THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, January 22, 2010

PRESENT:

Glen Ridgway, QC, President
Gavin Hume, QC, 1st Vice-President
Bruce LeRose, QC, 2nd Vice-President
Haydn Acheson
Rita Andreone
Kathryn Berge, QC
Joost Blom, QC
Robert Brun, QC
E. David Crossin, QC
Leon Getz, QC
Carol Hickman
Patrick Kelly
Stacy Kuiack
Barbara Levesque
Jan Lindsay, QC
Peter Lloyd, FCA
David Mossop, QC
Suzette Narbonne
Thelma O'Grady
Lee Ongman
David Renwick, QC
Alan Ross
Catherine Sas, QC
Richard Stewart, QC
Dr. Maelor Vallance
Herman Van Ommen
Art Vertlieb, QC
Kenneth Walker

ABSENT:

Patricia Bond
Ronald Tindale

STAFF PRESENT:

Tim McGee
Stuart Cameron
Lance Cooke
Su Forbes, QC
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Lesley Pritchard
Susanna Tam
Adam Whitcombe
Carmel Wiseman

GUESTS:

Dom Bautista, Executive Director, Law Courts Center
Johanne Blenkin, Executive Director, BCCLS
Dean Mary Ann Bobinski, Faculty of Law, University of BC
Ron Friesen, CEO, CLEBC
Dean Donna Greschner, Faculty of Law, University of Victoria
Robert Holmes, President, Trial Lawyers Associations of BC
Jamie Maclaren, Executive Director, Pro Bono Law of BC
Stephen McPhee, Vice-President, CBABC
Mary Mouat, Chair, Law Foundation Board of BC Board
Jane Mundy, Reporter, Lawyers Weekly
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Joanne Silver, Director of Stakeholder Relations, CBABC
Ryan Williams, President, TWI Surveys Inc.

BENCHERS' OATH OF OFFICE

The Honourable Lance Finch, Chief Justice of British Columbia, administered the swearing / affirming of

- the President's Oath of Office by the Law Society's President for 2010, G. Glen Ridgway, QC
- the Vice-President's Oath of Office by the Law Society's First and Second Vice-Presidents for 2010, Gavin H.G. Hume, QC and Bruce A. LeRose, QC, respectively
- the Bencher's Oath of Office by Haydn Acheson, Rita Andreone, Kathryn A. Berge, QC, Joost Blom, QC, Robert C. Brun, QC, E. David Crossin, QC, Leon Getz, QC, Carol W. Hickman, Patrick Kelly, Stacy Kuiack, Barbara Levesque, Jan Lindsay, QC, Peter Lloyd, FCA, David W. Mossop, QC, Suzette Narbonne, Thelma O'Grady, Lee Ongman, David M. Renwick, QC, Alan Ross, Catherine A. Sas, QC, Richard N. Stewart, QC, Herman Van Ommen, Art Vertlieb, QC, Kenneth Walker.

CONSENT AGENDA.

The following resolutions were **passed unanimously and by consent**.

A. ***BE IT RESOLVED*** that the Benchers create the Discipline Guidelines Task Force, with a mandate to be drafted by the Task Force and submitted to the Benchers for approval at the next opportunity.

1. Minutes

The minutes of the meeting held on December 11, 2009 were approved as circulated.

REGULAR AGENDA – for Discussion and Decision

2. President's Report

Mr. Ridgway referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President during the month of January (Appendix 1).

Mr. Ridgway also outlined his priorities as the Law Society's President for 2010:

- Supporting the effective and timely enhancement of the Law Society's discipline process, particularly in relation to the work of
  - the Discipline Guidelines Task Force
  - the Adjudication / Prosecution Task Force
- Supporting the development of a public oversight process to monitor the Law Society's effectiveness in promoting and protecting the public interest in the administration of justice, as called for by the Benchers at their 2009 Retreat
- Supporting the development of recommendations for enhancing access to and affordability of legal services in BC, particularly in relation to the work of
  - the Delivery of Legal Services Task Force

- the Access to Legal Services Advisory Committee

- Supporting the development of recommendations for enhancing the participation of Aboriginal people in BC's legal profession, particularly in relation to the work of
  - the Equity and Diversity Advisory Committee
- Supporting the "100 flowers that bloom" throughout the year
  - one or two compelling issues that may be brought forward for urgent action during the year by Benchers, staff or external events

3. CEO's Report

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

- Management's top five operational priorities for 2010
  - Task Force and Advisory Committee Support
  - Key Performance Measures (KPMs) – Process Review
  - Leadership Development and Skills Training
  - Managing in Turbulent Economic Times
  - Communications Strategy and Plan
- Update – Continuing Professional Development (CPD) Program
- 2009 Employee Survey
  - TWI Surveys President Ryan Williams presented an overview of the results of the 2009 Employee Survey
    - Fourth year that we have conducted a survey of all employees
    - Results are used to help us measure how we are doing as an organization and to help management develop action plans to better engage employees in the work and life of the Law Society
- Update – Search for New Chief Legal Officer (CLO) and Manager of Communications and Public Affairs
- Update – 2010 Olympics Planning
- Update – Bencher Orientation Session
- Paperless Meeting Pilot Project

4. Report on Outstanding Hearing and Review Reports

The Benchers received a report on outstanding hearing decisions.

GUEST PRESENTATIONS

5. Law Foundation of BC Annual Review

Law Foundation Board Chair Mary Mouat delivered a presentation to the Benchers, reviewing the Law Foundation's

- Legislative mandate
- Mission statement
- Vision
- Values
- Strategic Priorities
- Finances
- Programs and Projects Funded
- 2009 Highlights

Ms. Mouat thanked the Law Society for its support in 2009, noting particularly the contribution of the Trust Assurance department, led by Manager Felicia Ciofitto, in raising more than $400,000 for the Law Foundation by identifying trust account balances upon which interest should have been paid to the Foundation.

6. University of Victoria Law School Report

Dean Donna Greschner delivered a presentation to the Benchers, reviewing

- Renovations to the Diana M. Priestly Law Library
- UVic Law Demographics
- LL.B. Curriculum
- Experiential Learning Programs
  - Clinical Programs
  - Skills-based learning
  - Mooting
- Post-graduate Plans of the Class of 2009
- Locations of articles for the Class of 2009
- UVic Law Alumni (locations as of 2009)
- Tuition at Selected Law Schools
- Challenges & Opportunities

Dean Greschner thanked the Canadian Bar Association and the Law Society for their ongoing support of the University of Victoria's Faculty of Law.

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

7. Updating the 2009-2011 Strategic Plan

Mr. Lucas briefed the Benchers on proposed revisions to the Strategic Plan, referring them to his memorandum and the draft revised 2009-2011 Strategic Plan (at pages 700 and 714, respectively, of the meeting materials) for the substance of the suggested changes:

- The addition of Initiative 1-1 to reflect the next steps of the work of the Delivery of Legal Services Task Force;
- Re-wording of Strategy 1-3 to incorporate Aboriginal lawyers into the strategy, as well as the addition of initiative 1-3c to address the work being planned by the Equity and Diversity Advisory Committee aimed at retaining Aboriginal lawyers in the profession;
- Addition of Strategy 1-4 to include the decision to work (in cooperation with interested parties) toward developing an economic analysis of the justice system in British Columbia in order to better understand in empirical terms the economic benefit of funding the justice system and the systems that support the rule of law;
- Re-wording of Initiative 2-2 to reflect the direction given by the Executive Committee in the Fall of 2009;
- Re-wording of Initiative 2-3 to reflect the Benchers' resolution concerning this subject made in December, 2009;
- Re-wording of Initiative 2-3 to better reflect the purpose of this initiative;
- Addition of Strategy 2-7 and Initiative 2-7 to reflect the work to be done in connection with discipline processes.

Mr. Lucas advised that the proposed revisions arise from the discussion at the December 11, 2009 Benchers meeting and were vetted by the Executive Committee on January 14, 2010 for submission to the Benchers. He also identified two issues of importance that were not specifically mentioned in the revisions to the Plan:

- Implementation of two outstanding recommendations of the Retention of Women in Law Task Force (Recommendations 4 and 5)
  - 4. Consider the Feasibility of Creating a BC Think Tank for Regional/Mid-Size and Smaller Firms
  - 5. Consider the Feasibility of Additional Law Society Programs
- The current status of legal aid in British Columbia
  - Already being addressed under Goal 1 of the current plan – "Enhancing access to legal services"
  - Major focus of the 2010 Access to Legal Services Advisory Committee

Mr. Hume moved (seconded by Mr. Van Ommen) that the revised 2009-2011 Strategic Plan be approved.

Discussion followed, during which a number of issues were raised, including:

- The feasibility of implementing Recommendations 4 and 5 from the Retention of Women in Law Task Force is being studied by Law Society staff
- The three members resolutions passed at the 2009 Annual General Meeting were reviewed: it was noted that
    1. Resolution 1 (to amend the Strategic Plan to include Aboriginal lawyers as a priority under Strategy 1-3) will have been implemented if the changes to the Plan as proposed are approved
    2. Resolution 2 (to strike a Working Committee comprised of Benchers, Aboriginal Lawyers and Aboriginal law students that will review and update the 2000 report on "Addressing Discriminatory Barriers facing Aboriginal Law Students and Lawyers") will be substantially implemented through the focus of the Equity and Diversity Advisory Committee's attention on supporting Aboriginal lawyers and law students in 2010
    3. Resolution 3 (to establish a full time staff lawyer position whose sole purpose is to support Aboriginal law students, articling students and lawyers) will be discussed by the Benchers at their March 5, 2010 meeting
- In house counsel
    - Ethical issues and implications
- To be considered by the Ethics Committee during 2010
- Enhancement of access to legal services for British Columbians
    - Importance of the work of the Delivery of Legal Services Task Force in 2010
- Addressing the cost of legal services
    - Major focus of the Access to Legal Services Advisory Committee in 2010

The motion was carried.

REGULAR AGENDA – Other Matters for Discussion and/or Decision

8. LSBC Submission to the Special Committee of the Legislature for Review of the Freedom of Information and Protection of Privacy Act ("LSBC Submission")

Mr. Hoskins briefed the Benchers on the Law Society's participation in previous statutory reviews of the Freedom of Information and Protection of Privacy Act (the "Act"). He outlined the four recommendations set out in the draft LSBC Submission (at page 801 of the meeting materials – see Appendix 3), noting that the recommendations have been approved by the Executive Committee for submission to the Benchers.

Mr. LeRose moved (seconded by Mr. Ross) that the draft LSBC Submission and the four recommendations contained therein be approved and submitted to the all-party committee of the Legislative Assembly currently reviewing the Act.

The motion was carried.

9. FLS Council and Executive Committee Update

Ian Donaldson, QC reported to the Benchers as the Law Society's representative on the FLS Council and Executive Committee. Mr. Donaldson commented on the strength of LSBC's contribution to FLS projects and initiatives. He noted the quality and importance of the work being done by the Federation and suggested that the Benchers should try to view national initiatives through the lens of "the collective good" – using the "No-cash Rule" and the Model Code of Conduct as examples. Mr. Donaldson also commented that, since his election, he has found the proceedings of the FLS Council to be highly relevant and functional. He pointed to items 10, 11 and 14 on the current Benchers agenda as illustration.

Mr. Ridgway presented Mr. Donaldson with a gift on behalf of the Law Society's Benchers and staff. Mr. Donaldson expressed his deep appreciation for the kind thoughts and good wishes he and his family received from so many Benchers, members and staff of the Law Society during his recent illness.

10. Accreditation of the Canadian Common Law Degree

Mr. Stewart briefed the Benchers as Chair of the 2009 Credentials Committee. He provided background on the work of the FLS Task Force on the Canadian Common Law Degree (chaired by John Hunter, QC) leading to the release of the task force's Final Report in October 2009. Mr. Stewart noted that a Credentials subcommittee (Mr. LeRose, Ms. Fung and himself) was formed to review the report, following the Executive Committee's request to Credentials for such a review. He outlined the subcommittee's consultations with the deans of the UBC and UVic law schools and the task force chair and summarized their feedback.

Mr. Stewart advised the Benchers that the subcommittee carefully reviewed the Final Report in comparison to the Recommendations previously provided by the Benchers in relation to the task force's Consultation Paper. While the subcommittee noted some minor differences between the two, it was satisfied that these differences were not critical in consideration of its recommendation to approve the Final Report. After hearing from the UBC and UVic law deans and the task force chair, the subcommittee concluded that the Benchers should not deviate from the responses they previously provided. The subcommittee noted the suggestions (made by both the deans and Mr. Hunter)

- that an implementation committee should
    - be formed to give effect to the Final Report's recommendations
    - be given a clear mandate, sufficient to address any concerns surrounding compliance structures for law schools.

The subcommittee viewed the participation and support of the law schools as crucial to the success of any implementation of the recommendations set out in the Final Report.

Mr. Stewart moved (seconded by Mr. LeRose) that the Benchers adopt the draft resolution at page 1002 of the meeting materials:

> ***Be it resolved*** that:
>
> 1. The Law Society of British Columbia approves the Final Report of the Federation of Law Societies Task Force on Accreditation of the Canadian Common Law Degree issued October, 2009, and
> 2. The implementation issues arising from the recommendations in the report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.

In the ensuring discussion, a number of issues were raised, including:

- whether the various law societies would have opportunity to review the implementation committee's conclusions before their approval by the Federation
    - Mr. Treleaven confirmed that the law societies would be able to review the implementation committee's conclusions before providing their respective Council representatives with voting instructions
- the concerns expressed on behalf of the Council of Canadian Law Deans
- the importance of appropriate representation of and participation by Canadian law schools in the implementation process
- the need for caution regarding the risk of compromising the quality of Canadian legal education
- the importance of ensuring that the work of any implementation committee be adequately funded

The motion was carried.

Mr. Ridgway thanked Dean Bobinski and Dean Greschner for their constructive comments and assured them that the Benchers had heard their concerns.

11. FLS Model Code of Conduct

Mr. Hume briefed the Benchers on behalf of the Ethics Committee. He reviewed the background of the development of the Federation's Model Code, outlined a process for considering the Model Code as a replacement for Law Society's current *Professional Conduct Handbook*, and set out the Ethics Committee's provisional views about adoption of the Model Code.

Mr. Hume referred to the Ethics Committee's memorandum (page 1101 of the meeting materials):

> It is our view that we ought to recommend adoption of the Code to you, with appropriate changes that are necessary to recognize local issues or improve the rules in some important areas. To the extent that the LSBC makes changes to the Code, we are of the view that those changes should, nevertheless, be done in the style of the Model Code and be consistent with its organization. It may be that where changes are made to the Model Code those changes should be highlighted in some way to draw attention to features that

> may not be common to other provinces or territories. We have not determined what changes we will recommend to the Code before it can be adopted in place of the current *Professional Conduct Handbook*, but we expect to consider carefully the views Benchers expressed in 2007 concerning various issues raised by the Code …

Mr. Hume noted that the Code's conflicts provisions and future harm/public safety exception rule are not yet completed and will have to be reviewed at a later date.

14. Quebec Mobility Agreement

Mr. Stewart briefed the Benchers as Chair of the 2009 Credentials Committee. He reported that there is a proposal presently before the Council of the Federation of Law Societies of Canada to vote on the Quebec Mobility Agreement ("QMA") which would allow reciprocity with members of the Barreau du Quebec.

Mr. Stewart outlined the background and purpose of the QMA:

- Background
  - In August 2002 the Federation of Law Societies of Canada accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers
  - Eight law societies, including the Barreau du Quebec ("the Barreau"), signed the National Mobility Agreement ("NMA") on December 9, 2002
  - The NMA recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions
    - The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Quebec would delay implementation of the NMA with respect to the Barreau
  - In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement, along with the law societies of all three territories
    - Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1,2012
- Purpose
  - The purpose of the Mobility Agreement ("QMA") is to extend the scope of the NMA in facilitating the reciprocal permanent mobility between the common law jurisdictions and the Barreau

Mr. Stewart noted that the Credentials Committee considered and endorsed the Quebec Mobility Agreement at its December 11, 2009 meeting for referral to the Benchers.

Mr. Stewart moved (seconded by Ms. Hickman) that that the Benchers direct the Law Society's Federation Council delegate to vote in favour of the draft motion of the Federation Executive which provides:

> **WHEREAS** the Barreau du Quebec (the "Barreau") has established a special category of membership known as the Canadian Legal Advisor to permit members of other Canadian law societies to practise law in Quebec on a restricted basis;
>
> **WHEREAS** the other Canadian law societies have indicated a desire to establish reciprocal mobility for members of the Barreau on a similar basis;
>
> **RESOLVED THAT** the Quebec Mobility Agreement attached as Appendix "A" be approved by Council for submission to member law societies for their execution.

The motion was carried.

15. Nominations to 2010 Finance Committee

Mr. Ridgway confirmed that two Benchers-at-large (at least one of whom is not a member of the Executive Committee) and one appointed Bencher are to be nominated to the 2010 Finance Committee. If more than two Benchers or more than one appointed Bencher are nominated, the vote must be by secret ballot (Rule 1-39(11)(a)).

Kathryn Berge, QC and David Renwick, QC were nominated as the Benchers-at-large members of the 2010 Finance Committee.

Stacy Kuiack was nominated as the appointed Bencher member of the 2010 Finance Committee.

16. Election of Appointed Bencher to 2010 Executive Committee

Mr. Ridgway reminded the Benchers that at their December 11, 2009 Benchers meeting, Barbara Levesque was elected as the appointed Bencher member of the 2010 Executive Committee. Ms. Levesque has since submitted her resignation as a member of the Executive Committee, following the provincial government's announcement that she was not re-appointed as an appointed Bencher for 2010-2011.

Rule 1-39(12) provides that if a vacancy occurs for any Bencher elected to the Executive Committee, "…the Benchers or the appointed Benchers, as the case may be, must hold an election to fill the vacancy at the next regular meeting of the Benchers."

Peter Lloyd, FCA was declared elected as the appointed Bencher member of the 2010 Executive Committee.

18. Discussion of Costs Awarded by Hearing Panels

Mr. Vertlieb reported as Chair of the Discipline Committee. He reviewed the background of the Law Society's present partial indemnity costs model and outlined three options for the Benchers' consideration:

- a no costs model
- a partial indemnity costs model

- a full indemnity costs model

Mr. Vertlieb referred the Benchers to the statement of policy goals at page 1807 of the meeting materials:

> The policy goals behind costs awards include:
>
> - indemnifying the successful party
> - encouraging both parties to settle issues
> - penalizing unreasonable behaviour
> - penalizing behaviour that increases costs
> - discouraging meritless claims
> - increasing accessibility to the legal system
>
> The Manitoba Law Reform Commission in *Costs Awards in Civil Litigation* (September 2005) adds to those goals (somewhat differently expressed) the following objectives for a costs regime:
>
> - simplicity and clarity
> - flexibility
>
> We suggest that these goals should be kept in mind in considering the different costs models.

Mr. Vertlieb endorsed the staff assessment that a "partial indemnity costs model" is the best approach (at page 1814):

> The partial indemnity model fares well when viewed through the policy goals lens:
>
> - it indemnifies the successful party although only partially
> - it encourages parties to settle issues
> - it penalizes unreasonable behaviour
> - it penalizes behaviour that increases costs
> - it discourages meritless claims
> - it increases access to the legal system
> - by allowing the successful party to recover at least a portion of the costs expended
> - it is flexible.

Mr. Vertlieb suggested that the use of a tariff system to administer the partial indemnity model would simplify claims for costs and add transparency to the Law Society's cost recovery process. He noted that the tariffs can fall out of touch with current market conditions unless reviewed at regular intervals.

Mr. Vertlieb also pointed out that there is an anomaly in the treatment of costs in discipline proceedings resolved by admissions under Rules 4-21 and 4-22, as discussed in Section 8 of the staff memorandum (at page 1816 of the meeting materials):

> Rule 4-21 was originally used, and probably originally designed, for admissions of minor misconduct that did not require a discipline outcome. However, it is most often used today in cases of serious misconduct where the member resigns and, typically undertakes not to practise for a period of time, recognizing that any hearing is likely to result in disbarment. There is no hearing pursuant to Rule 4-21. Rather, the respondent tenders his or her admission of a disciplinary violation to the Discipline Committee who may accept or reject it.
>
> Rule 4-22 is a hearing process used for all agreed disciplinary resolutions (i.e. reprimands, fines and suspensions) short of resignation. There is always a costs component to a Rule 4-22 resolution, even though the underlying conduct may be far less serious than in Rule 4-21 cases.
>
> There are also cases in which the respondent has indicated from the outset a willingness to be fully co-operative, admits the applicable misconduct freely, and agrees to and proposes a reasonable penalty. Despite that, the nature of the process is such that costs are inevitably incurred, notwithstanding the respondent's full co-operation from the outset. In such a case, the imposition of costs – or anything more than nominal costs – might be considered to be unfair, as the costs are incurred simply by the nature of the process, and not because of the conduct of the respondent in the proceedings.

Mr. Vertlieb moved (seconded by Mr. LeRose) that the Benchers adopt the partial indemnity model for recovering the costs of the Law Society's discipline and credentials processes, as set out at page 1817 of the meeting materials as Option 2, on the understanding that:

- a tariff system will be developed by staff for the administration of the Law Society's cost recovery process
    - to be presented to the Benchers at the first reasonable opportunity for review and approval in principle, and then
    - to be referred to the Act and Rules Subcommittee to draft appropriate Rules amendments
        - to be returned to the Benchers for review and approval
            - at the first reasonable opportunity, and
            - thereafter at least once every five years
- a policy work-up and recommendations will be provided by staff
    - to ensure consistency in the cost recovery policies and practices employed throughout the Law Society's regulatory processes, including
        - the Rules 4-21 / 4-22 costs anomaly discussed in Section 8 of the staff memorandum (at page 1816 of the meeting materials)

- to confirm the policy goal of providing panels with maximum flexibility, such that they can order "no costs" or "full indemnity" in appropriate cases, and
    - to consider the jurisdictional and legislative amendment issues associated with "full indemnity"

Discussion ensued, during which a number of issues were addressed, including:

- advantages of a tariff system, particularly transparency, consistency and simplicity
- advantages of flexibility in a tariff system, particularly capability to address vexatious proceedings
- whether the current full-day hearing fee of $750 (Rule 5-9)
    - is an adequate measure of the value of hearing panelists' time
    - is an adequate deterrent to vexatious proceedings
- importance of clarity and transparency in the Law Society's policy for recovery of regulatory costs
- challenges of balancing the policy goals of consistency and flexibility, particularly in hard cases

The motion was carried.

***IN CAMERA* SESSION**

Discussion of Bencher Concerns

This matter was discussed *in camera*.

WKM
2010-01-29

PRESIDENT'S REPORT
January, 2010

It has been a tradition for Law Society Presidents to let the other Benchers know what they have been doing over the period of time between Bencher meetings. Accordingly, this report is to let you know what I have been doing since January 1, 2010.

On January 1, 2 and 3, I did absolutely nothing.

On January 4, I attended the Welcoming Ceremony for Mr. Justice Brian MacKenzie, who is now the resident Supreme Court Judge in Nanaimo, having previously served as a Provincial Court Judge for about nineteen years, a short period of time as a lawyer, and periods of time with the Canadian National Basketball team and the New York Yankees.

On the afternoon of January 4, I spent two hours doing pro bono work, without any involvement with pro bono hierarchies or organizations.

On January 6, I received a telephone call from a constituent. This constituent indicated to me that he had done his CPD, but had not had it registered prior to December 31. As such, he was being fined. I asked him if he was called me to do something about his fine. He said "Yes." I indicated to him that this was the equivalent of someone getting a parking ticket in Crofton, British Columbia, and calling Queen Elizabeth for relief. He got the point. It is my understanding that staff is going to give some leeway to those members of the profession who completed their CPD's, but were unable, due to system problems or individual incapabilities, to register that participation, to be accorded the benefit of the CPD requirement.

On January 8, I traveled to our capital city and participated in the "kickoff" of the 100th anniversary celebrations of the British Columbia Court of Appeal. This involved a Special Sitting at the old Victoria courthouse, located in Bastion Square. It is the building now occupied by the Maritime Museum, but the courtrooms still exist on the top floor and apparently are still used by the Tax Court and our Provincial Courts from time to time. Twenty-three of the twenty-six Justices attended the Victoria event.

Local Member of Parliament and Minister in the Federal Cabinet, Gary Lunn, who is a lawyer, spoke at the event, as did I, our Attorney General, the President of the Canadian Bar Association (James Bond), and the President of the Victoria Bar Association (Charlotte Salomon).

I then had an opportunity for about an hour-long meeting with Gavin Hume and our Chief Executive Officer, Tim McGee.

In the evening we all went to a tremendous dinner featuring venison, at the home of a former member of the Law Society, the Lieutenant Governor. The speeches were "light," and surprisingly, the inhabitants of two positions—the Chief Justice of British Columbia and the Chief Justice of our Supreme Court—proved to be individuals who could perhaps save the prime time schedule of NBC, which apparently Jay Leno and Conan O'Brien have not been able to do.

On the evening of Wednesday, January 13, I journeyed to Vancouver, British Columbia, and on Thursday, January 14, I participated in some continuing Legal education, and later that afternoon I attended a meeting of the Executive Committee of the Law Society. It is my intention this year to attend continuing legal education, as I hope all Benchers do, to stress the importance we place on this direction that we have given to our membership.

I spent the morning of Friday, January 15, participating in Bencher orientation, the weekly meeting with the CEO, and in learning office and technological procedures. The Bencher orientation session will have to be given again to catch two of our newly-elected members who could not attend, whoever is elected from the Okanagan to replace Meg Shaw, and our newly-appointed Benchers. It will be held sometime in March, and we hope to coordinate that with the educational sessions on "Hearing Panels." The program put together by our staff is very informative, and I would certainly suggest that all Benchers consider attending some or all of the orientation sessions. Mr. Hume, Mr. LeRose and Mr. Vertlieb, all of whom have the propensity to give off the air of "knowing it all," found the sessions very useful.

As this comes to you early on January 20, I anticipate the late afternoon of January 20 being spent with award-winning students at the University of Victoria Law School, and January 21 being spent at the weekly meeting with the Chief Executive Officer, dropping in on some Committee meetings at the Law Society, and attending the tribute dinner for former Chief Justice Brenner. Friday, January 22, will be spent attending the Benchers' meeting, including the swearing in by Chief Justice Finch, and at about 2 o'clock journeying out to the River Rock Casino to participate in the meeting of Local and County Bar Presidents put on by the Canadian Bar Association, BC Branch. In the late afternoon and evening, I will be attending the Robert Guile Memorial Debate at the Law Courts Inn.

Future events include attending in Vancouver on January 28 for my meeting with Mr. McGee and the Law Society Town Hall Meeting, attending in Vancouver on February 4, and on the afternoon of February 5, journeying to the Kootenays for the Kootenay Mid-Winter Meeting. It looks as if I will be returning home on Sunday, February 7, and as a result of this service to the Law Society and my dedication to my position, missing all or part of the Super Bowl.

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

January 22, 2010

Introduction

This is my first CEO's report to the Benchers for 2010 and I would like to wish you all the very best of the New Year. I would also like to extend a warm welcome on behalf of all the staff to our new President Glen Ridgway, QC. We look forward to working with all of you in the coming year.

In this report I would like to share with you senior management's operational priorities for the year. I have discussed these with the management team and with President Ridgway and with the Executive Committee. I have also met with Glen to review his Presidential priorities for 2010 (which he will speak to at the Bencher meeting) and I have incorporated the operational aspects of those into the priorities set out below. I have also included updates on a variety of different items.

1. Operational Priorities for 2010

The top 5 operational priorities for management in 2010 are as follows:

(a) Task Force and Advisory Committee Support

This year is an important year for execution of key items in our 2009-2011 Strategic Plan. The Delivery of Legal Services Task Force will be setting an aggressive timetable to be ready to report to the Benchers at the retreat in June. The Task Force on the separation of the prosecutorial and adjudicative function will be ramping up soon and establishing its work plan as will the planned Task Force on discipline guidelines. The Equity and Diversity Advisory Committee will take the lead in addressing the issues associated with aboriginal lawyers which are proposed additions to the Strategic Plan as well as monitoring and overseeing the outstanding recommendations from the former Task Force on the Retention of Women in the Law. The Policy group will be heavily engaged in supporting all of this work. We will also need to draw on other resources within the Law Society to help assess the operational impacts and feasibility of options before they become recommendations.

(b) Key Performance Measures (KPMs) – Process Review

The KPMs were first adopted by the Benchers in 2007 as the dashboard for monitoring the outcomes of our core regulatory functions to ensure we are meeting our objectives. Since then we have shared the KPMs with the government, media and the public at large to demonstrate our commitment to operational transparency and accountability. It is now time to re-assess and re-evaluate the appropriateness of the specific measures to ensure they continue to serve our public interest mandate effectively. To do this we will start

with a process review of each of our core functions. The Audit Committee oversaw the development of the KPMs in 2007 and will oversee this review in 2010. This project will require dedicated resources within the Law Society and a well developed project plan. I will be working with management and staff on these items in the coming weeks and I will report to the Benchers in more detail at the March meeting.

(c) Leadership Development and Skills Training

In the past two years we have made a significant investment in professional development and skills training for our managers and staff. Most recently, all managers completed individual 360° assessments and received customized feedback from our administrators. They are now working with the assessment results, and participating in training on coaching techniques, conflict resolution and team building. Each manager has also created an individual development plan focused on areas for personal development in 2010 to enhance their effectiveness as leaders. Seminars in the most sought after skills areas have also been held for staff and attendance in 2009 was oversubscribed in most cases. The goal in 2010 is to build on these important investments in our people and not lose momentum in terms of building a strong culture of leadership and a continuous learning environment.

(d) Managing in Turbulent Economic Times

In my initial report to the Benchers in 2009 I commented on the meltdown in the financial markets in Canada and around the world and said that while the impact of these turbulent conditions on the Law Society was difficult to predict we would be alert to demands on our services and manage our finances prudently. In the past year, we have seen a modest although not unexpected rise in the number of complaints against lawyers and insurance claims to LIF. TAF revenues (generated mostly by the real estate market) declined year over year but mostly in accordance with our projections. We finished the year on a solid financial footing and without the need for any service or program cutbacks. In short, I can say we were able to manage through the times reasonably well. While the intensity of the financial turmoil is lower as we head into 2010 we still face considerable external uncertainties. In response, we will continue to pay very close attention to our budgetary commitments and stay on track. The planning process at the Finance Committee resulted in much of the expense contingency for 2010 being removed. Because of this we will need to be particularly diligent throughout the year in tracking actual and projected expense. Our CFO, Jeanette McPhee, will be reporting to the Benchers on this and related matters throughout the year.

(e) Communications Strategy and Plan

2009 was a very challenging year on the communications front for a number of reasons: the demands of planning and supporting President Turriff's provincial speaking tour; exceptional media interest in an number of complex and controversial discipline cases and decisions; and a seemingly endless series of announcements of funding cutbacks to various justice agencies and corresponding requests for LSBC to comment. This was complicated by the fact that throughout most of the year we did not have a full complement of communications department staff. Most importantly perhaps we also lacked a communications plan and strategy which would enable us to be more proactive and responsive. In 2010 our priority will be to develop a strategic plan for communications with specific initiatives identified, and to move forward with implementing that plan. A new Manager of Communications will be appointed shortly who will have direct responsibility for overseeing this important work.

While the foregoing are our top operational priorities for 2010 we will continue to deliver our core regulatory services and member assistance services with a focus on efficiency and service excellence. In addition we will be also be allocating resources to a number of areas including the continuous refinement and administration of the CPD program, our government relations program, and the national initiatives of the Federation of Law Societies of Canada.

2. Update – Continuing Professional Development (CPD) Program

I would like to provide a brief update on the statistics for our CPD program as at January 1, 2010. Out of approximately 10,000 practising lawyers:

8,815	Completed the required 12 hours and answered "yes" to the ethics question
149	Completed the required 12 hours but did not report whether they met the ethics requirement
288	Reported some hours, but fewer than the required 12
602	Reported 0 hours

As of January 19, 2010 these numbers have improved slightly. Alan Treleaven will be available at the meeting to discuss these results and to report on steps being taken to follow up on members with incomplete results.

3. 2009 Employee Survey

Ryan Williams of TWI Surveys Inc. will present an overview of the results of the 2009 Employee Survey. This is the fourth year that we have conducted a survey of all employees. The results are used to help us measure how we are doing as an organization and to help management develop action plans to better engage employees in the work and life of the Law Society. I would welcome any feedback or questions you may have on the results or on the survey generally.

4. Update – Search for New Chief Legal Officer (CLO) and Manager of Communications and Public Affairs

I am pleased to report that we will be conducting short list interviews for the vacant CLO position in the next few weeks and that the short list interviews for the vacant Manager of Communications position are underway. The plan is to have final decisions made on candidates in early February (or shortly after the Olympics) so that we can have both positions filled by March 1st. I will be reviewing the shortlisted CLO candidates with the Ladder and providing them with opportunities to meet the candidates to provide any feedback.

5. Update – 2010 Olympics Planning

With the Vancouver 2010 Olympic Winter Games just a few weeks away, I thought it would be useful for the Benchers to have an update and review of the Law Society's planning for the Olympic period. Jeanette McPhee, in her capacity as chair of our staff committee for the Olympics, will be at the meeting to discuss these plans and to answer any questions.

6. Update – Bencher Orientation Session

Last week we conducted a new and improved one day orientation session for new Benchers. President Ridgway and the Ladder were in attendance and contributed to the program as did other Benchers who dropped in. The program materials are available to all Benchers and if there is sufficient interest we will repeat the session for all Benchers and tie that in with the arrival of our new Bencher from Kelowna.

7. Paperless Meeting Pilot Project

At the initial Bencher meeting in 2009 we announced the kick-off of a pilot project designed to test the feasibility of Benchers preparing for and attending Bencher and other Law Society meetings by using an electronic agenda and materials in conjunction with a laptop computer.

The three main reasons for the pilot project were:

(i) To take advantage of new information technology which is becoming increasingly widespread, convenient and effective;

(ii) To reduce the Law Society's photocopying costs for these meetings, which are substantial; and

(iii) To promote a greener working environment at the Law Society.

We said that depending on the results of the pilot project over the year we would consider whether the concept is one we should adopt more fully.

Look around the Bencher table at the meeting this week. Based on the increased number of "paperless" participants year over year, I think we can conclude that the pilot project has been a success. We are seeing similar success at the committee level as well. In particular, more than two-thirds of the Discipline Committee members now handle the voluminous materials for that committee electronically.

If you are not currently taking advantage of this capability and would like to, please contact Bill McIntosh, Manager of Executive Support. We will make all the necessary arrangements including providing "tech support" and training to help you get set up electronically and being available during meetings to assist with any issues.

Timothy E. McGee
Chief Executive Officer

The Law Society
of British Columbia

Submission to the Special Committee of the Legislative Assembly of British Columbia on the Review of the *Freedom of Information and Protection of Privacy Act*

January 22, 2010

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INTRODUCTION

The Law Society of British Columbia is the governing body of the legal profession in British Columbia. It was recognized and given statutory authority in legislation enacted in 1884. Today, the Law Society continues under the authority of the *Legal Profession Act*, which was adopted in 1998. The object and duty of the Law Society, as stated in s. 3 of the *Legal Profession Act*, is to uphold and protect the public interest in the administration of justice by, amongst other things, preserving and protecting the rights and freedoms of all persons.

The Law Society supports the principles of openness and accountability that the Freedom of Information and Protection of Privacy Act (the "*FOI Act*") is intended to promote. However, there are some concerns in connection with how the public interest in the administration of justice is affected by the *FOI Act* as well as about its application to a professional governing body such as the Law Society that we wish the Special Committee of the Legislative Assembly to consider. We have focused our attention on four points that we consider to be particularly important. The four points are set out in some detail below; however, they are best understood in the context of the Law Society's statutory mandate.

We start from the premise that both the *FOI Act* and the *Legal Profession Act* are intended to protect the public interest. The purposes of the *FOI Act* as set out in section 2(1) are to make public bodies more accountable to the public and to protect personal privacy by

- giving the public a right of access to records,
- giving individuals a right of access to, and a right to request,
- correction of, personal information about themselves,

- specifying limited exceptions to the rights of access,

- preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

- providing for an independent review of decisions made under the Act.

The paramount duty of the Law Society under section 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice by

- preserving and protecting the rights and freedoms of all persons,

- ensuring the independence, integrity and honour of its members, and

- establishing standards for the education, professional responsibility and competence of its members and applicants for membership.

In many respects the requirements of both Acts are congruent and the public is well served. However, in some respects the public interests served by the Acts are at crossed purposes. The Law Society's concerns arise from these points of tension. Dealing with information that is subject to solicitor-client privilege (a civil right of supreme importance in Canadian law) of is one place where such tension can arise; investigating allegations of lawyer misconduct or incompetence is another.

Some of the recommendations submitted by the Law Society in these submissions mirror recommendations made in 2004 (see recommendations 1 and 3 below). The balance of the recommendations are made as the result further developments in the law that we

consider affect the premises underlying the statute and therefore need to be addressed in the legislation.

I. SOLICITOR-CLIENT PRIVILEGE

1. Legal Advice

Section 14 of the *FOI Act* provides:

Legal Advice

> **14** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

In the *Lavallee* case (*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209, 2002 SCC 61) Madam Justice Arbour described solicitor-client privilege as a "*principle of fundamental justice and civil right of supreme importance in Canadian law*". The paramount duty to protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons means the Law Society's duty to protect the privilege of clients applies in all cases, not only in those where the Law Society is the custodian of the privilege as a result of its involvement with its members. The confidential relationship takes precedence over the rights of third parties to information, and only the client has the option of releasing privileged information arising from that relationship.

The Law Society's concern with section 14 of the *FOI Act* is that, by giving the head of a public body the discretion to refuse to disclose information that is subject to solicitor client privilege, it appears by implication to give discretion to disclose privileged information. In the *Lavallee* case Madam Justice Arbour concluded "*solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does*

not involve a balancing of interests on a case-by-case basis." In our view, there is no basis for a discretion to release privileged information. Disclosure must be refused.

RECOMMENDATION #1

The Law Society recommends that section 14 be made mandatory except when the public body is the client and can choose to waive privilege or, if the client is a third party, the client agrees to waive privilege.

2. Production to the Commissioner of information subject to solicitor-client privilege

Sections 44(1) and 44(3) of the *FOI Act* require production of any record to the Commissioner during an investigation or an inquiry under the *FOI Act*, and permit the Commissioner to examine such records, despite any privilege of the law of evidence. Subsection 44(2.1) provides that disclosure of a privileged document to the Commissioner at the Commissioner's request under subsection (1) does not affect the privilege. Although subsection 44(2.1) goes some way to limit the potential harm done by disclosure, in our respectful opinion, it does not go far enough.

The Law Society has a statutory obligation to investigate complaints made against lawyers, and in so doing may obtain privileged or confidential information of a lawyer's client. The Law Society can also be a party to litigation itself and, like other entities from time to time is required to seek advice and instruct counsel in connection with matters affecting its legal rights and obligations.

In the *Cypress Bowl* case (*B.C. Minister of Environment, Lands & Parks v. B.C. Information & Privacy Commissioner*, (1995) 16 B.C.L.R. (3d 64)), Mr. Justice Thackray confirmed that solicitor-client privilege is a principle that cannot be abridged by interpreting it narrowly, as the Commissioner had attempted to do by ordering the severance of certain documents related to giving legal advice. The Court held that s.4(2)

of the *FOI Act* (the "severance" provision) does not modify the common law principle of solicitor-client privilege which is incorporated into the *FOI Act* by s.14. Mr. Justice Thackray went on to say that the Commissioner does not need to look at documents that are subject to solicitor-client privilege in order to determine if they should be disclosed:

"*I have not seen Documents 254 and 311 and have no reason to do so. Neither, in my opinion, did the Commissioner. I am not suggesting that there are not cases wherein the Commissioner should not peruse the questioned documents. However, when a question of solicitor-client privilege is the issue that step should be taken only if necessary. It should never become routine."*

Since the *Cypress Bowl* case, the Supreme Court of Canada has had occasion to review in a significant manner, in a number of cases, the law concerning privilege, and has further and more firmly articulated the limits on disclosure of privileged documents. In the *Lavallee* case, the Supreme Court of Canada stated that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, and that the Court must therefore adopt stringent norms to ensure its protection. In order to pass the scrutiny of the *Charter*, therefore, any statutory provision affecting the privilege must only do so as minimally as possible.

In *Lavallee*, the Court determined that the impugned statutory provision (s. 488.1 of the *Criminal Code)* more than minimally impaired solicitor-client privilege. Three problems identified in the *Lavallee* case included:

- the naming of clients
- the fact that notice may not be given to clients
- the possibility of access by the Attorney General to the information prior to the determination of privilege.

We are concerned that all three of those failings exist in s. 44(1) and (3) of the Act at present should the Commissioner compel a public body (such as the Law Society) to produce information or documents in its possession over which a claim of solicitor-client privilege of a lawyer's client may be made. Production of such information would, at the very least, name clients. There is no statutory provision for notifying the clients that their privileged information is being required to be produced. Should the privileged information disclosed amount to evidence of an offence, the Commissioner by virtue of s. 47(4) may disclose that information to the Attorney General. This provision constitutes a *substantial*, not a minimal impairment of privilege.

Moreover, the Supreme Court of Canada has made clear in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* [2008] 2 S.C.R. 574 that an adjudication of privilege by the Federal Privacy Commissioner (or presumably anyone delegated by the Commissioner to make the decision), who is an administrative investigator and not an adjudicator, would be an infringement of privilege. While there are some differences between the federal *Personal Information and Protection and Electronic Documents Act* and the provincial Act that is the subject of these submissions, in our opinion the decision of the Supreme Court of Canada on this point is apposite. Consequently, the purpose for which s. 44(3) contemplates the production of documents over which a claim of privilege is made would itself be an infringement of the privilege and would apply equally whether the documents were third-party documents in the hands of the public body or of the public body itself.

The Supreme Court of Canada's decisions in *Goodis v. Ontario (Ministry of Correctional Services)* [2006] 2 S.C.R. 32 and in the *Lavallee* case state that any statutory provision permitting access to privileged documents must, in order to pass constitutional scrutiny, be "absolutely necessary" and "no more than minimally impair the privilege." In our submission, access to privileged documents by the Commissioner is not "absolutely necessary" in these cases. Nor would such access no more than "minimally impair privilege". If the Commissioner were, in error, to determine that the documents were not privileged, that privilege would be absolutely impaired as the documents would

ultimately be disclosed to the party seeking them, and the privilege would be lost. This outcome is not "absolutely necessary", as a process that allows the court to make a determination, in a manner that we have in the past suggested, is available. The Law Society therefore urges that a process be developed through which contested claims of privilege can be decided by the Courts, which is the ultimate and proper arbiter of privilege.

RECOMMENDATION #2

We recommend that section 44(3) be amended to exclude from disclosure to the Commissioner all records that are subject to solicitor-client privilege. We recommend that where an issue arises about the validity of a claim of privilege, a process be devised that would permit the Court to rule on the issue, on notice to all persons whose privilege may be affected by the order.

II. DISCLOSURE HARMFUL TO LAW ENFORCEMENT – Section 15(1) and Schedule 1: Definition of "law enforcement."

Section 15(1)(a) of the *FOI Act* applies to Law Society investigations leading to disciplinary proceedings involving a penalty or sanction. The Information and Privacy Commissioner confirmed this in Order 163-1997. However, there are several other methods by which the Law Society protects the public that require investigations to which section 15(1)(a) might not apply.

Under Part 2 of the *Legal Profession Act*, the Benchers and the Credentials Committee are responsible for ensuring that no person becomes a lawyer in B.C. who is not of good character and repute or is otherwise unfit. It is common for an extensive Credentials investigation of an applicant to take place when there is a question of character or fitness. Preventing unfit persons from becoming lawyers is obviously a more effective way of

protecting the public than attempting to discipline them for transgressions affecting memebers of the public after they become lawyers.

Credentials investigations should have the same protection as investigations related to disciplinary functions performed by the Law Society. In the course of Credentials investigations, the Law Society frequently receives confidential information, often from confidential sources. Section 15(1) might not apply to protect that confidential information because the investigation does not or might not lead to the imposition of a penalty or sanction, and therefore, does not fall within the definition of "law enforcement" in Schedule 1 of the *FOI Act*.

Similarly, the Law Society maintains programs to determine competence of individual members and, when they are found wanting, to assist them to achieve a higher level of competence. Again, investigations leading to voluntary remediation are arguably not included in the definition of "law enforcement" because the do not or might not lead to the imposition of a penalty or sanction.

The Law Society is authorized by section 33 of the *Legal Profession Act* to conduct audits to ensure that lawyers are maintaining proper records and following the requirements of the Act and the Law Society Rules concerning accounting for money held in trust. Audits may be initiated on the basis of confidential information, and confidential information is very often obtained during the audit. The purpose of the audit is to enforce the law with respect to lawyers' trust accounts, but it is not always clear that the audit could lead to the imposition of a penalty or sanction. We are concerned that other provisions of the *FOI Act* might not be able to prevent the disclosure of audit reports obtained through section 33 of the *Legal Profession Act* if they could be termed "routine inspections".

Our third recommendation reflects our view that the ability of the Law Society to conduct investigations in order to fulfill its statutory obligations should be the same whether the

issue is punishment and possible exclusion from practice of a current member, or preventing an applicant from becoming a member, or some other regulatory function.

RECOMMENDATION #3

We recommend that the definition of "law enforcement" in Schedule 1 be expanded to include:

> (d) proceedings or investigations authorized by an Act to be conducted by a professional governing body in furtherance of its duties and obligations in the public interest.

Alternatively, we recommend using more specific and restrictive language to define "law enforcement" as it applies to professional governing bodies:

> (d) proceedings or investigations conducted by a professional governing body in furtherance of its duties and obligations in the public interest, including but not limited to investigations or audits regarding
>
> (i) the qualification, character and fitness of an individual to become a member of the professional governing body or to be enrolled as a student under the authority of the professional governing body,
>
> (ii) the ability of a member of a professional governing body to practice and continue to practice a profession,
>
> (iii) a complaint, allegation or other information concerning the conduct of a member or former member of a professional governing body or a student under the authority of the professional governing body, and

compliance with rules or regulations governing the profession.

III. FEES – SECTION 75 AND REGULATIONS

The cost burden that has to be assumed by public bodies, and including in particular professional governing bodies, in complying with the provisions of the *FOI Act* remains of concern to the Law Society. Professional governing bodies receive no public funds. While the provincial government relies on a sizable tax base of over 3.7 million people, professional governing bodies are financed through assessments on relatively small groups of private individuals. Moreover, most of the applications under the *Act* made to governing bodies, such as the Law Society as an example, are made by persons who are not members of the governing body.

While it is, of course, appropriate for government to make the policy decision to provide certain services to members of the public at little or no cost and finance the cost of providing the services from general revenue, it is another thing to impose this requirement on relatively small organizations such as the professional governing bodies like the Law Society.

The *FOI Act* and the Regulations appear to contemplate that there are two types of persons who make applications under the *FOI Act*: individual applicants and commercial applicants. Policy considerations may militate in favour of ensuring that individuals who want to make applications are not precluded from doing so by reason of the risk of having to bear the costs of the public body in processing the request. Different policy considerations have been expressed, however, where the applicant is a commercial applicant. In such circumstances, where the application is made for information in connection with a business or venture for profit, the "actual cost" of the processing services is more justifiable, and this has been recognized in Reg 323/93.

In light of the Commissioner's Order F09-05, however, the Law Society submits that some statutory clarification is warranted. In that order, fees for certain services that the Law Society undertook in the course of processing an application under the *Act* were disallowed, including

- the cost of making working copies;
- staff time spent making working copies;
- staff time spent severing records;
- staff time spent drafting lists of records.

In many, and perhaps even all, circumstances, these sorts of services are inherent in or ancillary to the nature of activities listed in s. 75(1) of the *FOI Act.* Disallowing a fee for these services means, by necessity, that the public body cannot recover the actual cost of processing a request under the *Act* because some necessary services are, by virtue of the Commissioner's decision, apparently excluded by the *FOI Act*. Applicants, particularly commercial applicants, therefore are *not* having to pay the reasonable cost of their requests, and the public body is having to subsidize the cost of the service. It is not that the Commissioner considers these sorts of services to be necessarily *unreasonable*, just that it is not a s. 75(1)(a) "service."

In the past, a practice appears to have developed whereby a charge of 25¢ per photocopy (the "maximum fee" for photocopying) has been applied by public bodies through which, we expect, public bodies have attempted to recoup some of the ancillary or "overhead" services that may not be specifically provided for in the legislation. The charge of 25¢ per photocopy is the general charge allowed for photocopying services by the courts on costs matters and is generally approved by Registrars in reviews of lawyers' accounts. In Order F09-05, the Commissioner permits only the "actual cost" of photocopying. If this is to be the case, then the Law Society submits that the

ancillary costs must be recoverable at their actual cost. Otherwise, applicants, particularly commercial applicants, will receive a benefit at the cost of the public body. If the service is useful or reasonable in processing the application or is necessarily inherent in or ancillary to a service required to process a request, then the Law Society submits that it is reasonable to charge a commercial applicant the actual cost of that service. Statutory instruments should not place limits on the services that can be charged, at least to commercial applicants, provided they are reasonable services that aid in properly responding to the request.

RECOMMENDATION #4

We recommend that s. 75 and Regulation 323/93 be amended or clarified, in light of the Commissioner's Order F09-05 and particulary with respect to the cost of photocopying and ancillary services related to processing application. We recommend that public bodies be permitted to charge for *all* services that are useful or reasonable in the processing of a request made under the *FOI Act* by a commercial applicant.

Policy/Anna-ML/2010/Memos/0111foippa(subs)