Paralegal Task Force Report

October 27, 2003

Report to the Benchers on Paralegals

The Law Society of British Columbia

Purpose of report: *Bencher discussion and decision*

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I: INTRODUCTION

The paralegal issue has a long history at the Law Society. That history is set out in the Paralegal Working Group Report (the "Working Group Report") dated December 20, 2000 (available on the Law Society's website www.lawsociety.bc.ca) and, accordingly, will not be repeated here.

More recently, in 2001, the Benchers struck the Paralegal Task Force to consider and report on three options to expand the role of paralegals (legal assistants) in the delivery of legal services in British Columbia. Those options were contained in the Working Group Report. The three options they were asked to consider were:

1. expanding a legal assistant's function without changes to the current framework;

2. the certification of legal assistants with regulation through their supervising lawyers; and

3. the certification of legal assistants with separate regulation.

The Task Force provided its Preliminary Report to the Benchers dated June 13, 2002 (also available on the Law Society website) reporting on the three options and recommending that the Law Society explore programs to certify and regulate paralegals.

The Benchers accepted the Task Force's preliminary recommendations and expanded the Task Force's mandate to include a consideration of the issue of independent paralegals. The Task Force provided a preliminary report on independent paralegals earlier this year.

The Task Force now reports on the issues which the Benchers have asked it to consider.

II: INDEPENDENT PARALEGALS

1. Submissions received by the Task Force

To investigate this issue, the Task Force sought information and submissions from a wide variety of individuals and groups including the courts, administrative tribunals, CBA sections, paralegal associations, other regulatory bodies, and independent paralegals whom the Law Society was able to identify.

The BC Association of Legal Assistants (the "BCALA"), supported by the Canadian Association of Paralegals (formerly the Canadian Association of Legal Assistants) (the "CAP") confirmed its position that paralegals should continue to work under the supervision of a lawyer:

> ...The BCALA wishes to retain supervision by lawyers and has never advocated the independent practice of law by Legal Assistants.[1]

One paralegal group from whom we did not receive submissions despite its stated intention to provide them was the Society of Notaries Public.

Like the BCALA and the CAP, members of the profession, the CBA, and CBA Sections were generally opposed to independent paralegals. The CBA took the position that "the express prohibition against independent paralegals practicing law should continue."[2] The CBA elaborated that if paralegals were permitted to operate independently, they should be properly trained and regulated to protect the public.

> Regulation should include, specifically: completion of a specified standard of education and training; passing an examination on their knowledge and expertise; adherence to a code of professional conduct and being subject to discipline for breach thereof; establishment of a compensation fund for claims arising from unethical or fraudulent practices; and liability insurance.[3]

Many members and sections similarly expressed concerns about exposing the public to untrained and unregulated providers of legal services.

The Maritime Law Section of the BC Branch of the CBA commented on independent paralegals as follows:

> ... however, an obvious and more serious concern exists over non-lawyers dispensing legal advice to the public. Regardless, both of these concerns

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[1] BC Association of Legal Assistants, Submissions to the Paralegal Task Force, February 8, 2002, p. 11

[2] Submission from the Canadian Bar Association, March 12, 2003, p. 1

[3] Ibid, p. 2

> would seem to justify strict certification and regulatory standards being enforced by the Law Society...
>
> Aside from certification and regulation, however, there remains the broader issue of whether justice is effectively served by permitting broad independent paralegal practice. While the Task Force's stated desire to 'increase access to justice' is laudable, a danger exists that those who cannot or will not pay for a fully qualified lawyer will instead resort to a paralegal for assistance. This poses the risk of putting paralegals in the role of a 'poor man's lawyer' and creating a two-tiered justice system, which is exactly what the BC *Legal Profession Act* appears designed to prevent.[4]

Chief Judge Baird Ellan of the Provincial Court of British Columbia commented:

> The Provincial Court is of the view that the interests of the public are best served by a scheme which provides for certification and regulation of trained paralegals who are supervised by a member of the Law Society, and who appear in court only with respect to uncontested matters. The Court however opposes representation by non-lawyers at events requiring a decision by the Court which will ultimately affect the rights and obligations of the parties.[5]

Of the administrative tribunals from whom the Task Force heard, most indicated a lack of experience with paralegals. However, the Workers' Compensation Board Appeal Division (since abolished) provided lengthy submissions on the issue. They are worth reproducing at some length:

> Legal representation within the workers' compensation system has its own unique circumstances. Under section 94 of the *Workers Compensation Act*, two offices are established under the Ministry of Skills Development and Labour to provide representation to workers and employers in the workers' compensation system. Some of the advisers in these respective offices may have legal training. Subsection 94(4) provides that the members of those offices need not be members of the Law Society and if they are not members of the Law Society, section 15 of the *Legal Profession Act* does not apply.
>
> Lay representation in workers' compensation matters is well established. Indeed, Board policy specifically encourages and facilitates lay representation. In this regard, I enclose a copy of *Decision No. 75* of the

[4] Submission by Peter Swanson, Bernard & Partners, on behalf of the Maritime Law Section of the Canadian Bar Association (BC Branch), June 2, 2003, p. 2

[5] Submission by Chief Judge Baird Ellan, the Provincial Court of British Columbia, February 27, 2003

Governor's of the Workers' Compensation Board which states, in part, as follows:

> The procedure of the Appeal Division shall recognize and facilitate the appearance and participation by workers and employers acting for themselves or lay advocates acting on their behalf.

The number of lawyers regularly involved in representing parties in workers' compensation matters is relatively small. Instead, there are a significant number of lay representatives acting through their own private consulting businesses or as employees of organizations such as trade unions or employer organizations. Cost considerations for workers and employers may influence the use of representatives.

On balance, our experience with lay representation has been positive. Workers' compensation lends itself to a significant degree of specialization which is often reflected in such representatives. Nevertheless, from time to time there have been issues regarding conduct that has caused us concern. Such concerns have not been limited to lay representatives.

Fortunately, circumstances raising such concerns have not been pervasive before our tribunal and we have not found it necessary to develop specific practices and procedures to address the conduct of representatives, using the Chief Appeal Commissioner's authority under section 85.1 of the *Workers Compensation Act*. This appears to be in contrast to the experience of a similar workers' compensation appeal tribunal in Ontario. The Workplace Safety Insurance Appeals Tribunal (WSIAT) of Ontario has exercised its practice and procedure authority to establish a Code of Conduct for lay representatives. I enclose a copy of that Code for your information. The issue as to what authority our tribunal would have to supervise the conduct of lay representatives was canvassed in a 1995 Appeal Division decision (#95-0742), a copy of which is enclosed (edited for privacy considerations).

We are aware of the British Columbia Supreme Court decision in *Law Society v. Pritchard* (3 November 2000) Kelowna Registry No. 45357 (BCSC). We understand the necessity in specific cases for the Law Society to actively supervise the relationship of lay representatives to the terms of the *Legal Profession Act*. And the general thrust of the proposals in your October 9, 2001 letter related to lawyers supervising the work of "legal assistants" is understandable from a regulatory perspective. However, in light of the relatively few lawyers active in workers' compensation matters, one might wonder what dampening effect requiring a supervising lawyer might have on the extent of representation in

> workers' compensation matters. Such possible consequences suggests a need to perhaps broaden the consideration of representation issues in workers' compensation matters.
>
> It would seem a common interest of the Law Society and a workers' compensation appeal tribunal would be the quality of legal services, whether those services are provided by a lawyer, legal assistant, paralegal or other representative. A variety of means of ensuring this quality can fruitfully be canvassed, with one of those methods being placement of such assistants/paralegals/representatives under the supervision of a practicing lawyer. This appears to be a common element of the models contemplated in your October 9, 2001 letter. Other means of addressing the goal may include tribunal regulation of lay representatives as done by the Ontario WSIAT. Another means may be found in statutory constructs like the Workers' and Employers' Advisers Offices under section 94 of the *Workers Compensation Act*.[6]

Several independent paralegals also made submissions. Some of these submissions recognized the need for regulation. Several were of the view that independent paralegals enhanced access to justice. A Traffic Ticket Defense, which provides legal services in relation to traffic tickets in Alberta, argued in favour of independent paralegals handling provincial court matters:

> It is our view the service provided by paralegals is of tremendous value to the public. Paralegals have the time and expertise to handle provincial court matters, such as traffic offences, competently and perhaps less expensively than that of Barristers and Solicitors. This, we feel, opens the door for all the public to have access to and affordable representation in the courts.[7]

A Traffic Ticket Defense also considered that independent paralegals should meet basic qualifications, be regulated, insured, and be of good character.

2. The British Columbia situation

The Task Force notes that the situation with paralegals in British Columbia is very different from that in some other provinces in Canada, most notably Ontario. In Ontario, as a result of different legislative provisions and decisions of the Ontario courts, independent paralegals (who are not currently regulated), are providing a variety of legal services. That is not the case in British Columbia where there is no widespread use of

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[6] Submission by Gene Jamieson, Assistant to the Chief Appeal Commissioner, Workers' Compensation Board Appeal Division, April 22, 2002

[7] Submission by Dale V. Peters, President, A Traffic Ticket Defence, undated, p. 2

independent paralegals apart from notaries public, immigration consultants and, to a more limited extent, workers' compensation consultants.

Notaries public are the one class of paralegals in British Columbia who are subject to regulation. Under the *Notaries Act*, they are entitled to provide limited legal services. The Society of Notaries Public also requires its members to meet certain educational requirements, and to carry insurance. The Society of Notaries Public operates a defalcation fund.

Most paralegals in British Columbia are employed by law firms. Their representative associations indicate that they believe that that is how paralegals should continue to provide services in British Columbia.

The Law Society's experience with independent paralegals through its unauthorized practice program confirms that the public is at risk in dealing with independent paralegals. The problems encountered in unauthorized practice files range from incompetent provision of services to fraud. For example, the Law Society has received complaints from clients who report paying up front for a service which is never provided — sometimes with the practitioner moving, leaving no forwarding address. Typically, the client is left without effective recourse since the independent paralegal is without insurance and the amount involved does not justify the cost of civil proceedings even if the independent paralegal can be located and has assets. The Law Society's experience with independent paralegals is echoed in other jurisdictions where independent paralegals operate.

3. The immigration experience: a study in the problems created by the lack of regulation of legal service providers

The Paralegal Task Force finds instructive what has happened in the area of immigration consultants. As the Benchers are aware, immigration consultants have long operated in Ontario, and to a lesser extent in British Columbia. The Supreme Court of Canada in *LSBC v. Mangat* [2001] S.C.J. No. 66 found that the provisions of the *Immigration Act* were paramount to the provisions of the *Legal Profession Act* and, accordingly, found that the Law Society could not prevent immigration consultants from operating. Rather, the court found that the federal government had the power to regulate immigration consultants.

The federal government does not currently have in place any regulatory system for immigration consultants. While some immigration consultants deliver services in a reputable fashion, others do their clients serious harm. Many of those clients are left without effective redress since there is no requirement that immigration consultants carry insurance or defalcation coverage. The situation became so extreme that the Minister of Immigration, Denis Coderre, struck a Committee to develop a plan to regulate immigration consultants. The Honourable Minister, in a variety of press releases and

interviews, has noted the harm to the public caused by unregulated consultants and, indeed, has described some of them as "vultures." Following on the receipt of the Committee's report, the Minister has indicated his Ministry will be developing a program to certify and regulate immigration consultants.

4. The WCB situation

In British Columbia, the *Legal Profession Act* applies to prevent independent workers' compensation consultants from providing services to third parties for a fee [see *Legal Profession Act* ss. 1, 15, 85; *LSBC* v. *Pritchard* (unreported; November 3, 2000; Kelowna Registry No. 45357); *LSBC* v. *Blanchette* 2003 BCSC 89]. Notwithstanding that prohibition, some compensation consultants have set up independent practices — some of which have operated for a number of years.

The Task Force notes the submission from the Workers' Compensation Board Appeal Division reproduced above and the support of the Division for lay representation.

There is further support for some of these consultants – notably from some sophisticated employers who report satisfaction with the services. One such employer commented:

> We use non-lawyers in some of our issues with the W.C.B. and we want to continue to use them... But, the vast majority of [W.C.B.] issues in our experience are handled most effectively by capable experienced representatives who have a good relationship with the staff at the W.C.B.[8]

Not all WCB consultants' clients, however, are as satisfied as the employer quoted with the services they receive from consultants. Over the last few years, the Law Society has heard from a number of dissatisfied clients ranging from those whose consultant took fees but provided no services (and then disappeared) to those who have been incompetently represented — often with serious consequences (e.g. the expiration of appeal periods). Typically, these dissatisfied clients have been workers with limited means and sometimes, with serious disability issues. On the whole, they are a vulnerable group.

This past spring, following the Law Society's pursuit of some workers' compensation consultants for unauthorized practice and a strong reaction from some employers and consultants, the government proposed amending the *Workers Compensation Act* to allow lay advocates to provide services for a fee in workers compensation matters which passed.

Bill 37 – *Skills Development and Labour Statutes Amendment Act*, 2003 (3rd reading October 8, 2003; to come into effect by regulation) contains the following amendment to the *Workers Compensation Act*:

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[8] Letter from Mill & Timber Products Ltd., November 14, 2002

24. ***The following section is added:***

Lay advocates

94.1 (1) A person may

(a) give advice respecting the interpretation or administration of the Act, the policies of the board of directors, the Board's practices and procedures or any regulations, orders or decisions under the Act, or

(b) act on behalf of a person

(i) by communicating with the Board, an officer or employee of the Board, the appeal tribunal or any other person acting under this Act, or

(ii) by appearing before the Board, an officer or employee of the Board or the appeal tribunal.

(2) Section 15 of the *Legal Profession Act* does not apply to a person while the person performs the functions referred to in subsection (1).

There are no provisions for the regulation of the lay advocates in the Bill. The Task Force notes that the Law Society has written to the government expressing concern about the absence of any regulatory regime in the legislation.

The Task Force also received an inquiry from a member interested in employing a workers' advisor[9] in his firm to assist in providing services to his WCB clients. The member noted the provisions of Chapter 12 of the *Professional Conduct Handbook* (which limits what services a lawyer may delegate to a legal assistant) and sought the Law Society's confirmation that he would not be in violation of the Handbook if he hired this individual as an employee to provide services in the workers compensation field.

In support of his position that he be allowed to hire this individual to provide services, the member noted:

> ... It would greatly improve the legal services that we provide our clients, if we could employ this workers' advisor. We anticipate his hourly rate would be approximately $100.00 to $150.00 per hour. This is significantly less than the hourly rate normally billed by lawyers providing this service.… This would enable our firm to better provide a cost-effective delivery of this legal service to workers and their families.… Finally, existing public policy expressly provides for workers advisors to represent workers and appear before Workers' Compensation Board tribunals to advocate on behalf of workers. Such a policy and practice, we submit, can

[9] Workers' and employers' advisors are provided for in the *Workers Compensation Act*. They are employees of the Ministry of Labour.

> be delivered, at least as effectively, if the same qualified person, under the control and direction of a law firm, is permitted to represent its clients who are disabled or injured workers.[10]

The Ethics advisor confirmed to the member that he could not allow the employee to appear on his own at a WCB hearing as that would be contrary to the *Professional Conduct Handbook.*

The Task Force notes that very few members of the profession practise in the workers compensation field. They also note that there is significant lay representation before the WCB which is not contrary to the *Legal Profession Act*. These representatives include: workers' and employers' advisors, union representatives, company employees, etc.

5. Poverty paralegals – community advocates

The Task Force met with and received a thoughtful submission from three senior members of the profession with extensive experience in the area of poverty law.[11] The principal focus of the submissions was to ensure that community advocates — which they defined as volunteers and workers in community not-for-profit agencies — not be negatively impacted if the Task Force should redefine the "practice of law." At present, the work of community advocates is not prohibited by the *Legal Profession Act* as such advocates do not provide their services "in the expectation of a fee, gain, reward, direct or indirect." The submission noted, however, a possible concern with some community agencies suggesting a voluntary donation to the organization in return for services rendered, and queried whether such a request might constitute an expectation of an indirect gain with the result that the services were provided contrary to the *Legal Profession Act*.

Finally, the submission asked that the Task Force ensure that any recommendations that it might make on certification and supervision, take into account the impact of its recommendations on community advocates.

6. Discussion

a. General

The Paralegal Task Force is of the view that the public is not well served by independent paralegals who are not subject to any form of certification, regulation, or insurance. Permitting independent paralegals to operate would only be in the public interest if paralegals were required to attain a prescribed high standard of competency through a

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[10] Letter from William R. Hibbard of Smiley Hibbard Macaulay, March 22, 2002

[11] Allan A. Parker, Jim Sayre, and John Simpson, "Community Advocates: A Submission to the Paralegal Task Force," March 26, 2003

combination of formal education, testing and experience, be subject to regulation, carry mandatory insurance and defalcation coverage.

Even if such a program existed, the Paralegal Task Force is concerned that such a program could lead to a two-tiered justice system whereby the poor of this province would not have access to fully trained legal representation.

The Paralegal Task Force echoes the views of the 1989 Paralegalism Subcommittee Report:

> We cannot condone the continuation of a parallel legal profession such as the Society of Notaries Public which markets its members to the public as a provider of legal services, yet has lower standards than those that are met and adhered to by members of the Law Society. This is misleading and unfair to the public.

The Paralegal Task Force believes that the cost of certifying and regulating independent paralegals would be considerable. It does not see a formal role for the Law Society as the certifier or regulator of independent paralegals. The Task Force does not believe that it is in the interest of the public or the profession for the Law Society to regulate independent paralegals.

b. Independent workers compensation consultants

For the reasons set out above, the Paralegal Task Force does not believe that it is in the public interest for the government to allow paralegals to provide legal services in the workers' compensation field. However, it appears that the government is determined to proceed with the legislation. The Paralegal Task Force is of the view that the scheme should include provision for the certification and regulation of consultants, perhaps by the WCB itself. The requirements should be there at the outset — not after the fact when consumers have been hurt and consultants will argue they have a vested right to operate. The Task Force is of the view that the immigration experience illustrates the difficulties in imposing a regulatory framework on a group after the fact.

The Task Force recognizes that there are few members who practice in this field. In Part III of this memorandum, the Task Force explores the use of lawyer-employed and supervised paralegals to provide services in this field.

c. Community advocates

The Paralegal Task Force is of the view that community advocates — i.e. volunteers or employees of not-for-profit organizations — are not acting contrary to the *Legal Profession Act*. As the Task Force is not recommending changes to the definition of the "practice of law," we do not believe that these advocates will be affected by this Report. The Task Force recognizes, however, the concern with non-profit organizations that ask

for donations. The Task Force is of the view that any ambiguity that arises from these requests can best be addressed by the Unauthorized Practice Committee.

7. Recommendations

The Paralegal Task Force recommends:

1. that the Benchers continue to oppose the expansion of independent paralegals in British Columbia;

2. that, with respect to community advocates, the Benchers refer to the Unauthorized Practice Committee the concern about organizations who ask for or receive donations and further ask the Unauthorized Practice Committee to develop guidelines for such organizations to ensure that they do not act contrary to the *Legal Profession Act*.

8. Options re WCB

With respect to workers compensation consultants, the Task Force has identified the following options for consideration by the Benchers:

1. Continue to oppose Bill 37. This might include writing to the government asking that s. 24 of the *Skills Development and Labour Statues Amendment Act*, 2003 not be brought into effect by regulation;

2. Express to the government the Law Society's concern about the new legislation and the lack of provision for any type of regulation, particularly vis-à-vis vulnerable workers:

   (a) The Law Society could simply advise the government of its concerns with the unregulated system that has been adopted; or

   (b) The Law Society could advise of the government of its concerns and offer its expertise to assist in developing an appropriate certification and regulatory scheme.

The Task Force attaches as Appendix A to this Report a draft letter for consideration by the Benchers.

III: PARALEGAL CERTIFICATION AND REGULATION

1. Introduction and submissions received

At their meeting in June 2002, the Benchers approved in principle the Task Force's recommendation for a system of certified paralegals and asked the Task Force to further develop the proposal. Thereafter, the Task Force consulted with interested groups including the paralegal associations, the CBA sections, administrative tribunals, members, and some regulatory bodies.

The Task Force is of the view that by expanding the services a paralegal may provide, access to justice may be enhanced, with law firms able to provide clients with a lower-cost alternative to a lawyer for certain of the simpler, more routine tasks on a client file. The Task Force also believes that it would be beneficial to members to allow them to delegate additional services to their paralegals. Lawyers may be able to maximize the efficiency of their offices by delegating additional services to properly trained paralegals.

Lawyers were generally in favour of certifying paralegals who met certain criteria. One member put it this way: "[a certification scheme] would assist a firm, when hiring a legal assistant, to have some idea of that person's training and qualifications. It will also allow the public to know that information."[12]

By contrast, most of the submissions received did not include arguments in favour of or suggestions for any regulatory mechanism for paralegals.

The Task Force heard from Dr. John Henry of the College of Dental Surgeons. He indicates that the College's experience is that complaints from the public about dental assistants (which the College also regulates) are rare; typically members of the public will complain about the dentist whose assistant has provided the service rather than directly about the assistant.

The BCALA's submissions dealt both with certification and with regulation.

> The reasons for certification are numerous, and include the fact that it:
>
> - enhances the public image of Legal Assistants and the legal profession;
>
> - will help to eliminate the confusion surrounding the terms "Legal Assistant" and "Paralegal";
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> - provides a minimal standard professional credential for all Legal Assistants;

[12] James A. Vanstone of Vanstone de Turberville, February 13, 2002

- provides a recognizable professional credential for those demonstrating adherence to high ethical standards;
- improves the quality of legal services available from Legal Assistants to lawyers;
- encourages the expanded utilization of Legal Assistants by lawyers in reliance on the knowledge and professionalism of Legal Assistants;
- assists the legal profession to provide cost effective legal services to the public and keeping law firms competitive;
- discourages Legal Assistants from engaging in unauthorized practice; and
- will assist law firms in hiring Legal Assistants.[13]

With respect to regulation, the BCALA favoured direct regulation of paralegals rather than regulation of paralegals through their supervising lawyers. The Association considered it unnecessary for employed and supervised paralegals to be covered by a separate insurance or defalcation fund as their supervising lawyer's coverage would extend to them. However, they did consider it desirable for paralegals to be subject to complaints and disciplinary mechanisms to ensure the desired level of professionalism.

2. The proposal and survey

The Paralegal Task Force, with the assistance of a working group, developed a proposal for the certification of paralegals, and sought feedback on it from paralegals. The proposal is attached as Appendix B.

The proposal provides that graduates of Canadian law schools and graduates of approved paralegal programs who complete one year of paralegal work experience in British Columbia may apply for certification.

Graduates of paralegal programs that do not meet the specified criteria may apply for certification upon completing one year of paralegal work experience in British Columbia and successfully passing a challenge examination.

Applicants who have an LL.B. or equivalent degree from a common law jurisdiction outside Canada may also apply for certification upon completing one year as a paralegal in British Columbia or one year of paralegal experience outside British Columbia coupled with a challenge examination.

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[13] Supra, note 1, p. 10

The proposal also allows for certain categories of paralegals to be grandparented in the five years following the introduction of the program. This includes paralegals who are graduates of programs that do not meet the specified criteria who may apply for certification if they have three years of paralegal experience and paralegals who have completed 10 years of legal work experience including at least 5 years of paralegal work experience.

All applicants would be required to complete an application form which would include information regarding the applicant's character.

In May 2003, the Task Force conducted a survey of paralegals to determine their view of the proposal. The survey was conducted electronically. Lawyers were asked to refer the proposal and survey to paralegals they employed and supervised. In addition, the BCALA and the CAP asked their members to complete the survey.

The Task Force has prepared and submitted to the Benchers its report on the survey results and, accordingly, this Report will not set out the results in detail here. 628 paralegals responded to the survey. It is not known how many paralegals there are in the province. However, the BCALA submission references a survey by Western Management Consultants that estimates that there are 1300 – 2000.[14]

The survey results indicate a high level of interest from paralegals and strong support for the proposal.

The survey respondents' view is that only certified paralegals should be entitled to provide services additional to those which lawyers may delegate to their legal assistants in accordance with Chapter 12 of the *Professional Conduct Handbook*.

3. The Task Force's consideration of the proposal

a. The certification and regulation proposal

The Task Force was divided on whether it was desirable for the Law Society to adopt a certification and regulation regime for paralegals.

The Task Force members concluded that the principal benefits of certification are to provide an assurance of quality to a member who is hiring a paralegal and a marketing advantage to someone having the credentials. In addition, certification provides the consumer of legal services and the world at large (including hearing panels, judges, etc.) with some assurance that the paralegal has achieved a certain level of education and/or experience. Accompanied by a regulatory program, certification also serves as notice that the paralegal is subject to a regulatory scheme in the event of concerns about the paralegal.

[14] Supra, note 1, p. 8

With respect to paralegal regulation, the Task Force is of the view that, as a practical matter, most regulation of paralegals will be done by regulating the supervising lawyer, who will remain responsible for the delivery of legal services to the client. The Task Force expects that the Law Society's experience is likely to be similar to that of the College of Dental Surgeons with few complaints from the public (or the profession) about the conduct of a paralegal. Most complaints would probably best be dealt with by contacting the supervising lawyer who is responsible for supervising the paralegal and ensuring that he or she is behaving competently and appropriately.

Having said that, the Task Force is of the view that if the Law Society certifies paralegals, it must also have the ability to decertify a paralegal in situations where it is not sufficient to have the supervising lawyer deal with the matter.

The Task Force believes that if the Law Society decides to certify paralegals, it should have a Paralegal Committee, composed of volunteers from the public, paralegals, members and Benchers to deal with all issues relating to the certification and regulation of paralegals.

b. Costs of the proposal

The Paralegal Task Force has sought to quantify the costs associated with the certification and regulation proposal. The cost items identified are: staff costs associated with the development, implementation and maintenance of the certification and regulation program; examination costs and volunteer Committee costs.

The Law Society's staff costs would include costs associated with the development of the application process including the development and maintenance of a paralegal database, developing and maintaining a process to investigate applications, disciplinary matters and communications. In consultation with Mr. Stajkowski, the Task Force estimates the set up costs for the program at $25,000.00 with annual costs of $70,000.00.

In addition, there will be costs for developing and conducting the examinations of those who do not meet the usual certification requirements. The amount of this cost item will require much closer analysis as it would vary considerably depending on the number of examinations taken each year, examination content, investigation and appeals. Subject to those important qualifications, the Task Force estimates the set up costs for the examination process at approximately $25,000 with annual costs for the examination process of approximately $10,000.

The costs of the program can be summarized as follows:

1. **Start-up costs**

Program developments costs	$25,000
Examination development	$25,000
	$50,000

2. **Annual maintenance costs**

Program maintenance	$10,000
Investigations	$15,000
Discipline	$20,000
Communications	$25,000
Examination costs	$10,000
	$80,000

The Task Force is of the view that the program should be self-funding. The Task Force conservatively estimates that 500 paralegals will initially apply for certification with up to 100 new applicants a year. If the Law Society charges an initial application fee of $150.00 with an annual membership fee of $200.00, the costs associated with the program would be covered by these fees. An examination fee would also be charged to those who write the certification examination, again on a cost recovery basis.

c. Legal framework

As part of its mandate, the Task Force wrote to the Attorney General's office regarding the Law Society's authority to develop and implement a system for certifying and regulating paralegals. The Attorney General's office has indicated its view that the Law Society does not have the authority under the *Legal Profession Act* to implement such a scheme.

The Task Force is of the view that if the Law Society is to proceed with the proposal for certification and regulation of paralegals as described in this memorandum, it will first be necessary to seek and obtain the government's agreement to amend the *Legal Profession Act* to provide the Law Society with the necessary authority.

The Task Force is cognizant of the difficulties of seeking a legislative amendment. The government may be unwilling to expand the Law Society's legislative mandate to include the certification and regulation of paralegals. Moreover, the government's introduction of Bill 37 may be indicative of a view within government that the provision of legal services should generally be opened up to allow non-lawyers to provide legal services. Finally, even if the government is willing to amend the *Legal Profession Act*, the process may be lengthy.

d. The "who can provide expanded services" debate

There was a division of opinion at the Task Force on the issue of whether only certified paralegals should be entitled to provide expanded services (i.e. services in addition to those currently performed by legal assistants) or whether other law firm employees might also provide expanded services as long as, in their supervising lawyer's opinion, they were competent to do so.

From the perspective of some members of the Task Force, there would be no point in a paralegal certification scheme if non-certified employees could also provide those services. That perspective was echoed in the feedback received to the Paralegal Survey where the Respondents clearly set out their views that only certified paralegals should be entitled to provide the expanded services.

4. The Task Force's consideration of other options

a. Advocacy services where permitted by legislation

At present, in British Columbia, "consultants" regularly provide legal services in several fields: in the immigration field they do so pursuant to federal legislation; in the workers' compensation field, at present, they do so contrary to the *Legal Profession Act* but with support from some employers and the Workers' Compensation Board. As noted above, legislation has been passed which will allow these consultants to operate (although as at the date of this report, the statute has not been brought into force by regulation).

At present, clients who deal with these consultants do so at their own risk. There is no regulatory framework to protect the clients. The *Professional Conduct Handbook* currently prohibits a lawyer from allowing a legal assistant to actively participate in legal proceedings on behalf of a client except in a support role to the lawyer appearing in the proceedings.

Thus, while law firms can employ such consultants as legal assistants, the consultant employee could not represent a client at a hearing or directly advise a client because that would be contrary to the *Professional Conduct Handbook*.

It is arguable that the public is not well served by this limitation. In those forums which provide for representation by non-lawyers, allowing the public to be represented and advised by non-lawyers who are employed and supervised by lawyers would provide the public with access to alternate (and, presumably, cheaper) representation while at the same time providing the public with protection through the lawyer's requirements to supervise and to only delegate appropriate work, coupled with the regulatory and coverage regimes to which a lawyer is subject.

This regime would allow those consultants currently independently operating to seek employment with lawyers and for lawyers to employ consultants who are knowledgeable in their fields. The Task Force believes that most of these consultants would not meet the criteria necessary for them to become certified paralegals but that, some of them at least, are knowledgeable and competent such that allowing them to operate if they are employed and supervised by lawyers, would be in the public interest.

b. Chapter 12 of the *Professional Conduct Handbook*

Chapter 12 of the *Professional Conduct Handbook*, Supervision of Employees (annexed as Appendix C) deals with a lawyer's responsibility for all work entrusted to the lawyer but allows a lawyer to delegate certain tasks and functions to an employee if the employee's training and experience are appropriate to the task, and provided that the lawyer provides the appropriate supervision. The Handbook recognizes that it is in the interests of the profession and clients for the delivery of more efficient, comprehensive and better quality legal services that the training and employment of legal assistants be encouraged. Chapter 12 goes on to set out examples of tasks and functions that may properly be delegated to a legal assistant and those that must be performed by a lawyer.

The Task Force heard from a number of people that it was appropriate for the Law Society to increase the scope of services that lawyers' employees could provide to enhance the affordability of legal services while still providing the public with the protection that comes from hiring a lawyer.

In the current Chapter 12, "legal assistant" is not defined and there are no occupational requirements for a legal assistant. The Handbook regime requires the lawyer to ensure that a legal assistant's training and background are appropriate to the tasks delegated to him or her.

The Task Force considered two approaches to expanding the types of services that lawyers could delegate to their employees pursuant to Chapter 12.

The first option would simply allow lawyers to delegate more functions and tasks than currently permitted to their employees. The lawyer would be solely responsible for determining whether any given employee had the background and training necessary to perform any such delegated task.

The second option would set up a new regime which would allow lawyers to delegate to paralegals tasks and functions which may not currently be performed by legal assistants under the current Chapter 12. Under this option, lawyers could still delegate to legal assistant the tasks set out in Chapter 12. However, there would be additional duties and functions that could be delegated only to "paralegals" who met specified criteria. Of course, the lawyer would still be responsible for ensuring the paralegal is competent to perform the functions delegated.

The Task Force was of the view that the *Professional Conduct Handbook* could define who is a "paralegal" for the purpose of determining to whom the lawyer could delegate these additional functions.

Alternatively, the Handbook could allow lawyers to delegate the additionally specified tasks only to those non-lawyer employees certified as paralegals by specified paralegal associations. The Task Force is of the view that if this is the option preferred by the Benchers the Law Society could work with, assist and encourage the paralegal associations to develop their own certification programs.

5. Further steps

Whichever option is chosen by the Benchers, further work remains to be done. The Task Force has not, for example, developed a detailed core curriculum for paralegal certification. Nor has it produced a final list of additional services that legal assistants or paralegals ought to be able to provide. Some of the additional services would require legislative amendment, for example, to allow paralegals to act on small claims matters or become commissioners for oaths.

However, before embarking on the final details of any option, the Task Force considered that the Benchers should first decide which option they wished to pursue.

6. Options for consideration by the Benchers

The Paralegal Task Force has identified the following options for the Benchers:

a. Certified and regulated paralegals

The Benchers may opt to adopt a program to certify and regulate paralegals. The proposal described herein is a fairly detailed scheme that has met approval from the paralegal community. If this option is adopted, the Law Society ought first to request the Attorney General to amend the *Legal Profession Act* to provide the Law Society with the necessary authority to operate the program.

b. Legal assistants undefined: expanded services

The Benchers may opt to expand Chapter 12 of the *Professional Conduct Handbook* to allow lawyers to delegate to their employees services in addition to those which can currently be delegated to legal assistants. This proposal would essentially continue the present scheme under the Handbook with the lawyer the sole determiner of an employee's ability to provide any given service. The Handbook would make no distinction between those employees who have achieved a certain level of education and/or experience and those who have not.

c. Recognition of paralegals: expanded services

The Benchers may wish to adopt this option which alters the scheme set out in Chapter 12 of the *Professional Conduct Handbook* to recognize paralegals who meet specified criteria as a separate class of employee and to allow lawyers to delegate to their paralegal employees who meet the requirements services in addition to those which can currently be delegated to legal assistants. This option could be approached in two different ways:

1. The *Professional Conduct Handbook* could define who is a "paralegal"; or

2. the *Professional Conduct Handbook* could provide for delegation to paralegals who have been certified as paralegals by specified paralegal associations.

If the latter option is chosen, the Law Society should work with the paralegal associations to develop the certification program.

d. Advocacy services where allowed by law

Whichever of the above options the Benchers prefer, the Benchers may also wish to consider amending Chapter 12 of the *Professional Conduct Handbook* to allow lawyers to delegate to their employees legal services (including appearances at administrative hearings) where the law allows for such services to be provided by non-lawyers. This option provides the public with the opportunity to use a non-lawyer to provide services while at the same time ensuring that such services are delivered under the supervision of a lawyer. This option should increase the affordability of legal services while providing protection to the public who access these services.

e. Status quo: no certification; no regulation; no expansion

The Benchers may decide that the Law Society should make no changes to the present system of delivering legal services and opt to continue with the status quo. If this option is chosen, there would be no expansion or changes to Chapter 12 of the Handbook.

7. Conclusion

The Task Force presents the Benchers with this summary of the options it has, to date, considered. Before proceeding any further, the Task Force asks the Benchers to decide on the option(s) they believe the Law Society should pursue.

APPENDIX A

Honourable Graham Bruce
Minister of Skills Development and Labour
PO Box 9052 Stn Prov Govt
Victoria, BC V8W 9E2

Dear Sirs:

The Law Society notes that Bill 37, *Skills Development and Labour Statutes Amendment Act*, 2003, which allows for lay advocates to provide legal services in relation to WCB matters, has now passed third reading. The Law Society has previously written to you to express its concern about this legislation.

The Law Society is writing to you at this time to encourage the government to adopt a certification and regulatory scheme for the lay advocates authorized by the Act, before the legislation comes into force. The Law Society is particularly concerned about advocates who may seek to represent non-unionized injured workers. In the Law Society's experience, this group is particularly vulnerable and the consequences to them of incompetent or dishonest representation can be enormous. The Law Society urges you to adopt a certification and regulatory regime, at a minimum in respect to those advocates who will seek to provide services to non-unionized workers.

The Law Society has many years of experience with both certification and regulatory programs. We would be pleased to work with the government and the workers compensation system to assist in developing an appropriate certification and regulatory regime for these advocates.

Yours truly,

William Everett, QC
President

cc. The Honourable Gordon Campbell
The Honourable Geoff Plant, Attorney General of British Columbia