

# The Law Society of British Columbia



## **Report of the Independence and Self-Governance Committee** For: The Benchers

**Date:** March 20, 2008

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**Purpose of Report:**

**Information**

**Prepared on behalf of:**

**Independence and Self Governance Committee**

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## **Report of the Independence and Self-Governance Committee**

### **Introduction**

This Report of the Independence and Self-governance Committee is the result of the Committee's consideration of the importance of lawyer independence to the protection and maintenance of the rule of law, and thereby to the maintenance of an underlying cornerstone of Canadian democracy.

The first part of this Report addresses the meaning of and reason for lawyer independence, and examines why, in the Committee's view, lawyer independence is best preserved, for the benefit of the public interest, through self-governance. While the Supreme Court of Canada has recognized this principle, the Committee understands that effective self-regulation and self-governance requires public confidence. A lack of public confidence that the self-regulating body (the Law Society) is discharging its mandate effectively and in the public interest is inimical to the preservation of support for self-regulation, which would be a significant threat to lawyer independence.

With this in mind, the Committee therefore decided that it would be prudent to review core functions of the Law Society to consider whether the processes and activities of the Law Society can be expected to maintain the public's confidence in the Law Society's discharge of its statutory and common law duties, thereby adequately preserving and promoting independence and effective self-governance of lawyers. The second part of this Report describes the results of the review undertaken by the Committee.

### **Part I - Lawyer Independence and Self-Governance**

#### **What is "Lawyer Independence?"**

"Lawyer independence" is not a well-defined concept, and the Committee spent some considerable time discussing, for the purposes of this Report, how to define it.

Lawyer Independence is often presumed by the general public to confer a right upon lawyers. In reality, however, it is a public right necessary (as will be discussed below) to protect the rule of law. The public has a right to be able to obtain legal advice from a lawyer whose primary duty is to his or her client, not to any other person and certainly not to the state. The public's right to lawyer independence is therefore closely associated with the obligation on the profession to self-govern, in a responsible and effective manner, in order to ensure that lawyers are free from interference or control by the state.

The Committee recognized, however, that, to be useful, the definition needed to be relatively straightforward and free from obscure legal language. The Committee has settled on the following definition:

Lawyer independence is the fundamental right guaranteeing that lawyers may provide legal assistance for or on behalf of a client without fear of interference or sanction by the government, subject only to the lawyer's professional responsibilities as prescribed by the Law Society, and the lawyer's general duty as a citizen to obey the law.

The definition is drafted to incorporate the essential ideas of the concept:

- It identifies the importance of lawyer independence to Canadian society;
- It makes the separation of lawyers from government clear;
- Self-governance is incorporated by the phrase “subject only to the lawyer’s professional responsibilities as prescribed by the Law Society;”
- The concept is explained as a right to protect the public when obtaining legal advice (“that lawyers may provide legal assistance for or on behalf of a client without fear of interference or sanction by the government”).

The literature on the subject of lawyer independence has identified several other types of lawyer independence, including independence of control over conditions of work (such as for whom to act), and independence even from one’s client (on the basis that a lawyer must not be made to do something by a client that goes against the lawyer’s own sense of professional or ethical propriety), as well as independence from government and independence of the profession to regulate its own practices.<sup>1</sup> For the purpose of the Committee’s work, however, and for the purposes of this report, the Committee settled on the definition set out above, which emphasizes the independence from government as the important determinant of the notion of lawyer independence as the underpinning of the preservation of the rule of law.

## The Rule of Law

The Rule of Law is a fundamental principle underlying Canadian democracy. The preamble of the *Charter of Rights and Freedoms* states that the rule of law is one of the principles upon which Canada is founded. The rule of law has always been recognized as a fundamental principle. In *Roncarelli v. Duplessis*, for example, Mr. Justice Rand noted that the rule of law is a “fundamental postulate of our constitutional structure.”<sup>2</sup>

Briefly stated, the rule of law means that everyone is subject to the law or, put another way, that no one is above the law. Rich or poor, individuals, corporations, and governments alike are all subject to and governed by the law. The rule of law 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.<sup>3</sup>

The rule of law is required to provide for impartial control of the use of power by the state. It guards against arbitrary governance. Therefore, to be effective, the rule of law requires not only the submission of all to the law, but also the separation of powers within the state. Because the rule of law is devised, in part, to control the powers of the state, 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. An independent legal profession is also

<sup>1</sup> See, in particular, Robert Gordon, *The Independence of Lawyers* (1988) 68 Boston U. L.R. 1

<sup>2</sup> [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

<sup>3</sup> *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721 at pp 748.

fundamental to the maintenance of citizens' rights and freedoms under the rule of law, so that they are guaranteed access to independent, skilled, confidential and objective legal advice...[if the highest standards of skill, professionalism and integrity amongst the legal profession are not maintained] confidence in the legal process will be undermined, so will the necessary respect for the rule of law, and the executive and legislative branches will be both tempted and enabled to interfere in the processes which protect their independence."<sup>4</sup>

A failure to maintain the separation of powers described above, resulting in the interference by the executive with the independence of the judiciary and lawyers, can have severe ramifications on the rule of law and the protections it affords, as has been demonstrated within the past year in both Venezuela<sup>5</sup> and Pakistan<sup>6</sup>.

In an article entitled *The Independence of the Bar*<sup>7</sup>, Jack Giles Q.C. explained the connection between lawyer independence and the rule of law as follows:

It is simply inconceivable that a constitution which guarantees fundamental human rights and freedoms should not first protect that which makes it possible to benefit from such guarantees, namely every citizen's constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent bar...While a court of law worthy of its name is impossible without an independent judiciary, meaningful access and the effective use of such a court is impossible without an independent bar. In the result, both an independent bar and an independent judiciary are necessary to maintain and preserve the supremacy of law.

The Committee has therefore concluded that the independence of lawyers is necessarily linked to the preservation of the rule of law. Independent lawyers are therefore necessary to preserve a fundamental principle of the Canadian Constitution.

## **The Law Society and Self-Governance of Lawyers**

Accepting that lawyer independence is necessary to preserve the rule of law, the next question is how can that independence be assured? The Committee believes that self-governance is a necessary condition of this independence, and that this has generally been recognized in Canada by the courts and the legislatures.

The motto of the Law Society is *lex liberorum rex*, which means "the law is king of free men" (a more contemporary translation is "the law is ruler of free people"). This motto has been in place for well over a century, and reflects the importance of the rule of law and of the Law Society's role in protecting it.

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<sup>4</sup> Neate, Francis. *The Rule of Law* Discussion Paper, February 2008. Mr. Neate is the immediate 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.

<sup>5</sup> "Justice under threat in Venezuela" Law Talk (N.Z.), Issue 693 20 August 2007, pg 25

<sup>6</sup> "Musharraf Sweeps Democracy Aside", The Globe and Mail (Vancouver edition) November 5, 2007; CBA Condemns Arrests of Lawyers in Pakistan and Calls for Return to Rule of Law (News Release, November 5, 2007).

<sup>7</sup> The Advocate, [2001] Vol. 59, Part 4

The object and duty of the Law Society, set out in s. 3 of the *Legal Profession Act* S.B.C. 1998 c. 9, is to uphold and protect the public interest in the administration of justice by, amongst other things,

- preserving and protecting the rights and freedoms of all persons, and
- ensuring the independence of lawyers.

The independence of lawyers as a general concept is not, however, well understood, let alone regarded as a fundamental protection of the rule of law and, thereby, the rights and freedoms of citizens. At best, the independence of lawyers is an abstract principle to most people, including to many lawyers. In a recent article, W. Wesley Pue noted that to the general public, “(t)he idea of independence [of lawyers] from state regulation strikes many as undemocratic, if not a prescription for lawlessness.”<sup>8</sup>

The *Legal Profession Act* requires the Law Society to ensure the independence of lawyers. The Law Society must therefore discharge this task assiduously. This is particularly important given the essential role that lawyer independence has in the maintenance of the rule of law, and, through it, the administration of justice in Canada. The Supreme Court of Canada has commented on this principle a number of times, perhaps as a reflection of the importance of lawyer independence to the preservation of the rule of law. In a frequently quoted passage, McIntyre J., for example, stated:

In the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state.<sup>9</sup>

In a later case, LeBel J. stated:

...an independent and competent Bar has long been an *essential* part of our legal system.<sup>10</sup> (emphasis added).

To maintain independence, lawyers have traditionally been self-governing. Again, the Supreme Court of Canada has explained this principle in several cases. For example:

There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment. *The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality, and availability to the*

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<sup>8</sup> W. Wesley Pue, *Death Squads and “directions over lunch”: A Comparative Review of the Independence of the Bar*, (2007) pages 10-11.

<sup>9</sup> *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at p. 187

<sup>10</sup> *Lavallee, Rackel and Heintz v. Canada (Attorney General)* [2002] 3 S.C.R.209 (at para 68, per LeBel, J. dissenting in part)

*general public of members of the Bar and through those members, legal advice and services generally.... (emphasis added)*<sup>11</sup>

and

An independent Bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence....<sup>12</sup>

In *LaBelle v. Law Society of Upper Canada*,<sup>13</sup> the Ontario Superior Court discussed the rationale for self-governance by referring to an article by G. D. Finlayson, Q.C. (later Finlayson, J.A. of the Ontario Court of Appeal) entitled “Self-Government of the legal profession – can it continue?”<sup>14</sup> as follows:

The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment from the state. The protection of rights has been a historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so *there can be no compromise in the freedom of the profession from interference*, let alone control, by the government. (emphasis added).

...

Lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if they cannot maintain their independence as individuals. It is almost impossible to do this if the society that governs them is under the day to day control of the government. *It is imperative* that the public have a perception of the legal profession as entirely separate from and independent of the government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with government.<sup>15</sup> (emphasis added).

The Committee therefore believes that self-regulation and self-governance is essential to lawyer independence.<sup>16</sup> Self-governance most clearly distances the profession from the state, thereby assuring the public of lawyers’ independence and freedom from conflicts with the state. Lawyers, who are often retained to act on behalf of clients who are in conflict with the state, would find themselves in an untenable conflict of interest with their client should the lawyer be regulated by the state. If lawyers were not governed and regulated in a manner independent of the state, clients could not be assured that their lawyer would be providing them with independent representation, particularly (for instance) if the client’s case required a direct challenge to the state’s authority. In such

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<sup>11</sup> *Canada (Attorney General) v. Law Society of British Columbia* [1982] 2 S.C.R. 307 at pp 335-336 (“*Jabour*”) per Estey, J.

<sup>12</sup> *Finney v. Barreau du Quebec* [2004] 2 S.C.R. 17 at para. 1 (2001) 52 O.R. (3d) 398

<sup>13</sup> (1985) 4 Advocates Soc. J. No. 1

<sup>14</sup> *ibid* at pp 11-16

<sup>15</sup> The Committee notes that this position is shared by the Council of Bars and Law Societies of Europe (“CCBE”). In a CCBE position paper on Regulatory and Representative Functions of Bars [2005 06 30], it is stated:

“...an independent legal profession is the cornerstone of a free and democratic society. Self-regulation, conceptually, must be seen as a corollary to the core value of independence.”

cases, it is necessary that individuals can obtain legal advice and representation that is independent of state control.<sup>17</sup>

There are other models that have been or are being devised by which to regulate and govern lawyers, and not all of these are as clearly self-governing as those in Canada. While some of these models operate in countries that are best described as liberal democracies,

the fact that liberal, pluralistic democracy A functions without a safeguard does not mean that liberal, pluralistic democracy B functions *better* without it. Nor... does it necessarily follow that liberal, pluralistic democracy B should try to function without the safeguard. The question for liberal, pluralistic democracy B is whether or not the safeguard is desirable in the public interest of pluralistic democracy B.<sup>18</sup> (emphasis in original).

The Committee agrees with this assessment. Models of lawyer regulation that are not self-governing less clearly demonstrate and preserve the independence of lawyers, which is “an important [some would say necessary] component of the fundamental legal framework of Canadian society.”<sup>19</sup>

With self-regulation and self-governance, however, comes a responsibility to demonstrate that the Law Society is discharging its mandate in the public interest, rather than in the interest of those it regulates.

The necessary external condition is that the public and the government consider self-regulation to be in the public interest...Here it is the **perception** that the system operates, or at least is intended to operate, in the public interest that counts, but such a perception is not likely to continue for long if the system is in fact operated for the private interest of the profession...<sup>20</sup>(emphasis in original).

## Mandate

With this background in mind, the Committee developed its mandate, which was presented to and approved by the Benchers in July 2005. The mandate of the Committee is:

- to monitor issues (including current or proposed legislation) that affect or might affect the independence of lawyers and to develop means by which the Law Society can effectively respond to those issues;
- to help the Benchers to ensure that the legal profession and the public are properly informed about the meaning and importance, in the public interest, of access to justice and the law through a self-governing profession of independent lawyers;
- to help the Benchers to ensure that the processes and activities of the Law Society preserve and promote independence and effective self-governance of lawyers;

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<sup>17</sup> see Hurlburt, William H. *The Self-Regulation of the Legal Profession in Canada and England and Wales*, (2000) Law Society of Alberta and Alberta Law Reform Institute at p. 170.

<sup>18</sup> *Ibid* at p. 171

<sup>19</sup> see note 8 above

<sup>20</sup> See note 17 above, at p. 183.

- to monitor issues of judicial independence and to support the judiciary, where necessary, in maintaining judicial independence.

### **Challenges to Independence and Self-Governance**

Despite the connection between the independence of lawyers and the preservation of the rule of law, lawyer independence has been challenged, or attacked outright, in a number of areas in the world. In some of these areas of the world, such as Zimbabwe, challenges to lawyer independence are to be expected because a strong, independent bar impedes the abilities of dictatorial governments to suppress the rule of law. However, challenges to the notion of lawyer independence and self-regulation have also surfaced in developed common law jurisdictions, such as Australia and the United Kingdom, where the rule of law is otherwise well entrenched. Despite this, governments in each of those countries have introduced legislation that reduces or eliminates self-governance in the legal profession, and replacement regulatory mechanisms that involve varying degrees of state involvement or regulation.

Challenges to self-governance in Australia and the United Kingdom appear to have arisen where public criticism has developed concerning the local law society's ability to handle complaints made against lawyers. A theme underlying the criticism is that a regulatory body comprised of lawyers cannot be expected to properly discipline other lawyers. A concern appeared to develop, in the mind of the public, that the law societies were not acting, first and foremost, in the public interest, but were rather acting more in the interest of their members. Therefore, critics argued, a body independent of lawyers needed to be created to regulate lawyers.

In Australia and the United Kingdom, the fact that the local law societies were bodies responsible for *representing* lawyers' interests as well as being responsible for the regulation of lawyers meant that the law societies had dual and conflicting roles, and this fact complicated efforts in responding to criticisms in those jurisdictions.

In the result, changes were, or are, being made in Australia and England that place ultimate regulatory responsibilities with Boards appointed by government. Governments, particularly in England, maintain that lawyer independence is preserved through the measures taken and, indeed, maintaining the independence of the legal profession is one of the eight regulatory objectives of the Legal Services Board created under the *Legal Services Act 2007* (UK). It is noteworthy, however, that changes to the legislation agreed to in the House of Lords designed (in the words of that House) to ensure the protection of lawyer independence, were initially opposed by the government.<sup>21</sup> Ultimately, while there is to be a consultation with the Lord Chief Justice prior to any appointments being made to the Board, the appointments (the majority of whom must be lay persons) are still made by the Lord Chancellor.<sup>22</sup> This is said to safeguard the Board's independence from

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<sup>21</sup> Bill changes face reversal – Law Gazette, June 7, 2007

<sup>22</sup> Although the justice minister “stood firm against the call to oblige the Lord Chancellor to have the concurrence of the Lord Chief Justice when appointing members to the Board.” See “Bill given the green light”, Law Gazette, November 1, 2007.

government.<sup>23</sup> It is, however, a significant incursion on self-governance, and thereby, the Committee believes, places risks on the maintenance of lawyer independence.

While elsewhere in the world there may be a developing trend toward limiting or removing self-regulation as the model of governance for the legal profession, the Committee does not believe that this is the “best practice” for the protection of lawyer independence.

Some commentators challenge the notion that self-regulation is necessary to ensure the independent advocacy and advice of lawyers on behalf of their clients. In a recent article, Duncan Webb<sup>24</sup> points out that:

- the legal profession is subject already to many statutes and common law rules that affect the practice of law.
- while lawyers undeniably play an important part in the judicial process, they are “simply assistants to the Court.”
- advocacy, in any event, is only a part of the lawyer’s role, and most of the profession works, in fact, in non-litigious matters such as conveyancing, wills, business transactions, and the like.

The Committee believes that such points are relatively simply addressed. For example:

- Statutes and common law govern all individuals, and lawyers are no different. Lawyer independence (as the Committee’s definition sets out above) does not exempt lawyers from the application of the law. Rather, it ensures that the state cannot interfere in the determination as to who can and cannot be a lawyer. It prevents the state from investigating and sanctioning lawyers for what they do as lawyers.
- Lawyers are more than “assistants to the Courts.” Lawyers are officers of the Court, and with that title comes important responsibilities in the representation of a client, which the Court is entitled to rely upon and which better ensure the fairness and efficacy of proceedings. “Clients depend on the integrity of lawyers, as do colleagues. Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administration of justice depends upon counsel’s reputation for integrity.”<sup>25</sup>
- Independent advice to clients on what may loosely be referred to as “transactional” matters is no less important than on litigious matters. Many individuals and corporations must negotiate with governments. Those clients also need to be assured of their lawyer’s independence from the state.

Webb also suggests that a weaker version of the “independence argument” is that professional rules are only the business of lawyers, and that non-lawyers have no place in this function – perhaps even that non-lawyers could not possibly understand the complexities of practice.

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<sup>23</sup> The Law Society (of England and Wales) *The Legal Services Act 2007 – briefing*, November 29, 2007

<sup>24</sup> Duncan Webb, *Are Lawyers Regulatable?* 2007

<sup>25</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para 177.

To some extent, this criticism is answered by the case law that provides justification, at least in law, for the self-regulation or self-governance of lawyers. In *Re Prescott*<sup>26</sup>, the Court of Appeal for British Columbia held that:

The Benchers are the guardians of the proper standards of professional and ethical conduct. . . One of the most important statutory duties confided to [the Benchers] is that of disciplining their fellow members who fail to observe the proper standards of conduct and/or ethics which are necessary to keep the profession on that very high plane of honesty, integrity, and efficiency which is essential to warrant the continued confidence of the public and the profession.

Later, in *Pearlman v. The Manitoba Law Society Judicial Committee*<sup>27</sup> the Supreme Court of Canada stated:

Courts have recognized that Benchers are in the best position to determine issues and misconduct and incompetence. For example, in *Re Law Society of Manitoba v. Savino* (1983) 1 DLR (4<sup>th</sup>) 285 (Man. C.A.) the Court of Appeal said:

No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body.

Moreover, as has been described above, cases like *Jabour, Andrews, and Finney* all connect the rationale of independent governance beyond the “professional rules are only the business of lawyers” notion and connect lawyer independence to the preservation of the rule of law.

However, while criticism of self-regulation and self-governance of lawyers is answerable in law, the Committee believes, recognizing the criticisms raised, that it is of considerable importance to be able to instill confidence in the public that the Law Society is discharging its mandate in the interest of the public. Lay bencher involvement in policy making and discipline is important in this regard. So too, however, is being able to demonstrate as clearly as possible how the discharge of the operations of the Law Society is, first and foremost, in the public interest rather than that of lawyers.

## **Part II - Analysis of Law Society Core Functions**

One of the mandates of the Committee is to help the Benchers to ensure that the processes and activities of the Law Society preserve and promote independence and effective self-governance of lawyers. The Committee decided that it would be advisable to review the core functions of the Law Society to ensure that such processes and activities attain this goal. In doing so, the Committee analysed the issues of independence and self-governance that related to each function, identified the facets of the function that supported independence and self-governance, identified weaknesses, and considered options.

The core functions of the Law Society as reviewed by the Committee were:

- (a) Complaints handling;
- (b) Credentialing and admissions;

<sup>26</sup> (1971) 19 DLR (3d) 446 at p. 452

<sup>27</sup> [1991] 2 SCR 869

- (c) Practice standards;
- (d) Prosecutorial and adjudicative functions;
- (e) Policy and Legal Services; and
- (f) Insurance.

The Committee's review of each function is briefly described below:

(a) Complaints Handling

The Committee particularly noted that problems in complaints handling in England and some Australian states have been at least partly responsible for incursions on self-governance. Due to the significance of this risk, the manner in which the Law Society discharges this function has significant relevance to the issue of self-governance, and through it, effective lawyer independence.

The goals of a professional disciplinary system should include the redressing of complaints, and the protection of the general public by ensuring the highest ethical and professional standards in individual lawyers and the profession as a whole. The Committee believes that an effective complaints handling system requires:

- the system to be independent, impartial, procedurally fair and easily accessible to those who may wish to use it;
- the system to be efficient, effective, open and accountable. Reasons for decisions should be provided, and there should be a process that allows for a review of a decision that a complainant considers is adverse;
- meaningful participation by non-lawyers to be included so that complainants can be confident that the system is not operated solely by and for the benefit of lawyers;
- the system to be properly funded and resourced.

A review of the manner by which complaints about lawyers are handled at the Law Society was, in the Committee's opinion, generally consistent with the criteria described above. For instance:

- There is a concerted effort to address, in a timely and less paper-intensive way, the 75 percent of complaints that are, historically, resolved at an early stage;
- The system is easily accessible;
- Mediation training has been provided to Intake and Early Assessment lawyers;
- Processes are being considered to address, more effectively, the manner in which "repeat offenders" and "ungovernable" lawyers are dealt with;
- Training or education programs for those most frequently complained about are being considered;
- An explanation is given to every complainant when a file is closed, and these are reviewed by the Chief Legal Officer to ensure consistency in the complaint handling process;

- Confidentiality issues currently require that the existence of complaints not be disclosed. However, where complaints are publicly known, some disclosure is permitted. All discipline hearings are public and on the record;
- Effective Lay Benchers participation exists both on the Discipline Committee and on the Complainants Review Committee;
- The Complainants Review Committee provides a means for review of a decision that a complainant considers to be adverse. The Ombudsman provides a method to review the processes used by the Law Society in reaching a decision.

The Committee noted that, as described, the complaints process is designed to protect the public, deals expeditiously with complaints in an appropriate manner, identifies serious matters at an early stage, and devotes specific investigation to those matters. Handled in this fashion, the public can be confident in the Law Society's ability to handle complaints. The development of education programs for those most frequently complained about ought to improve the system, as will the development of processes to deal with ungovernable lawyers.

The principal caution noted by the Committee concerns the need to ensure that the program is always properly resourced and staffed. Too few qualified staff significantly reduce the program's ability to properly discharge its functions, which in turn could lead to weakened public confidence if delays in, or a drop in quality in the handling of, complaints resulted.

(b) Credentialing and Admissions

Preserving lawyer independence and self-regulation is best ensured by the Law Society having an effective process that deals fairly but appropriately with those who wish to become lawyers or to return to practice after an absence from the profession.

The *Legal Profession Act* requires the Benchers to assess the character and fitness of each applicant for membership. Section 19 of the *Act* requires the Benchers to be satisfied as to an applicant's character and fitness to practise law before admitting the applicant as a member of the Law Society. This responsibility has been delegated at the first instance to the Credentials Committee. It is important to ensure that this responsibility is discharged in the public interest, and the Committee's examination of the Law Society's processes in dealing with admissions was made with that goal in mind.

To enable the Credentials Committee to make assessments of character, the Law Society's application form asks a number of questions. Some of these questions have been criticized at various times. The Committee notes that affirmative answers to any of these questions do not automatically preclude the ultimate admission of the applicant. They may, however, result in further enquiries and investigations on the part of the Credentials Committee. Such a process is necessary to protect the public. Public interest demands high moral and ethical standards in the practice of law. Applicants whose past conduct displays a lack of character require special consideration. The Law Society has a duty of fairness to assess these individuals on the merit of each application, recognizing that lessons can be learned from past errors and that such applicants should be permitted to satisfy the Credentials Committee that, despite such errors, they now have the character necessary to practice law. Furthermore, as the practice of law is a demanding

profession, certain medical issues suffered by an applicant at the time of application or in the past may be relevant for consideration and, if possible, accommodation. Medical conditions that have been treated and, if at risk of recurrence, are being monitored, do not necessarily affect an applicant's fitness to practice law. Again, the assessment of the applicant on the particular circumstance of each application is necessary, both to ensure the protection of the public and to be fair to the applicant.

The Credentials Committee cannot deny an application. If that Committee has concerns about an application, a hearing may be ordered, at which the applicant has an opportunity to satisfy a hearing panel as to his or her character and fitness to practice law. A decision by the panel adverse to the applicant may be appealed to the Court of Appeal.

The Committee is satisfied that the current processes used by the Law Society in connection with credentials and admission are aimed first and foremost at the protection of the public interest, and may therefore be expected to preserve and promote independence and self-regulation. This function must, however, be debated with care. Should the Law Society reject applications for reasons that the public does not understand, public confidence in the ability to self-regulate would be adversely affected. The Law Society should therefore be able to explain why certain information is sought of applicants, and explain how, if conditions are attached to an admission, those conditions are necessary to protect the public interest.

In the past decade, the Law Society has had to address the national mobility of lawyers within Canada. This was accomplished successfully through the National Mobility Agreement. The likelihood of a push for greater international mobility of lawyers in the coming years should be recognized, and this will, in all probability, require the Law Society, through its credentialing processes, to be particularly vigilant with respect to the criteria for admission of foreign-trained lawyers to the practice of law in British Columbia.

The Committee also noted that the Law Society operates the Professional Legal Training Course, which all articulated students (and some applicants who are transferring from other jurisdictions or who are returning to practice after a lengthy absence) are required to take. The Committee did not consider the content of the course, but did comment on the need to ensure fairness and accommodation in the grading and examination process to ensure public confidence in the admission process and, through it, confidence in self-regulation.

(c) Practice Standards

Public confidence in self-regulation is improved if the regulator acts to assure that a standard of competence exists within the profession. The Committee therefore reviewed how the Law Society addresses practice standards.

While recognizing that it is likely everyone may make an occasional mistake, repetition of errors or poor practice habits generally indicate an underlying competence problem. The Committee understands that complaints about competence handled through the Practice Standards Committee and program aim to make recommendations for the lawyer concerning the improvement of his or her practice.

The main goal of the Practice Standards program is to remediate the lawyer in question. Ensuring that the lawyer is competent to practice best protects the public interest. The

program provides information, tools, and other materials to assist in improving the lawyer's practice skills to better serve his or her clients. This is often done through practice reviews conducted by the Law Society. Ultimately, of course, it is up to the lawyer to meet the recommendations of the program. If this is not possible, then the public interest is not protected by permitting the lawyer to remain, unregulated or unsanctioned, in practice. A failure to follow the recommendations can result in an order made by the Practice Standards Committee. A failure to comply with an order can, of course, be dealt with through the Discipline process. Prohibitions on practice – either generally or in particular areas of law – can be imposed by hearing panels. Disbarment can be ordered in appropriate cases. Public confidence in the ability of the Law Society to independently regulate the profession requires that those lawyers who are either unable or refuse to meet a general standard of competence are restricted in what they are able to do, or, if of a serious nature, are barred from practice altogether.

The Committee was satisfied that the goal of the program was consistent with preserving and promoting self-regulation and the independence of lawyers. Care should be taken to ensure that the appropriate standard of competence is set. The public should never conclude that the standard set by the Law Society is too low to adequately protect the public interest.

The Committee also noted that education is a goal of the Practice Standards program, and believes that recent initiatives of the Law Society, through both the Practice Standards and Lawyer Education Committees concerning the development of the on-line small firm course and the recently approved Continuing Professional Development program, protect the public interest as required by s. 3 of the *Legal Profession Act*. At the same time, such programs should be expected to enhance public confidence in the regulation of the legal profession by demonstrating that the profession (and its regulator, the Law Society) takes the issue of competence seriously enough to make continuing education a requirement of being a lawyer.

(d) Prosecutorial and Adjudicative Functions

There is an overlap between the prosecutorial and adjudicative functions of the Law Society. The Law Society is responsible for the prosecution of discipline hearings and credentials applications, a process that is overseen by the Discipline and Credentials Committees of the Benchers. The President appoints the members of hearing panels and panels must be chaired by a lawyer Bencher. In practice, hearing panels are routinely comprised of Benchers or life-Benchers.

The Committee recognizes that, on its face, this overlap of functions could be viewed as a conflict and may raise an apprehension of bias on the part of both the public at large and members of the Law Society. If the Law Society regulatory processes are perceived to be biased, the credibility of the organization may be impaired.

The Committee took a good deal of comfort from the fact that, in *McOuat v. Law Society of British Columbia*<sup>28</sup> the Court of Appeal commented specifically on the question of reasonable apprehension of bias in connection with the Law Society's process in a credentials application and hearing. Low J.A. held:

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<sup>28</sup> *McOuat v. Law Society of British Columbia*, (2001) 84 BCLR (3d) 242.

From my review of the statute and the rules made by the Law Society, I conclude under its authority, that no procedural unfairness emerges. The legislation and the rules, together with the process of selection of panels for individual cases outlined in the Robertson affidavit, *ensure that panel members are impartial and independent*. Of particular importance is Rule 5-5. It says that the panel “may determine the practice and procedure to be followed at a hearing.” The panel, subject to the statute and the rules, is the master of its own proceedings. There is no basis for finding procedural unfairness giving rise to a reasonable apprehension of bias.

*(emphasis added)*

One may therefore reasonably draw a conclusion that the *Legal Profession Act*, the Law Society Rules, and the Law Society’s procedures concerning the establishment of panels (at least those in place at the time of the *McOuat* hearing) ensure that the decisions of a hearing panel are independent of the Law Society’s investigative or prosecutorial functions.

As there are good legal arguments that the processes used by the Law Society are procedurally fair, the Committee does not believe that this issue is one that requires immediate attention. The Committee remains mindful of public perception and confidence, however. Would the public consider that the Benchers, elected by the group that they are required to regulate, are sufficiently independent in order to discharge the necessary regulatory responsibilities entrusted to them in the public interest? Would a separation of the functions assist? The matter was debated in 1985, and the Benchers ultimately resolved to keep both functions. The issue remains under debate in other jurisdictions. The Committee believes that it would be prudent for the Benchers to identify this issue as one for possible future (although not necessarily immediate) consideration, and to keep a close eye on developments concerning this issue in other jurisdictions. For example, if the Benchers remain responsible for both the investigative and adjudicative functions of lawyer regulation, should there be a more rigid division of functions within the ranks of the Benchers themselves? Alternatively, the Law Society may consider separating its adjudicative function from its investigative function entirely.

(e) Policy and Legal Services

The Committee notes that preserving lawyer independence through effective self governance depends in part on the Law Society:

- appropriately debating public policy;
- effectively regulating the profession;
- effectively enforcing its regulations;
- effectively advancing positions in favour of independence and self-regulation to government and to the courts and in discharging the functions of the Law Society effectively in order to ensure that the Society acts to uphold and protect the public interest in the administration of justice.

The Policy and Legal Services Department assists in this objective by enabling the Benchers to fulfill the mandate of the Law Society by providing the Benchers with timely, relevant, and balanced analysis of issues in order that the Benchers can make informed decisions.

This Department's function promotes independence and effective self governance by ensuring that policy decisions and rule-making are made by well-informed Benchers and that positions taken publicly by the Law Society are well developed and considered before being presented to the courts or government. The Department is also to develop a function that will provide support to tribunals in order to ensure a high quality of decision-making.

The Committee believes that the discharge of this core function is well suited, and integral, to help the Benchers ensure that the processes and activities of the Law Society preserve and promote independence and effective self-governance of lawyers. The Committee noted that care should be taken in developing tribunal support to ensure that no conflicts develop. The Committee also commented that it was important to ensure that the policy priorities identified by the Benchers are clearly communicated to staff.

(f) Insurance

The Committee noted and debated whether the divergent interests of the Law Society as a whole and the Law Society operating through its insurance department posed any concern to the promotion and preservation of lawyer independence and effective self-governance of lawyers. The debate was not about any concern that the Committee has in the operation of the program as a stand-alone program. Rather, the issue of debate concerned the divergent interests and duties of the Law Society as a whole and the Law Society acting as an insurer of lawyers. Having noted that the incursions on lawyer independence and self-governance in other jurisdictions arose, at least in part, due to an apparent loss of public confidence that the regulating body was acting first and foremost in the public interest, the Committee considered whether the divergent duties of the Law Society as regulator and Law Society as insurer may pose such a risk in British Columbia.

The primary duty and responsibility of the Law Society through its insurance department is, at law, to the insured – lawyers. An insurer owes a duty of utmost good faith to its insured. The Law Society, through its insurance function, must therefore act in the best interest, first and foremost, of *lawyers*. Those interests may require it to take particular positions or make particular operational decisions to advance the interests of the lawyers to whom it owes its primary duty. The Law Society could, in fact, expose itself to a bad faith claim were it to breach its duty of utmost good faith to its insureds – for example, by allowing access to an insurance file for a purpose ulterior to the insurance policy, such as the enforcement of regulatory requirements against the insured.

The primary duty of the Law Society, as a whole, however, is to act in the interest of the *public at large*. As the Supreme Court of Canada said in *Finney*<sup>29</sup>:

The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public.

The Law Society's primary duty is therefore to act in the public interest. The ability to act in the interest of lawyers is a secondary duty, and may only be discharged where to do so is not inconsistent with the primary duty.

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<sup>29</sup> [2004] 2 S.C.R. 17 para 16.

While the carrying out of the Society's duty through its insurance department does not necessarily detract from the discharge of the Society's duty to act in the public interest, the Committee remarked that the *primary* duties of each diverge. In a dispute over policy objectives, the Law Society through its insurance department and the Law Society through its other programs could therefore be serving two different ends. One recent example was the debate by the Benchers in 2007 over non-representation clauses in settlement agreements.

An operational example of the divergent duties is demonstrated through the issue of how much information should be shared between the insurance department and the regulatory departments of the Law Society. The collection of information, including reports and claims, by an insurer about its insureds would ordinarily be confidential, and perhaps privileged, and the duty of good faith would require the insurer to keep this information confidential. On the other hand, the Law Society, collecting this information through one of its departments, may find such information to be helpful, or even necessary, in the discharge of its public interest functions, including (but not necessarily limited to) regulation. The Committee noted that this has been a long-standing issue, although one that does not appear to have been debated at a Bencher meeting. Most provinces maintain some varying degrees of confidentiality between the insurance program and the regulatory programs, although not all jurisdictions operate the insurance program as an in-house department of the law society. Alberta is the exception to the general practice. In that province, the benchers have debated the issue and resolved in favour of free and unlimited use and distribution of information between the insurance program and the law society.

The Committee observed that the April 9, 1999 Bencher minutes noted a concern that a policy of confidentiality prevents the Lawyers Insurance Fund from providing information to other departments of the Law Society. The Benchers requested staff to prepare a discussion paper on the issue. Although a draft report from staff was prepared, the issue has not ever subsequently returned to a meeting of the Benchers for discussion.

There are, on the other hand, also a number of benefits to operating lawyer insurance through a Law Society department. The efficient operation of the insurance program is in the public interest. It keeps the cost of insurance at a reasonable level, which means that lawyers are not forced out of business because their insurance is unaffordable.

Operating the insurance program as a Law Society department also allows a more direct connection with Law Society policy objectives. As a department of the Law Society, the insurance program can more easily be structured to meet such objectives. For example, the insurance department can respond to the needs of the profession *as well as* the public and can balance those needs – although, presumably, where there may be a conflict between lawyers' needs and those of the public, steps would have to be taken to ensure the public's needs assumed priority.

Further, the Law Society, through the insurance department, has instituted free insurance coverage for exempt, non-practising and retired members who provide legal services to approved pro bono services providers. A commercial program would be unlikely to institute such a program. Because the Law Society controls the insurance program, it can also expand the scope of coverage to meet the needs of the public and profession such as

Trust Protection Coverage for lawyer theft. Further, commercial insurance providers will not take the public interest into account in the settlement of individual claims,<sup>30</sup> nor will they deal with expanded coverages, as the Law Society, through its insurance department, is able to do.

The Benchers have also consistently maintained a policy that there is to be no “risk-rating” of lawyers. This means that the insurance premium per lawyer is the same no matter what area of law is practised by the lawyer. It is highly unlikely that a commercial insurance provider would operate in this fashion and certainly not at current premium levels. Enabling part-time members of the Law Society to purchase insurance at a significant reduction (50% the regular annual premium) is perhaps another example of the insurance program, operating through the Law Society, conducting itself in a manner that it is unlikely a commercial provider would be prepared to do.

In the end, the Committee decided to raise this issue in this Report for the Benchers’ consideration.

The Committee did not reach a conclusion as to whether the divergent duties between the insurance department and the Law Society as a whole posed a detrimental risk to preserving public confidence in the role of the Law Society as a self-regulator of lawyers acting in the public interest. The Committee noted, on the one hand, that there is a risk that the public would view the Law Society as preferring the interests of its members to the public interest or that the Law Society may expose itself to liability for failing to have acted in a regulatory sense in connection with information gathered through the insurance department but not disclosed to the regulatory departments. The Committee noted, on the other hand, that there is a risk that changes to the operation of the insurance program may effect its efficiency, such that, for example, members may be less inclined to make early reports to the insurer of possible losses if they believed the information may be shared with the regulatory departments of the Law Society. The Committee did not conclude whether one risk outweighed the other. Some members of the Committee, in fact, expressed the view that the efficient operation of the insurance functions through the current process was very much in the public interest.

The Committee agreed that the current operational results of the insurance program suggested it was well run, but it was noted that there is little, if any, information gathered that would assist the Law Society to demonstrate empirically how the insurance department discharged its mandate first and foremost in the public interest. Other members considered that because the issue has not been debated for some time (noting the outstanding April 1999 Bencher minute) and because the law concerning the obligations (and liability) of self-governing bodies has developed since 1992 when the current program was brought into existence<sup>31</sup>, the matter ought to be referred to the Benchers for their determination as to whether to engage in further analysis and debate.

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<sup>30</sup> *Quaere*, however, whether it is in the interests of insureds to have the insurance program assess the extraneous public interest in determining issues related to the defence or settlement of a claim against the insured.

<sup>31</sup> See, for example, *Finney v. Barreau du Québec* (supra), *McClelland v. Stewart* (2004) 31 BCLR (4th) 203 (C.A.); *Pharmascience Inc. v. Binet* [2006] 2 S.C.R. 513; *Hill v. Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41.

## Conclusion

In this Report, the Committee has only tried to describe the basic importance of lawyer independence by explaining how it is integral to the maintenance of the rule of law, and why it cannot therefore be ignored or abandoned. The Committee has also endeavoured to show how self-governance is necessary to effective lawyer independence. While other countries have compromised self-governance, it is a crucial element of lawyer independence, and needs to be maintained as a bulwark against state interference.

To meet public concerns, and to deal with the sentiment that lawyer independence is anti-democratic, the Law Society must be able to ensure that it can demonstrate clearly that, even though it is self-governing, it is acting first and foremost in the public interest. The Committee has therefore examined the main operations of the Law Society with this in mind.

There are, however, issues other than those identified above that can affect lawyer independence, such as the debate over expanding the ability of non-lawyers to provide legal services, the debate concerning access to justice, and ongoing debates about alternative structures, such as multi-disciplinary partnerships, through which legal services might be offered. The growing expansion of international legal practices and the negotiations concerning the international trade of legal services through the World Trade Organization also present issues that may affect effective self-regulation and the public's right to lawyer independence. The Committee has not addressed these in this Report, but urges the Law Society to keep them in mind in future debates.

For example, the debate over access to legal services presents a critically important issue. If no one can afford to retain a lawyer, there is not much point in having an independent legal profession to ensure that clients can obtain legal assistance from a lawyer who is free from fear of interference or sanction by the government. Ignoring, or addressing ineffectively, the concerns about the public's ability to access legal advice could therefore significantly affect the public right of lawyer independence.

The Committee therefore urges the Benchers to remain vigilant over the Society's mandate described in section 3(b)(ii) of the *Legal Profession Act*. A great public trust is placed on and in the Law Society to maintain a right that benefits the public interest but is not necessarily well understood or even appreciated by the public.