year term election or in three for a three-year term election. Choices would have to be made as to which districts would elect for which term of office. One fair way of doing that would be to decide that by drawing lots, so that there was no chance it would appear that any favoritism was applied. Alternatively, the lower term of office could be assigned to districts where no incumbent Bencher qualified to run again, and the rest could be determined by lot.

38. The next two sections provide brief examples of how the transition to staggered elections could be done.

Staggering elections - two-year term:

39. This is an example of how it could be done in 2013:

County of Vancouver	7 for 2 years; 6 for 1 year
County of Victoria	1 for 2 years; 1 for 1 year
County of Westminster	1 for 2 years; 2 for 1 year
County of Nanaimo	1 for 2 years
County of Cariboo	1 for 2 years; 1 for 1 year
County of Kootenay	1 for 1 year
District of Kamloops	1 for 2 years
District of Okanagan	1 for 2 years
County of Prince Rupert	1 for 1 year

40. Benchers on the “ladder” would be assigned a term of office ending with the end of the year in which the Bencher is to be President. Multiple Bencher districts would be divided as evenly as possible. Candidates with higher votes would be assigned the longer term of

office. In which districts Benchers would have one-year or two-year terms would be determined by lot. That way there would be 13 Benchers elected for two years and 12 for one year. After 2013, half slates would be elected each November.

Staggering elections - three-year term

41. This is an example of how it could be done in 2013:

County of Vancouver	5 for 3 years; 4 for 2 years; 4 for 1 year
County of Victoria	1 for 3 years; 1 for 2 years
County of Westminster	1 for 3 years; 1 for 2 years; 1 for 1 year
County of Nanaimo	1 for 1 year
County of Cariboo	1 for 2 years; 1 for 1 year
County of Kootenay	1 for 3 years
District of Kamloops	1 for 2 year
District of Okanagan	1 for 1 years
County of Prince Rupert	1 for 3 years

42. Benchers on the "ladder" would be assigned a term of office ending with the end of the year in which the Bencher is to be President. Multiple Bencher districts would be divided as evenly as possible. Candidates with higher votes would be assigned the longer term of office. In which districts Benchers would have one-year, two-year or three-year terms would be determined by lot. That way there would be eight Benchers elected for three years, seven Benchers elected for two years and seven for one year. After 2013, slates of one-third of the Benchers would be elected each November.

VI. SUMMARY OF RECOMMENDATIONS

Staggered elections

43. The Law Society should conduct annual elections with the number of Benchers to be elected approximately equal to the total number of Benchers divided by the number of years in the term of office. Therefore, if the term of office remains at two years, half of the Benchers would be elected each year. If the term of office increases to three years, one-third of Benchers would be elected each year.

Term of office increased to three years

44. The term of office for all elected and appointed Benchers should be increased to three years and the term limit should be increased to allow three full terms in office. In the case of partial terms, the principle of not counting half or less of a term against the term limit should continue. That means that a Bencher or former Bencher would not be allowed to seek election or accept appointment to a term that would take the total time served as a Bencher beyond 10½ years.

APPENDIX A — OTHER MODELS

OTHER CANADIAN LAW SOCIETIES

Alberta

All members of the Law Society of Alberta are entitled to vote for all 20 Bencher positions from across the province. The top vote-getter in each of three regions outside of the two major metropolitan centres is elected, along with the 16 other top voters province-wide. The President-elect is also deemed elected under the governing legislation. Benchers are elected in a single (not staggered) election for a three-year term.

Manitoba

Lawyers in Manitoba elect 16 Benchers from seven districts in a single election for a two-year term.

New Brunswick

Lawyers in New Brunswick elect 20 Benchers from 11 districts in a single election for a two-year term.

Newfoundland and Labrador

The Law Society in Newfoundland and Labrador holds annual elections at which four Benchers are elected. There are six districts for Bencher elections, but all members of the Law Society across the province are entitled to vote for all candidates.

Northwest Territories

In the Northwest Territories, two of the four elected Benchers are elected each year in staggered elections for two-year terms. The public members of the Benchers are appointed for three-year terms.

Nova Scotia

Members of the Barristers' Society of Nova Scotia elect their 13 elected Benchers in a single election for a two-year term. There are four districts, but three Benchers are elected at-large across the province.

Nunavut

Nunavut follows the same rules as the Northwest Territories. Two of the four elected Benchers are elected each year in staggered elections for two-year terms. The public members of the Benchers are appointed for three-year terms.

Ontario

Ontario lawyers elect 40 Benchers, 20 from inside Toronto and 20 from outside Toronto. Eight of the 40 benchers are Regional Benchers - the candidates who received the highest

number of votes from voters in their own electoral region. The remaining 32 Benchers are the 13 candidates from outside Toronto who received the most votes from all voters and the 19 candidates from inside Toronto who received the most votes from all voters. The regions are Northwest, Northeast, East, Central East, Central West, Central South, Southwest and Toronto. The term of office is four years, and elections of the complete complement of elected Benchers takes place every four years.

Prince Edward Island

The eight Benchers of the Law Society of Prince Edward Island are elected each year at the Annual General Meeting.

Québec

Local Barreau councils elect delegates to the Barreau du Québec annually. There are 31 members of the council elected by 15 local Barreaux.

Saskatchewan

Members of the Law Society of Saskatchewan elect 18 Benchers in 10 divisions, including one province-wide division for new lawyers. Benchers are elected in a single election for three-year terms.

Yukon

The four Benchers in Yukon are elected for a one-year term on the day before the Annual General Meeting each year.

BENCHER TERM OF OFFICE

A. CANADIAN LAW SOCIETIES

Organization	No.	Districts	Term	Staggered	Notes
LS Alberta	20	3+	3 yrs	No	All members vote for all 20. Top vote-getter in each district is elected plus 17 more. Districts include only rural areas.
LS Saskatchewan	18	10	3 yrs	No	New division for new lawyers.
LS Manitoba	16	7	2 yrs	No	
LS Upper Canada	40	8	4 yrs	No	Ontario lawyers elect 40 benchers, 20 from inside Toronto and 20 from outside Toronto. Eight of the 40 benchers are regional benchers - the candidates who received the highest number of votes from voters in their own electoral region. The remaining 32 benchers are the 13 candidates from outside Toronto who received the most votes from all voters and the 19 candidates from inside Toronto who received the most votes from all voters. The regions are Northwest, Northeast, East, Central East, Central West, Central South, Southwest and Toronto.
Barreau du Quebec	31	15	1 yr	No	General Council delegate elected by local Barreau councils.
LS New Brunswick	20	11	2 yrs	No	
BS Nova Scotia	13	4	2 yrs	No	3 elected at-large.
LS Prince Edward Island	8	1	1 yr	No	Elected at AGM
LS Newfound-land and Labrador	15	6	4 yrs	Yes	4 elected each year (when only 3 Benchers' terms expire, they choose a fourth by lot). All members can vote in each district.
LS Yukon	4	1	1 yr	No	Elected day before AGM
LS Northwest Territories	4	1	2 yrs	Yes	2 elected each year public members appointed for 3 year terms.
LS Nunavut	4	1	2 yrs	Yes	2 elected each year public members appointed for 3 year terms.

B. SELECTED PROFESSIONAL BODIES IN BRITISH COLUMBIA

Organization	No.	Districts	Term	Staggered	Notes
Engineers and Geoscientists	7	1	2 yrs	Yes	1/2 of council elected each year.
Dentists	12	5	2 yrs	Yes	1 council member elected by specialists, 1 by UBC Faculty of Dentistry
Pharmacists	8	8	2 yrs	Yes	Districts include 2 “hospital” districts
Physicians and Surgeons	10	7	2 yrs	No	
Registered Nurses	9	2	3 yrs	Yes	3 rural, 3 urban, 3 at-large.
Social Workers	12	1	2 yrs	Yes	
Teachers	12	12	3 yrs	Yes	College now replaced
Chartered Accountants	15	4	2 yrs	Yes	Minimum of 5 elected at-large.
Real Estate Council	13	9	2 yrs	Yes	1 broker per County, 3 representatives, 1 manager

APPENDIX B — HISTORICAL LONGEVITY OF BENCHERS

LAW SOCIETY OF BRITISH COLUMBIA

BENCHERS ELECTED SINCE 1992

BENCHER/Life Bencher	DISTRICT	DATES/*Treasurer* or President	YEARS IN OFFICE
Shona A. Moore, QC	County of Vancouver	1990-1991; 1993-1995	5.0
Trudi L. Brown, QC	County of Victoria	1992-1998/*1998*	6.5
Ann Howard	Appointed Bencher	1992-2002	10.5
Marjorie Martin	Appointed Bencher	1992-2002	10.5
Gerald J. Lecovin, QC	County of Vancouver	1994-2001	8.0
Emily M. Reid, QC	County of Vancouver	1994-2001	8.0
Jane Shackell, QC	County of Vancouver	1994-2001	8.0
Karl F. Warner, QC	County of Westminster	1994-2000/2000	7.0
T. Mark McEwan	County of Kootenay	1994-1996	2.6
Alexander P. Watt	Kamloops	1994-1995	2.0
Richard S. Margetts, QC	County of Victoria	1995-2001/2001	7.0
Robert D. Diebolt, QC	County of Vancouver	1996-2003	8.0
Bruce Woolley, QC	County of Vancouver	1996-2000	4.8
Linda Loo, QC	County of Vancouver	1996	0.7
David W. Gibbons, QC	County of Vancouver	1996-2003	8.0
Peter J. Keighley, QC	County of Westminster	1996-2004	9.2
Richard C. Gibbs, QC	County of Cariboo	1996-2002/2002	7.0
G. Ronald Toews, QC	County of Pr. Rupert	1996-2003	8.0
Kristian P. Jensen	Kamloops	1996-1997	2.0
Reeva Joshee	Appointed Bencher	1996-1997	1.3
Robert W. Gourlay, QC	County of Vancouver	1996-2003	8.0
Gerald J. Kambeitz, QC	County of Kootenay	1996-2003	8.0
William J. Sullivan, QC	County of Vancouver	1997-2003	7.0
Anna K. Fung, QC	County of Vancouver	1998-2007/2007	10.0
JoAnn Carmichael, QC	County of Vancouver	1998-2001	4.0
William M. Everett, QC	County of Vancouver	1998-2004/2003-2004	7.0
D. Peter Ramsay, QC	County of Nanaimo	1998-2001	4.0
Patricia L. Schmit, QC	County of Cariboo	1998-2005	8.0
Robert W. McDiarmid, QC	Kamloops	1998-2006/2006	9.0
Ross D. Tunnicliffe	County of Vancouver	1998-1999; 2000-2005	6.8
Ralston S. Alexander, QC	County of Victoria	1999-2005/2005	7.0
Nao Fernando	Appointed Bencher	1999-2000	1.3
Wendy John	Appointed Bencher	1999-2001	1.5
Anita Olsen	Appointed Bencher	1999-2002	3.1
Ian Donaldson, QC	County of Vancouver	2000-2007	8.0
Terence L. LaLiberté, QC	County of Vancouver	2000-2001; 2004-2009	8.0
Jaynie Clark	Appointed Bencher	2000-2002	1.7
Dr. V. Setty Pendakur	Appointed Bencher	2000-2001	1.2
Robert Crawford, QC	County of Westminster	2001	0.8
June Preston	Appointed Bencher	2001-2008	7.0
John J.L. Hunter, QC	County of Vancouver	2002-2008/2008	7.0

BENCHER/Life Bencher	DISTRICT	DATES/*Treasurer* or President	YEARS IN OFFICE
Margaret Ostrowski, QC	County of Vancouver	2002-2005	4.0
James Vilvang, QC	County of Vancouver	2002-2009	8.0
Gordon Turriff, QC	County of Vancouver	2002-2009/2009	8.0
David Zacks, QC	County of Vancouver	2002-2009	8.0
Anne Wallace, QC	County of Victoria	2002-2005	3.6
Glen Ridgway, QC	County of Nanaimo	2002-2010/2010	9.0
Grant Taylor, QC	County of Westminster	2002-2005	3.6
Michael J. Falkins	Appointed Bencher	2002-2007	4.6
Patrick Kelly	Appointed Bencher	2002-2010	7.9
Valerie J. MacLean	Appointed Bencher	2002-2003	0.5
Patrick Nagle	Appointed Bencher	2002-2006	3.8
Dr. Maelor Vallance	Appointed Bencher	2002-2010	7.5
William Jackson, QC	County of Cariboo	2003-2009	7.0
Lillian To	Appointed Bencher	2003-2005	2.1
Joost Blom, QC	County of Vancouver	2004-2011	8.0
Gavin Hume, QC	County of Vancouver	2004-2011/2011	8.0
Carol Hickman, QC	County of Westminster	2004-2011	8.0
Darrell O'Byrne, QC	County of Pr. Rupert	2004-2005	1.7
Dirk Sigalet, QC	Okanagan	2004-2007	3.9
Gregory Rideout, QC	County of Westminster	2004-2005	1.6
Robert C. Brun, QC	County of Vancouver	2005; 2008-2011	5.0
Ronald Tindale	County of Cariboo	2006-2010	4.1
Robert Punnett, QC	County of Pr. Rupert	2006-2009	3.5
Ken Dobell	Appointed Bencher	2006-2008	2.1
Barbara Levesque	Appointed Bencher	2006-2010	4.1
Marguerite (Meg) Shaw, QC	Okanagan	2008-2009	1.9
Suzette Narbonne	County of Pr. Rupert	2009-2011	2.3
Patricia Bond	County of Vancouver	2010-2012	2.2
TOTAL	**BRITISH COLUMBIA**	69 BENCHERS	**5.5**

TAB 9

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

MEMORANDUM

FROM: Catherine Walker, Q.C.
Chair, National Mobility Policy Committee

TO: Council of the Federation
Law Society CEOs (for information)

DATE: December 3, 2012

SUBJECT: Quebec Mobility

ISSUE

1. At its meeting in Vancouver in September, the Council of the Federation endorsed a recommendation to explore a new arrangement for permanent mobility between Quebec and the common law jurisdictions in Canada to replace the Canadian Legal Advisor ("CLA") regime set out in the Quebec Mobility Agreement (the "QMA"). The National Mobility Policy Committee (the "Committee") was asked to consider the issue and report back to Council by December 2012.

2. The Committee wishes to provide a progress report on its work on this matter..

THE COMMITTEE'S DELIBERATIONS

3. Members of the Committee – Catherine Walker, Q.C., Chair (Nova Scotia Barristers' Society, Susanne Boucher (Law Society of Nunavut), Sylvie Champagne (Barreau du Quebec), Sophia Sperdakos (Law Society of Upper Canada), Alan Treleaven (Law Society of British Columbia), assisted on this issue by Michel Vermette (Chambre des notaires) and Jeff Hoskins (Law Society of British Columbia) – have met six times since the September Council meeting.

4. From the outset of our deliberations members of the Committee determined that it would be necessary to thoroughly explore not only the mechanics of implementing full mobility, but also a variety of issues raised, or potentially raised by allowing unrestricted mobility between civil and common law jurisdictions. The following are among the questions identified by the Committee:

- Would full mobility between civil and common law jurisdictions be consistent with the obligation of law societies to regulate in the public interest?
- Would the obligation of all members of the profession to practise only in those areas in which they are competent provide sufficient protection for the public?
- What implications would the proposal have for the work of the National Committee on Accreditation and the admission of lawyers trained in other countries, particularly those from civil law jurisdictions?
- Should full mobility be based on the agreement between the Barreau and the bars of France or on the National Mobility Agreement?
- Would the proposal open the door for lawyers who have been admitted to the Barreau under the terms of the Barreau's mobility agreement with the Bars of France to transfer to common law jurisdictions?
- Would it be necessary to establish a process for approving civil law degree programs similar to that in place for common law degree programs?
- What impact might full mobility have on law schools now offering four-year national programs (through which students obtain both a common law and a civil law degree) and one-year common law programs for holders of civil law degrees?
- How can a move to full mobility be reconciled with the requests that all law societies made for an exception to mandatory mutual recognition of professional licences for lawyers moving to or from Quebec under the Agreement on Internal Trade ("AIT")?
- Should the new mobility arrangement extend to members of the Chambre?

5. The Committee is continuing its exploration of the issues in anticipation of presenting recommendations to Council in early 2013. In this interim report, the Committee provides Council its preliminary analysis of the issues.

THE MOBILITY LANDSCAPE TODAY

6. The regulators of the legal profession in Canada have long been at the forefront of national mobility. Beginning with the National Mobility Agreement ("NMA") in 2002, and followed by the Territorial Mobility Agreement ("TMA") in 2006, and the QMA and its addendum in 2010 and 2012 respectively, the Federation and its member law societies have ensured that members of the legal profession in Canada are able to move from jurisdiction to jurisdiction with relative ease.

7. The NMA, to which the law societies of all common law provinces and the Barreau are signatories, is the foundation of the mobility regime for legal professionals in Canada. Pursuant to its provisions, lawyers licensed to practise in one common law jurisdiction may practise on a temporary basis (up to 100 days a year) in any other common law jurisdiction and may acquire a license to practice in another common law jurisdiction on a permanent basis on the basis of their license in their home jurisdiction without having to submit to additional assessment or examinations. The TMA provides for permanent mobility to and from the northern territories.

8. When the NMA was negotiated it was clearly contemplated that the same rules might apply to permanent mobility between the common law jurisdictions and mobility to and from the Barreau. This can be seen in the preamble to the agreement which, while recognizing that "differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions," includes the following statement

> [I]t is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

9. The willingness to permit mobility between the Barreau and the common law jurisdictions on the same terms is also reflected in paragraph 40 of the NMA which states

> 40. A signatory governing body, other than the Barreau, will admit members of the Barreau as members on one of the following bases:
>
> (a) as provided in clauses 32 to 36; or
> (b) as permitted by the Barreau in respect of the members of the signatory governing body.

10. As can be seen by paragraph 40(b), the agreement also recognized that the Barreau might establish a different set of rules for permanent mobility to or from Quebec. This reflected the political climate in Quebec at the time and the then government's greater interest in pursuing mobility arrangements with Europe, France in particular.

11. Notwithstanding the Barreau's interest in participating in the mobility regime, the Barreau did not implement the NMA until 2008 when regulations establishing the CLA regime were adopted. With the CLA regulations, which allow Canadian licensed lawyers to acquire restricted practise rights in Quebec, permanent mobility to Quebec by members of Canadian common law jurisdictions became a possibility. Two years later the law societies in the common law jurisdictions agreed to establish a reciprocal arrangement through the QMA pursuant to which members of the Barreau were able to acquire restricted practise rights as members of any of the common law jurisdictions. The extension of the CLA regime to members of the Chambre des notaires du Québec (“Chambre”) through the Addendum to the QMA signed in March 2011 closed the last remaining gap in the national mobility scheme.

12. Under the CLA regime, members of the Barreau and the Chambre may acquire membership or practise rights in any of the common law jurisdictions with a restricted scope of practise and members of any of the common law jurisdictions may acquire membership in the Barreau on the same terms. CLAs are permitted to practise federal law and the law of their home jurisdiction (with additional restrictions for Quebec notaries to reflect the scope of notarial practise).

MOVING TOWARDS FULL MOBILITY WITH QUEBEC

13. In 2009, following the signing of an agreement between the governments of Quebec and France on labour mobility, the Barreau entered into a mutual recognition agreement with the bars of France ("Barreau-France Agreement"), pursuant to which members of the Barreau educated in Quebec may acquire practise rights in France upon successful completion of a single examination in legal ethics. Members of any of the bars of France who receive their legal education in France may become licensed by the Barreau on the same basis.

14. When the replacement of the CLA regime with a more liberal form of mobility with Quebec was first proposed it was suggested that the agreement between the Barreau and the Bars of France might serve as a model. Although the members of the Committee are not yet ready to make a recommendation to Council on full mobility with Quebec, the consensus of the Committee is that the NMA provides the best model for full mobility. Amending the NMA to extend the existing provisions on permanent mobility between common law jurisdictions to mobility to and from the Barreau would be consistent with the Barreau's original proposal to move to full mobility.

15. In its current form, the NMA contains two separate sections dealing with permanent mobility. Paragraphs 32 through 36 set out the rules that apply to permanent mobility between the common law jurisdictions, while paragraphs 39 and 40 govern permanent mobility between Quebec and the common law jurisdictions. Amending the NMA to delete the paragraphs addressing permanent mobility with the Barreau (39 and 40), and amending the earlier paragraphs (32 through 36) to create a single set of provisions for permanent mobility whether between common law jurisdictions or between a common law jurisdiction and Quebec would ensure that all lawyers in Canada would be governed by the same rules for permanent mobility. This approach is not only straightforward, it is consistent with the original intent of the NMA and would build directly on the existing successful regime.

16. If this approach were adopted the rules that would apply to a member of the Barreau wishing to become licensed to practise law in a common law jurisdiction or to a member of a common law jurisdiction wishing to become a member of the Barreau would be those currently set out in paragraphs 32 and 33 of the NMA. As is now the case for lawyers seeking to transfer between common law jurisdictions, lawyers seeking to transfer to or from Quebec would have to be of good character and fitness and be eligible to practise law in their home jurisdictions. They would also have to certify that they had "reviewed all of the materials reasonably required" by the law society in the jurisdictions to which they seek to transfer. The reading requirement is currently used by the common law jurisdictions to address potential gaps in knowledge of those transferring into their jurisdictions. Extending this requirement to those transferring to or from Quebec could serve a similar purpose.

17. With regards to the implications of a full mobility regime for the Chambre, the Committee notes that the extension of mobility rights to members of the Chambre occurred only very recently. The CLA regime accommodates the unique nature of the notarial practice while ensuring that members of the Chambre are included within the mobility regime. The Committee anticipates recommending that the CLA regime be maintained for members of the Chambre, with the specific provisions incorporated into

the NMA. The Committee has been advised that this recommendation would be consistent with the wishes of the Chambre.

ISSUES CONSIDERED BY THE COMMITTEE

18. The Committee recognizes that the proposal to replace the existing mobility arrangements with Quebec raises a number of potential issues, the most significant of which are related to the nature of the respective legal systems.

19. The ethical obligation binding all legal professionals to provide only those services for which they possess the necessary competence provides reassurance that mobility between jurisdictions with different legal systems will not compromise the protection of the public. This ethical obligation – contained in the Model Code of Professional Conduct and in one form or another in the rules of professional conduct governing legal practitioners wherever in the country they practise – is a cornerstone of the regulation of the legal profession in Canada. Law is a complex field and regardless of where they are educated no member of the profession can be competent in all areas of the law. Lawyers are relied on to understand the limits of their competence and to refrain from practising in areas for which they are not qualified.

20. To determine whether reliance on this ethical obligation in a regime permitting unrestricted mobility between civil and common law jurisdictions would be consistent with the obligation of law societies to regulate in the public interest, the Committee also carefully considered the similarities and differences in the legal traditions, paying particular attention to the substantive legal knowledge required of practitioners in each. An overview of the comparison follows.

Canadian Common Law and Civil Law – Overview

21. Canada is a bijural country in which, in matters of private law, two legal systems coexist: the civil law in Quebec and the common law in the rest of the country. This bijural legal system is the historical legacy of the colonization of Canada, first by France and then by Great Britain. First recognized in the *Quebec Act, 1774,* and subsequently confirmed by the division of powers set out in section 92(13) of the *Constitution Act, 1867,* in Quebec civil law prevails in matters of private law, while all public law is governed by the common law. In the other provinces, and in the territories, the common law governs in all areas of law. Although commonly referred to as a civil law jurisdiction, it is thus more accurate to describe the legal system in Quebec as a mixed law jurisdiction in which the civil law and the common law coexist and interact.

22. Before analyzing the differences and similarities in the civil law and the common law in Canada, it is important to have a basic understanding the elements of the two systems.

Civil Law

23. The civil law tradition emphasizes the primacy of written laws[1], with the Quebec Civil Code (the “Civil Code”) serving as the key source of law in the private law sphere.

[1] *Bijuralism in Canada,* The Honourable Michel Basterache, February 4, 2000, http://canada.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b1-f1/bf1g.html

As stated in its Preliminary Provision, the Civil Code

> ". . . governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it."

24. Another distinguishing feature of the civil law tradition is its emphasis on abstract concepts. It is suggested that civil law uses a "deductive approach to legal reasoning, proceeding from the general to the specific."[2]

25. While civil law is understood to be codified law rather than "judge made" law, both legal scholarship and prior judicial decisions influence the law and serve as sources of it.[3]

26. Experts indicate that the civil law in Quebec has been and continues to be influenced by the common law, in both formal and substantive ways. This influence can be seen both in the legal principles that apply in given areas and in the manner in which judgments are rendered.[4]

27. The influence of the common law on the substance of the civil law in Quebec is not a new phenomenon. Reliance on the common law as an interpretative aid was not uncommon in the early days of Lower Canada and the common law continues to be referred to in comparative legal analysis today. It is also the case that French law, an important influence on Quebec civil law, is itself “in philosophical agreement with English law.”[5] Today the common law and statute law in other Canadian jurisdictions also serve as an important source for Quebec legislators in the reform and revision of Quebec law.[6]

28. The formal influence of the common law can be seen in the way in which judges in Quebec draft their decisions. Although, like judges in other civil law systems, judges in Quebec are not restating a legal rule established by a court but are rather applying an abstract codified rule to the facts before them, like their counterparts in common law Canada, they typically explain their reasoning, providing a detailed analysis of the applicable rule, considering its application in previous judgments, and applying the rule to the facts before them.

Common Law

29. In contrast to civil law in which codification of the law is an essential characteristic, the common law is unwritten law based on judicial precedent.[7] The common law employs inductive reasoning in which the findings or *ratio decidendi* of previous cases are applied by analogy to a set of facts.

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[2] Ibid.
[3] Ibid.
[4] *Some Thoughts on Bijuralism in Canada and The World*, Marie-Claude Gervais and Marie-France Séguin, at page 8; http://canada.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b2-f2/bf2.pdf
[5] Ibid.
[6] Ibid.
[7] supra, at page 5.

30. With roots in the England of the 11th century, the common law was developed gradually as the Royal Courts sought to standardize the law throughout England. Today the common law governs private law in more than 30 countries, including England, Wales and Ireland, 49 of the 50 American states, Australia, New Zealand, and all of Canada outside of Quebec. It also governs public law throughout Canada.

31. Although today in common law Canada much law is contained in statutes, historically the unwritten common law was the general law and statutory law was the exception.[8]

32. Just as civil law in Canada has been influenced by the common law, the common law has been influenced by the civil law. In case law from the Supreme Court of Canada, for example, the influence of civil law can be seen in the Court's reliance on English decisions that cited civilian cases.[9] A dialogue between the civil and the common law can also be seen in judgments of the Court in child custody matters and in cases involving issues of universal values, such as human rights law, with a resulting reciprocal influence between Canada's civil and common law traditions.[10]

Similarities and Differences

33. There is no question that there are differences between the common law system and the civil law system. It appears, however, that the differences between the two, at least in the Canadian context, are sometimes exaggerated.

> *Many of the differences between the civil law and common law systems are more apparent than real: they arise much more from the manner and order of presentation rather than the content of the rules, and the few underlying differences are attributable mostly, the authors note, to the vicissitudes of history.*
>
> *The convergences within western society largely transcend the national systems which comparative law has sometimes unduly pitted against each other. In fact, the similarities between the civil law and the common law are much more significant than the technical differences.*[11]

34. Despite their different forms and methods of legal reasoning both the common law and the civil law draw on Western legal tradition and share a common purpose: to determine the appropriate outcome in a particular matter through the application of legal principles to a set facts.

35. It is also important to recognize, as noted above, that the legal system in

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[8] ibid.

[9] *The Supreme Court of Canada and Its Impact on The Expression of Bijuralism*, France Allard, General Counsel, Legislative Services Branch, Department of Justice Canada, at page 5, http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b3-f3/bf3b.html

[10] Supra, at pages 20-21.

[11] *Harmonization of Federal Law with Quebec Civil Law: Canadian Bijuralism and its Actualizatio*n, Mario Dion, Associate Deputy Minister Civil Law and Corporate Management Sector, Department of Justice Canada, Montpellier, 2000

Quebec is a mixed system rather than a pure civil law system. Although legal practitioners outside of Quebec may not know much about the civil law, Quebec lawyers and notaries do receive training in the common law and also employ the common law in their practice.

36. With this general background we can now look more closely at the areas of overlap and difference in the practice of law in Quebec and the rest of the country.

Substantive and Practical Competencies — Common Elements

37. As part of the National Admission Standards Project – a project undertaken to develop consistent standards for admission to the legal profession across Canada - the Federation recently approved a National Entry to Practice Competency Profile for Lawyers and Quebec Notaries (the "National Profile") as a national admission standard. A copy of the National Profile is available here: http://www.flsc.ca/_documents/NASCompetenciesSept2012.pdf. Work is now beginning on identifying how the national standards will be implemented. Although this phase of the project is in its early days, it is anticipated that implementation will include agreement on methods for assessing whether candidates for admission to the Bar possess the competencies included in the National Profile.

38. The National Profile was developed using accepted best practices to ensure that the final document would accurately set out the competencies currently required upon entry to the practice of law in Canada. Thus while the National Profile has not yet been adopted by any of the Canadian law societies, and consideration of implementation of the National Profile as a national standard for admission to the practice of law in Canada is just beginning, it does provide useful information about the competencies required for the practice of law both in Quebec and in the rest of the country.

39. In developing the National Profile, steps were taken to ensure that it was truly national in scope and in particular that it was reflective of the practice of law in all jurisdictions in the country. A quick review of the National Profile reveals that the vast majority of the individual competencies set out in the profile are required of all legal practitioners regardless of where in Canada they practise.

40. The profile is divided into three sections: substantive legal knowledge, skills, and tasks. With only a handful of exceptions for notaries in Quebec, the skills and tasks that members of the legal profession must possess and be able to perform are identical regardless of the location of the practice. All new members of the profession require the same skills relating to ethics and professionalism, oral and written communication, legal analysis, research, client relationship management, and practice management. They must also be able to perform the same tasks relating to ethics, professionalism and practice management, client relationships, the conduct of matters, and adjudication and alternative dispute resolution.

41. There are differences in the substantive legal knowledge competencies needed for the practise of law in Quebec and in the rest of the country, but even in this area the differences are not extensive.

42. All new members of the profession must possess a general understanding of the core legal concepts applicable to the legal system in Canada including those relating to:

a) The constitutional law of Canada, including federalism and the distribution of legislative powers;
b) The Charter of Rights and Freedoms;
c) Human rights principles and the rights of Aboriginal peoples of Canada;
d) Administration of the law in Canada, including the organization of the courts, tribunals, appeal processes and non-court dispute resolution systems;
e) Legislative and regulatory system; and
f) Statutory construction and interpretation.

43. Those practising in Quebec must also possess knowledge of the Quebec Charter of Human Rights and Freedoms.

44. With the exception of new notaries in Quebec, everyone practising law in Canada must also possess the same knowledge of criminal law. New practitioners also require the same knowledge of administrative law, evidence, the principles of ethics and professionalism applicable to the practice of law in Canada, and practice management including knowledge of client development, time management, and task management.

Substantive Competencies — Differences

45. New practitioners require knowledge of the key principles of the applicable legal system in their jurisdiction: civil law in Quebec, common law and equity in the common law jurisdictions. It is worth noting, however, that possession of the required knowledge of the public law subjects set out above by those practising in Quebec, will inevitably include knowledge of the elements of common law as it is the common law that governs in these areas. Practitioners in Quebec also acquire knowledge of equitable remedies. The concept of unjust enrichment, for example, is now included in the Civil Code, and equitable remedies such as injunctions, specific performance and estoppel are also available in Quebec.

46. The National Profile makes almost no distinction between those practising in Quebec and elsewhere in Canada when it comes to Canadian substantive law. Thus all new practitioners must possess a general knowledge of property, torts, corporate and commercial law, wills and estates, evidence, rules of procedure, and procedures applicable to commercial, real estate, and wills and estates transactions. The National Profile does qualify for those practising in Quebec the requirement for knowledge of contracts and family law, by adding in the case of contract law, obligations and sureties, and in the case of family law, the law of persons.

47. A review of the required substantive law competencies in the National Profile does not, however, tell the whole story. Although the list of subject matter competencies differs little for entry-level practitioners in Quebec and the other provinces and territories, the specific content of some of the competencies does differ, most notably in the areas of contracts, torts and property. An overview of some of the more significant differences

in these areas is provided below, followed by a brief discussion of the addition of the "law of persons" to the family law requirement for legal practitioners in Quebec.

Contracts, Obligations and Sureties

48. There are, of course, differences in the source of the law applicable to contracts: the core legal concepts and the rules of interpretation of common law contract law are unwritten; in Quebec they are contained in the Civil Code. But there are also some significant differences in the substance of the law.

49. In the common law, the legal principles applicable to contracts favour certainty and the autonomy of the parties. Courts are reluctant to interfere with the intentions of the parties, instead restricting their task to ascertaining that intention on the basis of the wording of the contract itself.[12]

50. In contrast, civil law contractual theory is based on ideas of equality in exchange. Fairness is thus a relevant concept in contract interpretation. The interpretation of the will of the parties is also tempered by the application of rules for specific types of contracts.[13]

51. In addition to differences in certain substantive principles, there are also some conceptual differences in the area of contract law. The concept of "obligations" that are imposed when a contract results from a meeting of the minds is one example. The Quebec law of obligations revolves around codified contractual responsibilities and the corresponding case law interpreting obligations set out in the Code.

52. Civil and common law principles applicable to contracts do, however, overlap in many ways: notions such as offer and acceptance, consent and capacity are common to both systems. In addition the Civil Code imposes contractual liabilities, setting out the cause of action for breach of contract, similar to the cause of action for breach in common law Canada. It also provides for remedies for breach of contract including damages and the remedy of specific performance similar to the equitable remedy in common law Canada.

Torts and Civil Liability

53. Although the National Profile requires all entry-level practitioners to have a general knowledge of tort law the concept of tort law *per* se does not exist in Quebec. Instead the Civil Code includes the concept of extra-contractual liability. As is the case with common law torts a plaintiff must demonstrate fault on the part of the defendant, injury suffered by the plaintiff and a causal link between the fault and the injury.

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[12] Giuditta Cordero Moss (2007) "International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith," *Global Jurist*: Vol. 7: Iss. 1 (Advances), Article 3, at page 6. http://folk.uio.no/giudittm/Non-state%20Law_Good%20Faith.pdf

[13] Supra, page 13. See also Julian Hermida, *Convergence of Civil and Common Law Contracts in the Space Field*, http://www.julianhermida.com/dossier/dossierpubhk.pdf.

54. Principles related to the intentional torts of assault, battery, false arrest, false imprisonment, and defamation are codified in Quebec in the part of the Code governing the law of persons. The unintentional tort of negligence, at the root of so many civil actions in common law Canada, is codified in Quebec civil law as a general duty of care owed to all persons. Importantly, although this general duty of care between all individuals seems broader than the tort of negligence in common law jurisdictions, it has been restricted by the interpretation and application of fault and causation.

55. The Civil Code also creates some additional special duties, such as the oft-cited duty of care owed by a bystander to a stranger in distress, a concept that does not exist in common law Canada.

Property

56. Unlike in common law jurisdictions, property law in Quebec is largely codified in the Civil Code, although it is supplemented by case law interpreting its meaning and application and by ancillary legislation applying to specific types of property. Many property law concepts set out in the Civil Code are shared with common law Canada, including notions of moveable and immoveable property, real property, possession, found property, rights of way and co-ownership. The Civil Code also contains some civil property law concepts created by contract including “the right of superficies”, a concept derived from Roman law referring to the ownership of an immovable property overlapping, or overlapped by, another immovable property; “usufruct”, the right to the use and enjoyment, for a specified period of time, of property owned by another as one’s own, subject to an obligation of preserving the substance of the other’s property; “servitude”, an encumbrance over a building for the use and benefit of another building belonging to another owner (similar to an easement); and “emphyteusis” a leasehold interest of between 10 and 100 years granting a person the full benefit and enjoyment of an immovable owned by another provided he does not endanger its existence and undertakes to improve it by building on or cultivating the immoveable.

Family Law and the Law of Persons

57. Family law in Quebec and the common law jurisdictions share many common concepts such as the best interests of the child in determining child custody matters. Indeed family law provides an excellent example of an area in which the common law and the civil law interact. Just as family law in the common law jurisdictions is expressed in statutes, the relevant legal principles applicable to family in Quebec are contained in the Civil Code. In addition, the Civil Code includes principles applicable to the law of persons, including the enjoyment of civil rights, personality rights including rights related to the integrity, care and confinement of the person, privacy, reputation, and capacity, legal status, and the creation and rights of legal persons. In common law provinces similar conceptual personal rights are covered through a patchwork of legislation and precedent notably in the areas of family, human rights, and tort law.

Scope of practice

58. In the common law jurisdictions, the practice of law is reserved to lawyers, with limited exceptions in some jurisdictions permitting articled students, paralegals, and others to provide certain legal services. No legislative distinction is made in the scope of

practice of barristers and solicitors.

59. In Quebec the legal profession is divided between “avocats” (advocates or lawyers), who are members of and are governed by the Barreau and “notaires” (notaries), who are members of and are governed by the Chambre. Both lawyers and notaries provide legal advice and opinions; what distinguishes these two branches of the legal profession are their respective areas of exclusive jurisdiction: lawyers engage in all areas falling under the broad umbrella of the practice of law, except those areas reserved exclusively to notaries. The Quebec *Notaries Act* (the *“Act”*) confers on notaries the status of both public officer and legal advisor. The *Act* also reserves to notaries exclusive jurisdiction to perform the following acts, although section 16 of the *Act* specifies that these provisions do not restrict the rights conferred on advocates under the *Act Concerning the Barreau du Québec*:

> 15. Subject to the provisions of section 16, no person other than a notary may, on behalf of another person,
>
> (1) execute acts which, under the Civil Code or any other legislative provisions, require execution in notarial form;
>
> (2) draw up acts under private signature relating to immovables and requiring registration in the land register or the cancellation of such registration;
>
> (3) prepare or draw up an agreement, motion, by-law, resolution or other similar document relating to the constitution, organization, reorganization, dissolution or voluntary winding-up of a legal person or the amalgamation of legal persons;
>
> (4) prepare or draw up the administrative declarations and applications prescribed by the legislative provisions relating to the legal publicity of sole proprietorships, partnerships and legal persons;
>
> (5) give legal advice or opinions;
>
> (6) send a demand letter arising from an act he or she has executed, provided there is no charge to the person to whom it is addressed;
>
> (7) represent clients in any non-contentious proceeding, prepare, draw up or present any related motion on their behalf or uncontested motions in adoption proceedings, for judicial recognition of the right of ownership, for the voluntary partition of property, for the acquisition of the right of ownership by prescription, for registration in the land register or in the register of personal and movable real rights, or the correction, reduction or cancellation of a registration in either of those registers, or for the cancellation of an entry or the filing of a declaration in the register instituted under the Act respecting the legal publicity of sole proprietorships, partnerships and legal persons (chapter P-45) or the correction or deletion of any inaccurate information appearing in that register.

Implications for Mobility

60. As the review above indicates, there is considerable overlap between the substantive law competencies required for the practice of law in Quebec and the

common law jurisdictions. In addition, as practitioners in a mixed legal system in which public law is governed by the common law and private law by the civil law, those practising law in Quebec possess knowledge of and obtain practical experience in the common law and the principles of equity. It must be recognized, however, that those trained and licensed exclusively in a common law jurisdiction do not acquire any corresponding knowledge of civil law. In addition, notwithstanding the overlap in the substantive law competencies required to practise law, there will be differences in substance in the knowledge of practitioners in Quebec and in the other Canadian jurisdictions.

61. Certainly the substantive law varies not only between Quebec and the common law jurisdictions, but also among the different common law provinces and territories. The existence of such differences is noted in the following excerpt from the preamble to the NMA

> The signatories recognize that
> . . .
>
> [D]ifferences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions. . .

62. Yet mobility between these jurisdictions has been possible for a decade. It may be that the existence of substantive law differences between jurisdictions is the reason for the provision in paragraph 33(d) of the National Mobility Agreement allowing for the imposition of a reading requirement on transferring lawyers.

63. The significant overlap in substantive legal knowledge and practical competencies, the possibility of imposing a reading requirement to address potential gaps in knowledge, and the ethical and professional obligations that bind all members of the legal profession, are all factors relevant to assessing whether the public interest would be appropriately protected in a full mobility regime.

Agreement on Internal Trade

64. Another important issue identified by the Committee involves the implications of liberalized mobility to and from the Barreau and the Labour Mobility provisions of the federal, provincial, territorial Agreement on Internal Trade (the “AIT”).

65. Amendments to the Labour Mobility provisions of the AIT implemented in 2009 made mandatory the recognition of credentials of regulated occupations. The effect of the amendments was to require governments and regulatory bodies to accept the credentials of licensed professionals from other Canadian jurisdictions without requiring significant additional training, examination or assessment.

66. The AIT does permit provinces and territories to state exceptions to the mandatory mutual recognition requirement where significant differences in certification requirements exist between jurisdictions. Such exceptions must be justified by one of the following legitimate objectives:

a. public security and safety;

b. public order;
c. protection of human, animal or plant life or health;
d. protection of the environment;
e. consumer protection;
f. protection of the health, safety and well-being of workers;
g. provision of adequate social and health services to all its geographic regions; and
h. programs for disadvantaged groups.

67. Where an exception is stated, the regulatory body (or government) may impose additional requirements, restrictions, limitations or conditions on a license, or may refuse to recognize credentials.

68. The mandatory mutual recognition provisions replaced voluntary provisions that had been in force for a number of years. When first ministers agreed to move to a mandatory regime they imposed an aggressive timeline for implementation. As a result there was limited opportunity for input and little effective consultation.

69. An ad hoc group of Federation and law society staff met on a number of occasions to consider the impact of the amendments. A central concern of the members of the ad hoc group was whether the amendments would have repercussions for the mobility regime established by the national and territorial mobility agreements. Specific concerns were expressed about the potential impact of the amendments on the requirements for those transferring between jurisdictions to be of good character and the ability to maintain restrictions on licences imposed by a lawyer's home jurisdiction. Submissions by the Federation on these issues resulted in some changes to the wording of the relevant provisions under the AIT that largely addressed our concerns.

70. Although at the time of the amendments to the labour mobility provisions of the AIT, the NMA had been in place for six years, there had been virtually no experience with mobility to or from Quebec. The Barreau had just implemented regulations establishing the CLA category of membership and the common law jurisdictions had not yet agreed to establish a reciprocal arrangement (subsequently brought into place in 2010 with the signing of the QMA).

71. In the circumstances, the members of the ad hoc group raised concerns about unrestricted mobility to and from Quebec under the AIT provisions. Representations by the provincial and territorial law societies resulted in all common law jurisdictions stating an exception for lawyers from Quebec, and the government of Quebec stating an exception for lawyers from all other Canadian jurisdictions. The effect of this exception is to permit the regulators of the legal profession to impose additional requirements or restrictions on lawyers seeking to transfer to or from Quebec. No exception was required for notaries as there is no equivalent to the Quebec notarial profession.

72. In seeking the exception, law societies identified the existence of different legal systems and the corresponding differences in legal education in Quebec and the common law jurisdictions as the rationale. This position reflected common assumptions that were not carefully examined at the time. As noted above, when the exceptions were sought there had been very little experience with mobility to or from Quebec. The signing of the QMA in 2010, the addendum for members of Chambre in 2011, and the current proposal to move to full mobility with the Barreau have brought these historic

assumptions under greater scrutiny. Analysis of the differences and similarities in the legal systems in Quebec and the rest of Canada has demonstrated to the Committee that the differences in substantive law are fewer than might have been assumed. The mixed nature of the legal system in Quebec means that lawyers in that jurisdiction have both significant knowledge of and experience with the common law. While lawyers in common law Canada may not have any corresponding knowledge of the civil law, they share with their Quebec colleagues knowledge of much of the public law that governs in that province.

73. Experience with mobility between Quebec and the common law jurisdictions under Quebec's Canadian Legal Advisor regulations and the reciprocal regime established under the QMA has also contributed to greater confidence in the ability of civil law lawyers and common law lawyers to practise in each other's jurisdictions.

74. When the amendments to the AIT were brought in, government officials stressed that exceptions to the mandatory recognition requirement were to be rare. Pursuant to Article 708 of the AIT

> [m]ere differences in scope of practice or training and education requirements are not sufficient to justify an exception a mere difference between the certification requirements of a Party related to academic credentials, education, training, experience, examination or assessment methods and those of any other Party is not, by itself, sufficient to justify the imposition of additional education, training, experience, examination or assessment requirements as necessary to achieve a legitimate objective.

To date, although some 300 occupations are affected by the AIT provisions, only a handful of exceptions have been stated. In many cases, the exception for lawyers moving to or from Quebec is the only exception.

75. When law societies were seeking the exception, some government officials expressed concern about its open-ended nature as the policy goal of the amendments to the labour mobility provisions is to have unrestricted mobility for all regulated occupations. Rather than maintaining permanent exceptions, parties are encouraged to adopt common occupational standards (Article 707 of the AIT).

76. Full mobility to and from the Barreau would be consistent with the goals of the AIT and it seems likely that a request for termination of the exceptions would be met with approval by the provincial and territorial governments that originally stated them.

77. The Committee would like to flag one issue that might arise if the revised NMA were to be adopted by some, but not all jurisdictions. An agreement by the Barreau to recognize the credentials of lawyers from common law jurisdictions and by any of the common law jurisdictions to recognize those of Quebec lawyers without additional assessment or conditions would make it very difficult for any non-signatory jurisdictions to continue to justify the exception currently in place. This could lead to a challenge to any remaining exception or might cause the relevant government to withdraw the exception of its own initiative.

Other Issues

78. The Committee also considered a number of questions about the potential implications of the mobility proposal for activities of the Federation related to legal education and admissions, including those of the National Committee on Accreditation ("NCA") and the Canadian Common Law Program Approval Committee ("Approval Committee").

79. The Committee was aware of suggestions that allowing unrestricted mobility to common law jurisdictions for members of the Barreau with only civil law degrees would make it difficult to justify the continuation of the current policies for NCA applicants with non-Canadian civil law degrees. Typically such candidates are given no advanced standing and are required to return to law school in order to apply for a licence to practise law in a common law jurisdiction in Canada.

80. It was also suggested to the Committee that implementation of full mobility between the Barreau and the law societies in common law jurisdictions would necessitate a review of the requirements for civil law degree programs along the same lines as the review that led to adoption of the National Requirements for Common Law Degree programs (the "National Requirements").

81. In considering these issues, the Committee sought the input of the Chairs of the NCA and the Approval Committee.

Admissions vs. Mobility

82. The suggestion that full mobility might have implications for the work of the NCA and the Approval Committee highlights the need to distinguish between admissions and mobility.

83. Admission to a law society under the mobility rules is available only to those who have already been admitted to another law society. The scheme of permanent mobility for members of the legal profession first established through the NMA is premised on acceptance of the admission decisions of each law society. Although there are differences in the admissions standards of the various law societies, they do not look behind each other's admission decisions when faced with an application under the mobility rules (other than to determine whether the applicant is of good character). This includes not enquiring into the educational background of the applicant. By contrast a student who wishes to enter the licensing process of a law society must satisfy the educational requirements of that law society. The basis for mobility under the proposed amendments to the NMA will be the same. Only those already licensed by a law society will be eligible to transfer to or from Quebec. The basis of the admission of a member of the bar in Quebec to a law society in one of the common law jurisdictions will be based not on the legal education of the applicant but on the fact that they have been accredited in Quebec.

Implications for the NCA

84. At present, a member of the bar in Quebec who wishes to practise law in a common law jurisdiction other than as a CLA must have his or her credentials assessed by and receive a certificate of qualification from the NCA. The Committee's proposed amendments to the NMA would eliminate that requirement for anyone educated and licensed in Quebec. A graduate of a civil law program in Quebec seeking to practise in a

common law jurisdiction who has not completed the bar admission program and been called to the bar in Quebec would still have to go through the NCA.

85. The move to unrestricted mobility for lawyers licensed in Quebec and the analysis underlying the recommendation may lead to a review of the NCA policy for the assessment of the credentials of civil law graduates. This policy has not been reviewed in many years.

86. Unlike those trained outside of Canada, those trained and licensed as lawyers in Canada share much of the same substantive legal knowledge and practical competencies. The law in critical areas, including constitutional law, criminal law, administrative law and much other public law is the same whether one earns a common law or a civil law degree in a Canadian law school. The structure of the government and of the courts is the same in Quebec and the rest of Canada, and the licensing process in all Canadian jurisdictions shares certain key elements, including the requirement for a period of articling and the successful completion of exams or another assessment mechanism. This distinguishes members of the Barreau who may wish to transfer to a common law jurisdiction from NCA applicants from other countries. In addition, as can be seen in the labour mobility provisions of the Agreement on International Trade ("AIT"), for example, public policy in Canada strongly favours unrestricted mobility between provinces and territories, arguably justifying a more liberal approach to recognition of the credentials of licensed members of the Barreau.

87. It should be noted that these same factors will distinguish lawyers licensed in a Canadian common law jurisdiction seeking to transfer to Quebec under the new mobility rules from those trained outside of Canada applying to the Comité des equivalences, the Barreau's equivalent to the NCA.

Implications for the National Requirements

88. It was suggested to the Committee that permitting members of the Barreau to transfer to a common law jurisdiction without assessment of their credentials or a requirement to take transfer exams would be inconsistent with the Federation's decision to set requirements for approval of Canadian common law degrees unless similar requirements were imposed for civil law degrees.

89. As discussed above, in accepting a transfer applicant under the existing mobility rules, law societies rely on the assessment of the educational credentials of the applicant by the law society in the applicant's home jurisdiction. Since its inception, 10 years ago, the NMA has operated effectively without any common standard for the content of the educational requirement for admission. The National Requirements, which come into effect in 2015, will change that.

90. The National Profile recently adopted by the Federation may also have implications for this issue. Explicitly national in nature, the national Profile is intended to apply to applicants in the common law jurisdictions and in Quebec. By far the majority of the competencies in the profile are universal, applying to all applicants regardless of jurisdiction. There are knowledge competencies that are unique to applicants in Quebec or in the common law jurisdictions, but these are few in number.

Other Issues Related to Education

91. A number of other education-related questions were raised with the Committee, amongst them questions about the possible impact on law schools offering one-year bridging programs for holders of civil law degrees and those offering national programs through which students can earn both a common law and a civil law degree. While the Committee understands that law schools may have concerns about the effect of full mobility on those programs, the Committee is of the view that its mandate does not include an analysis of this issue.

Lawyers from France

92. As discussed above, pursuant to the Barreau-France Agreement, a lawyer educated in France may become a member of the Barreau with little formality. All that is required is successful completion of an exam on legal ethics. Some have questioned whether lawyers from France licensed by the Barreau under this arrangement will be able to move freely to Canadian common law jurisdictions if the liberalized mobility regime is adopted.

93. This issue first arose under the QMA. As lawyers moving to Quebec under the Barreau-France Agreement do not have the same knowledge about Canadian law and government and legal structures as those with Canadian civil law degrees who have gone through the Barreau's full admissions process they were excluded from the CLA regime. Clause 7 of the QMA addresses this:

> 7. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted as equivalent by the Barreau are not qualifying members of the Barreau for the purpose of clause 6.

94. A similar provision could be included in an amended NMA.

95. In the knowledge of the members of the Committee, in the two years since the QMA was adopted, no member of the Barreau licensed under the Barreau-France Agreement has sought CLA status or challenged this provision. In our view, the restriction is justified given the lack of familiarity with Canadian law and the need to protect the public. The Council may want at some point to consider whether this restriction should be permanent, or whether French lawyers who have practised in Quebec as members of the Barreau for a certain period of time might qualify for unrestricted mobility. The rules governing mobility of lawyers in the EU might provide a template for such an approach. The Committee does not, however, see this as a prerequisite to approving the revised NMA and is confident that at this stage, the restriction on French lawyers is appropriate and justifiable.

Language

96. A final issue considered by the Committee relates to the requirement that lawyers, like all professionals, must be able to speak French in order to work in Quebec. There was some suggestion that members of the Barreau seeking to transfer to a common law jurisdiction should be required to be able to speak English. In the

Committee's view this suggestion is without merit.

97. Although provincial law requires that those seeking to practise law in Quebec be proficient in French, neither the NMA nor the QMA impose any language requirement on members of the profession exercising mobility rights under the agreements. There is not now any requirement for CLAs from Quebec to speak English. A move to a more liberal form of mobility does not necessitate any change. It should be noted that the National Profile includes a requirement that applicants be able to communicate effectively in English or French.

CONCLUSION

98. The members of the Committee have been carefully considering the proposal to move to full mobility to and from the Barreau. The Committee requires additional time, however, to consider all of the issues. We anticipate completing our work and reporting to Council in early 2013.

The Law Society of British Columbia

Reply to: Bruce LeRose, QC

December 13, 2012

Minister of Justice and Attorney General
Honourable Shirley Bond
PO Box 9044, Stn Prov Govt
Victoria, BC V8W 9E2

Dear Madam Attorney:

Re: White Paper on Justice Reform –
Part One: A Modern Transparent Justice System

Preface

The Law Society of British Columbia regulates the legal profession in the province of British Columbia. It is an institution whose origin dates back to 1869, and which has been continued under the *Legal Profession Act*, SBC 1998, c. 9. The object and duty of the Society is to uphold and protect the public interest in the administration of justice by, *inter alia*, preserving and protecting the rights and freedoms of all persons. The Law Society therefore takes a considerable interest in matters involving the justice system, and believes that it can lend an important voice to the discussion surrounding its modernization. We expect that we will be able to make a valuable contribution to the efforts made by the various branches of the government, including the courts, to modernize British Columbia's justice system.

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A Modern, Transparent Justice System

The Law Society has reviewed the Ministry of Justice's White Paper entitled "A Modern, Transparent Justice System" (the "White Paper"), that was released by the Ministry of Justice earlier this fall.

An efficiently operated justice system that is able to resolve legal disputes in a timely and fair way is essential to a stable society that operates under the Rule of Law. The Rule of Law is a fundamental principle underlying Canadian democracy and is, as stated in the preamble of the *Charter of Rights and Freedoms*, one of the principles upon which Canada is founded. The Supreme Court of Canada has held that the Rule of Law is a fundamental postulate of Canada's constitutional structure. In order to have a society that operates under and is governed by the Rule of Law, the law must be accessible, and the population as a whole must have confidence in legal systems. People must be able to understand and access the law, and be able to access a judicial system that can interpret and resolve legal disputes. This must be done efficiently, fairly, and in a timely manner.

1. The Law Society supports the general vision set out by the government in the White Paper.

The Law Society accepts the general proposition put forward by government that the justice system must be transparent, timely, and balanced. In particular, the Law Society agrees that:

- in order to support the Rule of Law and public confidence in the judicial system, demand for justice should be met without excessive delay. Steps should be taken

to ensure that the courts are able to hear and adjudicate legal disputes fairly in a manner that avoids delay. Not only are there constitutional imperatives to doing so, the general confidence of the public in the justice system requires it. If there are reasonable measures or goals that can be identified to measure or reduce the time needed to reach resolution of legal disputes, they should be indentified and implemented;

- timeliness must, of course, be assessed against fairness. Consequently, the Law Society agrees that there needs to be a balance in the justice system to ensure that the fairness of process is not lost in the desire to increase the speed with which the resolution of legal disputes can be accomplished. However, where steps are available to assist parties when resolving disputes outside of court, or ensuring that individuals understand their legal obligations before entering into them (and thereby hopefully avoiding the likelihood of a dispute in the future), steps should be taken to achieve this end.

  The Law Society agrees that some analysis of risk will need to be addressed by government and by the courts in setting up systems to achieve timely and fair resolution of disputes; and

- ensuring that the justice system responds in a timely and balanced way to the resolution of legal disputes will, the Law Society believes, greatly aid in making the system more transparent to the general population.

The Law Society recognizes that the White Paper suggests the creation of a number of management processes. Management processes may well be necessary in order to gather

the data and make assessments in order to determine proper processes to be undertaken to improve the efficiency of the justice system. However, management processes can be costly. There is some danger, by creating such processes, of taking money away from improvements that are necessary to improve the justice system through the increase of a management bureaucracy. While the Law Society is certain that increased management will undoubtedly be necessary to achieve reform to the justice system, the government must be vigilant to ensure that such processes are proportionate and subject to review.

2. Justice and Public Safety Council

Action item 1 in the White Paper is the government's commitment to take measures to create a Justice and Public Safety Council. The Law Society notes that this Council will be responsible for "setting the strategic direction and vision for the justice system, and for leading the change that is necessary to achieve that vision." Consequently, the Law Society understands that the Justice and Public Safety Council will be perhaps the most important body in setting the agenda and guiding or implementing change to the system.

The Law Society is concerned that the Council, with the mandate that it has been given, will include only members within government. The White Paper explains that the Council will be the central location of executive decision making regarding the justice system within government, and that the independence of key actors in the system precludes them from being part of the Council. If the Council is only to be a co-coordinating function to ensure that the various branches of the Ministry of Justice consult with each other and reach a common direction, then the Law Society could understand why membership of the Council would be limited to organizations within the

executive branch of the government. However, given the responsibility for setting strategic directions and visions for the justice system, the Law Society believes that the Council will have a greater role than simply co-coordinating executive or legislative government action. Creating a vision and strategic direction for the justice system should involve more than the executive and legislative branches of government. The Law Society believes that the Justice and Public Safety Council could play an important role in bringing together the various independent key actors in the system, including the judicial branch of government and the legal profession in general, to work together to collaborate on the best solutions for improving public confidence in the system and reaching the goals set by the government in the White Paper. By doing so, the Council could usefully set an agenda for the justice summits, and make recommendations to the executive and legislative branches of government about how the system may be improved.

However, if the Council is left as being comprised solely of representatives of the executive or legislative branch of government, the limitations, including financial or spending limitations, that those branches of government face create the risk of limiting the solutions that might otherwise be found when other participants of the justice system are included on the Council. The Law Society therefore strongly encourages the government to re-evaluate its approach concerning the creation and composition of the Justice and Public Safety Council. Final authority for the implementation of any recommendations would remain with the executive or legislative branches of government, as should be the case.

3. The Justice Summit

Action item 3 in the White Paper is that government will promote meaningful engagement between key justice system participants by holding a regular justice summit meeting.

The Law Society encourages and endorses the concept of regular justice summits involving the key participants within a justice system. The Law Society will participate in any such summit held, and will work with all parties involved in the justice summit to ensure, as much as it is able, that the summits are useful and help to advance methods to make recommendations to improve the justice system.

The Law Society notes that the first justice summit is scheduled to be held in March of 2013. It is not clear in the White Paper what the first justice summit is meant to accomplish, nor does the Law Society have any idea at the present time about what agenda may be advanced at the summit. To make the summit as effective as possible, the Law Society believes that an agenda should be identified early so that the participants can adequately prepare for the topics to be discussed. In this regard, it may be an ambitious goal to hold a justice summit in March.

The Law Society believes that the success of a justice summit is important in establishing the confidence of the participants in the justice system, and the public at large, that sincere efforts are being made to improve the efficiency of the justice system, and thereby improve the confidence in the Rule of Law. The Law Society would be pleased to assist both in identifying issues for discussion and in setting the agenda for any summits to be held.

Conclusion

The 10 action items set out in the White Paper are, generally speaking, steps that the Law Society can support in order to improve the justice system. As stated in the White Paper, the 10 action items are somewhat lacking in specific language, and would benefit from a clear description of what methods are contemplated to achieve the goals set out. However, the Law Society recognizes that we are in the early stages of this process, and that further specifics will, no doubt, be provided.

Many of the process and management issues identified in the White Paper are ones that the Law Society itself has identified recently in a review and examination of its own processes in performance of its regulatory mandate. In particular, the Law Society has examined the timeliness of its regulatory decisions, and the processes within the Law Society in order to be able to support a timely, balanced, and fair result of its credentialing and disciplinary functions. While the Law Society is obviously a much smaller body than is the justice system as a whole, we consider that the work we have done may be transferable to a larger scale, and would be pleased to share our work and to assist in whatever way possible to aid in any process that will improve the justice system and the public's confidence in it.

Yours truly,

Bruce LeRose, QC
President