May 7, 2007

Justice Review Task Force
c/o The Law Society of British Columbia
8th Floor, 845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Sir:

Re: Civil Justice Reform Working Group report: *Effective and Affordable Civil Justice*

The Law Society appreciates the opportunity to respond to the Civil Justice Reform Working Group's Report: *Effective and Affordable Civil Justice*, November 2006 (the "Report"), and to actively participate in the work that lies ahead.

The Law Society's response to the Report consists of the following sections:

1. General Observations: Access to Justice and Public Confidence in the Administration of Justice
2. General Observations: the Cost of Accessing the Civil Justice System
3. Preliminary Response: the Creation of an Information Hub
    a. Conflicts of Interest
    b. Who will pay for services provided by the Hub?
    c. Access to the Hub must take into account the ability of various members of the public to access the Hub
    d. Information management
    e. Self-represented litigants
4. Preliminary Response: the Proposed Case Planning Conference Model
5. Preliminary Response: the Proposed Supreme Court Rules
    a. A new object of the Rules
    b. Limiting Discoveries
    c. Limiting the use of expert witnesses
    d. Lawyer Independence
6. Conclusion

This response sets out both commendations and concerns regarding the recommendations in the Report. The concerns identified in this response should be read as concerns rather than criticisms. The Law Society recognizes that the authors of the Report acknowledge much work remains, and that at some point proposals have to be made in order to effect institutional change. As is often the case, the devil lies in the details. Despite some concerns with the Report, the Law Society approves the broad vision that the civil justice system assist people in obtaining just, quick and affordable solutions to legal problems, while providing everyone, regardless of their means, with access to justice.

1. *General Observations: Access to Justice and the Public Confidence in the Administration of Justice*

The vision of the Report relates to ensuring access to justice, and the Recommendations are intended to give effect to that vision. In order to be able to measure whether reforms are successful, some effort will have to be made to articulate what access to justice means. Over the past forty years the meaning of access to justice has shifted, and it is likely to continue to do so. This suggests that the phrase might resist a narrow definition, but some effort should be made to articulate in a normative fashion what access to justice means. Part of the merit in establishing normative guidelines is that they provide a means by which we can measure the success or failure of initiatives designed to enhance access to justice. If we set reforms in motion with the laudable, but nebulous, object of enhancing access to justice, without first articulating what access to justice means, we will be unable to identify the reforms that have served to enhance access from those reforms that have had unintended and opposite consequences.

The British Columbia Ministry of the Attorney General, in its *Budget 2006: 2006/2007 – 2008/2009 Service Plan*, identified public confidence in the administration of justice "as a key indicator of an effective justice system" (p. 5). The Ministry goes on to indicate that it will develop a comprehensive performance management system in recognition of the important role public confidence in the justice system plays in the effective operation of that system (p. 19). The Ministry of the Attorney General further notes:

> The civil and family justice systems must be – and must be seen to be – fair, impartial and just. They must be responsive, reliable, proportionate and cost-effective. The public must understand the civil and family justice systems and have confidence that they support the resolution of problems and disputes in a timely and effective manner. (p. 24)

This recognizes an important tension that needs to be addressed in considering the recommendations set forth in the Report. The tension is between the public confidence in the administration of justice as a result of the cost of accessing the system, and public confidence in the administration of justice as a result of the nature of the system (i.e. that it be fair, impartial and just, that it retain the rule of law, that the judiciary remain independent, that the sanctity of the solicitor-client relationship be preserved, etc.). In either case, public confidence is a matter of perception. In the case of cost, perception

will largely be tied to the capacity of the public to afford accessing the system. For those who cannot afford to access the civil justice system, it is arguably irrelevant whether the system would hypothetically provide them with justice.

With respect to confidence in the nature of the system, public knowledge and understanding of the civil justice system plays a critical role. The Ministry of the Attorney General acknowledges that:

> Knowledge of the civil and family justice systems can lead to greater utilization and access to the system. It also relates to public confidence in the system. Public understanding influences the level of citizen engagement in the justice system and therefore contributes to its overall effectiveness. (p. 25)

Absent knowledge and understanding of the civil justice system, the measure of public confidence in the nature of that system is an unsatisfactory indicator by which to weigh the need for reform. While it is possible that public confidence in the justice system will be borne from knowledge and understanding, it is also possible that a lack of knowledge or understanding will go into the public confidence (or lack thereof) in the administration of justice.

In order to be able to properly determine the weight to be given to public confidence in the non-economic aspects of the civil justice system, the Law Society believes civil justice reform must be coupled with a well-modeled plan for enhancing public knowledge and understanding of the civil justice system. The performance management system the Ministry of the Attorney General implements will have to ask the right questions, and have a means to measure the information the public uses in formulating its responses to the questions asked.

The findings of the Canadian Forum on Civil Justice, *Public Perceptions of the Role of the Canadian Judiciary*, December 2005, suggests there are serious limits to be placed on the research and anecdotal observations regarding the public's understanding of the civil justice system, including:

> An overall conclusion is that we actually have very little reliable and valid evidence with which to answer the questions posed in this report about public views on the Canadian judiciary, or even about the justice system in general, in any detail. (p. 6)
>
> . . .
>
> Members of the public have at best only a very basic understanding of the distinct roles, organization and processes of the criminal and civil justice systems and are often misinformed. (p. 13)

To the extent that the findings of the Canadian Forum on Civil Justice are inconsistent with the observation in the Report that there are "high levels of public dissatisfaction with the civil justice system indicated by empirical research and anecdotal evidence" (p. vii), there is room for caution and need for further deliberation and dialogue. While making the civil justice system more affordable is a laudable goal, it is not the only goal, and the tension between what are at times competing perceptions as to the efficacy of the system need to be considered and carefully addressed. In order to protect the public interest, it is essential that any civil justice reforms be principled, comprehensible and defensible.

2. *General Observations: The Cost of Accessing the Civil Justice System*

The cost of accessing the civil justice system is not completely separable from the nature of the system. Still, it is important to recognize that public perception that the system is too slow and too costly affects confidence in the system and access to the system. To the extent that unnecessary procedures can be removed from the civil justice system – and practices that serve to abuse, more than validate, important processes can be curtailed – civil justice reform is desirable. Reducing costs in the system to make it more accessible to everyone is a worthy objective. The difficult work lies in identifying the aspects of the system, and attendant practices, that are unnecessary and to remove them without diluting essential aspects of the system. Because processes take time, the more process the greater the cost to the system and the users of the system. But efforts to streamline the system must accomplish several objectives.

First, the reforms must actually accomplish the object of enhancing access to the system. In other words, the reforms should not set up a false economy by shifting the burden from the justice system as an institution to other stakeholders (such as litigants or their counsel). An argument can be made that the number of Chambers applications in Supreme Court is down because process costs have been shifted into front-end costs for litigants, who choose not to engage the system because the reforms have made Chambers no longer viable. Second, we must identify the line beyond which we cannot cross in terms of streamlining process. If the civil justice system is to preserve its integrity and protect the public, there is a point beyond which process cannot be trimmed. Identifying this process meridian will be difficult, but it is important to get a sense of where it lies. The importance is due, in part, to the third matter for consideration, which requires that we obtain a better understanding of factors outside of the civil justice system that affect the capacity of people to engage the system.

Statistics Canada indicates that, in 1982, the personal savings rate on disposable income was approximately 18%, and by the end of the 1990s it had dropped to 1.4%.[i] Coupled with this trend in reduced savings we have seen a dramatic rise in debt levels, such that by 2001, 47% of all Canadian households spent more than their pre-tax income, representing a rise of 39% since 1982; from 1982 to 2001, the per capita debt doubled due to increases in mortgages and consumer spending. [ii] This phenomenon has to be better understood and taken into account as we move forward in modeling civil justice reform. A society where half the population is saddled with massive debt, and few

people save more than a nominal sum, is a society with a population that may not be able to afford accessing even a streamlined civil justice system. Even if a fair portion of that debt may be viewed as building equity in a home, it does not mean people are inclined to risk that equity by engaging an adversarial system.

Arriving at a better understanding of these economic trends, and finding a way to solve root problems is an important adjunct to any efforts made at civil justice reform. In simple terms, if we fail to understand these issues and take them into account in remodeling our civil justice system, we run the very real risk that in 10-15 years down the road, when people are no longer able to afford the civil justice system we are creating today, we will be faced with the difficult choice of making more cuts to process in order to enhance access, while trying to preserve the essential qualities of a fair and just system. If we don't take the proper steps today, we may be leaving our successors with an inevitable, unenviable, and impossible task.

It is also important to get a sense of where government funds can be spent to provide social programs and education designed to empower people to solve disputes without having recourse to the civil justice system, and to help those individuals who do engage the system in both their initial contact with the civil justice system and throughout their journey. There is truth in the sentiment that an ounce of prevention is worth a pound of cure, and in moving forward with proposals for civil justice reform the government should be considering other social programs that will both improve the quality of life for thousands of British Columbians, while providing the added benefit of reducing the strain on the justice system. For such efforts to be effective they will require consultation beyond the legal community, as well as adequate funding.

3. *Preliminary Response: the Creation of an Information Hub*

The concept of an information Hub is a valuable idea for effecting civil justice reform. To the extent that the Hub will make legal information more readily available and accessible, it will dovetail with the object of making the public more knowledgeable about the civil justice system. As discussed, increased knowledge and understanding of the system is an important aspect of public confidence in the administration of justice.

As the Hub is to exist in both physical locations, and be accessible through electronic means such as by phone and the Internet, technology will play a critical role in the success of the Hub. The Law Society recognizes that the authors of the Report have identified technology as a future issue for consideration. The research and dialogue about technology will have to occur prior to any viable model for the Hub being established. Some preliminary observations regarding the Hub follow.

A. *Conflicts of Interest*

The Law Society recognizes that, to the extent the Hub might be used to provide legal advice, there are conflict of interest issues that need to be addressed. The Law Society

looks forward to discussing this topic, along with other matters, as consultations continue. As a preliminary matter, we observe that while the establishment of standards of professional responsibility for lawyers is a matter within the mandate of the Law Society, many conflicts of interest rules are judge made as part of the common law. While the courts recognize the self-governing status of the various Law Societies to enact conflicts rules, the courts reserve the ability to regulate conflicts before the courts (see, *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235). The issue of conflicts is complex, and it is one of the many things that it is essential the civil justice reform initiatives get correct.

In *R. v. Neil*, [2002] 3 S.C.R. 631, Binnie J., writing for the Court, reminds us that the duty of loyalty "endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained" (para. 12). Mr. Justice Binnie adds that, "the value of an independent bar is diminished unless the lawyer is free from conflicting interests" (para. 13). The observations of Binnie J. remind us of a central challenge of the Report. On the one hand, the proposed reforms, including the Hub and the call for a relaxation of the conflicts of interest rules, are intended to enhance access to the system and, arguably, public confidence in the administration of justice. On the other hand, the Supreme Court of Canada has identified the critical role the conflict of interest rules and the duty of loyalty to a client play in the public confidence in the administration of justice. There are some costs that we can measure in time and money, and there are other costs we cannot – if the Hub is to accomplish its promise, we must be alive to the demands of these countervailing masters and develop a calculus by which we can reconcile their objectives.

B. *Who will pay for the services provided by the Hub?*

To a certain extent, the viability of the Hub seems predicated on the assumption that once conflicts of interest and unbundling issues have been resolved, lawyers will provide *pro bono* assistance. The authors of the Report write:

> We believe that, consistent with the altruistic reasons many lawyers had for deciding to enter law school, most lawyers want to volunteer and mandatory requirements are therefore not necessary at this time. If the conflict and unbundling issues can be resolved, it will be a matter of encouraging them to volunteer (at the firm or professional level), and rewarding them for doing so. (p. 9)

This observation created some concern when discussed by the Law Society's Access to Justice Committee. First, to what extent is the success of the proposed Hub contingent on the prophecy of *pro bono* participation? The government should carefully consider how it intends to fund both legal and non-legal services through the Hub in the absence of the requisite number of volunteers. If the prediction regarding *pro bono* participation does not bear out, and the information Hub fails to fulfill its promise, public confidence in the administration of justice may be adversely affected. Even if there is increased *pro bono* participation, we must be alive to the possibility that people will give their time when

they can, and that coverage gaps will exist – to operate to its potential, the Hub will require effective administration to ensure people who access the Hub are not being provided an unequal level of services.

In addition to determining the amount of funding required to operate the Hub, the government might wish to consider what other models could encourage lawyers to volunteer because we do not believe the government can *require* lawyers to provide *pro bono* services as a condition of being a lawyer. For example: providing interest-free status and/or tax rebates on student loans for volunteer participation in the Hub might encourage newly called lawyers (and social workers) to participate. Such an initiative would require coordination with other governments, but it recognizes that lawyers, like all members of society, have financial obligations that influence their decisions.

We also note that the organization that is responsible for implementing and operating the Hub faces the danger of creating a perception that the information, advice and assistance provided through the Hub may further the operator's own ends, rather than the user's ends. This danger is particularly relevant if the government is the operator of the Hub, because many people who access the Hub's services will find themselves in a position of adverse interest with the government.

The Law Society encourages the government to consider providing funding for a certain number of full time, paid lawyers to work at the Hub. These issues should be resolved prior to, or concurrent with, the Hub's infrastructure being established, and adequate funding should be in place to guard against the risk that the projected *pro bono* participation does not occur.

C. *Access to the Hub must take into account the ability of various members of the public to access the Hub*

If the Hub is to play a critical role in enhancing access to justice for everyone, the infrastructure of the Hub must accommodate a diverse range of needs. Physical locations must provide for access by the disabled, there would be a need for translation services for numerous languages and for people with learning disabilities, there would also be a need to assist people with sensory disabilities to access information. With respect to Internet access, efforts will have to be made at the front end to create an infrastructure that leverages modern technologies and best practices for accessible website coding to ensure that the information is available to the maximum number of people with minimal barriers.

We must also recognize that some individuals will lack computer literacy, and that accessing the Hub via the Internet will present challenges. Viable remote access alternatives must be made available. With respect to online access, it is also important to recognize that not all people can afford accessing "for profit" providers of up to date legislation, and as such, the Hub should make all British Columbia statutes and regulations accessible for free to members of the public, in up to date electronic and print form.

It is also important to recognize the challenges individuals who will have to attend the Hub with small children face, and some thought should be given to providing supervised care facilities at physical locations in order to allow parents who need detailed services to be able to speak to service providers while their children are being minded. Such efforts would go a long way to improving the user experience and enhancing public confidence in the Hub.

D. *Information Management*

Because the Hub will be dealing in information, and because it is critical to have consistent procedures and information throughout the various physical Hubs in order for the Hub to operate as a "single place", it is essential to have technology in place that ensures consistent and accurate collection, use and retention of data, while complying with all legislative requirements for preserving the privacy of the users and respecting the confidential nature of the communications. There are serious challenges regarding the long-term retention of digital information, as well as security issues relating to digital information. Information management and security will be an important feature of the Hub's infrastructure that must be planned for and built in at the front end of the process in order for the Hub to fulfill its promise, and to ensure the public is adequately protected. Because users of the Hub may reveal information that, if revealed to a lawyer for the purpose of seeking legal information or advice would be confidential or privileged, it is essential that mechanisms be established to ensure such information is protected. A litigant who does not have the means to engage a lawyer, and who utilizes the Hub for legal information and/or advice, should not be subject to a lesser standard of protection than an individual who retains a lawyer for similar advice or services.

E. *Self-represented litigants*

As the Report acknowledges, the Law Society is exploring the issues involved in the unbundling of legal services. The call for unbundled legal services is linked to the rise in self-represented litigants before the court. As the process of civil justice reform moves forward, we need to be prepared for a possible continued increase in self-represented litigants (regardless of what occurs with respect to unbundling), and the potential that the Hub might facilitate increased self-representation before the courts.

4. *Preliminary Response: the Proposed Case Planning Conference*

The Law Society is of the view that much of the success of the proposed Case Planning Conference ("CPC") depends on judicial acceptance of, and participation in, the new model. Training and commitment to the process is critical, as is ensuring there are adequate judicial resources. In addition, CPC Judges must exercise their powers in order to make the new system work.

Sufficient resources and commitment to the model are critical issues. At page 17 of the Report the authors observe:

> As this role of judges and masters is new, we strongly recommend that all judges receive training on how to conduct CPCs and that CPC judges be selected, in part, on the basis of their dispute resolution skills and their commitment to the process.

If the CPC is to become a mandatory step it is imperative to have maximum judicial participation in the process, otherwise we run the risk of the CPC creating further delays due to lack of resources and the scheduling problems. The Family Law Judicial Case Conference system has demonstrated that when judges are committed to, and engaged in, the process all participants in the civil justice system benefit, and there is the added benefit of the system operating at a great cost saving to the public.

A properly managed CPC can help streamline the process, and the Law Society is of the view that reform in this area could be useful in some instances. However, requiring actual attendance by the litigant, while arguably important, can work some harsh results. The Report acknowledges that mandatory attendance "may impose a burden on parties who live in remote locations" (p. 16). By requiring counsel, if any, to attend as well, increases the cost to users of the system. An individual of modest means might well choose to be self-represented if faced with the additional cost having to attend with his or her lawyer. There are economic considerations tied to location, but there are also economic considerations tied to the means of litigants, and there is the potential for this aspect of the CPC to create barriers to people accessing justice. The Report suggests that while the use of technology should be permitted at subsequent CPCs, it should only be allowed at the initial CPC in "extraordinary circumstances". What constitutes an extraordinary circumstance needs to be identified, and a process for making an application for remote attendance needs to be developed (e.g. perhaps in circumstances where the litigant is of modest means, physically unable to attend, or is a defendant who is resident outside the jurisdiction, etc.).

5. *Preliminary Response: the Proposed Supreme Court Rules*

The Law Society was fortunate to have Deputy Attorney General Allan Seckel, Q.C. and Chief Justice Brenner make a presentation to the Benchers regarding the Report. At that presentation, Mr. Seckel observed that the greatest amount of feedback regarding new Rules would occur once those Rules had been drafted and advised, with that in mind, a set of draft Rules are being crafted for the purpose of facilitating discussion. The Law Society looks forward to considering the draft Rules and participating in the development of revised Rules of Court. The observations that follow, therefore, pertain more to the Recommendations in the Report. It is possible some of these observations will be addressed in the draft Rules.

A. *A new object of the rules*

The proposed Rule 1(5) would require measuring the amount of time, process and expense with regard to the significance of a case, as determined by the case's monetary value, its importance to the jurisprudence of the province, and the complexity of the case (number of parties and nature of the issues). It is important to provide a clear articulation as to how these components are measured. This is not to suggest that 1/3 of significance should be based on the monetary value of the claim, 1/3 on the importance of the case, etc. It is to suggest that guidelines are important in order to avoid what may appear to be arbitrary and inconsistent application of the Rule. Just because a case has nominal monetary value, it does not mean it is simple, and the Report appears to recognize this by separating money from complexity. But how a quantifiable measure is to be compared to an intangible concept needs to be explained. In addition, any obligation requiring the parties and counsel to help the court further the object of the new Rules must be alert to the sanctity of the lawyer/client relationship, and that a lawyer must retain the independence to counsel his or her client.

B. *Limiting Discoveries*

The Law Society believes that abuse of the discovery process should be curtailed, but any reform of the discovery process should be carefully thought out. It is not in the interest of the public to have a plaintiff in a motor vehicle claim endure days of discoveries that generate volumes of material that is never used in trial, or to have a litigant buried in paper. That having been said, it is equally undesirable to have salient material undisclosed because the discovery process has been winnowed down. The primary concern with respect to the adequacy of discoveries does not lie in determining whether an individual trespassed on his neighbour's property while cutting the bough off a tree, but whether an individual litigant can get proper disclosure from an opposing party in circumstances where there is an imbalance of power and information. Processes for the scope of electronic discoveries, and the cost of requesting discovery are important aspects of civil litigation in an information age that need to be addressed. While the idea of abolishing interrogatories seems sound, careful thought will have to go into modifying the discovery process. This is an important area for consultation, and the Law Society looks forward to exploring this issue further.

C. *Limiting the use of experts*

The Law Society believes there is merit in limiting the number of expert witnesses and in requiring experts to have an over-arching duty to the court.

D. *Lawyer Independence*

The proposals outlined in the sections above all contemplate curtailments on current practices, guided by the principle of proportionality. Certain "default" provisions are contemplated, some of which are determined by the value of the case. We consider it important to comment that lawyers must continue to be allowed to advise their clients as

to what is appropriate in any given case, and to be allowed to advocate for processes that may differ from the default provisions as appropriate, without fear of sanction by either the State or the courts for doing so. Otherwise, the important principle of lawyer independence is substantially compromised.

6. Conclusion

At a March 8, 2007 speech to the Empire Club of Canada, the Honourable Beverly McLachlin, C.J.C., outlined the challenges the justice system faces, observing that "[t]he most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve." In her speech the Chief Justice acknowledged the essential role justice plays in ensuring a stable, secure and prosperous society, and identified the challenges to the justice system that arise due to economics, the growing length of trials, the effect of delays in the system, as well as endemic social problems. In that vein, the Report sets out recommendations for new infrastructure and processes for the justice system, in order to create "a civil justice system that assists citizens in obtaining just solutions to legal problems quickly and affordably" and to provide "everyone, regardless of their means, with access to civil justice" (p. v).

The Law Society believes that the public interest is best served by a civil justice system that is just in both process and result. While the cost of the system and the capacity of people to afford it are critical matters to be addressed, we must be mindful that access to process is not synonymous with access to justice. As such, important dialogue is required to identify the essential aspects of the system that must be preserved, and mechanisms that must be created to prevent abuses of justice from occurring. We must also be alive to economic issues that operate outside of the justice system and which impact on the ability of people to engage the system. Understanding the complex variables in the equation is critical to assessing what reforms, within and beyond the justice system, are required, and being able to measure whether the reforms are successful.

As Chief Justice McLachlin rightly observes, in Canada we are fortunate to have inherited a just legal system. As keepers of that system we have a responsibility to ensure the system is responsive to the needs of society, while ensuring that any changes we make to the system are principled and proportionate. The changes we make to the system must be alive to our present needs, but we must also recognize we hold the system in trust for future generations of Canadians. The Report is an important first step in creating a dialogue for how we can improve the current state of our civil justice system.

The Law Society looks forward to the opportunity to work with government and other stakeholders to ensure that the proposals for reform, once refined and implemented, operate as a beacon for other jurisdictions that face similar challenges, and not as a lighthouse.

Yours truly,

Anna K. Fung, QC
President

cc: Allan Seckel, QC, Deputy Attorney General
The Honourable Chief Justice Donald I. Brenner

[i] Statistics Canada, Canadian Social Trends, Winter 2000, Statistics Canada – Catalogue No. 11-008, at pp. 10-12

[ii] Statistics Canada, *The Daily*: "Study: Household spending and debt", March 22, 2005, at URL: http://www.statcan.ca/Daily/English/050322/d050322c.htm (accessed January 29, 2007).