The Law Society of British Columbia

Agenda

Benchers

Date: Saturday, May 9, 2015

Time: **7:30 am** Hot breakfast
8:30 am Call to order

Location: Salon A, Sun Peaks Grand Hotel & Conference Centre

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. Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Renee Collins Goult) prior to the meeting.

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
1	Consent Agenda	1	President		
	• Minutes of April 10, 2015 meeting (regular session)			Tab 1.1	Approval
	• Minutes of April 10, 2015 meeting (*in camera* session)			Tab 1.2	Approval
	• Amendment to Rules: Accounting Designations			Tab 1.3	Approval
	• Ratification of the Law Society Scholarship Recipient			Tab 1.4	Approval
	• Ratification of the Aboriginal Scholarship Recipient			Tab 1.5	Approval
	• Approval of CanLII Fee			Tab 1.6	Approval

The Law Society of British Columbia

Agenda

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
DISCUSSION/DECISION					
2	2015 First Quarter Financial Report	15	Peter Lloyd, FCA & CFO	Tab 2	Discussion
3	BC Code Rule 7.1-3: Lawyers' Duty to Report Certain Matters to the Law Society and Implications for Lawyers Assistance Program	10	Herman Van Ommen, QC	Tab 3	Decision
4	Tribunal Program Review Task Force	45	President	Tab 4	Discussion
GUEST PRESENTATIONS					
5	Update on Federation	15	Jonathan Herman / Thomas G. Conway / Gavin Hume, QC		Presentation
REPORTS					
6	Report on Outstanding Hearing & Review Decisions	5	President	(*To be circulated at the meeting*)	Briefing
7	President's Report	15	President	Oral report (update on key issues)	Briefing
8	CEO's Report	15	CEO	(*To be circulated electronically before the meeting*)	Briefing

The Law Society of British Columbia

Agenda

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
9	2015-2017 Strategic Plan Implementation Update: • Rule of Law and Lawyers Independence Advisory Committee initiative: Public Commentary on Rule of Law Issues	10	President / David Crossin, QC		Briefing
IN CAMERA					
10	*In camera* • Bencher concerns • Other business	20	President/CEO		Discussion/ Decision

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The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Committee
Date: April 13, 2015
Subject: **Accounting designations**

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1. The provincial legislature has now enacted the *Chartered Professional Accountants Act*, SBC 2015, c. 1. The Act thus far remains unproclaimed, but the Act and Rules Committee recommends that the Benchers adopt consequential changes to the Law Society Rules and Law Society Rules 2015, effective on proclamation of the new Act.

2. The Act repeals and consolidates the three Acts dealing with professional accountants (the *Accountants (Certified General) Act*, RSBC 1996, c. 2; the *Accountants (Chartered) Act*, RSBC 1996, c. 3; and the *Accountants (Management) Act*, RSBC 1996, c. 4). Under the new Act, accountants now divided into three groups with separate designations all become "Chartered Professional Accountants" or "CPAs."

3. The Act makes a number of consequential changes, including this amendment to s. 61(8) of the *Legal Profession Act*:

   (8) The accounts of the [Law] foundation must be audited annually by a chartered professional accountant ~~or certified general accountant~~ appointed for that purpose by the board.

4. There are a number of similar references to accountant designations in the Law Society Rules, which need to be changed in accordance with the new legislation. Most of these are in relation to auditors of the books of the Law Society itself or of law firms.

5. I attach a draft of changes intended to accommodate the legislative changes. Since not all CPAs are qualified to conduct audits, the Committee recommends defining the term "qualified CPA" as those with the appropriate designation who are permitted by the new

regulatory body to conduct audits. That has the result of simplifying some of the substantive provisions.

6. Section 12 of the *Legal Profession Act* restricts the Benchers' ability to amend certain rules, including Rule 1-8, 1-10 in the Law Society Rules 2015 *[Auditors]*, which will be affected by the new accounting designation. Amendment of that rule requires the approval of members voting in a general meeting or a referendum. The Committee recommends that the Benchers adopt the proposed amendment effective on the approval of the members at the Annual General Meeting in October 2015, subject to proclamation of the legislation.

7. I attach suggested resolutions to give effect to the Committee's recommendations.

Attachments: draft amendments
suggested resolutions

JGH

LAW SOCIETY RULES

[Highlighted amendments subject to approval at AGM]

Definitions

1 In these Rules, unless the context indicates otherwise:

"qualified CPA" means a person in public accounting practice who is permitted to perform audit engagements by the Organization of Chartered Professional Accountants of British Columbia;

PART 1 – ORGANIZATION

Division 1 – Law Society

Meetings

Auditors

1-8 (1) At each annual general meeting, the members of the Society must appoint an auditor.

(2) The auditor appointed under subrule (1) must be a ~~chartered accountant or a certified general accountant~~qualified CPA.

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other Client Property

Failure to file trust report

3-74.1 (5) If a lawyer has not delivered a trust report after it is required, the Executive Director may do either or both of the following:

(a) engage or assign a qualified ~~accountant~~ CPA to complete the trust report;

(b) order an examination of the lawyer's books, records and accounts under Rule 3-79.

Report of accountant when required

3-75 (1) The Executive Director may require a lawyer who is required to deliver a trust report under Rule 3-72 or a lawyer or former lawyer who is required to deliver a trust report under Rule 3-78 to deliver as part of the report required under the relevant Rule, an accountant's report completed and signed by a ~~person in public accounting practice who is permitted to perform audit engagements by~~ qualified CPA.

~~(a) the Institute of Chartered Accountants of British Columbia, or~~

~~(b) the Certified General Accountants Association of British Columbia.~~

Division 11 – Client Identification and Verification

Client identification and verification in non-face-to-face transactions

3-97 (4) For the purpose of subrule (2), a guarantor must be a person engaged in one of the following occupations in Canada:

(k) professional accountant (~~Chartered Accountant, Certified General Accountant, Certified Management Accountant~~Chartered Professional Accountant, Accredited Public Accountant, Public Accountant or Registered Public Accountant);

LAW SOCIETY RULES 2015

RULE 1 -- DEFINITIONS

Definitions

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"qualified CPA" means a person in public accounting practice who is permitted to perform audit engagements by the Organization of Chartered Professional Accountants of British Columbia;

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Division 7 – Trust Accounts and Other Client Property

Failure to file trust report

3-81 (5) If a lawyer has not delivered a trust report after it is required, the Executive Director may do either or both of the following:

(a) engage or assign a qualified ~~accountant~~ CPA to complete the trust report;

(b) order an examination of the lawyer's books, records and accounts under Rule 3-85 *[Compliance audit of books, records and accounts]*.

Accountant's report

3-82 (1) The Executive Director may require a lawyer who is required to deliver a trust report under Rule 3-79 *[Trust report]* or a lawyer or former lawyer who is required to deliver a trust report under Rule 3-84 *[Former lawyers]* to deliver as part of the report required under the relevant rule, an accountant's report completed and signed by a ~~person in public accounting practice who is permitted to perform audit engagements by~~ qualified CPA.

~~(a) the Institute of Chartered Accountants of British Columbia, or~~

~~(b) the Certified General Accountants Association of British Columbia.~~

LAW SOCIETY RULES 2015

Division 11 – Client Identification and Verification

Client identification and verification in non-face-to-face transactions

3-104 (4) For the purpose of subrule (2), a guarantor must be a person engaged in one of the following occupations in Canada:

(k) professional accountant (Chartered Professional Accountant, ~~Certified General Accountant, Certified Management Accountant,~~ Accredited Public Accountant, Public Accountant or Registered Public Accountant);

LAW SOCIETY RULES

[Highlighted amendments subject to approval at AGM]

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1 In these Rules, unless the context indicates otherwise:

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(a) engage or assign a qualified CPA to complete the trust report;

(b) order an examination of the lawyer's books, records and accounts under Rule 3-79.

Report of accountant when required

3-75 (1) The Executive Director may require a lawyer who is required to deliver a trust report under Rule 3-72 or a lawyer or former lawyer who is required to deliver a trust report under Rule 3-78 to deliver as part of the report required under the relevant Rule, an accountant's report completed and signed by a qualified CPA.

LAW SOCIETY RULES

Division 11 – Client Identification and Verification

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LAW SOCIETY RULES 2015

RULE 1 -- DEFINITIONS

Definitions

1 In these rules, unless the context indicates otherwise:

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Division 1 – Law Society

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Auditors

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(2) The auditor appointed under subrule (1) must be a qualified CPA.

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Division 7 – Trust Accounts and Other Client Property

Failure to file trust report

3-81 (5) If a lawyer has not delivered a trust report after it is required, the Executive Director may do either or both of the following:

(a) engage or assign a qualified CPA to complete the trust report;

(b) order an examination of the lawyer's books, records and accounts under Rule 3-85 *[Compliance audit of books, records and accounts]*.

Accountant's report

3-82 (1) The Executive Director may require a lawyer who is required to deliver a trust report under Rule 3-79 *[Trust report]* or a lawyer or former lawyer who is required to deliver a trust report under Rule 3-84 *[Former lawyers]* to deliver as part of the report required under the relevant rule, an accountant's report completed and signed by a qualified CPA.

LAW SOCIETY RULES 2015

Division 11 – Client Identification and Verification

Client identification and verification in non-face-to-face transactions

3-104 (4) For the purpose of subrule (2), a guarantor must be a person engaged in one of the following occupations in Canada:

(k) professional accountant (Chartered Professional Accountant, Accredited Public Accountant, Public Accountant or Registered Public Accountant);

SUGGESTED RULE AMENDMENT RESOLUTIONS— [ACCOUNTANT DESIGNATION]

RESOLUTION 1

BE IT RESOLVED to amend the Law Society Rules, effective on proclamation of Part 5 of the Chartered Professional Accountants Act, SBC 2015, c. 1, as follows:

1. In Rule 1, by inserting the following definition:

"qualified CPA" means a person in public accounting practice who is permitted to perform audit engagements by the Organization of Chartered Professional Accountants of British Columbia;***;***

2. In Rule 3-74.1 (5), by rescinding paragraph (a) and substituting the following:

(a) engage or assign a qualified CPA to complete the trust report;***;***

3. In Rule 3-75, by rescinding subrule (1) and substituting the following:

(1) The Executive Director may require a lawyer who is required to deliver a trust report under Rule 3-72 or a lawyer or former lawyer who is required to deliver a trust report under Rule 3-78 to deliver as part of the report required under the relevant Rule, an accountant's report completed and signed by a qualified CPA.***;***

4. In Rule 3-97(4), by rescinding paragraph (k) and substituting the following:

(k) professional accountant (Chartered Professional Accountant, Accredited Public Accountant, Public Accountant or Registered Public Accountant);**.**

RESOLUTION 2

BE IT RESOLVED to amend the Law Society Rules 2015, effective on proclamation of Part 5 of the Chartered Professional Accountants Act, SBC 2015, c. 1, as follows:

1. In Rule 1 [Definitions], by inserting the following definition:

"qualified CPA" means a person in public accounting practice who is permitted to perform audit engagements by the Organization of Chartered Professional Accountants of British Columbia;***;***

2. In Rule 3-81 (5) [Failure to file trust report], by rescinding paragraph (a) and substituting the following:

(a) engage or assign a qualified CPA to complete the trust report;***;***

3. In Rule 3-82 [Accountant's report], by rescinding subrule (1) and substituting the following:

(1) The Executive Director may require a lawyer who is required to deliver a trust report under Rule 3-79 *[Trust report]* or a lawyer or former lawyer who is required to deliver a trust report under Rule 3-84 *[Former lawyers]* to deliver as part of the report required under the relevant rule, an accountant's report completed and signed by a qualified CPA.***;***

4. In Rule 3-104 (4), by rescinding paragraph (k) and substituting the following:

(k) professional accountant (Chartered Professional Accountant, Accredited Public Accountant, Public Accountant or Registered Public Accountant);**.**

RESOLUTION 3

BE IT RESOLVED

1. To amend the Law Society Rules 2015, effective on proclamation of Part 5 of the Chartered Professional Accountants Act, SBC 2015, c. 1, and subject to approval of the members under section 12 of the Legal Profession Act, by rescinding Rule 1-10 (2) and substituting the following:

(2) The auditor appointed under subrule (1) must be a qualified CPA.***;***

2. To recommend to the 2015 Annual General Meeting the adoption of a resolution authorizing the amendment to be effected by para. 1 of this Resolution.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To: Benchers
From: Lesley Small
Date: April 14, 2015
Subject: **2015 Law Society Scholarship**

The Benchers are asked to ratify the recommendation of the Credentials Committee to award the 2015 Law Society Scholarship to Yun Li-Reilly.

The Law Society Scholarship of $12,000 is offered annually to eligible candidates to encourage and financially assist those candidates in completing graduate studies which will, in turn, ultimately benefit the individual, the province, and the legal profession in British Columbia.

Eligibility

Candidates who are proceeding to a full program of graduate studies in a field of law at a recognized institution are eligible for the Scholarship if they are graduates or graduating students of the University of British Columbia, University of Victoria or Thompson Rivers University law school or, in some other way, can demonstrate a real or substantial connection to British Columbia. Candidates are advised that the Committee will only consider applications from candidates who have outstanding academic and other qualifications.

Guidelines

In addition to examining how the candidate's proposed graduate studies will benefit the individual, the province, and the legal profession in BC, the Committee also takes into consideration:

i) the candidate's academic standing;

ii) the candidate's positive social contributions, such as volunteer work;

iii) whether the candidate intends to practise in BC after their graduate studies;

iv) financial need; and

v) importance or significance of proposed graduate work.

Candidates awarded the Scholarship are required to provide a reporting letter on the use of the Scholarship and a copy of the relevant work.

Documents Required in Support of the Application

Each candidate must apply by letter setting out the details of the candidate's academic career to date and proposed plans for graduate study.

The following must also be submitted with the application:

i) official transcripts of the candidate's academic career; and

ii) one letter of recommendation from the Dean and two letters from professors of the law school the candidate has graduated or will graduate from.

Conditions

Candidates are advised that the Scholarship will not necessarily be offered every year and, when offered, will be awarded only if there is a highly qualified candidate. The Scholarship must be used in the year it is awarded. The recipient may accept and receive other scholarships and awards up to an amount not exceeding the tuition of the graduate program in which the recipient enrolls, or such other amount as the Committee may determine.

Candidates

The Committee resolved to recommend to the Benchers that the $12,000 Law Society Scholarship be awarded to Yun Li-Reilly.

Yun Li-Reilly

Ms. Li-Reilly obtained her law degree from the University of British Columbia in 2011. She clerked with the Court of Appeal of British Columbia and articled with Farris, Vaughan, Wills & Murphy LLP. Ms. Li-Reilly was called on December 20, 2012 and currently practices with Farris.

Ms. Li-Reilly has recently advised that she has been accepted to study in the Harvard Law School LL.M. Program, commencing August, 2015. She advises that her area of interest is the interplay between freedom of expression and protection of privacy. Ms. Li-Reilly wishes to study the effect of the right to be forgotten, recently considered by the Court of Justice of the European Union, on the delicate balance between freedom of expression and privacy protection in the context of court proceedings. She states: "The significance of this research project lies in the exponential growth of the internet and the public's access to endless amounts of information, including those describing the legal affairs of private individuals. The treatment of the right to

be forgotten in Canada and elsewhere in the world may have important consequences for the operation of the legal systems and the welfare of society as a whole."

Attachments

- Application from Yun Li-Reilly.

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The Law Society of British Columbia

Memo

To: Benchers
From: Lesley Small
Date: April 14, 2015
Subject: **2015 Law Society Aboriginal Scholarship**

The Benchers are asked to ratify the recommendation of the Credentials Committee to award the 2015 Law Society Aboriginal Scholarship to Darcy Lindberg.

This is the third year that the Law Society Aboriginal Scholarship has been offered. The Aboriginal Scholarship of $12,000 will be offered annually to eligible Aboriginal candidates to encourage and financially assist those candidates in completing graduate legal studies which will, in turn, ultimately benefit the individual, the province, and the legal profession in British Columbia.

Eligibility

Aboriginal candidates who are proceeding to a full program of graduate studies in a field of law at a recognized institution are eligible for the Scholarship if they are graduates or graduating students of the University of British Columbia, University of Victoria or Thompson Rivers University law schools or, in some other way, can demonstrate a real or substantial connection to British Columbia. Candidates are advised that the Credentials Committee will only consider applications from candidates who have outstanding academic and other qualifications.

Guidelines

In addition to examining how the candidate's proposed graduate studies will benefit the individual, the province, and the legal profession in BC, the Credentials Committee also takes into consideration:

i) the candidate's academic standing;

ii) the candidate's positive social contributions, such as volunteer work;

iii) whether the candidate intends to practise in BC after his or her graduate studies;

iv) financial need; and

v) importance or significance of proposed graduate work.

Candidates awarded the Scholarship are required to provide a reporting letter on the use of the Scholarship and a copy of the relevant work.

Documents Required in Support of the Application

Each candidate must apply by letter setting out the details of the candidate's academic career to date and proposed plans for graduate study.

The following must also be submitted with the application:

i) official transcripts of the candidate's academic career;

ii) one letter of recommendation from the Dean and two letters from professors of the law school the candidate has graduated or will graduate from; and

iii) photocopy of either a status or membership card or formal letter from a recognized organization attesting to Aboriginal identity. Aboriginal refers to First Nations (North American Indian, Status and non-Status), Metis and Inuit.

Conditions

Candidates are advised that the Aboriginal Scholarship will not necessarily be offered every year and, when offered, will be awarded only if there is a highly qualified candidate. The Aboriginal Scholarship must be used in the year it is awarded. The recipient may accept and receive other scholarships and awards up to an amount not exceeding the tuition of the graduate program in which the recipient enrolls, or such other amount as the Credentials Committee may determine.

Recipients

The Credentials Committee resolved to recommend to the Benchers that the $12,000 Aboriginal Scholarship be awarded to **Darcy Lindberg**.

Darcy Colin Lindberg

Mr. Lindberg obtained a law degree from the University of Victoria in 2012. He articled with Davis LLP in Whitehorse and was called in both the Yukon and BC in May 2013. Mr. Lindberg continues to practice with Davis LLP in the Yukon.

Mr. Lindberg has been accepted into the LL.M. program at the University of Victoria commencing September 2015. He proposes that his graduate studies be focused on exploring the normative effects of ceremonial and spiritual practices on informing, preserving and adapting the legal traditions of indigenous communities.

Attachments

- Application from Mr. Lindberg

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The Law Society of British Columbia

Memo

To:	Benchers
From:	Jeanette McPhee, CFO and Director of Trust Regulation
Date:	April 15, 2015
Subject:	2015 CanLII levy – Bencher Approval

BACKGROUND

Pursuant to the CanLII by-laws and the Governance Agreement entered into by all Canadian law societies, the CanLII Board makes an annual recommendation to the Federation Council with respect to the amount of the annual CanLII levy to be charged.

As the annual CanLII levy setting process occurs later than September, when the Law Society of B.C. practice fee is set in September, the CanLII levy (collected on behalf of CanLII through the practice fee) is based on an estimate. The final CanLII levy may be higher, lower or equal to the estimate. The 2015 CanLII levy was estimated at $36.98 per lawyer, which was approved by the Benchers in September 2014.

The CanLII Board has submitted a 2015 levy recommendation in the amount of $38.00 per lawyer, a difference of $1.02 per lawyer. This change in levy will result in a relatively small difference of $12,000 for the 2015 year.

BENCHER RESOLUTION

The following Bencher resolution is proposed:

BE IT RESOLVED that the CanLII 2015 levy be set at $38.00 per lawyer.

Once approved, Gavin Hume, Law Society of BC Federation Council member, will provide approval of the 2015 levy to CanLII.

The Law Society of British Columbia

Quarterly Financial Report

March 31, 2015

Prepared for: Finance & Audit Committee Meeting – April 9, 2015

Bencher Meeting – April 10, 2015

Bencher Meeting – May 9, 2015

Prepared by: Jeanette McPhee, CFO & Director Trust Regulation

Quarterly Financial Report – First Quarter 2015

Attached are the financial results and highlights for the first quarter of 2015.

General Fund

General Fund (excluding capital and TAF)

The General Fund operations resulted in a positive variance of $278,000 to March 31, 2015.

Revenue

Revenue was $5,402,000; $149,000 (3%) ahead of budget, which is due to the timing of revenues received.

Operating Expenses

Operating expenses for the first quarter were $4,935,000; $129,000 (3%) below budget due the timing of expenditures.

2015 Forecast - General Fund (excluding capital and TAF)

While it is still early in the year, we are tracking to budget in the first quarter, but there continues to be pressure in the external counsel fee area.

Operating Revenue

At this time, all revenues are projected at budget. Practicing membership revenue is budgeted at 11,310 members, and PLTC revenue is budgeted at 485 students.

Operating Expenses

At this time, operating expenses are projected at budget but there continues to be pressure on external counsel fees in the professional conduct, discipline, custodianships and credentials departments. We will be closely monitoring any developments in this area.

TAF-related Revenue and Expenses

The first quarter TAF revenue is not received until the April/May time period, so no first quarter TAF revenue is recorded at this time. Trust assurance program costs are under budget $38,000, due to the timing of travel costs.

Special Compensation Fund

The transfer of the Special Compensation Fund reserve is being reviewed and is expected to be transferred in 2015.

Lawyers Insurance Fund

LIF operating revenues were $3.8 million in the first quarter, very close to budget.

LIF operating expenses were $1.4 million, $309,000 below budget. There were staff salary savings of $110,000 due to vacancy savings. Insurance costs are under budget as the stop loss refund from the stop loss insurance policy was received in the first quarter in the amount of $118,000, and was not in the budget.

The market value of the LIF long term investments held by the investment managers is $127 million, an increase of $8 million in the first quarter. The related year to date investment returns were 6.84%, compared to a benchmark of 5.95%.

The sale of the Law Society's interest in the 750 Cambie building closed in the first quarter of 2015, resulting in a gain of $10.7 million. The proceeds have been invested in short term securities pending a final recommendation by the Finance and Audit Committee regarding the asset mix/investment manager structure.

The Law Society of British Columbia

Summary of Financial Highlights - Mar 2015
($000's)

2015 General Fund Results - YTD Mar 2015 (Excluding Capital Allocation & Depreciation)

	Actual*	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	4,327	4,294	33	1%
PLTC and enrolment fees	48	44	4	9%
Electronic filing revenue	185	200	(15)	-8%
Interest income	127	81	46	57%
Other revenue	427	349	78	22%
Building revenue & recoveries	288	285	3	1%
	5,402	5,253	149	3%
Expenses (excl. dep'n)	4,935	5,064	129	3%
Results before spending on reserve items	**467**	**189**	**278**	
Approved spending from Reserves	8	-	8	
	459	189	270	

2015 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2011 Actual	10,564
2012 Actual	10,746
2013 Actual	10,985
2014 Actual	11,114
2015 Budget	11,310
2015 YTD Actual	**11,172**

	Actual Variance
Revenue	
Membership revenue projected to be at budget	-
PLTC revenue projected to be at budget	-
	-
Expenses	
Projected to be at budget for the year	-
	-
2015 General Fund Variance	-

Reserve funded amounts (Bencher approved):	**Approved**	**Spent**
2015 - CBA REAL contribution ($50K approved) - first payment in April	50	-
2015 - Year 2 - Articling student ($58K approved) - to start in May	58	-
2015 - Practice standards program review ($65K approved)	65	5
2014 - Update to on-line courses ($30K remaining unspent)	30	3
2014 - Knowledge Management program set up costs - ($235K approved)	235	-
	438	8

Trust Assurance Program Actual

	2015 Actual	2015 Budget	Variance	% Var
TAF Revenue**	36	-	36	0.0%
Trust Assurance Department	553	591	38	6.4%
Net Trust Assurance Program	(517)	(591)	74	

** Q1 revenue not due until April 30th - small amount relating to Q4, 2014, received after completion of audit

2015 Lawyers Insurance Fund Long Term Investments - YTD Mar 2015 *Before investment management fees*

Performance	6.84%
Benchmark Performance	5.95%

The Law Society of British Columbia
General Fund
Results for the 3 Months ended March 31, 2015
($000's)

	2015 Actual	2015 Budget	$ Var	% Var
Revenue				
Membership fees **(1)**	6,293	6,274		
PLTC and enrolment fees	48	44		
Electronic filing revenue	185	200		
Interest income	127	81		
Other revenue	425	349		
Building Revenue & Recoveries	288	285		
Total Revenues	7,366	7,233	133	1.8%
Expenses				
Regulation	1,770	1,855	85	
Education and Practice	763	692	(71)	
Corporate Services	660	682	22	
Bencher Governance	332	369	37	
Communications and Information Services	474	474	-	
Policy and Legal Services	555	547	(8)	
Occupancy Costs	528	589	61	
Depreciation	79	80	1	
Total Expenses	5,161	5,288	(127)	-2.4%
General Fund Results before TAP	**2,205**	**1,945**	**260**	
Trust Administration Program (TAP)				
TAF revenues	36	-	36	
TAP expenses	553	592	39	7%
TAP Results	**(517)**	**(592)**	**75**	
General Fund Results including TAP	**1,688**	**1,353**	**335**	

(1) Membership fees include capital allocation of $1.97m (YTD capital allocation budget = $1.98m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at March 31, 2015
($000's)

	Mar 31 2015	Dec 31 2014
Assets		
Current assets		
Cash and cash equivalents	134	111
Unclaimed trust funds	1,890	1,781
Accounts receivable and prepaid expenses	1,190	1,494
B.C. Courthouse Library Fund	574	568
Due from Lawyers Insurance Fund	18,672	24,127
	22,460	28,081
Property, plant and equipment		
Cambie Street property	12,786	12,691
Other - net	1,282	1,331
	36,528	42,103
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	4,431	5,671
Liability for unclaimed trust funds	1,890	1,781
Current portion of building loan payable	500	500
Deferred revenue	13,169	18,807
Deferred capital contributions	31	34
B.C. Courthouse Library Grant	574	568
Deposits	31	28
	20,626	27,389
Building loan payable	2,600	3,100
	23,226	30,489
Net assets		
Capital Allocation	3,580	1,841
Unrestricted Net Assets	9,722	9,773
	13,302	11,614
	36,528	42,103

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 3 Months ended March 31, 2015
($000's)

	Invested in capital	*Working Capital*	Unrestricted Net Assets	Trust Assurance	Capital Allocation	2015 Total	2014 Total
	$	$			$	$	$
Net assets - December 31, 2014	10,676	(1,941)	8,735	1,038	1,841	11,614	9,908
Net (deficiency) excess of revenue over expense for the period	(266)	588	322	(517)	1,882	1,688	1,706
Repayment of building loan	500	-	500	-	(500)	-	-
Purchase of capital assets:							-
LSBC Operations	(311)	-	(311)	-	311	-	-
845 Cambie	(45)	-	(45)	-	45	-	-
Net assets - March 31, 2015	10,554	(1,353)	9,201	521	3,580	13,302	11,614

The Law Society of British Columbia
Special Compensation Fund
Results for the 3 Months ended March 31, 2015
($000's)

	2015 Actual	2015 Budget	$ Var	% Var
Revenue				
Annual assessment	-	-		
Recoveries	-	-		
Total Revenues	-	-	-	100.0%
Expenses				
Claims and costs, net of recoveries	-	-		
Administrative and general costs	-	-		
Loan interest expense	(6)	-		
Total Expenses	(6)		(6)	-100.0%
Special Compensation Fund Results	6	-	6	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at March 31, 2015
($000's)

	Mar 31 2015	Dec 31 2014
Assets		
Current assets		
Cash and cash equivalents	1	1
Accounts receivable	-	-
Due from Lawyers Insurance Fund	1,340	1,334
	1,341	1,335
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	-	-
Deferred revenue	-	-
	-	-
Net assets		
Unrestricted net assets	1,341	1,335
	1,341	1,335
	1,341	1,335

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
Results for the 3 Months ended March 31, 2015
($000's)

	2015 $	2014 $
Unrestricted Net assets - December 31, 2014	1,335	1,287
Net excess of revenue over expense for the period	6	48
Unrestricted Net assets - March 31, 2015	1,341	1,335

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 3 Months ended March 31, 2015
($000's)

	2015 Actual	2015 Budget	$ Var	% Var
Revenue				
Annual assessment	3,863	3,786		
Investment income *	18,786	1,652		
Other income	69	70		
Total Revenues	22,718	5,508	17,210	312.5%
Expenses				
Insurance Expense				
Provision for settlement of claims	3,676	3,676		
Salaries and benefits	628	739		
Contribution to program and administrative costs of General Fund	320	349		
Insurance	10	108		
Office	81	110		
Actuaries, consultants and investment brokers' fees	120	131		
Allocated office rent	62	61		
Premium taxes	3	2		
Income taxes	-	-		
	4,900	5,176		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	203	236		
Total Expenses	5,103	5,412	309	5.7%
Lawyers Insurance Fund Results	**17,615**	**96**	**17,519**	

* Investment income includes the gain on the sale of the 750 Cambie Street building, of $10.7m

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at March 31, 2015
($000's)

	Mar 31 2014	Dec 31 2014
Assets		
Cash and cash equivalents	39,200	26,984
Accounts receivable and prepaid expenses	523	745
Due from members	1,211	1,194
General Fund building loan	3,100	3,600
Investments	123,656	126,301
	167,690	158,824
Liabilities		
Accounts payable and accrued liabilities	575	1,755
Deferred revenue	3,424	7,198
Due to General Fund	18,672	24,127
Due to Special Compensation Fund	1,340	1,334
Provision for claims	53,022	51,368
Provision for ULAE	7,231	7,231
	84,264	93,013
Net assets		
Unrestricted net assets	65,926	48,311
Internally restricted net assets	17,500	17,500
	83,426	65,811
	167,690	158,824

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 3 Months ended March 31, 2015
($000's)

	Unrestricted	Internally Restricted	2015 Total	2014 Total
	$	$	$	$
Net assets - December 31, 2014	48,311	17,500	65,811	59,429
Net excess of revenue over expense for the period	17,615	-	17,615	6,382
Net assets - March 31, 2015	65,926	17,500	83,426	65,811

The Law Society of British Columbia

BC CODE RULE 7.1-3: LAWYERS DUTY TO REPORT CERTAIN MATTERS TO THE LAW SOCIETY AND IMPLICATIONS FOR LAWYERS ASSISTANCE PROGRAM

April 10, 2015

Purpose of Report: **Recommendation for Change to BC Code**

Prepared by: **Ethics Committee**

The Law Society of British Columbia

Memo

To: Benchers
From: Ethics Committee
Date: April 10, 2015
Subject: **BC Code Rule 7.1-3: Lawyers' Duty to Report Certain Matters to the Law Society and Implications for Lawyers Assistance Program**

During the past year we have been having discussions with the Executive Director of the Lawyers Assistance Program ("LAP"), Derek Lacroix, QC, concerning the requirement of rule 7.1-3 and its commentary. The rule states:

Rule 7.1-3 states:

7.1-3 Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society:

(a) a shortage of trust monies;

(a.1) a breach of undertaking or trust condition that has not been consented to or waived;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

[1] Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer

should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

[3] Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counseling. Therefore, lawyers acting in the capacity of counselors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counseling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

LAP is concerned about a number of aspects of rule 7.1-3. However, since the rule itself is under review by the Federation Standing Committee on the Model Code, this memo focuses only the last two sentences of commentary [3], statements that LAP finds particularly troublesome. These sentences contemplate that a lawyer providing counseling assistance to another lawyer must report to the Law Society potential misconduct that he or she anticipates may occur in the future. It is LAP's view and ours that requiring lawyers to assess whether or not certain ethical lapses may occur in the future and report them to the Law Society is wholly inappropriate. Not only is it unrealistic to expect lawyers to be able to predict with accuracy whether another lawyer will engage in serious misconduct in the future, the obligation to report the possibility of such future misconduct has a serious potential to undermine the relationship between the counseling lawyer and the lawyer receiving the counseling.

We recommend the deletion of the last two sentences as shown in the attached redraft.

Attachment:

- Redraft of rule 7.1-3, commentary [3] [637844 & 637829]

(781272/2015)

Duty to report

7.1-3 Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society:

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The Law Society of British Columbia

Memo

To: Benchers
From: Ken Walker, QC
Date: April 13, 2015
Subject: **Tribunal Program Review Task Force**

---

1. The Tribunal Program Review Task Force will complete its work and report out to the Benchers with recommendations by the middle of this year. However, I wanted to share with you some of the work that we have done, the issues that we have identified and some of the thoughts that we have had with respect to those issues.

Mandate

2. The Benchers gave the Task Force a mandate to do the following:

   - review the three-year trial period for the new tribunal system
   - recommend changes to improve
   - identify further reforms for Benchers to consider
   - report by end of 2014

Background

3. The Benchers started reviewing the separation issue earlier than 2008. The concept was that total separation of the regulatory function from the adjudicative function was preferred. In 2010 a task force took the 'hybrid" model to the Benchers. Nearly unanimously the Benchers supported this project for a 3-year run ending in 2014. I attach the reports that formed the basis of the Benchers' decision to adopt the current tribunal program.

4. The purpose of separation is greater transparency and removing potential conflicts in duties as much as possible. Nova Scotia and New Brunswick have complete separation of these functions. This means in Nova Scotia and New Brunswick Benchers do not sit on discipline

or credential hearings. Manitoba and Ontario a mixed or hybrid model, which allows Benchers to sit on panels but panels are not required to be populated by Benchers.

5. The focus of the task force has come to be on competent, skilled, trained members. The most important of these is experienced members with the confidence of the public (including lawyers). We need to build experience but allow for renewal.

Process

6. We reviewed the process as it has existed since 2012, including statistics resulting from that activity.

7. We sought and obtained information from other Law Societies and regulatory bodies in BC. I attach a table summarizing the responses.

8. We sought written comments from former Benchers, from Counsel from Law Society and from those appearing for lawyers subject to hearings.

9. We heard from adjudicators participating. This occurred at a dinner/training session on March 4. I attach a transcript of some of the feedback we received from experienced adjudicators introducing themselves at that function.

Issues

10. On review of our three-year project, some issues were identified:

    (a) **The size of each of the pools.** The original task force was concerned that too few people would be a problem and therefore estimated 25 as the 'right' number for each pool. We find that that was wrong. Twenty-five was too many. Over the last three years, most panel members averaged only one or two hearings per year. This resulted in waste and worry. The worry because panellists wished to participate but could not and then worried. Waste because training occurred but the training was not being used.

    The size of the Bencher pool will fluctuate from something as high as 25 to as few as 15 because of conflicts and training. We are thinking that the lawyer and public pools should be reduced to a smaller size that will allow more (but not too many) hearings per pool member per year.

(b) **Three panellists from three different pools.** The mandatory requirement of a panel member from each "pool" (public, lawyer, and bencher) caused scheduling issues and other unexpected problems. Michelle Robertson was restricted to use one person from each pool, which caused on occasion delays, particularly in finding a Bencher to chair each panel. Flexibility is very important. In years past Michelle would email the Bencher group and first 3 to replay were appointed to the hearing panel. This was efficient but perhaps not the "best" method or use of the adjudicators. The new protocol was effective but created a need to use three different lists or the pools. More flexibility is required to allow timely hearings and to avoid administrative nightmares.

We are considering whether the lawyer pool and the lawyer Bencher pool can be combined to allow any two in that large group be two members of the panel. The public member would be the third panellist. This recommendation would be more like Manitoba but not yet like Nova Scotia and New Brunswick.

(c) **Bencher chair.** The mandatory requirement that Benchers be the "chair" created an unforeseen issue. It was expected that the Bencher would always have the experience and thus should be chair. That was so until 2014 when there was a crop of newly-elected Benchers. We then had a situation in which new Benchers were required to "chair" having no earlier experience and only recent training. Fortunately the situation was tempered by having an experienced "winger" to assist with chair duties. Often the winger had experience from hearings from his or her earlier Bencher life. We believe we lucked into a system in which experience was valued.

In the old system new Benchers were added to pools as new wingers. The new Bencher listened and learned on the job (with little training). The experienced Benchers would mentor and assist until new Benchers had experience. This old school system created an experienced capable base of decision makers. Experience in the hearing panel should be mandatory for a leadership role. We also view that the chair should be the most "experienced" and should have at least 5-10 hearings prior to first chairing.

(d) **Mandatory training.** Our review concludes this was very positive. We are leaders here. The Federation of Law Societies is now coordinating a move to standards to achieve what we have done on a national scale.

(e) **Mandatory public participation in the panels.** This is near universally accepted as a very positive development. The public panel members were picked by a neutral third party looking for skills needed for the position including previous (though not legal) decision making experience. This has been very positive. The public panellists applaud the move. They enjoy the experience, including training. They enjoy participating in the decision. Although they expressed some initial skepticism, this was quickly resolved in favour of appreciation. Each of these public participants is now an advocate for our

decision-making process. The Law Society has more individuals educating others about the Law Society mandate and its values.

(f) **Separation of functions.** The degree of separation between the adjudicative and prosecutorial functions of the Law Society has been enhanced by the new configuration of tribunals. While Benchers have provided the steady hand of experienced adjudicators in the past, there is now a sizable group of lawyers and non-lawyers who have had significant hearing experience.

While the President appoints those on the Discipline Committee to consider citations, he or she also populates the panel that will decide the citation. The Executive Director is responsible for the management of the investigation of complaints and prosecution of citations, but also can unilaterally set dates for hearings and exercises discretion on the publication of hearing and review decisions.

In other jurisdictions (Manitoba, Ontario, Nova Scotia) an independent chair of the tribunal fulfills functions like those. We are looking at what that role would look like for British Columbia. The chair would be independent of the Benchers and staff. He or she would be the spokesperson for the tribunal body, manage the size and experience of the pools. This Chair would also appoint panels from existing pool members. She/he would be a mentor to adjudicators, assist them and evaluate their performance. Further duties could include overseeing a skills-based appointments process for new members of the hearing panel pools. This development of the Independent Chair would be a further step towards complete separation of the regulatory and decision making functions. A list of possible duties for an Independent Chair that we have discussed is attached.

In some other jurisdictions Law Society Benchers participate in the charge approval process, like our Discipline Committee, but not on the adjudication side of the operation. Many current Benchers have invested time and effort in getting trained and experienced in the adjudication process. But we now also have a sizable group of non-Benchers who are trained and experienced. There may be an opportunity to separate current Benchers from adjudication by not adding more lawyer Benchers to the pool after future Bencher elections.

(g) **Continuity and renewal.** Continuity of experienced adjudicators from all pools is obviously essential to the continued success of the tribunal. But periodic renewal is also essential. To accomplish this we have thought about how long a person should serve as an adjudicator. We have thought six years (rather arbitrarily) but later lean toward eight years as the limit. That is consistent with the usual term limit for elected and appointed Benchers. It also seems to provide a basis of both experience and renewal.

11. I wish to thank the Task Force comprising Haydn Acheson, Linda Michaluk, David Mossop, QC, Pinder Cheema, QC, David Layton, Jeff Hoskins, QC and Michelle Robertson for

continued hard work and dedication. I also want to thank Michal Lucas and Ingrid Reynolds for their sometime support. Sometime here because of divided duties to other equally hardworking task forces and committees. It was a wonderful experience working with all of them.

Attached: Report to Benchers, 2008
Report of Task Force, 2010
Table of survey responses
Transcript of introductions
List of duties of chair

JGH

The Law Society of British Columbia

An Examination of Issues in Connection with the Dual Prosecutorial and Adjudicative Functions of the Benchers

For: **The Benchers**
Date: **November 4, 2008**

Purpose of Report: **Discussion**

Prepared by: **Policy and Legal Services Department**
Michael Lucas
(604) 443-5777

TABLE OF CONTENTS

An Examination of Issues in Connection with the Dual Prosecutorial and Adjudicative Functions of the Benchers

Executive Summary

The issue that this discussion paper addresses is whether the current hearings process at the Law Society sufficiently distinguishes the investigative, prosecutorial and adjudicative functions of the benchers to ensure that the Law Society's decisions on admissions and disciplinary matters are independent and impartial and not susceptible to an apprehension of bias. It also questions, for the purpose of discussion, whether there are other processes by which to conduct hearings could be considered that meet other goals, such as increasing the number of adjudicators in general and, in particular, lay adjudicators.

Maintaining public confidence in the disciplinary and adjudicative processes of the Law Society is an important consideration. If the Law Society is to protect the public interest in the administration of justice, it would be best if the public were satisfied that the Law Society was discharging its mandate effectively. Public dissatisfaction or cynicism on this issue could be, as has been seen elsewhere in the world, inimical to self-governance and lawyer independence, which is itself an important right of clients.

The general underlying premise is that the public – or government – is less likely to have confidence in the decisions made by the Law Society if it perceives that they are biased or as a result of a process that is not independent because it unsatisfactorily distinguishes between investigative and adjudicative functions. The basis for self-regulation is undermined if the public loses confidence in the Law Society's ability to render unbiased decisions by a sufficiently independent hearing panel. Lay participation on hearing panels may increase public confidence in the process. Spreading the current limited resources of the benchers too thinly could, on the other hand, possibly diminish the quality of decisions, which should be expected to decrease public confidence.

Other Canadian law societies have considered this issue and this has resulted in some different processes for the appointment of hearing panels, particularly in the Maritime Provinces and Ontario. These will be discussed below, as well as some systems that have been devised in other Commonwealth countries. The processes in some other professions are also briefly reviewed.

This paper is written not to lead to any conclusions, but rather to introduce the subject to the benchers and to stimulate some discussion about whether the case for public confidence, protection of the public interest, and the preservation of independence and self-governance may be enhanced if another process were implemented. The paper poses a series of questions that could be discussed.

1. Preface

Earlier this year, on the recommendation of the Independence and Self-Governance Advisory Committee, the benchers identified that one of the Law Society's priorities should be to examine the dual prosecutorial and adjudicative functions of the benchers.

The Independence and Self-Governance Advisory Committee identified the priority as follows:

> The Law Society should consider, given the overlap between prosecutorial and adjudicative functions of the benchers, how to ensure that Law Society decisions are not, and are not seen to be, biased, and whether it is necessary to develop another manner of appointing hearing panels that would address any conflicts or appearance of conflicts.

The rationale for this recommendation was explained:

> Lawyer independence is best preserved through effective self-regulation. The Law Society, through its programs, must discharge its objects and duties first and foremost in the public interest. Effective self-regulation and self-governance requires public confidence. Challenges to self-regulation and self-governance in other common law jurisdictions have arisen where the public became concerned that the local law societies were not acting, first and foremost, in the public interest, but were instead acting more in the interest of their members. Would the public consider that the benchers, elected by the group that they are required to sanction, are sufficiently independent to discharge the regulatory functions entrusted to them in the public interest? The issue was last debated by the benchers in 1985. It remains under debate in other jurisdictions, including jurisdictions within Canada.

This paper has been prepared for the purpose of introducing the benchers to the topic, providing some background information, explaining what takes place in some other jurisdictions, and presenting some options for the purpose of debate and consideration.

2. A Brief History of the Issue at the Law Society

The debate about the dual roles of benchers as being in charge of the Law Society's prosecutorial function and also sitting as adjudicators is not new, but neither has it been thought about much in the recent past. As mentioned above, the prosecutorial and adjudicative functions of the benchers were last debated in 1985. The minutes of the bencher meeting from January 11 and 12, 1985, which outline the discussion, are attached. It is interesting to note that the discussion was a multi-faceted one, and included the questions of confidentiality and the nature of disciplinary proceedings. Ultimately, it was resolved that the benchers would retain the prosecutorial and adjudicative functions. It was further resolved that members of the Discipline Committee who participate in a decision to issue a citation shall not participate in any subsequent hearing of the citation.

The 1985 debate was generated for some reasons that resonate in 2008. There was even in 1985 an increasing focus on the duty of the legal profession to protect the public interest. Even then, there was an underlying recognition in the Commonwealth that self-

governing status would not survive a public belief that lawyers were unwilling or unable to respond appropriately to complaints made against their members.[1] Benchers were asked to consider, amongst other items, whether laypersons should participate in the disciplinary process and what the best way would be to separate the adjudicative and prosecutorial functions of the benchers.

3. Analyzing the Current Process

Before identifying whether there are alternatives to the current process, and whether any alternatives might be preferred to the current process, it is worth briefly analyzing that process.

1. The Structure as Set Out in the Law Society Rules

The ***Legal Profession Act*** and the Law Society Rules outline the functions of the benchers in these various roles. The salient points are as follows:

(a) the ***Act*** permits the benchers to establish a Discipline Committee[2]. The ***Act*** also permits the benchers to establish a Credentials Committee[3]. The Benchers have passed a rule requiring the President to appoint a Discipline Committee and a Credentials Committee each year[4]. Each Committee must have a Chair and a Vice-Chair, each of whom must be benchers. The balance of each Committee is made up of "other Benchers ***and lawyers."***

(b) as permitted by the ***Act***, the benchers have made rules permitting the Discipline Committee to consider any complaint referred to it and to instruct or authorize any further investigation it considers desirable[5]. Further rules permit the Committee to recommend that a citation be issued against a lawyer where appropriate, commencing the process that results in a disciplinary hearing[6].

(c) as permitted by the ***Act***, the benchers have made various rules contained in Part 2, Division 2 of the Rules permitting certain matters to be referred to the Credentials Committee, and, if appropriate, to order a hearing[7]. Such an order commences the process that results in a credentials hearing.

---

[1] See Kathleen Keating ***The Disciplining of Lawyers: An Analysis of the Policy Options Available in Designing a Procedure for Coping with Misconduct in the Legal Profession,*** October 1984. This Report was prepared for the Benchers and considered at their January 1985 Retreat. It is interesting to note that the Queensland Law Society had reported in 1984 that:

> The current self-scrutiny by the profession is not a reaction to the threat of losing a valued privilege [self-government] but a serious effort to explore effective ways of enforcing ethical and professional standards.

[2] s. 36(a)
[3] s.21(1)(a)
[4] Rules 4-2 (Discipline Committee), 2-24 (Credentials Committee)
[5] Rule 4-3
[6] Rules 4-4, 4-13
[7] See, for example, Rule 2-50 and Rule 2-52(8), (9).

(d) the ***Act*** requires each of disciplinary hearings[8] and credentials hearings[9] to be conducted before a panel. The ***Act*** permits the benchers to make rules concerning the appointment and composition of panels[10]. The benchers have passed a rule requiring the President to appoint a panel when a citation is authorized or when a credentials hearing is ordered. As permitted by the ***Act***, the rules further outline the powers of and procedure before the panel[11].

(e) the rules require a panel to be chaired by a bencher who is a lawyer[12] and the balance of the panel be must composed of benchers and/or lawyers[13]. The rules prohibit a person who participated in the decision that authorized the issuance of the citation from being on a panel hearing the citation[14].

(f) the rules require the Executive Director to appoint counsel to represent the Society (not the Discipline Committee or Credentials Committee, and not the panel) when a direction to issue a citation[15] or an order for a credentials hearing[16] has been made. This counsel prosecutes the matter at the hearing.

2. Judicial Consideration

While I do not intend to conduct an in-depth analysis of the jurisprudence concerning this issue, a few findings of the courts are worth keeping in mind.

(a) In ***Pearlman v. Manitoba Law Society Judicial Committee***[17] the Supreme Court of Canada held that

> …benchers are in the best position to determine issues of misconduct and incompetence. For example in ***Re Law Society of Manitoba and Savino*** (1983), 1 D.L.R. (4th) 285…the Court of Appeal said (at pp. 292-3):
>
> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.

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[8] s. 38(2)
[9] s. 22(2)
[10] s. 41
[11] Rules 5-4, 5-5
[12] Rule 5-2(3)
[13] Rule 5-2(4), although Rule 5-2(6) permits a former lawyer to continue on the panel by the consent of the President
[14] Rules 5-3(1), (2)
[15] Rule 4-20
[16] Rule 2-63
[17] (1991) 84 D.L.R. (4th) 105 The rule in ***Pearlman*** that the judgment of a lawyer's conduct by one's peers is appropriate has been followed in ***Elias v. Law Society of British Columbia*** [1996] B.C.J. No. 1847 (C.A.) and ***Histed*** v. ***Law Society of Manitoba*** [2006] M.J. No. 290 (C.A.)

The current Law Society Rules provide for the appointment of benchers ***and*** all lawyers to hearing panels. Current practice limits appointments to benchers and occasionally former Benchers, but there is nothing in the Rules prohibiting the appointment of lawyers who are not benchers or former benchers to a panel.

(b) In ***Brosseau v. Securities Commission (Alberta)***[18], the Supreme Court of Canada held:

> In establishing (administrative) tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate…….If a certain degree of overlapping functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se.

As the ***Legal Profession Act*** permits the benchers to establish rules on this issue, it is likely that the final sentence of the passage quoted above is applicable to the process that currently exists at the Law Society.

(c) In ***Association of Professional Engineers and Geoscientists of British Columbia v. Visser et al***[19], the Supreme Court of British Columbia considered whether the Association of Professional Engineers and Geoscientists of British Columbia (the "Association") had standing under the ***Judicial Review Procedure Act*** to seek the review of a decision made by a panel of the Association summarily dismissing a Notice of Inquiry brought against Mr. Visser alleging that he had breached certain duties imposed upon him as a member of the Association. Mr. Visser argued that it did not – that in essence the Association was attempting to appeal its own decision, and it was not, therefore, a "person aggrieved" under the statute.

The Association succeeded on the question of standing. The Court concluded that the enabling legislation created a separation between the investigative, prosecutorial and adjudicative functions. The power to investigate lay with the Investigations Committee. The power to conduct inquiries (hold hearings) and impose sanctions lay with the Discipline Committee. Both bodies were appointed by the council of the Association, but each was a mandatory entity under the enabling legislation and each was exclusively empowered to perform their respective duties under the Act. Moreover, the prosecutorial function was discharged separately by counsel employed by the Association, and this was clearly envisaged by the relevant statute. There was no provision that counsel acted as a function of either the Investigation or the Discipline Committee.

Therefore, the enabling legislation created a scheme for determining contraventions of its provisions through separate investigative, prosecutorial and adjudicative functions. The clear purpose of the ***Act*** was to establish the independence and impartiality of the three functions.

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[18] [1989] 1 S.C.R. 301

[19] 2004 BCSC 700 aff'd on appeal [2006] B.C.J. No. 3283 (C.A.)

The Court concluded that the Association was able to be classified as a "person aggrieved", presumably on the basis that the decision of the Discipline Committee was independently and impartially made. For the purposes of the case before it, it was presumably open to the Association to disagree with the Committee's decision, and apply to quash it.

The important point, however, is that on the basis of the processes of the Association for investigating, prosecuting and deciding a discipline case, the decision of the Discipline Committee was made independently and impartially of the rest of the Association, despite the fact that it was appointed by Council. As will be explained below, no members of the Council of Association of Professional Engineers and Geoscientists sit on the Discipline Committee, which is not the case with the Law Society.

(d) Finally, in ***McOuat v. Law Society of British Columbia***[20], the Court of Appeal commented specifically on the question of reasonable apprehension of bias in connection with the Law Society process in a credentials application and hearing. Mr. McOuat's argument was that the panel lacked institutional independence from the Law Society, thereby creating a reasonable apprehension of bias.

One of Mr. McOuat's arguments was that the apprehension of bias arises because the President of the Law Society who appointed the panel was on a panel that had heard (and, I believe, dismissed) one of Mr. McOuat's earlier applications. The Law Society filed the affidavit of Ms. Robertson, our hearing administrator, who outlined the process she used to establish panels. This process, in a nutshell, may be described as a "hearing roster" process. If benchers from that roster were unavailable because of scheduling or conflicts, she enquired of the other benchers whether they are able to sit on an "as-available" basis. Once the panel was finalized, she prepared a document for signature by the President formally appointing the panel. She deposed that nobody at the Law Society and no bencher had interfered with this practice. In dismissing Mr. McOuat's concerns, Low J.A. (Southin and Rowles JJ.A. concurring) held:

> There is no merit in this complaint. There is no evidence that the president had any reason to select panel members to suit his own purposes and the Robertson affidavit makes it clear that the president only formally appoints the panel members. Their selection is made by the fair process outlined in the affidavit.

In examining the question of bias generally, Low J.A. held:

> From my review of the statute and the rules made by the Law Society, I conclude under its authority, that no procedural unfairness emerges. The legislation and the rules, together with the process of selection of panels for individual cases outlined in the Robertson affidavit, ***ensure that panel members are impartial and independent.*** Of particular importance is Rule 5-5. It says that the panel "may determine the practice and procedure to be followed at a hearing." The panel, subject to the statute and the rules, is the master of its own proceedings. There is no basis for finding procedural unfairness giving rise to a reasonable apprehension of bias.
>
> (***emphasis added***)

[20] 2001 BCCA 104

3. Issues That May Arise From the Current Process

On its face, some concerns could be identified. Benchers set the Rules by which hearings are governed. They are ultimately responsible for the direction of an investigation, and a Committee appointed by the President, composed largely of benchers, determines whether a hearing should be held. Determinations made by the Panels are made in reference to rules that are set by the Benchers. Hearing Panels, appointed by the President, are almost invariably composed of benchers, and the Chair of the Panel must be a bencher. Benchers might be viewed as judges of their own actions, hearing cases the prosecution of which they have authorized on the basis of an investigation that they direct concerning rules that they have made. Some might liken that situation to legislators being both prosecutors and judges.

On the other hand, the jurisprudence suggests that the ***Legal Profession Act,*** the Law Society Rules, and the procedures adopted by the Law Society in use at the time of ***McOuat*** in establishing panels all ensure that the decisions of a panel are independent of the Law Society. The Court of Appeal has specifically concluded that the processes then in use ensured that panel members were impartial and independent such that an applicant for reinstatement at a credentials hearing (and presumably a member at a discipline hearing) cannot challenge a decision adverse to his or her interests on the basis of an allegation of a reasonable apprehension of bias. It should be noted that the roster system is, however, no longer in use. The Hearing Administrator now attempts to cover hearings with benchers, lay benchers and life benchers on an "as-available" basis, excluding benchers who participated in authorizing the issuance of a citation or ordering the credentials hearing, as well as any bencher who sat on the Discipline or Credentials Committees in the previous, or current year. The President still, of course, formally appoints panel members.

4. Why Consider this Topic Again?

Public scrutiny of the professions has become even more pronounced in the past few years. It is likely even more necessary today than it was in 1985 when this issue was last examined to instill public confidence that the regulatory functions that reside with the Law Society are carried out effectively, and in the broader public interest, and not in the interest of the lawyers who elect the benchers to govern them. Moreover, with the increased public scrutiny comes a closer attention to the quality of the decisions themselves. Ensuring that decision-makers are of the highest quality is therefore of considerable importance.

There is also a general principle of law that "no one should be a judge in his own action." This principle underlies the doctrine of "reasonable apprehension of bias". It is an aphorism that "…it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." ***R. v. Sussex Justices, ex p. McCarthy***[21]. Even if the jurisprudence suggests that the current process is acceptable, would that matter to the public (and governments) if an

[21] [1924] 1 K.B. 256

issue arose. If in the public mind an apprehension exists that the Law Society's decisions into disciplinary or credentials matters are biased, the case for an independent self-regulating profession may be weakened. This proposition is expanded on below. The perception of members is not irrelevant, either. If lawyers, or their counsel, appearing before a Hearing Panel were concerned that the "fix was in" because the Panel, composed of members of the same group of people appointed to the body that made the determination to authorize the issuance of the citation, was therefore biased, dissatisfaction of the process would come from within the profession as well.

The current process is also heavily dependent on a relatively small number of people to perform adjudicative functions. There are only 31 benchers, and at least several of those are on either the Credentials or Discipline Committees and are therefore unavailable to sit on Panels in, respectively, credentials and discipline matters. While the ***Legal Profession Act*** allows non-bencher lawyers to be appointed to a Panel, in practice they are rarely used. The only non-lawyers that the ***Act*** permits to sit on a Panel are lay benchers, but given their various appointments to the Credentials and Discipline Committee, there are few lay benchers eligible to be appointed as adjudicators. If it were desirable to increase the number of lay benchers on Panels, they could soon become over burdened with hearings.

If only lawyers were to sit on adjudication panels, would the perception of "the fox guarding the henhouse" ever be dispelled? Would it matter to the public that there were non-bencher lawyers hearing cases? That might allay concerns of members, but would it dispel concerns of the public? If a wider cast of appointments were desired, however, special care would be needed to ensure a high quality of decision-maker.

Moreover, as will be discussed below, other law societies, both in Canada and elsewhere in the Commonwealth, have been examining this question, either on their own, or at the behest of their governments. Some have been fortunate to have devised their own solutions, while others have had solutions imposed on them.

Models from other professions show that some do not distinguish much between the two functions, while others have devised ways to separate adjudicative processes. Some of these will be discussed as well. Other regulators, particularly the securities commissions, maintain a unitary function. However, even here the issue is under consideration. In the Report of the Fairness Commission to the Ontario Securities Commission in 2004, [22] for example, the authors[23] noted that while there was "not yet a track record for separate adjudicative tribunals in securities regulation...the conclusion that a study of other jurisdictions gives is that while evidence may be limited, the move towards the separate adjudicative model is substantial."[24]

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[22] ***Report of the Fairness Committee to the Ontario Securities Commission*** March 5, 2004

[23] The authors of the Report were the Honourable Coulter A. Osborne, Q.C., Professor David J. Mullan, and Bryan Finlay, Q.C.

[24] See footnote 22, Appendix II

5. The Public Perception

The Law Society mandate is to uphold and protect the public interest in the administration of justice[25]. Two of the ways it is to discharge this duty is to preserve and protect the rights and freedoms of all persons and to ensure the independence, integrity and honour of its members[26]. To properly preserve the independence of lawyers, the Law Society has been, since its inception, a self-regulatory and self-governing body. Because of the importance the Canadian system of law accords to the ability of an individual to consult an independent lawyer free from state interference, self-regulation is, it is argued, fundamental to preserving the rights and freedoms of all persons.

Maintaining public confidence in this function is, however, of considerable importance. If the public in general is dissatisfied with, or even worse, cynical about, the self-regulation of the legal profession, government may feel encouraged to try to impose another manner of governance. While in the litigation involving the ***Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("PC(ML)TFA")***, the Law Society has argued that there is a constitutional element to the independence of lawyers that prevents the government from limiting that independence through legislation, the fact remains that if the public in general became skeptical of the benefits of an independently regulated self-governing legal profession, the credibility of the Law Society would be seriously eroded.

The impact that a negative public perception has had on regulators of the legal profession, which arose largely from the manner in which complaints were handled, can be seen in England and Wales and several of the Australian states.

If overlap in the investigative, prosecutorial and adjudicative functions of the Law Society were to lead the public to perceive that there might be a risk that Law Society decisions are in some way biased, one should expect an erosion of the public perception of the Law Society. Therefore, even if the Courts were to have concluded that at law there is no reasonable apprehension of bias in the processes used by the Law Society as described in ***McOuat*** in investigating and adjudicating on discipline or credentials matters, that may not end the matter. If the general public perceived that, despite what the Court might conclude, the Law Society process led them to an apprehension of bias (whether reasonable or not), the credibility of the organization would be severely impaired. How that would cause the government to act is an open question.

While there is probably a good legal argument that the hearing process is independent and impartial from the investigation process, it is at least noteworthy that the Supreme Court of Canada held in ***Brosseau*** that "in establishing (administrative) tribunals, the legislator is free to choose the structure of the administrative body." This suggests that the legislature might consider it has the authority to change the current process if it is politically expedient to do so. It would therefore be worthwhile to at least think about the

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[25] ***Legal Profession Act***, S.B.C. 1998 c. 9 (***"LPA"***), section 3.
[26] ***LPA*** s. 3(a)(i) and (ii).

issue in a broader form if there is any concern that the current process could, to a reasonable person, appear to be biased.

Are there other ways of accomplishing the Law Society's regulatory role that would draw a more obvious line between the benchers' prosecutorial and adjudicative functions, and therefore enhance the confidence both of the public and of lawyers in the integrity of the process involved in disciplinary and credentials matters? Beyond questions about the independence and impartiality of panels, are there other methods of structuring the discipline function that would enhance participation by non-lawyers, or methods by which one could best ensure the highest quality of decision makers? Consideration of each of these questions is likely to improve the public confidence in the Law Society's regulatory process.

6. Arguments For and Against Separating Adjudicative and Prosecutorial Functions

A brief assessment of some of the arguments for and against separating the adjudicative and prosecutorial functions follows. Some of these arguments are drawn directly from the Report of the Fairness Committee to the Ontario Securities Commission.

Arguments For Separation

1. Public Perception

Effective self-regulation and self-governance requires public confidence. It also requires the confidence of the membership. Can that confidence be maintained in today's legal world where the benchers set the rules, authorize the prosecution and conduct the hearing? Would considerations of institutional loyalty be perceived as making it difficult for benchers to act dispassionately? Does the fact that panels can award costs against applicants or respondents raise an economic conflict?

2. Blurring the Policy Function with the Discipline Function

By creating Hearing Panels comprised of benchers, is there a risk that policy considerations of the Law Society inform a regulatory hearing? On the one hand, benchers on the panel would be in a better position to ***apply*** policy set by the benchers as a whole, but hearings should not be used to ***develop*** policy. Creating panels made up of policy makers runs that risk.

3. Bencher Time

Hearings are getting longer. Benchers are volunteers, and there are a limited number of them. Can it reasonably be expected that the limited number of benchers will be able to meet the number of hearing days required in the future? A separate panel could increase the number of adjudicators.

4. Panel Expertise

Hearings are becoming more complex. While there is generally a wide variety of expertise amongst the benchers, a great deal depends on who is elected, and experience suggests that there are routinely many fewer solicitor benchers. A separate body could assist in balancing expertise.

5. Lay Participation

If the participation of non-lawyers on hearing panels is determined to be desirable, the current number of lay benchers would put a tremendous strain on their time should an increase in lay participation be required. A separate panel could enable the identification of non-lawyer adjudicators with expertise.

Arguments Against Separation

1. The Current Process Has Been Judicially Approved

The current process (or one very similar to that which operates) has been judicially approved in ***McOuat.*** If there is no legal problem to fix, would it be inadvisable to create a new system that has not been judicially considered? If the Supreme Court of Canada concluded that benchers are in the best position to determine issues of professional misconduct and incompetence, would it be wise to create a system that reduces, or perhaps even removes, bencher involvement in determining such matters?

2. The Current System Seems to Work

There is very little, if any, overt criticism of the current hearing process from either the public or the membership. Is the interest in separating out the adjudicative function part of an increasing and regrettable movement in the direction of the judicialization of administrative processes?[27]

Hearing Panels in British Columbia do not routinely find in favour of the Law Society. Panels in Credentials hearings discharge an important function by setting conditions in the public interest, which are informed by bencher policy, which may be difficult to apply to separate panels.

3. Appointing the Adjudicative Body

To ensure proper regulation of the legal profession, a high quality of adjudicators is necessary. Some question whether a separate regulatory adjudicative body would attract the quality of persons required to make it work. Would the workload be sufficiently attractive to interest those who would be needed to adjudicate? Would remunerating adjudicators become necessary, and what would this cost?

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[27] See page 18, ***Report of the Fairness Committee to the Ontario Securities Commission***, March 2004.

Further, how would the body be appointed without compromising the independence of lawyers which is a fundamental right of clients?

7. Key Comparisons

Legal Professions

Other Canadian law societies have devised different ways of creating, or appointing, panels to hear matters of professional misconduct, and/or credentials applications that require a hearing. Some other Commonwealth jurisdictions have had government-created solutions imposed upon them. Some comparative examples are set out below.

1. Nova Scotia

Nova Scotia has, relatively recently, enacted a new ***Legal Profession Act***. Sections 41 – 48 of that ***Act*** establish an independent Hearing Committee. Pursuant to the Regulations, it is made up of at least 12 persons, none of whom can be members of Council (equivalent to benchers). The composition of the Hearing Committee is determined, however, by the Council. Currently, there are 25 persons on the Hearing Committee: 21 lawyers and 4 public representatives. All the current lay members appointed are past lay members of Council, and all the lawyers appointed are either former elected Council members (including a number of Past Presidents of the Nova Scotia Barristers Society), or have served on the Nova Scotia equivalent of the Discipline Committee. The Chair of the Hearing Committee is responsible for empanelling panels and appointing a panel chair. The Nova Scotia Barristers Society describes the work of the Hearing Committee as being "of the highest importance in terms of the Society's right to self-govern, and to enhance the level of trust and respect members of the public have for the profession."[28]

2. New Brunswick

The ***Legal Profession Act*** in New Brunswick creates a system somewhat similar to Nova Scotia. A Hearing Committee is established under the New Brunswick statute, composed of ten practising lawyers appointed by Council and four lay persons appointed by the Minister of Justice. The Committee sits in panels of five, which must include one lay person, chaired by the chairperson of vice-chairperson of the Committee. The chairperson and one or more vice-chairperson(s) are chosen by the Council.

[28] Nova Scotia Barristers' Society Council Highlights
www.nsbs.org/documents/general/CouncilHighlights.pdf

3. Ontario

Amendments to the ***Law Society Act*** in 2007 have altered the composition of Hearing Panels in Ontario. These alterations were based upon recommendations by the Task Force on Tribunals Composition.[29]

Pursuant to the ***Act***, Hearing Panels must consist of at least 3 persons, appointed by Convocation (the benchers). The only persons eligible to be appointed to the Hearing Panel are benchers, licensees[30], or persons approved by the Attorney General. Each panel must have a lay member. The lay member may be a lay bencher, or another person approved by the Attorney General. The appointment as a member of the Hearing Panel is for a term not to exceed 4 years. Currently, Convocation has appointed 63 persons to the Hearing Panel.

Scheduling of hearings is conducted by an independent Tribunals office within the Law Society, whose staff do not report to the complaints or discipline sector of the Law Society. The Office is, in fact, independent of all other functions of the Law Society. The Office schedules hearings and sets the three person panel, although the chair must authorize the appointments.

This manner of composition of the Hearing Panel allows benchers, as members of the profession having special skill and knowledge to judge the conduct of a fellow "licensees," and permits non-bencher lawyers and non-bencher non-lawyers to be added as panel members. Required representation of the public through a non-lawyer appointee ensures that the public interest is discharged through a public appointee, and is not left solely to "licensees" to discharge. The Act permits non-bencher non-lawyers to be appointed if approved by the Attorney General. The Law Society of Upper Canada is in the process of identifying four such individuals to ensure that there will be a large enough pool from which to draw.

4. Newfoundland

Section 42(4) of the ***Law Society Act*** establishes the Discipline Panel, from whom members of Adjudication Tribunals are chosen. The Discipline Panel is constituted as follows:

> (a) the benchers appoint twenty members who are not elected benchers, one of whom becomes the Chair of the Committee;
>
> (b) the Minister of Justice appoints ten people who are neither benchers nor members of the Law Society.

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[29] The Task Force made two reports to Convocation dated November 24, 2005 and April 26, 2007, both of which are available on the Law Society of Upper Canada's website.

[30] The new ***Law Society Act*** defines "licensee" as persons entitled to provide legal services. Such persons include paralegals.

Persons appointed to the Disciplinary Tribunal are appointed for three year terms, which may be renewed.

5. Prince Edward Island

In Prince Edward Island, there are a total of 16 people who are responsible for adjudications, divided into two Discipline Committees. Each committee has 8 people, 6 of whom are members of the Law Society and 2 of whom are non-members. Therefore, a total of 12 members are appointed to the Committee. These 12 are appointed by Council, and cannot be members of Council.

A total of 4 non-members are also appointed, 2 of whom are lay benchers. These 4 are chosen by the Lieutenant Governor in Council from a list of individuals submitted by a Committee consisting of the Chief Justice of the Province, one representative of the Law Society, one member representing the Attorney General, and one person representing the public at large appointed by the Attorney General.

6. Manitoba

Rule 5-93(4) requires the benchers to appoint a Discipline Committee of not less than six benchers. The duties of the discipline committee (which includes hearings into charges laid against members) must be exercised by a panel of three members of the committee. Two of the three members must have current practising certificates.

Rule 2-63(1) permits the appointment of "any person" to a Committee, and the Law Society uses that rule to appoint non-bencher volunteers to the Discipline Committee. The Law Society is looking at adding more lay participation in the Discipline Committee by ensuring that one member of the three member panel hearing a case is always a lay person, which would be unworkable with the current cohort of only four lay benchers, and one possibility is to add to the Committee lay persons who are not benchers.

7. Saskatchewan

Section 47 of the ***Legal Profession Act*** provides that where an investigation committee makes a recommendation to the discipline committee, the chairperson of the discipline committee shall appoint a hearing committee to hear and determine the formal complaint.

A hearing committee appointed must consist of not more than five benchers or members, none of whom were members of the investigation committee that inquired into the matter that was the subject of the formal complaint.

8. Alberta

Section 59(1) of the ***Legal Profession Act*** provides that if the Conduct Committee directs that the conduct of a member is to be dealt with by the Hearing Committee, the Chair of the Conduct Committee must appoint a Hearing Committee comprised of three or more benchers other than the President. Others eligible for appointment include an honorary bencher (equivalent to a life bencher in B.C.) who was a President of the Society in the 10 years immediately preceding the appointment of the Hearing Committee provided he or she remains a member, or any other member who was elected as a bencher at least twice in the 10 years immediately preceding the appointment of the Hearing Committee.

From this brief survey, one notes that the Maritimes and Ontario have more developed processes that separate the adjudicative and prosecutorial functions than do the Western Provinces. However, the issue of lay participation on adjudicative bodies is on the table in Manitoba.

Some examples from elsewhere in the Commonwealth follow:

9. New Zealand

The ***Lawyers and Conveyancers Act***, a new Act governing the conduct of lawyers and the newly created profession of conveyancers, came into effect in New Zealand on August 1, 2008. The ***Act*** is described as a departure from the self-governing complaints and disciplinary regime for the legal profession. It is described as providing independent review and determinations of complaints.[31] The ***Act*** creates a Legal Complaints Review Officer and establishes the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

A Standards Committee of the New Zealand Law Society examines and determines complaints, and may lay charges before the Disciplinary Tribunal. These decisions are reviewable by the Legal Complaints Review Officer, appointed by the Minister responsible for the ***Act***. The LCRO, who cannot be a lawyer, is able to conduct reviews of decisions by the Standards Committee. While the review seems to be described as primarily one of processes, the LCRO's powers appear to be broader. Ultimately, the LCRO can confirm, modify or reverse any decision of the Standards Committee. The LCRO may also exercise any of the powers that could have been exercised by the Standards Committee. If he decides it is appropriate, the LCRO may himself lay a charge before the Disciplinary Tribunal.

The New Zealand Lawyers and Conveyancers Disciplinary Tribunal, established in the ***Act***, hears formal charges made by the Standards Committee or the LCRO against practitioners. Its membership is as follows:

[31] http://www.justice.govt.nz/lcdt/about/about-the-tribunal.asp

(a) 1 member who is to be appointed as the chairperson;
(b) 1 member who is to be appointed as the deputy chairperson;
(c) not less than 7 nor more than 15 lay members (being persons whose names are neither on the roll nor on the register of conveyancers). These persons are appointed by the Governor General on the recommendation of the Minster responsible for the ***Act*** after consultation with the Council of the New Zealand Law Society and the Council of the New Zealand Society of Conveyancers;
(d) not less than 7 nor more than 15 members who are lawyers, appointed by the Council of the New Zealand Law Society:
(e) not less than 3 nor more than 5 members who are conveyancing practitioners, appointed by the Council of the New Zealand Society of Conveyancers

The Chairperson must not currently be a lawyer or a conveyancer, but must not have had less than 7 years practice as a lawyer. The Chairperson and deputy chairperson are appointed by the Governor General on the recommendation of the Minister responsible for the ***Act.***

10. England and Wales

In the current situation in England and Wales[32], complaints are made to the Legal Complaints Service, which describes itself as an independent complaints handling body, part of the Law Society, but operating independently.[33]

The Solicitors' Disciplinary Tribunal (SDT) hears and determines applications in respect of solicitors relating to allegations of unbefitting conduct or breaches of the rules. The SDT is constitutionally independent of the Law Society of England and Wales, although mostly funded by it. Its members have been appointed by the Master of the Rolls. Solicitor members must have at least ten years standing and must not be members of the Law Society Council. Lay members must be neither barristers nor solicitors. Panels sit in divisions of three, with two solicitor and one lay member. Prosecutions before the SDT are made, in over 90% of the cases, by the Law Society.[34]

11. New South Wales

The Legal Services Division of the Administrative Decisions Tribunal (ADT) hears discipline matters concerning members of the Law Society of New South

[32] Changes to this process will take place when the ***Legal Services Act 2007*** takes full effect. An independent Office for Legal Complaints, appointed by the Legal Services Board, will handle complaints about legal services providers. If the OLC identifies an issue, it may be referred to existing organizations (such as the Law Society) for action. The regulatory functions of such organizations will be overseen by the Legal Services Board.
[33] See http://www.legalcomplaints.org.uk/about-us.page
[34] http://www.solicitorstribunal.org.uk/introduction.html

Wales. Its members are variously appointed by the Governor or the responsible Minister. In order to qualify for many of the positions, including President and Deputy President, one must be a judge or former judge. Other members, however, only need (in the opinion of the appointing Minister) "special knowledge or skill in relation to any class of matters in respect of which the Tribunal has jurisdiction." While many such appointees may be lawyers, there is no guarantee that they will be. Members of the New South Wales Law Society Council do not sit on the ADT.

The Office of the Legal Services Commission (OLSC) in New South Wales oversees the investigation of complaints about the conduct of practitioners and works as part of a co-regulatory system, together with the Law Society of NSW. The OLSC's website states that a complaint of misconduct against a lawyer is investigated by OLSC and they may refer the complaint to the Law Society of NSW, where OLSC will monitor the investigation and intervene in the investigation, if necessary, to re-examine the matter.

If the Legal Services Commissioner or the Councils of the NSW Bar Association or Law Society of NSW decide that a legal practitioner has a case to answer, (a reasonable likelihood of professional misconduct) they (or OLSC) must lodge an application in the Legal Services Division of the ADT (individuals cannot directly lodge complaints with the ADT).

Panels are made up of three members: a judicial member, a legal practitioner and a lay member. Each panel is appointed administratively, with a presiding member, usually based on seniority, and is inevitably a legally qualified member.

The Law Society does not fund the ADT. The Tribunal is an umbrella organization with divisions dealing with a number of professions. The legal division is funded by money from clients' trust account income.

This survey is obviously not complete. Examples from other Australian states may be drawn upon for different processes. What is evident, however, is that elsewhere in the Commonwealth processes have been created that have separated the prosecutorial and adjudicative functions of the legal profession's regulators, and lay participation has been built into the process.

Other Non-Health Profession Regulators

Briefly, for the purposes of comparison, I have outlined the hearing appointment process in four professions in British Columbia.

1. Architects

The Council of the Institute of Architects is fixed at 15 members by s. 6 of the ***Architects Act.*** Four members are appointed by the Lieutenant-Governor in Council who are not members of the Institute of Architecture. One is the director (or a person nominated by the Director) of the School

of Architecture at the University of British Columbia. The remaining ten are elected by and from the members of the Institute.

Section 46 of the ***Architects Act*** allows Council to order an inquiry by a Disciplinary Committee into the conduct of a member. The Discipline Committee consists of three or more Council members selected by Council. The Disciplinary Committee may appoint a judge of the Supreme Court as a member of the Committee.

2. Accountants (Chartered)

Section 24 of the ***Accountants (Chartered) Act*** provides that disciplinary matters are heard before a Committee appointed by Council. Rule 800 of the By Laws requires Council to appoint a Committee, called the Discipline Committee, consisting of not less than 20 people, at least two-thirds of whom are members of the Institute of Chartered Accountants, and at least 3 of whom are not. Council designates the Chair and Vice-Chair. Hearings are heard before panels of either three or five adjudicators, one of whom is not a member of the Institute.

3. Engineers

The ***Engineers and Geoscientists Act*** requires the Council of the Association of Engineers and Geoscientists to appoint a Discipline Committee of at least five members of the Association. The terms of reference of the Discipline Committee provide that no Council members of the Association may sit as members of the Discipline Committee. The result is that the Discipline Committee comprises only members of the Association (no lay members), and no members of Council. Council has appointed about 15 members of the Association to the Committee. Interestingly, the Investigations Committee has the same prohibition against having Council member participation.

4. Teachers

The ***Teaching Profession Act*** requires the Council of the B.C. College of Teachers to appoint a Discipline Committee. Each member of Council is eligible to sit on the Discipline Committee, and a quorum of the Committee is three. The College of Teachers' website states that hearings are presided over by three Council members. According to the ***Teaching Profession Act***, Council members are as follows

(a) 12 elected members of the College;

(b) 7 persons appointed by the Lieutenant Governor in Council on the recommendation of the Minister of Education, at least three of whom must be members of the College;

(c) 1 person nominated jointly by the deans of the faculties of education appointed by the Minister.

The Health Professions

While the regulation of lawyers is the obvious focus of this paper, and the ***key*** comparisons relate to how the disciplinary function is discharged elsewhere in connection with lawyers, it should not be forgotten that recent changes have taken place in British Columbia in connection with the health care professions.

The ***Health Professional (Regulatory Reform) Act 2008*** seeks to ensure that regulatory practices are more objective, partial, fair and transparent. Therefore the government proposes the establishment of a Health Professionals Review Board chaired by a member or a former member of the Law Society. No registrants, regulators or government employees may sit on the review board. The role of the review board will be to review some registration decisions, complaints to a college that have not been disposed of and decisions of the Inquiry Committee on the request of the complainant. The Board is a general supervisory board, independent of each of the Colleges.

8. Some Options to Consider

The purpose of this paper is not necessarily to lead the reader to a conclusion about whether there should be a more marked distinction between the adjudicative and prosecutorial functions of the benchers. While a discussion of options might therefore seem out of place, readers may, when considering the main issue, find it useful to think about what alternatives could replace the current system. Thinking about what options there are may assist in determining what conclusions to draw. Therefore, a short discussion about options follows. Some of these options are, of course, reflected in what other jurisdictions or other professions are doing.

There are three broad options from which a process might be chosen should a more formal distinction between prosecutorial and adjudicative functions be desired. Each of those options, however, has a considerable number of models from which to choose in order to implement the option. The three options, their advantages and disadvantages, and some (but by no means all) of the models that could be fashioned from each option follow.

Option 1: Benchers Remain in Control of the Investigative Process, and a Separate Body is Responsible for the Adjudicative Function

Advantages

- Clearly distinguishes between adjudicative and investigative functions.
- Preserves the benchers' ability to control the investigative process and make decisions about what sort of conduct warrants a hearing.

- Retains the institutional expertise that the Law Society has in investigating lawyer misconduct.

- Consistent with the ***Act's*** requirement that the benchers satisfy themselves about the character of an applicant for admission, a requirement that really requires the benchers to be responsible for the investigation of applications.

Disadvantages

- Depending on the model, benchers may relinquish some control over the process. Some bencher participation might still be maintained in the adjudicative body.

- Decisions about admissions to the profession and ultimately about what constitutes professional misconduct or conduct unbecoming, are not made solely by benchers.

Models

(i) Hearing Panels Could be Drawn from the Membership at Large, with the Appointment Made by the President (or Some Other Group of Benchers)

The current Rules permit any member of the Law Society to be on a hearing panel, although it must be chaired by a lawyer bencher. Drawing from the membership at large preserves peer assessment. A variation on the model could permit some lay representation. However, if the President (or benchers) continued to appoint members to the panel, the process appears less independent than it would if the appointments were made by a body or person outside the Law Society.

(ii) Hearing Panels Could be Drawn From a Separate Tribunal of Members at Large

In this model, a "tribunal" of members would exist. One form of the model might see the tribunal with a Chair (and perhaps Vice-Chairs) who could also serve administrative functions such as choosing which members sit on which panels.

The composition of the tribunal could take a number of different forms. Perhaps it could be composed of life benchers. Perhaps it could be composed of members elected by the membership at large – so-called "hearing benchers." Perhaps – more controversially – members could be appointed by the Attorney General, akin to the manner in which, for example, Provincial Court Judges are appointed by Cabinet on the advice of the Attorney General. Provisions could be made for the appointment of non-lawyers to ensure lay participation.

Whatever manner in which the tribunal was composed, it could be designed to take advantage of the decision of the Supreme Court in Pearlman – that "(n)o one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body."

(iii) Outside Body

This model draws the clearest distinction between adjudicative and investigative functions, and may appear the least biased to the public in general as lawyers would have no involvement in adjudication, although the value of the lawyers' training would be lost to the hearing panel. This model may, however, be inconsistent with the Pearlman decision if it removes the review of conduct by, at the very least, practising lawyers. It also most seriously erodes lawyer independence, especially if the outside body is appointed by the government.

The "outside body" could be the Courts. In many American states, the disciplinary function over lawyers is performed by the Court or a special division of the Court, or by judges or referees appointed by a Discipline board.

Option 2: Benchers Remain in Control of the Adjudicative Function and an Outside Body is Responsible for Investigations and Prosecutions

Advantages

- Clearly distinguishes between investigative and adjudicative functions.
- Benchers remain the group who ultimately determine what constitutes misconduct.
- Benchers retain the ultimate enforcement of the Rules that they enact.

Disadvantages

- Outside body is able to make decisions about closing files, meaning benchers lose control over what warrants a hearing and ultimately what conduct is deserving of sanction.
- The Law Society would refer out complaints made about its members to another body, and would therefore lose access to complaints-related information about the profession, as well as access to information collected during the course of the investigation that may be necessary to protect the public interest.
- Inconsistent, on credentials matters, with requirement in the Act that benchers satisfy themselves as to character and fitness of applicant.

- Does not remove the fact that benchers, if elected, are judging those who elect them.

- Is not a model that would reduce bencher workload, as the model does not envisage increasing the pool of adjudicative panel members.

Models

(i) Complaints could be referred out (or made) to a newly created outside body created expressly for this purpose. That body would be charged with the investigation of a complaint, and with making a decision about whether to prosecute it before a panel of benchers, who would remain the adjudicators.

(ii) Complaints could be referred out (or made) to an already existing body. That body would be required to investigate the complaint, and to make a decision about whether to prosecute. Depending on the model, the outside body could conduct the prosecution or, perhaps, require the Law Society to do so.

(iii) Complaints could be made to an outside body, which would be empowered to investigate or, at its discretion, to require the Law Society to investigate. A decision by the Law Society to close the complaint short of a prosecution would be subject to the review of the outside body.

It should be noted that, as the ***Act*** currently permits a person who wants to complain about the conduct of a lawyer to make a complaint to the Law Society, a change to the ***Act*** would be required if a model were chosen through which the Law Society would stop receiving complaints.

Option 3: Benchers Retain Overall Responsibility for Both the Investigative and Adjudicative Functions, but a More Solid Division of Functions Within the Ranks of the Benchers Themselves is Established

A related option would be to limit the number of benchers on the Discipline Committee (or other prosecutorial group)

Advantages

- Would preserve many (or all) of the efficiencies already built in to the disciplinary and credentials processes.

- Probably the easiest option to implement.

Disadvantages

- Less clearly perhaps, in minds of the public, distinguishes between adjudicative and prosecutorial functions of the Law Society as a whole.

- May limit the pool of adjudicators unless provisions were made to increase the number of benchers, or a model were chosen through which a separate, but internally constituted, hearing tribunal were created that could include non-Bencher members (and possibly non-Bencher non-members).

Models

(i) Upon election, benchers would configure themselves into groups. One group would be, in effect, "hearing benchers" who would only hear cases. The remaining benchers would discharge the other functions of benchers. While perhaps some procedure could be designed to permit benchers to switch groups, generally speaking their functions would be distinct. Benchers would continue to set policy and rules, be responsible for investigations and prosecutions, and for the adjudication of hearings, but their functions would be clearly divided, and one might expect there to be significantly less interaction between adjudicators and those responsible for investigation than is now the case.

(ii) A variation on this model would be to configure the groups of benchers into a group of "discipline benchers" – those who sit on the Discipline Committee – on the one hand, and "other benchers" on the other hand. Policy and rule-making benchers would therefore be available to conduct hearings. The investigation of complaints and decisions about whether to institute a hearing would be made by the separate group of "discipline benchers." Discipline benchers would not be involved in other aspects of the Law Society's governance.

(iii) A third variation of this model would be to create three groups of benchers – policy and rule-making Benchers, "Discipline Benchers" and "hearing benchers." Each function would be distinct.

Each of the three variations above would, for practical reasons, probably require an increase in the number of benchers elected (or possibly, appointed), which would necessitate a change to the ***Act***. Alternatively, better use of the current provisions permitting the appointment of non-bencher members to hearing panels could be utilized by adding such members to the "hearing benchers." Provisions could also be considered to permit the addition of non-bencher, non-members to the group of hearing benchers to ensure lay representation on Hearing Panels.

9. Some Questions For Discussion Purposes

The purpose of this paper is to start a discussion, not to reach a conclusion. Some questions that might assist the discussion include:

1. Is there any dissatisfaction with the current system? Does it work well?

2. Would public confidence in the Law Society's regulatory conduct be enhanced by separating the benchers' investigatory and adjudicative functions?

3. Is there any worry that the current system may give rise to a reasonable apprehension of bias on the part of the public (including applicants for admission) or members facing prosecution before a Hearing Panel?

4. Are there enough benchers currently available to sit on Hearing Panels? Is the workload increasing in a way to make it more difficult to use, almost exclusively, benchers on Hearing Panels?

5. Would the use of non-bencher lawyers on Hearing Panels detract from the Law Society's regulatory capabilities?

6. Would mandatory inclusion of non-lawyers on Hearing Panels help instill public confidence? Or would it detract from or interfere with the hearing process?

7. If mandatory inclusion of non-lawyers on Hearing Panels is a good idea, are there enough lay benchers to sit on every Hearing Panel? Where could more non-lawyer members be found? How would they be appointed?

8. Would a more formal separation between the adjudicative and prosecutorial functions of the benchers affect the efficiency by which the Law Society discharges its regulatory function?

9. Are there any examples of complaint and hearing processes from other jurisdictions that are attractive and worth further study?

10. Are there other methods of investigating, prosecuting and adjudicating complaints that more clearly delineate the roles, but do not diminish lawyer independence or self-governance?

10. Conclusion

The issue underlying this paper is whether the current hearings process sufficiently distinguishes the investigative, prosecutorial and adjudicative functions to ensure that the Law Society's decisions on admissions matters and on disciplinary matters are independent and impartial and not susceptible to an apprehension of bias. It also questions, for the purpose of discussion, whether there are other processes by which to conduct hearings that could be considered to meet other goals.

The general underlying premise is that the public – or government – is less likely to have confidence in the decisions made by the Law Society if it perceives that they are biased or as a result of a process that is not independent because it unsatisfactorily distinguishes between investigative and adjudicative functions. The basis for self-regulation is undermined if the public loses confidence in the Law Society's ability to render unbiased decisions by a sufficiently independent hearing panel. Limited lay participation on hearing panels may increase public confidence in the process. Spreading the current limited resources of the benchers too thinly could, on the other hand, possibly diminish the quality of decisions, which should be expected to decrease public confidence.

It may well be concluded, after discussion, that the current process in British Columbia functions well, and that, having the approval of the courts, no more needs to be done. For example, a recent submission from the British Columbia Securities Commission to the Expert Panel on Securities Regulation states, in connection with securities regulation, that

> separating the adjudication function from the rest of the regulatory agency functions is a possibility and perhaps could be made to work, although it is unlikely to provide any significant advantages over the current structure, and could entail significant risks.[35]

The submission noted that the Supreme Court of Canada had ruled in favour of the Securities Commission's existing structure[36], and that while in some jurisdictions some (mostly defence counsel) thought the structure unfair, there was no evidence provided of any miscarriages of justice attributed to the structure. Moreover, it was argued that a division would create gaps between the policy objectives of the regulator, and enforcement outcomes.

On the other hand, given the existence of other systems governing the appointment of adjudicators to hear complaints in Canada as well as elsewhere in the Commonwealth, and knowing that the public interest in professional regulation is significant, consideration of other systems may be called for.

This paper is written to stimulate some discussion about whether the case for independence and self-governance may be enhanced if another process were implemented.

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[35] ***Expert Panel on Securities Regulation: Submission of the British Columbia Securities Commission*** July 15, 2008
[36] ***Brosseau v. Securities Commission (Alberta)***, ***supra,*** footnote 20

The Law Society of British Columbia

Report of the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers

For: The Benchers
Date: July 9, 2010

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Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **The Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers**

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Report of the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers

Introduction

In November 2008 the Benchers considered a Discussion Paper prepared by staff entitled "An Examination of Issues in Connection with the Dual Prosecutorial and Adjudicative Functions of the Benchers." The Paper examined the policy considerations arising from the fact that the Benchers are responsible for investigating complaints and disciplinary matters as well as for adjudicating citations authorized arising from such investigations. The Discussion Paper examined arguments for and against separating the investigative and adjudicative functions of the Benchers, and compared the processes in the regulatory bodies of the legal profession in other jurisdictions, as well as the processes of regulatory bodies in other professions. After debate, the Benchers referred the issue to the Independence and Self-Governance Committee for review and recommendations.

In December 2009, the Independence and Self-Governance Committee presented its Report (the "Independence Committee Report") to the Benchers. In that report, the Committee reviewed its discussion and analysis of the issue, and analysed various options for change. The Benchers resolved to create a Task Force to develop models for the separation of the Law Society's adjudicative and investigative functions based on Option 1 in the Independence Committee Report, and to make recommendations on which model to adopt.

A Task Force was appointed, comprising Ken Walker as Chair, together with David Crossin, Q.C., Haydn Acheson and Ralston Alexander, Q.C. Jeff Hoskins Q.C. (Tribunals and Legislative Counsel) and Deborah Armour (Chief Legal Officer) also participated in meetings. Staff support was provided by Michael Lucas and Colette Souvage.

The Option Examined by the Task Force

The Benchers, in their resolution in December 2009, directed the Task Force to examine Option 1 from Independence Committee Report, and to develop models based on that option for consideration by the Benchers. In Option 1, the Benchers would remain in control of the investigative process, and a separate body would be created for the adjudicative function.[1]

The Task Force therefore based its discussions on an examination of models where the investigative function of the Law Society would remain much as it is now. Decisions

[1] The Independence Committee Report described three options. Option 2 contemplated the Benchers remaining in control of the adjudicative function with an outside body being responsible for investigations and prosecutions. In Option 3, the Benchers would have retained overall responsibility for both the investigative and adjudicative functions, but a more solid division of functions within the ranks of the Benchers would be established.

about whether to authorize the issuance of a citation would continue to be made by the Discipline Committee, and Law Society counsel would continue to "prosecute" such matters essentially on the instructions of that Committee. Models were considered that would change the structure of hearing panels, so that such panels would no longer necessarily be made up of benchers, and might therefore be viewed as being more independent of the investigation of complaints undertaken by the Law Society.

The Task Force examined models from the legal profession elsewhere in Canada and in some of the other common law jurisdictions, including Australia, England and Wales, and New Zealand. It also examined models from other self-regulated professions in British Columbia, including the models recently implemented through the *Health Professions Reform Act*. What became very clear is that there is no uniform model of structuring discipline to separate it from the rule-making or investigative functions of a self-regulating body. It was also clear, however, that many of the self-regulating bodies are thinking about, or have already implemented models to effect, the separation of investigations from adjudications.

The Current Model

When proposing new models for consideration, it is useful to review what the current situation is.

The *Legal Profession Act* is permissive on the issue of hearing panels. Section 41 provides:

> **41** (1) The benchers may make rules providing for any of the following:
>
> (a) the appointment and composition of panels;
>
> (b) the practice and procedure for proceedings before panels.

The *Act* does not limit the benchers' powers in this regard.

The Rules passed by the benchers pursuant to section 41 are set out in Rule 5-2. For the purpose of this Report, the important Rules are Rules 5-2(3) and (4):

> (3) A panel must be chaired by a Bencher who is a lawyer.
>
> (4) All Benchers, all Life Benchers and all lawyers are eligible to be appointed to a panel.

The Rules therefore allow all benchers (elected and appointed), all life benchers (elected and appointed), *and all lawyers* to be appointed to a hearing panel. Panels are appointed by the President although, in practice, the panels are chosen by the Hearing Administrator, and then approved by the President.

Current bencher policy, pursuant to a benchers' resolution dated October 3, 1997, limits who can be appointed to hearing panels to benchers, life benchers and former lawyer

benchers (including attorneys general), providing (in the case of lawyers) they are still practising members. Even with those limitations, 96 individuals are currently eligible for appointment, although 10 must be subtracted from Discipline Hearings as they sit on the Discipline Committee, and 8 must be subtracted from Credentials Hearings as they sit on the Credentials Committee. It is, however, less common that a life or former lawyer bencher is appointed to a panel, and the only non-lawyers eligible are appointed benchers, or appointed life benchers, of which there are only 5.

Legal Considerations

First of all, the Task Force has noted that the Court of Appeal in *McOuat v. Law Society of British Columbia* 2001 BCCA 104 provides some judicial support for the current overlap of investigative and adjudicative processes, at least in the context of credentials hearings. It is reasonable to extend the Court's reasoning to discipline hearings as well. Furthermore, as a result of the Supreme Court of Canada's decision in *Brosseau v. Securities Commission (Alberta)* [1989] 1 S.C.R. 301, no reasonable apprehension of bias will be presumed if legislation authorizes a certain degree of overlapping functions. As the *Legal Profession Act* gives the benchers the power to set rules providing for the appointment of panels, it is likely that the legislation has contemplated that the resulting rules will permit the benchers to appoint themselves to panels and thus the overlapping functions of rule-making (authorized by the *Act*), investigative functions (also authorized by the *Act*) and adjudicative function should be permissible.

Despite apparent judicial authority for the current model, the Task Force recognizes that, while there appears to be little public concern with the current overlap of functions, public confidence in the process is important, and that a lack of public confidence in Law Society investigative or adjudicative processes could cause the government to consider legislative changes as has happened with the Health Professions.

At the same time, however, in order to be an effective self-regulator the Law Society must have the confidence of those who it regulates. The reasons of the Manitoba Court of Appeal in *Re Law Society of Manitoba and Savino* (1983) 1 D.L.R. (4th) 285 (approved by the Supreme Court of Canada in *Pearlman v. Manitoba Law Society Judicial Committee* (1991) 84 D.L.R. (4th) 105) are important when considering the proper balance of regulation:

> Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. <u>It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct. Professional misconduct is a wide and general term</u>. It is conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well respected brethren in the group -- persons of integrity and good reputation amongst the membership.
>
> <u>No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body</u>.
>
> *(emphasis in original)*

The Task Force discussed the fact that lawyers elect benchers largely due to the confidence that lawyers have that those they elect are senior members of the Bar, skilled in practice, and are persons of integrity and good reputation – individuals who lawyers can be confident that, as adjudicators on disciplinary matters, they will impose the appropriate sanctions for misconduct in order to protect the reputation of the profession in the eyes of the public. Any model that would separate the function of investigation from that of adjudication should keep in mind the words of the Court in *Savino*.

Purpose of Proposing a New Model

The Independence Committee Report speaks to the need to ensure public confidence in Law Society processes. One method of doing so is to create a model through which those who adjudicate hearings are more formally separated from those who decide whether there should be a hearing. Another method is to create a model that will utilize the non-lawyer appointed benchers in hearings, as is being done, to ensure that a voice from outside the profession is heard. Other reasons for considering new models include finding the best way to utilize Law Society resources, including finding a method that best ensures that panels are composed of individuals who are skilled and trained to conduct hearings, as well as knowledgeable in the subject matter of the hearing itself. The Task Force has kept these purposes in mind when considering models.

Current Use of Appointed Benchers and Non-Benchers on Panels

As is currently permitted, life or former benchers are appointed to panels from time to time, and appointed benchers are also urged to sit on panels. During the four year period between 2006 and 2009, 103 panels were appointed. Of that number, 21 panels had an appointed bencher, and 30 had at least one life or former bencher.

Models Considered

The Task Force focused its review of models on those that have been developed, or are being developed, in the legal profession in Canada. While models from other countries and professions were considered, the Task Force determined that examining what was being done in the legal profession in Canada was best. Models from other Commonwealth jurisdictions have raised concerns with the benchers about whether lawyer independence is compromised. The Task Force believes that those models are inconsistent with the rationale of lawyer self-regulation explained in *Savino*.

The models of most interest to the Task Force were from the Atlantic provinces and Ontario.

The Atlantic provinces have all adopted models that more clearly formalize the distinction between investigations and adjudication. For example, Nova Scotia and New Brunswick each have a separate “hearing committee” from which panels are appointed. In Nova Scotia, legislation requires that the hearing committee must be non-benchers, while there is no such legislative prohibition in New Brunswick, although in practice benchers are not appointed to it. Panel appointments are made by the Chair of the committee (in Nova Scotia) and by the Registrar of Complaints (in New Brunswick).

Ontario developed a model, on the recommendation of a Task Force on Tribunals Composition in 2007, that requires non-lawyer members to be appointed to each panel. The Hearing Committee, from which appointments to panels are made, comprises all 81 Benchers (subject to disqualifying conflicts). Each panel must have a non-lawyer member. Because there are only 8 non-lawyer benchers in Ontario, changes to the Law Society Act in 2007 permitted the appointment of 4 additional non-lawyer non-benchers to the Hearing Committee to ensure a large enough pool of non-lawyers. The Law Society of Upper Canada identifies who these non-lawyers should be, but they must be approved by the Attorney General. The Law Society also appoints four non-bencher lawyers to the Hearing Committee. They are chosen to improve expertise in adjudication. In the result, the Hearing Committee is not a separate entity from the Law Society, and in fact the chances of a panel being comprised of three benchers is relatively high. There is however a more formal separation at the stage of deciding who will be appointed to a panel. This decision is made by the "Tribunals Office", a department within the Law Society but whose staff and functions are independent of all other functions at the Society.

Discussion of Possible Models

The Task Force reviewed three aspects in its consideration of models through which a separation of functions could be developed.

First of all, one has to decide what degree of separation ought to be implemented. Should there be a complete separation, where all the adjudicators on panels come from outside the Law Society? Or should it be a partial separation where some percentage of each panel (a majority or minority) comes from outside the organization? Should the "adjudicator body" be formalized as a body separate from the Law Society with its own Chair, or can it be simply a group of people the Law Society has determined ought to be adjudicators?

Second, one needs to determine how the adjudicators are to be chosen. How is the group of people that will make up hearing panels to be appointed? What criteria ought to be necessary? Should they be benchers, former benchers, life benchers or others, and if others, what qualifications would be needed? The appointments themselves could be by the benchers, or they could be made by various "stakeholder groups" within the legal profession (such as the Law Society, Canadian Bar Association, the Courts, the Attorney General, etc.) They could even be elected in separate elections (although the Task Force wondered how this would be accomplished for non-lawyers should there be a decision to ensure participation by non-lawyer adjudicators). There could be an outside body created to make or recommend appointments, along the model of the judicial councils.

The third item that needs to be determined is how the adjudicators are actually appointed to the hearing panels. Should they continue to be appointed by a Law Society official (currently they are appointed by the President) or should the Chair of the adjudicator group (assuming one has been appointed) be given that responsibility? Or should an independent office within the Law Society be created along the model of the Law Society of Upper Canada?

After some thought, three models were reviewed.

Model 1

This model would create a formalized "Hearing Committee" and members to it would be appointed by an appointments committee comprised of the major stakeholders in the legal profession based on criteria established by that group. Members of the Hearing Committee would elect a Chair, and the Chair would make appointments to hearing panels as necessary. Policies or rules could require that a non-lawyer adjudicator be appointed to each panel.

Model 2

A formalized "Hearing Committee" would be created and members to it would be appointed by the benchers, comprising members identified from for example, the following categories:

- benchers
- former (including life) benchers and eligible (qualified) non-bencher lawyers based on criteria to be determined
- former (including life) appointed benchers and eligible (qualified) non-lawyer non-benchers based on criteria to be determined.

Appointments to hearing panels would be made from this group, either by a Chair elected by the group (the most formalized separation model) or by a Law Society official such as the President (through which there would be a less formalized separation of functions). Ideally, the panel would be made up of one member from each category.

Model 3

The benchers would establish criteria for prospective adjudicators, particularly non-lawyer adjudicators, and then identify appropriate members from, for example, the categories set out in Model 2

This model would create an informal "hearings pool" from which it would be resolved that appointments to panels could be made, probably by the President, although the LSUC model of an independent Tribunals Office could also be implemented. Again, ideally, the panel would be made up of one member from each category.

The Task Force agreed that if one wanted to demonstrate the maximum degree of independence between investigations and adjudications, Model 1 should be recommended. However, the Task Force also agreed that while such a model may be one that the Law Society might eventually need to move to in the future, it represented a significant departure from the current process. Evidence suggests the current model

works relatively well, utilizing both benchers elected by lawyers for the very reason that they are senior, skilled lawyers of high ethical and professional standards who will act, as adjudicators, to protect the public interest and the profession's reputation with the public, and appointed benchers who bring a visible public face to the adjudicative process. The current model accords with the rationale for self-governance described in cases such as *Pearlman* and *Savino.* Leaping from the current model toward a model that effectively sets up a separate regulatory adjudicative Committee is, in the Task Force's opinion, too great a leap, one that is not recommended at this time given a lack of any particular identifiable public concern with the current model.

The Task Force next considered whether a recommendation should be made to move *toward* a model of greater separation, through which other identifiable goals might be realized in the meantime. Would it make sense to develop a process that would increase the number of qualified adjudicators, including non-lawyers, available to sit on hearing panels? The Independence Committee Report identified the efficient use of resources as a possible benefit that might arise from some separation of investigative and adjudicative functions. With longer hearings becoming more frequent, together with a proclivity for more specialized subject matters, strains are placed on the current benchers. Moreover, if "transparency" (which the Task Force interprets to mean including views from outside the profession on the issue of lawyer regulation) of processes is desirable, it could be advantageous to create a model that would ensure that a non-lawyer adjudicator is part of the hearing panel wherever it is appropriate to do so. However, as there are only at most 4 appointed benchers available for hearings (as two sit on the Discipline Committee and are conflicted from sitting on citation hearings and up to two sit on the Credentials Committee and are conflicted from sitting on admission hearings), one would need to identify more non-lawyers qualified to sit on panels. Life appointed-benchers are available to sit on panels, and as time progresses, more of those individuals should exist.

Models 2 and 3 might be categorized as steps toward Model 1, with Model 2 being a little farther along the line because it would formalize the "hearing body" and that model could permit it to take responsibility for hearing panel composition. Model 3 would be the easiest first step toward separating the adjudicative function from the rest of the Law Society's processes, as it would simply require a rule change authorizing the appointment of non-lawyers other than life or life-appointed benchers.

Reviews of Panel Decisions

"Reviews" of a decision by a hearing panel are referred to the benchers for a review on the record. Therefore, even if a decision is made to create a model that separates the adjudicative process even notionally from other Law Society processes, any reviews of a decision are statutorily required to return to the benchers, thereby defeating the effect of any separation that has been created between the adjudicative and the investigative process at the hearing panel stage.

A statutory requirement would be necessary to alter the current requirement for reviews, and the Task Force notes that the Benchers are currently considering whether to seek an amendment through which reviews would be heard by "review boards" rather than by the

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

Recommendation

1. Individuals Qualified to Sit on Panels

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

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

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

2. The Task Force recommends that this pool include

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

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

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

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

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

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

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

2. Appointments to Hearing Panels

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

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

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

3. Effect of Recommendations

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

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

to permit former (but not yet life) appointed benchers and non-lawyers to be eligible to be appointed to panels. Consideration will need to be given about whether to make the processes for how panels are comprised to be part of the rules or simply a policy.

While the proposed model admittedly does not *fully* separate the adjudicative process from the rest of the Law Society's functions, it *functionally* separates them because benchers will no longer form the entirety of the panel hearing a case the citation for which has been authorized by the Chair of the Discipline Committee on the recommendation of that Committee. The majority of the panel will *not* be part of the Law Society. Two out of the three panel members will not be existing regulators. One of the members of the panel will be a member of the public. The continuance of a bencher member is a recognition of the value that is brought by having a senior member of the profession skilled in practice and ethics on the panel, in recognition of the decision in *Pearlman* and *Savino.* At the same time, the experience and expertise of other lawyers will be available to the panel, and the public interest will at all times be more clearly recognized by ensuring a non-lawyer participant sits on the panel.

The Task Force recognizes that a process that requires the President to make the formal appointments to particular hearing panels further compromises the separation of the adjudicative function from that of investigations. However, if the President's involvement is merely administrative, and the actual appointment is made through some other process (perhaps a roster system, such as that established in *McOuat* , or some other process to be created), the compromise becomes of less concern.

There may be costs associated arising from the recommendation of the Task Force. It may, for example, be necessary to compensate non-bencher members of panels for their work as adjudicators, and that has not been factored in to the recommendation.[5] The Task Force believes that cost should not be a consideration as to whether the proposed recommendation should be accepted, and that a policy decision should be made by the benchers on the merit of the proposal. Costs would be better considered when deciding whether to implement the recommendation.

Measuring the Effectiveness of the Recommendation

The recommendation, if implemented, should be allowed to operate for at least a three year period. The Task Force expects that, while the panels would be more autonomous from the Law Society, there would still be some capacity for operational requirements to be placed on panels. In particular, the current directive that decisions be rendered within 60 days should continue.

After a three year period, the Law Society should review the subject to determine whether the process works effectively from a regulatory, as well as from a public interest, point of view. For example, the Law Society should determine at least the following:

- whether decisions are released and

[5] The Law Society of Upper Canada pays its non bencher members of hearing panels $500.00 per day of hearing.

- whether panels can be comprised

at least as quickly, on average, as they are at present.

Next Steps

If the Benchers resolve to approve the recommendation of the Task Force, the Task Force recommends that the matter be sent to the Act and Rules Subcommittee for consideration concerning what necessary rule changes are required.

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Province Reg. Body	Hearings per Year	Annual Budget	Composition of Panels	Training	Appointment System	Separation of Pool	Appointment of Panels	Length of Appt Term	Re-Appointments	Evaluation	Removal
Alberta	45	$582,000	24 Benchers 4 public	Twice yearly, voluntary after initial session	Bencher elections	No	By chair of charging committee	While bencher	Bencher elections	N/A	N/A
Ontario	½ yr = 60	$2 mil	83 total 31 Benchers 3 paralegals 7 Lay Benchers 28 appointees 14 *Ex Officio*	2 days Plus 2 – 3-hr sessions/year	Inside appointments /outside advertise occasionally	yes	Convocation appoints Chair – lawyer, non-Bencher; full-time/paid	Benchers – 2 yrs; lawyers staggered	Yes – evaluation process	yes	Formal process for removal of Chair; not other members
Manitoba	12 – 15	No separate budget figures	14 Benchers 44 lawyers 8 public	1 full-day/year Some noon-hours 2 days – public	Inside/public advert	Independent Chair Vice-chair is Bencher 1 public rep/2 lawyers No Bencher required	Independent Chair; part-time/paid	Lawyers – year to year; public reps not changed since start of program, 5 yrs ago	More or less same year to year	No	No – but annual reappointment gives opportunity not to continue a member
Saskatchewan	14		24 Governors (less Benchers on Conduct Investigation Comm.) 12 – 14 public	When available being developed	none	no	Bencher Chair appoints panels; Hearing Chair designated	Benchers – 2 3-yr terms, max of 6 yrs; public reps – up to 2 3-year appointments	Better to have more staggered change with new replacements	No – developing as part of governance strategy	no
New Brunswick	6 – 10	No fixed budget	15 lawyers 4 public 1 Governor	No formal training	Inside/advert for public reps	Kept at arm's length from Soc. functions	Registrar appoints panels	Terms are 7 yrs; try to stagger exits	Have occurred; 7 yr policy new, not likely reappoint after 7	no	no

Province Reg. Body	Hearings per Year	Annual Budget	Composition of Panels	Training	Appointment System	Separation of Pool	Appointment of Panels	Length of Appt Term	Re-Appointments	Evaluation	Removal
Nova Scotia	3 - 4	$52 K	24 lawyers 4-5 public no Hearing Comm. Members on Council (fully independent)	1 full day plus skills matrix	Appointed by council	yes	Hearing Comm. Chair is volunteer	No spec term – suggests no more than 3 2-yr terms; do stagger	No specified term – no more than 3 2-yr terms; do stagger changeover	Not unless appeal	Yes – by recommendation from Chair to President
Physicians & Surgeons	None for 5 yrs	No budget needed	None; Council – 10 elected MDS 5 public	Orientation on role of committee and governance; no admin law	Public – appointed by government Inside – 6 yr limit	no	No hearings	no hearings	No hearings	No hearings	Council members have been asked to resign – is formal process
Dental Surgeons	1 - 3	$250 K	1 Bencher 10 dentists 5 public	Annual plus refresher	inside	yes only 1 Board on Disc Comm.	Chair or Vice-Chair appoints panels – volunteers	2 years, with reappointments staggered	Yes – consideration and recom-mendation from Gov. Comm.	No – in process of developing evaluation framework	no
BC	40 - 50	$128 K (excl salaries)	19 Benchers 22 lawyers 25 public	2 to 6 days of training	Benchers elected/appointed, others applied and evaluated independently	Mostly	President	3 years	Extended for additional year pending review	No	No

INTRODUCTIONS OF LAW SOCIETY TRIBUNAL ADJUDICATORS

JEFF HOSKINS, QC: Before we get to the instructors, I want to ask each of you, if we can organize that in this way, to just say a few words about who you are first and what your experience has been for the last three years. Just a little snippet of that so we have an idea of who everybody is and, because we are recording this for those people that aren't here, we are going to use the floor mic that Diana has there, and so I will ask her start somewhere down there and just ask people to introduce themselves briefly.

JOHN LANE: My name is John Lane, and I have done I think about five hearings. I found the hearings to be absolutely excellent in the sense that they are so well organized and so straightforward and I think one of the biggest thing I found as a lay person is in every case the chairs that I have had the opportunity to work with have been extremely helpful and beneficial and very knowledgeable. I have sat on other tribunals, and they don't go as well, and they are not as straightforward. So I found it to be a very beneficial process for me.

GRAEME ROBERTS: Good afternoon, my name is Graeme Roberts. I'm from Victoria, BC. I have been retired for a number of years, served for about seven and a half years as Chairman of the British Columbia Public Service Commission. I am a car dealer by breeding, almost by birth, and I found it extremely interesting when I got into the Law Society being a lay bencher and echoing John's words, I found everybody most helpful. There was never a moment where I felt that I was alone. I was always given the opportunity to ask the questions, and I just have the highest degree of respect for all those that I work for and I look forward very much to continuing and thank you for having me here today.

JOHN WADDELL, QC: I'm John Waddell, a lawyer from Victoria. I have sat on four or five panels. Two things have impressed me the most, one is the quality of training available to all of us and secondly the quality of counsel that has appeared in front of us on behalf of both the Law Society and the members.

SHARON MATTHEWS, QC: I'm Sharon Matthews, an elected bencher from Vancouver County, and I have been doing hearings for just under a year now. I did the training at this time last year. I have sat on, I think, eight or nine hearings in four matters, and I was pleasantly surprised at how much I enjoyed both the adjudicating and the writing and the training was far more scary than the reality, so the hearings are well-organized by Law Society counsel and the member's counsel.

JAMIE MACLAREN: Hi, I'm Jamie Maclaren. I'm an elected bencher from Vancouver, and I have sat on two panels now and felt well-prepared, though still quite daunted by the prospect of it all. I thought that counsel were particularly helpful in being patient and guiding me when

needed and also my fellow panel members, including the public representative which was John [Lane] just recently. Thank you.

LAURA NASHMAN: Thank you. I'm Laura Nashman, CEO of the BC Pension Cooperation. I have sat on I think three or four panels and enjoyed it very much. I learned that lawyers are people too and appreciated very much the humanity that is brought to the process.

JUNE PRESTON: Hello, my name is June Preston. I'm a social worker. I'm a life-appointed bencher since 01 or I guess after I finished my time; I became the lifer, yeah. I have high regard for the Law Society and how they work in the best interest of the public. That is just really always, I think, before them, and their members hold that as their vision and why they want to get elected and get on the board. I kind of brought it up, if any of the lay people could attend a bencher's meeting because I thought that might be interesting to actually see the bencher meeting, you know, if they wanted to.

Anyway, as I have sat on panels over the last ten years before it became organized this way and was very glad to know that it was becoming more organized, even though I did take training over the years and always felt so supported by the members who really cared about each other and for sure the lay people on them. But I also think they are respectful of their own members who are being brought before a hearing, and I think that's really important that that reputation, it's not a place that you will be put down or scoured upon, but it is held in a regard that a person can present their side and so on, and I think it's important that that will always be continued.

CAROL HICKMAN, QC: Hi, I'm Carol Hickman. I'm a lawyer from New Westminster. I was a bencher for eight years until I think 2011, and so I'm now a life bencher and continue to do this work in this new capacity as a lawyer representative. I also do work as a family law arbitrator, so I find the training very valuable in both capacities. I'm like June because of doing hearings both as a bencher and now sitting in this capacity. I have lost track, so I don't know how many hearings I have done, but I continue to enjoy the work and always appreciate the refreshers and the training that we get.

WOODY HAYES: Hi everyone, I'm Woody Hayes. I am a retired partner now from a firm called Hayes Stewart Little on Vancouver Island. We work in Nanaimo, Duncan and Victoria. I'm a past president of the Institute of Chartered Accountants and for a while was responsible for their discipline process, so this has been very interesting. Being a lay member, I have been particularly impressed with the fairness of the process, and I think everybody seems to bend over backwards in order to make it as fair to everyone involved as they possibly can. So I would just like to make that particular comment, so thank you very much.

SANDRA WEAFER: My name is Sandra Weafer. I'm a non-bencher lawyer member of the Hearing Panel Pool. In my other life I am counsel at the Department of Justice. I have sat on probably four or five hearings, including my first review hearing, which I found to be an interesting exercise. I very much appreciated the structure of the panels and the different perspectives that the benchers, the lay members and the non-bencher lawyers bring to the issues. I found it very educational, very useful experience.

JOOST BLOM, QC: I'm Joost Blom. I'm a Professor at UBC Law School, or the Peter A. Allard Law School at UBC, and I was a bencher for eight years and sat on a decent number of hearings during that time. I thought the process was good, but I think the current process, which came in just as I was finishing, is better. But I have not actually had much personal experience. I am now on the roster of non-bencher lawyers, but because of my teaching schedule, it took me a while to actually be able to go to the training course. Since then, I have participated in one hearing, the only result of which was to decide that we shouldn't sit because the respondent wasn't there and we thought we really shouldn't proceed. But anyway, I hope to get more experience.

CAROL GIBSON: I'm Carol Gibson. I'm a public representative. I was informed that I'm not a lay person, I'm a public representative. I have been on about four hearings, and I have been particularly impressed by how seriously the Law Society and all of the lawyers take their responsibility to the public and to the profession. I just wish that the general public was aware of that. Thank you.

LYNAL DOERKSEN: I'm Lynal Doerksen. I'm a bencher from the Kootenay County in Cranbrook. My day job is as a crown prosecutor, and I have done that for almost 25 years. I can say, despite the fact that I am constantly in court, I was very impressed with the training we had and how much there was to learn about actually being on the other side and not being an advocate and chairing a panel. It has been very challenging, and I have learned a lot. I really enjoy the work, and I really enjoying working with the public representatives who are on these panels as well.

JIM DORSEY, QC: Good evening, my name is Jim Dorsey. I'm a lawyer member of the Hearing Pool. My practice away from this is as a full-time arbitrator. I have sat as an administrative arbitrator, both public and private, for thousands of days over four decades, and what I particularly enjoy about this process is the extensive and thorough preparation that occurs before we get to a hearing and at the hearing, the respect, courtesy and competence of all of the people that I have been dealing with.

GAIL BELLWARD: Hi, I'm Gail Bellward, public representative, Professor Emeritus at UBC Pharmacology and Toxicology. I have become one of your biggest boosters because I have done

a lot of work in the Health Sciences with physicians, pharmacists, nurses, that sort of thing. It's really important that this type of thing where there is the respect, where there is the detail where people go into it knowing exactly what is going to happen and see the end result, the learning is just incredible and the elevation of your profession is constant as a result I think is just magnificent.

PAULA CAYLEY: Hi, I'm Paula Cayley and I'm the former CEO of Interlock, the members' assistance program, and I have known for quite a while that lawyers are human just to respond to one comment. The first hearing I had, we brought somebody back to the profession who had been disbarred, so I really felt the seriousness certainly of the role and the respect that everybody gave to that person in that process. I was very impressed. I have sat on a few panels, and it has been a really positive experience. I have really been impressed with Law Society counsel and the challenge of their role in this process. In my other life, I am a part-time member of the BC Review Board as well. Thanks.

GLENYS BLACKADDER: My name is Glenys Blackadder, and I have previous experience in tribunals, but I find that the most rewarding work that I have been able to do have been with the Law Society and I appreciate the opportunity. There is a divergence of interesting opinions in most of the discussions, and I really enjoy that particularly. So thank you.

DAVID LAYTON: Hi, my name is David Layton. I'm a lawyer member. I have been a criminal lawyer for many years, mostly as defence counsel but more recently as prosecutor. I have been really impressed with the professionalism and the transparency of the tribunal process, and I have thoroughly enjoyed the experience of sitting on the panels and writing decisions. I think I am particularly impressed with the Law Society's effort to constantly assess and reassess and modify this process so that it has become and will continue to become a leader in Canada in terms of really a sound adjudicative process in administrating professions.

JASMIN AHMAD: Hi, my name is Jasmin Ahmad. I'm a non-bencher lawyer member. I'm a commercial litigator in Vancouver. I have sat on about five or six or maybe more hearings, credentials and discipline and thoroughly enjoyed them all. I find this experience to be extremely rewarding. I am pleased I can give back to the profession in this way. What struck me about the hearings is what everyone, the benchers, the lawyers, the lay representatives have brought to the compassion, the sympathy, the empathy but at the same time the over-arching principle of the interest of the public. That has been present and apparent and brought to the table by everyone, and so it has really struck me. I think that the Law Society is doing a wonderful job in bringing all of the experience and the perspectives they have in bringing this format.

LANCE OLLENBERGER: Good evening, Lance Ollenberger, public member of the Lay Panel. I'm hoping that it is a mutually beneficial experience because it has been very beneficial to me in my other life, working with the panels, observing and participating in the adjudicative process and determining that things are not always cut and dried the way at times that we feel that they are. So I really appreciate the process we go through, the back and forth, the discussions and decisions that we make so for me, it has been very beneficial. I think five hearings, both credential and discipline, so thank you.

DON SILVERSIDES, QC: I'm Don Silversides. I practise law in Prince Rupert, currently corporate commercial law. I was a bencher of the Law Society from 1984 through 1996, and when I became a bencher, there were no lay benchers, it was a very hot topic and divided the profession. There were many lawyers who said basically over my dead body will a non-lawyer become part of the Law Society, even led a recent president, then called the treasurer, to resign as a life bencher so that she could seek re-election again to carry on the fight against these heathens and barbarians who were at the gate but in my first or second or third year. I can't remember when, we did get lay benchers and my experience was that they really contributed a great deal to our deliberations.

I must say I sat on a number of hearings then but we didn't have the current scheme as we do now. Since this panel has been set up, I have had at least two credentials hearings, three discipline hearings, sorry, two discipline hearings and a review, which Sandra was on. I think that having public representatives really benefits the process. They are not shrinking violets, they participate fully and, in my experience, on every panel, their views, which are very much grounded in common sense, have often carried the day.

BOB SMITH: Thank you for the introduction. I'm a public member. My name is Bob Smith. My career is Health Leader in British Columbia and elsewhere in Canada, but I have spent the last nine years at UBC as an Adjunct professor and now doing some health care consulting. As a public member on these panels, I honestly feel privileged to be representing the public in the deliberations that the panel is hearing. I look forward, having had only three sessions, some others were cancelled at the 11th hour, so maybe I would have had more, but I look forward to continuing to be able to participate and hopefully more frequently.

HAYDN ACHESON: I'm Haydn Acheson. I'm an appointed bencher from Vancouver. I'm in my eighth and final year. I have done many hearings over the years, sat on the original task force, probably four or five years ago, where we reviewed the tribunal process, made the recommendation to go outside the bencher table. On the current task force, evaluating the three-year trial, as I look around the room and the diversity I think we made the right decision in the trial. I think the public is served very well by having the diverse group here and for me, being an

appointed bencher has been a tremendous honour, a deep respect for the lawyers and the process at the Law Society. Thank you.

GAVIN HUME, QC: I'm Gavin Hume; I'm a lawyer, life bencher, simple labour lawyer. I was involved in the setting up of these tribunals, so it is a great pleasure to me to hear about the successes that we are having. I continue to sit, I don't how many I have done, and I very much appreciate also the training. I was dumped in, like many of us when we first started as benchers, and the training I think has been very useful.

DAVID MOSSOP, QC: My name is Dave Mossop, and I'm also in my final year as a bencher. I have sat in on many hearing panels. The two things I learned from sitting on the panels are follow the advice of Jeff Hoskins and follow the advice of Michelle Robertson and then you won't have any problems.

KEN WALKER, QC: My name is Ken Walker and I agree with David.

TOM FELLHAUER: Hi, my name is Tom Fellhauer, and I am the elected bencher for the Okanagan. I am in year six, and I have experienced both the hearing panels being all benchers and also the new regime. I would have to say that I am really, really impressed. There is a completely different feeling when you have a public representative on the hearing panel, and I have had a number of instances where we have been dealing with a situation or asking questions and the public representative has come up with a question that is just spot-on and really captures what I would say, you know, the more public interest. That has been really impressive, and I am so pleased that we are doing that.

ELIZABETH ROWBOTHAM: Good evening, I'm Elizabeth Rowbotham. I'm an elected bencher for Vancouver. This is my second year. I have a varied practice, of a litigator, a bit of administrative law and a bit of solicitor's advice. I have taught aspects of the administrative law course to statutory decision-makers, so being on the other side is quite interesting. I have had about four or five panels in the past year. I have chaired two disciplinary and credential, three disciplinary; anyhow, they start to blend together after a while so I kind of understand. I have enjoyed the process very much. I find the benefit of the input of advice from both the lawyers and the public representatives very helpful and integral to a successful panel hearing. Thank you.

CLAYTON SHULTZ: Hi, I'm Clayton Shultz. I'm a public representative, and in my other life, I'm a chartered accountant, morphing into a CPA where I'm a little schizophrenic about all that but anyway it is happening.

The thing that impressed me most when I joined this group is the warmth of the reception that I received. I found that it was a marked contrast to the time that I was appointed to a health organization by the government as part of including members that are not in the particular profession to be part of the decision-making group. A couple of us in the public representative camp, sat down with the executive director and several of the board members and said, how much can we do? What can we do to help? And the answer was nothing, we wish you weren't here, and this is true. We eventually kind of ironed that out and carried on. The inclusiveness I found very welcomed from the Law Society and the genuine welcome, which is evident from the comments around this room. It's been a rewarding experience, and I have looked back on it with great enthusiasm.

BRUCE LEROSE, QC: My name is Bruce LeRose. I'm a life bencher and a past president of the Law Society. I have to tell you that when current present president Ken Walker was the chair of this task force that brought this forward to the benchers, the vote was 30 to 1 in favour of Ken's recommendations; I was the one. I have to tell you that I am an absolute convert. Having had the opportunity over the last three years to sit with the likes of Clayton and Woody Hayes and others, they have added so much to the process, and it is a much better process. I'm proud to say that I was wrong. With respect to the training, you are never too old to learn, it's been wonderful training and despite the fact I had the opportunity to sit on many and many of these hearings prior to us getting the training, it has helped me immeasurably. Thank you.

BILL EVERETT, QC: Thank you. Bill Everett, life bencher and past president. I have been most impressed by the training that we have all received in preparing us to sit on these panels. I think it's been first-class, and it's allowed us to be able to write really excellent decisions and to conduct the hearings in the fairest manner possible. I am also very impressed by the lay people who serve on the panels. As others have said, Tom as you said, they come up with the question that cuts right through it all and goes right to the heart of the matter, and I have been very impressed by that.

I have also been very impressed by Jeff. I want to thank you very much because I quite often get assigned with the task of writing, and it goes into Michelle and Michelle gives it to you and then you do a marvellous job of editing the writing and I thank you very much for that. It really does improve the quality of our work, and I appreciate that very much.

I also like the way in which the new system separates the prosecutorial arm from the hearing panel so that we have truly independent and transparent hearing panels judging the lawyers that come before us. So, thank you very much.

PETER WARNER, QC: Hi, I'm Peter Warner, solicitor from Peachland but many years from Prince George. I have done about six or seven hearings under this new panel system, one today,

and that's why I was late. The hearing ran late, and it is going to continue tomorrow. I did a number when I was a bencher from 1992 to 98, and I think this system is a better system. I think having members of the public sitting on the bench, as it were, is a sobering experience for either students or lawyers who are in trouble or who are in front of us. With the public there, it is a bigger carpet they are being called upon, so I think it has worked very well.

THELMA SIGLOS: Hi, my name is Thelma Siglos. I agree with many of the comments here. Just a bit of background about myself. I'm an accountant by profession. I have worked for many years with the BC Public Service in the financial integrity and investigations side. I have recently retired and was hired by the Ministry of Justice as a consultant on the financial integrity side of things as well. I was past chair of the professional conduct inquiry for the Chartered Accountants and the Rulings Committee.

So I agree with many of the things that were said here. I totally welcomed the training that I was receiving because I felt it helped me in some of the work that I was doing with respect to writing reports as a consultant on the financial integrity investigations angle. I am really grateful for that training.

The second thing is that I was totally impressed with the fairness of the process in terms of transparency, and the respect given to the lawyer who was in front of us and the other counsel and the time given to me when I asked certain questions to understand, and the process itself. I say I took my stand or perspective as a public representative very seriously in that respect.

Thirdly, I was grateful also for the process of giving us copies of the reports, that to me was a wealth of understanding, seeing what happened in some of the cases and being able to say, yeah how this differs from the matter that I was part of. So overall I am grateful to be part of this process and I learned a lot. Thank you.

DAN GOODLEAF: My name is Dan Goodleaf. I'm a public representative. I recently retired, formerly Canada's Ambassador to Central America, great place to be. Currently a member of the Board of Directors for Access Pro Bono. I am now in the midst of my fifth panel, and I will share with you a bit of a secret that I had at the beginning. I had some doubts. I thought what is the Law Society of British Columbia doing? Is this window dressing? Is there is some kind of pressure that came its way that is causing them to do what it is doing? So I had the doubts, maybe I was with Bruce on the one that decided to keep the barbarians away from the door. I will tell you that after the first session, any doubts that I had were taken away. As a lay person, as a public representative, at least in the five panels I have been on, you are brought in as an equal, you are treated as an equal, you are expected to carry your own weight, you are expected to have views and not just sit there, and you are expected to defend those views. You may not have the legal credentials, but you have at least the wisdom, you have some smarts and you are

expected to defend and with that I think that's a tribute to the members of the legal profession here in British Columbia. So my doubts have gone, and I think there were reasons why the Law Society did it, and perhaps the rest of the country can follow suit. Thank you.

DON AMOS: My name is Don Amos. I'm a public member with a law enforcement background. I have sat on other tribunals, and I found my experience here just excellent. The whole process has been just first-class. I also recently sat on my first review hearing and again this was a very very good process. It's a good thing to do, and I hope that I have an opportunity to do this again.

There is one thing that I have not had the courage or temptation to do and that has been to put my hand up and say I'll attempt to write a decision, but you know maybe that'll come with a little more time. I have become familiar with a lot of the case law, but I still don't feel 100% comfortable to try to do that last step.

CLAUDE RICHMOND: Thank you, I'm Claude Richmond, and I'm in my sixth year as a lay bencher, and it's been a great experience. I have sat on discipline and credentials and a couple of other committees, and I find it very rewarding, especially when we can contribute from a point of view that isn't always present in the room. I find that very very good. I should also point out that I'm a barbarian from Kamloops, the political centre of the universe, and I want you to know that our president is from Kamloops too and we are good friends. Thank you.

GREG PETRISOR: My name is Greg Petrisor. I'm an elected bencher from Prince George. I appreciate the opportunity to do these training sessions. It gives you a chance to maybe have some feedback and discussion with other people who sit on panels because you are kind of alone up there trying to make decisions quickly and answer questions that come up. So, I appreciate the opportunity.

JORY FAIBISH: Good evening. I'm late because I was teaching at the Justice Institute today, and I apologize for my attire. If I looked like all of you, they would have not let me in today so I'm here looking a little bit different from most of you. My name is Jory Faibish, I'm a public representative. My experience has been the same as I have heard from many of my colleagues: warm welcome, great deal of consideration in terms of any input that I have to make and I have really appreciated that. I have to say it was a surprise, and a welcomed surprise. I have been on a couple of panels and, like some others, have been appointed to a number of panels which cancelled at the 11th hour. So I'm looking forward to being on more. It's been a great experience.

ROLE OF INDEPENDENT CHAIR

1. Basically, the role of the Chair would be those of

    a) member of lawyer pool;
    b) chief of Tribunal;
    c) chambers bencher (subject to delegation);
    d) adjudicator on publication issues.

    all subject to *Legal Profession Act* and Law Society Rules.

2. The functions of the independent chair would include these:

    (1) Establish panels and review boards, appoint members, remove, replace, consent to continuation, etc., supported by staff and guided by Protocol;

    (2) Participate in hearings as chair of panel in rotation with other members of lawyer pool;

    (3) Conduct prehearing and prereview conferences or appoint another member of the lawyer pool;

    (4) Adjudicate applications made before and after hearing or review, such as adjournments, stays, variation of orders, or appoint another member of the lawyer pool. Direct applications to Committee or panel where appropriate;

    (5) Act as spokesperson for the Tribunal;

    (6) Be responsible for the disclosure and publication of citations, decisions and other Tribunal information and documents. Adjudicate applications relevant to exercise of discretion in relation to publication and disclosure;

    (7) Set date for hearing or review when counsel cannot agree;

    (8) Designate three or more Benchers to consider applications for interim suspension, etc.;

    (9) Be a leader, mentor and coach with all tribunal members;

(10) Participate in the appointment and re-appointment process.