The Law Society of British Columbia

Reply to: Bruce LeRose, QC

May 18, 2012

Geoff Cowper, QC
BC Justice Reform Initiative
#2900 – 550 Burrard Street
Vancouver, BC V6C 0A3

Dear Mr. Cowper:

Re: Justice Reform Initiative – Modernizing British Columbia's Justice System

Preface

The Law Society of British Columbia regulates the legal profession in the province of British Columbia. It is an institution whose origin dates back to 1869, and which has been continued under the *Legal Profession Act*, S.B.C. 1998 c. 9. That Act provides that the object and duty of the Society is to uphold and protect the public interest in the administration of justice by, *inter alia*, preserving and protecting the rights and freedoms of all persons and ensuring the independence, integrity, and honour of its members. The Law Society therefore takes a considerable interest in matters involving the justice system and believes that it can lend an important voice to the discussions surrounding its modernization. We hope that we can make a valuable contribution to the consultation in which you are currently engaged.

Modernizing British Columbia's Justice System

The Law Society has reviewed the Green Paper entitled "Modernizing British Columbia's Justice System" (the "Green Paper") that was released by the Minister of Justice and Attorney General in February 2012.

We are pleased that the government recognizes the importance of an efficient justice system. As a separate branch of government, the judiciary performs a vitally important role in the preservation of the rule of law. Ensuring that the judiciary is supported by a modern, efficient and affordable justice system that allows the timely resolution of disputes is crucial to the democratic values upon which our society is based.

In this submission, we will focus on two key issues currently under consideration by you. The first concerns the independence of the various bodies involved in the justice system. The second relates to the review of British Columbia's system for approval of prosecutions.

Independence

The Green Paper confirms that "key parts of the (justice) system are, as a part of the rule of law, operationally independent by law or under our constitution." The Law Society strongly agrees with this statement, particularly as it recognizes the independence of the judiciary and lawyers from the legislative and executive branches of government. The rule of law, which is recognized in the Charter of Rights and Freedoms as one of the principles upon which Canada is founded and which has been described by the Supreme Court of Canada as a fundamental postulate of our constitutional structure[1] means that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. [2] In order to preserve the rule of

[1] [1959] S.C.R. 121 at p 142. See also *Reference re Secession of Quebec* [1998] 2 S.C.R.21 at para 51, and *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721
[2] *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721 at pp 748

law, there must be a division amongst those who make the law, those who interpret and apply it, and those who enforce it. This requires "an independent judiciary, which in turn requires an efficient, functioning court system and a strong, independent, properly qualified legal profession to support it..."[3]

While recognizing the importance of independence within the justice system, the Green Paper comments that this independence can stand in the way of the required environment of shared management information, diagnostic skills and capacity to implement reforms and can therefore be an impediment to measuring and evaluating justice system performance in ways that meet the standards commonly applied to public institutions.

The Law Society strongly believes that independence cannot preclude discussing how organizations that are independent can improve performance and reduce any inefficiencies that may exist, or be perceived to exist, in their operations. Stakeholders in the justice system must be prepared to recognize that the public expects some measure of accountability. As the independent regulator of lawyers in the Province, the Law Society recognizes that it must still demonstrate how it discharges its mandate in the public interest. Even though the courts have held that the public interest is fundamentally connected to a self-regulating bar that is independent from the influence of the State,[4] it is of considerable importance for the Law Society to ensure that the public is confident that it is discharging its mandate in the interest of the public. Despite its own status as an independent regulator, the Law Society believes it is nevertheless important to participate in discussions concerning how the legal profession should be governed, and to listen to parties who have suggestions about how improvements to regulation might be made.

To that end, we agree that independence should not be used as a shield against scrutiny on issues related to public administration.

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[3] Neate, Francis. *The Rule of Law* Discussion Paper, February 2008. Mr. Neate is a past president of the International Bar Association. The discussion paper was prepared for members of the IBA to remind them of and to develop further the concern for the rule of law reflected in the IBA Council's Resolution of September, 2005.

[4] *Federation of Law Societies of Canada v. Canada (Attorney General)* 2011 BCSC 1270

There are, of course, different aspects to independence. Judicial independence comprises both adjudicative independence and administrative or institutional independence. There is a distinction between the two types of independence. As the Supreme Court affirmed in *Valente v. The Queen*: [5]

> …the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between judicial interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

In another judgment, McLachlin J. (as she then was) noted that it is "impossible to conceive of a judiciary that is devoid of any relationship to the executive and legislative branches of government."[6]

While institutional independence encompasses control over the administrative decisions that bear directly and immediately on the exercise of the judicial function,[7] it is difficult to delineate precisely where institutional independence ends and adjudicative independence begins. The latter is not open to any interference at all. Other participants in the justice system may agree or disagree with judicial decisions, but they must not influence them.

The former, on the other hand, perhaps more clearly opens a path to the sort of relationship between the judiciary and other branches of government contemplated by

[5] [1985] 2 S.C.R. 673
[6] *MacKeigan v. Hickman* [1989] 2 S.C.R. 796
[7] *Valente v. The Queen,* above, at paragraph 52

McLachlin J. above. However, excessive or unilateral executive or legislative interference with the administration of the judiciary is inimical to the notion of independence and must be avoided. There must be a dialogue between the stakeholders, and each must be ready to hear from others about where improvements to the efficiency of the system may lie and how each organization might implement improvements. While dealing with independent stakeholders, it must be recognized that change needs to come from within and cannot be imposed from outside. However, it also must be recognized that a dialogue must take place in order to develop ways to improve the justice system to allow it to resolve disputes in a timely and affordable manner and thereby allow the public to retain confidence in the system. If the public does not have confidence in the justice system and does not therefore feel it is relevant to them, the independence of all the stakeholders in the system is meaningless.

A number of ways to improve the justice system have been raised over the last number of years. We do not propose to enumerate all of them, but items like case management, docketing, judicial specialization, and monetary increases to Small Claim jurisdictions have all been discussed in the past. Some have been raised by the government, and some have been raised by the judiciary. Rather than unilaterally presenting without consensus a series of proposed improvements and efficiencies for the justice system in a White Paper, the Law Society believes that the stakeholders should look seriously at their operations and develop innovations designed to improve efficiency for the system overall. "Striking the right balance," which is the goal identified in the Green Paper, cannot be done in a vacuum where there are many stakeholders involved in the system. The Law Society would be pleased to assist as needed in facilitating this work.

Approval of Prosecutions

The Green Paper identifies for consideration a review of British Columbia's system for approval of prosecutions. It notes that most other provinces do not involve Crown Counsel in approving charges before they are formally laid. The relative merits of the various systems are, we understand, to be considered in this review, including whether

the model of pre-charge review by Crown Counsel should be maintained and if so whether improvements could be made to the system.

We note that this particular issue was considered in the report of the Justice Reform Committee in 1988 (the "Hughes Report"). The resulting recommendation, which was adopted, was that the authority to decide what charges will be laid must remain with the Attorney General or her agent – Crown Counsel.

As was noted in the Hughes Report, the determination of whether charges should be laid is a difficult and extremely serious matter. The report commented that for many people, the damage done simply by the laying of the charges is enormous, no matter what the eventual outcome. Therefore, the person making the decision must consider the likelihood of conviction in light of all the evidence available, the procedural obstacles that may lie in the way, and the constitutional remedies that might be available to the accused, as well as whether it is in the public interest to pursue the prosecution. The conclusion drawn in the Hughes Report was that the person best able to decide whether a charge should be laid is one who is knowledgeable about criminal law and who is ultimately accountable for the prosecution of the case. That person is the Attorney General or her agent – Crown Counsel.

Recognizing that there would be times where the police disagreed with a decision of Crown Counsel not to lay charges, the Hughes Report recommended that there should be a process enabling the officer in charge of a detachment to have a decision not to charge reviewed by Regional Crown Counsel and ultimately by the Deputy Attorney General. We do not know whether this recommendation was implemented.

The Law Society strongly supported both recommendations in 1988 and continues to do so.

There are valid reasons to prefer a system where the decision whether to lay charges lies with a person or organization that is different from the person or organization that

conducted the investigation leading to the issue of whether to lay charges. The most important reason, in our view, lies in avoiding the perception of any conflict of interest or bias on the part of the police. Structuring a process, particularly a process in the area of criminal law, which removes to the greatest extent possible any perception that the organization that lays the charge may be biased toward accepting a recommendation from itself concerning the laying of charges is, we believe, more likely to promote public confidence that charges are being laid for the right reasons. This outcome best preserves public confidence in the criminal justice system.

We recognize that British Columbia is one of only three jurisdictions in Canada where the Crown, rather than police, lay charges. This fact alone does not support a conclusion that the British Columbia system is not preferable. We believe that the current division in responsibilities – one organization investigating facts in order to make a recommendation, and the other reviewing the recommendation and making a decision about whether to lay charges – best protects the public interest in the administration of the criminal justice system.

Current statistics indicate that the system at present is working well as 57% of the police reports are assessed within one full working day of being received, 71% are assessed within five days, and 93% within 30 days.

A group of lawyers, trained in law concerning the issues relevant to the successful prosecution of a charge, seems to us to be the most efficient way to make effective determinations about whether to approve a charge recommended by police. This is especially so when it is considered that, were police able to lay charges, prosecutors would still be able to, and indeed expected to, stay charges in the event the prosecutor concluded that there was not a substantial likelihood of conviction, or that it was not in the public interest to proceed. We are unsure where any improvement in efficiency or public confidence would arise if the prosecutors were to make determinations after charges had been laid by police similar to what they are currently doing *before* charges are laid. While it is clear that charge approval constitutes a significant amount of work

for prosecutors, that work will have to be done by someone, and in the Law Society's opinion, it is better that the work is done by independent Crown Counsel who are knowledgeable about criminal law and who are ultimately responsible for the prosecution of the case.

Whatever improvements in efficiency or savings in cost may be argued to exist by having police lay charges, the question must be asked whether they would be substantial enough to justify increasing the perception of bias or risk of conflict of interest, or to remove the decision-making from a group of lawyers knowledgeable about the criminal law? The Law Society, in its submissions to the Justice Reform Committee in 1988, said that reform to achieve expediency can never be allowed to infringe or erode, or create the possibility of infringement or erosion of basic principles like the protection of the public interest in the justice system, the preservation of the rule of law, and the preservation and enhancement of an independent bar that (in the context of the criminal law) includes the maintenance of a professional corps of prosecutors with a strong sense of public duty befitting their position. We have not changed our view.

The Law Society believes that the best justice system is one that avoids perceptions of bias or conflicts, uses individuals who are trained in and ultimately responsible for the prosecution of a case, and better reduces the risk of damage that people will suffer by virtue of having a charge laid against them by an investigating authority that may later be stayed by the prosecuting authority.

Yours truly,

[Original signed by Bruce LeRose, QC]

Bruce LeRose, QC
President