THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday July 13, 2007

PRESENT:

Anna Fung, QC, President
John Hunter, QC, 1st Vice-president
Gordon Turriff, QC, 2nd Vice-president
Kathryn Berge, QC
Joost Blom, QC
Ken Dobell
Leon Getz, QC
Carol Hickman
Gavin Hume, QC
William Jackson
Patrick Kelly
Bruce LeRose, QC
Jan Lindsay
June Preston
Robert Punnett
David Renwick, QC
Glen Ridgway, QC
Allan Seckel, QC, Deputy AG
Dirk Sigalet, QC
Richard Stewart
Ronald Tindale
Dr. Maelor Vallance
Art Vertlieb, QC
Ken Walker
David Zacks, QC

NOT PRESENT:

Rita Andreone
Ian Donaldson, QC
Terry La Liberté, QC
Thelma O'Grady
James Vilvang, QC

STAFF PRESENT:

Timothy McGee, CEO
Barbara Buchanan
Stuart Cameron
Brad Daisley
Su Forbes, QC
Jeffrey Hoskins
Graeme Kierstead
Howard Kushner
Michael Lucas
Bill McIntosh
Melissa McConchie
Jeanette McPhee
Doug Munro
David Newell
Michelle Robertson
Alan Treleaven
Adam Whitcombe
Carmel Wiseman

GUESTS:

Dr. Stephen Toope, President, University of British Columbia
Dean Mary Ann Bobinski, University of British Columbia
Michael Milani, QC, President, Federation of Law Societies
Jonathan Herman, Executive Director, Federation of Law Societies
Caroline Nevin, Executive Director, CBABC
Ken Walton, Vice President, CBABC
Johanne Blenkin, Executive Director BCCLS
Stephen Frame, Trial Lawyers Association
Ted Strocel
Paul Albi

1. MINUTES

The minutes of the meeting held on June 2, 2007 were approved as circulated.

2. CONSENT AGENDA

The following resolutions were passed unanimously and by consent:

Resolved: to extend the mandate of the Women in the Legal Profession Task Force to the end of September 2007.

Resolved: to authorize publication of revised model policies on workplace equality and respectful language guidelines, as set out in Appendix 1.

Resolved: to authorize the President to execute the Protocol attached as Appendix 2.

Resolved: to amend the Law Society Rules by rescinding Rule 3-3(2)(a) and substituting the following:

> (2) Despite subrule (1), the Executive Director may do any of the following:
>
> (a) disclose information referred to in that subrule, with the consent of the lawyer,
>
> (i) in responding to an enquiry made for the purpose of a potential judicial appointment, or
>
> (ii) under a protocol with a Court of which the lawyer is a part time judicial officer;

Resolved: to authorize the Executive Director to publish the Report of the Title Insurance Task Force by posting it on the Law Society website, together with an invitation to interested persons to comment on the report no later than October 12, 2007

Resolved: to respond to the Ministry of the Attorney General's Green Paper, "Reforming British Columbia's *Limitation Act*"(February 2007) in the form set out in Appendix 3.

3. PRESIDENT'S REPORT

Ms. Fung circulated a written report setting out her activities on behalf of the Law Society over the previous month. She thanked several Benchers for representing the Law Society at events she was not able to attend. Matters Ms. Fung noted included:

- The publication "Beat The Clock" prepared by the Lawyers Insurance Fund has generated a lot of positive feedback.
- The Society of Notaries Public sent a notice that they are adopting a program of mandatory continuing education.
- Nineteen law firms have joined in writing a letter to Finance Minister, Carol Taylor, asking the government to reconsider removing the PST from legal fees.
- Kuan Foo, Law Society staff lawyer for Equity and Diversity, is leaving the Law Society to return to private practice.

4. CEO'S REPORT

Mr. McGee circulated a written report. Highlights included:

- A steering committee has been formed to prepare a proposal for how to approach a review of the Law Society's governance and strategic plan. The committee will examine the scope of work to be done, whether external assistance is needed, and the timeline for completion.

- The Law Society will be honoured by the Simon Weisenthal Centre for Holocaust Studies for its support and work on the Lawyers Without Rights exhibition and public forum scheduled for the fall. The award will be presented on August 10, 2007.

- Ms. Fung has been honoured for the second month in a row, this time with the CBA BC Branch Equality and Diversity Award.

5. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions and Bencher reviews.

6. ADDRESS TO THE BENCHERS FROM MICHAEL MILANI, QC AND JONATHAN HERMAN

Mike Milani, QC, President of the Federation of Law Societies, and Jonathan Herman, Executive Director of the Federation of Law Societies spoke addressed the Benchers on what the Federation does and why it should matter to the Law Society of BC. Mr. Milani noted a number of initiatives undertaken by the Federation in the last few years including:

- The National Mobility Agreement.
- CanLII
- A National Model Code of Conduct
- The Task Force on Canadian Common Law Degrees.
- The money-laundering legislation challenge.

Mr. Herman sought to place the Law Society of BC, and other law societies in a national and international context. He said how the Law Society of BC and other Canadian law societies regulate lawyers is watched by international bodies and other governments. What goes on here is important in Paris, Geneva, and Brussels. Three major issues resonate internationally:

International trade policy. Canada is either party to or is negotiating bilateral trade agreements and multi-party negotiations at the WTO level that now extend to trade in services, including professional services. The Federation is well placed to provide the federal government with information about what the Law Societies are doing and assert their interest in being involved in consultations that touch on jurisdiction to regulate lawyers.

The next issue concerns competition authorities. In other countries competition authorities have stepped in and forced changes to the regulatory model. Canada's Competition Commissioner is examining regulation of the professions. We have made every effort to distinguish the Canadian experience from that in other countries, and we await reaction.

The third issue is the global fight against money-laundering and terrorist financing. The Law Society of BC needs no lessons or lectures on the subject as it is a leader within the Federation on

that front. The actions of the LSBC fit very directly into national and international contexts. Those contexts are very dynamic. Internationally, the financial action task force (with representatives from 32 countries, including Canada) was established to make recommendations. As a signatory, Canada has every interest in ensuring that it is in full compliance with the recommendations. Last year Canada assumed the chairmanship of the task force. This year the task force undertook an assessment of Canada's compliance with its recommendations. Domestically, compliance is under scrutiny by the Auditor General, who identified as a gap the fact that lawyers are not subject to the reporting requirements of the legislation. Two weeks ago the federal government published new regulations for consultation that are designed to apply to lawyers dealing with client identification and verification, and record keeping. There is a motivation for Law Societies to be seen to be regulating proactively in this area.

Ms. Preston asked Mr. Milani if the Federation had ever given consideration to the connection between lay Benchers across the country. Mr. Milani said one of the functions of the Federation is the ability to collate and circulate information. He had not heard the particular question before, and said he would take it back and consider a communication that might spur on the suggestion.

Ms. Berge asked for Mr. Milani's comments with respect to the Barreau du Quebec's involvement in the Federation's review of law degrees, and how they are integrating into the model code of conduct. Mr. Milani said the Batonnier had asked to appoint a member of the task force on review of common law degrees. In general, Quebec has been very engaged in Federation projects over the past few years. Mr. Herman said that for the most part the issues dealt with a the Federation are consistent with the Barreau's concerns. There is excellent representation from and communication with the Barreau.

Mr. Kelly was particularly interested in hearing about what is happening at the international level. He noted that the Benchers had recently offered very strong support for the Lawyers Without Rights exhibit coming to Vancouver in November. The event involves international participation and presented an opportunity to profile some of the important things being done at the national and international level.

Mr. McGee added that the Federation was increasingly providing opportunities to compare notes on how different Law Societies do things operationally and improve performance. From the staff point of view, the Law Society of BC plays a major role at the Federation and is extremely motivated to participate because of the opportunity to establish and compare benchmarks.

7. RULE AMENDMENT RE: WRITTEN REASONS IN CREDENTIALS HEARINGS

Mr. Hume reviewed a memorandum from the Regulatory Policy Committee recommending amending the Law Society Rules to require Hearing Panels in credentials matters and Benchers on a Bencher Review of a Hearing Panel decision to provide written reasons.

It was moved (Hume/Zacks) to amend the Law Society Rules as follows:

1. In Rule 2-68 by adding the following subrules:

(3) After submissions under subrule (1), the panel must determine the facts and decide whether to

(a)grant the application

(b)grant the application subject to conditions or limitations that the panel considers appropriate, or

(c)reject the application.

(4) The panel must prepare written reasons for its findings, but may announce its decision, with or without oral reasons, before the conclusion of the hearing.

(5) The Executive Director must promptly deliver a copy of the panel's written reasons prepared under subrule (4) to the applicant and counsel for the Society.

2. In Rules 4-34(2)(a) and 4-35(1)(b), by deleting "***by majority decision,***"

3. In Rule 5-12(1) and (3), by deleting "Rules 5-12 to 5-19***" and substituting "***Rules 5-12 to 5-20***".***

4. In Rule 5-13(1) by deleting "of a decision under section 47 of the Act***".***

5. In Rule 5-16(1) by deleting "under section 47(1) or (3)***" and substituting "***under section 47(1) or (2)***".***

6. In Rule 5-17(1) by deleting "under section 47(1) or (2)***" and substituting "***under section 47(1) or (3)***".***

7. By adding the following Rule

Decision on review

5-20 (1) The decision of the Benchers on a review is made by majority vote.

(2) The Benchers must prepare written reasons for their decision on a review.

(3) On request, the Executive Director must disclose the Benchers' written reasons for their decision, subject to the protection of solicitor and client privilege and confidentiality.

(4) When the Benchers give written reasons for their decision, they must not disclose in those reasons any information that is confidential or subject to solicitor and client privilege.

(5) The Executive Director must promptly deliver a copy of the Benchers' written reasons prepared under subrule (2) to the applicant or respondent and counsel for the Society.

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

8. KEY PERFORMANCE MEASURES.

Mr. Zacks reviewed the history of development of performance monitoring indicators at the Law Society as part of policy governance. He noted that the indicators fell out of favour because they were overly complex and very time consuming without producing a lot of useful information. Having learned a great deal from its first attempt, the Audit Committee, together with management staff, has developed goals and objectives for each key area of the Law Society, and then developed measurements related to them. Mr. Zacks thanked the committee, and in particular the non-Bencher members Ted Strocel, Paul Albi and Deborah Armour for their contributions.

It was moved (Zacks/LeRose) to rescind the existing monitoring indicators and replace them with the key performance measures set out in the presentation to the Benchers, a copy of which is attached as Appendix 4.

Ms. Hickman noted that there was nothing in the indicators for professional conduct and discipline that measured members' satisfaction with the process, particularly regarding timeliness, and said she would like to see an indicator for that included. Mr. Kushner said the member ratings were quite high, with a percentage in the high nineties expressing satisfaction. He said the satisfaction of members involved in the complaints and discipline process was something management looked at, but did not think it was part of the performance measures that concerned the public interest. Ms. Hickman said that information would be very useful for Benchers.

Mr. Jackson noted the goal that complaints not increase over time. He said that would not account for changes in the number of lawyers. With respect to credentials, he noted the suggested measure was 98% of principals recommend students as fit to practice law. He asked how the percentage figure was arrived at. Mr. Treleaven said it tracked past experience. Mr. Jackson was also concerned that the proposed target one to one ratio of policy matters referred to Benchers and policy decisions made might not be fair to staff in that matters are referred back without a decision for many reasons, some of which are no reflection on the staff work. Similarly, the ratio for hearings, reviews and appeals might be unfair to hearing panels. Mr. Hoskins said the proposed targets were aspirational and not intended to measure individual performance but collective performance.

Mr. Zacks noted that the targets tied in to various things that were being done to improve the overall quality of hearings and hearing reports. Perfection is not a completely unreasonable goal for a group of lawyers. A target is needed, and it ought not be one of failure. Mr. Hoskins said part of the success of the program would be a reduced number of openings for review. Not reaching the target ratio may assist in finding ways to improve.

Mr. Kushner said that the frequency of complaints measures not only the professional conduct department but reflects on the Law Society more generally including other programs. He said the measurement is normalized to account for changing numbers of lawyers.

Mr. Kelly applauded the Committee's effort and noted that Mr. McGee had proposed a review of governance and strategic planning. He said there should be a really tight connection between those efforts and the performance measures.

Mr. McGee agreed with Mr. Kelly that in a perfect world the strategic plan would come before the key performance measures. However, the proposed measurements related to core activities that will not change as a result of the review so there is value in putting them in place right away. Additionally, the performance measures are about management responsibility and accountability.

Mr. Turriff reminded the Benchers that there are lots of variables that may make it impossible to reach targets of perfection. The quality of hearings and hearing reports turns on who is elected as a Bencher, panel composition, and the quality of counsel. He said the Benchers might come to the question of whether there should be a special cadre of discipline Benchers who only sit on hearing panels.

Ms. Preston appreciated the work that went into the measures. With respect to unauthorized practice, she said the Law Society wanted not only to protect the public directly by preventing unauthorized practice, but also indirectly by educating people. She asked if there was a way to measure the outcome of that effort.

Mr. Zacks suggested that public protection and education were not treated as a core program but were really the outcome of all the things the Law Society does.

Mr. Getz said the point had been made in other discussions that Benchers tend to talk amongst themselves and pretend that it is convincing to people who don't hear what they are saying. He said it is important to consider how the Law Society communicates with the rest of the world and on what topics.

Ms. Fung said that was something the Executive Committee could consider in terms of the strategic planning process.

Mr. Hunter reminded the Benchers that this was discussed at their retreat and the Benchers agreed with Ms. Preston's point that the Law Society must talk to people. He said he would be disappointed if the steering committee did not come back with a recommendation that gets the Law Society's information out into the community. It might be that further measurements will be needed and added as new programs are developed.

Ms. Fung asked if there was an explanation for the drop in satisfaction with respect to student's knowledge of practice and procedure, and preparation for the practice of law? Mr. Treleaven said the measure of satisfaction was more stable if considered over a long period. He said the Law Society had been asking students questions like this since the beginning of the PLTC, but this was the first time numbers were put to it and used as a performance measure. The targets are considered reasonable.

Ms. Fung noted that there had been a drop in the satisfaction expressed by students in the admission program with respect to their increased knowledge of practice and procedure and preparation to practice law, and she asked if that was attributed to anything in particular. Ms. Fung also asked if the goals were "stretch" goals. Mr. Treleaven said that over a longer term the satisfaction rate is more stable. With respect to the goals Mr. Treleaven said that the Law Society had been asking students similar questions since the inception of the program but this was the first time they were being used as a performance measure. He said the targets were considered reasonable. Mr. Zacks commented that the targets could be changed once feedback is received.

Mr. McGee said the performance measures were not intended to be static. The Audit Committee and management will try to assess what initiatives impact positively on the measures.

The motion was carried.

9. SUMMARY HEARING PROCESS

Mr. Hume introduced a proposal from the staff complaints reduction group to implement a summary hearing process to deal with certain matters, in particular failures to abide by regulatory obligations such as responding to enquiries by the Law Society, abiding by practice conditions, or bringing accounting records up to date in accordance with the rules.

It was moved (Hume/Jackson) to amend the Law Society Rules as follows:

1. In Rule 1-3 by adding "4-2,***" after "***2-69,***".***

2. In Rule 3-6 by adding the following subrule:

(4) Despite subrule (3), the Executive Director may refer a complaint to the Chair of the Discipline Committee if the complaint concerns only allegations that the lawyer has done one or more of the following:

(a)breached a Rule;

(b)breached an undertaking given to the Society;

(c)failed to respond to a communication from the Society.

3. ***In Rule 3-12,***

(a) by adding the following subrule:

(3.1) Despite subrule (3)(e), the Practice Standards Committee may refer a complaint to the Chair of the Discipline Committee if the complaint concerns only allegations that the lawyer has done one or more of the following:

(a)breached a Rule;

(b)breached an undertaking given to the Society;

(c)failed to respond to a communication from the Society***., and***

(b) in subrule (4), by inserting "or (3.1)***" after "***under subrule (3)***".***

4. ***In Rule 3-14,***

(a) by adding the following subrule:

(6.1) Despite subrule (6), the Practice Standards Committee may refer a report to the Chair of the Discipline Committee with respect to allegations that the lawyer has done one or more of the following:

(a)breached a Rule;

(b)breached an undertaking given to the Society;

(c)failed to respond to a communication from the Society***, and***

(b) in subrule (7), by inserting "or (6.1)***" after "***under subrule (6)***".***

5. ***In Rules 3-18.2(2) and 3-44(4) by inserting "***or the Chair of the Discipline Committee***" after "***to the Discipline Committee***".***

6. ***In Rule 4-2, by adding the following subrule:***

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

7. ***By rescinding Rule 4-3 and substituting the following:***

Consideration of complaints by Committee

4-3 The Discipline Committee must consider any complaint referred to it under these Rules and may instruct the Executive Director to make or authorize further investigation that the Discipline Committee considers desirable.

8. ***By adding the following Rule:***

Consideration of complaints by Chair

4-4.1(1) The Chair of the Discipline Committee must consider any complaint referred to him or her under these Rules and may instruct the Executive Director to make or authorize further investigation that the Chair considers desirable.

(2) After considering a complaint under subrule (1), the Chair of the Discipline Committee must

(a)order a hearing into the conduct or competence of a lawyer by directing that the Executive Director issue a citation against the lawyer, or

(b)refer the complaint to the Discipline Committee.

9. ***In Rule 4-5 by inserting "***or the Chair under Rule 4-4.1***" after "***the Discipline Committee under Rule 4-4***".***

10. ***By adding the following Rule:***

Summary hearing

4-24.1(1) This Rule may be applied in respect of the hearing of a citation comprising only allegations that the respondent has done one or more of the following:

(a)breached a Rule;

(b)breached an undertaking given to the Society;

(c)failed to respond to a communication from the Society.

(2) Despite Rule 4-27(5), the Bencher presiding at a pre-hearing conference may order that the conference not consider any or all of the matters referred to in that subrule.

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

(a)affidavit, or

(b)statement of facts agreed between the parties.

(4) Despite Rules 4-34 and 4-35, the panel may consider facts, verdict, penalty and costs and make one decision respecting all aspects of the proceeding.

11. ***In Rule 4-38(1), by adding the following paragraph:***

(a.2) at the conclusion of a hearing on a citation under Rule 4-24.1.

12. ***In Rule 5-2(2),***

(a) by rescinding the preamble and substituting the following:

(2) A panel may consist of one Bencher who is a lawyer, if

(b) by adding the following paragraph:

(b.1) the hearing proceeds under Rule 4-24.1,

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

10. 2008 FEES

Mr. Hunter reviewed the key points underlying the Financial Planning Subcommittee's recommendation for 2008 fees. Those included:

- Management presented a balanced General Fund budget with no use of reserve.
- A 10-year capital plan was developed and funding is provided for in the practice fee.
- General Fund operating and capital cost increase of $107 per member.
- Custodianship costs no longer funded by TAF and included in the practice fee.
- Special Compensation Fund assessment reduced by $150.
- Trust Administration Fee remains the same at $10.
- Insurance assessment remains the same at $1,400.

It was moved (Hunter/Turriff)

1. To recommend to the members at the 2007 Annual General Meeting a practice fee of $1,554 for the practice year commencing January 1, 2008, consisting of the following amounts:

General Fund	$1,313.50
BCCLS	$160.00
LAP	$53.00
Advocate	$27.50
Practice Fee	$1,554.00

2. The insurance fee for 2008 pursuant to section 30(3) of the Legal Profession Act be fixed at $1,400;

   the part-time insurance fee for 2008 pursuant to Rule 3-22(2) be fixed at $700; and

   the insurance surcharge for 2008 pursuant to Rule 2-62(2) be fixed at $1,000.

3. The cost to the General Fund of operating the custodianship program not be funded from TAF revenue from 2008 onwards;

   the $1.1 million TAF surplus previously allocated to the Lawyers Insurance Fund be applied to TAF funded programs;

   the General Fund may borrow up to $1 million from the Lawyers Insurance Fund to fund capital expenditures in accordance with the 10 year capital plan; and

   $17.5 million from the Lawyers Insurance Fund surplus be allocated to Part B coverage.

Mr. Hunter noted that the sub-committee proposed to keep the TAF at $10 in 2008 but the Benchers would have to consider an increase in the next year to pay for the trust audit program.

Dr. Vallance asked if there was any prediction as to the amount of the increase. Mr. Hunter said an increase of $5 was discussed.

Mr. McGee said the 2008 budget was balanced for the second year in a row, and did not resort to reserves. The main component relates to market-based salaries, which are mandated by the

requirement to treat staff fairly. The significance of the in-field audit program is that it allows the Law Society to deliver on its commitment to employ the most effective techniques to ensure that there is a high level of confidence in lawyers handling of trust funds. He said management had discussed with the Financial Planning Subcommittee providing a rolling three-year plan. The budget that underlies the fee recommendations is responsible and meets the Law Society's regulatory obligations.

Mr. Walker described the recommendation as "good news and bad news". With respect to the practice fee he noted that there was an increase of 28% in 2007 and now a further increase of 24% was proposed for 2008, which appeared to result from the transfer of the custodianship program into the general fund from the special compensation fund where it historically resided. Mr. Walker said he was not a fan of the TAF but recognized that the Benchers had committed to the program. He said it was imperative to track expenses associated with TAF funded programs. He was against the principle of transferring the custodianship program to the general fund and would prefer to see it continue to be paid for by the special compensation fund, even if that meant keeping the special compensation fund assessment at $500 and maintaining the general fund portion of fees where it is.

Mr. McGee said the special compensation fund assessment is a member-based fee. If custodianships are maintained under the special compensation fund, the net result is the same.

Mr. LeRose understood that Mr. Walker's point was not fiscal but philosophical, but the members are primarily concerned with the bottom line cost, which is the same in either case. Going forward, the proposal is the best that can be done to meet the Law Society's obligations.

Mr. Stewart asked why custodianships were part of the special compensation fund. Mr. Hoskins said the decision was made in the 1990's based on the theory that if there is a trust problem, the sooner a custodian is in place, the easier it would be to detect defalcations. The justification was somewhat thin then and virtually non-existent now. Mr. Stewart said if there was no longer any justification for leaving the expense with the special compensation fund, there should be no difficulty in moving it to the general fund. He noted that there are different reasons for custodianships, many of which do not relate to trust funds.

Mr. LeRose said it was important to remember that the majority of members would be saving the cost of hiring auditors, which was a great benefit of the TAF.

The motion was carried.

11. ADDRESS FROM DR. STEPHEN TOOPE, PRESIDENT OF THE UNIVERSITY OF BRITISH COLUMBIA.

Dr. Toope spoke to the Benchers about the university's role in the law. A copy of his address is attached as Appendix 5.

Mr. Turriff said he was always taken aback when universities assume that the Law Society does not agree that a law degree is a liberal education for advanced citizenship. The Law Society does, but also has a responsibility to provide a minimum number of lawyers to advise people in all parts of the province. We want to continue to work with Dean Bobinski to strike the right balance.

Dr. Toope said he did not assume there was a disagreement. Rather, he assumed that he was speaking with colleagues who share the aspiration. He agreed that the university and the Law Society should continue with an open dialogue to achieve the needed balance in a completely cooperative relationship.

Mr. Hunter said the Law Society did not want "lawyer factories" but did have the problem Mr. Turriff mentioned. He asked Dr. Toope if he saw the two visions of law school as mutually exclusive? The Law Society sees a three-year program that teaches a liberal legal education but does not teach much about being a lawyer. Is there something that can be added to better equip students, most of whom intend to practice as lawyers?

Dr. Toope said this was an old dilemma that may never be fully resolved. He thought the real difficulty lay in getting law teachers to move away from the idea that they must deliver a lot of substantive content in particular areas in terms of what the law is at that particular time. We want students to have basic knowledge and skills that can be transferred from one problem to the next. If we do that, then there will be a lot more room in the program to provide other key aspects of a good legal education. Dr. Toope noted that the great American and British law faculties do not have any compulsory courses.

Mr. McGee asked Dr. Toope what he thought were perceived outside Canada as the strengths of Canadian lawyers.

Dr. Toope said Canadian lawyers were prized internationally. Their strengths include a solid legal education, flexibility derived from working in a truly federal system, language skills for many people, a disinclination to be prematurely prescriptive and not leaping to the most familiar solution.

Mr. Kelly echoed earlier thanks to Dr. Toope for agreeing to participate in the upcoming public forum. He said one of the biggest challenges lawyers have, particular new lawyers, is running a business.

Dr. Toope said that was a uniform view in the professions. He said it is a fundamental challenge and the universities must recognize that our world is based on a market economy and that most people are going to wind up running some form of business.

Ms. Lévesque said she worked at the community level where lawyers are counted on to have a greater understanding and depth of knowledge in matters of social discourse. Lawyers are counted on to do the right thing and also to speak up when other citizens may not even know there is a problem. She encouraged creating an extra lawyer of ethical understanding in legal education.

Mr. Stewart commented that although "lawyer factory" might be seen as a pejorative term, law degrees are essentially post-graduate degrees and the fact remains that most people who go to law school want to be taught law.

Dr. Toope said good lawyers could teach themselves the substantive legal knowledge they require. That is different from skills. It is more important to have a broad skill set and flexibility of mind to allow adaptation to a wide variety of problems and situations.

Ms. Preston asked if the university was following students who do pro bono legal work to find out what impact that has on them. Earlier experience in issues at a community level, such as funding issues for other services, is significant. Dr. Toope said the university should start tracking things like that.

Dr. Toope concluded his remarks by saying that as a lawyer he wanted to thank the Benchers for what they do. Self-regulation is exactly where it should be and is fundamentally important.

12. SPECIAL COMPENSATION FUND FEES, TAF AND LOW INCOME CLIENTS – REPORT ON CONSULTATION

The Benchers received a report from the working group on special compensation fund fees, TAF and low-income clients for information. Ms. Fung advised that the report would be published on the Law Society website subject to any objections provided to the Corporate Secretary no later than July 20, 2007.

13. UPDATE ON CLAIMS AND RECOVERIES IN THE WIRICK MATTER

This matter was considered *in camera.*

14. PROPOSED COLLECTIVE AGREEMENT

This matter was considered *in camera*.

DMGN
07-08-27

Appendix 1

— MODEL POLICY —

WORKPLACE EQUALITY

Preface

Achieving equality is a complex task that will be accomplished only if we apply good will and good sense to the challenge of creating inclusive workplaces. The foundation of the Workplace Equality Model Policy is the recognition of the right to work in a professional atmosphere that promotes equal opportunities and prohibits discriminatory practices. This fundamental right is realized, in part at least, by the specific policies which address aspects of employment and firm membership.[1]

Law firms have differing abilities to initiate special programs and lawyers have differing needs. For smaller firms it is recognized that certain aspects of the model policy may be impractical or impossible to implement. Different firms will have different goals and may choose different approaches to promote workplace equality. For example, some firms set hiring targets or include provisions respecting participation of members of identifiable groups on particular committees. At the same time it is recognized that some firms will choose not to implement such specific provisions for reasons including that the provisions are unnecessary given the diversity that already exists at the firm or the size of the firm. For this reason, this model policy is intended to serve as a guide only. Firms may adapt all or part of the policy as suits their circumstances and in accordance with applicable legislation.

In order that day-to-day decision-making in a law firm takes full account of the aspirations and contributions of all firm members, it is important that the diversity of firm membership be reflected in the decision making process of firms. This, and other aspects of the Workplace Equality Model Policy, will help ensure that all firm members are full participants in the workplace.

Formal procedures requiring decision-makers and employees to directly and clearly communicate about matters such as working conditions, job requirements and employees' success in meeting those requirements may be needed to counteract the very human tendency of decision-makers to communicate fully only with those with whom they feel at ease. This inclination may mean that individuals who belong to traditionally marginalized groups do not receive the feedback or recognition that are essential to professional advancement or perceive that there is a lack of such communication.

There is also provision for a special program applicable to women, aboriginal peoples, persons with disabilities and members of visible minorities in circumstances of hiring and promotion (see section

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[1] Several of the recommendations concerning equality of opportunity for women lawyers in the Law Society of British Columbia's *Women in the Legal Profession Report* (1991) are incorporated into the provisions of this model policy. In the Fall of 2005, the Law Society of British Columbia commissioned a survey of inactive members in order to identify factors influencing lawyers to move to inactive status. Thirty-five percent of respondents said that they had experienced some form of discrimination while practicing law in B.C. Among respondents, discrimination was more prevalent among females than males and among those who had been called to the Bar more recently. Among those who reported experiencing discrimination, their comments were largely related to gender discrimination (68%) and, to a lesser extent, age/experience discrimination (16%). See: *Law Society of BC: Survey of Inactive members of the Law Society, October 31, 2005* by NRG Research Group. The findings of this survey closely matched the results of similar surveys in Alberta (see: *Alberta Law Foundation: Report on Equity and Diversity in Alberta's Legal Profession, January 26, 2004* by Merrill Cooper, Joan Brockman, and Irene Hoffart) and Ontario (see: *Turning Points and Transitions: Women's Careers in the Legal Profession, A Longitudinal Survey of Ontario Lawyers 1990-2002 – A report to The Law Society of Upper Canada, September 2004* by F.M. Kay, C. Masuch, and P. Curry).

5.13).[2] The British Columbia *Human Rights Code* makes provision for special programs which have as their objective the amelioration of conditions of groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex. Employment equity programs may be developed and implemented without prior Tribunal approval however, an approved employment equity program that meets the *Code* criteria under section 42 is not discrimination or a contravention of the *Code*. The Firm may make application for approval of the Tribunal in order for such a program to be deemed not to be in contravention of the *Human Rights Code*. Approval as a special program does not insulate the Firm from a human rights complaint if there is conduct falling outside the terms of the Tribunal's approval.

Firms wishing to adopt this policy with the inclusion of section 5.13 or a provision like it may wish to contact the Tribunal in order to seek approval of a finalized policy as a special program under the *Code*. As other aspects of this policy are consistent with human rights legislation, the remainder of the policy would not be considered a special program. The B.C. Human Rights Tribunal has published a Special Programs Policy which provides information about the requirements for Tribunal approval of a special program.[3]

Model Policy

1. Statement of Commitment

[Name of firm] recognizes that respect for the dignity and worth of everyone who works at the Firm is the foundation of harmonious and productive working relationships. Each individual has the right to work in a professional atmosphere which promotes equal opportunities and prohibits discriminatory practices.

2. Purpose

The purpose of this policy is to promote equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons related to a prohibited ground of discrimination and unrelated to ability.

In the fulfillment of this goal, this policy also includes mechanisms to assist in correction of conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and

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[2] The *Employment Equity Act*, S.C. 1995, c. 44, s. 3 defines "designated groups" under the Act as "women, aboriginal peoples, persons with disabilities and members of visible minorities" and "members of visible minorities" as "persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour". This Policy is designed to promote diversity as considered in the federal equity legislation and in human rights legislation wherein there is provision for employment equity programs that have as their objective, the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex. Firms may wish to develop a program that targets one or more specific identifiable group. This policy is drafted in keeping with the groups identified in the federal legislation and is intended to be compliant with provincial human rights legislation.

[3] See http://www.bchrt,bc,ca/policies/special_programs_policy.htm. Firms must have regard to s. 42 of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210 which allows employers to develop special programs that may otherwise be a breach of the Code. Section 42 states:

(1) It is not discrimination or a contravention of this Code to plan, advertise, adopt or implement an employment equity program that (a) has as its objective the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex, and (b) achieves or is reasonably likely to achieve that objective. …

(3) On application by any person, with or without notice to any other person, the chair, or a member or panel designated by the chair, may approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups.

(4) Any program or activity approved under subsection (3) is deemed not to be in contravention of this Code.

members of visible minorities (collectively, the "Identified Groups") by giving effect to the principle that employment equality means more than treating persons in the same way in that it may require special measures and the accommodation of differences.[4] For the purposes of this policy, "members of visible minorities" is defined as persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour.[5]

3. Persons covered by this Policy

This policy applies to all Firm members, including all those working for [name of firm] including secretarial, support, professional and administrative staff, articling and summer students, associates and partners ("Firm Members"). This policy will also apply to applicants for positions with the Firm as appropriate.

4. Statement of principles

4.1 Right to equal opportunity

The Firm recognizes that every person has the right to equal opportunity without discrimination in matters relating to employment or membership in the Firm. Under no circumstances shall any person be treated in a discriminatory manner because of his or her race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age or because an applicant or candidate has been convicted of a criminal or a summary conviction offense unrelated to employment.

4.2 Discrimination defined

Discrimination means a distinction, whether intentional or not, based on a characteristic or perceived characteristic referred to in paragraph 4.1 that has the effect of imposing burdens, obligations, or disadvantages on an individual or class of individuals not imposed upon others, or which withholds or limits access to opportunities, benefits, or advantages available to other individuals or class of individuals.

4.3 Employment decisions covered

In particular, the Firm will not discriminate against an individual in decisions respecting hiring, evaluation, promotion, partnership, remuneration, the provision of support services, the assignment of work, or the provision of professional development and client entertainment opportunities.

4.4 Pregnancy discrimination included

The right to equal opportunity without discrimination because of sex includes the right to equal opportunity without discrimination because a woman is pregnant or may become pregnant.[6]

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[4] See *Employment Equity Act*, S.C. 1995, c. 44, s. 2. Firms will want to carefully consider the characteristics which they wish to include in the Identified Groups. This definition has been drafted in keeping with groups identified in federal employment equity legislation. Section 42 of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210 provides for the approval of special programs that may otherwise be a breach of the Code including programs that have the objective of the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex.

[5] See *Employment Equity Act*, S.C. 1995, c. 44, s. 3.

[6] The inclusion of women in the definition of Identified Groups recognizes this aspect of discrimination.

4.5 Special programs

The firm may adopt or carry out a special program pursuant to the *Human Rights Code* (a "Special Program") with the objective of ameliorating conditions including opportunities for employment or Firm membership for members of the Identified Groups.[7]

5. Equality in action

5.1 Firm committees

All Firm committees will strive to be inclusive and diverse in membership. Where it is not possible to ensure formal representation of all Identified Groups on all committees, the Firm will strive to ensure that the views of members of Identified Groups are considered in decision making.[8]

5.2 Recruitment interviews

The Firm follows the Law Society of B.C. Guidelines - Recruiting, Interviewing & Hiring Practices which is designed to promote a fair hiring process in which all candidates are considered on the basis of their skills and abilities. Everyone carrying out recruitment interviews for the Firm will observe these guidelines. In addition, the Firm will provide sufficient notice of social invitations so that applicants can make whatever arrangements are necessary to attend and ensure that social functions are accessible wherever possible. On request, the Firm will also take steps to ensure that informational material available to candidates is communicated in a format which ensures that all candidates can be fully informed.[9]

5.3 Orientation

The Firm will ensure that orientation materials and information about career development and promotional opportunities are communicated and made available in a format which ensures that all interested persons can be fully informed.[10]

5.4 Evaluation

The Firm's evaluation procedure includes:

- established performance categories that are communicated to all Firm Members;
- direct communication about performance and expectations;
- a discussion of satisfaction with the type and level of work assigned; and
- a record of the results of the evaluation under each performance category.

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[7] Firms may wish to proactively seek approval of this Policy from the BC Human Rights Tribunal as a special program in order to prevent complaints of discrimination arising from the application of the Policy. See section 42 of the *Human Rights Code* and the B.C. Human Rights Tribunal Special Programs Policy at http://www.bchrt.bc.ca/policies/special_programs_policy.htm.

[8] Firms may wish to be more specific and include a statement such as "The Firm's goal is to have women members on these committees in a proportion that is at least equal to the proportion of women in the profession as determined by Law Society statistics**".** Such statements can be adapted to make provision for inclusion of any or all Identified Groups. This practice may be considered a Special Program under the *Human Rights Code.*

[9] See the Law Society Guidelines – Recruiting, Interviewing & Hiring Practices.

[10] This may include large print or audio communication.

Evaluations will be carried out by [a committee] during any probationary period, and annually thereafter to ensure there is an opportunity to receive adequate and timely feedback.

5.5 Promotion and remuneration

Recommendations about remuneration and promotion will be made by a committee and will be based on established performance categories.

5.6 Professional development

Equal access to professional development opportunities appropriate to the role of the Firm Member will be made available. Professional development opportunities such as attendance at conferences and courses, will be approved and recorded by [a committee]. In house training and educational programs conducted by the Firm are accessible to all Firm Members as appropriate as based on their role with the Firm. This will include training respecting harassment and discrimination.

5.7 Work assignment

The distribution and assignment of work and client responsibilities will promote the development of individual talents and interests without reliance on preconceptions respecting the preferences and abilities of individuals based on a characteristic or perceived characteristic related to one or more of the prohibited grounds of discrimination, including a person's membership in an Identified Group.

5.8 Mentoring

The Firm's policy respecting mentoring is as follows:

- each [associate or Firm Member] will be given the opportunity to choose a mentor from among a group of those who are people of influence in the Firm;
- the opportunity to choose a mentor will be given annually at an evaluation interview;
- [associates or Firm Members] are not obliged to have a mentor;
- the mentor will not be the [associate's or Firm Member's] supervisor; and
- the mentor's role is to advise the [associate or Firm Member] on professional matters and, where appropriate, to be an advocate for the [associate or Firm Member] within the firm.

[OR]

The Firm will make every effort to provide [associates and students OR Firm Members] with a designated mentor who will advise the [associate or Firm Member] on professional matters.

5.9 Location of firm/professional functions

Firm or professional functions are held only in facilities and at times that accord access to all Firm Members. The Firm ensures that such functions are accessible to Firm Members. The Firm sponsors and participates in a variety of social activities and client functions so that Firm Members are able to participate in a variety of activities.

5.10 Client entertainment

Client entertainment opportunities will include a variety of events that appeal to diverse interests and provide opportunities for all Firm Members to entertain clients. The Firm ensures that client entertainment functions are accessible and respectful of the diversity of Firm Members.

5.11 Work premises

The Firm ensures accessibility to and at the work premises. This includes both the entrance to and movement around the premises including washroom facilities. Signs, manuals, workplace instructions and electronic information is made accessible to firm members who may require information in a different format. Emergency information is communicated in a format which ensures that all individuals are able to understand the information.

5.12 Supporting Firm Members

In the event of inequitable or discriminatory treatment of Firm Members arising from interaction with third parties such as clients or suppliers, the Firm will support the Firm Member in resolving the matter.[11]

5.13 Employment equity[12]

Where candidates are substantially equal in merit but one candidate is a member of an Identified Group, the candidate who is a member of the Identified Group will be hired or promoted.[13]

5.14 Equality and Diversity Advisor

The Firm will designate a senior lawyer in the firm as an Equality and Diversity Advisor who will answer questions about the Firm's policies that may be applicable to equality and diversity issues, monitor compliance, assist in the coordination of accommodation efforts, and advocate on behalf of Firm Members as appropriate in order to address concerns raised. The Equality and Diversity Advisor's name and contact information is <*>.

6.0 Review

The Firm will review this policy bi-annually.

7.0 Enquires

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[11] Some firms may wish to be more specific with respect to measures the firm is prepared to take. For example, if it appears that a client objects to a lawyer handling a file based on a characteristic or perceived characteristic related to the lawyer's membership in an Identified Group, a firm may wish to consider some or all of the following actions: informing the client of the lawyer's relevant experience and credentials, recommending that the lawyer continue with the work assignment, or refusing to continue to provide service to the client.

[12] This provision can be omitted or adapted to apply to any group that is targeted for hiring purposes. Although it is recognized that recruitment of members of Identified Groups can be a very different challenge than retention, some firms may wish to proactively change their hiring practices in order to promote greater diversity. The *Women in the Legal Profession Report* clearly indicated that promotion of women within the profession is a continuing problem. The Model Policy includes this provision in order to provide a mechanism for addressing the imbalance for firms that wish to take such an approach. The Law Society maintains statistics respecting the number of women members.

[13] This practice would likely require approval as a Special Program, approval for which should be obtained under the *Human Rights Code.*

Enquiries about this policy and procedure should be addressed to <*>.

8.0 Related Policies

<*>

RESPECTFUL LANGUAGE GUIDELINE

I. PREFACE

The Law Society strives to reflect the diversity among legal professionals, which includes associates and partners, articling and summer students and support, secretarial, administrative and professional staff ("Firm Members"), and the clients they serve. To that end, the Law Society is providing this Guideline to law firms ("Firms") to raise awareness among Firm Members about:

(a) how values and attitudes are reflected in word choice and usage;

(b) how certain language usage may exclude women or members of certain minority groups; and

(c) how certain language usage may be perceived as reflecting stereotypes or containing demeaning references towards others.

The language used by Firm Members should aim to be inclusive and respectful of diversity.

This Guideline discusses how the use of language can affect others and encourages and supports Firms and Firm Members to establish and develop best practices for respectfulness in all of their communications by promoting the use of language that respects the strengths, skills, talents and individuality of Firm Members and the clients they serve. This Guideline aims to help Firm Members acknowledge all members of society on an equal basis through modes of communication, especially language. It suggests ways of avoiding unnecessary and unintended offence by cultivating awareness of commonplace assumptions and prejudice in everyday language and it suggests appropriate ways of expressing and communicating ideas.

Because norms respecting language use evolve over time and there is sometimes no consensus even among specific groups as to what could be considered offensive, this Guideline is not to be considered prescriptive. In fact, it is fair to say that none of the usages outlined within the Guideline should be thought of as being unanimously accepted. Rather, the purpose of the Guideline is to start Firm Members thinking about the respectful use of language in our profession by pointing out areas or controversy and offering examples, techniques and alternatives so as to avoid using language that might offend others. Above all, this Guideline respects the right of individuals and groups to refer to themselves as they choose.

This Guideline deals with the general principles of Respectful Language use including Gender-Neutral Language use. The Guideline also identifies specific issues regarding terminology involving the following groups:

(a) Women;

(b) People of Diverse Races, Ethnicities, or Countries of Origin;

(c) People of Aboriginal Descent;

(d) People with Disabilities;

(e) People who are Lesbian, Gay, Bisexual and Transgender; and

(f) Adoptive Families.

II. GENERAL PRINCIPLES

1. Avoid Mentioning Personal Characteristics Unless Relevant

As a general rule, personal characteristics, such as race, sexuality and disability, should only be referred to when they are relevant to the communication. Otherwise avoid mentioning them.

2. Inclusive Language and Person First Construction

If a subject's personal characteristics are relevant to the communication, it is useful to follow the principles of **Inclusive Language** and **Person First Construction** in making the communication.

Inclusive Language is language that does not stereotype or demean people based on personal characteristics including gender, race, ethnicity, disability, religion, sexual orientation, etc.

Use inclusive language to emphasize or focus the reader's attention on similarities, equality and respect. Conversely, avoid using language that detracts from the sense of value of the whole person and terms that exclude, marginalize, diminish or lower the status of any individual or group (e.g., "us and them" constructions). In addition, avoid stereotypes and words that are derived from negative assumptions e.g., using the expression "going Dutch" for "splitting the bill".

Person-First Construction places people ahead of personal characteristics, e.g. "a person with a disability" instead of "a disabled person". Person-first communication emphasizes or focuses attention on a subject's personhood, rather than on cultural, ethnic, linguistic, national or the existence of a disability, illness or condition.

3. Terms Preferred by the Group or Individual

The Law Society recognizes the right of individuals and groups to refer to themselves as they choose. In that regard, the Law Society is guided by the principle that "respectful language" must respect the preferences of the people being referred to or addressed. Therefore, individuals and groups should be described using the term(s) preferred by that individual or group. Accordingly, it is important to guard against making assumptions as to how individuals or groups wish to be addressed. If in doubt, it is often best to simply ask.

4. Gender-Neutral Language

Using language that is truly gender-neutral is more than simply avoiding certain terminology. The English language contains many gender-specific usages that may exclude or limit women. In particular, be mindful of the following:

False Generics – Generics are nouns and pronouns that are intended to be used for both women and men. However, linguistically, some generics are male-specific. For example, the word "man" was generically used to mean "human being" or "person" but, over the years, it has come to mean only "male persons." Such use of generics should be avoided as they are not gender neutral.

Parallel Treatment – Gender neutral language strives for overall gender balance in your written and spoken communications by treating men and women in a parallel way (e.g. "husband and wife" or "man and woman" instead of "man and wife").

Stereotypes – Avoid using biased or stereotyped terms that may be demeaning or offensive. Also avoid using gendered adjectives where gender is irrelevant (e.g., "lady doctor", "woman lawyer" and "male nurse").

For more detailed suggestions for gender-neutral language usage, please see Appendix A.

III. SPECIFIC CONTEXTS

Determining appropriate language and terminology use with regard to traditionally marginalized groups can sometimes be complicated or even seem contradictory. Because many of these groups are only recently going through the process of self-determination, consensus has yet to develop as to what language and epithets are considered correct or inoffensive. Further complicating things are the conscious attempts by members of particular groups to reclaim, for political reasons, terminology that may have once been considered offensive. In other cases, the sheer size and diversity of a group defeats anything more detailed than a broad statement of principles (see "Race and Ethnicity"). In short, it is not always feasible to set out a universally agreed-upon list of terms and phrases that one should avoid when communicating to these groups.

What this section will do is offer some principles to observe when communicating to or about specific groups. It also attempts to identify potential issues or pitfalls, understanding that these may change over time.

Finally, recall the general principles set out in Section II, especially the right of individuals and groups to refer to themselves as they choose.

1. Women

See previous discussion on Gender-Neutral Language use and Appendix A.

2. People of Diverse Races, Ethnicities, or Countries of Origin

General Principles

As the specific issues of communications involving race and ethnicity are as diverse as race and ethnicity themselves, this Guideline will only confine itself to the following general principles:

As a general rule, avoid referring to a person's race, ethnicity or country of origin unless it is relevant to the communication.

Avoid using stereotypes and archaic expressions that may be demeaning or offensive, e.g., using "going Dutch" to mean "splitting the bill."

Do not assume that all people belonging to particular communities act or think the same way. Accordingly, avoid making sweeping generalizations involving entire communities, e.g., saying that a particular ethnic group is inclined to be socially conservative.

Potential Issues

"Visible minorities" is a term used in federal legislation to describe persons who are not of the majority race in a given population. Visible minorities are defined under the *Employment Equity Act* as "persons, other than Aboriginals, who are non-Caucasian in race or non-white in colour." The term "visible minorities" is also used as a demographic category by Statistics Canada. In March 2007, the United Nations Committee on the Elimination of Racism denounced the term "visible minorities" and Canada's use of it as racist. A spokesperson for the Committee explained, "the use of the term seemed to somehow indicate that 'whiteness' was the standard, all others differing from that being visible." However, the Committee did not suggest an alternative term.

Also note that the term "race" is controversial among those who assert that there is only one race, the human race, and that traditional notions of racial differences are artificial and arbitrary constructs. Proponents of this view prefer the use of the term "racialized groups" to describe people that would be

traditionally referred to as visible minorities. This term reinforces the idea that "race," or more properly "racialization," is something imposed on a person by outside perception.

3. People of Aboriginal Descent

General Principles

"Aboriginal" is generally used to refer to all three constitutionalized Aboriginal groups: Status Indian, Métis and Inuit. Aboriginal is a generic term.

It is usually preferable to refer to a particular First Nation by its chosen name if you are targeting it for identification, such as: Nisga'a, Haida, Tlingit etc. With such usage, many First Nations dispense with the use of the term First, as in Kwakiutl Nation instead of Kwakiutl First Nation.

"Indigenous" is the term preferred for international discussions of other aboriginal peoples from places outside of Canada.

Avoid using the term "Indian" to refer to Aboriginal people unless you are specifically referring to a person who is a Status Indian registered under the *Indian Act* and that fact is relevant to the communication.

Potential Issues

Often the terms "Aboriginal," "First Nations," "Native," "Indigenous" and even "Indian" are used interchangeably, sometimes by members of the Aboriginal community. However, it should be recognized that these terms carry different social and political meanings to different people. Therefore, when dealing with specific people or groups from the Aboriginal community, it is always best to find out what term they prefer.

3. People with Disabilities

General Principles

Use person-first constructions that put the person ahead of the disability, e.g., instead of "a blind woman" or "a diabetic" use "a woman who is blind" or "a person with diabetes." Just as it is not always necessary to convey the color of a person's hair or skin, do not mention that a person has a disability unless it is relevant to the communication.

Avoid using language that casts disabilities as negative. For example, avoid using phrases such as *suffers from, afflicted with* or *victim of*, as such expressions cast disabilities as negative attributes. By the same token, avoid using the terms *handicapped*, *challenged* and *crippled*.

Most disabilities are not diseases. Do not refer to a person with a disability as a *patient* unless that person is in a hospital or care facility. In the context of occupational or physical therapy, the term *client* is preferable.

Potential Issues

Although the majority of disability advocacy groups and members of the disability community generally accept the term "disability," there are some who believe that even the term "disability" itself is pejorative. Such people may often prefer to use terms such as "differently abled" or may characterize a disability as simply a difference rather than any sort of impediment, for example, members of Deaf Culture.

For more detailed suggestions regarding the correct terms for specific disabilities, please see Appendix B.

4. People Who Are Lesbian, Gay, Bisexual or Transgender ("LGBT")

General Principles

When referring to people who are lesbians, gay, bisexual or transgender, the abbreviation *LGBT* may be used after the first use of the full phrase. In referring to *LGBT*, the word *homosexual* is often considered insulting.

The term *gay* is most often used to refer to gay men although many women also identify as gay. However, most women prefer the term *lesbian*.

Bisexual describes an individual who is sexually attracted to members of both genders. It does not presume non-monogamy.

Transgender is an umbrella term that can include preoperative, postoperative or nonoperative transsexuals, female and male crossdressers, drag queens or kings, female or male impersonators and intersex individuals. If an individual prefers to be called transsexual, drag queen or king, etc., use that term. Avoid using the term *transvestite*.

The expression *same sex* is an adjective that is used in preference to *homosexual* to refer to something that lesbians and gay men do or have as a result of being in a relationship, for example: *same sex marriage* or *same sex relationship*.

Sexual orientation is the legal term used within Provincial Human Rights Codes and within the *Charter* context. Courts and tribunals have interpreted sexual orientation to be an all-inclusive expression for the various sexual identities that exist. The term *sexual orientation* is inclusive of lesbian, gay, bisexual and transgender people.

Queer is a term used by people inside the communities and academics in certain contexts as a way of re-appropriating the term, which was originally pejorative. Avoid using this term except in these specific contexts.

With respect to families, it is preferable to refer simply to *parents* and *families* unless it is relevant to refer to the fact that the parents are of the same gender. The majority of same-sex parents prefer to be referred to as a *family with two-moms* or a *family with two-dads*.

In referring to two men or two women who have married, they usually refer to the other as their *spouse*. The term *spouse* is neutral but designates their status as a married couple. The term *partner* is also neutral but does not designate their marital status and is more commonly used by people living in a common-law relationship.

Possible Issues

Language use around LGBT issues is still evolving so none of the usages outlined above should be thought of as being unanimously accepted. In particular, the rejection of previously acceptable terms (e.g., "homosexual") and the reclaiming of previously pejorative terms (e.g., "queer") are not universal. As always, this Guideline respects the right of individuals and groups to refer to themselves as they choose.

5. Adoptive Families

Adoption is a part of many families. The following are some suggested guidelines for respectful language about adoption and families.

When referring to a person having been adopted, use the expression *Jane was adopted* instead of *Jane is adopted*. The latter makes the adoption process sound like a condition rather than a process. Similarly, avoid using expressions such as *Doug's adopted daughter* unless the adoption is relevant to the discussion.

When referring to a person's birth parents use expressions such as birth-mother *or* birth-father *instead of* real mother *or* real father.

IV. OTHER FORMS OF COMMUNICATION

1. Visual Communications

The principles that underlie respectful language guidelines for written and spoken material apply to visual communications as well. Minority groups should be portrayed as equals. Members of minority groups should be depicted in positions of authority and as having achieved success in a wide variety of endeavours. It is important that the total presentation depicts a diverse range of people:

- Members of minority groups as equal and active participants in all aspects of life —at home, in the workplace, in school, in public life and in the community;
- People of various ages, ethnic origins and of differing physical attributes;
- People in non-traditional and non-stereotyped roles —for example, women in technical or financial positions and men as nurses or secretaries;
- Members of minority groups in positions at all levels of authority and of comparable status; and
- Members of minority groups as being successful in a variety of endeavours –for example, career, home, education, community, public life.

2. Audio and Oral Communications

Audio and oral communications — whether on their own or as part of a visual presentation — should be guided by the same principles of fairness as written materials. In addition, when preparing speeches, seminars and audio-visual voice-overs, remember to:

- use members of minority groups as interviewers, interviewees and speakers at events; and
- use female voices as often as male voices in voice-overs and ensure that dialogue and style of expression convey equal status and authority when alternating between male and female voices.

V. ENQUIRIES

Enquiries about the Respectful Language Guideline should be addressed to:

APPENDIX A – Gender-Neutral Language

I. False Generics

Generics are nouns and pronouns intended to be used for both women and men. Linguistically, however, some generics are also male-specific, which can create ambiguity. Traditionally, the word *man* was generically used to mean *human being* or *person* but, over the years, it has come to mean only male persons. The generic use of *man* causes ambiguity that can be avoided by using gender-neutral generics. Similarly, the use of h*e*, *his* and *him* for antecedents of an unspecified gender is not gender-neutral. Below are some suggested alternative approaches:

(a) Use the plural

Recasting a sentence in the plural is often the best choice.

> **Instead of:** *Each office manager should ensure that he attends the meeting.*
>
> **Preferred:** *Office managers should ensure that they attend the meeting.*

If you do convert to the plural, avoid making the sentence ambiguous. The following is an example:

> **Singular:** *The vice-president should ensure that the regional manager understands the policy before he attends the meeting.*
>
> **Plural:** *Vice-presidents should ensure that regional managers understand the policy before they attend the meeting.*

The ambiguity can be resolved by reordering the sentence as follows:

> *Before vice-presidents attend the meeting, they should ensure that regional managers understand the policy.*

(b) Eliminate personal pronouns

Another technique is to eliminate gender-specific personal pronouns altogether.

> **Instead of:** *Each applicant must submit his resume.*
>
> **Preferred:** *Each applicant must submit a resume.*

(c) Use *he or she*

The expression *he or she* (or *she or he*) is an acceptable substitute for the generic *he*. Some people use it specifically to draw attention to the fact they are including both women and men, as in the following example: *Each applicant must submit her or his resume.*

Used sparingly, the expressions *he or she* and *his or her* can be very helpful solutions.

(d) Use *you*

In some cases you can avoid using the generic *he* by addressing the reader directly.

> **Instead of:** *Each driver must be sure to renew his automobile insurance annually.*
>
> **Preferred:** *Be sure to renew your automobile insurance annually.*

(e) Use *one*

You can sometimes use *one* in place of a third-person pronoun. Bear in mind this usage will change the tone of your writing by making it more formal and distanced.

Instead of: *A consumer should compare prices before he buys groceries.*

Preferred: *As a consumer, one should compare prices before buying groceries.*

(f) Use a gender-neutral synonym

In order to avoid using the generic *he*, use gender-neutral synonyms instead of repeating antecedent nouns.

Instead of: *Every charitable organization has an executive director. He is responsible for the administration of the agency.*

Preferred: *Every charitable organization has an executive director. This official is responsible for the administration of the agency.*

(g) Use *they* as a singular pronoun

The singular use of *they* is most acceptable when used to refer to gender-indefinite antecedents like *any*, *anyone*, *each*, *every*, *everybody*, *everyone*, *nobody*, *no one*, *someone* and *somebody*. Here are some examples:

Instead of: *Nobody got his cheque on Friday.*

Preferred: *Nobody got their cheque on Friday.*

Instead of: *Everyone loves his dog.*

Preferred: *Everyone loves their dog.*

(h) Rewrite the sentence

If nothing else works, you might have to rewrite the sentence by combining a number of techniques, as in the following example:

Instead of: *When an editor revises a document, he usually marks his changes in pen or pencil.*

Preferred: *When revising a document, an editor usually marks changes in pen or pencil*

The sentence was restructured and the personal pronoun was deleted.

Another alternative would be the addition of a relative clause, as in the following example: *An editor who is revising a document usually marks changes in pen or pencil.*

Things to avoid when eliminating *he*

(a) Do not use *s/he* or *(s)he* or any of their variants.

Although these forms provide a quick solution, they are awkward and interruptive.

(b) Do not repeat nouns.

Instead of: *The treasurer must draft the budget. The treasurer is also responsible for the agency's financial statements.*

Preferred: *The treasurer, who is also responsible for the agency's financial statements, must draft the budget.*

If necessary, restructure or combine sentences.

(c) Do not use the passive voice to avoid the generic *he* unless absolutely necessary.

The passive voice is less direct than the active voice as it deletes the "doer" of the action. This can sometimes result in ambiguity. Use the active voice, for example: *Before filing an appeal, each candidate should understand the correct procedure*.

(d) Do not alternate gender-neutral and gender-specific terms for the same subject.

For example, do not switch from *police-officer* to *policewoman* to *policeman* unless there is a specific reason to do so.

(e) Do not alternate between the generic *she* and the generic *he*.

Avoid using the generic *she* in one paragraph and the generic *he* in the next, and so on.

(f) Babies and infants

When writing or speaking of babies and infants, you can alternate your use of the generic *she* in one chapter or section and the generic *he* in the next. In short passages, it is best to find alternatives to personal pronouns.

(g) Do not use disclaimers

The practice of using a disclaimer to advise readers that the use of the male pronoun in the texts is intended to include women is not preferred. There are other more effective alternatives, as described above, to the use of the generic *he*.

II. Parallel Treatment

Strive for overall gender balance in your written and spoken communications. Generally, your audience will be comprised of both men and women, so you should address yourself to them equally. Use inclusive, rather than exclusive, language and use gender-marked terms appropriately. Use an equal number of male and female hypothetical names or case studies.

1. Parallel language

Use parallel language when referring to the sexes:

Instead of:	***Use:***
men and ladies	men and women/women and men; gentlemen and ladies/ ladies and gentlemen
man and wife	husband and wife/wife and husband
Miss Sorensen and Robert Tanaka	Mary Sorensen and Robert Tanaka
Mr. Tanaka and Mary	Tanaka and Sorensen; Robert and Mary

2. Generalizations

Avoid generalizations that exclude women or assign gender to gender-neutral subjects. For example:

Instead of: *Conference delegates and their wives are invited to attend the breakfast meeting.*

Preferred: *Conference delegates and their spouses are invited to attend the breakfast meeting.*

3. Word order

Be conscious of word order. Alternate customary phrases, such as *men and women* and *boys and girls* so that men do not always go first. For example: use *women and men* and *girls and boys*.

Ladies and gentlemen. This pairing continues to be commonly used in public speaking. However, many speakers now prefer to use other terms, such as, *colleagues*, *delegates* and *members of the association* to begin their speeches.

4. Asymmetrical usage

Be consistent in how you use forms of address, both in speaking and in writing.

Instead of: *Dr. Jim Evans and his assistant, Mary.*

Preferred: *Dr. Jim Evans and his assistant, Mary Jones.*

5. The use of *Ms.*

The female equivalent of *Mr.* is *Ms.* (the plural form of which is *Mses.*). However, if a woman indicates that she prefers to be called *Mrs.* or *Miss*, follow her preference.

6. Salutations in letters

If a person has a professional or academic title, such as *Dr.* or *Professor*, use it. If writing to a company or firm and you wish to address both the company or firm and the individual use, *Dear Sirs and Mesdames, Attention: Jane Brown*.

(a) To one person (gender known)

Consider omitting courtesy titles.

Instead of: *Dear Mrs. Wilson* and *Dear Mr. Goldberg*.

Preferred: *Dear Joan Wilson* and *Dear Howard Goldberg.*

(b) To one person (identity or gender unknown)

Instead of: *Dear Sir*.

Preferred: *Dear Sir or Madam* or *Dear Madam or Sir*.

If you know a person's name and/or initials but not their gender, omit the courtesy title. For example: *Dear C.L. Carter* or *Dear Chris Carter*.

(c) To more than one person (gender known)

Use Dear *Mses. Rodriguez and Bernstein, Dear Maria Rodriguez and Muriel Bernstein, Dear Messrs. Andersen and Leblanc* or *Dear Edward Andersen and Norman Leblanc.*

When circulating a document, be consistent in the style you choose.

Instead of: *cc: Ms. Alice McKinnon, C. Carter, Carl Ellis, Miss Regina Rogers.*

Preferred: *cc: Alice McKinnon, Chris Carter, Carl Ellis, Regina Rogers.*

(d) To more than one person (gender unknown)

Instead of: Dear Sirs.

Preferred: *Dear Colleagues (Members, Friends), Gentlemen and Ladies* or *Ladies and Gentlemen.*

7. Feminine suffixes

The nouns in the "Preferred" columns are generic and can be used for both women and men:

Instead of:	***Preferred:***
actress	actor
administratix	administrator
executrix	executor
waitress	waiter

III. Stereotyping

The following suggestions will help you to eliminate the use of stereotypes in your writing and speech:

1. Do not use biased or stereotyped terms

Do not refer to adult women as *girls*, *gals* or *ladies* in situations where you would refer to men as *men*. *Woman* is the word that corresponds to *man*.

Avoid using terms that make irrelevant assumptions about women or men, such as *my better half*, *feminine intuition*, the *fair sex*, the *little woman*, *masculine drive*, the *weaker sex* and *women's work*.

Do not use *lady* or *woman* as adjectives where gender is irrelevant, as in: *lady doctor*, *woman lawyer* or *woman driver*. Remember that language can also stereotype men, as in: *male nurse*.

Do not use *female* as a noun, as in: *Our new deputy minister is a female,* unless the corresponding word would be male. For example: *The police arrested six females and two males.*

Avoid using the adjectives *lady-like*, *man-like* and *manly*. These adjectives have many connotations, depending on one's perception of such qualities. Choose adjectives that say exactly what you intend to say, such as: *elegant*, *well-mannered*, *strong* or *courageous*.

2. Do not describe women by their physical attributes

Focusing on a woman's physical appearance can trivialize and demean her accomplishments. Mention physical appearance only if the description is relevant.

3. Do not use demeaning or offensive terms

Avoid using offensive metaphors for women, such as *chick*, *broad* and *bimbo*. In the workplace, terms of endearment for women, such as *dear*, *honey* and *sweetie*, are inappropriate.

Instead of:	***Preferred:***
businessman	business executive, business person ("businessman" and businesswoman" if used gender-fairly*)*
cameraman	camera operator
chairman	chair, chairperson*
clergyman	cleric (or use specific term, *e.g.*, preacher, bishop)
draftsman	drafter, draftsperson*
early man, primitive man	early peoples, primitive humans
fireman	firefighter
fisherman	fisher
foreman	supervisor, chief, lead or head supervisor
handyman	caretaker, repairer ("handyman" and "handywoman" if used gender-fairly)
mailman	letter-carrier, postal worker
man	human beings, people, individuals
man (verb)	staff, operate, serve at/on
middleman	go-between, intermediary
mankind	humankind, people, human beings, humanity
man-hours	worker-hours
man-made	synthetic, artificial, handmade
man-power	staff, employees, human resources, personnel
newsman	reporter, journalist (or be specific, *e.g.*, columnist)
policeman	police officer ("policeman" and "policewoman" if used gender fairly)
repairman	repairer, technician (or be specific, *e.g.*, mechanic)
salesman	sales clerk, sales representative, salesperson* ("salesman" and saleswoman" if used gender-fairly)
spokesman	spokesperson* ("spokesman" and "spokeswoman" if used gender-fairly)
sportsman	sports lover, sports enthusiast ("sportsman" and "sportswoman" if used gender-fairly)
stewardess	flight attendant
tradesman	tradesperson* ("tradesman" and "tradeswoman" if used gender-fairly)
watchman	watch, security guard
workman	worker
career woman	professional, business executive
cleaning lady	cleaner, housekeeper, janitor
girl Friday	assistant, secretary
housewife	homemaker
Kelly Girl	office temporary
sales girl, sales lady	sales clerk, sales representative, salesperson
women's libber	feminist
working mom	woman who works outside the home

Bear in mind that some people feel that *person-words* sound contrived and awkward. Try to find alternatives whenever possible.

APPENDIX B – People With Disabilities

Specific Language Use

1. Use of wheelchairs

Avoid using the phrases *wheelchair-bound* or *confined to a wheelchair*, which belies the fact that many people with motor disabilities engage in activities without their wheelchairs. The phase *uses a wheelchair* is more appropriate.

2. Mental disability

Mental disabilities include cognitive, psychiatric and learning disabilities and physical head trauma.

Instead of: *Mentally retarded, insane, slow learner, learning disabled* or *brain damaged*.

Preferred: *Person with cognitive disabilities* or *person with learning disabilities*.

3. Quadriplegia and Paraplegia

Quadriplegia is a substantial loss of function in all four extremities. Paraplegia is a substantial loss of function in the lower part of the body. Use the expressions *person with paraplegia* or *she has quadriplegia*. Avoid using the words *paraplegic* or *quadriplegic* as either nouns or adjectives.

4. Blindness and visual disabilities

The term *blind* refers to a total absence of sight. The terms *low vision* or *visual disability* may be more accurate for people who have a degree of sight.

5. Deafness and hearing disabilities

The term *deaf* refers to a complete absence of hearing. The terms *hard of hearing* or *hearing disability* may be more accurate for people who have partial hearing. Note that people who consider themselves part of *Deaf Culture* or the *Deaf Community* refer to themselves as *Deaf* (capitalized). This can be as much a declaration of personal identity as it is an indicator of hearing ability. For further discussion on Deaf Culture, please see:

http://en.wikipedia.org/wiki/Deaf_culture

Instead of:	***Preferred:***
Senile	Age-related cognitive impairments
Multi-handicapped	Multiple disabilities
Mentally retarded	Cognitive disability
Developmentally disabled	Developmental disability
Emotionally disturbed	Emotional disability
Severely handicapped	Significant disability
Mentally ill	Mental illness
Autistic	Has autism
Wheelchair bound	Uses a wheelchair
In special ed	Receives special ed services
Handicapped parking	Accessible parking

Appendix 2

PROTOCOL

Effective the _____ day of _____, 2007

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

845 CAMBIE STREET, VANCOUVER, BRITISH COLUMBIA
(the "Law Society")

AND:

THE PROVINCIAL COURT OF BRITISH COLUMBIA
#602 – 700 WEST GEORGIA STREET
VANCOUVER, BRITISH COLUMBIA
(the "Provincial Court")

WHEREAS:

A. The government of British Columbia will be appointing part-time Judicial Justices of the Peace, by Order-in-Council, from among the lawyers in the Province;

B. The government of British Columbia will be appointing part-time Justices of the Peace (the "Judicial Arbitrators") by Order-in-Council from among the lawyers in the Province to serve as arbitrators on certain Small Claims matters;

C. The Law Society is obliged under the *Legal Profession Act* and the *Freedom of Information and Protection of Privacy Act* to protect information subject to solicitor client privilege and confidentiality and to deal with information in its possession in accordance with these statutes;

D. Both the Law Society and the Provincial Court wish to ensure that lawyers who also serve as Judicial Justices of the Peace or Judicial Arbitrators exhibit the highest levels of integrity and professionalism; and

E. Both the Law Society and the Provincial Court wish to clarify their respective jurisdiction over complaints made about part-time Judicial Justices of the Peace and part-time Judicial Arbitrators who are also lawyers.

THEREFORE the following protocol has been agreed upon between the Chief Judge of the Provincial Court and the President of the Law Society, acting on behalf of their respective organizations:

1. The Provincial Court will require any lawyer who is appointed as a part-time Judicial Justice of the Peace or part-time Judicial Arbitrator to grant permission, in writing, for the Law Society and the Provincial Court to share with each other any information or documents relevant to a complaint about that lawyer.

2. Subject to the Law Society's obligations to protect solicitor and client privilege and confidentiality under the *Legal Profession Act* and the *Freedom of Information and Protection of Privacy Act*, each party agrees that it will share with the other party information or documents relevant to a complaint made about a lawyer who is also a part-time Judicial Justice of the Peace or Judicial Arbitrator when asked to do so by the other party.

3. If a complaint is made about the conduct of a part-time Judicial Justice of the Peace or about a part-time Judicial Arbitrator in his or her role as a Judicial Officer, the Chief Judge of the Provincial Court will have primary responsibility to investigate the complaint but will inform the Law Society when the complaint is received and, at the conclusion of the Chief Judge's investigation of the complaint, about the outcome of the investigation. The Law Society may separately investigate the complaint or may decline to do so pending the investigation of the complaint conducted by the Office of the Chief Judge.

4. If a complaint is made about the conduct of a part-time Judicial Justice of the Peace or about a part-time Judicial Arbitrator in his or her role as a lawyer, the Law Society will have primary responsibility to investigate the complaint but will inform the Office of the Chief Judge when the complaint is received and, at the conclusion of the Law Society's investigation of the complaint, about the outcome of the investigation. The Office of the Chief Judge of the Provincial Court may separately investigate the complaint or may decline to do so pending the investigation of the complaint by the Law Society.

5. If a complaint is made about the conduct of a part-time Judicial Justice of the Peace or a part-time Judicial Arbitrator that is unrelated to that person's role either as a Judicial Officer or as a lawyer, both parties agree they will notify the other upon receipt of the complaint and will inform the other party whether the party who received the complaint will be investigating it. Both parties also agree that they will advise the other on the conclusion of any investigation and, subject to the Law Society's obligations under the *Legal Profession Act* and the *Freedom of Information and Protection of Privacy Act* will, on request, provide any information or documents related to the complaint while it is ongoing.

6. Notwithstanding the provisions of the preceding paragraphs of this Protocol, the parties may decide that it is appropriate for the other party to have primary responsibility to investigate a complaint in a particular case.

7. In the event a part-time Judicial Justice of the Peace or part-time Judicial Arbitrator ceases to be a member of the Law Society, the parties agree that the Office of the Chief Judge of the Provincial Court will have primary responsibility to investigate any complaint received about that person unless it is a complaint that the former member of the Law Society has engaged in the unauthorized practice of law in which case the Law Society will have primary responsibility to investigate the complaint. The parties agree that each will keep the other informed about the status and outcome of the investigation and, subject to the Law Society's obligations to protect solicitor and client privilege and confidentiality, will provide the other party with information and documents related to the complaint upon request.

Signed this _____ day of _____, 2007.

_____
The Chief Judge
of the Provincial Court of British Columbia

_____
The President
of the Law Society of British Columbia

Appendix 3

Re: Ministry of the Attorney General, Green Paper, "Reforming British Columbia's *Limitation Act*" (February 2007)

The Law Society appreciates the opportunity to respond to the Green Paper, and is grateful for being provided an extension of time to do so. The *Legal Profession Act*, S.B.C. 1998, c. 9, states:

> 3 It is the object and duty of the society
>
> *(a) to uphold and protect the public interest in the administration of justice by*
>
> (i) preserving and protecting the rights and freedoms of all persons.

Limitation periods play an important function in a just society. They must strike a balance between protecting the ability of a person to enforce a right, while setting an outer limit on the ability of people to enforce a right in order to provide a measure of certainty for those who may have a claim brought against them. We are mindful of the challenges associated in finding the proper balance. The critical question is whether changes to the *Limitation Act* will adversely affect access to the justice system and public confidence in the administration of justice.

Question 1: Should the *Limitation Act* create a single basic limitation period of two years?

We believe that creating a single basic limitation period of two years does not, absent more, adversely affect the public interest in the administration of justice or access to the justice system.

Question 2: Should the *Limitation Act* create a single ultimate limitation period of ten years?

We believe that creating a single ultimate limitation period of ten years does not, absent more, adversely affect the public interest in the administration of justice.

Question 3: If a single ten-year ULP were adopted, should the postponement mechanism of adult incapacity remain subject to the ULP?

We agree with Recommendation 7 of the British Columbia Law Institute, "The Ultimate Limitation Period: Updating the Limitation Act", BCLI Report No. 19, July 2002 ("BCLI Report"), that "The ultimate limitation period of general application should apply to persons under a legal disability (other than minority) in the normal course." We believe that the reasons set forth in the BCLI Report in support of this recommendation are sound and, subject to when the clock starts to run on the ultimate limitation period, does not present substantial access to justice issues.

Question 4: If a single ten-year ULP were adopted, should any limitation period (basic or ultimate) run while a plaintiff is a minor?

We support Recommendation 6 of the BCLI Report:

> Section 8 of the Limitation Act should be amended to provide that in those cases where the plaintiff is a minor at the time the cause of action arises the ultimate limitation period is postponed until the plaintiff reaches the age of majority.

Question 5: Subject to postponement, should the clock start from the date of the act or omission giving rise to the legal claim rather than from the accrual of the cause of action?

We believe that this is the critical issue with respect to protecting the public interest, and that the clock should start to run from the accrual of the cause of action and not from the date of the act or omission.

The British Columbia Law Institute in its report on the Ultimate Limitation Period, acknowledged that "[t]he drawback of abandoning the accrual rule for cases where damage is an essential element of the cause of action is that time could run with respect to a cause of action, and perhaps extinguish it, before the plaintiff has any legal right to bring an action" (p. 18). The authors of that report viewed this possibility as an "anomaly [that] will likely occur in a few cases." It may be that the number of cases where damage occurs more than 10 years from the date of the act or omission giving rise to that damage are few, but we do not believe that the number of cases where damage will occur some years after the act or omission are few.

To set the ULP from the date of the act or omission has the effect of rewarding defendants whose acts or omissions cause damage down the road, over those defendants whose acts or omissions result in immediate harm. The former are rewarded because once the damage occurs, and the plaintiff's right to bring a claim crystallizes, the plaintiff will be left with less than 10 years to bring a claim (and some will be statute barred because the ULP will have extinguished the right before it ever existed). The effect would be to provide a benefit to those who insulate buildings with cancer-causing agents, don't recall defective products because the cost exceeds the risk, build leaky condominiums, etc., at the expense of those who suffer harm as a result of such acts or omissions. It also provides such defendants with greater protection than that afforded to those whose act or omission causes proximate damage.

The proposed changes have the potential to adversely affect several groups of future plaintiffs, most notably, purchasers of real property and the elderly. There is a construction boom in the province. The cost of property is high, and many people are purchasing property at or beyond the limits of their means. Even if the ratio of negligently constructed to acceptable properties remains constant, the number of negligently constructed properties in the province will increase. Profits will be made from the sales of these properties, and both for principles of fairness and for confidence in the market place, consumers should have a reasonable opportunity to pursue a claim once damage has manifested from a negligent act or omission that affects the value of the property.

The second significant group is the aging population of Baby Boomers. We are on the verge of a large, elderly population who will make increased demands on the health care system. Some of these individuals will have been exposed to products or work environments that will cause illness that will not show up until late in life. Running the limitation period on these wrongs from the date of the act or omission will statute bar many of these individuals from being able to pursue a remedy for the harm caused to them.

While we recognize that there are costs associated with record keeping and insurance, we observe that in many instances there are inherent flaws in pointing to these costs as justification for reducing the ULP, and fixing it to the time of the wrongful act. In some instances the actor will have engaged in an activity that exposes both adults and children to harm. Even if the ULP ran from the date of the wrongful act, rather than on an accrual model, in some circumstances the actor cannot with any certainty destroy records within 10 years of the wrongful act on the assumption that the ULP will have barred all claims. Assume that in year zero an actor installed pipes in a condominium that gradually leached toxins into the water. In year 10 the actor destroys their records because no claim has been brought. In year 11 a number of residents, including children are diagnosed with cancer. Because the ULP for the children will not run during their minority, the actor cannot destroy the records with any certainty. If we accept that the actor should be allowed to destroy the records in such a situation at year 10 from the date of the act or omission, because of the costs associated with records keeping, we must accept that minors will in some cases be subject to a disproportionately difficult process of proving their claim. This would have the ironic effect of diminishing the value in postponing the running of the ULP for minors.

We must also be alert to the fact that many actors will be able to pass along the cost of record keeping to the public in the form of increased fees, costs, and in the case of government, taxes. In such cases it is the public who bear the cost of record keeping. If the public is prepared to trade away its rights in order that goods and services might hypothetically be delivered at a lower cost due to reduced record keeping obligations that is one thing, for an organization to raise that argument, absent compelling evidence that they will be bound by an undertaking to reduce the costs of fees and services accordingly is another. In our quest for certainty, we must be vigilant not to lose sight of the object of fairness.

Insulating actors from liability for wrongs that take time to manifest harm to individuals is not desirable. While it might make sense to run the ULP from the time of an automobile accident (subject to postponement for minors), this does not allow us to conclude that it makes sense to run the ULP from the date an actor exposes an individual, or members of the public, to an agent that causes cancer. Creating a limitation model that extinguishes rights before those rights exist at law favours certainty over fairness: while this may increase profitability for many actors, it serves to diminish access to justice.

Question 6: As regards commencement and demand obligations, should the clock begin to run at the moment of default after the lender has made a demand for performance?

Question 7: Are there sufficient reasons to carve out a different ULP for demand obligations where a demand for performance has not been made?

The Law Society approves of Recommendation 8 of the BCLI Report:

> The *Limitation Act* should be amended as follows:
>
> > (1) The limitation period for a demand obligation will commence on the date that a default in performance occurs after a demand is made.
> >
> > (2) Despite (1) a claim cannot be brought after 30 years from the date that the demand obligation is first created.

Question 8: Should the Limitation Act provide that the clock in a claim for contribution and indemnity starts to run from the earlier of (Note – this is a single option):

• the date the claimant is made a defendant in the claim in respect of which contribution and indemnity is sought, or

• the date the claimant incurs liability through settlement of the claim in respect of which contribution and indemnity is sought?

Of these options, we agree with the concept of linking the limitation to the date the claimant is made a defendant in the claim for which contribution and indemnity is sought.

Question 9: Should third party claims other than those for contribution and indemnity, counterclaims and the addition or substitution of parties remain a discretionary decision of the judge under the new legislation? If not, which of the approaches discussed above should be taken?

We believe it should remain at the discretion of the judge.

Question 10: Should the Limitation Act be structured such that where the defendant's dishonesty causes delay (e.g. where the defendant willfully conceals material facts), the ULP does not operate?

Yes.

Question 11: Of the models discussed above, which method of ensuring that confirmations reset the ULP do you prefer, and why?

The Law Society prefers the Recommendation 5 of the BCLI Report, for the reasons articulated in that report (i.e. "Allowing a confirmation of a cause of action to restart the running of time under the ULP is, however, preferable as it ensures that defendants are protected by an outer limitation period running from the date of the last confirmation").

Question 12: Should the Limitation Act allow parties to agree to extend limitation periods but not to shorten them?

Yes.

Question 13: Should extensions be limited by the maximum described by the ULP? Why or why not?

No. Allowing parties to extend the ULP does not diminish access to the justice system or harm the public interest in the administration of justice.

Question 14: Should the Limitation Act provide greater flexibility to commercial actors (i.e. non-consumers) to vary limitation periods? If so, what should commercial actors be able to agree to do?

Yes. Commercial actors should be able to modify limitation periods to give effect to their business objectives. It is important to properly define who is a commercial actor. The safeguard is that commercial actors should avail themselves of legal advice when bargaining away protections, and then the onus would fall on the lawyer to properly advise the commercial actor of the risk. We do not believe this places the public at risk.

Question 15: Which conflict of laws option is preferable, and why?

The Green Paper sets out the conflict of laws example of a couple getting into a car accident in California. It assumes, for the sake of the example, that the limitation period in California is three years versus a two-year limit in British Columbia. The case of *Castillo v. Castillo*, [2005] 3 S.C.R. 870 deals with a similar situation, although the limitation period in Alberta was two years and the limitation period in California was one year. The court affirmed the decision in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 that the "*lex loci delicti* – the substantive law of the place where the tort occurred – applies in a tort action" (para. 3) and that limitation periods are part of the substantive law. As such, the claim was statute-barred in Alberta. The presence of a longer limitation period in Alberta did "not purport to revive an action time-barred by the substantive law of the place where the accident occurred" (para. 4). The court recognized, however, that it was within the purview of the legislature to establish different rules.

We believe that Option 2 is preferable, and that if the governing substantive law establishes a lesser limitation period than that in British Columbia, the British Columbia limitation period should not serve to revive the claim. This approach discourages sitting on a claim in circumstances where the governing substantive law provides a lesser limitation period, and then forcing the defendant to defend the action in British Columbia following expiration of the lesser limitation period. As well, it prevents the British Columbia limitation period from being extended to entertain cases where the governing substantive law provides for a limitation period greater than that in British Columbia.

Question 16: What are your views about the effectiveness of the sample transition clause?

As noted above, we believe that the accrual method for calculating time should continue to apply. Setting the ULP from the effective date of the legislation in circumstances where the cause of action has not yet accrued would serve to diminish access to the justice system.

The Law Society agrees that if the claim was already statute barred, it should not be revived. With respect to claims discovered prior to the effective date, we caution that it is possible that an individual might have sought advice from a lawyer and been informed that he or she had six years to bring an action. Those individuals will have ordered their affairs in reliance on what was at the time sound legal advice. It is also worth noting that such individuals will have incurred the cost of obtaining legal advice, and the value received should be respected. In addition, it is administratively impractical to require lawyers to review all their files to ascertain whom they might have given such advice to and to contact those individuals to warn them that the limitation period has now changed. Any transition mechanism should provide a safeguard for individuals who can demonstrate that they were relying on legal advice given to them prior to the effective date of the new legislation.