REPLY TO: Susan I. Forbes, QC
Direct Line: (604) 443-5760
e-mail: sforbes@lsbc.org

May 14, 2007

Justice Review Task Force
c/o The Law Society of BC
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Sirs/Mesdames:

RE: *Effective and Affordable Civil Justice*

I write on behalf of the Lawyers Insurance Fund to respond to the invitation for comments on the report of the Civil Justice Reform Working Group, *Effective and Affordable Civil Justice* (the "Report").

The Lawyers Insurance Fund administers the Law Society's professional liability insurance program and defends negligence actions against lawyers. As a result, we are very familiar with the civil litigation process in British Columbia.

The Report is clearly the result of many hours of open-minded consideration and careful preparation. It recognizes the varying, and frequently divergent, interests of those who use our civil justice system. In our view, the Report recommends creative reforms that recognize and attempt to balance those interests. It perhaps goes without saying that the proposed reforms are significant and will take time for the judiciary and the profession to adapt to and accept. In particular, the success of the proposed Case Planning Conference will depend very much on the thoughtful and considered participation of the judiciary in this new process.

As the professional liability insurer for BC lawyers, our experience in the defence of negligence actions gives us a unique perspective on the issues considered in the Report. The implications of a negligence action for a lawyer go well beyond the prospect of an award of damages; a judgment can have a significant effect on the lawyer's professional reputation. Accordingly, while we recognize the need to modernize our current system of civil justice, we do not favour procedural reforms that could compromise the ability to properly defend a lawyer's reputation.

Our comments in respect of several of the key recommendations in the Report, as well as some specific suggestions as to how those recommendations could be refined, supplemented, or effectively implemented, are set out below.

New Supreme Court Rules

The Report recommends the adoption of new objects that would provide, in part:

> 1. The object of these rules is to ensure that all proceedings are dealt with justly and that the amount of time, process and expense incurred by the parties in reaching the resolution of a case is proportional to the significance of the case.
>
> 2. The significance of a case is the court's discretionary assessment of the case's:
>   a. monetary value;
>   b. importance to the jurisprudence of the province; and
>   c. complexity, in terms of the number of parties and the nature of the issues.

While the monetary value of a case in many instances may be a good proxy for the significance of the case to the parties, there will be cases where the importance cannot be measured solely by the monetary value at stake. As noted above, an adverse finding in a professional negligence action can have significant implications for a lawyer's reputation. As a result, we suggest Paragraph 2 of the proposed objects permit the court to explicitly consider the importance of the case to the parties as well as to the jurisprudence of the province.

As the Report notes, the UK courts consider the importance of a case to the parties as a factor in applying their objects rule. The Report refers to *E.S. Chesterfield and North Derbyshire Royal Hospital NHS Trust*, a 2003 decision of the English Court of Appeal. In that case, the claimant made serious allegations of medical malpractice and the issue was whether the general rule limiting the number of expert reports should be relaxed.

All three of the Court of Appeal Justices considered the importance of the case to the parties. Lord Justice Brooke observed (at Paragraph 19) that:

> It would be difficult to under-estimate the importance of the case to the parties. To those who are used to handling heavy clinical negligence cases it might appear to be just another cerebral palsy case, but to the claimant and her family on the one hand and to the medical staff of the hospital, whose standard of professional care is being impugned in a matter which resulted in catastrophic consequences, the case is very important indeed.

Similarly, Mr. Justice Holman commented (at Paragraph 33) that, "The case is a very important one to both sides … For the doctors who face an allegation of professional negligence the case is obviously very important…". Lord Justice Kennedy also noted (at Paragraph 43) the "considerable importance" of the case to the doctor involved.

Allegations of negligence are, of course, also of considerable importance to lawyers.

To "ensure that all proceedings are dealt with justly", we suggest the following modification to Paragraph 2 of the proposed objects rule:

2. The significance of a case is the court's discretionary assessment of the case's:
   a. monetary value;
   b. importance ***to the parties and*** to the jurisprudence of the province; and
   c. complexity, in terms of the number of parties and the nature of the issues.

Limiting Discovery

We support the proposed elimination of interrogatories and the requirement that parties be required to produce only those documents enumerated in the Report.

However, we have some concerns in respect of the limitations on oral discovery proposed. The Report recognizes that an "important aspect" of examination for discovery is to assist in the settlement process but notes that examination for discovery is "a very labour-intensive and therefore costly process", and concludes that the cost of oral discovery often outweighs the benefits.

While we agree that it is appropriate to limit oral discovery, in our experience, the benefits of some examination for discovery almost always outweigh the cost. Examination for discovery frequently plays a vital role in settling disputes; most actions are resolved after the parties' evidence is given and tested in discovery. Without the opportunity to test the evidence on discovery, many parties are unwilling to make significant compromises.

The Report recommends the elimination of oral discovery without leave or consent for cases valued at $100,000 or less. The Report further recommends that, in respect of cases valued at greater than $100,000, the parties be required to attend for no more than one day of oral discovery, unless the court grants leave for additional discovery. The Report suggests that the parties could consent to an additional day but implies that anything more than two days per party would require leave of the court.

It is notable that in the UK the "no oral discovery" rule applies to cases having a value of approximately CDN$ 30,000. This is roughly equivalent to the current monetary jurisdiction of our small claims court ($25,000), in which there is no oral discovery.

We are of the view that an appropriate compromise position would be to limit oral discovery to one day per party in cases between $25,000 (small claims jurisdiction) and $100,000, and to limit oral discovery to two days (with the parties being entitled to agree to a third day each) in cases above $100,000, all subject to the discretion of the court to grant leave for additional days.

Applications before the Case Planning Conference ("CPC")

The Report recommends that a CPC be held before any "non-emergency" interlocutory applications, but also indicates that a list of "permitted applications" will be developed,

"likely including applications for interlocutory injunctions, restraining orders, orders extending time for service or for substitutional service, and so on."

This appears to adopt the approach in the current Expedited Litigation Project Rule (Rule 68), which generally prohibits interlocutory applications unless a case management conference or a trial management conference has been conducted. Rule 68(11) enumerates certain types of interlocutory applications that may be brought prior to a conference. The list includes applications under Rules 18 and 19(24), and applications to add, remove, or substitute a party. We strongly support the proposal to develop a list of "permitted applications" that may be made *before* the parties are required to attend a CPC.

In our view, that list should (like Rule 68) include applications for summary judgment under Rule 18 and applications to strike under Rule 19(24). This will enable a party to apply, before being required to incur the time and expense of attending a CPC, to dispense with an unmeritorious, frivolous, or vexatious action or an action that is an abuse of the court. While the procedural reforms recommended in the Report are intended to allow unrepresented litigants to more easily navigate the litigation process, the reforms should not make it easier for represented or unrepresented litigants to abuse the justice system. It should be possible for a defendant to dispense with an inappropriate action before being required to attend a CPC.

To ensure that all of the necessary parties attend a CPC, we assume the revised Rules would permit the issuance of a 3rd Party Notice before a CPC is held. For the same reason, we recommend that the parties be permitted to apply before a CPC to add, remove, or substitute a party. It should also be possible to apply, before a CPC, for particulars to ensure that a claim is adequately described and the issues are properly defined before the parties attend the CPC.

We also recommend that in view of the personal attendance requirement, a party be permitted to bring a pre-CPC application to change the venue of an action. If an action has been commenced in an inappropriate court registry, the defendant should not be required to attend a CPC at that registry (with the attendant inconvenience and cost) before being permitted to apply for an order to transfer the action to a proper venue.

Conclusion

We understand that the Civil Justice Reform Working Group will consult further as the reforms proposed in the Report are developed and refined. We would be pleased to engage in further consultation as the process moves forward.

On a separate note, we understand that the "Hub" concept contemplates some lawyers providing legal services on a pro bono basis. To encourage lawyers to provide pro bono services, we provide insurance, at no cost, to lawyers not in private practice for certain pro bono services. This initiative may be of interest to you in planning the Hub concept, and I encourage you to contact Mr. Jamie Maclaren, Executive Director, ProBono Law of

BC, for more information. You can reach Mr. Maclaren at 604.893-8932 or at jmaclaren@probononet.bc.ca.

If you would like additional input or clarification of our views, please feel free to contact me or our Policy Advisor, Kerry Sheppard (at (604) 443-5756 or ksheppard@lsbc.org), at your convenience.

Sincerely,

Susan I. Forbes, QC
Director of Insurance

SF\lst