The Law Society of British Columbia

Agenda

Benchers

Date: Friday, May 10, 2013

Time: **7:30 am** Continental breakfast
8:30 am Call to order
12:00 pm Adjourn

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.***

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

The Law Society of British Columbia

Item	Topic	Time (min)	Speakers	Materials	Action
1	Consent Agenda • Draft minutes of the regular session • Draft minutes of the in camera session (Benchers only) • Selection of 2013 Law Society Scholarship Recipient • Tribunal Support: Role of Tribunal Counsel	1	President	pg.1100 pg.1200 pg. 1300 (*in camera*) pg. 1400	Decision Decision Decision Decision
2	Composition of Review Boards	30	Mr. Hoskins	pg. 2000	Decision
3	Rules Concerning Trust and Other Client Property – Lawyers Acting as Attorneys and Executors	15	Ms. Berge	pg. 3000	Decision
4	Ratification of the National Mobility Agreement 2013	30	Mr. Petrisor	pg. 4000	Decision
5	2012-2014 Strategic Plan Implementation Update	5	President/CEO		Information Oral report
6	President's Report	15	President		Briefing

The Law Society of British Columbia

Item	Topic	Time (min)	Speakers	Materials	Action
7	CEO's Report	15	CEO	pg. 7000	Briefing
8	Quarterly Financial Report	10	CFO	pg. 8000	Briefing
9	Report on Outstanding Hearing & Review Reports	5	President	(*To be circulated at the meeting*)	Information
10	For Information Only • Examination of the Relationship Between the Law Society as Regulator and Insurer of Lawyers • Memorandum from Ms. Crisanti: Bencher participation in Law Society Speakers Bureau • Letter from The Honourable Shirley Bond to Tim McGee re the inaugural Justice Summit • Minutes of the March 13, 2013 Executive Committee meeting (for the Benchers only)			pg. 10100 pg. 10200 pg. 10300 pg. 10400	Information Information Information Information
11	*In camera* • Bencher concerns • Other business	15	President/CEO		Discussion/Decision

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, April 05, 2013

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

Absent: Vincent Orchard, QC

Staff Present:
Tim McGee
Deborah Armour
Robyn Crisanti
Jeffrey Hoskins, QC
Su Forbes, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Alan Treleaven
Adam Whitcombe

Guests:

Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Johanne Blenkin, Chief Executive Officer, Courthouse Libraries BC
Mary Anne Bobinski, Dean, Faculty of Law, University of BC
Kari Boyle, Executive Director, Mediate BC Society

Anne Chopra, Equity Ombudsperson
Susan Munro, Director of Publications on behalf of Ron Friesen, Continuing Legal Education Society of BC
Dean Crawford, Vice-President, CBABC
Donna Greschner, Dean, Faculty of Law, University of Victoria
Jeremy Hainsworth, Reporter, Lawyers Weekly
Tamara Hunter , Law Foundation of BC
Marc Kazimirski, President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Caroline Nevin, Executive Director, Canadian Bar Association of BC
The Hon. Nancy Phillips, Associate Chief Judge of the Provincial Court of BC
MaryAnn Reinhardt, BC Paralegal Association
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Deb Whelan, BC Paralegals Association

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on March 1, 2013 were approved as circulated.

The *in camera* minutes of the meeting held on March 1, 2013 were approved as circulated.

The following resolutions were passed unanimously and by consent.

- **Schedule 4 of the Law Society Rules: tariff of costs and interim suspension proceedings**

  BE IT RESOLVED to amend Schedule 4 of the Law Society Rules by rescinding item 2 and substituting the following:

2.	Proceeding under s. 26.01, 26.02 or 39 and any application to rescind or vary an order under the Rules, for each day of hearing	30

- **Rule 5-14 - stay of order on intention to review**

  BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 5-14(3) and substituting the following:

  (3)When a review has been initiated under Rule 5-13, any party to the review may apply to the President for a stay of any order not referred to in subrule (1) or (2).

- **Rule 9-1 – Unlimited liability companies (ULCs) as law corporations**

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 9-1 and substituting the following:

9-1 A law corporation must use a name

(a) under which no other corporation holds a valid law corporation permit under this Division,

(b) that does not so nearly resemble the name of another corporation holding a valid law corporation permit under this Division that it is likely to confuse or mislead the public,

(c) that complies with the *Code of Professional Conduct*, section 4.2 *[Marketing]*, and

(d) that includes one of the following phrases:

(i) "law corporation";

(ii) "law ULC";

(iii) "law unlimited liability company".

- **Rule 10-1 and others – serving documents and notice of Law Society proceedings**

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

1. By rescinding Rule 4-15 and substituting the following:

Notice of citation

4-15 The Executive Director must serve a citation on the respondent

(a) in accordance with Rule 10-1, and

(b) not more than 45 days after the direction that it be issued, unless the Discipline Committee or the chair of the Committee otherwise directs.

2. By rescinding Rule 4-41(2) and substituting the following:

(2) The notice referred to in subrule (1) must be served in accordance with Rule 10-1.

3. By rescinding Rule 10-1 and substituting the following:

Service and notice

10-1 (1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally or by sending it by

(a) registered mail, ordinary mail or courier to his or her last known business or residential address,

(b) electronic facsimile to his or her last known electronic facsimile number,

(c) electronic mail to his or her last known electronic mail address, or

(d) any of the means referred to in paragraphs (a) to (c) to the place of business of his or her counsel or personal representative or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation.

(1.2) If it is impractical for any reason to serve a notice or other document as set out in subrule (1), the President may order substituted service, whether or not there is evidence that

(a) the notice or other document will probably

(i) reach the intended recipient, or

(ii) come to the intended recipient's attention, or

(b) the intended recipient is evading service.

(1.3) The President may designate another Bencher to make a determination under subrule (1.2).

(2) A document may be served on the Society or on the Benchers by

(a) leaving it at or sending it by registered mail or courier to the principal offices of the Society, or

(b) personally serving it on an officer of the Society.

(3) A document sent by registered mail or courier is deemed to be served 7 days after it is sent.

(4) Any person may be notified of any matter by ordinary mail, electronic facsimile or electronic mail to the person's last known address.

- **Proposed new Rule 4-20.1 – Notice to Admit**

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

1. By adding the following Rule:

Notice to admit

4-20.1 (1) At any time, but not less than 45 days before a date set for the hearing of a citation, the respondent or discipline counsel may request the other party to admit, for the purposes of the hearing only, the truth of a fact or the authenticity of a document.

(2) A request made under subrule (1) must

(a) be made in writing in a document clearly marked "Notice to Admit" and served in accordance with Rule 10-1 *[Service and notice]*, and

(b) include a complete description of the fact the truth of which is to be admitted or attach a copy of the document the authenticity of which is to be admitted.

(3) A request may be made under subrule (1) by a party that has made a previous request under that subrule.

(4) A respondent or discipline counsel who receives a request made under subrule (1) must respond within 21 days by serving a response on the other party in accordance with Rule 10-1 *[Service and notice]*.

(5) The time for response under subrule (4) may be extended by agreement of the parties or by an order under Rule 4-26.1 *[Preliminary questions]* or 4-27 *[Pre-hearing conference]*.

(6) A response under subrule (4) must contain one of the following in respect of each fact described in the request and each document attached to the request:

(a) an admission of the truth of the fact or the authenticity of the document attached to the request;

(b) a statement that the party making the response does not admit the truth of the fact or the authenticity of the document, along with the reasons for not doing so.

(7) If a party who has been served with a request does not respond in accordance with this Rule, the party is deemed, for the purposes of the hearing only, to admit the truth of the fact described in the request or the authenticity of the document attached to the request.

(8) If a party does not admit the truth of a fact or the authenticity of a document under this Rule, and the truth of the fact or authenticity of the document is proven in the hearing, the panel may consider the refusal when exercising its discretion respecting costs under Rule 5-9 *[Costs of hearings]*.

(9) A party who has admitted or is deemed to have admitted the truth of a fact or the authenticity of a document under this Rule may withdraw the admission with the consent of the other party or with leave granted on an application

(a) before the hearing has begun, under Rule 4-26.1 *[Preliminary questions]* or 4-27 *[Pre-hearing conference]*, or

(b) after the hearing has begun, to the hearing panel.

2. By rescinding Rule 4-24.1(3) and substituting the following:

(3) Unless the panel rules otherwise, the respondent and discipline counsel may adduce evidence by

(a) affidavit,

(b) an agreed statement of facts, or

(c) an admission made or deemed to be made under Rule 4-20.1 *[Notice to admit]*.

3. By rescinding Rule 4-30(3) and substituting the following:

(3) Despite subrule (1), before the hearing begins, the panel may receive and consider

(a) the citation,

(b) an agreed statement of facts, and

(c) an admission made or deemed to be made under Rule 4-20.1 *[Notice to admit]*.

4. By adding the following paragraph to Rule 5-5(6):

(b.1) an admission made or deemed to be made under Rule 4-20.1 *[Notice to admit]*;

GUEST PRESENTATION

2. Overview of Provincial Court of BC Scheduling Project

The Honourable Nancy Phillips, Associate Chief Judge of the BC Provincial Court, briefed the Benchers on the Provincial Court Scheduling Project (PCSP). Officially announced and endorsed by Chief Judge Crabtree in August 2012, PCSP's objectives are "to develop and implement scheduling practices that will make more efficient, effective and equitable use of judicial resources."[1]

Associate Chief Judge Phillips elaborated on PCSP's objectives:

- to develop and implement new scheduling practices to enhance the use of judicial resources

- to rescind parts of the Criminal Caseflow Management Rules (CCFM) that have not proven effective in reducing the number of appearances or creating trial certainty

[1] PCSP Briefing Note, circulated at the April 5, 2013 Bencher meeting.

- to develop computer software to support the new scheduling process and enable the court to obtain better management information

- engage justice system stakeholders in the Provincial Court Scheduling Project to foster systemic change

The new scheduling model features three elements:

- delayed assignment of judges to cases and cases to courtrooms

- simplified Criminal Front End Processes – non-adjudicative and uncontested appearances will be dealt with by Judicial Case Managers (JCMs)

- increased use of video technology and computer software to provide options for earlier case conferencing (family & civil), bail and sentencing hearings

    - the software will improve current ad hoc practices which see available judge-time linked with emergent needs in other locations

Associate Chief Judge Phillips outlined the project's three key principles:

- Flexibility – the new scheduling model will better enable the court to address inevitable last-minute developments on trials, reducing unused court time and delay and thereby increasing access to justice

- Community equity – court schedules will be drawn to ensure communities have similar wait times-to-trial and that court resourcing standards in family, civil as well as criminal are monitored and addressed.

- File management by counsel – in moving away from the CCFM Rule appearances, the Provincial Court is signaling a return of responsibility for file management to counsel.

Associate Chief Judge Phillips confirmed that active engagement with the bar is an important aspect of the project's development and implementation: PCSP has sought feedback from counsel by surveying lawyers and is working closely with the Ministry of Justice, Legal Services Society, the Criminal Justice Branch and others. Elements of the new scheduling model, such as the elimination of some of the CCFM appearances, will be implemented at the same time across the province. The trial streaming component will be brought into place in a staged fashion starting late 2013 or early 2014 in North Fraser. Following her presentation Associate Chief Judge Phillips responded to a number of questions from Benchers.

3. Law Foundation of BC Annual Update

Board Chair Tamara Hunter presented the Law Foundation's annual update to the Benchers. Formed in 1969 as North America's first law foundation, this non-profit body's founding legislation authorizes it to receive and distribute interest earned on clients' funds held in their lawyers' trust accounts. From its inception through 2011, the Law Foundation has approved grants totalling almost $460 million to support important law-related programs in British Columbia.[2] Ms. Hunter's presentation slides are attached as Appendix 1 to these minutes.

Ms. Hunter outlined the Law Foundation's mandate, vision, mission and strategic priorities:

- Mandate
    - Legal aid
    - Legal education (professional legal education and public legal education)
    - Law libraries
    - Law reform
    - Legal research
- Vision
    - a society where access to justice is protected and advanced
- Mission:
    - to advance and promote a just society governed by the rule of law, through leadership, innovation and collaboration
- Strategic Priorities
    - maintain and improve Law Foundation finances
    - provide support for Law Foundation grantees
    - continue the ongoing evaluation of Law Foundation programs and projects
    - research and address gaps in access to justice in BC – sectoral and substantive
    - Develop new programs and initiatives

Ms. Hunter reviewed the history of Law Foundation's efforts to respond to the cuts in legal aid funding that started in 2002, noting that about 65 per cent of current grants are directed at supporting the provision of legal aid in BC.

[2] The Foundation's 2011 Annual Report at page 4.

Ms. Hunter confirmed the impact of the downturn in the global economy since 2008 on interest rates and the Foundation's finances: for the past four years the Foundation has drawn on reserves maintained in its grant stabilization fund to maintain funding commitments made to grantees. Difficult decisions are expected for this fall when the Foundation will assess its current and 2014 funding commitments. Ms. Hunter noted that a principled and strategic approach will be taken, focusing on value and need as key funding criteria.

Ms. Hunter also noted that law firms can make an important contribution to the Foundation's work by ensuring that their trust accounts are maintained at financial institutions providing the highest possible rates of interest. She acknowledged the following institutions for committing to favourable rates in their banking agreements with Law Foundation: HSBC Bank of Canada, Canadian Imperial Bank of Commerce, Royal Bank of Canada, TD Canada Trust and Vancouver City Savings Credit Union.

Ms. Hunter confirmed the Law Foundation's appreciation for its close working relationship with the Law Society and for the interest and support shown by the Benchers over the years. She noted particularly the valuable contributions made by the Trust Assurance department in realizing interest revenue of about $1 million over the past four years in the course of auditing various banks' compliance with their respective Law Foundation agreements.

REGULAR AGENDA – for Discussion and Decision

4. Report from Ethics Committee: Issues Relating to the *Code of Professional Conduct for British Columbia* (the BC Code)

Mr. Crossin briefed the Benchers as chair of the Ethics Committee regarding a number of proposed amendments to the BC Code. He noted that the proposed amendments relate to four issues which the Committee views as warranting immediate changes to the BC Code, without waiting for the Federation of Law Societies of Canada to determine whether such changes should be incorporated into the Federation's Model Code of Professional Conduct. Mr. Crossin noted that those four issues are discussed in the Ethics Committee's report to the Benchers, at Tab 4of the meeting materials:

A. BC Code rule 3.2-7: Dishonesty of Client (page 4002)

B. Rule 6.1-4: Associating with person whose character and fitness are in (page 4003)
C. Rule 3.6-2: Contingent Fees and Contingent Fee Agreements (page 4004)

D. Chapter 11, Rule 12 of the *Professional Conduct Handbook* (page 4004)

Mr. Crossin moved (seconded by Mr. Zacharias) that the Benchers adopt the following resolution:

BE IT RESOLVED to amend the Code of Professional Conduct for British Columbia as follows:

1. *By rescinding rule 3.2-7 and substituting the following*

Dishonesty, fraud by client

3.2-7 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.

2. *In rule 3.6-2, by rescinding paragraph [1] of the Commentary and substituting the following:*

[1] In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The test is whether the fee, in all of the circumstances, is fair and reasonable.

3. *In rule 3.6-3, by rescinding paragraph [1] of the Commentary.*

4. *By rescinding rule 6.1-4 and substituting the following:*

Suspended or disbarred lawyers

6.1-4 Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction,

(a) has been disbarred and struck off the Rolls,

(b) is suspended,

(c) has undertaken not to practise,

(d) has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted,

(e) has failed to complete a bar admission program for reasons relating to lack of good character and repute or fitness to be a member of the bar,

(f) has been the subject of a hearing ordered, whether commenced or not, with respect to an application for enrolment as an articled student, call and admission, or reinstatement, unless the person was subsequently enrolled, called and admitted or reinstated in the same jurisdiction, or

(g) was required to withdraw or was expelled from a bar admission program.

5. In rule 7.2-1, by adding the following paragraph to the Commentary:

[5] A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

In the ensuing discussion the following issues were raised:

- whether there is tension between the protection of the public interest provincially and nationally
- whether protection of the public interest in BC risks undermining progress toward a nationally uniform Model Code
- whether there is or should be a target date for achievement of a uniform Model Code
- whether progress toward national uniformity is
    - incremental and ad hoc, or
    - coordinated and strategic

Mr. McGee noted that the Federation's Standing Committee on the Model Code, chaired by Mr. Hume, is continuing to work closely with the Federation's member law societies toward the goal of a nationally uniform Model Code.

The motion was carried.

5. Strategic Plan Implementation Update

Mr. Vertlieb updated the Benchers on a recent Credentials Committee discussion of articled students, noting that the discussion was framed in the context of alignment with the current Strategic Plan. He also provided an update on the work of the Governance Committee, confirming that major issue retreat meetings have been scheduled for May 3 and May 24, and that a mid-year progress report will be delivered at the Benchers' Retreat.

Mr. McGee noted that a mid-year report on implementation of the current Strategic Plan will provided at the July Bencher meeting.

6. Review of the Law Society's Draft 2012 Financial Statements and Year End Financial Report

Ms. Lindsay briefed the Benchers as Chair of the Finance Committee. She advised that the 2014 budgeting process will commence in June 2013, and that the Finance Committee expects to present its recommendations regarding 2014 practice fees at the September 27 Bencher meeting. Ms. Lindsay noted the current TAF funding shortfall facing the Trust Assurance program in light of the ongoing downturn in real estate activity on TAF revenue and confirmed that the Finance Committee will be reporting to the Benchers with recommendations in the coming months.

Ms. Lindsay also updated the Benchers on the work of the Reduced Fee Feasibility Working Group in relation to the member resolution passed at the 2012 Annual General Meeting, calling on the Law Society to consider the feasibility of a reduced-fee class of membership for non-profit lawyers.

Chief Financial Officer Jeanette McPhee reported on the draft 2012 Financial Results, providing an overview of General Fund, Trust Assurance Fund and Special Compensation Fund performance for the past year. Ms. McPhee referred to three sets of material included in the agenda package:

- Summary of Financial Highlights (draft) – December 2012 (page 6004)
- Income Statements (draft) – December 2012 (page 6005)
- Law Society of BC 2012 Draft Financial Results (page 6014)

Ms. McPhee also provided a preliminary view of the Law Society's financial performance for the first quarter of 2013.

Following her presentation Ms. McPhee responded to several questions from Benchers on topics including:

- relationship between Professional Legal Training Course revenue and expenses
- challenges of leasing space in the Law Society's building at 835 Cambie Street
- staff vacancies and outside counsel costs anticipated for 2013

- comparison of law society revenue change and lawyer population change, provincial and national

Mr. McGee noted the significance of the 2011 – 2012 increase of 1.7% in the Law Society's practicing membership and related revenue. Mr. McGee also noted that improved accuracy is expected to follow from conducting the Law Society's annual financial forecasting and budgeting processes in the second half of the year commencing in 2013 , rather than the first half, as has been the case for many years.

7. President's Report

Mr. Vertlieb reported on various Law Society matters that have arisen since the last Bencher meeting, including:

a. Inaugural Justice Summit and BC Justice Leaders Dinner (March 15 – 16)

First Vice-President Jan Lindsay, QC represented the Law Society at the BC Justice Leaders Dinner. Mr. McGee delivered welcoming and closing remarks at both the dinner and the summit. Both events went well and signal early progress in this multilateral and ongoing dialogue process, initiated by the Minister of Justice and Attorney General and directed at reforming BC's criminal justice system.

b. Canadian Bar Association Meeting in Terrace

Mr. Vertlieb attended a CBABC meeting in Terrace to brief members of the Prince Rupert, Smithers and Terrace bars on the Designated Paralegals Pilot Project. The assistance and hospitality of Prince Rupert County Bencher Barry Zacharias was gratefully acknowledged.

c. Canadian Bar Association Meeting in Campbell River March 7)

Mr. Vertlieb attended a CBABC meeting in Campbell River to brief members of the local bar on the Designated Paralegals Pilot Project, and on the work of the Leal Service Provider Task Force.

d. BC Supreme Court Meeting (March 12)

Mr. Vertlieb attended a BC Supreme Court committee meeting chaired by BC Supreme Court Justice Gail Dickson. The committee is considering the introduction of television cameras into BC courtrooms.

e. Federation of Law Societies of Canada Council Meeting and Semi-annual Conference (March 20 – 22, Quebec City)

Ms. Lindsay will report on this matter later in the meeting.

f. Meeting with Vancouver Airport Authority Board Chair Mary Jordan (April 2)

Mr. Vertlieb met with Vancouver Airport Authority Board (VAA) Chair Mary Jordan to review Law Society's upcoming appointment of a director to the VAA board. Ms. Carol Kerfoot's distinguished service as the retiring VAA board member was acknowledged.

g. Special Compensation Committee

Mr. Vertlieb noted that 2013 will be the final year of operation for the Special Compensation Committee. He also noted the significance of the work done by many Benchers on that committee over many years, and particularly thanked Mr. Renwick for his leadership in that regard.

Mr. Renwick expressed appreciation to past Committee members for their dedication and commitment, particularly Azim Adoo, Michael Falkins, Patrick Kelly, Bruce LeRose, QC, Peter Ramsay, QC, Patricia Schmit, QC and Richard Stewart, QC. Mr. Renwick also thanked Graeme Keirstead, Stephanie Komick and Lainie Shore for their valuable staff support.

8. CEO's Report

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

- 2013 Operational Priorities – Progress Report
    1. Review and Renewal of Management Structure
    2. Lawyer Advice and Support Project
    3. Support for Legal Service Provider Task Force
    4. Regulation of Law Firms – Policy and Operational Assessment
    5. Implementation of Governance Review Task Force Report
- Federation of Law Societies of Canada 2013 Semi-Annual Conference, Quebec City
- Inaugural BC Justice Summit

- New Westminster Bar Association Presidents' Dinner
- Bencher Retreat

9. Federation of Law Societies of Canada Council Meeting and Conference Update (March 20 – 22, Quebec City)

First Vice-President Jan. Lindsay, QC briefed the Benchers. Advising that the theme of the conference was "legal regulation in the future," Ms. Lindsay commented on the challenges posed by regional disparities in resources and priorities to the goals of national standards and uniformity in legal regulation. She noted a particular regulatory challenge facing larger, stronger law societies: balancing pursuit of local excellence with commitment to national standards and uniformity.

Ms. Lindsay drew attention to the Law Society's strong contributions in a number of areas, including Mr. McGee's presentation highlighting the importance of outreach by law societies to a broad range of stakeholders; and Ms. Armour's participation in a panel discussion on discipline standards.
Ms. Lindsay also noted her impression that there is broad commitment among Canada's law societies to pursuit of improvement in regulatory performance, and to pursuit of public education and support.

10. Outstanding Hearing Reports

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

WKM
2013-04-22


THE LAW
FOUNDATION
OF BRITISH COLUMBIA

Mandate

- Legal aid
- Legal education (professional legal education and public legal education)
- Law libraries
- Law reform
- Legal research

Vision

A society where access to justice is protected and advanced.

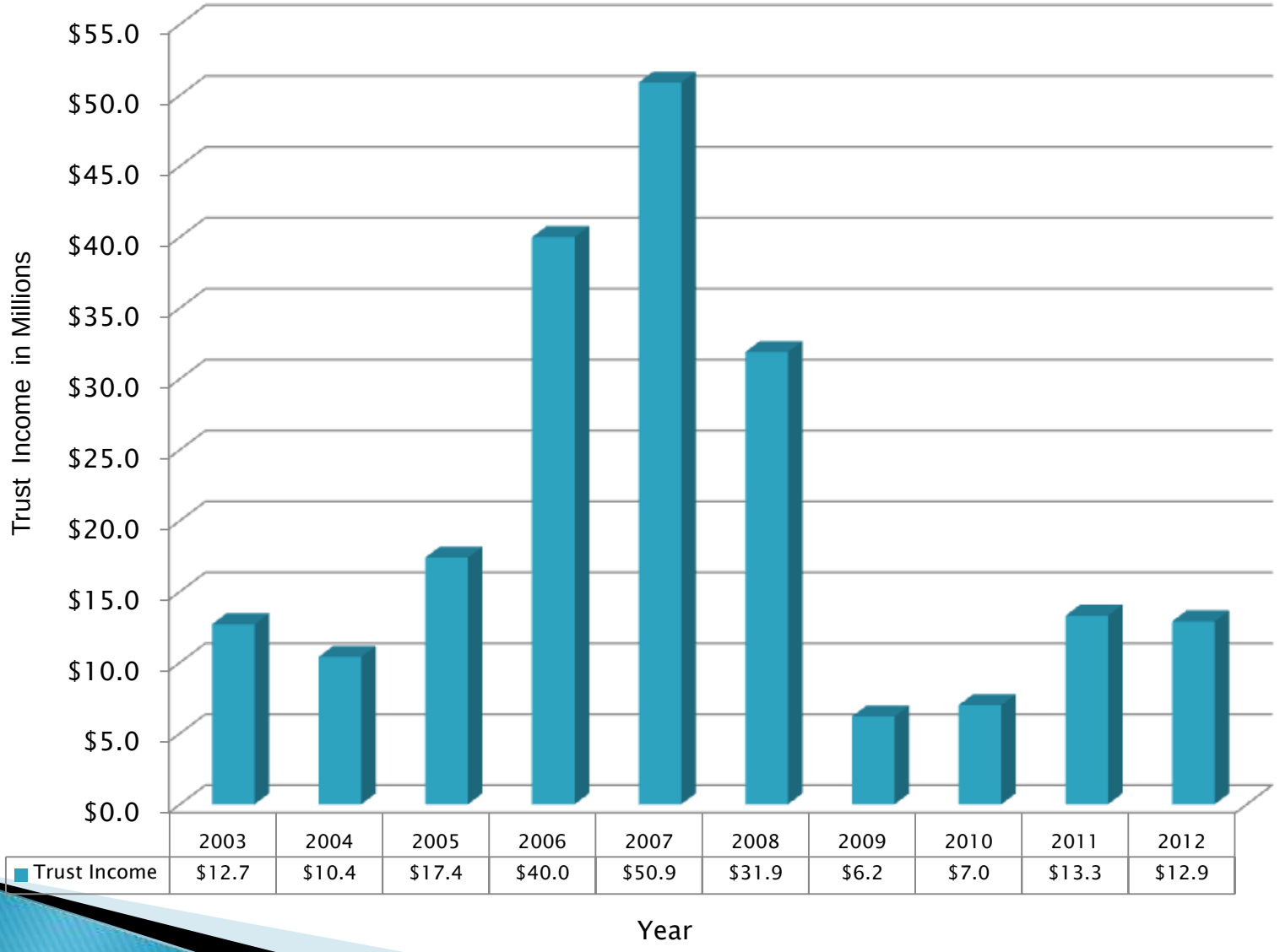
Mission

To advance and promote a just society governed by the rule of law, through leadership, innovation and collaboration.

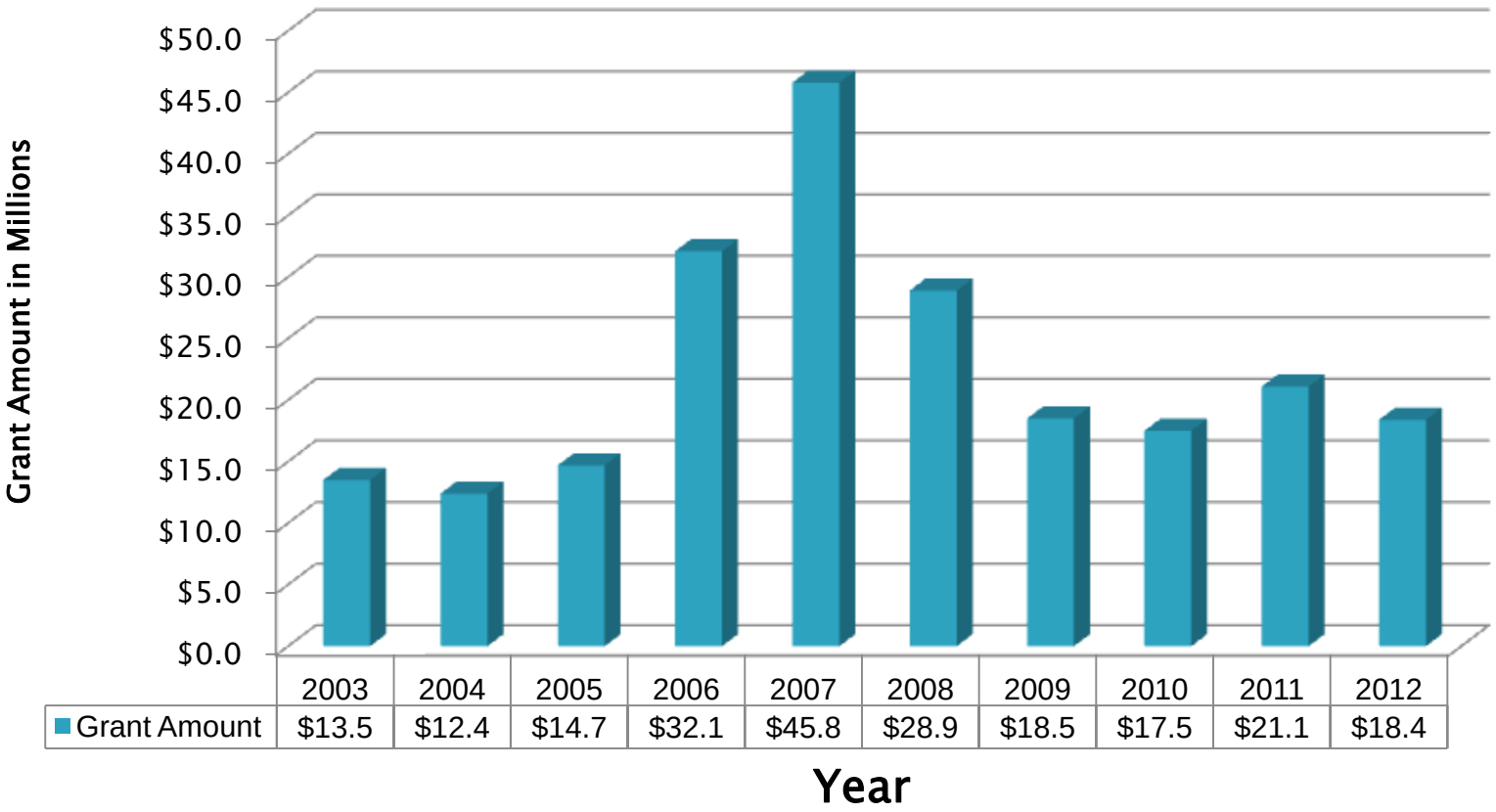
Strategic Priorities

1. Maintain and improve Law Foundation finances.
2. Provide support for Law Foundation grantees.
3. Continue the ongoing evaluation of Law Foundation programs and projects.
4. Research and address gaps in access to justice in BC – sectoral and substantive.
5. Develop new programs and initiatives.

Trust Income for the Past 10 Years



Grants for the Past 10 Years



Grantmaking Principles

1. Fulfilling its statutory mandate;
2. Remaining a stable and effective organization;
3. Producing the greatest value to the poor;
4. The importance of delivering services to disadvantaged people;
5. Giving a direct benefit to the public of Law Foundation funding;
6. Providing the maximum benefit to British Columbia;
7. Minimizing, as much as possible, any lasting harm to grantees; and
8. Taking into account alternate funding that may be available to grantees.

Statistics: 2012 Law Foundation Funded Programs

A. FUNDING

- Number and annual dollar value of Continuing and OnTrack Programs: 92 Programs - $18,703,216
- Number and dollar value of projects: 38 Projects - $911,423

B. LEGAL AID

- Number of clients served by legal advocates and law students: 62,883
- Number of clients served by lawyers: 22,833
- Number of lawyers involved in pro bono activities: 1,153
- Number of test cases worked on/ completed: 97; regulatory hearings:56

C. PROFESSIONAL LEGAL EDUCATION

- Number of law students involved in Law Foundation funded programs: 833
- Number of law students receiving bursaries and scholarships: 106

Statistics: 2012 Law Foundation Funded Programs

D. PUBLIC LEGAL EDUCATION

- Numbers of publications produced and distributed: 62 titles; over 214,653 print copies

E. LAW LIBRARIES

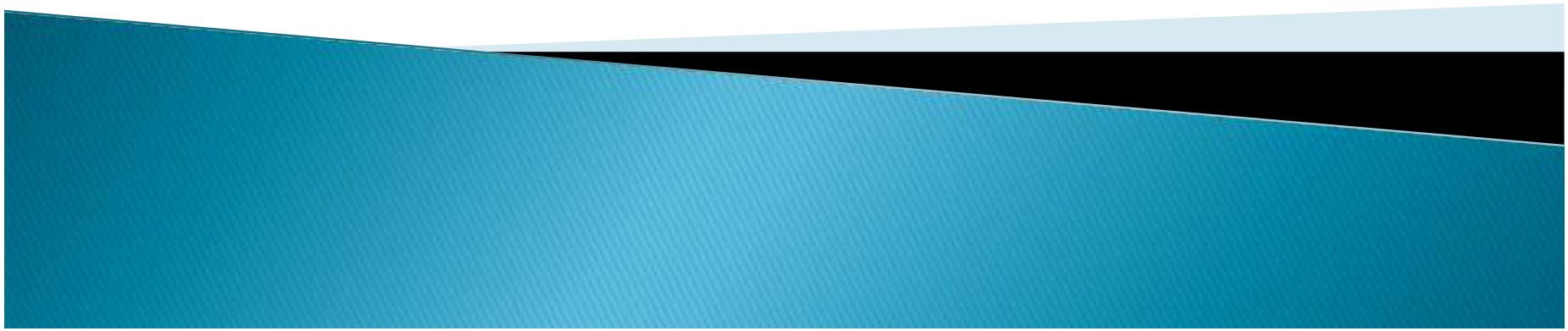
- Number of people (public) served by law libraries: 96,643 public served via public access computers; 19,565 information requests
- Number of workshops: 2,600; 51,909 attendees

F. LAW REFORM

- Number of law reform projects worked on or completed in 2012: 61

G. LEGAL RESEARCH

- Number of legal research projects in 2012: 40




THE LAW
FOUNDATION
OF BRITISH COLUMBIA

The Law Society of British Columbia

CEO's Report to the Benchers

April 5, 2013

Prepared for: Benchers

Prepared by: Timothy E. McGee

Introduction

This month I will provide an update on progress under the 2013 Operational Priorities Plan and share highlights from the Inaugural BC Justice Summit attended by justice leaders on March 15 and 16 in Vancouver. I will also report briefly on the Federation of Law Societies of Canada Semi-Annual Conference held in Quebec City from March 20 to 22.

2013 Operational Priorities – Progress Report

In January I outlined for the Benchers the top five operational priorities for management in 2013. Throughout the year and at least quarterly I will provide updates on progress in those areas. The current update is set out below. I would be pleased to provide further details and to answer any questions at the meeting.

1. Review and Renewal of Management Structure

Since the start of the year management has been considering how our current management model can be improved upon to better meet our needs in the future. We want to provide staff with greater opportunities to demonstrate leadership skills and to participate in decision making at more senior levels. This will help bring fresh perspectives to management deliberations and assist in our goal to have more extensive succession planning across the organization. We have also focused on our increasing use of and need for project management capabilities. Recent successful projects, such as the Core Process Review, Enterprise Risk Management Plan, LEO, and RRex, show that we accomplish much when we organize into project teams based upon staff interest and skills and supported by clear mandates. Our review has assessed the benefits of institutionalizing this approach. This work is now complete and I will be reviewing the results with the Executive Committee and with the Benchers in the coming weeks.

2. Lawyer Advice and Support Project

The Lawyer Advice and Support project team is undertaking a comprehensive review and assessment of our current model for delivering member advice and support services. As I said in the most recent Benchers' Bulletin, "The goal is to determine what Law Society services are most useful to lawyers, who can best deliver them and how they are best delivered." The project team has completed

extensive consultations with every department in the Law Society that interfaces with the membership to get their information and ideas. The team is now moving to obtain the input of the membership. Starting in April we will conduct a random telephone survey of approximately 800 lawyers in the province to collect their feedback and ideas. The survey will be conducted by an external firm and as project leader Kensi Gounden says in the current Benchers' Bulletin, "The survey will give us the perspective of the lawyers who use our services – what's working, what's missing and what needs to be changed." Lawyers have also been invited to submit any comments or suggestions at any time to a designated email address. We would also like to invite any Benchers who would like to see the survey script and/or complete a survey to contact Kensi. This phase of the project team's work will be complete by midyear and the team is still on track to deliver its report and recommendations by year end.

3. Support for Legal Service Provider Task Force

The Legal Services Providers Task Force chaired by Bruce LeRose, QC has met three times this year and its next meeting is scheduled for April 8. The Task Force is making good process on its mandate. It intends to provide a status report to the Benchers in July. The Task Force has developed a road map for its work and a methodology for analyzing the issues. It is considering the advantages and disadvantages of a single regulatory model, and has reviewed materials relating to various jurisdictions, including BC, Ontario, England, Washington State and Denmark in order to get a sense of different approaches to regulation. It has considered the issue from an access to legal services perspective and is presently focused on identifying other benefits of unified regulation. At the April meeting the Task Force will hear from a senior representative from the accounting profession regarding a similar initiative to create a unified regulatory regime for the accounting professions. The Task Force has also identified the need for broader consultation on the topic and believes that the consultation stage should occur after the July report, when the Benchers can provide their guidance and ideas on that stage of the Task Force's work.

4. Regulation of Law Firms – Policy and Operational Assessment

With the passage into law of the recent amendments to the *Legal Profession Act* the Law Society now has the statutory authority to regulate law firms as well as lawyers. While the exact nature and scope of the work to be undertaken on this

topic has yet to be determined, i.e. Bencher Task Force or assignment to a standing advisory committee, it is certain that operational considerations will play an important part in assessing options and formulating recommendations. To date this year, management has been working on a report for the Executive Committee which will outline these considerations and assist in the planning of the work. I expect this topic to be considered at the next meeting of the Executive Committee in April, where next steps and recommendations for the balance of the year can be formulated.

5. Implementation of Governance Review Task Force Report

The Governance Committee met twice in January and once in February for a full day offsite retreat. The focus of the retreat session was to start to deal with the major issues and recommendations set out in the Governance Review Task Force report presented in 2012. At the retreat the Committee discussed the role descriptions for each of the Benchers, the Executive Committee, and the President, and instructed staff to follow up on certain items relating to those topics. The next meeting of the Committee is a half day session scheduled for May 3 and the agenda for that session is currently being developed. The Committee expects to have reviewed and assessed the majority of the recommendations in the Task Force report and to bring them back to the Benchers for review by year end.

Federation of Law Societies of Canada 2013 Semi-Annual Conference, Quebec City

The Federation of Law Societies of Canada held its Semi-Annual Conference and Council meeting in Quebec City from March 20 -22. The theme of the conference was “Globalization and Risk Management: Challenges for Law Societies”. In addition to the conference program there was a full day meeting of the Law Society CEOs and selected senior staff from across the country as well as a half day session of the Federation Council. The BC delegation was President Art Vertlieb, QC, Second Vice President Jan Lindsay, QC, Council Representative Gavin Hume, QC, myself and management board representatives Deborah Armour, Alan Treleaven and Adam Whitcombe. BC was also represented on the Council Executive by past Law Society of BC President and past Federation President John Hunter, QC.

Deb Armour participated on a panel discussing and comparing various approaches to managing risk within the professional conduct and discipline areas.

I was asked to give a presentation on the topic of Globalization and International Trade in Legal Services and I entitled my presentation “Major Trends and the Regulators’ Dilemma”. My thesis was that the major trends associated with the globalization of law call for a unified approach to certain aspects of regulation, which would best be addressed through a global law regulator established by agreement of local law regulators around the world. This is not a new idea but one which increasingly has merit as trends such as offshore legal process outsourcing evolve from being trends to parts of everday practice.

I am attaching to this report as Appendix A a brief summary of the various Conference programs and discussions. As always, the conference program attempts to strike a useful balance between content which is relevant and meaningful to day to day law society operations and governance, and with larger strategic and directional issues about which the delegates should be informed. I think this conference was successful in achieving that balance although many of us thought the program attempted to cover a bit too much given the timeframe. The highlight for me among the practical topics were the workshops focused on what all law societies are doing and could be doing to help lawyers comply with their professional and regulatory requirements – a summary of these items is set out in paragraph #6 of the attached report. The most compelling presentation on the strategic front was given by Mr. Michel Nadeau, the head of the Quebec Institute for Governance of Private and Public Organizations. Mr. Nadeau reviewed public survey data which strongly suggests that regulatory bodies must never underestimate the public’s high expectations that we do our jobs in a demonstrably effective and efficient manner.

The Council meeting on Friday was devoted entirely to a review of the Trinity Western University matter relating to its proposed law degree program. That topic will be reviewed in the in-camera session of the meeting.

Inaugural BC Justice Summit

The “Inaugural Justice Summit” focusing on reforms to the criminal justice system took place at Allard Hall at the UBC Law School on March 15 and 16. The event also included a “Justice Leaders Dinner” at Allard Hall on the Friday evening. I acted as MC for the dinner and as Moderator for the working sessions on Friday and Saturday. George Thompson, a former Deputy AG and former Provincial Court Judge in Ontario, acted as Facilitator. The dinner was attended by our Vice President Jan Lindsay, QC and invited staff Adam Whitcombe and Michael Lucas, as well as the Minister of Justice and Attorney General, Shirley Bond, Justice

Richard Wagner of the Supreme Court of Canada, Chief Justice of BC Lance Finch, Associate Chief Justice Austin Cullen, Chief Judge Thomas Crabtree, Associate Chief Judge Gill, Deputy Attorney General Richard Fyfe, Deputy Minister of Justice Lori Wanamaker and Associate Dean Benjamin Goold of UBC Law School. Justice Wagner delivered a well received keynote speech which echoed many of the themes relating to the need for better access to justice which the Chief Justice of Canada and other speakers have emphasized recently.

In my introductory remarks I said the following:

> This Summit takes place at a time when there has been a great deal of study and analysis of the justice system, particularly the criminal justice system, and a substantial amount of reform and proposed reform.
>
> The Summit is provided for in legislation that has been passed; indeed it received Royal Assent recently, but is not yet proclaimed. That legislation provides for the Summit – it does not prescribe what it is to do, although it does speak to some things it may do.
>
> There is a need for a forum where perspectives, experience and expertise can be shared and answers found that go beyond what any one part of the system can accomplish on its own.
>
> Indeed, it is appropriate that this Summit is being held in this exceptional place of learning, because learning from each other is a goal we all share for the Summit.
>
> While significant accountability may rest with the executive arm of government and the new legislation reinforces this, it is extremely important that it listens to, consults with and learns from those who work within the system and those whom it serves as a part of doing the work mandated by the legislation, such as developing a three year strategic plan. The Summit is not the only way to do this, but it is an essential way, so, for example, it is I think assumed that the Council will not finalize any plan without an opportunity for the Summit to provide input such as the possibility of reviewing a draft plan for the subsequent year.
>
> This is the beginning of a long term process.

The working sessions were attended by approximately 40 delegates, being senior representatives drawn from the principal participants and parties with an interest in

the criminal justice system – the Crown, police agencies, trial lawyers, Legal Services Society, health care agencies and support services, court administrators, the Law Foundation, Ministry officials and academics. In addition, Chief Justice Finch, Associate Chief Justice Cullen, Chief Judge Crabtree and Associate Chief Judge Gill were all in attendance for all of the Saturday sessions and participated actively in the discussions. The sessions were broken down into two parts. The Friday afternoon session focused on indentifying the values that should guide the criminal justice system. A thematic summary of the group discussions suggested that the threshold values were fairness, proportionality, evidenced-based decision making, and joint accountability. Many aspects of each of those values were canvassed in the group discussions. The Saturday session built on that foundation but carried on into more detailed small group discussions around what the priorities should be and how future Justice Summits could help address and facilitate desired reforms.

Overall, I would say that the sessions exceeded the expectations of most of the participants. There was a very good energy in the room and the delegates were certainly engaged in the process and in the exchange of views and ideas. In the wrap-up there was a strong consensus that providing a safe and informal forum for the exchange of ideas and information among the key participants was a very useful tool to addressing the vexing issues of the day. Geoff Cowper, QC spoke during the working lunch session and he echoed this sentiment. Having said that, it was also clear that the issues are complex and not easily addressed without considerable resolve and collaboration. The group was agreed that a second summit should be held within the year to attempt to build on this modest but promising start.

The Justice Summit Steering Committee is planning to issue a public report on the Summit in late May or early June.

New Westminster Bar Association Presidents' Dinner

On March 12, Art Vertlieb, QC and I attended the New Westminster Bar Association Presidents' Dinner, as the guests of the Association, Vice President Jan Lindsay, QC and Benchers David Renwick, QC and Phil Riddell. President Vertlieb made a presentation on the Law Society's Paralegal Pilot Project and reviewed other Law Society priorities. The event was well attended and provided a great opportunity to share this important initiative with our members.

Bencher Retreat

Planning for the June 13 to 15 Bencher Retreat at the Tin Wis Resort in Tofino is in the final stages. This year's Friday retreat workshop theme is *The Business of Law in the 21st Century: Are we at Risk of Losing (or can we Maintain) our Professional Values?* The full retreat agenda will be finalized by the May Benchers' meeting.

If you haven't had a chance to complete the Bencher Survey that was emailed to the Benchers on Tuesday, March 19, please be sure to do so as soon as possible.

Timothy E. McGee
Chief Executive Officer

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC
Date: April 30, 2013
Subject: **Role of Tribunal Counsel in Law Society Tribunals**

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1. This memorandum is apropos of recent discussion about what additional assistance can be offered to hearing panels and the role of Tribunal Counsel in that regard. The Executive Committee refers the discussion to the Benchers for approval.

2. In my view, the service that is currently offered to hearing panels in connection with the writing of decisions is all that can properly and legally be done without putting the decisions seriously at risk of being quashed on review. However, I think that there are opportunities to improve the up-take of additional assistance by hearing panels. It may be that more assistance at an earlier stage in the process would help alleviate some decision-writing difficulties.

What we are doing now

3. I attach a document prepared for previous discussions indicating the function of staff in Tribunal Support.

4. Currently, in most cases, Tribunal Counsel has little contact with hearing panels before or during the hearing. Sometimes issues arise and hearing panels, or sometimes just one or two members of the panel, typically the chair, ask for help and meetings and/or correspondence can ensue. In most cases, though, the first contact of any significance is when the panel submits a near-final draft decision at the end of their active participation in the process.

5. This is a summary of the process from that point, paraphrased from the attached document:

> Tribunal Counsel reviews the draft decision closely for editorial purposes, ensuring consistency with LS standards and practices (spelling, punctuation, grammar, accuracy of quotes and citations), as well as suggesting better phrasing where appropriate.
>
> In addition, Tribunal Counsel reviews written submissions of counsel, when available, and reviews the draft decision for legal issues, raising questions with the panel and making suggestions as required.
>
> Tribunal Counsel may ask a Law Society staff lawyer not involved in the discipline or professional conduct process to review the draft decision for further corrections and identification of issues.
>
> Tribunal Counsel may contact the chair of the panel or the principal author of the draft, if known, regarding significant issues or shortcomings in the draft reasons. As well, Tribunal Counsel may include questions and suggestions in a draft returned to the panel for consideration. It is made clear to all panellists that the decision is theirs to make, and the panel may freely accept any suggestions of Tribunal Counsel in whole or in part, or reject them altogether.

Limits on assistance

6. The law is clear that the decisions of a tribunal must be that of the individuals who have the authority to make the decision, and not staff supporting the tribunal. While it is permissible for Tribunal Counsel to review draft decisions, make non-substantive edits and suggest other changes, he should not actively write all or part of hearing decisions.

7. The purpose of the position of Tribunal Counsel was to reduce the risk of successful review or appeal from hearing panel decisions on the basis of failure to observe the rules of natural justice and basic administrative law. Expansion of the role into decision writing would appear to be counterproductive in that regard.

Areas where up-take could be better:

8. The role of Tribunal Counsel is explained in some detail as part of the training program for hearing panel pool members. They are told to expect that their draft decisions will be vetted and they may get some suggestions on improvement or be directed to some legal issues that they had not fully dealt with. In addition, they are told that Tribunal Counsel is available to

assist with problems at any point in the hearing process. Nonetheless, few panels avail themselves of the opportunity to ask questions or discuss issues before they are about to sign off on the final decision.

9. Until the last act of the hearing panel, Tribunal Counsel is generally not in direct contact with panels, and uninvolved in the process unless invited into it by a panel. It seems to me that the process could often benefit from some earlier involvement of Tribunal Counsel. Besides the obvious advantage of early clarification of procedures and expectations, it may be that the timeliness of issuing decisions could also be improved through contact.

10. I suggest that there are two opportune times for proactive contact by Tribunal Counsel with hearing panels:

    (a) *Before hearing begins:* Tribunal Counsel could review the citation or notice of credentials hearing and contact the panel (or just the chair) at the time that the panel is appointed and a hearing date is set. The purpose would be to remind panellists that Tribunal Counsel is available to help before and during the hearing, as well as after, and to discuss any preliminary concerns.

    (b) *After the hearing has concluded, if the decision is reserved:* Tribunal Counsel could again contact the panel (or chair) to remind them of the expected timeframe and to discuss any issues that have given the panel difficulty. A further reminder could be given that Tribunal Counsel is available to help with the writing of the panel's decision. That assistance must stop short of writing all or part of the decision. Counsel could also be asked to formally or informally review a question of law or the submissions of counsel for the assistance of the panel. Panels would have to be reminded that the law requires that any significant new issue of fact or law that arises in that process must be shared with the parties so that they have the opportunity to make submissions on the issue.

Attachments:

description of current function, with its attachments

JGH

LAW SOCIETY OF BRITISH COLUMBIA
ROLE OF TRIBUNAL COUNSEL

BEFORE THE HEARING

1. Tribunal Counsel (TC) oversees the process of issuing citations, setting dates for hearings and appointment of hearing panels, holding of pre-hearing conferences and other preliminary matters, as well as the logistics of assigning a room and engaging a court reporter. All of this is performed by the Hearing Administrator.

2. From time to time, TC is consulted by hearing panels and individual panel members on possible issues to be confronted in the hearing, possible issues of reasonable apprehension of bias or procedural matters. All consultations and meetings with panels and individual panellists are on a privileged and confidential basis.

DURING THE HEARING

3. TC does not attend hearings except on request of the hearing panel, which rarely occurs.

4. TC may meet with panels, at the request of the panel, and advise with respect to procedural and other issues. In particular, TC offers opinions on procedural provisions in the Act and Rules.

AFTER THE HEARING

5. TC may meet with panels during the deliberation process. This is always at the request of the panel or the chair and usually in relation to particular issues.

6. A panel or panellist may ask TC for views on a particular issue, but to the extent that significant new matters (issues, arguments) are raised, they may need to be canvassed with the parties if the panel is to consider them in reaching a decision.

PREPARING WRITTEN REASONS

7. Hearing panels always draft their own reasons for their decisions. Drafts are circulated among the panellists. Panels are urged to complete this process within 45 days of the

completion of the hearing. TC may be consulted in this process, but does not, and should not, prepare any part of the draft decision.

8. When a hearing panel or other tribunal has completed their internal consultations, a draft is prepared and submitted electronically to the Hearing Administrator, who puts the draft into a standard format and does some proofing.

9. The draft is then forwarded to TC, who reviews it closely for editorial purposes, ensuring consistency with LS standards and practices (spelling, punctuation, grammar, accuracy of quotes and citations), as well as suggesting better phrasing where appropriate.

10. In addition, TC reviews written submissions of counsel, when available, and reviews the draft decision for legal issues, raising questions with the panel and making suggestions as required.

11. TC may ask a LS staff lawyer not involved in the discipline or professional conduct process to review the draft decision for further corrections and identification of issues.

12. TC may contact the chair of the panel or the principal author of the draft, if known, regarding significant issues or shortcomings in the draft reasons. As well, TC may include questions and suggestions in a draft returned to the panel for consideration. It is made clear to all panellists that the decision is theirs to make, and any suggestions of TC may be freely accepted in whole or in part, or rejected altogether.

13. I attach a document entitled "Decision Review Protocol", which was prepared for another administrative tribunal (BC Property Assessment Appeal Board). It sets out the purposes for review of draft decisions by professionals who are not part of the tribunal, as well as the types of advice that a reviewer might give to a tribunal and the limits on the role that the reviewer can take.

14. When the draft has been reviewed, it is returned to the panel in redlined form for approval. It is important that all panellists review the same version of the final decision and adopt it as their own. A record of approvals is kept on the tribunal's hearing file.

Also attached for information is a document entitled "Role of Tribunal Counsel" prepared by outside counsel. It was provided to members of the hearing panel pool with the materials for the training course in basic administrative law and introduction to Law Society procedures. It was also considered by the Executive Committee in 2011.

DECISION REVIEW PROTOCOL

The purpose of decision review is to ensure:

- Decisions are written clearly in plain language, with correct grammar and punctuation, in accordance with Board style guides
- Decisions contain essential elements including, as appropriate, an introduction, a clear statement of the issue(s), clear statements of the facts, evidence and submissions of the parties, a clear and logical analysis, and a conclusion and board order
- Findings are supported by evidence and analysis
- Conclusion and order are consistent with findings
- Consistency with previous Board decisions, or if a decision is inconsistent, that it contains reasons for not following a previous Board decision on point.
- Consistency with legal authority binding on the Board

The reviewer must respect the independence of the decision maker. The reviewer must not substitute their opinion for the writer's or pressure the decision maker to change their findings and conclusions.

The reviewer may

- Suggest amendments to language to enhance clarity, conciseness and readability
- Suggest amendments to organization to enhance clarity, conciseness and readability
- Point out gaps in reasoning or indicate where reasoning may need to be enhanced
- Indicate where writing or reasoning may be unclear
- Ask questions of decision writer to assist in clarifying reasoning
- Indicate where there is no apparent support in analysis for findings
- Indicate where there are apparent disconnects between analysis and findings or findings and conclusion
- Indicate potential reviewable errors such as making findings without evidence or relying on information that is not in evidence
- Indicate if decision is inconsistent with previous Board decisions and identify decisions that writer may need to consider
- Indicate if decision may be inconsistent with authority binding on the Board that has not been considered in the decision and identify that authority

The Role of Tribunal Counsel

1. The Law Society employs a senior staff lawyer as Tribunal Counsel (TC). This section of the manual outlines the TC's roles in connection with discipline and credentialling.

Advisor to Panels

2. The TC is responsible to provide legal advice and professional support to discipline panels and credentials panels convened to conduct a hearing. The TC may be consulted by the panel collectively, through the chair, or by individual panelists.

3. As an advisor to panels, the TC is independent of the Professional Conduct and Discipline Departments and the Admissions and Credentials Departments. With the panel's permission, the TC may consult with staff lawyers outside those departments (eg, Policy Department).

4. As with any legal consultation, communications between a panel and the TC are confidential. The panel may meet with the TC while the parties are not present while the case is being heard, or while the case is under reserve. As is noted below, however, there may be circumstances in which administrative law principles require the panel to disclose the TC's advice to the parties appearing before it.

5. The TC will not usually attend hearings, unless at a panel's request.

6. It is appropriate for a panel to ask the TC to review and comment upon arguments received from the parties.

7. Under the *Legal Profession Act* and the Rules, responsibility is imposed on the panel to decide the issue at hand. It is fundamental that this responsibility cannot be delegated. Moreover, the panel must decide the issue having regard to the evidence and arguments put forward by the parties. It follows that the panel may not rely on the TC's advice in place of considering the evidence, arguments and authorities submitted by the parties.

8. The TC should not be asked to draft reasons for decision. It is the responsibility of the panel to formulate its own reasons. It may not be inappropriate for the panel to incorporate into its reasons legal analysis taken from a memorandum prepared by the TC, if the analysis reflects the panel's own considered view.

9. A panel may ask the TC to consider new legal issues not raised by the parties, or the TC may identify new legal issues for the panel's consideration. In either case, if the issue is or may be significant to the result, it is incumbent on the panel to afford the parties an opportunity to address the issue before deciding it. The obligation may arise whether or not the panel has consulted the TC in connection with the new issue. If there has been consultation, this is the case in which the proper course may be to bring the TC's advice to the attention of both sides and invite further submissions. The TC can advise as to what is required in the circumstances.

10. A panel or a panel member may ask the TC to review and comment upon draft reasons for decision. Apart from any specific request made to the TC, draft reasons for decision, once

submitted to the hearing administrator, are circulated to the TC before the reasons are issued. The TC does copy and legal editing, and identifies for the panel's consideration any points in the draft decision that appear to him to be mistaken or controversial. It is up to the panel whether to take this advice. Because the final decision must always be that of the panel, it is essential that the reasons for decision, in their final form, be formally approved by the panel members.

Responsibility for Training and Orientation

11. The TC is also responsible for the training and orientation of panelists generally. This is a distinct role arising outside the context of a particular hearing involving a particular member or applicant for admission. In this context, the TC is supervised by the Society's Chief Legal Officer and may work with other professional staff, including staff in the Professional Conduct, Discipline and Credentials Departments.

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC on behalf of Executive Committee
Date: April 29, 2013
Subject: **Review Boards**

Introduction

1. This memorandum asks the Benchers to make decisions about the composition of review boards. The Executive Committee has considered the issues and makes some recommendations to assist the Benchers.

2. Recent amendments to the *Legal Profession Act* and the Law Society Rules will replace Bencher reviews of hearing panel decisions with reviews by review boards. The legislation and rules call for the boards to be appointed by the President like hearing panels, but do not specify the size of each board or the individuals who are to populate them. While the President has the discretion to appoint hearing panels, the Benchers have adopted policies for the guidance of the President in making appointments. It is time now for the same to be done with respect to review boards.

3. The amendments to the *Legal Profession Act* were proclaimed in effect as of January 1, 2013, and the Law Society Rules amendments were timed to coincide. However, the law is that changes to the review and appeal structure do not affect citations that are in progress at the time that the legislation takes effect. See *Teskey v. Law Society of BC* (No. 2) (1990), 49 BCLR (2d) 223 (SC). That means that review boards will begin hearing reviews from decisions on citations that were issued in 2013 and credentials hearings that were ordered in 2013.

Legislation

4. Section 47 of the *Legal Profession Act* establishes review boards as the internal body for review of hearing panel decisions:

Review on the record

47 (1) Within 30 days after being notified of the decision of a panel under section 22 (3) or 38 (5), (6) or (7), the applicant or respondent may apply in writing for a review on the record by a review board.

(2) Within 30 days after the decision of a panel under section 22 (3), the credentials committee may refer the matter for a review on the record by a review board.

(3) Within 30 days after the decision of a panel under section 38 (4), (5), (6) or (7), the discipline committee may refer the matter for a review on the record by a review board.

(3.1) Within 30 days after an order for costs assessed under a rule made under section 27 (2) (e) or 46, an applicant, a respondent or a lawyer who is the subject of the order may apply in writing for a review on the record by a review board.

(3.2) Within 30 days after an order for costs assessed by a panel under a rule made under section 46, the credentials or discipline committee may refer the matter for a review on the record by a review board.

(4) If, in the opinion of a review board, there are special circumstances, the review board may hear evidence that is not part of the record.

(5) After a hearing under this section, the review board may

(a) confirm the decision of the panel, or

(b) substitute a decision the panel could have made under this Act.

(6) The benchers may make rules providing for one or more of the following:

(a) the appointment and composition of review boards;

(b) establishing procedures for an application for a review under this section;

(c) the practice and procedure for proceedings before review boards.

5. While this provision establishes review boards as the internal review body for decisions of hearing panels, it limits the review to a review on the record, with review boards to hear evidence only in "special circumstances". It establishes the authority of review boards to confirm the decision of the hearing panel or to substitute any other decision that was available to the panel. Finally it authorizes the Benchers to make rules governing the appointment and composition of review boards, as well as practice and procedure before review boards.

6. Under section 48 of the *Legal Profession Act*, decisions of review boards can be appealed by either party to the BC Court of Appeal.

Rules

7. The Benchers have adopted rules governing some aspects of the appointment of review boards.

Review boards

5-12.1(1)A review board must consist of

(a) an odd number of persons, and

(b) more persons than the hearing panel that made the decision under review.

(2) A review board must be chaired by a Bencher who is a lawyer.

(3) Review board members must be permanent residents of British Columbia over the age of majority.

(4) The chair of a review board who ceases to be a Bencher may, with the consent of the President, continue to chair the review board, and the review board may complete any hearing or hearings already scheduled or begun.

(5) Two or more review boards may proceed with separate matters at the same time.

(6) The President may refer a matter that is before a review board to another review board, fill a vacancy on a review board or terminate an appointment to a review board.

(7) Unless otherwise provided in the Act and these Rules, a review board must decide any matter by a majority, and the decision of the majority is the decision of the review board.

Disqualification

5-12.2 The following must not participate in a review board reviewing the decision of a hearing panel:

(a) a member of the hearing panel;

(b) a person who was disqualified under Rule 5-3 *[Disqualification]* from participation in the hearing panel.

8. The composition of review boards will be governed by these aspects of this Rule:

- A review board must have more members that the hearing panel whose decision it is reviewing.
- A review board must consist of an odd number of members.
- Like hearing panels, all review boards must be chaired by a Bencher who is a lawyer.

How many members?

9. The Executive Committee recommends that review boards be composed of seven members: One current lawyer-Bencher as chair, two more lawyer-Benchers, two public representatives and two non-Bencher lawyers. The rule for Bencher reviews required at least seven, a majority of whom must be lawyers.

10. Seven-member review boards would continue the current level of participation while allowing input from non-lawyers and non-Bencher lawyers in equal proportions. The proportion of lawyer-Benchers required would be 3/7 or 43%, a modest reduction from the previous majority. In relation to hearing panels, it would mean a modest increase in the proportion of lawyer-Benchers, up from one-third. It would allow Benchers to retain significant influence in review decisions without appearing to negate the participation of others in the hearing process.

11. The model established for hearing panels consists of one lawyer-Bencher as chair, one non-lawyer and one non-Bencher lawyer. The input from the three groups is equal. The Law Society has announced the move to this model, and it has been noted and well received in the media. The Executive Committee considers it important that Benchers continue to have an important role in review decisions, while recognizing and advancing the principles that led to the adoption of the hearing panel model with one from each group. Keeping that sort of balance of representation in the review boards is also considered important.

12. Since the Rules require that a review board be chaired by a lawyer-Bencher, with three lawyer-Benchers on the board, the risk that a review could be lost if the Bencher chair could not continue for some reason would be minimal.

13. Logistically, a seven-person review board should not cause problems. Currently in the hearing panel pool there are 25 members in each of the non-lawyer and non-Bencher lawyer groups. Among the Benchers, taking into account those that are members of the Discipline and Credentials Committees and those who have not, for one reason or another, completed the courses required to sit on hearing panels, there are 12 Benchers available for discipline hearings and 10 for credentials hearings. It is significant though that, as of the beginning of 2014, several Benchers will retire and be replaced by new Benchers who will have to take the training courses before they can begin to chair hearing panels and review boards.

14. After a little over a year, all non-Benchers in the pool have now had the opportunity to sit on at least one hearing. Lawyer-Benchers have been considerably more in demand, although likely less than they were when all three panel members were usually Benchers.

15. In their report to the Benchers, the Task Force that proposed the new scheme noted that the Benchers retaining the function of reviewing and sometimes reversing the decisions of hearing panels detracted from the objective of setting up relatively independent hearing panels. The purpose of establishing review boards was to enhance the appearance and reality of the independence of the panels and to bring the review process into line with the new program of separation of functions.

Special qualifications

16. All members of the hearing panel pool are well-qualified, and all have taken the required course work and participated in at least one hearing, or are scheduled to do so very shortly. For the long run, though, the Executive Committee recommends that the Benchers require that a new member of the hearing pool sit as a member of at least one regular hearing panel before sitting as a member of a review board judging the correctness of a hearing panel's decision.

Single pool

17. Currently there is one pool of hearing panel members who are drawn from lists in their categories in a rotation for hearing panels. The process is designed to be fair and allow all members of the pool to sit on hearings with approximately the same regularity. At the same time, there is some flexibility to allow the President to make appointments out of order in unusual circumstances.

18. We will continue the rotation method and fill hearing panels and review boards from the same group as the need arises. If there is a problem with the current system, it is that it moves relatively slowly, and it can take a year or more for some members of the pool to be included in a hearing. Adding review boards to the rotation will only help to alleviate that concern.

19. For your information, I attach a copy of the hearing panel appointment protocol amended to take into account review boards.

Decisions for the Benchers

20. SUGGESTED RESOLUTION:

RESOLVED to set the number of members of a review board at seven: one Bencher-lawyer chair and two each of lawyer-Benchers, non-Bencher lawyers and members of the public;

FURTHER RESOLVED to require that members of the hearing panel pool be required to sit as a member of at least one hearing panel before sitting as a member of a review board.

JGH

The Law Society of British Columbia

PANEL AND REVIEW BOARD APPOINTMENT PROTOCOL

Under the Law Society Rules, the appointment of hearing panels and review boards is in the discretion of the President. This protocol sets out guidelines for the exercise of that discretion, based on Benchers resolutions and operational practice.

1. Each hearing panel is chaired by a Bencher who is a lawyer and includes two members of the hearing panel pool:
    - one lawyer who is not a current Bencher, and
    - one person who is not a lawyer.

2. Each review board is chaired by a Bencher who is a lawyer and includes two additional lawyer Benchers and four members of the hearing panel pool:
    - two lawyers who are not current Benchers, and
    - two people who are not lawyers.

3. The hearing administrator maintains three rosters:
    - a roster of current lawyer Benchers who qualify to chair hearing panels and review boards;
    - a roster of non-Bencher lawyers who are members of the hearing panel pool; and
    - a roster of non-lawyer members of the hearing panel pools, including current Appointed Benchers.

4. When a member of the hearing panel pool or a lawyer-Bencher completes the required training courses, his or her name is added to the bottom of the appropriate roster.

5. The required courses are as follows:

    - for all panellists, the introductory course on administrative justice and any annual updates required by the Benchers;
    - for all lawyers, the decision-writing workshop; and
    - for all lawyer Benchers, the hearing skills workshop;

6. When a hearing panel or review board is to be appointed, the hearing administrator determines the highest member(s) on each roster who

    - is not disqualified under Rule 5-3(1) or (2);
    - is not a member of the Committee that ordered the hearing, either at the time the hearing was ordered or at the time of the hearing;
    - has not had previous dealings with the respondent or applicant that could give rise to a reasonable apprehension of bias;
    - is not the subject of a complaint investigation or discipline matter;
    - is available on the hearing dates.

7. Before being appointed to a review board, a member of the hearing panel pool or a Bencher must have completed at least one hearing as a member of the hearing panel.

8. The President approves the appointment of the three pool members as a hearing panel or seven pool members as a review board.

9. The President may appoint members of the pool out of order in a case that, in the President's opinion, requires special skill, expertise or experience.

10. When a member of the pool is appointed to a hearing panel or review board, his or her name goes to the bottom of the appropriate roster. If the hearing or review does not proceed, or if the pool member does not begin the hearing or review, for any reason, he or she may request that his or her name be returned to the top of the roster.

11. If a pool member at the top of a roster is not available for three or more consecutive hearings panels or review boards, the President may direct the hearing administrator to place the pool member's name at the bottom of the appropriate roster.

12. The hearing administrator keeps a complete record of the appointment process for each hearing panel or review board.

13. Pool members and Benchers may enquire of the hearing administrator as to where they stand on the applicable roster.

Memo

The Law Society of British Columbia

To The Benchers

From The Executive Committee

Date April 25, 2013

Subject **Rules Concerning Trust and Other Client Property – Lawyers Acting as Attorneys and Executors**

I. Introduction

This matter was brought to the attention of the Executive Committee by Ms. Berge, arising from concerns, as discussed below, expressed to her from members of the Bar in Victoria. The matter has now been considered by the Executive Committee at its meetings of October 16, 2012 and April 25, 2013. The Committee also placed an earlier memorandum explaining the issue, prepared by Ms. Berge and Mr. Lucas, before the Benchers for information only at the Benchers' October 26, 2012 meeting. The matter is now placed before the Benchers with a recommendation for approval in principle to amend the rules to address the concerns as identified, and to then refer the matter to the Act and Rules Subcommittee.

Preliminary draft rules are appended to the memorandum to give a sense as to what rule changes will be necessary, but they will need further consideration by the Act and Rules Subcommittee before being returned to the Benchers for approval.

II. Identification of the Problem Under Examination

Lawyers who act as a personal representative of a person where the appointment is derived from a solicitor-client relationship (such as an executor under a will, an attorney under a power of attorney, or as a trustee), have identified concerns about the current trust rules and how they can adversely affect such representations. These concerns have been raised directly with Law Society trust auditors, and have been of particular concern to a segment of the Victoria Bar. This matter was raised by Ms. Berge with the Executive Committee. The Committee suggested that further exploration of the underlying policy issues be examined.

The Trust Department, when conducting audits of law firms, has also noted a tension arising amongst those members practicing in the wills and estates area who are often asked to act as such fiduciaries, and who, quite properly, strive to practice within the Rules while endeavouring to meet their full fiduciary relationship to their clients. The Trust Department has also noticed that the Trust Rules are not always complied with where a lawyer-fiduciary is acting other than in a traditional solicitor-client role.

When handling trust funds, lawyers must operate under specific obligations set out in Division 7, Part 3 of the Law Society Rules (the "Trust Rules"). "Trust Funds" are defined in Rule 1 to include

> .. funds received in trust by a lawyer acting
>
> (b) as a personal representative of a person or at the request of a person, or as a trustee under a trust established by a person, if the lawyer's appointment derived from a solicitor-client relationship;

Even if a lawyer is acting *qua* "personal representative in circumstances where his or her appointment is derived from a solicitor-client relationship" rather than *qua* lawyer, the funds received are "trust funds" and must be dealt with under the Trust Rules. This result raises difficulties in the administration of the responsibilities assumed by the lawyer. These are explained below.

This memorandum examines policy considerations surrounding the Trust Rules insofar as they relate to relationships where the lawyer is not acting as a lawyer but does have fiduciary responsibilities. It will consider whether the handling of trust funds and other client valuables in those situations may allow for some different considerations from those currently set out in the Trust Rules, which really address considerations where the lawyer is acting as a lawyer only and not in a general fiduciary capacity.

The possibility of a new rule governing the handling of funds and client property where the lawyer is not acting as a lawyer but is a fiduciary/personal representative arising from a solicitor-client relationship will be considered.

III. Background

When reviewing and considering the trust rules in the early 2000s, the Trust Assurance Reform Task Force recognized that, in order to protect the public interest, it was important that it be clear that lawyers must properly handle and account for funds and valuables handled by them in circumstances where the lawyer was acting as a "personal

representative" (such as a trustee or a fiduciary) even if the relationship was not that of lawyer-client – and especially so where the relationship arose from the lawyer having acted for a client.

Therefore, where a lawyer was (for example) appointed executor over a client's estate arising from circumstances where the lawyer had advised the client on legal matters and the client trusted the lawyer as a professional advisor, the Task Force considered it was important that the lawyer account for the funds of the estate as "trust funds" even though the lawyer was now acting *qua* executor rather than *qua* lawyer. Equally, where a client appointed a lawyer as his or her attorney under a power of attorney to handle part or all of the client's assets either permanently or temporarily, the Task Force concluded that lawyers must account for these assets in accordance with the Trust Rules. Moreover, such appointments must be disclosed on the lawyer's Trust Report and be subject to audit, as required.

In large part, the Task Force believed such reporting and handling of the funds and client property was necessary because, should the lawyer ever abscond with the funds, the Special Compensation Fund (now Part B Insurance) could be liable. Ensuring that an audit trail existed was therefore a prudent and necessary consideration to protect the public interest.

To be clear, the Trust Rules only apply where the trustee or fiduciary relationship arises from a solicitor-client relationship. Lawyers acting as a personal representative are not governed by the Trust Rules if the underlying relationship did not arise from a solicitor-client relationship, but instead arose from, for example, familial responsibilities or where the lawyer was appointed because he or she was a long-standing friend of the testator or donor. Nor is the lawyer, in those circumstances, required to disclose that relationship on his or her Trust Report. However, even in these situations lawyers, like all fiduciaries, are still required to account for the property handled in accordance with other legislation (such as the *Trustee Act*, the *Power of Attorney Act* or the *Estate Administration Act*) or pursuant to the laws of equity.

It is unknown exactly how widespread problems arising from the operation of the current Trust Rules are for lawyers acting as personal representatives, because the current rules have been in place for almost a decade and until recently no real concerns had been raised. However, concerns, as discussed below, have been identified, and it would be wise to give some policy consideration to them.

IV. Issues

The current requirements under the Trust Rules set out very specific obligations on how "trust funds" must be handled. Specifically, for example, such funds must be deposited in designated savings institutions. Funds may only be paid out by cheque. No automatic withdrawals are permitted. Therefore, if a lawyer is acting as a personal representative with fiduciary responsibilities where the appointment was derived from a solicitor-client relationship, the lawyer may be obligated, in accordance with the Trust Rules, to redesignate the accounts as trust accounts in the lawyer's name, which may not be what the beneficiary desires nor may it be in the beneficiary's best interests. In some cases, if the accounts are held in unusual ways (perhaps in off-shore accounts), the lawyer may be required to cash in all the accounts and re-deposit them in accounts that accord with those permitted by the Rules. This could have significant consequences. For example, if the lawyer is acting as a temporary Attorney for a client during a client's absence from the country, it is doubtful that the client will want the lawyer to have to cash in all existing securities accounts, although this could be required on a strict reading of the current rules.

Equally, acting as an executor, it may be advantageous from an estate's point of view to leave the funds of the estate in the accounts of the testator pre-existing death. For example, the executor may find it as easy to allow automatic withdrawals to continue to pay utility bills than to change account instructions and have to write cheques, as the Trust Rules would require. Alternatively, for the estate's accounting purposes, it may be advantageous to pay estate expenses directly through the bank or maintain lucrative investments in an investment account that provides the possibility of much greater income than that which can be earned from a pooled trust account or an interest-bearing investment account.

If a lawyer is appointed as an attorney for his or her client and the client later becomes incapacitated, the standard approach is that the lawyer proceeds to administer the client's assets in more or less the same, or similar, form as the investments were in at the time that the lawyer-attorney assumes his or her responsibilities: Investments and bank accounts are left intact, mortgages and other obligations paid from them and the funds are not liquidated and placed in the lawyer's pooled trust. In many instances the client is a minor or disabled person and is expected to live many years into the future or the estate may take some years to administer; liquidation of all assets to convert into pooled trust, or interest-bearing trust, is not necessarily considered a prudent investment. Maintenance of the security of the client's assets and income for the benefit of the client him or herself,

or heirs, is considered the first responsibility of the lawyer-fiduciary acting as a personal representative.

Further, a lawyer acting under a power of attorney or as an executor may, directly or indirectly, maintain control of the client's real estate investments in order to allow the estate to earn income, the client's children to benefit from the use of the real estate assets, or to plan for development or other investment in the land. Real estate is not a permitted investment in a pooled trust account under the Trust Rules.

All these examples raise issues with the application of the current Trust Rules to situations where a lawyer is acting as a fiduciary from an appointment arising out of a solicitor–client relationship.

V. Policy Considerations

1. General considerations

When lawyers are handling funds or property where the lawyer has been appointed as personal representative deriving from a solicitor-client relationship, the Law Society Rules ought to address how the funds and property are handled and accounted for. Lawyers are respected professionals and the public places a high level of trust in them. The assets should be handled and accounted for with the integrity expected of a lawyer, even if the lawyer is not performing solicitor-client functions in connection with the appointment. Lawyers handling property or trust funds in these circumstances should still be expected to be subject to audit by the Law Society with respect to their handling of the trust funds or property in the course of discharging obligations as a personal representative. Simply put, the lawyer has been appointed because of a past relationship that the lawyer and person making the appointment have had. It is reasonable to view the lawyer as a member of a regulated profession, and expect that the lawyer is handling the assets as a member of a regulated profession, even though the lawyer's principle function is as some other type of fiduciary.

Moreover, the Compulsory Professional Liability Insurance Policy, through Part B, now covers dishonest appropriation of money or other property that was entrusted and received by a lawyer in his or her capacity as a barrister and solicitor and in relation to the provision of professional services in certain circumstances. Dishonest appropriation by a lawyer acting as a personal representative deriving from a solicitor-client relationship may be covered through Part B. In order to be able to properly address claims under Part B, it is important for the Law Society to ensure that funds that may be

the subject of a claim are accounted for as "trust funds." This protects both the public and the Law Society itself.

2. Specific considerations

The current Trust Rules, insofar as they relate to "trust funds" focus on "funds" that are received by a lawyer as a retainer or in the course of the retainer, such as settlement funds, or sale proceeds. These are particular funds that come into existence arising from a specific, or a series of specific, matters. While they may be held by the lawyer for a period of time, the lawyer's principle function is in *holding* the funds, rather than *managing* them.

When acting as a personal representative, though, the trust funds (or other property) may be of a significantly different nature than those received for the purposes of a matter on which a lawyer is acting for a client. Rather than receiving funds in connection with a particular matter, the lawyer may in fact be taking over the *management* of pre-existing assets, such as securities or brokerage accounts.

Recognizing the differing functions that a lawyer has compared to a personal representative, an application of the Trust Rules to funds being held as a personal representative may raise the following considerations:

a. Trust Funds must be deposited to a pooled account and interest must be paid to the Law Foundation.

These requirements may be negated by specific instructions, and therefore should presumably be dealt with by the lawyer before agreeing to the appointment as personal representative. However, it is often likely that this will not be possible. In many situations, many years elapse between the appointment of the lawyer-fiduciary and the date upon which that lawyer takes control of the assets. At the time of the appointment, no detailed discussion may have been undertaken about the Trust Rules and their effect upon income and the overall assets should the lawyer-fiduciary be required to assume control of the client's estate at some later date. Although anecdotal, most appointments of lawyers as attorneys and executors never are acted upon. To obtain detailed instructions regarding an unlikely eventuality is seen to be speculative and uncertain given that the Trust Rules may have changed by the time the attorney or executor controls the client's estate.

Even if such detailed instructions were, however, obtained from each client where such a nomination is made, they are not binding in the event of the client's subsequent loss of capacity, unless provided irrevocably. Obtaining such irrevocable instructions would be unwise due to the likelihood that there will be significant changes in the underlying circumstances of the client in the years that intervene between the appointment and the assumption of responsibilities by the lawyer-fiduciary.

If instructions cannot or have not been received, the Trust Rules prescribe that any funds that the lawyer receives would have to be deposited to a pooled trust account rather than be deposited into an already existing account of the estate that the lawyer is to manage. The interest would accrue to a body external to the trust, which would be contrary to the personal representative's (lawyer's) obligations as a fiduciary.

b. Trust Accounts must be kept in the name of the lawyer or the lawyer's firm and designated as a "trust account."

Where the lawyer is acting as, for example, a temporary attorney under a limited power of attorney, it may make no sense and in fact be contrary to the intention of the donor for the accounts to be renamed and designated "in trust" for any funds that the lawyer was to receive while acting as personal representative (such as where the lawyer is acting under a limited power of attorney to collect rents). All of the concerns identified above apply here; in most instances of longer-term lawyer-fiduciary appointments, these investments are not being held in such accounts.

c. Funds must be held in a designated savings institution.

Unless instructions to the contrary can be received from the client (which in some cases may no longer be possible) some or all of the accounts of the estate handled by the lawyer may have to be converted to a designated savings institution. It may well be prudent for the lawyer, acting as a fiduciary, to make such a change in any event. However, there may be circumstances where the holding of the funds in a non-designated savings institution has been done for a reason, and it would be imprudent to have to cash in the account and re-deposit the funds. The issue should perhaps be addressed on the basis of prudent asset management, rather than adherence to prescribed formulas set out in the Trust Rules.

Even with specific instructions to hold funds in a non-designated savings institution, Rule 3-53 requires a trust account to be in a "savings institution" which is defined in the *Interpretation Act* to mean:

(a) a bank,

(b) a credit union,

(c) an extraprovincial trust corporation authorized to carry on deposit business under the *Financial Institutions Act*,

(d) a corporation that is a subsidiary of a bank and is a loan company to which the *Trust and Loan Companies Act* (Canada) applies, or

(e) the B.C. Community Financial Services Corporation established under the *Community Financial Services Act*;

It is at least conceivable that funds could be held in something that was not a "savings institution" – cash in certain brokerage accounts, for example – in which case even with client instructions a lawyer acting as a personal representative managing assets as a fiduciary could be required under the Trust Rules to deal with the assets in a way not contemplated by his or her appointment.

It is worth noting that "funds" is defined to include coin or bank notes bills of exchange, cheques, drafts, money orders, etc. "Securities" are included in the definition of "valuables" in Rule 3-47 and therefore are not "trust funds." They would have to be accounted for as valuables, but accounts in which securities are held probably escape the application of the rules to "trust accounts" (not defined) which seem to address the holding of "trust funds."

d. Payments or Withdrawals out of a Trust Account

Rule 3-56 permits withdrawals to be made from a trust account only by certain methods and for specific reasons. It is likely that Rule 3-56(a) would cover most situations for payment of funds out of the trust, *provided that* "client" included the donor of the power of attorney, the settlor of the trust, or the testator of an estate, for example. However, if a situation arose where for some reason a payment of funds out of trust by a lawyer acting as a personal representative or executor did not fall within Rule 3-56, the Trust Rules would create problems for the lawyer.

> Equally, funds may only be withdrawn from a trust account by cheque, electronic transfer as permitted by the Rules, by instruction to a savings institution (but only to pay funds to the Law Foundation), or by cash (but only in very specific and unusual circumstances that are not relevant to a normal trust). It may be advantageous for the lawyer, acting as fiduciary, to maintain the donor's previously authorized withdrawals or payments from the account.

What is it that Law Society needs to establish in these sorts of relationships to ensure that it can regulate and, if need be, audit how the lawyer has dealt with the assets? Do the requirements of accounting for trust funds set out in Trust Rules need to be discharged, or is it enough that the lawyer discharges (and is able to show he or she has discharged) general requirements that may be less prescriptive than the specific provisions of the existing Trust Rules, thereby permitting more flexible management of assets but still allowing a proper accounting and, if necessary, audit of the lawyer's activities?

3. Public interest

The public interest is to ensure that when a lawyer is acting either as a lawyer or as a personal representative, where the appointment derives from a solicitor-client relationship, the lawyer will hold trust assets properly and that the client or party appointing the lawyer can be assured that the lawyer's conduct is regulated or at least supervised by the Law Society. A finding of professional misconduct would be expected should a lawyer fail to hold trust funds properly when acting as a lawyer. A finding of conduct unbecoming a lawyer would be available should a lawyer not hold trust funds properly when acting in a capacity other than as a lawyer.

However, if the lawyer, acting as a personal representative where the appointment was derived from a solicitor-client relationship, were required to deal with trust property in a way not contemplated by the appointing party (the client or former client of the lawyer), it is likely that second thoughts would be given to the appointment of a lawyer as a fiduciary. This may not be generally in the public interest, because it may result in the client appointing someone else whose responsibilities are not regulated, or a trust company whose fees (we understand) may be higher.

Moreover, a trust company representative may not be generally expected to have all the same skills or experience as a lawyer, and certainly would not have the same comprehension and familiarity with a client's affairs as would a lawyer appointed as executor or other fiduciary arising out of the solicitor-client relationship. The client would not be expected to have the same degree of trust and confidence in what would,

essentially, amount to a stranger assuming an important fiduciary role in connection with the client's affairs. Ensuring therefore that lawyers remain able to undertake these responsibilities is in the public interest.

On the other hand, public confidence in the legal profession requires that lawyers abide strictly by Law Society regulations concerning the handling of funds entrusted to a lawyer. If the current rules allow the Law Society to best protect the public, then amending the rules to provide different standards for the handling of such funds depending on whether the lawyer was acting *qua* lawyer or *qua* personal representative could be counter-productive to effective regulation. The fact that the rules have been in place a considerable period of time and yet concerns have only been raised in the recent past suggests that lawyers have been able to work with the rules.

4. Member relations

Lawyers should obviously give serious consideration before accepting an appointment as a personal representative, trustee or executor. However, given a lawyer's professional expertise and a general level of trust that may have developed with specific individual clients or former clients, it is to be expected that such appointments will occur and perhaps even be necessary. If so, it would be advisable to ensure that the Trust Rules do not interfere with the fiduciary obligations that a lawyer has undertaken in order that the lawyer is not caught between his or her responsibilities as a fiduciary and his or her obligations to the Law Society.

VI. Options

1. Amend the Rules

A rule amendment to permit a different manner of holding or dealing with funds by a lawyer acting *qua* personal representative could be considered.

There are different ways that this could be accomplished. After consideration, the recommended approach would be to carve out a definition of "trust property" from the current definition of "trust funds." "Trust property" would define funds and valuables received by a lawyer acting as a personal representative of a person or at the request of a person, or as a trustee under a trust established by a person, if a lawyer's appointment is derived from a solicitor-client relationship. In other words, "trust property" would be separately defined from "trust funds," applied to property that a lawyer holds as a

fiduciary from a relationship in which the lawyer is not acting as a lawyer, but where the relationship has been derived from a solicitor-client relationship.

The balance of the trust rules would continue to apply to "trust funds" that a lawyer holds in connection with the solicitor-client relationship. Many of those rules will continue to apply to "trust property" as well. However, some rules would be amended to allow a lawyer to hold or deal with "trust property" in ways more consistent with the trust, thereby relieving the lawyer from some of the applications of the trust rules that may currently prove impractical or even, in some cases, inconsistent with a lawyer's trust obligations, and that gave rise to the tensions that prompted the analysis of this matter.

The application of the rules to trust property can be designed to track the language of the Power of Attorney Regulations under the recently proclaimed *Power of Attorney Act*, creating specific obligations on lawyers concerning the efforts they must make to establish the property and liabilities of the fiduciary obligations and to maintain a list accordingly.

Consequently, rules could be designed to ensure that a lawyer's fiduciary obligations relating to "trust property" would track obligations as established elsewhere in legislation, but still be designed to ensure particular aspects of responsibility necessary to ensure that the lawyer's handling of "trust property" will remain within the purview of the Law Society and be subject to Law Society audits.

A preliminary draft of rules that would effect changes consistent with this recommendation is attached.

2. Leave the Rules in their Current State

The other option is to leave the Rules as they currently read, and to leave it to lawyers to use their good sense in interpreting them insofar as they apply to their handling of trust funds and property where the lawyer is not acting as a lawyer but is acting as a personal representative where the appointment is derived from a solicitor-client relationship. The current rules have been in place for many years and while they do not seen to generate many complaints, the issue appears to be one that is of concern to the wills and estates bar. It has been reported to us that a considerable number of lawyers are appointed as trustees, executors, or attorneys arising out of a solicitor-client relationship.

However, given that concerns have been raised by lawyers engaged in this activity and that an examination as described above identifies that there are some policy

considerations that suggest some problems could arise from the application of the current rules to these situations, leaving the Trust Rules as they are currently drafted may not be a viable option. Providing clarity concerning how funds and property should be handled when acting as a fiduciary but not as a lawyer could be of valuable assistance to lawyers in the Province.

VII. Key Comparisons

The Rules of some other law societies do address this issue to some greater extent than do the rules in British Columbia.

In particular, the Rules of the Law Society of Alberta create a category of lawyer acting "in a representative capacity." Lawyers acting in a representative capacity are exempted from the application of the rule that sets out what a lawyer must do on the receipt of trust money.

VIII. Consultations

The Trust Accounting Department, the Professional Conduct Department and the Lawyers Insurance Fund have been consulted and each has provided information and feedback to the content of this memorandum.

The issue itself was brought to the attention of the Law Society by members practicing in areas of law where a lawyer may be, on occasion, expected to act in a representative capacity as an executor, attorney, or trustee where the appointment has arisen as a result of a solicitor-client relationship. The problems that the current rules are said to create have been identified by those lawyers and expanded on in this memorandum, and this group of lawyers is awaiting a response from the Law Society in connection with the concerns it has raised.

IX. Recommendation

The concerns and issues that have been identified by lawyers practising in areas of law where there is some real likelihood that the lawyer will act in a representative capacity are not speculative and could be problematic, putting lawyers acting in representative fiduciary capacities in conflict with their obligations as a lawyer in handling "trust funds" as defined in the Rules. Consequently, the Executive Committee recommends that rule amendments be approved in principle in the manner of those appended to this memorandum. The Benchers are asked to approve in principle amendments to the rules to address the concerns raised in this memorandum, and to refer the matter to the Act and

Rules Subcommittee to finalize draft rules that can then be returned to the Benchers for consideration and approval.

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LAW SOCIETY RULES

Definitions

1 In these Rules, unless the context indicates otherwise:

"general funds" means funds other than trust funds and trust property, received by a lawyer in relation to the practice of law;

"trust funds" includes funds received in trust by a lawyer acting

~~(a)~~ in the capacity of a lawyer, including funds

(~~i~~a) received from a client for services to be performed or for disbursements to be made on behalf of the client, or

(~~ii~~b) belonging partly to a client and partly to the lawyer if it is not practicable to split the funds~~, and~~;

~~(b) as a personal representative of a person or at the request of a person, or as a trustee under a trust established by a person, if the lawyer's appointment derived from a solicitor-client relationship;~~

"trust property" means any funds, other than trust funds, and valuables received by a lawyer acting in a representative capacity or as a trustee if the lawyer's appointment is derived from a solicitor-client relationship;

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Inter-jurisdictional practice

Disqualifications

2-10.21 (2) For the purposes of this Rule, an economic nexus is established by actions inconsistent with a temporary basis for providing legal services, including but not limited to doing any of the following in British Columbia:

(d) opening or operating a trust account, or accepting trust funds or trust property, except as allowed under Rule 2-16;

Trust funds and compensation fund

2-16 (1) A visiting lawyer providing legal services must not maintain a trust account in British Columbia, and must

(a) promptly remit funds received in trust to the visiting lawyer's trust account in the home jurisdiction, or

LAW SOCIETY RULES

(b) ensure that trust funds received are handled

(i) by a practising lawyer in a trust account controlled by the practising lawyer, and

(ii) in accordance with the Act and these Rules.

Practitioners of foreign law

Restrictions and limitations

2-19 (3) A practitioner of foreign law must not

(b) deal in any way with funds or valuables that would, if accepted, held, transferred or otherwise dealt with by a lawyer, constitute trust funds or trust property, except money received on deposit for fees to be earned in the future by the practitioner of foreign law.

Multi-Disciplinary Practice

Trust funds and trust property

2-23.11 (1) A lawyer practising law in an MDP that accepts any funds or valuables in trust from any person must maintain a trust account and a trust accounting system

(a) in accordance with Part 3, Division 7 of these Rules, and

(b) that are within the exclusive control of lawyers practising law in the MDP.

(2) A lawyer practising law in an MDP must ensure that all funds or valuables received by the MDP that would, if received by a lawyer, constitute trust funds or trust property, are handled through a trust account and accounting system that complies with these Rules.

Division 3 – Fees and Assessments

Application and definition

2-72.1 (1) Rules 2-72.1 to 2-72.5 apply to client matters in connection with which a lawyer receives trust funds or funds that are trust property on or after March 1, 2005.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other ~~Client~~ Property

Definitions

3-47 In this Division,

"client" includes any beneficial owner of trust funds or trust property;

~~funds or valuables received by a lawyer in connection with the lawyer's practice;~~

"valuables" means anything of value that can be negotiated or transferred, including but not limited to

(a) securities,

(b) bonds,

(c) treasury bills, and

(d) personal or real property.

Personal responsibility

3-48 (1) A lawyer must account in writing to a client for all of the following received by the lawyer ~~funds and valuables received~~ on behalf of ~~the~~ a client:

(a) trust funds;

(b) trust property;

(c) other valuables.

(2) In this Division, the responsibilities of a lawyer may be fulfilled by the lawyer's firm.

(3) A lawyer is personally responsible to ensure that the duties and responsibilities under this Division are carried out, including when the lawyer

(a) is authorized by the firm or lawyer through which the lawyer practises law to open, maintain, or deal with funds in a trust or general account, or

(b) delegates to another person any of the duties or responsibilities assigned to a lawyer under this Division.

Trust property

3-48.1 (1) This rule applies to lawyers who receive or otherwise handle trust property.

(2) A lawyer must make all reasonable efforts to determine the extent of the trust property that the lawyer receives or otherwise handles and must maintain a list of the trust property.

LAW SOCIETY RULES

(3) A lawyer must keep the following records in relation to the period for which the lawyer is handling trust property:

(a) a current list of valuables, including an estimate of the value if it is reasonable to do so;

(b) accounts and other records respecting the trust property;

(c) all invoices, bank statements, cancelled cheques or images, and other records necessary to create full accounts respecting the receipt or disbursement of the trust property and any capital or income associated with the trust property.

(4) A lawyer must handle and account for funds that are trust property as specifically required in this Division.

Removal of designation

3-50 (2) A lawyer who holds trust funds in a savings institution that is not or ceases to be a designated savings institution must immediately transfer those funds into a designated savings institution.

Deposit of trust funds

3-51 (1) Subject to subrule (3) and Rule 3-54, a lawyer who receives trust funds must deposit the funds in a pooled trust account as soon as practicable.

(3) Despite subrule (1), a lawyer who receives trust funds with instructions to place the funds otherwise than in a pooled trust account may place the funds in a separate trust account in accordance with section 62(5) of the Act and Rule 3-53.

(4) Unless the client instructs otherwise in writing, a lawyer must deposit all trust funds in an account in a designated savings institution.

Pooled trust account

3-52 (3) Subject to subrule (4) and Rule 3-66, a lawyer must not deposit to a pooled trust account any funds other than trust funds and funds that are trust property.

Separate trust account

3-53 (3) Subject to Rule 3-66, a lawyer must not deposit to a separate trust account any funds other than trust funds and funds that are trust property.

Withdrawal from trust

3-56 (1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are

(g) unclaimed trust funds remitted to the Society under Division 8.

LAW SOCIETY RULES

(1.1) The Executive Director may authorize a lawyer to withdraw trust funds for a purpose not specified in subrule (1).

(1.2) No payment from trust funds may be made unless

(a) trust accounting records are current, and

(b) there are sufficient funds held to the credit of the client on whose behalf the funds are to be paid.

(3) A lawyer who withdraws or authorizes the withdrawal of trust funds for the payment of fees must withdraw the funds with a cheque payable to the lawyer's general account.

Payment of fees from trust

3-57 (2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(5) A lawyer must not take fees from trust funds when the lawyer knows that the client disputes the right of the lawyer to receive payment from trust funds, unless

(6) Despite subrule (5), if a lawyer knows that the client disputes a part of the lawyer's account, the lawyer may take from trust funds fees that are not disputed.

Withdrawal from separate trust account

3-58 (3) A lawyer who disburses trust funds received with instructions under Rule 3-51(3) must keep a written record of the transaction.

Accounting records

3-59 (1) A lawyer must record all funds received and disbursed in connection with his or her law practice by maintaining the records required under this Division.

(1.1) Subrule (1) applies to funds that are trust property.

Trust account records

3-60 A lawyer must maintain at least the following trust account records:

(a) a book of entry or data source showing all trust transactions, including the following:

(i) the date and amount of receipt or disbursements of all funds;

(ii) the source and form of the funds received;

(iii) the identity of the client on whose behalf trust funds are received or disbursed;

LAW SOCIETY RULES

(iv) the cheque or voucher number for each payment out of trust;

(v) the name of each recipient of money out of trust;

(b) a trust ledger, or other suitable system, showing separately for each client on whose behalf trust funds have been received, all trust funds received and disbursed, and the unexpended balance;

(c) records

(i) showing each transfer of funds between clients' trust ledgers, including the name and number of both the source file and the destination file,

(ii) containing an explanation of the purpose for which each transfer is made, and

(iii) containing the lawyer's written approval of the transfer;

(d) the monthly trust reconciliations required under Rule 3-65, and any documents prepared in support of the reconciliations;

(g) a current listing of all valuables held in trust for each client.

Monthly trust reconciliation

3-65 (2) The monthly trust reconciliation must be supported by

(a) a detailed monthly listing showing the unexpended balance of trust funds held for each client, and identifying each client for whom trust funds are held,

(b) a detailed monthly bank reconciliation for each pooled trust account,

(c) a listing of balances of each separate trust account or savings, deposit, investment or similar form of account, identifying the client for whom each is held,

(d) a listing of balances of all other trust funds received pursuant to Rule 3-51(3), and

(e) a listing of valuables received and delivered and the undelivered portion of valuables held for each client.

(3) A lawyer must retain the detailed listings described in subrule (2) as records supporting the monthly trust reconciliations.

(4) A lawyer must make the trust reconciliation required by this Rule not more than 30 days after the effective date of the reconciliation.

(5) This Rule applies to funds that are trust property when the funds are held in a pooled or separate trust account.

LAW SOCIETY RULES

Trust shortage

3-66 (1) A lawyer who discovers a trust shortage must immediately pay enough funds into the account to eliminate the shortage.

(2) A lawyer must immediately make a written report to the Executive Director, including all relevant facts and circumstances, if the lawyer

(a) discovers a trust shortage greater than $2,500, or

(b) is or will be unable to deliver up, when due, any trust funds held by the lawyer.

(3) A trust shortage referred to in this Rule includes

(a) a shortage caused by service charges, credit card discounts and bank errors, and

(b) a shortage of funds that are trust property when the funds are held in a pooled or separate trust account.

Retention and security of records

3-68 (0.1) In this Rule, **"records"** means the records referred to in Rules 3-48.1 and 3-~~60~~ 59 to 3-62.

(1) A lawyer must keep his or her records for as long as the records apply to money held in trust and, in any case, for at least 10 years.

(2) A lawyer must keep his or her records at his or her chief place of practice in British Columbia for as long as the records apply to ~~money held in~~ trust funds or funds that are trust property and, in any case, for at least 3 years.

(3) A lawyer must protect his or her records and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure.

Trust report

3-72 (1) Subject to subrules (4) and (6), a lawyer must deliver to the Executive Director completed trust reports for reporting periods of 12 months covering all the time that the lawyer is a member of the Society.

(2) The date on which a firm ceases to practise law is the end of a reporting period.

(3) A lawyer must deliver a completed trust report to the Executive Director within 3 months of the end of each reporting period.

LAW SOCIETY RULES

(4) On a written request made before the due date of a trust report, the Executive Director may allow a lawyer to submit a trust report covering a time period other than 12 months.

(5) A trust report delivered to the Executive Director under this Rule must

(a) be in a form approved by the Discipline Committee,

(b) be complete to the satisfaction of the Executive Director, and

(c) include all signatures required in the form.

(6) A non-practising or retired lawyer or a practising lawyer who is exempt under Rule 3-25 from the requirement to maintain professional liability insurance and pay the insurance fee, is not required to file a trust report for a reporting period of 12 months during which the lawyer has

(a) not received any funds in trust, including funds that are trust property,

(b) not withdrawn any funds held in trust, including funds that are trust property, and

(c) complied with this Division.

Disposition of files, trust money and other documents and valuables

3-80 (1) Before leaving a firm in British Columbia, a lawyer must advise the Executive Director in writing of his or her intended disposition of all of the following that relate to the lawyer's practice in British Columbia and are in the lawyer's possession or power:

(a) open and closed files;

(b) wills and wills indices;

(c) titles and other important documents and records;

(d) other valuables;

(e) trust accounts and trust funds;

(f) trust property.

(2) Within 30 days after withdrawing from the practice of law in British Columbia, a lawyer or former lawyer must confirm to the Executive Director in writing that

(a) the documents and property referred to in subrule (1)(a) to (d) have been disposed of, and any way in which the disposition differs from that reported under subrule (1),

LAW SOCIETY RULES

(b) all trust accounts referred to in subrule (1)(e) have been closed and that

(i) all the balances have been

(A) remitted to the clients or other persons on whose behalf they were held,

(B) transferred to another lawyer with written instructions concerning the conditions attaching to them, or

(C) paid to the Society under Rule 3-82, and

(ii) any net interest earned on a pooled trust account has been remitted to the Foundation in accordance with this Division, and.

(c) the lawyer or former lawyer has notified all clients and other persons for whom the lawyer is or potentially may become a personal representative, executor, ~~or~~ trustee or other fiduciary regarding the lawyer or former lawyer's withdrawal from practice and any change in his or her membership status.

Division 8 – Unclaimed Trust Money

Definition

3-81 In this Division, **"efforts to locate"** means steps that are reasonable and adequate in all the circumstances, including the amount of money involved.

Payment of unclaimed trust funds to the Society

3-82 (1) A lawyer who has held ~~funds~~ money in ~~his or her~~ trust ~~account~~ on behalf of a person whom the lawyer has been unable to locate for 2 years may apply to the Executive Director to pay those funds to the Society under section 34 of the Act.

LAW SOCIETY RULES

Definitions

1 In these Rules, unless the context indicates otherwise:

"general funds" means funds other than trust funds and trust property, received by a lawyer in relation to the practice of law;

"trust funds" includes funds received in trust by a lawyer acting in the capacity of a lawyer, including funds

(a) received from a client for services to be performed or for disbursements to be made on behalf of the client, or

(b) belonging partly to a client and partly to the lawyer if it is not practicable to split the funds;

"trust property" means any funds, other than trust funds, and valuables received by a lawyer acting in a representative capacity or as a trustee if the lawyer's appointment is derived from a solicitor-client relationship;

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Inter-jurisdictional practice

Disqualifications

2-10.21 (2) For the purposes of this Rule, an economic nexus is established by actions inconsistent with a temporary basis for providing legal services, including but not limited to doing any of the following in British Columbia:

(d) opening or operating a trust account, or accepting trust funds or trust property, except as allowed under Rule 2-16;

Trust funds and compensation fund

2-16 (1) A visiting lawyer providing legal services must not maintain a trust account in British Columbia, and must

(a) promptly remit funds received in trust to the visiting lawyer's trust account in the home jurisdiction, or

(b) ensure that trust funds received are handled

(i) by a practising lawyer in a trust account controlled by the practising lawyer, and

LAW SOCIETY RULES

(ii) in accordance with the Act and these Rules.

Practitioners of foreign law

Restrictions and limitations

2-19 (3) A practitioner of foreign law must not

(b) deal in any way with funds or valuables that would, if accepted, held, transferred or otherwise dealt with by a lawyer, constitute trust funds or trust property, except money received on deposit for fees to be earned in the future by the practitioner of foreign law.

Multi-Disciplinary Practice

Trust funds and trust property

2-23.11 (1) A lawyer practising law in an MDP that accepts any funds or valuables in trust from any person must maintain a trust account and a trust accounting system

(a) in accordance with Part 3, Division 7 of these Rules, and

(b) that are within the exclusive control of lawyers practising law in the MDP.

(2) A lawyer practising law in an MDP must ensure that all funds or valuables received by the MDP that would, if received by a lawyer, constitute trust funds or trust property, are handled through a trust account and accounting system that complies with these Rules.

Division 3 – Fees and Assessments

Application and definition

2-72.1 (1) Rules 2-72.1 to 2-72.5 apply to client matters in connection with which a lawyer receives trust funds or funds that are trust property on or after March 1, 2005.

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other Property

Definitions

3-47 In this Division,

"client" includes any beneficial owner of trust funds or trust property;

LAW SOCIETY RULES

"valuables" means anything of value that can be negotiated or transferred, including but not limited to

(a) securities,

(b) bonds,

(c) treasury bills, and

(d) personal or real property.

Personal responsibility

3-48 (1) A lawyer must account in writing to a client for all of the following received by the lawyer on behalf of a client:

(a) trust funds;

(b) trust property;

(c) other valuables.

(2) In this Division, the responsibilities of a lawyer may be fulfilled by the lawyer's firm.

(3) A lawyer is personally responsible to ensure that the duties and responsibilities under this Division are carried out, including when the lawyer

(a) is authorized by the firm or lawyer through which the lawyer practises law to open, maintain, or deal with funds in a trust or general account, or

(b) delegates to another person any of the duties or responsibilities assigned to a lawyer under this Division.

Trust property

3-48.1 (1) This rule applies to lawyers who receive or otherwise handle trust property.

(2) A lawyer must make all reasonable efforts to determine the extent of the trust property that the lawyer receives or otherwise handles and must maintain a list of the trust property.

(3) A lawyer must keep the following records in relation to the period for which the lawyer is handling trust property:

(a) a current list of valuables, including an estimate of the value if it is reasonable to do so;

(b) accounts and other records respecting the trust property;

(c) all invoices, bank statements, cancelled cheques or images, and other records necessary to create full accounts respecting the receipt or disbursement of the trust property and any capital or income associated with the trust property.

LAW SOCIETY RULES

(4) A lawyer must handle and account for funds that are trust property as specifically required in this Division.

Removal of designation

3-50 (2) A lawyer who holds trust funds in a savings institution that is not or ceases to be a designated savings institution must immediately transfer those funds into a designated savings institution.

Deposit of trust funds

3-51 (1) Subject to subrule (3) and Rule 3-54, a lawyer who receives trust funds must deposit the funds in a pooled trust account as soon as practicable.

(3) Despite subrule (1), a lawyer who receives trust funds with instructions to place the funds otherwise than in a pooled trust account may place the funds in a separate trust account in accordance with section 62(5) of the Act and Rule 3-53.

(4) Unless the client instructs otherwise in writing, a lawyer must deposit all trust funds in an account in a designated savings institution.

Pooled trust account

3-52 (3) Subject to subrule (4) and Rule 3-66, a lawyer must not deposit to a pooled trust account any funds other than trust funds and funds that are trust property.

Separate trust account

3-53 (3) Subject to Rule 3-66, a lawyer must not deposit to a separate trust account any funds other than trust funds and funds that are trust property.

Withdrawal from trust

3-56 (1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are

(g) unclaimed trust funds remitted to the Society under Division 8.

(1.1) The Executive Director may authorize a lawyer to withdraw trust funds for a purpose not specified in subrule (1).

(1.2) No payment from trust funds may be made unless

(a) trust accounting records are current, and

(b) there are sufficient funds held to the credit of the client on whose behalf the funds are to be paid.

LAW SOCIETY RULES

(3) A lawyer who withdraws or authorizes the withdrawal of trust funds for the payment of fees must withdraw the funds with a cheque payable to the lawyer's general account.

Payment of fees from trust

3-57 (2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(5) A lawyer must not take fees from trust funds when the lawyer knows that the client disputes the right of the lawyer to receive payment from trust funds, unless

(6) Despite subrule (5), if a lawyer knows that the client disputes a part of the lawyer's account, the lawyer may take from trust funds fees that are not disputed.

Withdrawal from separate trust account

3-58 (3) A lawyer who disburses trust funds received with instructions under Rule 3-51(3) must keep a written record of the transaction.

Accounting records

3-59 (1) A lawyer must record all funds received and disbursed in connection with his or her law practice by maintaining the records required under this Division.

(1.1) Subrule (1) applies to funds that are trust property.

Trust account records

3-60 A lawyer must maintain at least the following trust account records:

(a) a book of entry or data source showing all trust transactions, including the following:

(i) the date and amount of receipt or disbursements of all funds;

(ii) the source and form of the funds received;

(iii) the identity of the client on whose behalf trust funds are received or disbursed;

(iv) the cheque or voucher number for each payment out of trust;

(v) the name of each recipient of money out of trust;

(b) a trust ledger, or other suitable system, showing separately for each client on whose behalf trust funds have been received, all trust funds received and disbursed, and the unexpended balance;

LAW SOCIETY RULES

(c) records

(i) showing each transfer of funds between clients' trust ledgers, including the name and number of both the source file and the destination file,

(ii) containing an explanation of the purpose for which each transfer is made, and

(iii) containing the lawyer's written approval of the transfer;

(d) the monthly trust reconciliations required under Rule 3-65, and any documents prepared in support of the reconciliations;

(g) a current listing of all valuables held in trust for each client.

Monthly trust reconciliation

3-65 (2) The monthly trust reconciliation must be supported by

(a) a detailed monthly listing showing the unexpended balance of trust funds held for each client, and identifying each client for whom trust funds are held,

(b) a detailed monthly bank reconciliation for each pooled trust account,

(c) a listing of balances of each separate trust account or savings, deposit, investment or similar form of account, identifying the client for whom each is held,

(d) a listing of balances of all other trust funds received pursuant to Rule 3-51(3), and

(e) a listing of valuables received and delivered and the undelivered portion of valuables held for each client.

(3) A lawyer must retain the detailed listings described in subrule (2) as records supporting the monthly trust reconciliations.

(4) A lawyer must make the trust reconciliation required by this Rule not more than 30 days after the effective date of the reconciliation.

(5) This Rule applies to funds that are trust property when the funds are held in a pooled or separate trust account.

Trust shortage

3-66 (1) A lawyer who discovers a trust shortage must immediately pay enough funds into the account to eliminate the shortage.

(2) A lawyer must immediately make a written report to the Executive Director, including all relevant facts and circumstances, if the lawyer

(a) discovers a trust shortage greater than $2,500, or

(b) is or will be unable to deliver up, when due, any trust funds held by the lawyer.

(3) A trust shortage referred to in this Rule includes

(a) a shortage caused by service charges, credit card discounts and bank errors, and

(b) a shortage of funds that are trust property when the funds are held in a pooled or separate trust account.

Retention and security of records

3-68 (0.1) In this Rule, **"records"** means the records referred to in Rules 3-48.1 and 3-59 to 3-62.

(1) A lawyer must keep his or her records for as long as the records apply to money held in trust and, in any case, for at least 10 years.

(2) A lawyer must keep his or her records at his or her chief place of practice in British Columbia for as long as the records apply to trust funds or funds that are trust property and, in any case, for at least 3 years.

(3) A lawyer must protect his or her records and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure.

Trust report

3-72 (1) Subject to subrules (4) and (6), a lawyer must deliver to the Executive Director completed trust reports for reporting periods of 12 months covering all the time that the lawyer is a member of the Society.

(2) The date on which a firm ceases to practise law is the end of a reporting period.

(3) A lawyer must deliver a completed trust report to the Executive Director within 3 months of the end of each reporting period.

(4) On a written request made before the due date of a trust report, the Executive Director may allow a lawyer to submit a trust report covering a time period other than 12 months.

(5) A trust report delivered to the Executive Director under this Rule must

(a) be in a form approved by the Discipline Committee,

(b) be complete to the satisfaction of the Executive Director, and

(c) include all signatures required in the form.

(6) A non-practising or retired lawyer or a practising lawyer who is exempt under Rule 3-25 from the requirement to maintain professional liability insurance and pay the insurance fee, is not required to file a trust report for a reporting period of 12 months during which the lawyer has

(a) not received any funds in trust, including funds that are trust property,

(b) not withdrawn any funds held in trust, including funds that are trust property, and

(c) complied with this Division.

Disposition of files, trust money and other documents and valuables

3-80 (1) Before leaving a firm in British Columbia, a lawyer must advise the Executive Director in writing of his or her intended disposition of all of the following that relate to the lawyer's practice in British Columbia and are in the lawyer's possession or power:

(a) open and closed files;

(b) wills and wills indices;

(c) titles and other important documents and records;

(d) other valuables;

(e) trust accounts and trust funds;

(f) trust property.

(2) Within 30 days after withdrawing from the practice of law in British Columbia, a lawyer or former lawyer must confirm to the Executive Director in writing that

(a) the documents and property referred to in subrule (1)(a) to (d) have been disposed of, and any way in which the disposition differs from that reported under subrule (1),

(b) all trust accounts referred to in subrule (1)(e) have been closed and that

(i) all the balances have been

(A) remitted to the clients or other persons on whose behalf they were held,

(B) transferred to another lawyer with written instructions concerning the conditions attaching to them, or

(C) paid to the Society under Rule 3-82, and

(ii) any net interest earned on a pooled trust account has been remitted to the Foundation in accordance with this Division, and.

LAW SOCIETY RULES

(c) the lawyer or former lawyer has notified all clients and other persons for whom the lawyer is or potentially may become a personal representative, executor, trustee or other fiduciary regarding the lawyer or former lawyer's withdrawal from practice and any change in his or her membership status.

Division 8 – Unclaimed Trust Money

Definition

3-81 In this Division, **"efforts to locate"** means steps that are reasonable and adequate in all the circumstances, including the amount of money involved.

Payment of unclaimed trust funds to the Society

3-82 (1) A lawyer who has held money in trust on behalf of a person whom the lawyer has been unable to locate for 2 years may apply to the Executive Director to pay those funds to the Society under section 34 of the Act.

The Law Society of British Columbia

National Mobility Agreement 2013

Credentials Committee

May 10, 2013

Prepared for: Benchers

Prepared by: Alan Treleaven, Director, Education and Practice

Approval of the National Mobility Agreement 2013

The Council of the Federation of Law Societies of Canada, has voted unanimously in favour of the resolution to approve the new National Mobility Agreement 2013 ("NMA 2013") for submission to member law societies for their approval. If approved, and implemented, the NMA 2013 will provide for full, permanent mobility between the Barreau du Québec and the common law jurisdictions.

The Executive Committee has referred this matter to the Credentials Committee for consideration and recommendations. The Credentials Committee will consider the NMA 2013 at its meeting of May 9, 2013 and provide its recommendations to the Benchers at the May 10, 2013 meeting on the following motion:

Motion

1. That the Benchers approve in principle the National Mobility Agreement 2013 ("NMA 2013"), attached as Appendix A, on the condition that implementation will be subject

   a) to Bencher approval of such amendments to the Law Society Rules as are required,

   b) to resolution of the issues related to liability insurance and the approval of any consequential amendment to the insurance-related NMA 2013 provisions,

   c) to clarification that law societies will be permitted to require Canadian Legal Advisor applicants to certify that they have read and understood all of the reading materials reasonably required by the law societies, and

   d) in the case of implementation by the Barreau, to obtaining the necessary approvals by the Office des Professions du Québec and the Government of Québec, and

2. That the Law Society of British Columbia's President or his designate be authorized to execute the NMA 2013.

3. That the Benchers request that the Federation develop as an addition to the NMA reading requirement a guide on the key differences between the legal systems in Québec and the common law jurisdictions for law societies' use.

Background

Since 2002 the Federation of Law Societies and its member law societies have undertaken a number of initiatives to extend lawyer mobility nationally. The process began with the signing of the National Mobility Agreement ("NMA") in 2002, followed by the introduction of the

Territorial Mobility Agreement ("TMA") in 2006 and 2011 and the Québec Mobility Agreement ("QMA") and amendments in 2010 and 2011.

At its meeting in Vancouver in September 2012, the Council of the Federation of Law Societies endorsed a recommendation to consider an expansion of the current permanent mobility ("transfer") between the Barreau du Québec and the common law jurisdictions in Canada to replace the Canadian Legal Advisor ("CLA") regime set out in the QMA.

The Barreau du Québec signed the NMA in 2002. It was contemplated at the time that the Barreau could implement the NMA on the same basis as the common law signatories or, in the alternative, through an approach it determined. The relevant provisions of the NMA state as follows:

> PERMANENT MOBILITY BETWEEN QUEBEC AND COMMON LAW JURISDICTIONS
>
> 39. While the signatory governing bodies recognize that the Barreau must comply with regulations that apply to all professions in Québec, the Barreau agrees to consult with the other signatory governing bodies before changing regulations on the mobility of Canadian lawyers to Québec.
>
> 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;[1]
>
> (b) as permitted by the Barreau in respect of members of the signatory governing body.

In 2007 the Barreau introduced a Canadian Legal Advisor regime to implement permanent mobility and in 2010 the common law jurisdictions and the Barreau signed the QMA to create a reciprocal approach. While the reciprocal regime permitted lawyers to transfer between jurisdictions without having to write examinations, their scope of practice was limited to the law of their home province or territory or matters under federal jurisdiction.

The Federation Council's September 2012 proposal sought to extend permanent mobility (transfer) to and from Québec on the same basis as applies to the other signatories to the NMA and TMA.

The Federation's National Mobility Policy Committee was asked to consider the issues and report to Council in December 2012. It provided a progress report at that time and its final Report (attached as Appendix B) in January 2013.

[1] These are the provisions relating to permanent mobility (transfer) between and among common law jurisdictions.

The Federation Council considered the Report and unanimously approved it for dissemination to law societies for their consideration and approval.

The Federation Committee in particular focused its attention on the public interest considerations that must be satisfied in extending mobility in the manner proposed with respect to both members of the Barreau practising in Canadian common law jurisdictions and members of Canadian common law jurisdictions practising in Québec.

The Benchers are asked to note the following:

1. The introduction of meaningful national mobility of lawyers in Canada has been in existence for approximately a decade. Prior to that, law societies considered that protection of the public interest in their jurisdiction necessitated that lawyers from other Canadian jurisdictions (including across common law jurisdictions) who sought to transfer must pass a number of transfer examinations. At earlier points in time they had to re-article as well. This restrictive view of transfer was not examined on its merits for many years, but was simply assumed to be the only way to address the public interest.

2. The discussions that led to the 2002 signing of the NMA examined the rationale for that restrictive approach to mobility and noted that in fact lawyers across the country have much in common, including but not limited to receiving similar legal education in Canadian law schools, completing bar admission processes that have similar underpinnings and being subject to rules of professional conduct whose ethical and professional requirements are largely the same.

3. The evolution and successful implementation of national mobility over the past dozen years has confirmed law societies' original belief that mobility does not pose a risk to the public.

4. All lawyers in Canada, regardless of the jurisdiction or legal system in which they are admitted, are ethically bound by the requirement that they provide only those services they are competent to perform. The fact that all law societies admit lawyers as generalists illustrates the significance of this rule of professional conduct. Conceptually, the importance of adherence to this requirement is the same whether lawyers in a common law jurisdiction, having practised one area of law for a numbers of years, decide to practise in a completely different area, or to move from a common law jurisdiction to a civil law jurisdiction (or vice versa) and must educate themselves on any new conceptual principles of the other system of law.

5. There are differences between certain concepts and principles of civil law and common law systems. The Federation Report concludes that there are many similarities as well, particularly in the way the two systems have evolved in their Canadian context, but

acknowledges that there are certain areas in which the conceptual differences are noteworthy.

6. The important question for law societies to ask is whether lawyers across both systems in Canada have the same competencies that would equip them to apply and adapt their learning and analytical and other skills to a range of professional contexts. In the context of the Federation mobility proposal, the public interest will require that lawyers moving from one legal system to the other be capable of recognizing, understanding and addressing the differences in the systems. It is worth noting that the public interest similarly requires those same adaptive and analytical skills when a lawyer seeks to change practice areas or moves from solicitor to barrister work, or vice versa.

7. The recently approved Federation National Competency Profile should further address concerns respecting the existence of these essential skills across legal systems. A validated competency profile has confirmed that lawyers in common law jurisdictions and in the civil system in Québec share these essential competencies upon which all bar admission in Canada is based. The Benchers approved the National Competency Profile on January 25, 2013.

8. One of the provisions of the NMA is that all transferring lawyers must satisfy such reading requirement as the jurisdiction to which they are transferring determines would be useful to highlight areas of law or concepts that are unique to that jurisdiction. Members of the Federation National Mobility Policy Committee observed that there should be an addition to the reading requirement highlighting the practical areas of difference between civil and common law jurisdictions to which lawyers should be alerted. This would further support the goal of the protecting the public interest. It would be beneficial for the Federation to develop this document for all law societies' use to promote consistency, but this would not preclude the Law Society of BC itself from supplementing such a document as it considered appropriate in the interest of the public of BC.

In summary, the Federation National Mobility Policy Committee concluded that the extension of mobility between the common law and civil law jurisdictions in Canada is in the public interest because of:

1. the existence and approval of national competency standards across the civil and common law jurisdictions in Canada,

2. the ethical requirement for lawyers in all jurisdictions to provide legal services only in those areas in which they are competent,

3. the success of mobility in common law jurisdictions replacing a historically entrenched belief that only restrictive transfer rules could protect the public interest, and

4. the original contemplation of the NMA that the basis for mobility across the civil and common law jurisdictions could be entertained on an identical basis, without risk to the public.

The Benchers should also note that as part of the past development of the NMA, TMA and QMA, law societies and the various professional liability insurers across the country ensured the implementation of necessary technical adjustments to policies of insurance to reflect the new mobility provisions.

The Federation is aware of certain differences between the liability insurance provisions of the Barreau and the common law jurisdictions that remain to be addressed before implementation of the NMA 2013 can occur. These relate primarily to differences in occurrence limits and coverage issues.

As occurred during the discussion of earlier mobility agreements, the liability insurers across the country, including the Law society of BC's Lawyers Insurance Fund, are engaged in ongoing discussions with the Federation to address insurance issues and resolve them prior to implementation.

The motion before the Benchers proposes approval of the NMA 2013 in principle, with any necessary amendments to be approved by the Benchers before implementation. The Benchers will therefore at a future date be asked to consider any proposed resolution of insurance issues and proposed amendments to the NMA 2013.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

National Mobility Agreement 2013

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Federation of Law Societies of Canada

XX XX, 2013
City

The purpose of this agreement is to facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter- jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,

- while differences exist in the legislation, policies and programs pertaining to the signatories, including those differences between common law and civil law jurisdictions in Canada, lawyers have a professional responsibility to ensure that they are competent with respect to any matter that they undertake, and

- it 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.

Most of the signatories subscribed to the Interjurisdictional Practice Protocol of 1994, in which they agreed to certain measures to facilitate the temporary and permanent inter-jurisdictional practice of law and the enforcement of appropriate standards on lawyers practising law in host jurisdictions.

Since December 2002, all provincial law societies, other than the Chambre des notaires du Quebec (“Chambre”), have signed the National Mobility Agreement (“NMA”) establishing a comprehensive mobility regime for Canadian lawyers.

In 2006 all law societies other than the Chambre, signed the Territorial Mobility Agreement. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces for five years. A further agreement made in November 2011 renewed the Territorial Mobility Agreement without a termination date.

In June 2008 Quebec enacted a “Regulation respecting the issuance of special permits of the Barreau du Quebec” (“Barreau”), which provided, inter alia, that a member in good standing of a bar of another Canadian province or territory could become a member of the Barreau known as a “Canadian legal advisor” (“CLA”). A CLA may provide legal services respecting the law of federal jurisdiction, the law of his or her home province and public international law.

In March 2010 all law societies, other than the Chambre, signed the Quebec Mobility Agreement (“QMA”). Under that agreement members of the Barreau are able to exercise mobility in the common law jurisdictions on a reciprocal basis as CLAs.

In June 2010 the Council of the Federation approved the Mobility Defalcation Compensation Agreement (“MDCA”) to bring more consistency, certainty and transparency to the process for compensating the public if funds are misappropriated by lawyers exercising their mobility rights under the NMA. Since then, all provincial law societies, other than the Barreau and the Chambre, have signed the MDCA.

In March 2012 all law societies, including the Chambre, signed an addendum to the Quebec Mobility Agreement extending to members of the Chambre the right to acquire CLA status in another province.

In January 2013, the Council of the Federation of Law Societies approved a report from the National Mobility Policy Committee. In that report, the Committee concluded and recommended that it would be in the public interest to implement mobility to and from the Barreau on the same terms as now apply to mobility between common law jurisdictions under the permanent mobility provisions of the NMA. The Committee also reported that the CLA provisions of the QMA and its Addendum should continue in place with respect to members of the Chambre, and the Chambre was in favour of that resolution. The Committee’s report and recommendations do not affect the current rules for temporary mobility between Quebec and other provinces and the territories.

As a result, the signatories hereby agree to adopt this new National Mobility Agreement, 2013 (“NMA 2013”), changing the original NMA to remove the distinction between members of the Barreau and members of law societies outside of Quebec for the purposes of transfer between governing bodies. The signatories also agree to incorporate into the NMA 2013 the provisions for members of the Chambre to be granted status as CLAs by law societies outside of Quebec and to rescind the QMA and its Addendum.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

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

"Barreau" means le Barreau du Québec;

"Chambre" means la Chambre des notaires du Québec;

"day" means any calendar day or part of a calendar day in which a lawyer provides legal services;

"discipline" includes a finding by a governing body of any of the following:

(a) professional misconduct;

(b) incompetence;

(c) conduct unbecoming a lawyer;

(d) lack of physical or mental capacity to engage in the practice of law;

(e) any other breach of a lawyer's professional responsibilities;

"disciplinary record" includes any of the following, unless reversed on appeal or review:

(a) any action taken by a governing body as a result of discipline;

(b) disbarment;

(c) a lawyer's resignation or otherwise ceasing to be a member of a governing body as a result of disciplinary proceedings;

(d) restrictions or limits on a lawyer's entitlement to practise;

(e) any interim suspension or restriction or limits on a lawyer's entitlement to practise imposed pending the outcome of a disciplinary hearing.

"entitled to practise law" means allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction;

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

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

jurisdiction" has a corresponding meaning;

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

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

"lawyer" means a member of a signatory governing body, other than the Chambre;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"mobility permit" means a permit issued by a host governing body on application to a lawyer allowing the lawyer to provide legal services in the host jurisdiction on a temporary basis;

"notary" means a member of the Chambre;

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

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

"Registry" means the National Registry of Practising Lawyers established under clause 18 of this agreement;

"resident" has the meaning respecting a province or territory that it has with respect to Canada in the *Income Tax Act* (Canada).

General

2. The signatories agree to adopt this agreement as a replacement for the National Mobility Agreement of 2002, the Quebec Mobility Agreement of 2010 and the Addendum to the Quebec Mobility Agreement of 2012, all of which are revoked by consent.

3. The signatory governing bodies will

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

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

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

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

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

5. A signatory governing body will not, by reason of this agreement alone,

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

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

6. Amendments made under clause 3(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Temporary Mobility Among Common Law Jurisdictions

7. Clauses 8 to 32 apply to temporary mobility of lawyers of common law jurisdictions in other common law jurisdictions.

Mobility without permit

8. A host governing body will allow a lawyer from another jurisdiction to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, without a mobility permit or notice to the host governing body, for a total of not more than 100 days in a calendar year, provided the lawyer:

(a) meets the criteria in clause 11; and

(b) has not established an economic nexus with the host jurisdiction as described in clause 17.

9. The host governing body will have the discretion to extend the time limit for temporary mobility under clause 8 with respect to an individual lawyer.

10. It will be the responsibility of a lawyer to

    (a) record and verify the number of days in which he or she provides legal services in a host jurisdiction(s) or with respect to each jurisdiction; and

    (b) prove that he or she has complied with provisions implementing clause 8.

11. To qualify to provide legal services on a temporary basis without a mobility permit or notice to the host governing body under clause 8, a lawyer will be required to do each of the following at all times:

    (a) be entitled to practise law in a home jurisdiction;

    (b) carry liability insurance that:

        (i) is reasonably comparable in coverage and amount to that required of lawyers of the host jurisdiction; and

        (ii) extends to the lawyer's practice in the host jurisdiction;

    (c) have defalcation compensation coverage from a Canadian governing body that extends to the lawyer's practice in the host jurisdiction;

    (d) not be subject to conditions of or restrictions on the lawyer's practice or membership in the governing body in any jurisdiction;

    (e) not be the subject of criminal or disciplinary proceedings in any jurisdiction; and

    (f) have no disciplinary record in any jurisdiction.

12. For the purposes of clause 8:

    (a) a lawyer practising law of federal jurisdiction in a host jurisdiction will be providing legal services in the host jurisdiction;

    (b) as an exception to subclause (a), when appearing before the following tribunals in a host jurisdiction a lawyer will not be providing legal services in a host jurisdiction:

        (i) the Supreme Court of Canada;

        (ii) the Federal Court of Canada;

        (iii) the Tax Court of Canada;

        (iv) a federal administrative tribunal.

13. A host jurisdiction will allow a lawyer to accept funds in trust on deposit, provided the funds are deposited to a trust account:

    (a) in the lawyer's home jurisdiction; or

    (b) operated in the host jurisdiction by a member of the host governing body.

Mobility permit required

14. If a lawyer does not meet the criteria in clause 11 to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, a host governing body will issue a mobility permit to the lawyer:

    (a) on application;

    (b) if, in the complete discretion of the host governing body, it is consistent with the public interest to do so;

    (c) for a total of not more than 100 days in a calendar year; and

    (d) subject to any conditions and restrictions that the host governing body considers appropriate.

Temporary mobility not allowed

15. A host governing body will not allow a lawyer who has established an economic nexus with the host jurisdiction to provide legal services on a temporary basis under clause 8, but will require the lawyer to do one of the following:

    (a) cease providing legal services in the host jurisdiction forthwith;

    (b) apply for and obtain membership in the host governing body; or

    (c) apply for and obtain a mobility permit under clause 14.

16. On application, the host governing body will have the discretion to allow a lawyer to continue to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction pending consideration of an application under clause 15(b) or (c).

17. In clause 15, an economic nexus is established by actions inconsistent with temporary mobility to the host jurisdiction, including but not limited to doing any of the following in the host jurisdiction:

    (a) providing legal services beyond 100 days, or longer period allowed under clause 9;

    (b) opening an office from which legal services are offered or provided to the public;

    (c) becoming resident;

    (d) opening or operating a trust account, or accepting trust funds, except as permitted under clause 13.

National Registry of Practising Lawyers

18. The signatory governing bodies will establish, maintain and operate a National Registry of Practising Lawyers containing the names of lawyers from each signatory governing body qualified under clause 11 to practise law interjurisdictionally without a mobility permit or notice to the host governing body.

19. Each signatory governing body will take all reasonable steps to ensure that all relevant information respecting its members is supplied to the Registry and is kept current and accurate.

Liability Insurance and Defalcation Compensation Funds

20. Each signatory governing body will ensure that the ongoing liability insurance in its jurisdiction
    (a) extends to its members for the provision of legal services on a temporary basis in or with respect to the law of host signatory jurisdictions; and
    (b) provides occurrence or claim limits of $1,000,000 and $2,000,000 annual per member aggregate.

21. In the event that a claim arises from a lawyer providing legal services on a temporary basis, and the closest and most real connection to the claim is with a host jurisdiction, the home governing body will provide at least the same scope of coverage as the liability insurance in the host jurisdiction. For clarity, all claims and potential claims reported under the policy will remain subject to the policy's occurrence or claim limit of $1,000,000 and $2,000,000 annual per member aggregate.

22. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their liability insurance policies that affect the limits of liability or scope of coverage.

23. Signatory governing bodies that are also signatories to the MDCA will apply or continue to apply the provisions of the MDCA respecting defalcation compensation. Signatory governing bodies that are not signatories to the MDCA will apply or continue to apply the provisions of the Interjurisdictional Practice Protocol respecting defalcation compensation, specifically clause 10 of the Protocol and Appendix 6 to the Protocol.

24. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their defalcation compensation fund programs that affect the limits of compensation available or the criteria for payment.

Enforcement

25. A host governing body that has reasonable grounds to believe that a member of another governing body has provided legal services in the host jurisdiction will be entitled to require that lawyer to:
    (a) account for and verify the number of days spent providing legal services in the host jurisdiction; and
    (b) verify that he or she has not done anything inconsistent with the provision of legal services on a temporary basis.

26. If a lawyer fails or refuses to comply with the provisions of clause 25, a host governing body will be entitled to:

    (a) prohibit the lawyer from providing legal services in the jurisdiction for any period of time; or

    (b) require the lawyer to apply for membership in the host jurisdiction before providing further legal services in the jurisdiction.

27. When providing legal services in a host jurisdiction or with respect to the law of a host jurisdiction, all lawyers will be required to comply with the applicable legislation, regulations, rules and standards of professional conduct of the host jurisdiction.

28. In the event of alleged misconduct arising out of a lawyer providing legal services in a host jurisdiction, the lawyer's home governing body will:

    (a) assume responsibility for the conduct of disciplinary proceedings against the lawyer unless the host and home governing bodies agree to the contrary; and

    (b) consult with the host governing body respecting the manner in which disciplinary proceedings will be taken against the lawyer.

29. If a signatory governing body investigates the conduct of or takes disciplinary proceedings against a lawyer, that lawyer's home governing body or bodies, and each governing body in whose jurisdiction the lawyer has provided legal services on a temporary basis will provide all relevant information and documentation respecting the lawyer as is reasonable in the circumstances.

30. In determining the location of a hearing under clause 28, the primary considerations will be the public interest, convenience and cost.

31. A governing body that initiates disciplinary proceedings against a lawyer under clause 28 will assume full responsibility for conduct of the proceedings, including costs, subject to a contrary agreement between governing bodies.

32. In any proceeding of a signatory governing body, a duly certified copy of a disciplinary decision of another governing body concerning a lawyer found guilty of misconduct will be proof of that lawyer's guilt.

Permanent Mobility of Lawyers

33. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:

    (a) entitlement to practise law in the lawyer's home jurisdiction;

    (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and

    (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.

34. Before admitting as a member a lawyer qualified under clauses 33 to 38, a governing body will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to do all of the following:

    (a) provide certificates of standing from all Canadian and foreign governing bodies of which the lawyer is or has been a member;

    (b) disclose criminal and disciplinary records in any jurisdiction;

    (c) consent to access by the governing body to the lawyer's regulatory files of all governing bodies of which the lawyer is a member, whether in Canada or elsewhere; and

    (d) certify that he or she has reviewed all of the materials reasonably required by the governing body.

35. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted by the Barreau are not qualifying members of the Barreau for the purpose of clauses 33 to 38.

Public Information

36. A governing body will make available to the public information obtained under clause 34 in the same manner as similar records originating in its jurisdiction.

Liability Insurance

37. On application, a signatory governing body will exempt a lawyer from liability insurance requirements if the lawyer does the following in another signatory jurisdiction:

    (a) is resident;

    (b) is a member of the governing body; and

    (c) maintains ongoing liability insurance required in that jurisdiction that provides occurrence or claim limits of $1,000,000 and $2,000,000 annual per member aggregate.

38. In the event that a claim arises from a lawyer providing legal services and the closest and most real connection to the claim is with a jurisdiction in which the lawyer has claimed an exemption under clause 37, the insurance program of the governing body in the jurisdiction where the lawyer is insured will provide at least the same scope of coverage as the liability insurance in the jurisdiction in which the lawyer is exempt. For clarity, all claims and potential claims reported under the policy will remain subject to the policy's occurrence or claim limit of $1,000,000 and $2,000,000 annual per member aggregate.

Temporary Mobility between Quebec and Common Law Jurisdictions

39. The Barreau will permit lawyers entitled to practise law in a home jurisdiction, on application under regulations that apply to the Barreau, to provide legal services in Quebec or with respect to the law of Quebec on a specific case or for a specific client for a period of up to one year, which may be extended on application to the Barreau.

40. A signatory governing body, other than the Barreau, will permit members of the Barreau to provide legal services in its jurisdiction or with respect to the law of its jurisdiction on one of the following bases:

    (a) as provided in clauses 8 to 32; or

    (b) as permitted by the Barreau in respect of the members of the signatory governing body.

Permanent Mobility of Quebec Notaries

41. Signatory common law governing bodies will establish and maintain a program in order to grant Canadian Legal Advisor ("CLA") status to qualifying members of the Chambre.

42. Members of the Chambre whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted by the Chambre are not qualifying members of the Chambre for the purpose of clauses 41 to 47.

43. A member of the Chambre who is granted the status of CLA in any jurisdiction outside of Quebec may, in his or her capacity as a CLA:

    (a) give legal advice and consultations on legal matters involving the law of Quebec or involving matters under federal jurisdiction;

    (b) prepare and draw up a notice, motion, proceeding or similar document intended for use in a case before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations;

    (c) give legal advice and consultations on legal matters involving public international law; and

    (d) plead or act before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations.

44. A governing body will require no further qualifications for a notary to be eligible for status as a CLA beyond the following:

    (a) entitlement to practise the notarial profession in Quebec; and
    (b) good character and fitness to be a member of the legal profession, on the standard ordinarily applied to applicants for membership.

45. Before granting CLA status to a notary qualified under clauses 41 to 47, a governing body will not require the notary to pass a transfer examination or other examination, but may require the notary to do all of the following:

    (a) provide certificates of standing from all Canadian and foreign governing bodies of the legal profession of which the notary is or has been a member;
    (b) disclose criminal and disciplinary records in any jurisdiction; and
    (c) consent to access by the governing body to the notary's regulatory files of all governing bodies of the legal profession of which the notary is a member, whether in Canada or elsewhere.

46. A governing body will make available to the public information obtained under clause 45 in the same manner as similar records originating in its jurisdiction.

47. A governing body must require that a notary who is granted the status of a CLA continue to maintain his or her practising membership in the Chambre.

Inter-Jurisdictional Practice Protocol

48. The signatory governing bodies agree that the Inter-Jurisdictional Practice Protocol will continue in effect, to the extent that it is not replaced by or inconsistent with legislation, regulation and programs adopted and implemented to give effect to this agreement.

Transition Provisions

49. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

50. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect:

    (a) with respect to all Canadian lawyers until this agreement is implemented; and
    (b) with respect to members of Canadian law societies that are not signatories to this agreement.

Withdrawal

51. A signatory may cease to be bound by this agreement by giving each other signatory written notice of at least one clear calendar year.

52. A signatory that gives notice under clause 51 will:

    (a) immediately notify its members in writing of the effective date of withdrawal; and

    (b) require that its members who provide legal services in the jurisdiction of another signatory governing body ascertain from that governing body its requirements for inter-provincial mobility before providing legal services in that jurisdiction after the effective date of withdrawal.

SIGNED as indicated in respect of each signatory below

LAW SOCIETY OF BRITISH COLUMBIA

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF ALBERTA

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF SASKATCHEWAN

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF MANITOBA

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF UPPER CANADA

Per: _____ _____

Authorized Signatory Date

BARREAU DU QUÉBEC

Per: _____ _____

Authorized Signatory Date

CHAMBRE DES NOTAIRES DU QUÉBEC

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF NEW BRUNSWICK

Per: _____ _____

Authorized Signatory Date

NOVA SCOTIA BARRISTERS' SOCIETY

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF PRINCE EDWARD ISLAND

Per: _____ _____

Authorized Signatory Date

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR

Per: _____ _____

Authorized Signatory Date

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

NATIONAL MOBILITY POLICY COMMITTEE

MOBILITY BETWEEN QUEBEC AND THE CANADIAN COMMON LAW JURISDICTIONS

FINAL REPORT

January 15, 2013

INTRODUCTION

1. In September 2012 the Council of the Federation approved a recommendation to explore full mobility between Quebec and the rest of the country. The National Mobility Policy Committee (the "Committee") was asked to develop recommendations for the implementation of full mobility. The Committee has completed its work on the issue and recommends the adoption of a new National Mobility Agreement (the "NMA 2013") to replace the existing National Mobility Agreement ("NMA 2002"), the Quebec Mobility Agreement (the "QMA"), and the Addendum to the QMA ("Addendum"). The NMA 2013 attached as Appendix "1" to this report provides for permanent mobility between the Barreau du Québec (the "Barreau") and the common law jurisdictions on the same terms in place for mobility between common law jurisdictions under the NMA 2002 and preserves the Canadian Legal Advisor ("CLA") regime for members of the Chambre des Notaires du Québec (the "Chambre").

BACKGROUND

2. Facilitating the mobility of members of Canada's legal profession has long been part of the national mission and purpose of the Federation. Since the adoption of the NMA 2002 in 2002 and the Territorial Mobility Agreement (the "TMA") in 2006 lawyers from Canadian common law jurisdictions have enjoyed full permanent mobility rights with other Canadian common law jurisdictions.

3. The NMA 2002, to which the law societies of all common law provinces and the Barreau are signatories, is the foundation of the mobility regime. 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 practise in another common law jurisdiction permanently 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.

4. Although it was one of the original signatories to the NMA 2002, the Barreau implemented the agreement only in 2008 when it adopted a regulation establishing the CLA category of membership. This regulation permits lawyers from other Canadian jurisdictions to acquire limited rights to practise law in Quebec. A CLA in Quebec may practise federal law, the law of the CLA's home jurisdiction and public international law. Adoption of the QMA in 2010 established a reciprocal CLA regime in the common law jurisdictions extending to members of the Barreau the right to practise federal law and the law of Quebec in any of the common law jurisdictions. The Addendum adopted in March 2012 extended the CLA regime to members of the Chambre .

5. In June 2010 the Barreau implemented a regulation to give effect to an agreement entered into with the bars of France providing for permanent mobility of lawyers between Quebec and France (*Règlement sur la délivrance d'un permis du Barreau du Québec pour donner effet à l'arrangement conclu par le Barreau du Québec en vertu de l'entente entre le Québec et la France en matière de reconnaissance mutuelle des qualifications professionnelles)*. Pursuant to the regulation, lawyers trained

in France may become full members of the Barreau subject only to an examination on the ethical principles and regulations applicable to the practise of law in Quebec. Members of the Barreau have reciprocal mobility rights with the bars of France on the same basis.

6. In mid-2012, at the initiative of Nicolas Plourde, Bâtonnier of the Barreau and with the support of the Federation Executive, a proposal emerged to replace the CLA regime with a system of full mobility between Quebec and the Canadian common law jurisdictions underpinned by the ethical obligation that binds all members of the legal profession to undertake only those matters for which they possess the necessary competence. Council of the Federation endorsed exploration of this proposal at its meeting in September 2012.

MOVING TO FULL MOBILITY

7. The move to full mobility between Quebec and the common law jurisdictions raises a number of questions, the most significant of which are related to the nature of the respective legal systems. Amongst the questions considered by the Committee are the following:

- Is full mobility between civil and common law jurisdictions consistent with the obligation of law societies to regulate in the public interest?
- Will 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?
- Does a move to full mobility have implications for the work of the National Committee on Accreditation (“NCA”) and the admission of lawyers trained in other countries, particularly those from civil law jurisdictions?
- Will 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?
- Will 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?

Public Interest Considerations

8. The obligation of legal professionals to provide only those services they are competent to perform provides reassurance that mobility between Canadian jurisdictions with different legal systems will not compromise the protection of the public. This ethical

obligation – contained in the Federation's Model Code of Professional Conduct and in one form or another in the rules of professional conduct governing legal practitioners in all Canadian jurisdictions – is a cornerstone of the regulation of the legal profession in Canada. Law is a complex field and regardless of where 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.

9. In considering whether reliance on this ethical obligation in a regime permitting unrestricted mobility between Canadian civil and common law jurisdictions would be consistent with the obligation of law societies to regulate in the public interest, the Committee examined 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, first provided in the Committee's interim report to Council in December 2012, follows.

Canadian Common Law and Civil Law – Overview

10. 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.

11. Before analyzing the differences and similarities in the civil law and the common law in Canada, it is important to have a basic understanding of the elements of the two systems.

Civil Law

12. 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. 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."

[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

13. 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]

14. 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]

15. 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]

16. 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]

17. 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

18. 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.

19. 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.

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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.

20. Although in common law Canada today much law is contained in statutes, historically the unwritten common law was the general law and statutory law was the exception.[8]

21. 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

22. 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]

23. 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.

24. It is also important to recognize, as noted above, that the legal system in Quebec is a mixed system rather than a pure civil law system. Although legal practitioners outside of Quebec may not be educated in the civil law, Quebec lawyers and notaries do receive training in the common law and also employ the common law in their practice.

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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

25. With this general background we can now look more closely at the areas of overlap and difference in the practise of law in Quebec and the rest of the country.

Substantive and Practical Competencies — Common Elements

26. 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. The National Profile has been referred to the law societies for adoption and 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.

27. 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 practise 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 practise of law in Canada is just beginning, it does provide useful information about the competencies required for the practise of law both in Quebec and in the rest of the country.

28. 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 practise 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.

29. 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.

30. 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.

31. 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.

32. Those practising in Quebec must also possess knowledge of the Quebec Charter of Human Rights and Freedoms.

33. 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 practise of law in Canada, and practice management including knowledge of client development, time management, and task management.

Substantive Knowledge Competencies — Differences

34. 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.

35. 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.

36. 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

37. 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.

38. 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]

39. 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]

40. 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.

41. 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

42. 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

[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.

injury suffered by the plaintiff and a causal link between the fault and the injury.

43. 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.

44. 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

45. 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

46. 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 practise

47. In the common law jurisdictions, the practise 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 practise of barristers and solicitors.

48. 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 practise 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 referred to in Chapter II of the Act respecting the legal publicity of enterprises (chapter P-44.1)or the correction or deletion of any inaccurate information appearing in that register.

Implications for Mobility

49. As the review above indicates, there is considerable overlap between the substantive law competencies required for the practise 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.

50. 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 2002

> 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. . .

51. 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 NMA 2002 allowing for the imposition of a reading requirement on transferring lawyers.

52. In light of the significant overlap in substantive legal knowledge and practical competencies, and the ethical and professional obligations that bind all members of the legal profession, the members of the Committee have concluded that including a provision in the NMA 2013 allowing law societies to impose a reading requirement to address potential gaps in knowledge would provide sufficient protection for the public.

Agreement on Internal Trade

53. Another important issue identified by the Committee involves the implications of full mobility to and from the Barreau and the labour mobility provisions of the AIT.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. Although at the time of the amendments to the labour mobility provisions of the AIT, the NMA 2002 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).

60. 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 elsewhere in Canada.

61. 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 questioned 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 and the Addendum in 2012 and the current proposal to move to full mobility with the Barreau have brought these historic assumptions under greater scrutiny. As discussed above, 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.

62. Experience with mobility between Quebec and the common law jurisdictions under the CLA regime has also contributed to greater confidence in the ability of civil law lawyers and common law lawyers to practise in each other's jurisdictions.

63. 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 practise 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.

64. 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).

65. 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.

66. The Committee would like to flag one issue that might arise if the NMA 2013 is adopted by some, but not all jurisdictions. In the face of recognition by the signatory common law jurisdictions of the credentials of lawyers from the Barreau without additional assessment or conditions and corresponding recognition by the Barreau of the credentials of lawyers from common law jurisdictions it would be 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

67. 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 NCA and the Canadian Common Law Program Approval Committee ("Approval Committee").

68. The Committee was aware of suggestions that allowing unrestricted mobility to common law jurisdictions for members of the Barreau who have a civil law degree only 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.

69. 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").

70. In considering these issues, the Committee sought the input of the Chairs of the NCA and the Approval Committee.

Admissions vs. Mobility

71. 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.

72. 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 2002 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 NMA 2013 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. Similarly, admission of a member of a law society in a common law jurisdiction to the Barreau will be based on the fact that they have been licensed by their home law society, not on an assessment of the lawyer's legal education.

Implications for the NCA

73. 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 first have his or her credentials assessed by and receive a certificate of qualification from the NCA. The proposed NMA 2013 would eliminate that requirement for anyone educated in Canada and licensed by the Barreau. A graduate of a civil law program in Canada 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.

74. The move to unrestricted mobility for lawyers licensed in Quebec and the analysis supporting the recommendation is expected to lead to a review of by the NCA of its policy for the assessment of the credentials of those with civil law degrees from Canadian universities. This policy has not been reviewed in many years. The Committee has concluded, however, that this anticipated review, while triggered by adoption of the NMA 2013, is not a prerequisite to adoption.

75. 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.

76. 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

77. 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.

78. 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 2002 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.

79. 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.

80. The Committee has concluded that questions about civil law degrees, dealing as they do primarily with education rather than with mobility, are outside of the Committee's mandate and are ultimately something that the Council of the Federation may wish to consider. The members of the Committee do not think, however, that this is an issue that needs to be addressed prior to adoption of the NMA 2013 and implementation of full mobility.

Other Issues Related to Education

81. 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.

Chambre des notaires

82. The extension of the CLA regime to members of the Chambre occurred only very recently with the adoption and implementation of the Addendum. 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 therefore recommends that the CLA regime be maintained for members of the Chambre and the relevant provisions from the Addendum have been included in the NMA 2013 to achieve this. The Committee has been advised that this recommendation is consistent with the wishes of the Chambre.

Lawyers from France

83. 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.

84. 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.

85. The Committee has proposed a similar provision in the NMA 2013.

86. 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 NMA 2013 and is confident that at this stage, the restriction on French lawyers is appropriate and justifiable.

Language

87. 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.

88. Although provincial law requires that those seeking to practise law in Quebec be proficient in French, neither the NMA 2002 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.

FULL MOBILITY - BUILDING ON THE EXISTING FOUNDATION

89. Consideration of the issues outlined above has led the members of the Committee to conclude that full mobility between Quebec and the common law jurisdictions can be achieved in a manner that is consistent with the obligation to regulate the legal profession in the public interest.

90. Although adopting a system of full mobility between Quebec and the Canadian common law jurisdictions will mark a significant change the idea is not a new one. The NMA 2002 clearly contemplates 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 both in the preamble to the agreement and in the specific provisions addressing mobility for members of the Barreau. While recognizing that "differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions," the preamble to the NMA 2002 includes the following statement

> [I]t is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practise of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

91. The willingness of the drafters and signatories to the NMA 2002 to embrace full mobility between the Barreau and the common law is also reflected in paragraph 40 of the agreement:

> 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.

92. The system of mobility between the common law jurisdictions established through the NMA 2002 has been in place for more than 10 years and has proven workable and effective. It is the view of the Committee that this system offers the best foundation for the extension of full mobility to and from Quebec.

93. In drafting the NMA 2013, the Committee sought to make only those changes necessary to extend the permanent mobility provisions of the NMA 2002 to mobility to and from Quebec, and to include the provisions governing mobility for members of the Chambre currently set out in the Addendum. The NMA 2013 is thus quite similar to the NMA 2002. Specific changes include the addition of a provision revoking the NMA 2002, the QMA and the Addendum (see Appendix “1” paragraph 2), the deletion of the specific provisions governing mobility of members of the Barreau (paragraphs 39 and 40 of the NMA 2002), and the addition of the provisions of the Addendum setting out the rights of members of the Chambre to seek CLA status in any of the common law jurisdictions (see Appendix “1” paragraphs 41-47). The preamble has also been rewritten to provide the context for the agreement.

CONCLUSION

94. The members of the Committee recommend that the NMA 2013, attached as Appendix “1” to this report, be approved by the Council of the Federation for submission to the law societies for their adoption.

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94. The members of the Committee recommend that the NMA 2013, attached as Appendix “1” to this report, be approved by the Council of the Federation for submission to the law societies for their adoption.

The Law Society of British Columbia

CEO's Report to Benchers

May 10, 2013

Prepared for: Benchers

Prepared by: Timothy E. McGee

First Quarter Financial Results

I'm pleased to advise that the financial results for the first quarter ending March 31, 2013 have been reviewed with the Chair of the Finance Committee, Jan Lindsay, QC. Ms Lindsay and Jeanette McPhee, Chief Financial Officer, will be reviewing the highlights of those results with you at the Bencher meeting. Materials will be provided to you separately as part of your Bencher agenda package. Together with members of the Management Board I will be pleased to respond to any questions or comments which you may have.

Review and Renewal of Management Structure

As you know, one of our operational priorities for the year is a review and renewal of the current management structure. I use the term management structure to capture the broad range of things that describe how management goes about its daily business. This includes such things as our internal reporting relationships, our meeting schedules, agenda setting, and initiatives involving all staff such as our quarterly Town Hall meetings and projects such as Leo and RRex. The current structure reflects changes which I initiated upon my arrival in 2005 and modifications we have made as a management team since then to better meet our evolving needs.

The review and renewal process has been a highly collaborative one involving the entire management team over the past several months. I am looking forward to sharing with you the highlights of the proposed new structure at the meeting. While the changes are quite selective and won't be noticeable to the Benchers on a day-to-day basis because of their operational focus I believe they will strengthen our management capability and benefit the organization as a whole. I am attaching as Appendix "A" a presentation which we have used at the staff level to track our progress. I am including it here just as background reference, as I will speak to the main points at the meeting.

Indigenous Lawyers Mentoring Program - Update

Initiative 2-1(c) of the Strategic Plan is to support the retention of Aboriginal lawyers by developing and implementing the Indigenous Lawyer Mentoring Program. The project was structured in two phases. Phase 1 was completed last summer when a report prepared by Rosalie Wilson was presented to the Benchers. The report, prepared after a consultation process, analyzed a needs assessment to determine appropriate options and structure for an Aboriginal mentoring program. The report detailed best practice guidelines tailored to mentor Aboriginal lawyers, and included recommendations regarding mentoring options and models, together with best practices. Phase 2 contemplated the development of the program itself based on the practices and options

identified in Phase 1. Andrea Hilland, Staff Lawyer, Policy and Legal Services, has been working hard at preparing a program, and I am pleased to advise that she is close to completion. Andrea will report to you on the proposed program and its anticipated commencement at the Bencher meeting.

Federation National Admission Standards Project Update

The Federation of Law Societies has published a Communiqué update (attached as Appendix "B") providing an update on the competencies aspect of the National Admission Standards project. The Competencies Project is now in Phase II, which is to identify options for implementing the National Competency Profile. The work includes meeting with expert consultants to designate the competencies in the National Competency Profile on which to test students, and how each competency might best be assessed. Using the data obtained through the national survey that was used to develop the National Competency Profile, the Phase II review process is identifying what is most important for testing, based on factors such as criticality (how critical the skill/task is from a risk perspective) and frequency (how often the competency is used). This preliminary process, referred to as "competency mapping," will also provide guidance on options for assessing the competencies. Lynn Burns, Deputy Director, PLTC, is a member of the Phase II Federation working group.

The Lawyer Education Advisory Committee's 2013 – 14 focus, pursuant to the Law Society Strategic Plan, is admission program reform linked to the National Admission Standards.

The Federation's Character and Fitness Standards Working Group continues to deliberate. Lesley Small, Manager, Member Services and Credentials, and Michael Lucas, Manager, Policy and Legal Services, represent BC.

Alan Treleaven, Director, Education and Practice, and I are members of the Steering Committee for the National Admission Standards project.

Memorandum of Understanding among Judiciary and Minister of Justice and Attorney General

Please find attached as Appendix "C" a copy of the Memorandum of Understanding effective April 3, 2013 among the three levels of judiciary in British Columbia and the Minister of Justice and Attorney General of British Columbia. You may have seen media reports referring to the MOU or heard it discussed at various events but I wanted to make sure that you had an opportunity to read the MOU in its entirety. It is posted on the Ministry website as well. This is an interesting and important document in my view

and it comes at an opportune time, given the intense scrutiny being directed at all facets of the justice system in British Columbia. As I reported to you at the last Bencher meeting, the Inaugural Justice Summit held in March which I participated in as moderator was viewed as a modest but important step forward by all those participating including the Judiciary and the Minister of Justice and Attorney General and senior Ministry officials. I believe this MOU is further evidence that a constructive and informed approach to reform is preferred by those who play essential and vital roles in the justice system.

Speakers Bureau

A number of Benchers have expressed an interest in participating in the Law Society's Speakers Bureau. Accordingly, I am pleased to attach as Appendix "D" a memo from Robyn Crisanti, Manager, Communications and Public Affairs setting out a proposed process for Bencher participation. Robyn will be available at the Bencher meeting to take your suggestions and to answer any questions you may have with respect to this suggested process.

Changes to Electronic Version of Benchers Bulletin

A change is being made to the electronic version of the Benchers Bulletin. At present, the Bulletin is sent via email in a newsletter format, with links to web pages on the Law Society website. It is also available as a simple pdf, though this is not immediately obvious to recipients.

With advances in pdf file options, the preference now is to send the Bulletin via email as an enhanced pdf with bookmarks, links and other features. It is our opinion that this will improve readability. In particular, we believe readers will be more likely to at least scan all the content. At present, individual web pages for each item in the Bulletin do not lend themselves to easy reading or scanning. Other advantages include improved access to the Bulletin on mobile devices and better control over the size of our website. If you have any questions or comments regarding this change, please contact Robyn Crisanti.

Time with Tim Addition to Lex Website and Staff Breakfast Meetings

I would like to share with you some new initiatives involving expanding and improving sharing of information with staff and encouraging interdepartmental relations. We have identified these as action items coming out of our last annual employee survey. The first initiative is a new section called *Time with Tim* on our internal Law Society website known as Lex. Lex is the go-to site for all of our employees and it is accessed heavily by

staff for a wide range of purposes. *Time with Tim* will provide staff with information and thoughts from me on a wide range of topics that staff might not otherwise hear about, such as important meetings that I attend on behalf of the Law Society or developments in our sister Law Societies. While it is specifically not designed as a blog it is intended to be more informal in tone and conversational. The page will be updated weekly or as events suggest. A copy of the current posting of *Time with Tim* is attached as Appendix "E" for your interest.

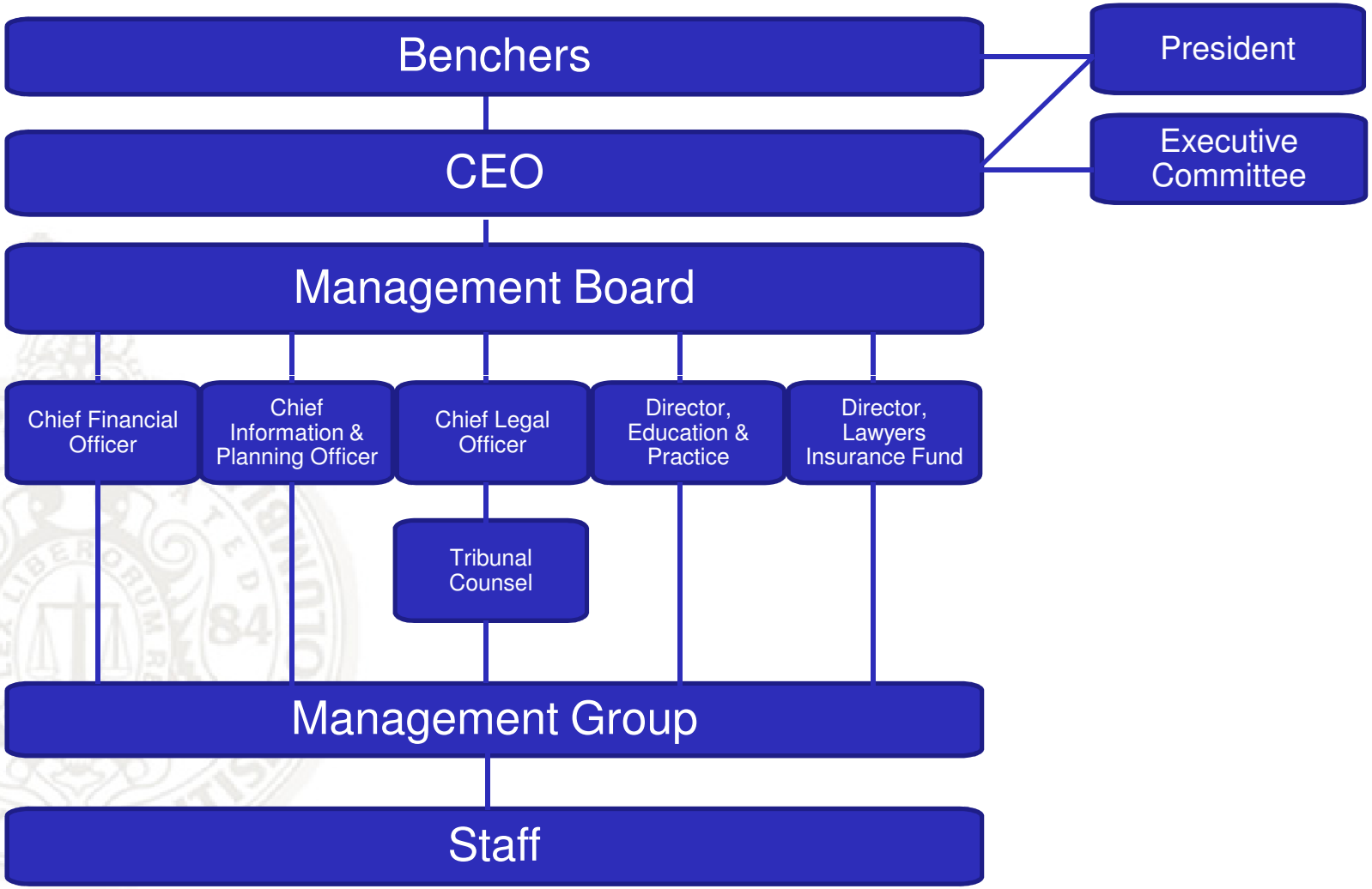
The second initiative that is now well underway is a series of CEO/staff breakfast meetings. These are breakfast meetings hosted by me with approximately 15 staff drawn from different departments. The breakfasts are informal and allow time for me to share some information about what is top of mind for me. We also go around the table and have everyone introduce themselves and say a bit about what they do at the Law Society and their interests before opening the floor to discussion on any topics of interest. This helps people to get to know their colleagues in other departments a little bit better. So far the breakfasts have been well attended and I am encouraged by the feedback. We have scheduled a total of 10 breakfast meetings to date (4 completed so far) and, when finished, I expect that every one of our employees will have participated.

The Law Society of British Columbia

Review and Renewal of Management Structure

2013-05-10

Current Management Structure

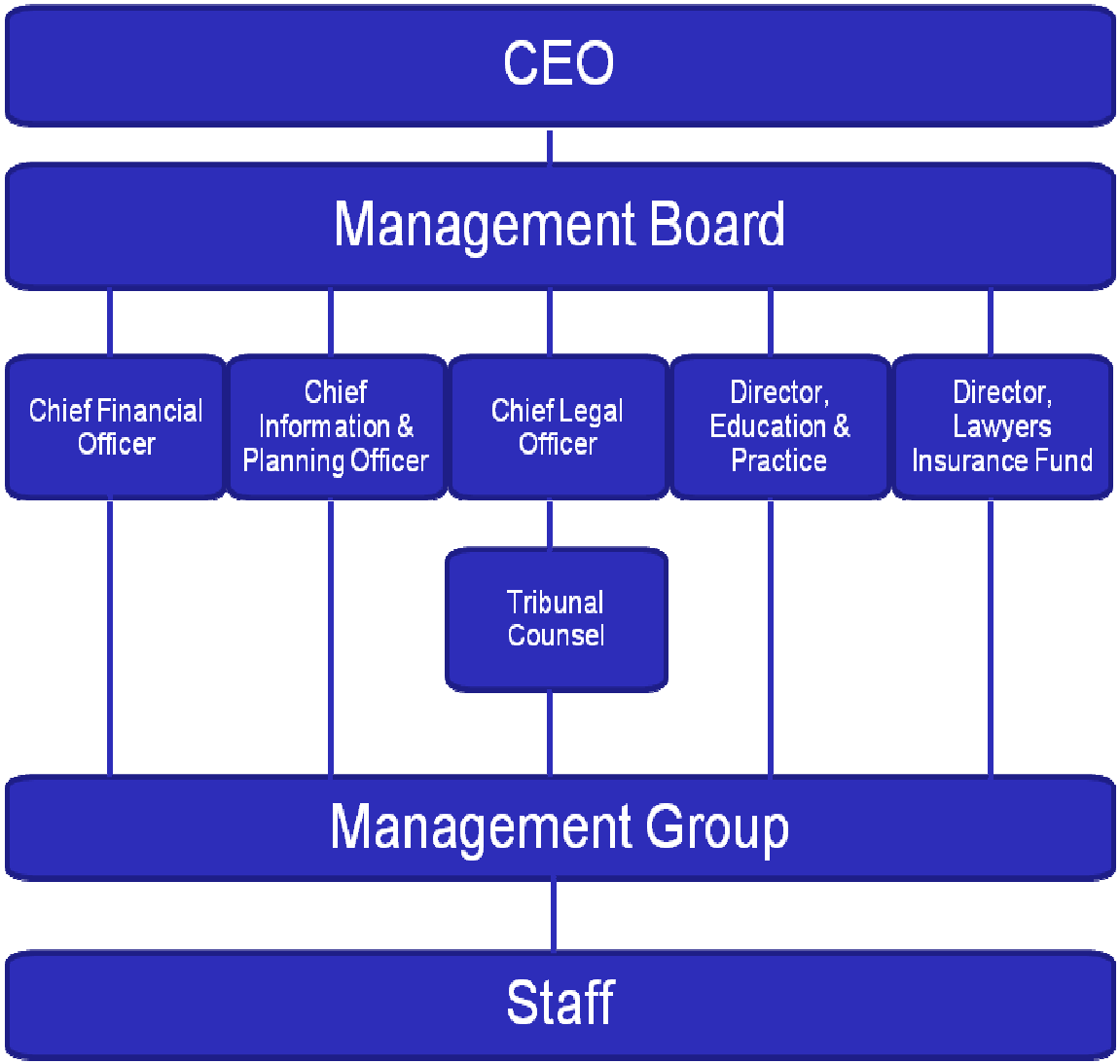


Current Relationships

CEO / MB

Management Board / Management Group

Management Group / Staff

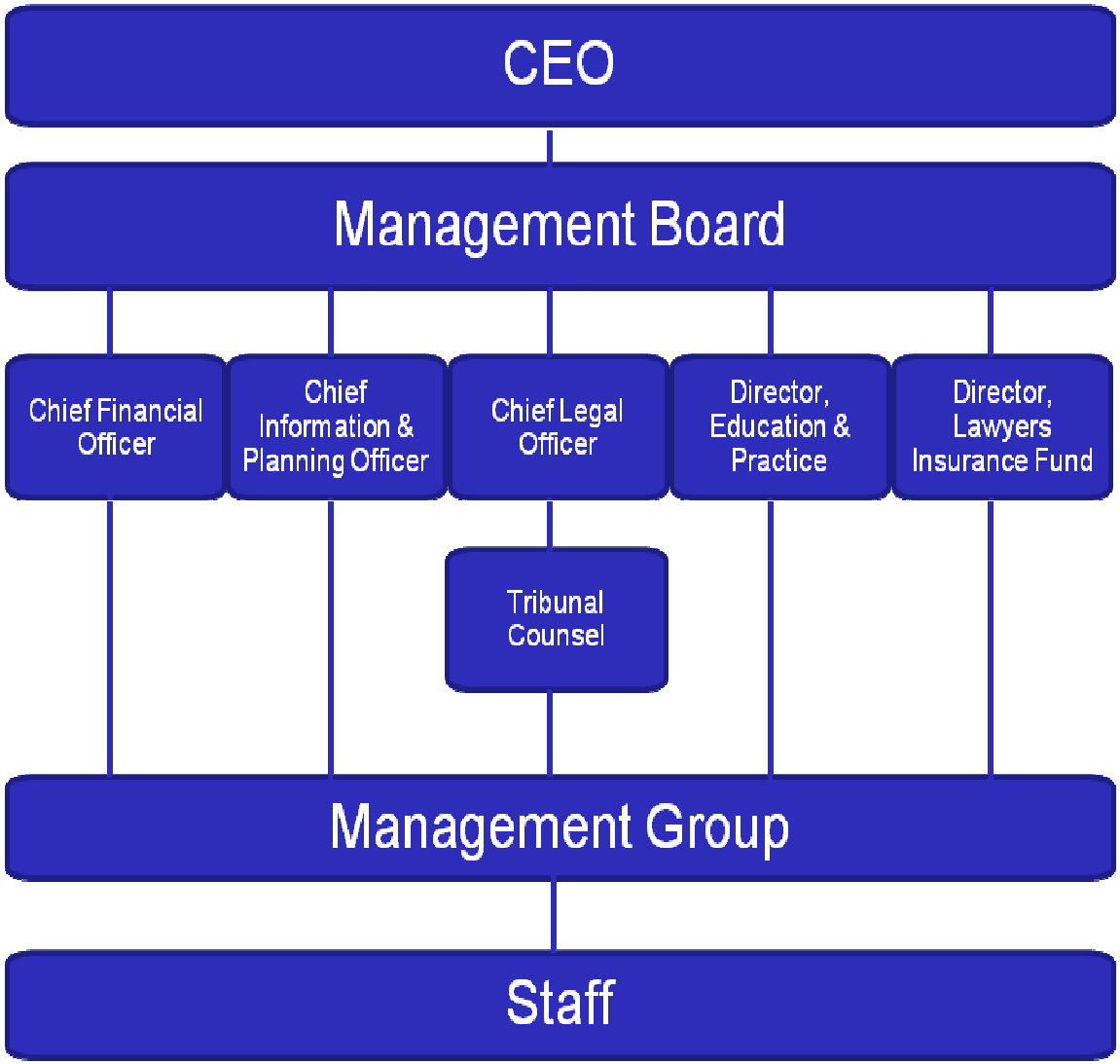


Current Meetings / Interactions

Management Board meets 2/month

Management Group meets 2/month

Staff Town Hall 3/year



Why Change?

A key feature of effective leadership is review and renewal to meet evolving needs.

Current management structure unchanged for more than 5 years.

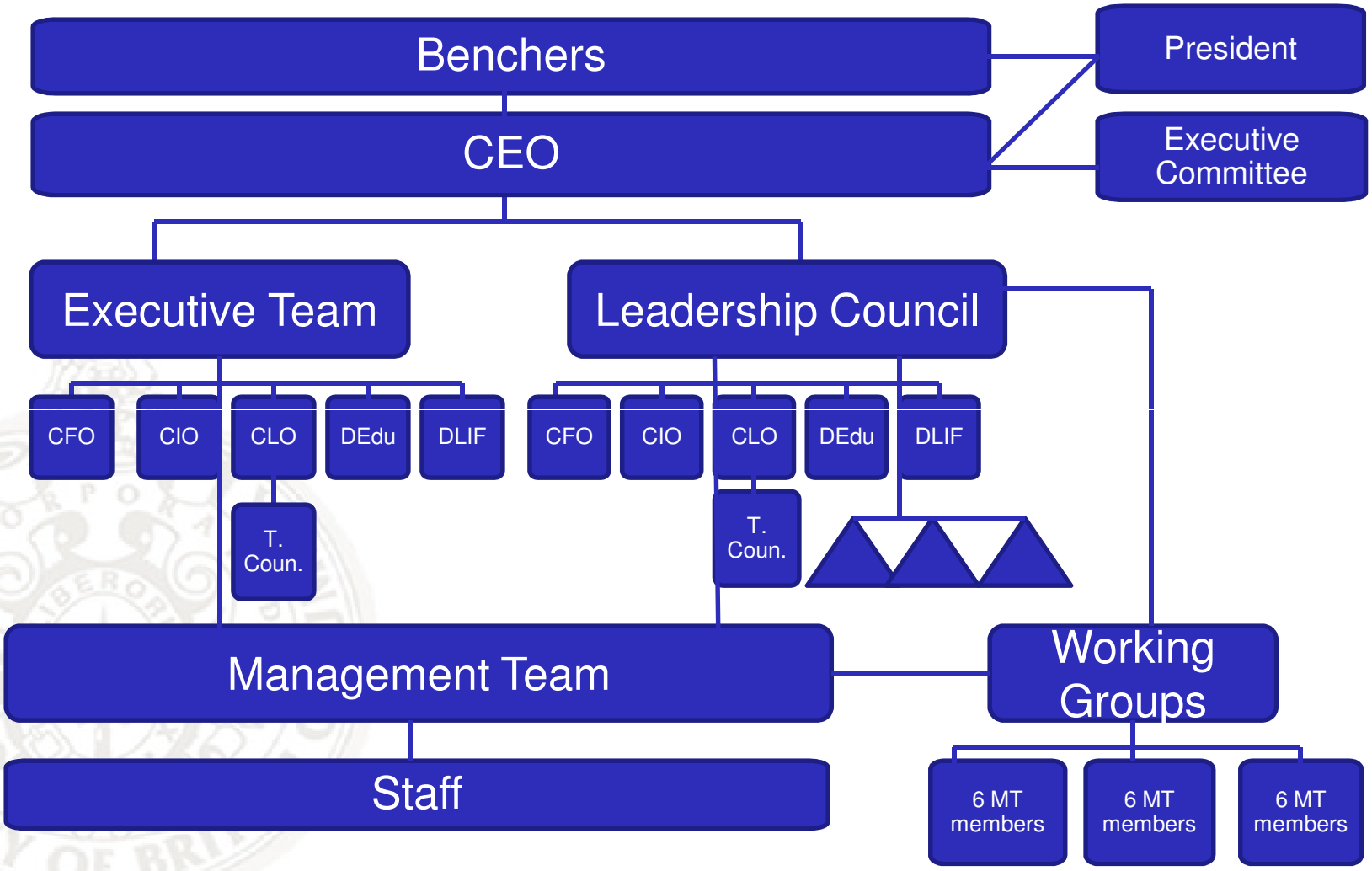
Recent project successes demonstrated wealth of management group skills – opportunity exists to take greater advantage of this.

Benefits of investment in recent management skills and leadership training should be maximized.

Workplace culture discussions showed appetite for more innovation and greater involvement in decisions that effect operations.

Timing is right, given need to develop succession planning at all levels.

Proposed Management Structure



= staff member at large

Proposed Governance

	Leadership Council	Executive Team	Management Team/ Working Groups
Who?	CEO, direct reports & T. Csl. + 3 "at large" mbrs:	CEO, direct reports + T. Csl.	All managers
	- top/strong performers		Working Groups – 3/yr
	- willing to serve		Working Group Chair TBD by subject matter
	- CEO appoints /1 year term		
When?	Meet twice a month	Meet ad hoc, as required	MT meets 1/month
			WG meets as required - set in January after operational priorities set & reports out to LC
What?	All on LC are full, equal members	Bencher confidential issues	Implementation planning of all operational priorities
	Sets operational priorities for year	Review of compensation policy	HR policies advisory role
	Oversees/monitors operational priorities	RRex Awards	Staff / personnel issues
	Sets/reviews operational policies	CEO issues	Other as required

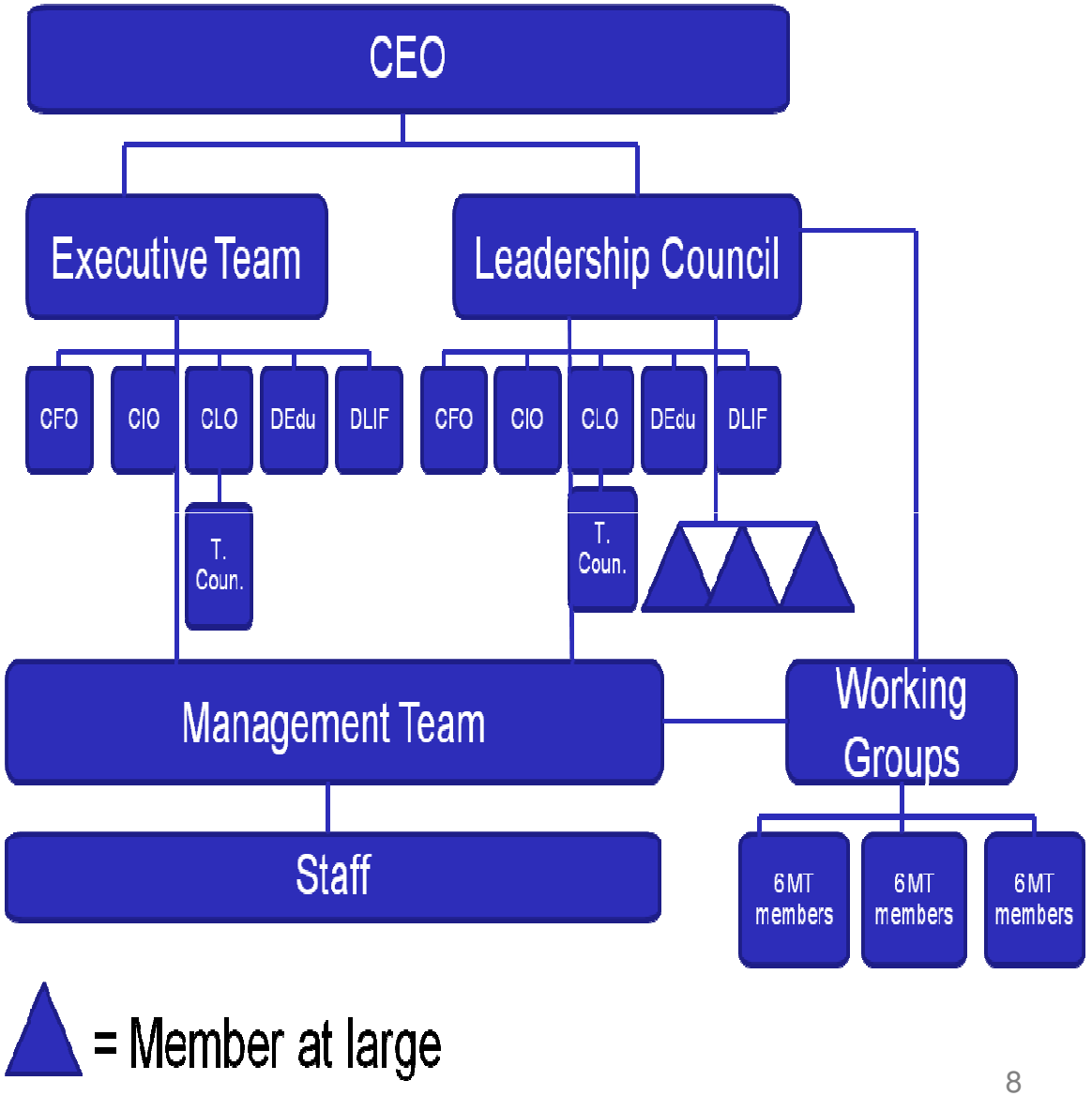
Proposed Meetings / Interactions

Leadership Council meets 2/month

Management Team meets 1/month

Working Groups meet as required

Executive Team meets as required



Benefits of Proposed New Structure

- Enhance decision making through broader perspectives.
- More strategic / planning focus.
- Shifts operational planning more to management team.
- Managers have new opportunity for leadership development.
- Added responsibility as part of Leadership Council.
- Skills development and assists with succession planning.
- Working groups – better use of management skills / engagement.
- Better coordination and build on teamwork strengths.

National Admission Standards

Communiqué **Spring 2013**

The Rationale For National Admission Standards

Lawyers and Quebec notaries are accountable to the public. They are required to be competent and to meet high ethical standards. Setting appropriate standards for admission to the legal profession is a critical aspect of the mandate of Canada's 14 law societies to regulate in the public interest. The diagram below illustrates some of the factors that have an impact on legal practice, including legal education, law society licensure requirements, continuing professional development and mobility. Collaboratively-driven national admission standards will ensure that entry-level legal professionals are equipped for competent and ethical legal practice anywhere in Canada, and will help law societies meet their public interest mandate given the realities of the legal practice landscape in Canada today.

In 2009, the CEOs of the law societies and the Council of the Federation identified the need to develop national standards for admission to the practice of law in Canada and the National Admission Standards Project took flight. The project reflects 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 programs in Canadian law societies, significant differences do exist. With mobility, both as originally established through our mobility agreements and as now mandated by 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 fair access to regulated professions legislation in three jurisdictions, different admission practices may be difficult to justify as being in the public interest.

Identifying the essential competencies required of applicants for admission to practise was a key element of the first phase of the National Admissions Standards Project. Through the collaborative efforts of senior law society admission staff members (the Technical Advisory Committee), professional credentialing consultants from ProExam (formerly PES), and practicing lawyers (through the Competency Development Taskforce and survey of almost 7000 entry-level lawyers and Quebec notaries), a profile of entry-level competencies – knowledge, skills and tasks – was developed.

Project Update

As reported in our Briefing Note to law societies in October 2012, Council adopted the National Entry-Level Competency Profile for Lawyers and Quebec Notaries (the “National Competency Profile”) in September, 2012. The National Competency Profile was one of the goals of the first phase of the project. The other was a good character standard, which describes what we mean by fitness and suitability to practise and provides guidance in determining whether applicants meet the standard.

Phase I

Adoption of the National Competency Profile

The National Competency Profile has been adopted by 10 law societies:

Nova Scotia Barristers' Society	Law Society of New Brunswick
Barreau du Québec	Law Society of Upper Canada
Law Society of Manitoba	Law Society of Alberta
Law Society of British Columbia	Law Society of Yukon
Law Society of the Northwest Territories	Law Society of Nunavut

Adoption is subject to the development and approval of a plan for implementation.

National Fitness and Suitability to Practise Standard

A draft framework for the suitability to practise standard and a draft standard questionnaire has been developed. Work on refining the standard is ongoing and guidelines are being developed to assist law societies with implementation. The working group has also explored the pros and cons of developing a “fitness to practise” admission standard; the issue is still under consideration. A draft standard will be provided to law societies in the late spring for consultation. It is expected that the final standard will be ready for circulation to law societies in the fall of 2013.

Phase II

Phase II of the National Admission Standards Project involves engaging with representatives of all of the law societies to identify options for implementing the National Competency Profile and the National Fitness and Suitability to Practise Standard and to reach agreement on moving forward.

Implementing National Admission Standards

The National Admission Standards Project Steering Committee set a timeline and developed a high level plan for exploring options and arriving at a recommendation for implementing National Admission Standards at its in-person meeting on December 19, 2012. The preliminary project plan identifies the major components of Phase II of the project, including a plan to engage stakeholders, the expert resources needed to complete the project, and the governance framework. The plan will be refined as stakeholders are engaged and the project unfolds. October 17, 2013 was identified as the target date by which a preliminary recommendation on implementation will be made to Council.

Engaging Stakeholders

The Steering Committee recognized that given the breadth of this endeavour, engaging law societies early in the planning process would be critical to the project's success. In Phase I, engagement efforts included involving law society staff and management through the Technical Advisory Committee and Fitness and Suitability to Practise Working Group; engaging the elected leaders and senior staff members of the law societies and various other stakeholders through Federation conferences in PEI and Vancouver; involving the profession through the Competency Development Task Force and national survey; and communicating with law society CEOs, elected leaders and senior staff through circulation of a communications package in the fall of 2012.

Teleconference meetings with CEOs on February 13, 2013 were important first steps in the engagement of key law society stakeholders in Phase II of the Project, and much of the feedback received from CEOs was echoed by senior law society staff at an in-person meeting held the following week. On February 20 and 21, a group of senior law society admission staff, several law society CEOs, Federation personnel and Don Thompson, chair of the National Admission Standards Steering Committee (23 people in total), met in Toronto to discuss Phase II. All law societies were represented directly, except for Nunavut and the Northwest Territories.

Through engaging this group, a great deal was learned about the distinctive features of each law society's admission program and the unique challenges that exist in implementing a national admission standard in different jurisdictions. The valuable feedback from these meetings will help tailor the planning as the project moves forward. The meeting provided an opportunity to engage senior law society staff members and to bring attendees up to speed on the status of the project and the time frame for achieving the first milestone by October 2013. The concepts of defensibility and consistency in evaluation and training were discussed, and a process for working together and moving forward was explored.

Governance Framework

The National Admission Standards Steering Committee, comprised of law society CEOs, volunteers and senior Federation staff, will continue to provide overall direction and oversight for the project. Its members will provide regular reports to Council of the Federation and ensure that law societies are kept well informed about progress. The Steering Committee will meet regularly by teleconference and in person.

Senior Federation staff will manage the project. With assistance from law society staff and credentialing experts, they will also carry out much of the substantive work. Law society elected leaders are key players in this initiative and the project will only succeed with your support. The Steering Committee recognizes that an open flow of communication about the project among those involved on the ground and law society leaders is critical. We will provide you with timely information and we invite your input and engagement, so that you are well informed about the content of the project recommendations and the process followed in reaching them.

Next Steps

The next step is to engage expert consultants to work with senior law society admissions staff and members of the profession to identify both which competencies in the National Competency Profile applicants should be tested on and how each competency might be best assessed. The list of competencies is long and not all substantive legal knowledge, skills and tasks can or need be tested. Using the data obtained through the national survey, the review process will identify what is most important to test based on factors such as criticality (how critical the skill/task is from a risk perspective), and frequency (how often the knowledge is used). This preliminary process, referred to as competency mapping, will also provide guidance on options for assessing the competencies.

The Federation is in the process of retaining a consultant for the competency mapping exercise. Information from the consultant is needed before the timeline and project plan can be finalized. We will continue to engage law society staff and practising lawyers to assist us in this critical strategic review process. A further Communiqué addressing developments in the Project will be provided in the summer, 2013.

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF BRITISH COLUMBIA

-AND-

THE CHIEF JUSTICE OF BRITISH COLUMBIA

-AND-

THE CHIEF JUSTICE OF THE SUPREME COURT OF BRITISH COLUMBIA

-AND-

THE CHIEF JUDGE OF THE PROVINCIAL COURT OF BRITISH COLUMBIA

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1. PREAMBLE

1.1. The Attorney and the Chief Justices acknowledge their joint responsibility for the administration of justice in the Province of British Columbia, with each playing a vital role in the administration of each of the Courts.

1.2. The Attorney and the Chief Justices are committed to developing and maintaining an accessible, modern, and effective justice system in the Province of British Columbia that delivers timely, impartial, and open justice.

1.3. The Chief Justices recognise that the Attorney is accountable to the Legislative Assembly of British Columbia for the expenditure of public resources required for the administration of justice and, in particular, those resources that are used to operate each of the Courts.

1.4. The Attorney recognises that the Chief Justices are responsible for efficient and effective Judicial Administration and that each of the Courts must be given sufficient resources to allow them to carry out their functions under the *Constitution Act, 1867* (U.K.), 30 & 31 Vict, c. 3, reprinted in R.S.C. 1985 App. II, No. 5, and their Empowering Legislation.

1.5. The Attorney recognises that the Courts are an independent branch of government and that the constitutional principle of Judicial Independence must be respected to maintain the rule of law and to ensure public confidence in the administration of justice.

1.6. The Attorney and the Chief Justices recognise that Court Administration should be pursued collaboratively to ensure that resources are used as efficiently and effectively as possible.

2. PURPOSE

2.1. The purpose of this Memorandum of Understanding is to describe the roles and responsibilities of the Attorney and the Chief Justices in the administration of the Courts.

2.2. This Memorandum of Understanding does not create, purport to create, or detract from any law or legal rights or responsibilities that exist or may exist in the future between the Attorney and the Chief Justices. It is not intended as a justiciable document.

3. DEFINITIONS

3.1. **"Attorney"** means the Minister of Justice and Attorney General of British Columbia, or either role, as applicable.

3.2. **"Business Intelligence"** means the collection, storage, disclosure, and/or use of data, the goal of which is to study or otherwise influence the productivity or effectiveness of a process and includes strategic planning, analytics, performance measurement, and performance planning.

3.3. **"Chief Administrator of Court Services"** means the Assistant Deputy Minister of Court Services in the Ministry of Justice of British Columbia.

3.4. **"Chief Justice(s)"** means the Chief Justice of British Columbia, the Chief Justice of the Supreme Court of British Columbia, and the Chief Judge of the Provincial Court of British Columbia, or any of them, when used in singular form.

3.5. **"Court(s)"** means the Court of Appeal for British Columbia, the Supreme Court of British Columbia, and the Provincial Court of British Columbia, or any of them, when used in singular form.

3.6. "**Court Administration"** means the management and direction of matters necessary for the operation of the Courts or other matters assigned to the Attorney by law. Court Administration specifically excludes Judicial Administration.

3.7. **"Court Administration Record(s)"** means a record or records relating to Court Administration. Court Administration Record(s) includes information in aggregate and/or electronic form, but does not include a Court Record or Judicial Administration Record.

3.8. **"Court Record(s)"** means anything on or by which information, in whole or part, is stored that relates to proceedings before the Courts and includes the information itself. Court Record(s) includes information in aggregate and/or electronic form, but does not include a Court Administration Record or Judicial Administration Record.

3.9. **"Court Staff"** means an employee or employees appointed under the *Public Service Act*, R.S.B.C. 1996, c. 385, who provide services to the Courts, but excludes those managed by an Office of the Chief Justice.

3.10. **"Deputy Attorney"** means the Deputy Attorney General of the Ministry of Justice of British Columbia.

3.11. **"Empowering Legislation"** means, as applicable, the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, the *Supreme Court Act,* R.S.B.C. 1996, c. 443, the *Provincial Court Act*, R.S.B.C. 1996, c. 379, or any other act or regulation of the Legislative Assembly of British Columbia or Parliament of Canada that enables the Courts to exercise their powers or grants jurisdiction to any of the Courts.

3.12. **"Judicial Administration"** means the management and direction of matters related to judicial functions, and includes, at a minimum, matters connected to the preparation, management, and adjudication of proceedings in the Courts and all other matters assigned to the judiciary by law or through this Memorandum of Understanding. Judicial Administration specifically excludes Court Administration.

3.13. **"Judicial Administration Record(s)"** means a record or records relating to Judicial Administration, and includes, as defined in the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165, a record or records containing information relating to a judge, master, or justice of the peace. For greater certainty, it includes a record or records relating to a registrar, judicial justice, or judicial case manager. Judicial Administration Record(s) includes information in aggregate

and/or electronic form, but does not include a Court Record or Court Administration Record.

3.14. **"Judicial Independence"** includes the judicial independence of an individual judge, justice or other court officer exercising a judicial function, and/or the administrative and institutional independence of a Court.

3.15. **"Office of the Chief Justice"** means, for each of the Courts, the Chief Justice and legal and administrative personnel under his or her direction whose function relates to Judicial Administration of that Court. The Office of the Chief Justice excludes the Deputy District Registrar(s) of the Supreme Court and Deputy Registrar(s) of the Court of Appeal, but includes all other registrars, executive directors, law or legal officers, public information officers, judicial law interns or clerks, Court scheduling staff, and any other personnel whose function relates to Judicial Administration.

4. CONSTITUTIONAL AND LEGISLATIVE AUTHORITY

4.1. *Constitutional Principles*

4.1.1. Section 96 of the *Constitution Act, 1867* provides that "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

4.1.2. Subsection 92(14) of the *Constitution Act, 1867* provides for the administration of justice in the Provinces, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

4.1.3. Subsection 11(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, section 96, and the preamble of the *Constitution Act, 1867* have been recognised by the Supreme Court of Canada as affirming the principle of Judicial Independence in Canada.

4.2. *The Attorney General Act*

4.2.1. Section 2 of the *Attorney General Act*, R.S.B.C. 1996, c. 22, provides for the duties and powers of the Attorney in respect of the administration of justice in the Province of British Columbia.

4.3. ***The Court of Appeal Act***

4.3.1. Section 2 of the *Court of Appeal Act* provides for the continuation of the Court of Appeal for British Columbia.

4.3.2. Section 32 of the *Court of Appeal Act* provides for the appointment of certain persons under the *Public Service Act* and provides that "Subject to the direction of the Chief Justice in matters of judicial administration and to the direction of the Attorney General in other matters, the chief administrator of court services for the Court of Appeal must direct and supervise facilities, registries and administrative services for the Court of Appeal."

4.4. ***The Supreme Court Act***

4.4.1. Section 2 of the *Supreme Court Act* provides for the continuation of the Supreme Court of British Columbia.

4.4.2. Subsection 2(3) of the *Supreme Court Act* provides that the Chief Justice of the Supreme Court has responsibility for the administration of the judges of the Supreme Court of British Columbia.

4.4.3. Subsection 10(1) of the *Supreme Court Act* provides that "The Attorney General is responsible for the provision, operation and maintenance of court facilities, registries and administrative services."

4.4.4. Subsections 10(2) and 10(4) of the *Supreme Court Act* provide for the appointment and responsibilities of the chief administrator of court services with respect to the Supreme Court of British Columbia.

4.4.5. Subsection 10(3) of the *Supreme Court Act* provides that "Subject to the direction of the Attorney General, and to the direction of the Chief Justice in matters of judicial administration and the use of court room facilities, the chief administrator of court services must direct and supervise registries and administrative services for the court."

4.5. ***The Provincial Court Act***

4.5.1. Section 2 of the *Provincial Court Act* provides for the continuation of the Provincial Court of British Columbia.

4.5.2. Subsection 41(1) of the *Provincial Court Act* provides that "The Attorney General is responsible for the provision, operation and maintenance of court facilities and services."

4.5.3. Subsection 41(2) of the *Provincial Court Act* provides that "Subject to the direction of the Attorney General, and to the direction of the chief judge in matters of judicial administration, the chief administrator of court services must direct and supervise facilities, registries and administrative services for the court."

4.5.4. Subsection 41(3) of the *Provincial Court Act* provides that "The Attorney General may appoint, under the *Public Service Act*, persons the Attorney General considers necessary to carry out the purposes of this *Act*."

4.5.5. Subsection 41(3.1) of the *Provincial Court Act* provides that "The chief administrator of court services, for the purposes of carrying out his or her duties under this *Act*, may disclose to the chief judge information regarding the conduct of persons appointed under subsection (3) in the performance of their duties under this *Act*."

4.5.6. Subsection 41(4) of the *Provincial Court Act* provides that "The Attorney General may make regulations respecting the operation and maintenance of court facilities and services."

4.6. ***The Justice Reform and Transparency Act***

4.6.1. Subsections 10(1), 10(2), and 10(3) of the *Justice Reform and Transparency Act,* S.B.C. 2013, c. 7, provides that the Attorney and the Chief Justices may enter into a memorandum of understanding governing any matter relating to the administration of their respective Courts.

4.6.2. Subsection 10(4) of the *Justice Reform and Transparency Act* provides that the memorandum of understanding may address the respective roles and responsibilities of the parties in the administration of the courts and may

specify how those parties are to share information, promote effective court administration, and report to the public.

4.6.3. Subsection 10(5) of the *Justice Reform and Transparency Act* provides that the Attorney may publish, in a manner that can reasonably be expected to bring to the attention of the public, all or part of the memorandum of understanding, except to the extent the memorandum of understanding otherwise provides.

5. ADMINISTRATION OF THE COURTS OF BRITISH COLUMBIA

5.1. *The Role of the Chief Justices*

5.1.1. Each Chief Justice has sole responsibility to manage and direct Judicial Administration in his or her Court, including the following specific areas:

5.1.1.1. the education and management (and for the Provincial Court, conduct and discipline) of justices, judges, masters, judicial justices, judicial case managers, and registrars;

5.1.1.2. the scheduling and assignment of justices, judges, masters, judicial justices, judicial case managers, and registrars as well as managing court sittings and courtrooms;

5.1.1.3. the supervision and control of Court Staff when carrying out functions related to Judicial Administration;

5.1.1.4. the supervision and control of Sheriffs, as officers of the Court, when carrying out functions related to Judicial Administration;

5.1.1.5. the independent management, budgeting, appointment, and staffing of an Office of the Chief Justice;

5.1.1.6. the supervision and control of Court Records and Judicial Administration Records;

5.1.1.7. the supervision and control of information technology related to Judicial Administration;

5.1.1.8. the supervision and control over the use of Court facilities, including courtrooms, courthouses, and other facilities when those uses relate to Judicial Administration or, for greater certainty, have the potential to affect the dignity and decorum of the Court(s);

5.1.1.9. the issuance of practice directives and other notices governing matters of practice and procedure, decorum, and matters relating to Judicial Administration;

5.1.1.10. the design and implementation of public and media relations strategies, including public education initiatives that relate to Judicial Administration;

5.1.1.11. the design, implementation, and reporting to the public of Business Intelligence relating to Judicial Administration; and

5.1.1.12. other matters assigned to the judiciary by law.

5.2. ***The Role of the Attorney***

5.2.1. The Attorney has sole responsibility to manage and direct Court Administration in the Courts, including the following specific areas:

5.2.1.1. the establishment of Court registries;

5.2.1.2. the provision, operation, and maintenance of Court facilities, registries, and administrative services;

5.2.1.3. the appointment, management, reclassification, and termination of Court Staff;

5.2.1.4. the supervision and control of Court Staff when those staff are carrying out functions related to Court Administration;

5.2.1.5. subject to subsection 5.1.1.6 of this Memorandum of Understanding, the management and storage, including archiving, of Court Records, Court Administration Records, and those Judicial Administration Records that the Chief Justice(s) request the Attorney to manage, store, and/or archive.

5.2.1.6. the security and safety of any person within a Court facility or a facility where a function relating to Judicial Administration is occurring, including emergency planning;

5.2.1.7. the administration of the Sheriffs, as outlined in the *Sheriff Act,* R.S.B.C. 1996, c. 425;

5.2.1.8. the design and implementation of public and media relations strategies relating to Court Administration;

5.2.1.9. the design, implementation, and reporting to the public of Business Intelligence relating to Court Administration; and

5.2.1.10. other matters assigned to the Attorney by law.

6. COLLABORATION AND CONSULTATION

6.1. *General Acknowledgement*

6.1.1. Given the division of roles and responsibilities described in section 5 of this Memorandum of Understanding, the Chief Justices and the Attorney agree that collaboration and consultation on matters of Judicial Administration and Court Administration are necessary to develop and maintain an accessible, modern, and effective justice system.

6.1.2. The Chief Justices acknowledge that the Attorney should be consulted in a timely, transparent, and accountable way on any programs or initiatives developed by an Office of the Chief Justice or delegates thereof that may affect Court Administration.

6.1.3. The Attorney acknowledges that the Chief Justices should be consulted in a timely, transparent, and accountable way on any programs or initiatives developed by the Attorney or delegates thereof that may affect Judicial Administration.

6.2. *Provision of Resources*

6.2.1. The Attorney acknowledges responsibility to provide sufficient resources to each of the Courts to allow them to carry out their functions under the *Constitution Act, 1867* and their Empowering Legislation.

6.2.2. The Attorney and the Chief Justices acknowledge that public funds must be used efficiently and effectively to fund the operation of the Courts.

6.2.3. The Attorney and the Chief Justices acknowledge that the preservation of a fair, independent, and impartial Court system is a priority in the allocation of public funds.

6.2.4. As part of the Attorney's commitment to provide sufficient resources to the Courts, the Attorney agrees to consult directly with the Chief Justice(s), as appropriate, but at a minimum, semi-annually, on the resource needs of their Court or the Courts generally, with particular regard to the following:

6.2.4.1. the general workload of the Court(s) and adjustments to the complement of each of the Courts;

6.2.4.2. changes to the law, both federal and provincial, including to Empowering Legislation, that may affect the workload of the Court(s);

6.2.4.3. changes to the demographics of British Columbia, including population growth and composition, that may affect the workload of the Court(s);

6.2.4.4. the presence of self-represented litigants and access to the Court(s) generally;

6.2.4.5. the use of technology and the modernisation of Court facilities, registries, and administrative services;

6.2.4.6. the needs of each Office of the Chief Justice, including those with respect to budgeting, strategic planning, and personnel; and

6.2.4.7. any further issues that are identified by the Attorney or the Chief Justice(s) and consented to, in writing, by the Attorney and the Chief Justice(s).

6.2.5. When the Attorney identifies and assesses resource needs related to Court Administration, the Attorney will develop proposals to address those resource needs and provide reasonable time for consultation with the Chief Justice(s) prior to the approval of a proposal.

6.2.6. The Chief Justices recognise that, for meaningful decisions to be made about providing sufficient resources to the Courts, information concerning the resource needs of the Courts and Judicial Administration must be provided to the Attorney.

6.2.7. With specific respect to subsection 6.2.4.1 of this Memorandum of Understanding, when the issue of judicial complement is to be addressed by the Attorney, each Chief Justice agrees to deliver information to the Attorney concerning the workload of his or her Court, trends in that workload, and the capacity of the existing judicial complement in his or her Court to address that workload.

6.3. ***Budgeting***

6.3.1. Every year, each Office of the Chief Justice shall prepare a yearly budget of expenditures for his or her Court for the following fiscal year, and an estimate of expenditures for the following two fiscal years, for inclusion in the budget of the Ministry of Justice and approval by the Treasury Board of British Columbia.

6.3.2. The yearly budgets of expenditures shall be submitted to the Deputy Attorney in sufficient time to be reviewed and finalised by the Deputy Attorney.

6.3.3. The Attorney and the Chief Justices agree that no changes to the operating budget of the Court(s) for the following year shall be made without reasonable consultation with Office(s) of the Chief Justice before the end of each fiscal year.

6.4. ***Facilities***

6.4.1. Where new courthouse facilities or significant alterations to existing facilities impacting operations or decorum are planned, at an early stage and before any undertaking or public commitment is made respecting a proposed project, the Attorney shall provide timely notice and detailed descriptions of the proposed project to, and consult with, the Chief Justice(s).

6.4.2. As part of that consultation process, the Attorney and the Chief Justices recognise that the following standards shall be considered: the dignity of the Court(s), the importance of the rule of law, the open court principle, and access to justice, Judicial Independence, the need to modernise the Court(s), and the effective and efficient use of public resources.

7. BUSINESS INTELLIGENCE

7.1. At the direction of a Chief Justice, each of the Courts may explore implementing a process for the use of Business Intelligence as it relates to Judicial Administration or, with the cooperation of the Attorney, Court Administration.

7.2. The Attorney agrees to consult with the Chief Justices on the development or use of Business Intelligence relating to Court Administration.

7.3. The Attorney shall not conduct any Business Intelligence activity that affects, or has the potential to affect, Judicial Administration or that impairs, or has the potential to impair, Judicial Independence.

8. ANNUAL REPORTS

8.1. The Chief Justice of British Columbia and the Chief Justice of the Supreme Court of British Columbia shall cause to be published an annual report prior to April 1 for his or her Court for the previous year that shall include a report on Judicial Administration in that Court.

8.2. The Chief Judge of the Provincial Court shall cause to be published an annual report prior to July 1 for his or her Court for the previous year that shall include a report on Judicial Administration in that Court.

8.3. The publication of annual reports that conform to these requirements shall commence in calendar year 2014.

9. INFORMATION TECHNOLOGY

9.1. The Attorney and Chief Justices acknowledge the need to maintain a judicial technology environment with comprehensive security and privacy specifications for Judicial Administration, having due consideration to the principles outlined in the Canadian Judicial Council's *Blueprint for the Security of Judicial Information,* published from time-to-time.

9.2. The Attorney recognises that, to ensure the integrity and security of information generated by the judiciary and Judicial Administration Records, a separate judicial information technology network and infrastructure is necessary for Judicial Administration of the Courts.

10. COURT RECORDS AND INFORMATION

10.1. *Access to and Use of Records*

10.1.1. As outlined in subsections5.1 and 5.2 of this Memorandum of Understanding, there is a shared responsibility for Court Records.

10.1.2. The Chief Justice of the Court to which the Court Record relates is responsible for developing policies on access to and use of Court Records and Judicial Administration Records.

10.1.3. Access to and use of Court Administration Records is governed by the *Freedom of Information and Protection of Privacy Act.*

10.1.4. The Chief Administrator of Court Services is responsible for developing policies and procedures for managing, auditing, and ensuring that access to Court Records conforms to the policies developed by the Chief Justice in the Court to which the Court Records relate.

10.2. *Combining of Records*

10.2.1. The Attorney and the Chief Justices recognise that, in practice, Court Records, Judicial Administration Records, and Court Administration Records, or any of them, may merge, particularly when in aggregate and/or electronic form.

10.2.2. When Court Records or Judicial Administration Records form part of Court Administration Records, authorisation from the Chief Justice(s) must be obtained for the use and/or disclosure by the Attorney, unless such use and disclosure is already permitted by policies developed by the Chief Justice in the Court to which the Court Records or Judicial Administration Records relate.

10.2.3. At the request of the Attorney, the Chief Justice(s) to which the Court Record or Judicial Administration Record relates may prepare a schedule of certain types or categories of Court Records and Judicial Administration Records where permission for specified use(s) and/or disclosure shall be granted as a matter of course or on terms and conditions set by the Chief Justice(s).

10.3. ***Support to the Courts***

10.3.1. Through the Chief Administrator of Court Services, the Attorney agrees to the continued provision of sufficient staff, including Court Staff, and sufficient resources to manage, store, and archive Court Records for each of the Courts.

10.3.2. Nothing in this Memorandum of Understanding affects the *Protocol Agreement on the use of Court Technology in Electronic Form* signed by the Chief Justices and the Chief Administrator of Court Services on 29 October 2002, nor does it affect any existing protocol or agreement between the Court(s) and the Ministry of Justice and/or Ministry of the Attorney General of British Columbia.

11. APPROVAL, TERMINATION, AND RENEWAL

11.1. This Memorandum of Understanding takes effect on the date of its signature by the Attorney and the Chief Justices.

11.2. This Memorandum of Understanding:

11.2.1. is subject to amendment with the agreement in writing of all parties to this Memorandum of Understanding at any time;

11.2.2. is subject to review at any time by the Attorney or the Chief Justice(s) on receipt of a written request from a party to this Memorandum of Understanding;

11.2.3. may be terminated by the Attorney or any Chief Justice(s) as it relates to his or her Court at any time on thirty (30) days written notice;

11.2.4. shall be reviewed upon the appointment of a new person to the office of the Attorney or Chief Justice and, unless that new person repudiates in writing this Memorandum of Understanding within ninety (90) days of that appointment, this Memorandum of Understanding remains in effect; and

11.2.5. if a Chief Justice elects to terminate or a new Chief Justice elects to repudiate this Memorandum of Understanding under subsections 11.2.3 or 11.2.4 respectively, this Memorandum of Understanding shall continue in effect between the remaining Chief Justice(s) and the Attorney.

THIS MEMORANDUM OF UNDERSTANDING effective this 3rd day of April, 2013.

"Shirley Bond"

The Honourable Shirley Bond
Minister of Justice and Attorney General
Province of British Columbia

"Lance S.G. Finch, CJBC"

The Honourable Lance S.G. Finch
Chief Justice of British Columbia

"Robert J. Bauman, CJSC"

The Honourable Robert J. Bauman
Chief Justice of the Supreme Court of British Columbia

"Thomas J. Crabtree, CJPC"

The Honourable Thomas J. Crabtree
Chief Judge of the Provincial Court of British Columbia

The Law Society of British Columbia

Memo

To: Benchers
From: Robyn Crisanti
Date: March 26, 2013
Subject: For information only: Bencher participation in Law Society Speakers Bureau

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The Law Society's Speakers Bureau was launched in 2012 and so far has included only staff speakers. At the request of some Benchers, the program is now being expanded beyond staff to include Benchers who would like to speak publicly on behalf of the Law Society, either to lawyers or the general public.

In addition, regardless of whether Benchers are registered Law Society speakers, we wish to capture all instances of Benchers speaking publicly so that overall outreach efforts can be reported annually.

This memo outlines the suggested related processes.

Process to be a Law Society Speaker

1. Advise Communications, who will add you to the online roster of Law Society speakers and clarify the topics on which you wish to speak.

2. As requests come in, you will be contacted by Communications as appropriate (given the topic and geographical area) to gauge your level of interest.

3. If you agree to take on a particular speaking engagement, you will be put in contact with the event organizer to determine the particulars.

4. If you require speaking notes, they will be provided by Communications.

Process to report your speaking engagements

To ensure any public speaking you do is included in the annual Speakers Bureau report, please forward the following information to Communications:

- Name of audience group

- Date of presentation
- Approximate size of audience
- Topic of presentation

The report of all public speaking activity will be written shortly after year end on an annual basis.

Quick links: What's new | In the pipeline | Of interest | Reports

Welcome to *Time with Tim*. Here I hope to give you information on our organizational goals and to learn a little about each other along the way. I'll be keeping this page up to date with the status of our organizational priorties and will provide updates from Bencher and management meetings and Breakfast with Tim.

What's new

Breakfast with Tim invitations in the mail

By now most of you have received invitations to Breakfast with Tim. I've increased the number of breakfasts per month to try and meet with everyone before August; however, due to the small group sizes some breakfasts will occur in the fall. If you have not received an invitation to a breakfast, please understand that we are in the process of scheduling fall dates and invitations will be sent out shortly.

I'm very excited to see that the majority of people receiving invitations so far have been able to accept them and I'm looking forward to getting together.

Breakfast with Tim

Starting in April, I will host monthly off-site breakfast meetings with staff. This is an informal opportunity to get to know other employees and share comments and suggestions with one another. Each breakfast will include randomly-selected staff members from across the organization. Over the course of 2013, I am hopeful that everyone will be able to attend a breakfast meeting.

In the pipeline

Project Leo

We're nearing the end of Project Leo and entering an exciting new road ahead for the Law Society. With training complete and Leo installed on everyone's computers, we are looking at the April 30 deadline of closing the network drives to saving. I encourage everyone to start using Leo and become comfortable with creating, saving and searching for documents. Personally, I've found using Recently Edited Documents and Content Searching highly effective in finding the documents I'm looking for. The project team has scheduled additional training sessions in April to help you become proficient. To register for a training session or for more information about the project, visit the project page.

Lawyer Support and Advice Project

As one of the operational priorities for 2013, this project will develop a recommendation for how lawyer advice and practice support at the Law Society can be delivered in an effective, efficient and consistent manner. The first stage of the project is to gather ideas on how to improve lawyer advice and support, and the project team is reaching out to all staff. This is an exciting opportunity for you to be involved in a major project, to think innovatively and to provide ideas on how we as an organization can reach this important goal. Interviews have been held with individual departments; however, you are welcome to submit any suggestions or ideas to the project team. After ideas have been generated, a telephone survey of lawyers will commence in April to get input on our ideas. Click here to

Highlights of Tim's April Calendar:

Presiding over the first Call & Admissions Ceremony of 2013

Meetings with several legal community stakeholders

Continuing working with Management Group on management review and renewal project

Saving all new documents into Leo

Contact me

Stop by my office or send me an email - tmcgee@lsbc.org

Bits

Birthplace: *Victoria, BC*

Favorite movie: *The Great Escape*

Favorite local restaurant: *Chambar*

UPCOMING EVENTS

- *May 01:* Bencher Agenda Materials (Final form deadline)
- *May 01:* Room 914 -Costco marketing presentation
- *May 02:* Management Group Meeting
- *May 10:* Bencher Meeting
- *May 14:* Management Board Meeting

MY LINKS [+/-]

- A-Z Directory
- Employee Pro
- Forms and Templates
- Law Society Information System (LSIS)
- Meeting Room Schedule
- Planned Absences
- Record Pro
- Resource Centre for Legal Research
- Safety and Security
- BC Courthouse Libraries
- BC Laws
- Department of Justice
- BC Online
- CanLII
- Continuing Legal Education
- Federal Legislation Search
- Great-West Life
- My ADP
- QuickLaw
- Yellow Pages

MY CONTACTS [+/-]

COMMITTEE MEETINGS

- *May 06:* Legal Service Providers Task Force
- *May 07:* Complainants' Review Committee
- *May 08:* Rule of Law and Lawyer Independence Advisory Committee
- *May 09:* Practice Standards Committee
- *May 09:* Act and Rules Subcommittee

submit an idea or for more information about the project, visit the project page.

Profession you would most like to try: *Architecture*

Favourite mentor: *My late uncle*

Person you would most like to meet: *Winston Churchill*

Of interest

RRex

For at least two reasons, RRex is a remarkable program for recognizing and rewarding employee excellence. First, it has been built from the ground up; that is, we have surveyed and consulted with staff over the past year to ensure that the program is responsive to the types of incentives and recognition that will motivate performance, innovation and teamwork. Second, because of the thorough external research we have done on this topic, we have also been able to design the program based upon the best features of successful programs elsewhere.

Congratulations to Denise Findlay, our first recipient of the Golden Lion Award! Nominitated by a colleague, Denise was recognized for her commitment and dedication to high quality work. More information about RRex is available here.

2012 Employee Survey feedback

Our seventh consecutive employee survey was conducted in November of 2012. We had a record high response rate for the survey and the results are both interesting and encouraging on several fronts. Key points that came out of the employee survey and that I plan to focus on this year are:

- connecting more with staff through Lex and monthly breakfasts
- increasing transparency around organizational priorities
- working towards creating more autonomy for all staff

2013 Operational Priorities

We are a high-performing organization dedicated to excellence. At the same time, we should always look for innovative ways to do things better, more efficiently or more effectively. Here are the five operational priorities for management for 2013:

1. Review and renewal of management structure
2. Lawyer Advice and Support Project
3. Support for Legal Service Provider Task Force
4. Regulation of law firms – policy and operational assessment
5. Implementation of Governance Review Task Force report

Detailed information on each priority can be found here or in my January report to Benchers.

Federation of Law Societies of Canada 2013 Semi-Annual Conference, March 20-22

I attended the Federation of Law Societies of Canada Semi-Annual Conference and Council meeting in Quebec City. The theme of the conference was “Globalization and Risk Management: Challenges for Law Societies”. I gave a presentation on the topic of Globalization and International Trade in Legal Services which focused on the major trends associated with the globalization of law and a call for a unified approach to certain aspects of regulation. The highlight for me among the practical topics were the workshops focused on what all law societies are doing and could be doing to help lawyers comply with their professional and regulatory requirements. The most compelling presentation on the strategic front was given by Mr. Michel Nadeau, the head of the Quebec Institute for Governance of Private and Public Organizations, who reviewed public survey data which strongly suggests that regulatory bodies must never underestimate the public’s high expectations that we do our jobs in a demonstrably effective and efficient manner.

More information on the conference can be found in my April report to Benchers.

Inaugural BC Justice Summit, March 15-16

The “Inaugural Justice Summit", at the UBC Law School, focused on reforms to the criminal justice system and was comprised of two full-day working sessions broken down into two parts. The Friday afternoon session focused on indentifying the values that should guide the criminal justice system. The Saturday session built on that foundation but carried on into more detailed small group discussions around what the priorities should be and how future Justice Summits could help address and facilitate desired reforms. I acted as moderator for the working sessions on Friday and Saturday and George Thompson, a former deputy attorney general and former Provincial Court Judge in Ontario, acted as facilitator.

The working sessions were attended by approximately 40 delegates, including senior representatives drawn from the principal participants and parties with an interest in the criminal justice system. In addition, Chief Justice Finch, Associate Chief Justice Cullen, Chief Judge Crabtree and Associate Chief Gill were in attendance for all of the Saturday sessions and participated actively in the discussions. Overall, the delegates were certainly engaged in the process and in the exchange of views and ideas. In the wrap-up there was a strong consensus that providing a safe and informal forum for the exchange of ideas and information among the key participants was a very useful tool to addressing the vexing issues of the day; however, it was also clear that the issues are complex and not easily addressed without considerable resolve and collaboration.

More information about the Summit can be found in my April report to Benchers.

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The Law Society of British Columbia

Quarterly Financial Report

March 31, 2013

Prepared for: Bencher Meeting – May 10, 2013

Prepared by: Jeanette McPhee, CFO & Director Trust Regulation

Quarterly Financial Report – First Quarter 2013

Attached are the financial results and highlights for the first quarter of 2013.

General Fund

General Fund (excluding capital and TAF)

The General Fund operations resulted in a positive variance of $157,000 to March 31, 2013.

Revenue

Revenue is $4,854,000, $34,000 (0.7%) ahead of budget.

Operating Expenses

Operating expenses for the first quarter were $4,562,000, $93,000 (2.0%) below budget due the timing of costs in various areas.

2013 Forecast - General Fund (excluding capital and TAF)

We are forecasting the General Fund to be on budget for the year.

Operating Revenue

Practicing membership revenue is budgeted at 11,000 members, and is expected to be close to budget. PLTC revenue is projected at 430 students compared to a budget of 400, resulting in a positive variance of $75,000.

Operating Expenses

There are two Bencher-approved unbudgeted expense items. The Benchers approved a $75,000 contribution in 2013 to the CBA REAL program and an additional annual contribution of $48,000 to the Access Probono Society. At this time, we are projecting other savings will offset these additional costs.

845/835 Building

We are pleased that the second floor of 835 Cambie has been leased effective July 1st and Access Probono is now leasing space on the third floor of 845 Cambie. Our leasing agent continues to market the third floor of 835 Cambie. As the third floor of 835 Cambie was budgeted to be leased by July 1st, we are forecasting a negative variance of $82,000 in leasing revenue for the year.

TAF-related Revenue and Expenses

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

TAF operating expenses had a small positive variance in the first quarter, with savings in travel costs.

With the continued slowdown in real estate unit sales, we are forecasting TAF revenue to be similar to 2012, which will result in a shortfall in the Trust Assurance Program of approximately $235,000 for the year. The TAF fees will be reviewed at the upcoming Finance Committee meeting.

Special Compensation Fund

When the final claim payments are paid out in 2013, the remaining Special Compensation Fund reserve will be transferred to LIF.

Lawyers Insurance Fund

LIF operating revenues were $3.7 million in the first quarter, very close to budget.

LIF operating expenses were $1.5 million, $187,000 below budget. This positive variance was due to staffing costs, insurance and external counsel savings.

The market value of the LIF long term investments is $104 million, an increase of $4.7 million in the first quarter. The year to date investment returns were 4.76%, compared to a benchmark of 3.95%.

The Law Society of British Columbia

Summary of Financial Highlights - Mar 2013
($000's)

2013 General Fund Results - YTD Mar 2013 (Excluding Capital Allocation & Depreciation)

	Actual	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	4,172	4,162	10	0.2%
PLTC enrolment fees & grant	103	94	9	9.6%
Electronic filing revenue	187	189	(2)	-1.1%
Interest income	102	69	33	47.8%
PD Reporting penalties	69	67	2	3.0%
Other revenue	221	239	(18)	-7.5%
	4,854	4,820	34	0.7%
Expenses before 845 Cambie (excl. dep'n)	4,562	4,655	93	2.0%
	292	165	127	
845 Cambie St. - net results (excl. dep'n)	147	117	30	25.6%
	439	282	157	

2013 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2008 Actual	10,035
2009 Actual	10,213
2010 Actual	10,368
2011 Actual	10,564
2012 Actual	10,746
2013 Budget	11,000
2013 YTD Actual	**10,745**

	Actual Variance
Revenue	
PLTC - 30 students more than budget of 400	75
Lease revenue vacancy	(82)
	(7)
Expenses	
CBA REAL Initiative contribution*	(75)
Access Pro Bono - additional contribution re: 3rd floor space*	(48)
Miscellaneous savings - various areas	130
	7
2013 General Fund Actual Variance	-
2013 General Fund Budget	-
2013 General Fund Actual	-

* Approved by Benchers as an unbudgeted item

Trust Assurance Program Actual & Forecast

	2013 Actual	2013 Budget	Variance	% Var
TAF Revenue **	1	2	(1)	-50.0%
Trust Assurance Department	533	564	31	5.5%
Net Trust Assurance Program	(532)	(562)	30	

** Q1 revenue not due until April 30th

	2013 Forecast	
TAF Revenue	2,158	***- assumes same revenue as 2012 Actual***
Trust Assurance Department	2,393	***- per 2013 Budget***
Trust Assurance Program - 2013 Forecast	**(235)**	

2013 Lawyers Insurance Fund Long Term Investments - YTD March 2013 *Before investment management fees*

Performance	4.76%
Benchmark Performance	3.95%

The Law Society of British Columbia
General Fund
Results for the 3 Months ended March 31, 2013
($000's)

	2013 Actual	2013 Budget	$ Var	% Var
Revenue				
Membership fees **(1)**	6,066	6,055		
PLTC and enrolment fees	39	31		
Electronic filing revenue	187	190		
Interest income	102	69		
Other revenue	355	368		
Total Revenues	6,749	6,713	36	0.5%
Expenses				
Regulation	1,589	1,680		
Education and Practice	881	881		
Corporate Services	677	683		
Bencher Governance	567	531		
Communications and Information Services	471	468		
Policy and Legal Services	377	412		
Depreciation	87	90		
Total Expenses	4,649	4,745	96	2.0%
General Fund Results before 845 Cambie and TAP	2,100	1,968	132	
845 Cambie net results	8	(122)	130	
General Fund Results before TAP	**2,108**	**1,846**	**262**	
Trust Administration Program (TAP)				
TAF revenues	1	2	(1)	
TAP expenses	533	564	31	5%
TAP Results	**(532)**	**(562)**	**30**	
General Fund Results including TAP	**1,576**	**1,284**	**292**	

Membership fees include capital allocation of $1.894m (YTD capital allocation budget = $1.898m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at March 31, 2013
($000's)

	Mar 31 2012	Dec 31 2012
Assets		
Current assets		
Cash and cash equivalents	187	672
Unclaimed trust funds	1,745	1,672
Accounts receivable and prepaid expenses	1,145	982
B.C. Courthouse Library Fund	1,732	2,487
Due from Lawyers Insurance Fund	13,922	19,355
	18,731	25,168
Property, plant and equipment		
Cambie Street property	12,041	11,382
Other - net	1,642	1,593
	32,414	38,143
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	1,987	2,575
Liability for unclaimed trust funds	1,744	1,672
Current portion of building loan payable	500	500
Deferred revenue	12,701	18,225
Deferred capital contributions	56	58
B.C. Courthouse Library Grant	1,732	2,487
Deposits	21	29
Due to Lawyers Insurance Fund	-	-
	18,741	25,546
Building loan payable	3,600	4,100
	22,341	29,646
Net assets		
Capital Allocation	2,835	2,407
Unrestricted Net Assets	7,238	6,090
	10,073	8,497
	32,414	38,143

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 3 Months ended March 31, 2013
($000's)

	Invested in P,P & E net of associated debt	Unrestricted	Unrestricted Net Assets	Trust Assurance Allocation	Capital Allocation	2013 Total	2012 Total
	$	$			$	$	$
Net assets - December 31, 2012	8,448	(2,118)	6,018	72	2,407	8,497	7,112
Net (deficiency) excess of revenue over expense for the period	(226)	439	213	(531)	1,894	1,576	1,385
Repayment of building loan	500	-	500	-	(500)	-	-
Purchase of capital assets:							
LSBC Operations	808	-	808	-	(808)	-	-
845 Cambie	158	-	158	-	(158)	-	-
Net assets - March 31, 2013	9,688	(1,679)	7,697	(459)	2,835	10,073	8,497

The Law Society of British Columbia
Special Compensation Fund
Results for the 3 Months ended March 31, 2013
($000's)

	2013 Actual	2013 Budget	$ Var	% Var
Revenue				
Annual assessment	-	-		
Recoveries	1	138		
Total Revenues	1	138	(137)	-99.3%
Expenses				
Claims and costs, net of recoveries	-	18		
Administrative and general costs	11	12		
Loan interest expense	(8)	-		
Total Expenses	3	30	(27)	-90.0%
Special Compensation Fund Results	(2)	108	(110)	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at March 31, 2013
($000's)

	Mar 31 2012	Dec 31 2012
Assets		
Current assets		
Cash and cash equivalents	1	1
Accounts receivable	-	-
Due from Lawyers Insurance Fund	1,391	1,396
	1,392	1,397
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	168	171
Deferred revenue	-	-
	168	171
Net assets		
Unrestricted net assets	1,224	1,226
	1,224	1,226
	1,392	1,397

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
Results for the 3 Months ended March 31, 2013
($000's)

	2012 $	2011 $
Unrestricted Net assets - December 31, 2012	1,226	932
Net excess of revenue over expense for the period	(2)	294
Net assets - March 31, 2013	1,224	1,226

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 3 Months ended March 31, 2013
($000's)

	2013 Actual	2013 Budget	$ Var	% Var
Revenue				
Annual assessment	3,694	3,666		
Investment income	4,664	576		
Other income	22	13		
Total Revenues	8,380	4,255	4,125	96.9%
Expenses				
Insurance Expense				
Provision for settlement of claims	3,160	3,160		
Salaries and benefits	596	699		
Contribution to program and administrative costs of General Fund	388	403		
Office	205	266		
Actuaries, consultants and investment brokers' fees	99	114		
Allocated office rent	37	36		
Premium taxes	7	3		
Income taxes	-	-		
	4,492	4,681		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	190	188		
Total Expenses	4,682	4,869	187	3.8%
Lawyers Insurance Fund Results before 750 Cambie	3,698	(614)	4,312	
750 Cambie net results	96	96	-	
Lawyers Insurance Fund Results	**3,794**	**(518)**	**4,312**	

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at March 31, 2013
($000's)

	Mar 31 2013	Dec 31 2012
Assets		
Cash and cash equivalents	14,933	23,225
Accounts receivable and prepaid expenses	652	936
Due from members	124	42
General Fund building loan	4,100	4,600
Investments	112,041	108,464
	131,850	137,267
Liabilities		
Accounts payable and accrued liabilities	770	1,688
Deferred revenue	3,385	6,947
Due to General Fund	13,922	19,356
Due to Special Compensation Fund	1,391	1,396
Provision for claims	51,660	50,959
Provision for ULAE	7,162	7,155
	78,290	87,501
Net assets		
Unrestricted net assets	36,060	32,266
Internally restricted net assets	17,500	17,500
	53,560	49,766
	131,850	137,267

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 3 Months ended March 31, 2013
($000's)

	Unrestricted	Internally Restricted	2013 Total	2012 Total
	$	$	$	$
Net assets - December 31, 2012	32,266	17,500	49,766	44,267
Net excess of revenue over expense for the period	3,794	-	3,794	5,499
Net assets - March 31, 2013	36,060	17,500	53,560	49,766

The Law Society of British Columbia

Report to Benchers

April 12, 2013

Report of the Rule of Law and Lawyer Independence Advisory Committee on its Examination of the Relationship Between the Law Society as Regulator of Lawyers and as Insurer of Lawyers

Committee Members

Claude Richmond, Chair

Kathryn Berge, QC Vice Chair

Herman Van Ommen, QC,

Leon Getz, QC

David Crossin, QC

James Vilvang, QC

Craig Dennis

Jeevyn Dhaliwal

Purpose of Report: Decision

Prepared by Policy & Legal Services

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COMMITTEE PROCESS

1. Approximately 5 years ago, a predecessor of the Committee encouraged the Benchers to consider the implications for the Law Society, as an organization responsible for acting in the public interest, arising from the operation of both a regulatory function that investigates and, where appropriate, sanctions lawyers, and an insurance program that may be required to defend lawyers in connection with their discharge of professional responsibilities – sometimes on the same facts that have given rise to regulatory involvement.

2. That predecessor Committee recommended that an examination of this issue be included on the Law Society's strategic plan. The recommendation was ultimately adopted by the Benchers for inclusion in the current strategic plan for 2012-2014, forming Initiative 1-1(b) under the first Goal of the Plan – that the Law Society will be a more innovative and effective professional regulatory body.

3. Consequently, the Committee began a further and more detailed examination of the matter and devoted most of its substantive work during 2012 to a consideration of the issues that arise. In the course of its examination, it has consulted with the Insurance Department, the Professional Regulation and Discipline Departments, as well as with the Chief Financial Officer and the Chief Executive Officer, all of which have attended one or more meetings of the Committee and all of which provided the Committee with a considerable amount of background and information that greatly aided the Committee's work.

ACKNOWLEDGEMENTS

4. A great deal of the discussion and analysis concerning this subject was done in 2012 by the Committee under the Chair of Kathryn Berge, QC, with Herman van Ommen QC as Vice Chair. Jan Lindsay QC, Richard Stewart QC, and Cam Mowatt were also members of the 2012 Committee.

EXECUTIVE SUMMMARY

5. The Law Society operates a professional liability insurance programme. Does this compromise or create an appearance that might reasonably be considered to compromise the performance of its statutory obligation to uphold and protect the public interest in the administration of justice? That is the question addressed in this Report. If the answer, either generally or in particular circumstances, is "yes" or "possibly", this could undermine or at least have the potential to undermine public confidence in the Society's ability to regulate the legal profession in the public interest.

6. In examining this question the Committee has taken account of the Law Society's responsibilities to set policy in relation to lawyers' professional liability insurance and to manage claims filed in respect of that insurance. The Committee has identified two risks associated with the current arrangement and operation of the Lawyers Insurance Fund within the Law Society. At a high, policy-setting level, both regulating and insuring lawyers are in the public interest. At the operational level, however, there is a risk of actual conflict in concurrently performing the obligations inherent in each role. The Committee has concluded that this first risk in the existing arrangement is best described in terms of a conflict of *duties*, rather than a conflict of *interests*. The second risk is the potential for a perception or apprehension of a conflict, in the minds of the public, and the effect that might have on the public confidence in the Law Society's ability to meet its statutory responsibilities. A public apprehension of conflicting duties would invite the question of which duty would take priority in the event of an actual conflict. Both the risk of an actual conflict of duties and the risk of related negative public perceptions remain to be addressed. The Committee's view is that the identified risks are sufficiently serious to warrant corrective action.

7. The Committee has considered a number of possible responses to the concerns it has identified and has come to the conclusion that a more extensive and readily apparent division between the Law Society's insurance department and the rest of the organization is desirable. The Committee's view is that this would go some distance towards enhancing transparency and minimizing the potential for loss of public confidence in the way in which the Society performs its functions. The details and extent of such a separation remain to be developed. The Committee has not been in a position to fully investigate the costs or all the operational consequences associated with the elements of any particular "solution option." Consequently, it is not recommending a particular solution for discussion in this Report. Further work is required to develop specific

"solution options" before the Benchers will be in a position to make a fully informed and final decision.

8. After considerable debate within the Committee, however, the range of potential responses has been narrowed to the following two options, which the Committee believes should now be developed as detailed proposals:

    A. Modify the Lawyers Insurance Fund's current integration as a Law Society department by creating more indicia of separation between the insurer and the rest of the organization, together with sufficient functional and operational separation to address the substance of the underlying tensions that are identified in the report;

    B. Operate the Lawyers' Insurance Fund as a separate legal entity, with sufficient independence from the Law Society that the insurer's duty to the insured would be removed from the responsibilities of the regulatory body.

9. As the development of the two proposals the Committee envisions remains a significant task, the Committee now makes the following ***recommendations***:

    1. That the Benchers first determine whether they agree with the Committee's conclusion that the tension and propensity for conflict between the Law Society's co-existing responsibilities as regulator and insurer of lawyers warrants corrective action; and

    2. If the Benchers share the Committee's concerns, that a working group, consisting of Benchers and Law Society staff, be created to undertake, in the light of this Report, a detailed examination and analysis of the two options to form the basis for future debate by the Benchers.

10. By following this recommended course, the Committee believes that the Law Society's ability to manage its co-existing responsibilities can be substantially improved, while preserving existing public interest benefits that result from the Law Society's fulfillment of both its regulatory and insurance functions.

BACKGROUND

11. Initiative 1-1(b) of the Strategic Plan – the issue that this Committee has been asked to address – is to "examine the relationship between the Law Society as the regulator of lawyers and the Law Society as the insurer of lawyers."

12. The Law Society has a statutory obligation to act in the public interest. It has a regulatory function that requires it to investigate and, where appropriate, sanction lawyers for misconduct in performing their professional responsibilities. It also operates a professional liability insurance program, which may require it to defend lawyers sued in connection with their performance of those responsibilities. Sometimes it may have to perform both functions in relation to the same facts.

13. Accordingly, the Committee has examined the relationship between the Law Society's regulatory and insurance functions, with an eye to effective self-regulation in the public interest. This Report is the Committee's report of its examination.

INSURANCE OF LAWYERS WITHIN THE AUSPICES OF A PUBLIC INTEREST REGULATORY BODY

14. One way to protect the public interest is to require that lawyers are insured for any errors or negligence that may occur during the representation of a client. The *Legal Profession Act* (the "LPA") specifically requires the Law Society to operate an insurance fund to compensate claimants for any dishonest appropriations from lawyers' trust accounts. More broadly, liability insurance allows a client who has suffered a proven loss caused by a lawyer to recover from an insurance fund, rather than having to risk recovery against the lawyer who may be unable to pay. The LPA permits (but does not require) the benchers to make rules to establish and operate a professional liability insurance program and, since 1992, this insurance function has been discharged through a department of the Law Society, which operates both the policy-setting function of the insurer and handles claims against insured lawyers.

15. Does the Law Society's function in operating as a professional liability insurer detract from its statutory obligation to act in the public interest? By operating an insurance program, including a claims-handling role, does the Law Society create a tension with its mandate to regulate the practice of law in the public interest? This question forms the essential underlying issue of consideration and analysis by the Committee in this report.

1. Statutory Mandate and Trust Protection Insurance Fund (Part B Insurance) Obligation

16. The Law Society takes its mandate from its originating statute, the LPA. Section 3 of the LPA sets out the organization's mandate as follows:

> **OBJECT AND DUTY OF SOCIETY**
>
> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

17. The LPA prescribes that the Law Society's object and duty is "to uphold and protect the public interest in the administration of justice" by engaging in a number of different kinds of activities. For any activity the Law Society may undertake, the measuring stick is set: Is the activity consistent with the Law Society's duty to uphold and protect the public interest in the administration of justice?

18. The LPA also sets out a number of insurance-related obligations and powers in section 30. The provisions in section 30 require the benchers to establish an insurance fund and to maintain and operate a trust protection insurance program. "Trust protection insurance" is a defined term in the section, meaning insurance to compensate persons who suffer a loss by a dishonest appropriation from a lawyer's trust funds. Trust protection insurance may be contrasted with professional liability insurance, which is to compensate for losses suffered as a result of a lawyer's negligence in the course of legal practice. Additionally, section 30 provides that the benchers may maintain and operate a professional liability insurance program, although the provision is clearly enabling, not mandatory. Thus the LPA's treatment of professional liability insurance is different than its treatment of trust protection insurance. Maintaining a program to cover trust protection insurance is a statutory obligation of the Law Society. Operating a professional liability insurance program is an option for the Law Society, presuming of course that the activities involved

in the course of such a program are not themselves inconsistent with the Law Society's statutory mandate.

19. The purpose of reviewing the Law Society's co-existing regulatory and insurance responsibilities is to identify and assess any potentially problematic issues that arise from the relationship between them. When such concerns are raised there is a reasonable question as to how those concerns are most accurately characterized. Do they involve a conflict of interests or duties? Or is the issue something less, perhaps merely a perceivable tension between the co-existing responsibilities? Tensions among competing priorities and duties may be common in complex organizations, such as governments and regulatory authorities, making an appreciation of their overall effect on the public interest a matter of some importance. In any event, the Committee is satisfied that at the highest conceptual level, that is, at the level of the Law Society's statutory *obligations*, no concerns arise regarding the Law Society's statutory mandate and the obligation to maintain a trust protection insurance fund and program.

2. Statutory Mandate and Professional Liability Insurance Program

20. Although the Law Society does not have a statutory *obligation* to operate a professional liability insurance program, section 30(2) provides that "[t]he benchers may establish, administer, maintain and operate a professional liability insurance program" and that they may set fees and use the fees collected for that purpose. The LPA also requires the benchers to make rules that require lawyers to have professional liability insurance. In fact, as enabled by section 30(2), the Law Society does operate a professional liability insurance program. The Law Society's practicing member lawyers are required to obtain their professional liability insurance from the Law Society and to pay the Law Society an insurance fee.

21. The Law Society's professional liability insurance program is operated by the Lawyers Insurance Fund (LIF), a department within the Law Society. In this program LIF staff lawyers function as claims examiners and, in many cases, as legal counsel to the lawyers who are or may be subject to negligence claims. Also in many cases, insurance litigation lawyers from outside the Law Society are retained to act as legal counsel to the lawyers subject to claims. In such cases, an LIF staff lawyer continues to act in the capacity of a claims examiner and is responsible for instructing the outside counsel retained to defend against the claim.

22. Described in broad outline only, the maintenance of a professional liability insurance program is not apparently inconsistent with the Law Society's statutory mandate. By enabling the creation and maintenance of such a program, the LPA does not speak to operational details, such as whether Law Society employees will perform the claims handling function or will provide insured lawyers with legal advice relating to claims against them.

3. Public Interest Advantages to an In-House Liability Insurance Program

23. When considered at the level of description set out in the LPA, a Law Society-administered professional liability insurance program has potential public interest advantages over a "for-profit" alternative provider. One obvious advantage is that an efficiently operated Law Society program does not need to incorporate a profit-margin into premiums. The immediate effect should be less onerous insurance costs and no need for lawyers to pass along an additional profit expense to their clients through higher billing rates. At the margin, relatively lower insurance costs may make some law practices more viable and attractive to lawyers who provide services in areas where there are no comparable alternatives. Thus, relatively modest liability insurance costs have an immediate access to legal services benefit that is very much in the public interest.

24. A second public interest benefit is represented by the fact that the Law Society is in a position to ensure that insurance is available and at relatively stable rates. If the provision of the required insurance were left in private or for-profit hands, there is always the possibility that short-term market forces or company-specific financial issues might make insurance costs extremely volatile, or even make the required insurance unavailable for limited periods of time. Such possibilities could have a disastrous impact on the provision of legal services and the proper functioning of the administration of justice. However, as a regulatory agency created by statute, the Law Society's existence and involvement with the legal profession is part of the foundation of the administration of justice in British Columbia. When setting professional liability insurance premiums, it can be guided by the public interest in affordable legal services and in the long-term stability of the insurance program itself. There is no risk of the Law Society's being enticed away to more profitable markets because, on one hand, it is not seeking financial profit and, on the other, it has no capacity to leave the province or to separate itself from its public interest mandate. In these ways, the Law Society is well positioned to be able to ensure that the required insurance coverage continues to be available to qualified lawyers.

25. A further public interest benefit may be found in the ability of the Law Society to bring some amount of public interest concern to bear on the policy decisions that set the guidelines for claims management within LIF. The full extent of this point can be difficult to illustrate effectively. On one hand, the claims handling process involves making decisions about when liability ought to be contested, what litigation tactics ought to be employed, when the quantification of compensable loss should be questioned, and how strenuously. A public interest focused regulatory body such as the Law Society can ensure that litigation procedures are not used to take unfair advantage of claimants and that claimants are treated with courtesy and respect. As a result, the Law Society may approach some of these decisions in a different manner than a profit-motivated private insurance company would.

26. On the other hand, any insurance provider, including the Law Society, owes a duty of utmost good faith to act in the best interests of the insured, in accordance with the terms of the insurance policy and on the available facts. In other words, strictly speaking, the Law Society's orientation to achieving broader public interest benefits can never be allowed to compromise its duty of utmost good faith to the insured in any given case.

27. The Law Society's co-existing responsibilities (acting in accordance with a public interest mandate versus meeting the insurer's duty of utmost good faith to the insured) have quite different characteristics. The mandate to uphold and protect the public interest in the administration of justice is imposed by statute. It is sufficiently broad that deciding how it applies in a given situation may require significant interpretation. If it is viewed as a duty, it is not a duty to act in the best interests of any particular individual, though it may call for action that happens to be in some individuals' best interests. On the other hand, the duty to the insured is a duty to a specific person in each case. That duty is accepted by the Law Society in choosing to operate its insurance program, rather than having it imposed by statute. The duty is assumed and discharged by LIF staff, as part and parcel of the Law Society's assumption of the role of insurer and manager of professional liability claims.

28. Any duty to act in the best interests of a given individual cannot be identical to a duty to uphold and protect the public interest in the administration of justice, even if in some cases actions taken in fulfillment of those duties may be consistent or overlapping. Consequently, in establishing and operating a professional liability insurance program, the Law Society has taken on a responsibility that has a potential to be in tension with its statutory mandate. In view of the evident public interest benefits of a Law Society-operated professional liability insurance program, it may be quite legitimate to posit that

those benefits could simply outweigh any potential tensions arising between the Law Society's co-existing responsibilities.

4. A Divergence of Duties and Consequences of Some Concern

29. The Committee has observed that there is a divergence of duties between the Law Society as a regulator of lawyers on one hand, and the Law Society as an insurer of lawyers on the other. In addition to its public interest duties, as an insurer handling insurance claims against lawyers, the Law Society has a duty to those who are insured – lawyers. Because the Law Society may be handling a regulatory investigation or hearing regarding a lawyer's conduct, while providing or supervising the lawyer's defence on an insurance claim arising from the same facts, the Committee is concerned that the Law Society's duties may come into conflict and that the perception of this tension could raise public concern about whether the Law Society might be preferring one duty over the other.

30. In the course of its examination, the Committee considered a number of operational scenarios and observations that it views as manifestations or consequences of the underlying divergence of duties. Some of these scenarios were based on historical examples and some were identified merely as potential risks inherent in the Law Society's present structure and co-existing responsibilities. While some of these scenarios and observations did not concern every member of the Committee, each was identified as a matter of concern to one or more members of the Committee or as a potential basis for a negative public perception, that is, a perception that the Law Society's attention to its duties to insured lawyers might be detracting from its regulation of the profession in the public interest. These examples, reproduced in brief description, are intended to illustrate the basis for the Committee's concern, the scope of that concern, and the significance of the underlying issue for the Law Society. This set of examples should also be regarded as a suggestion of appropriate targets, to guide corrective action, should the Benchers conclude that such action is warranted after a full consideration of this Report.

a. Maintaining contrary positions in parallel proceedings

31. In contemporaneous disciplinary proceedings and insurance litigation, discipline counsel and counsel retained by the Law Society to defend the insured lawyer may need to take contradictory positions on the facts from which both proceedings arise. For example: there may be a dispute as to whether the lawyer received clear instructions from a client. In accordance with the citation directed by the Discipline Committee, discipline counsel may be required to argue, and a panel may find, that clear instructions were provided but

not heeded by the lawyer. At the same time, in the parallel negligence action, insurance defence counsel may be duty-bound to argue that no clear instructions were received by the defendant lawyer.

b. Discouraging admissions or apologies

32. In the course of a complaint investigation Law Society regulatory staff may seek to obtain relevant admissions regarding the conduct of the subject lawyer or even an apology from the lawyer in order to further the investigation, confirm appropriate remediation, or assist in the resolution of the complaint. It is foreseeable that the lawyer's defence counsel in a related insurance matter may be concerned that such communications could be detrimental to the lawyer's legal defence and may advise the lawyer to refrain from making admissions or apologies where a defence risk is perceived. While such advice may be good counsel from an insurance defence perspective, it may be perceived as unseemly that it should come from an agent of the same regulatory authority that is conducting the complaint investigation, regardless of whether that agent is an LIF staff lawyer or outside counsel retained by the Law Society for the purpose of defending in the insurance claim.

c. Influencing complaint investigation responses

33. Closely related to the theme addressed above is any extent of influence by insurance defence counsel upon the answers or explanations provided by the lawyer in response to a complaint investigation. In the course of a complaint investigation, the lawyer's response to the complaint is communicated, in summary or verbatim, to the complainant. In many cases the lawyer's response is a very important communication, as it often delineates facts in dispute and contentious issues and interpretations. The lawyer's response often shapes the course of subsequent investigation and in some cases it may be taken to fully answer and effectively resolve the complaint. Many lawyers subject to complaints would do well to obtain the advice of experienced counsel in preparing their responses in the investigation. However, there may be an unseemly appearance where the lawyer's response has been edited, vetted, or otherwise influenced by an agent of the Law Society, retained to defend the lawyer in a legal action arising from the same circumstances as the complaint, and who must give priority to the duty of utmost good faith to the lawyer in that regard. Particularly to a member of the public who may be dissatisfied with the outcome of the investigation and who has no means of confirming that nothing inappropriate occurred in communications beyond his view, the inference that the regulator stacked the deck in favour of its registrant may be too compelling to resist.

d. Insurance defence processes that may affect timely regulatory investigations

34. The Committee is concerned that, occasionally, good insurance defence counsel may employ completely valid litigation strategies, such seeking abeyances of regulatory investigations for litigation purposes, determining not to produce documents where relevance is in issue, or taking other steps that result in delays in the Law Society's parallel complaint investigation. Once again, while exactly the same steps might be taken by insurance defence counsel if the Law Society had no role in evaluating and defending the insurance claim, when such steps are taken by an agent of the Law Society on behalf of the subject lawyer, there is a potentially unseemly appearance that may be difficult to effectively dispel.

e. Lack of transparency to the separation of the functions

35. While measures taken toward effective separation of the regulatory and insurance functions at the operational level may be apparent to Law Society staff, they may be invisible to members of the public, the media, government, and even to lawyers who have dealings with various Law Society departments. It may be impossible to completely eliminate the potential for an individual complainant, insurance claimant, or even a lawyer, to be confused as to the effective separation of the Law Society's co-existing responsibilities and functions. However, reports of confidential materials being received by the wrong department and reports of individuals assuming that confidential communications with one department are immediately available to all Law Society departments are troubling. Similarly, the committee is troubled by reports of complainants remaining confused at the point of a disciplinary hearing, as to whether the loyalties of the Law Society's discipline counsel may be divided as a result of the Society's relationship with the insured lawyer and its acting against the same complainant in a parallel insurance action. Public perception is important in regard to the Law Society's ability to meet each of its coexisting responsibilities without sacrificing others. Consequently, the Committee is concerned that outside observers who want to take the time to understand the separation of functions within the Law Society should be able to do so. The Committee is also concerned that the Law Society's public appearance should make manifest its relevant operational separations rather than enable confusion as to their existence.

f. Appropriate use of statutory authority

36. The Law Society's Chief Legal Officer drew the Committee's attention to the issue of whether the use of the Law Society's regulatory powers should be more carefully

restricted to the protection the public interest. It was noted that a lawyer's required compliance with terms of the insurance contract has been incorporated into the Code of Professional Conduct (and previously was addressed in the Professional Conduct Handbook). More particularly then, the question was raised as to whether the taking of disciplinary action in response to failures to report insurance claims would be an appropriate use of the Law Society's regulatory authority.

g. Apparent consequences of the use of statutory authority

37. What appearances may follow on the use of the Law Society's regulatory authority, particularly from the perspective of a complainant who is also a plaintiff in a negligence action against the lawyer? To such a complainant it may appear unfair or unseemly if information first provided by the complainant to the Law Society in the conduct investigation is subsequently marshaled in the lawyer's defence in the negligence action. There may in fact be nothing inappropriate occurring in such a situation. However, to the complainant the Law Society may appear to be "on the lawyer's side" in such circumstances. Stated most generally, it may create an unseemly appearance if the regulatory and disciplinary authority and processes of the Law Society are used for the benefit of an individual lawyer in the context of a legal action to which the Law Society is not a party.

h. Apparent access fuels a potential perception issue

38. Even where insurance department staff may not avail themselves of regulatory department information about specific individuals, either routinely or ever, the fact that they have access to the location of the information (either the physical location or the electronic location) may encourage the perception that they can and do, in certain cases, use the information. The Committee's view is that in responding to such concerns when raised, it is more effective to answer that the staff in question have no access than to explain that while they do have access they do not generally make use of it.

i. The withholding of any information from the regulatory departments should be minimal and necessary

39. As the insurance function is fulfilled by a department of the Law Society, attention should be given to the question of how much of the information gathered by LIF must be kept confidential from the regulatory departments in order to meet the insurer's duties to the insured, so as to ensure that the regulatory departments have access to as much of the Law Society's information as possible, even where the potential utility of the information to the

regulatory departments may not be immediately apparent. The availability of specific information for regulatory purposes could be addressed in the terms of the liability insurance policy. While some insurance file information may need to be kept confidential from the regulatory departments in order to fulfill the insurer's duties to the insured, it is important that any resulting impairment of access by the regulatory departments is kept to a minimum, in order for the Law Society to best meet its regulatory responsibilities. It is also important for the Law Society to be able to respond most effectively in the event that issues of public perception arise.

j. Regulatory staff's silence about potential insurance claims

40. Complainants or other members of the public whom regulatory staff may encounter in the course of a complaint investigation may need guidance or prompting to mitigate or forestall any loss suffered as a result of interactions with the lawyer subject to investigation. Investigating staff are usually lawyers and may have insight into whether the recommendation of legal advice would be appropriate. If the investigating staff person is of the opinion that it would be reasonable and potentially important for the member of the public to seek legal advice, then remaining silent on the point may amount to a failure to best fulfill the Law Society's public interest mandate. Further, to the extent that the silence may be motivated, or perceived to be motivated, by the Law Society's role as insurer or by a duty to the insured lawyer, then it may appear that the Law Society's insurance function is being preferred to its public interest mandate in the context of a regulatory investigation. The Committee's view is that investigating regulatory staff ought to be enabled and guided by a clearly stated policy that in applicable circumstances it may be appropriate to raise the possibility of a negligence claim with a member of the public and to recommend obtaining timely legal advice in the same regard.

5. Evaluating Claims, Defending Lawyers and Confidential Information Regarding Lawyers' Conduct

41. In cases where the same set of circumstances gives rise to both a negligence action and a professional conduct complaint against the same lawyer, the plaintiff in the legal action and the complainant who has brought the professional conduct complaint may be the same person. With respect to the negligence action, Law Society staff lawyers involved in the claims examining and insurance defense processes receive confidential and privileged information directly from the lawyer and from any outside legal counsel who may be retained to act in the lawyer's defence. In order to meet the duty of utmost good faith and the entailed duty of confidentiality to the defendant lawyer, any information received by

the Law Society in the reporting, evaluating and defending of the insurance claim must be kept confidential and must not be used for any other purpose. Consequently, the Law Society has a longstanding operational policy that restricts access to LIF claims files to LIF staff. With limited exceptions, such as cases where there is evidence of misappropriation or other criminal activity, information residing in LIF claims files is not made available to other Law Society staff who may be investigating the professional conduct complaint against the same lawyer, notwithstanding the potential relevance of the claims file information to the complaint investigation.

42. Such dual activity situations illustrate the tension that sometimes arises between the Law Society's co-existing responsibilities. In terms of the roles it must assume, the Law Society is simultaneously defending the lawyer against the negligence claim and investigating the lawyer's conduct, potentially even pursuing a citation against the lawyer in a regulatory hearing. These roles may not be directly inconsistent. In a regulatory proceeding, the Law Society is not acting in the personal interest of a complainant. The Law Society's submissions may have an adversarial appearance in relation to those of the respondent lawyer. However, the Law Society's objective is a just and fair regulatory result in the public interest, which does not necessarily equate to the harshest penalty it could recommend to the hearing panel. That said, in discharging its regulatory responsibilities, the Law Society may well be seeking a fine, a suspension, or even disbarment of a lawyer, as the appropriate result in the public interest.

43. However, consider the confidentiality of the information received by Law Society staff in the process of handling the insurance claim. In a situation where that information would be relevant to a disciplinary proceeding, were it to be available for that purpose, the Law Society is in a position of having relevant information but refusing to consider it with respect to the discharge of the statutory duties to ensure the integrity and honour of lawyers and to regulate the practice of law in the public interest. A similar circumstance can occur where LIF staff receives information in respect of a number of claims against a lawyer, information that would raise sufficient concern to cause a professional conduct investigation, if it were known by the Law Society's regulatory staff. If no professional conduct complaints have been received to alert the regulatory staff to the issue, and if LIF staff are bound by a duty of confidentiality not to share the information with the regulatory departments, then the Law Society may be in the position of having information that ought to trigger an investigation, while its investigations staff have no way of knowing that they ought to be investigating. In this situation is the Law Society's duty to the individual lawyer effectively trumping its statutory regulatory responsibilities?

44. Does the Law Society have a duty to make use of all relevant information in its possession in the discharge of its statutory obligations? Rule 3-4 appears to be consistent with the contention that it does, at least in the case of information relating to possible misconduct, as follows:

> ***Consideration of complaints and other information***
>
> **3-4** (1) The Executive Director must consider every complaint received under Rule 3-2.
>
> (2) Information received from any source that indicates that a lawyer's conduct may constitute a discipline violation must be treated as a complaint under these Rules.
> [heading and (2) amended 09/1999]

45. If the Law Society has such a duty to make use of all relevant information in its possession in the execution of its regulatory functions, then the segregation and exclusion of information provided to LIF does not merely illustrate a tension in the Law Society's coexisting responsibilities; it marks both a conflict between the Law Society's duties and an apparent preference of the assumed duty of utmost good faith to the insured lawyer over the statutory duty to regulate the profession in the public interest. On the other hand, not all may agree that the Law Society has a duty to use all of the relevant information in its control in fulfilling its responsibility to regulate the profession, in which case even the confidential information issue may be viewed as a mere tension, rather than a conflict.[1] The Committee is concerned, in either case, that the conflict or tension inherent in this restricted use of information within the Law Society has the potential to undermine the public confidence in the Society's ability to regulate the legal profession in the public interest.

46. An aspect of concern to the Committee is the matter of public perception. Would members of the public, and members of the media that informs the public, find it unacceptable that the only authority capable of disciplining lawyers should receive information regarding a lawyer's conduct and then refuse to consider its potential regulatory significance? Arguments to the contrary aside, would the Law Society *be perceived as* placing its duty to preserve the confidentiality of the lawyer's information ahead of its responsibility to regulate the conduct of the lawyer? Is the potential for such a

[1] Information provided to Law Society Practice Advisors in communications from lawyers seeking ethical and professional advice is also kept confidential and is not available to other personnel within the Law Society. In view of the fact that neither confidential insurance information nor confidential practice advice communications are routinely treated as potential "complaints," one might argue that an amendment to Rule 3-4(2) should be considered.

perception effectively countered by an accounting of the public interest benefits to be gained from the Law Society's maintenance and operation of a professional liability insurance program? The complexity of the explanation may compromise its effectiveness in a battle for public perception and acceptance. At the same time, there would likely be a need to explain *why* it is necessary for the Law Society to handle the claims information, in order to create each of the public interest benefits that may weigh in favour of having a Law Society-based professional liability insurance program. Would it not be possible for the same public interest benefits to be obtained without the necessity of dividing the Law Society's loyalties? Could a re-structuring or re-assignment of the claims management and insurance defence functions resolve or diminish the tension that may be perceived as calling into question the motives of the regulatory authority?

47. It is open to observe in response that moving the claims handling and insurance defence functions outside of the Law Society would not increase the information available in the context of a professional conduct investigation. Exactly the same information would likely be conveyed to those charged with the claims and defence responsibilities. The same information that would previously have been withheld from the Law Society's regulatory departments would now be withheld from the Law Society as a whole. Thus there would be no investigative improvement or gain in the shift. The gain would merely be in the ability of the Law Society to maintain a more cohesive focus in the pursuit of its regulatory function and the execution of its statutory responsibilities. There would be no potential issue about the propriety of a regulatory body withholding from itself potentially relevant information. The gain would be that when insurance defence counsel cautions a client lawyer about the dangers of being too forthcoming with information in a professional conduct investigation, and cautions of the propensity for claimants to use such investigations as an alternative avenue of discovery, it would not be a Law Society staff lawyer (nor counsel retained and instructed by the Law Society) who might be taken as suggesting that his client be less than fully and immediately candid with a Law Society investigator. It is almost certain that the same cautions would be provided by any reasonably knowledgeable outside claims adjuster or outside counsel in assuming the roles currently handled by LIF staff lawyers. However, there would be no question of whether *the Law Society* might be effectively frustrating its own investigative and disciplinary responsibilities in order to meet its insurance defence duties to individual lawyers. To the extent that the Law Society would not assume those duties to individual lawyers at the outset, there could be no question as to whether the Law Society may have gone too far in the satisfaction of those duties, at the expense of its statutory obligation to regulate the profession in the public interest.

CONCLUSION

48. In accordance with its mandate, the Committee has addressed itself to the task identified under Initiative 1-1(b) of the Strategic Plan: to examine the relationship between the Law Society as the regulator of lawyers and the Law Society as the insurer of lawyers. Through its investigation to date, the Committee has concluded that the Law Society's dual roles as regulator and insurer give rise to a significant tension between its co-existing responsibilities. In the Committee's view the manifestations of this tension are problematic, in part because they may support a perception that the Law Society may be compromising its statutory mandate in order to meet its assumed duties to insured lawyers.

49. Quite apart from express statutory obligations that are imposed upon the Law Society, the Law Society may assume additional responsibilities in furtherance of its efforts to fulfill its statutory mandate. Ideally such duties will be consistent with the Law Society's statutory obligations and not in tension or in conflict with them. Where the fulfillment of an assumed duty might prevent or diminish the fulfillment of a statutory obligation, the assumption of the duty may have created a conflict of duties. If one is of the view that the Law Society, when regulating the practice of law, has a duty to use all of the relevant information it possesses, then one would likely view the Law Society's assumption of the insurer's duty of utmost good faith to the insured, and the duty of confidentiality that flows from it, as creating such a conflict. Even if one views the segregating of information for a particular purpose as not implying a conflict, one may yet be concerned about the potential for a negative perception developing in the mind of the public as a result of the Society's divergent duties.

50. In short, the conclusions of the Committee are that the Law Society's co-existing responsibilities as both regulator and insurer of lawyers are in tension, that the tension is problematic, and that appropriate corrective measures should be developed. The Committee has also concluded that there remains much work to be done before the Benchers would be sufficiently well informed on the specifics of any proposed corrective measures to enable an adequate evaluation and determination.

51. The Committee has considered a range of potential courses the Law Society might follow in response to the identified concerns, though of necessity these options have been conceived of in broad strokes only. At one end of this range would be the maintenance of the *status quo*: no change to the current set of functions and operations. At the other extreme would be the Law Society's complete withdrawal from the professional liability insurance function: a return of the role of insurer to commercial interests. The Committee

rejects both of these extremes. The Committee's view that the identified concerns warrant the development of appropriate corrective measures is a rejection of the idea that the *status quo* is completely satisfactory. At the same time, the Committee is concerned that the Law Society's complete withdrawal from the professional liability insurance arena would come at the cost of the significant public interest benefits that may be derived from its continued participation.

52. Between the rejected extremes there remains a broad range of potential responses, depending on which measures and how many measures may be included in a proposal. For illustration's sake, one may consider measures such as:

- increasing the indicia of apparent separation for LIF, such as a separate brand, logo, email address format, telephone network and reception desk;
- the physical separation of LIF from the rest of the Law Society by a move to a different location;
- a more significant restriction on LIF staff's access to information gathered in the Law Society's regulatory capacity, such that there would be no appearance of potential advantage for the insured lawyer from the insurance claimant's cooperation with the Law Society's regulatory investigation;
- an additional rule or rules to clarify that a lawyer's obligation to respond in a conduct investigation is not diminished or compromised by the lawyer's position as an insured; and
- the corporate separation of LIF from the rest of the Law Society, to address any concern of conflicting duties by placing them in the hands of separate legal persons, in addition to any other methods of separation that may be brought to bear.

53. Neither these measures nor any like them are specifically recommended at this time because the operational impact of such steps needs to be considered in the preparation of any proposal. Any propensity for individual measures to do more harm than good must be evaluated. There may be significant expenses associated with specific measures. The Committee has not been in a position to investigate, for example, such costs such as may attend the relocation of personnel or any amount of organizational restructuring. In addition, the Committee has observed that some of the more significant changes that could be considered may call for a preliminary evaluation from a corporate management consultant or for legal opinions regarding corporate law, tax or employment obligations.

While this kind of evaluation may be essential to further steps in the direction of addressing the issues of concern to the Committee, thus far it has been beyond the scope of the Committee's examination of those issues. It is reasonable to expect some cost related to obtaining such expert advice as may be necessary for the evaluation of specific solution options. However, it may be possible to assess the merits of some potential solutions in advance of any decision to incur the cost of expert advice.

54. Having concluded that it has identified a problem that warrants correction, the Committee has concluded that a Working Group including Benchers and Law Society staff should be directed to develop two alternative proposal sets to be brought to the Benchers for debate in the future. The Working Group may be guided in the process of crafting the proposals by the concerns identified in this report and, if useful, by future consultation with the Committee. The Benchers' future debate may be similarly informed by this report. Thus, the Committee envisions the proposals being brought to the Benchers for debate focusing significantly on the extent to which the proposals provide solutions to the identified concerns, as well as on their practicability and anticipated cost.

55. The "Subsequent Steps" section below provides further guidance on the development of solution options for future debate.

SUBSEQUENT STEPS: SOLUTION OPTIONS

56. The Committee has considered a range of potential solution options for further development to address the issues raised in analysis of the problem being addressed.

57. Some of the potential options were rejected reasonably quickly.

58. For example, one available option would be to make no changes, to simply carry on the operation of the insurance program as a department of the Law Society as it is currently operated. For the reasons identified earlier in this Report, the Committee has concluded that this is not a recommended option. Having identified a number of concerns or risks with the current structure, the Committee is of the view the *some* action needs to be taken to address the issue.

59. The Committee also considered, but dismissed, an effort limited to enhancing the *appearance* of separation of the insurance and regulatory operations, focusing on the points of interface with the public and with lawyers (such as letterhead, website, email addresses, receptionists, etc.). The Committee agreed that changes to these items would not address the underlying issues with substantive solutions. The result could be worse

than the current standard – it could create the appearance of separation that would be deceptive of the actual relationship. One Committee member summed up the matter as "simply masking a relationship that the public ought to otherwise know exists." The Committee does not believe that the Law Society should engage in any revisions that may be perceived as deceptive.

60. At the other end of the spectrum, the option of leaving the role of insurance provider to the commercial market was deemed unlikely to serve the public interest. In particular, profit-motivated insurance companies would not have the same motivation to continue public interest-informed claims-handling policies. In addition, there would be a substantial risk of increased premiums adding to lawyers' overhead costs and, ultimately, contributing to increased legal expense for members of the public. In effect, a move to private insurance providers would carry a risk of decreasing public access to legal services.

61. In the end the Committee supports the further consideration and development of two options. The two options should be measured by the extent to which they would be a reasonably practical solution in the public interest and by the extent to which they would provide substantive solutions to the various concerns identified by the Committee. As models of the two options are developed, they may display many similarities but they are distinguishable by a difference in corporate structure, as follows:

    (a) Solution Option 1: Modify LIF's integration as a Law Society department –

62. This option maintains the Lawyers Insurance Fund "in-house" and involves no significant changes to the corporate structure of the Law Society.

63. The development of Option 1 incorporates the challenge of maintaining the existing corporate structure of the Society while envisioning a list of operational policies, protocols, and other changes that will address the concerns of the Committee for matters of both appearance and underlying substance. Thus, while changes may include more indicia of separation between LIF and the rest of the Law Society (e.g. separate letterhead, web presence, telephone numbers, and potentially even location and address, etc.), the relatively cosmetic changes must be "backed up" with sufficient functional and operational separation to address the substance of the motivating concerns.

64. For example, it is foreseeable that, with very limited and well defined exceptions, there would be no sharing of file information between the regulatory departments and the insurance department. Other than the stipulation that LIF will remain a department of the

Law Society and will not have a separate and independent legal existence, the potential for functional and operational change is not limited in advance and such change may be taken as far as it needs to be taken to address such issues as may be addressed in the context of this approach.

65. The development of Option 1 should ultimately provide the benchers with a proposal of steps the Law Society could take to address the concerns identified by the Committee, an explanation of exactly how those steps would address the associated concerns, and a clear description of the limits of the proposal, in terms of any issues that are not substantively addressed in the context of Option 1.

(b) Solution Option 2: Operate LIF as a separate legal entity, in the form of a relatively independent subsidiary of the Law Society –

66. Rather than operating claims management and insurance services through a private, for-profit corporate model, this option envisages instead the creation of a separate, not-for-profit Law Society subsidiary corporation that would handle claims management with a separate board and reporting structure.

67. This option would more clearly separate the Law Society's regulatory function from its responsibilities regarding insurance. In theory it would more effectively remove actual or perceived conflicts because the insurance program would be operated by a separate subsidiary organization. Decisions would, however, need to be made about the board structure of the subsidiary, as the more common the board is to that of the Law Society itself, the less separate the subsidiary would be perceived to be.

68. This option might allow the maintenance of a sufficient connection in the corporate structures of the insurance program and the Law Society to ensure the Law Society's continued ability to substantially impact and address claims-handling policies at the highest, policy, level in order to ensure continued guidance by the public interest in the execution of LIF's corporate responsibilities. On the other hand, the Committee envisions this option as promising a sufficient, legal, separation between the insurance program and the Law society itself, such that there would be no basis for imputing any knowledge of LIF's file information to the Law Society and such that the Law Society may focus on regulatory matters without concern for a duty of utmost good faith to an insured party.

RECOMMENDATIONS

69. As the development of the two proposals the Committee envisions remains a significant task, the Committee now makes the following ***recommendations***:

    1. That the Benchers first determine whether they agree with the Committee's conclusion that the tension and propensity for conflict between the Law Society's co-existing responsibilities as regulator and insurer of lawyers warrants corrective action; and

    2. If the Benchers share the Committee's concerns, that a working group, consisting of Benchers and Law Society staff, be created to undertake, in the light of this Report, a detailed examination and analysis of the two options to form the basis for future debate by the Benchers.

70. By following this recommended course, the Committee believes that the Law Society's ability to manage its co-existing responsibilities can be substantially improved, while preserving existing public interest benefits that result from the Law Society's fulfillment of both its regulatory and insurance functions.

The Law Society of British Columbia

Memo

To: Benchers
From: Robyn Crisanti
Date: March 26, 2013
Subject: For information only: Bencher participation in Law Society Speakers Bureau

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The Law Society's Speakers Bureau was launched in 2012 and so far has included only staff speakers. At the request of some Benchers, the program is now being expanded beyond staff to include Benchers who would like to speak publicly on behalf of the Law Society, either to lawyers or the general public.

In addition, regardless of whether Benchers are registered Law Society speakers, we wish to capture all instances of Benchers speaking publicly so that overall outreach efforts can be reported annually.

This memo outlines the suggested related processes.

Process to be a Law Society Speaker

1. Advise Communications, who will add you to the online roster of Law Society speakers and clarify the topics on which you wish to speak.

2. As requests come in, you will be contacted by Communications as appropriate (given the topic and geographical area) to gauge your level of interest.

3. If you agree to take on a particular speaking engagement, you will be put in contact with the event organizer to determine the particulars.

4. If you require speaking notes, they will be provided by Communications.

Process to report your speaking engagements

To ensure any public speaking you do is included in the annual Speakers Bureau report, please forward the following information to Communications:

- Name of audience group

- Date of presentation
- Approximate size of audience
- Topic of presentation

The report of all public speaking activity will be written shortly after year end on an annual basis.

BRITISH COLUMBIA

APR - 9 2013

Mr. Tim McGee
Chief Executive Officer
Law Society of British Columbia
845 Cambie Street
Vancouver BC V6B 4Z9

Dear Mr. McGee: Tim:

I am writing to express my appreciation for your support of and involvement with the inaugural Justice Summit. This was made at significant personal cost, as well, I understand, which demonstrates your true commitment to justice reform. I understand that you also dedicated many hours to the Steering Committee, in addition to your work as emcee at both the Summit and BC Justice Leaders Dinner.

The Justice Summit, as you know, is the start of what I hope will be an enduring dialogue between leaders from across the sector. One of the important functions of an emcee is to set the right tone for an event, and you did this so well. It helped to establish a collaborative discussion between the participants.

I am advised by ministry staff that the Justice Summit report is being drafted and will be provided to all participants for input before it is finalized. I understand it will be circulated to the Summit Steering Committee in early April.

Again, thank you for your support of both events.

Sincerely,

Shirley Bond

Shirley Bond
Minister of Justice
and Attorney General

pc: Mr. Art Vertlieb, Q.C.
Mr. Jay Chalke, Q.C.

Thank you for your leadership on the Justice Summit.

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