Law Society of Yukon

Status of Policy Paper since distribution to the membership in November 2011

The Policy Paper was distributed to the membership in November, 2011 for comments and feedback. On December 1, 2011, to facilitate this process a town hall meeting was held. Five lawyers and one articled student attended and asked a number of questions. In addition several emails were received containing further questions. The purpose of this response is to clarify the rationale outlined in the policy paper in relation to the specific issues raised by those members.

1. What is the duty owed by the Law Society and to whom?

We want to clarify that the duty owed to the public is not a fiduciary duty as was suggested at the December Town Hall meeting. That said this duty imposes a significant obligation on those mandated to implement the governing statute. The courts have repeatedly confirmed the obligation of Law Societies to ensure the public interest is the focus of their regulatory functions. The Supreme Court of Canada in *Pearlman v. Manitoba Law Society Judicial Committee* [1991] 2 S.C.R. 869 and *Barreau de Quebec v. Finney* [2004] SCC 36 describe the duty to the public as the core duty of Law Societies and the central pre-requisite of maintaining self-regulation.[See Appendix for excerpt from the judgments]

If the Law Society of Yukon cannot demonstrate that we can effectively regulate in the public interest, we risk increased or complete government involvement in our regulatory processes. Effective regulation of the legal profession means, among other things; ensuring professional standards are set and upheld; ensuring discipline processes are appropriately structured and fairly and effectively implemented; and ensuring the provision of competent legal services. At times, the individual interests of lawyers may conflict with the Law Society's requirements for an effective regulatory scheme that serves the public interest.

The concept of self-regulation has come under increasing scrutiny both within and outside of Canada. In England, as a result of a lack of confidence in the regulator's ability to regulate in the public interest, self-regulation of certain aspects of the legal profession has been replaced with a government oversight body. While this has not occurred in Canada, there has been increasing government involvement in the regulation of professions generally. For example, fair registration practices legislation has been introduced in Ontario, Manitoba and Nova Scotia, allowing government officials to monitor registration processes for all professions. Loss of independence would have implications for our ability to represent clients freely and ensure individual and democratic rights and civil liberties are protected.

The Policy Paper is consistent with both the statements from the Supreme Court of Canada regarding the role of the regulator of legal services, and the purposes or objects found in legislation governing Law Societies across Canada.

2. Why should the Executive be given the authority to approve the Rules under the new Act?

The Executive, not the members, has the mandate under the legislation to ensure that the public interest is fulfilled. The rationale for Executive approval, rather than membership approval for most of the Rules is based on the recognition that acting in the public interest can sometimes conflict with members' interests. For the reasons stated above, it is essential that the Law Society define the public interest and act to protect it, even when it may conflict with or be perceived to conflict with the interests of individual members or groups of members of the Law Society.

The role of the regulator of legal services to regulate in the public interest is distinct from the role of advocacy organizations for lawyers such as the Canadian Bar Association. Advocacy organizations' central role is to advocate, support and protect the interests of its members.

Executive approval of the Rules exclusively is used in eight other jurisdictions. In the ninth, BC, the Benchers have the authority to approve Rules, with certain limited exceptions, which require an affirmative vote of two thirds of members. The Law Society of BC has recently questioned this process, noting that membership approval of Rules raises difficult issues of conflicts of interest and may make it difficult for the Law Society to demonstrate that it is a regulator in the public interest rather than the members' interest.

Unlike the eight other Canadian jurisdictions that require only the approval of the Executive, the proposal in the Policy Paper requires membership approval of the Rules related to the process of election of the Executive, the term of office of the Executive and the removal of the Executive. Further, all other proposed Rules or amendments will require consultation with the membership before the Executive votes.

This balance is designed to avoid the potential for conflict of interest that may occur when members vote on Rules that may directly and adversely affect their own interests, economic or otherwise, but which nonetheless may be necessary in order to fulfill the mandate of regulating in the public interest, the protection of which is entrusted to the Executive, and not the members.

3. Why does the Policy paper talk about the potential to regulate notaries etc. and provide for the unbundling of legal services?

The Legal Profession Act has not been amended substantively since its introduction in 1985. We now have a window of opportunity to modernize the Act to reflect the changes in society and in the profession that have occurred over the last 27 years.

We do not know when this opportunity for legislative amendment will come again. In order to be able to respond to changes that may arise in the future, we are proposing that the legislation include enabling provisions to allow for the unbundling of legal services to permit limited retainers and ensure the Law Society is the entity authorized to regulate non-lawyers providing legal services, recognizing that it may not be acted upon for many years, if at all.

4. A member, responding to the Policy Paper asked: Given that the Yukon is unique in that the non-practicing members outnumber the private bar, why shouldn't any fundamental changes or additions to rules materially affecting the private practice of lawyers in Yukon require the approval by a majority of the private bar? The Executive understood the reference to "non- practicing members" to mean lawyers who are employees of government, corporations and other similar organizations.

As noted above the purpose of the Law Society is to act in the public interest, and not protect the interests of its members or certain groups of its members. The public interest role of a Law Society in relation to standards set by the Law Society was addressed by the Court of Appeal in Law Society of New Brunswick v. FCT Insurance Company, 2009 NBC 22, which held, among other things, that certain standards related to conveyancing adopted by the New Brunswick Law Society were adopted to protect the commercial interests of lawyers and were not in keeping with the public protection objectives of the governing statute. This case is a clear reminder of the paramount public interest role of the Law Society.

The approach in the Policy paper is that consultation with all of the members about proposed rules is essential and will be made mandatory before the Executive votes on any Rules. This process would ensure input from any and all members, so the Executive has full knowledge of the implications of any particular matter prior to the vote by the Executive.

The policy paper does propose limited membership approval of rules related to governance such as composition of Executive, terms of office and election matters.

The assumption in the question about the private bar is not correct. A review of current Law Society statistics shows that of a total membership of 294, 133 are resident and 161 are non-resident. Of the 133 resident members, 76 members are insured, indicating they are in private practice. Of the 161 non-resident members, 125 are insured, indicating private practice. Sixty-eight (68%) of the total members indicate they practice privately.

5. Why does the Policy Paper not set out detailed strategies for upholding the Rule of Law and supporting the independence of the Bar?

The proposals in the Policy Paper are intended in part to address the concerns that have led to government involvement in the regulation of the profession in Canada and other countries. The independence of the legal profession must be maintained in order to uphold the rule of law, as noted above from the excerpts from the Supreme Court of Canada decisions.

The purpose of the Policy Paper is to provide guidance to the legislative drafters for the preparation of a new statute. Once the new statute is in place, it will set the backdrop for the development of Rules. Then it is expected that the Executive will develop a plan to establish the strategic direction of the Law Society, followed by a business plan setting out detailed objectives. The governing statute is not the place to lay out detailed strategies for the achievement of the objectives of the governing body.

6. Why does the Policy Paper propose that the Law Society can infringe on solicitor-client privilege by accessing privileged information for its regulatory processes?

The Law Society agrees that solicitor-client privilege is vital to the relationship between lawyer and client and to the administration of justice. Yet courts have made it clear it is not an absolute right and have recognized certain limited exceptions to the privilege. One of those recognized exceptions is for the purpose of allowing a law society to carry out an investigation into a complaint against a member of the law society. In *Law Society of Saskatchewan v. EM & M Law Group* (2008), 300 D.L.R. (4th) 462, (Sask. C.A.) leave to appeal to S.C.C. refused, 302 D.L.R. (4th) vii, the Court of Appeal noted the significant responsibility of the Law Society to govern the legal profession and ensure the integrity of the lawyers. An important aspect of the regulatory regime was the positive obligation on the Law Society to investigate complaints against its members. In this case the governing statute authorized the Law Society to demand access to material subject to solicitor-client privilege, and the Court of Appeal confirmed the principle set out in *Descoteaux v. Mierszinwski* [1982] 1 S.C.R. 860 that the privilege should only be interfered with to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation. This limited the scope of the materials requested and the individuals to whom it would be disclosed.

The statutory exception to solicitor-client privilege also allows lawyers to defend themselves fully in responding to any complaint or disciplinary proceedings.

The legislation governing the majority of other Law Societies in Canada have clear statutory language requiring disclosure of solicitor-client privileged information for the investigation of a complaint or disciplinary matter. Most jurisdictions have also introduced statutory protection of the privileged material, to ensure it will not be disclosed or used in any other external processes, as has been proposed in the Policy Paper. This provides added protection in addition to the common law 'absolutely necessary' principle.

The proposal in the Policy Paper suggests the creation of an express provision allowing the Law Society to access privileged information for investigative purposes and a statutory privilege prohibiting the use of privileged information outside of the Society's own processes. This will protect privileged information from use external to the Law Society; allow the Society to perform its role of regulating in the public interest; and is consistent with the practices of the majority of Canadian Law Societies.

7. Should the new statute address the practice of law through limited liability partnerships?

The Policy Paper states on p. 81 that 'there is an increasing trend in Canada toward the use of LLPs as a structure for engaging in legal practice, and it is recommended that this should be recognized in the new statute'. Thus the Policy paper <u>does</u> propose and recommend that LLPs for the practice of law be recognized in the Yukon.

8. Does the Policy paper address the concern that institutions and others not located in the Yukon can register documents in the Yukon?

The Act governs who can practice law in the Yukon. Lawyers from outside the jurisdiction who are not authorized to practice law in the Yukon would be subject to the provisions dealing with the unauthorized practice of law.

9. Should the Law Society change its name of the new statute?

One of the comments received was that the "Law Society of Yukon' is an archaic name and contributes to the idea that it is a private club that serves to protect and not to regulate lawyers.

The Executive is open to suggestions for changes of names of the Law Society. Given the historical use of the name the Law Society of Yukon and the breadth of many of the other proposed amendments in the policy paper, there was a decision made not to engage in a discussion about a new name at this time. However, the Law Society is open to any suggestions for renaming.

10. With respect to proposal that all lawyers should contribute to the Special Fund, regardless of whether they are government lawyers or lawyers without trust property, one member stated that "it does not take into account the reality that some lawyers belong to a group whose clients will never make a claim". Why does the Policy Paper recommend that all lawyers should be required to pay into the Special Fund?

The position taken in the Policy Paper, that all practicing or active members pay into the Special Fund, is based on the obligation of the profession – not only the ones causing the risk to the public. All lawyers have an equal stake in the public interests and public protections offered by the Special Fund. Government and lawyers without trust property are still part of the profession, and are regulated by the Law Society, which has over-arching responsibilities to act in the public interest. Part of what makes lawyers unique as a profession is that the profession as a whole ensures that members of the public are properly compensated if they are victims of an unscrupulous or careless member of the profession. This benefits all members by enhancing the reputation of the entire legal profession.

In every other Canadian jurisdiction, all lawyers, regardless of the nature of their practice, contribute to a fund similar to our Special Fund.

11. What next?

After consideration of all comments received from the membership, the Executive will finalize the Policy Paper for forwarding to government. Thank you for your interest in the future of your Law Society.

APPENDIX

Specifically, in *Pearlman,* the Supreme Court of Canada said this:

> ***The authors [of a study paper produced by the Ministry of the Attorney General of Ontario entitled The Report of the Professional Organizations Committee (1980)] noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:***
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> ***Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.***
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> ***On this view, the self-governing status of the professions and of the legal profession in particular, was created in the public interest.***
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> ***This position has gained considerable judicial support. For example, in Attorney General of Canada v. Law Society of British Columbia, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, Estey J., who wrote for the Court, dealt directly with the self-regulating nature of the legal profession. He said (at pp. 335-36):***
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> ***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 general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community. [Emphasis added.]***

Similarly, in *Finney,* the Supreme Court wrote:

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 and to lawyers' own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession, which are then responsible for ensuring the competence and honesty of their members in their dealings with the public (see Fortin v. Chrétien, 2001 CSC 45 (CanLII), [2001] 2 S.C.R. 500, 2001 CSC 45, at paras. 11-18 and 52, per Gonthier J.).
