



**THE CANADIAN  
BAR ASSOCIATION**  
British Columbia Branch

## **CBABC Submission on Self-Regulation and LSBC**

Submitted to: **Harry Cayton**

Submitted by: **Canadian Bar Association, BC Branch**

Date: **October 25, 2021**

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## Canadian Bar Association, BC Branch

CBABC represents over 7,300 lawyers, students and judges in BC as a branch of the Canadian Bar Association (“CBA”), the largest national, legal professional association. Members of CBABC are dedicated to protecting the rule of law, the independence of the judiciary and the Bar, and improving laws, justice, legal systems and access to justice. We believe in equality, diversity and inclusiveness in the profession, in justice and in legal systems. We are committed to the process of reconciliation with Indigenous people.

Through a Board of Directors, 69 Sections, 20 committees and working groups, and member service programs, CBABC:

- improves and promotes the knowledge, skills, ethical standards and well-being of members of the legal profession;
- provides opportunities for members to connect and contribute to the legal community; and
- advocates on behalf of the profession based on members’ professional, front-line experience.

This submission draws on the expertise of representatives from the Professional Issues Committee. The members involved in this submission are volunteer lawyers from throughout BC:

Clare Jennings, Chair and President	Patricia Blair, Board Liaison
Joseph Cuenca	Jacob Kojfman
Eric Charles Ledding	Ann Tuck
Sybila Valdivieso	John Vamplew

CBABC Staff contributing to this submission include Jo-Anne Stark, Director of Advocacy, Kerry Simmons QC, Executive Director, and Rachel Barsky and Dustin Klaudt, Policy Lawyers.

## Executive Summary

The Law Society of BC (“LSBC”) is to be commended for its successes as the legal profession’s regulator. In an attempt to improve LSBC’s governance structure in meeting the Standards of Good Governance and ensure that it continues its role without government interference, CBABC offers the following recommendations which are set out in detail in the discussion that follows:

- i. Make a clear delineation of LSBC as the legal profession’s regulator;
- ii. Cease providing continuing professional development programming;
- iii. Cease granting awards to its membership;
- iv. Prepare to effectively supervise non-lawyers;
- v. Reduce the number of benchers;
- vi. Consider implementing a time gap between service on advocacy organizations and LSBC; and
- vii. Increase transparency in recruitment to committees and task force/working groups, and reconsider their make-up.

## **Background Information:**

### **A Self-Regulating Legal Profession**

As then-CBA President Susan McGrath wrote in her 2004 letter (referenced in the attached Appendix “A”) offering a Canadian perspective regarding issues raised by Sir David Clementi in his *Review of the Regulatory Framework for Legal Services in England and Wales*, the public interest requires lawyers to be subject to standards of competence and professional conduct and demands an objective regulatory structure to ensure lawyers observe these standards. At the same time, there is an over-arching public interest in ensuring the profession’s independence from the state.

To ensure independence from state inference, the legal profession must be self-regulating. In BC, self-regulation is accomplished through LSBC which is governed by elected “Benchers”, the majority of whom are senior lawyers. The provincial government appoints non-lawyers as “Appointed Benchers” and LSBC also appoints laypeople to its committees and disciplinary panels. This non-lawyer representation adds a different perspective which assist LSBC in being accountable to the public interest.

In CBABC’s view, independent and self-regulating legal professionals best safeguard the public interest. There must be a clear separation of powers between the legal profession and the government. A regulatory system that would diminish the independence of the legal profession by making it (or creating the perception that it is) subject to the control of government would seriously harm the role of lawyers in a democratic society. Lawyers owe a duty of undivided loyalty to their clients and do not serve as instruments of the state’s control or supervision of its citizens. Lawyers must act upon their clients’ interests, which may be diametrically opposed to the interests of the government (this is most apparent in criminal defence and constitutional law cases). Additionally, lawyers are officers of the Court. Further, having an independent bar is a prerequisite to an independent judiciary -- the weakening of one necessarily undermines

the other. Independence of the judiciary from the executive and legislative branches is a cornerstone of our system of government and by extension, of Canadian democracy itself. CBABC opposes any measure that would give Canadians the mistaken impression that the judicial branch answers to the legislative or executive branch.

Through LSBC, lawyers must be able to determine the standards of admission into the profession, establish standards and rules which govern members of the profession, and discipline individuals who fail to meet these standards. Independence requires the legal profession's freedom from governmental pressure in matters of access to the profession or of discipline. This principle was clearly articulated by G.D. Finlayson, Q.C.:

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 by 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 principle of freedom of the profession from interference, let alone control, by government.<sup>1</sup>

Finlayson continues:

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 government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with the government.

In *A.G. Canada v Law Society of British Columbia* [1982] 2 S.C.R. 308 at pp. 335-336, the Supreme Court of Canada (SCC) strongly affirmed the importance of an independent bar:

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 must, so far as by human ingenuity it can be so designed, be free from state

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<sup>1</sup> "Self-Government and the Legal Profession—Can it Continue?" (1985) 4 Advocate's Society Journal 11.

interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in the 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.

As held by Justice LeBel in *Finney v. Barreau du Quebec* [2004] 2 S.C.R. 36 at para. 1:

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.

The SCC cited the above cases and others in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, discussing the importance to the legal system of lawyers being free from government interference at paras. 97-103. The jurisprudence supports the position that the right and power to govern itself, free from interference, is an essential part of the independence of the legal profession.

### ***Legal Profession Act***

The *Legal Profession Act*, SBC 1998, c. 9<sup>2</sup> identifies the responsibility of LSBC under the provincial *Legal Profession Act* is to protect the public interest in the administration of justice in five areas:

1. preserving and protecting the rights and freedoms of all persons
2. ensuring the independence, integrity, honour and competence of lawyers,
3. establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
4. regulating the practice of law, and

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<sup>2</sup> [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/98009\\_01](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/98009_01)

5. supporting and assisting lawyers, articling students and lawyers of other jurisdictions who are permitted to practice law in British Columbia in fulfilling their duties in the practice of law.

LSBC works to ensure that the public is well served by a legal profession that is honourable, competent and independent. LSBC sets and enforces standards of professional conduct for lawyers in our province. LSBC also brings a voice to issues affecting the justice system and the delivery of legal services.

## **LSBC's Governance Structure**

What should LSBC's governance structure look like, in order to support the mandate of LSBC? Ideally, LSBC's governance structure will support the following standards of governance, based on the Standards of Good Governance developed by the Professional Standards Authority in consultation with regulatory boards in the UK, Canada and Australia:

1. The regulator has an effective process for identifying, assessing, escalating, and managing risk of harm, and this is communicated and reviewed on a regular basis by the board and senior staff.
2. The regulator has clear governance policies that provide a framework within which decisions can be made in line with its statutory responsibilities.
3. The regulator demonstrates a commitment to transparency in the way it conducts and reports on its work.
4. The regulator engages appropriately and effectively with the legal profession and the public.
5. The board sets strategic objectives for the organisation and monitors performance and outcomes against those objectives for the legal profession and the public.



6. The board takes account of equality, diversity, and inclusivity in its decision-making.
7. The board has appropriate and effective oversight of the operations of the organization.
8. The board works corporately, with an appropriate understanding of its role as a governing body and of members' individual responsibilities.

## **Improving LSBC's Governance Structure**

In reviewing LSBC's governance structure, CBABC determined that LSBC generally fares quite well in meeting the Standards of Good Governance. However, there are some aspects that could be improved upon. CBABC's priority in this consultation is to ensure that LSBC remains self-regulating to maintain the independence of the legal profession. In working towards this mission, CBABC endeavours to assist LSBC in alerting LSBC to potential problems in its governance structure and offers suggestions as to how to address these issues. As part of this discussion, we will set out our concerns regarding overlap between LSBC activities and those of CBABC. To meet the Standards of Good Governance, it is imperative that LSBC must act distinctly as a regulator and not veer into playing the role of an educator or an advocate.

## **CBABC – What We Do**

As much of our position is predicated on the need for distinction between the role of LSBC and the role of professional organizations, we provide this information about CBABC to provide background and context for our recommendations.

CBABC membership comprises 50% of the practicing lawyers in British Columbia as well as articling students, law students, academics and judges. It is largest association of lawyers in British Columbia and the only one which has a national headquarters and branches throughout Canada. Membership in CBA is voluntary and fees for articling student and lawyers range from \$174 to \$650 depending on practicing status and year of call. Fees are paid directly by members and/or their employers directly to CBA.

CBABC connects members to the people, knowledge and skills they need to successfully practice law. We do this through:

- a) Advocacy and professional initiatives within the legal profession;
- b) Learning and development; and
- c) Community building and support.

Our [Annual Report](#) highlights this work and what follows is a high-level overview most relevant to this submission with links to various sections of [www.cbabc.org](http://www.cbabc.org).

#### **i. Advocacy**

Through engagement with members and development by volunteers and staff, CBABC [advocates](#) in three primary areas.

First, CBABC makes recommendations to the provincial government for law reform and improvements to justice policy. The core example of this is [Agenda for Justice 2021](#), the 3<sup>rd</sup> quadrennial installment of recommendations to government which aligns with the provincial election cycle. These recommendations are based on the front-line experience of our members working with clients in many areas of law. It includes reforms for legal aid funding, increased investment to support the courts, and areas requiring legislative reform. The Agenda anchors CBABC government relations through a government's mandate. Additionally, CBABC members make specific recommendations in response to government consultations or upon member initiative based on changing circumstances. Recent examples of this include our submission on [Civil Jury Trials](#) and ["Who's Getting Left Behind"](#) regarding the impact of the digitization of the justice system on those without access to technological tools and expertise.

Second, CBABC liaises with the three levels of court in British Columbia and occasionally makes formal written submissions. Recently CBABC delivered ["Reforming Court Scheduling"](#) to the BC

Supreme Court to provide information about the impact of the current court scheduling system and offering members' suggestions for reform.

The third area of advocacy is with respect to the regulator, LSBC. Regular liaison meetings between the senior staff and the senior elected leadership of the respective organizations are supplemented by more formal submissions in response to consultations, or at the initiative of CBABC members. Topics include possible expansion of who is authorized to practice law, trans-competent training for instructors of LSBC *Professional Legal Training Course*, and the future needs of the legal profession.

## **ii. Learning and Development**

Members primarily engage with their association through [Sections](#), which are organized groups of members based on areas of practice or areas of common interest. CBABC has 69 Sections operating in BC and members can engage on a pan-Canadian level through 39 Sections. Through Sections, members develop substantive law and practice knowledge from speakers selected by members. In 2020-21, Sections collectively hosted 242 meetings. These meetings are included with the membership.

CBABC provides additional professional development opportunities in substantive law, lawyering skills, business and practice management, and professional responsibility and ethics. The majority of these are 90-120 minute short courses with CBABC staff developing content in co-ordination with speakers. Others are day-long conferences with the content organized by Sections. In 2020-21, we hosted over 4,000 people in 38 of these sessions. For members, these sessions are free or 50% of the non-member price.

CBABC's ethics courses are delivered in-person in communities outside of Vancouver, allowing for a workshop-style approach to discussing typical ethical situations. Usually delivered by a senior CBABC member and a local LSBC benchler, the course is periodically updated to reflect

emerging ethical issues as noted in LSBC's Discipline Digest, updates to the Code of Professional Conduct, and topics from the annual CBA-Federation of Law Societies of Canada Ethics Symposium.

All professional development through Sections or Professional Development sessions can be found [here](#).

Together with LSBC and law schools, CBABC is also a member of the [Continuing Legal Education Society of BC](#). Founded in 1976, CLEBC is an independent non-profit established by its member institutions to provide professional development and publications for lawyers. The Deputy Attorney General and 5 member organizations of CLEBC appoint the Board of Directors who govern the organization of 50 staff and extensive volunteer network of lawyers who contribute to over 50 publications and 80 educational sessions annually.

CBABC's professional development programming can be distinguished from that of CLEBC's in that CBABC's programming is primarily short course (1-2 hours) in contrast to full-day or multi-day CLEBC programming, and most of our 6 conferences are delivered in communities outside of Vancouver, rather than in Vancouver.

### **iii. Community Building and Support**

In addition to the connections developed through Sections, members have the opportunity to connect through CBABC committees, mentorship programs, and other initiatives.

More than 100 volunteers are appointed to CBABC committees whose mandates range from recommendations on programs and services to oversight of CBABC finances to development of advocacy submissions. CBABC offers its members an opportunity to collaborate with other lawyers and make a meaningful contribution to the legal profession and justice system outside of their day-to-day work duties.

CBABC operates mentorship programs for law students at each of the three BC law schools and hosts an annual mentorship reception for all participants. This provides a chance for mentors to give back to the next generation, learn about their experiences, and help connect law students to the people and knowledge they need for the next steps in their careers. Students can request matches based on area of practice or personal background. More than 300 matches are made very year. CBABC also operates the Women Lawyers Forum mentoring program with close to 100 matches each year. The Aboriginal Lawyers Forum hosts speed-mentoring with law students and also participates in LSBC Aboriginal Lawyers Mentoring Program.

The [Rural Education and Access to Lawyers](#) (“REAL”) initiative was established in 2009 to address the developing shortage of lawyers in rural and smaller communities throughout BC. The core program pairs second year law students with a law firm during their summer between second and third year law to discover small town practice. CBABC administers REAL and the majority of the funding from the Law Foundation of BC and Columbia Basin Trust is distributed to the law firms to pay the salaries of participating students. Fifty per cent of students participating receive an offer to return to articles and 35% of program participants remain in rural and small communities five years after admission to the bar. More than 120 students have been placed through REAL. LSBC contributed to the funding of REAL for seven years until 2017.

In 2018 in response to the Truth & Reconciliation Commission’s Calls to Action, CBABC established a [Reconciliation Action Plan](#) to guide its efforts to help more lawyers understand the experience of Indigenous people in residential schools, the multi-generational impact and legacy of those schools, and steps required for reconciliation. The plan addresses education, resources for law firms, advocacy for justice system changes, and indigenous lawyer participation and leadership within CBABC. The plan will be updated by spring 2022.

CBABC administers nine [awards](#) to the profession, three annual awards to Indigenous students, first year entrance scholarships at each law school through endowments administered by each school, and a scholarship program for Indigenous first year law students administered by [Indspire](#). The nine awards include:

- President's Medal
- Georges A Goyer, QC Award for Distinguished Service
- Harry Rankin, QC Pro Bono Award
- Community Supporter Award
- Innovation Award
- Equality & Diversity Award
- Aboriginal Lawyers Forum Special Contribution Award
- Women Lawyers Forum Award of Excellence
- Women Lawyers Forum Debra Van Ginkel, QC Mentoring Award

Other than the President's Medal, these awards are based on nominations from the membership. The awards are given to CBA members, except for the Goyer Award which may be given to any resident of British Columbia.

CBABC supports the continuing mental health of the profession in a number of ways, including promoting the work of the Lawyers Assistance Program. Our primary activities in this area are running our own professional development programming and social media campaigns.

#### **iv. CBABC Governance**

The Canadian Bar Association was established through a special act of Parliament in 1876. CBABC is a branch of CBA mandated to carry out the work of CBA in British Columbia, and it maintains [bylaws](#) and policies which align with CBA's bylaws and regulations. The most recent update to CBABC bylaws and governance structure occurred in February 2020.

CBABC's Board of Directors is comprised of 11 members:

President

Aboriginal Lawyers Forum Representative

First Vice-president	Equality & Diversity Committee Representative
Second Vice-president	Young Lawyers' Representative
Chair, Finance & Audit Committee	Directors at Large (4)

The overall composition of the Board must include at least one member from Victoria or Nanaimo Counties and one from the counties of Yale, Prince Rupert, Cariboo or Kootenay. Each director serves a one-year term and is eligible for re-election for a maximum of 3 years unless they move to the presidential ladder.

The majority of the Board is elected by Provincial Council with the Aboriginal Lawyers Forum and Equality & Diversity representatives being determined by those groups. The President reaches that position by first being elected as Second Vice-president and moving up in successive years.

The Board's responsibilities include approving a budget, appointing members to committees, setting policies, directing advocacy, and overseeing the Executive Director.

Provincial Council is an advisory body to the Board of Directors. Its composition includes the Board of Directors, 18 representatives elected from the Sections, 29 representatives elected from the 7 judicial counties, and the chairs of the Committees and Working Groups who are appointed by the Board of Directors. These members are joined by approximately 20 non-voting representatives of the legal community such as the law schools, Trial Lawyers Association of BC, LSBC, CLEBC and others, who are invited to meetings and engagement.

Council meets three times each year to receive presentations and discuss issues facing the profession such as legal education, truth & reconciliation, non-lawyer legal service providers, and innovations in legal practice. Results of discussions are then shared with Committees or the Board of Directors for further development of recommendations or submissions.

CBABC has 20 committees and working groups. Each has [terms of reference](#) and are populated through an open call for volunteers from the membership at large. The committees meet

virtually on a monthly or quarterly basis to fulfill their respective mandates. Each is supported by at least one member of the CBABC staff.

The operations of CBABC are led by the Executive Director who oversees a team of 20 full-time and 13 part-time employees and contractors.

## **Recommendations with respect to LSBC's Governance**

### **i. Make a Clear Delineation of LSBC as the Legal Profession's Regulator**

The roles of—and relationships between— LSBC and bodies which administer educational and social programming to the legal profession as well as bodies which advocate for their members and/or issues affecting the public must be delineated as clearly as possible. These bodies include CBABC as well as other organizations such as the Trial Lawyers' Association of BC, Continuing Legal Educational Society of BC, Vancouver Bar Association, The Advocates' Society, Federation of Asian Canadian Lawyers (BC), South Asian Bar Association (BC), Criminal Defence Lawyers Association, et cetera.

As we represent CBABC, we will focus on its relationship with LSBC. While LSBC conducts its regulatory and governance responsibilities with an overarching mandate of public protection, CBABC brings the perspective of lawyers in BC to both professional and public interest issues. As a professional association, CBABC's mandate is broader and distinct from LSBC's, and the scope of its activities are commensurately broad. While CBABC's ability to act and be perceived as an independent body benefits significantly from the independence and self-governance of lawyers, it carries on its activities separate and distinct from LSBC.

Maintaining distinction between the two organizations requires effort from both sides. For example, CBABC does not insert itself into issues of regulation of lawyers or discipline, except when acting as an advocate in respect of LSBC's policies or actions. Similarly, LSBC should consider whether its activities are acting to blur the distinction between itself and professional associations like CBABC. If the public or lawyers perceive that LSBC and CBABC are engaging in



similar activities, they may perceive them as playing similar roles, which could damage LSBC's position as an independent regulator.

## **ii. Cease Providing Educational Programming to its Members**

Part of LSBC's role is to administer the Continuing Professional Development (CPD) program through which BC lawyers must complete 12 hours of accredited CPD within each calendar year. In CBABC's view, it is within LSBC's purview to accredit the courses and activities completed by lawyers to adhere to the *Legal Professions Act*, however LSBC should not provide programming or courses itself. In other words, the role of LSBC is to provide quality control of the courses, rather than being the content provider.

As the legal profession's regulator, if LSBC provides programming, it runs the risk of implicitly guaranteeing a higher quality in its courses compared to courses in the marketplace (which may lead to a false sense of security among lawyers who think that if they complete LSBC's programming, they will not run afoul of LSBC's Rules), and a risk that the public may perceive LSBC as being more lenient in terms of disciplining lawyers who complete its programming. Further, if there are complaints or concerns about courses offered by LSBC, there is no impartial third-party to address them with, whereas with third-party CPD providers, attendees can raise their concerns with LSBC, as LSBC authorizes credits for third-party providers' programs. To avoid any such issues, it is best that LSBC focus its resources on actual regulatory activities (such as its Diversity Action Plan, for instance,<sup>3</sup> which furthers the sixth Standard of Good Governance) rather than course development and let lawyers enroll in CPD activities offered by the marketplace which have been reviewed and approved by LSBC.

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<sup>3</sup> See LSBC's website for details: <https://www.lawsociety.bc.ca/our-initiatives/equity-and-diversity/>

LSBC should reflect where grey areas may arise, such as whether LSBC should organize certain activities such as courses promoting good mental health in the legal profession and courses educating legal professionals as to the findings of the Truth and Reconciliation Commission and related matters. This is because the capacity of practitioners directly affects the quality of service they provide their clients and therefore the public interest, as does lawyers' understanding of Indigenous issues, for instance. However, in general we believe it is best that LSBC leave the provision of programming to other organizations including the Continuing Legal Education Society of BC, of which it is a governing member. It should set the standards and determine if education providers meet them when accrediting them.

### **iii. Cease Acting as an Advocate Beyond its Core Mandate**

LSBC is registered as a lobbyist with the Office of the Registrar of Lobbyists in British Columbia.<sup>4</sup> Lobbying or advocacy efforts beyond changes to the *Legal Profession Act* may interfere with LSBC's mandate to protect the public interest and should be left to bodies such as CBABC. There are certain circumstances in which it may be appropriate for LSBC to take a position on a particular issue, such as in *Law Society of British Columbia v. Trinity Western*, 2018 SCC 32, and its participation in the Cullen Commission. This is because these issues relate to protection of the public interest and regulatory matters, which falls under LSBC's mandate. LSBC should not take positions which advocate for lawyers' interests. An example of an issue LSBC is currently involved in which we are concerned may be outside its purview is its involvement in Bill 11/the Civil Resolution Tribunal (CRT) matter (the government's plan to increase the CRT's role in place of the courts with regards to the transition to the no-fault scheme concerning motor-vehicle accident victims). Other than matters falling under the auspice of protection of the public and

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<sup>4</sup> Online:  
<https://www.lobbyistsregistrar.bc.ca/app/secure/orl/lrs/do/clntSmmry?clientOrgCorpNumber=1945&sMdKy=>

regulating the legal profession, LSBC should leave lobbying and advocacy work to CBABC and others (TLABC, FAFL, et cetera).

#### **iv. Cease Granting Awards to its Membership**

Currently, LSBC grants 14 awards to recognize specific members in the profession. In our review into this issue, we focused on the Law Society Award (LSA); the [Equity, Diversity, and Inclusion Award](#) (EDIA);<sup>5</sup> the Excellence in Family Law Award (FLA); the Leadership in Legal Aid Award (LAA); the Pro Bono Award (PBA);<sup>6</sup> and the [Mark Andrews Excellence in Litigation Award](#) (ELA) (collectively the Reviewed Awards). Overall, there has been a stark proliferation in the number of awards in recent years, with at least nine of the current 14 awards being first awarded after 2013 (six of those – five being awards for LSBC members – first awarded after 2017).

We concluded that the following arguments exist against LSBC granting awards:

##### **(a) Conflict between serving the public's interests and LSBC/its members' interests**

LSBC's granting of awards appears to be a relic from days when regulators, acting like professional associations, focused on promoting the interests of the profession. This is seemingly a display of mission drift and shows an arguable conflict of interest between LSBC's objective to regulate and protect the public interest and the interests of its members in promoting the legal profession.<sup>7</sup>

The BC Government retained Harry Cayton in its recent review of the College of Dental Surgeons of BC (CDSBC) and other health regulators. In December, 2018, Mr. Cayton produced

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<sup>5</sup> Further information on the inception of this award and its full rationale is found in the [September 2020 LSBC Benchers Meeting Agenda](#) at 169 and 183. The EDIA is the only LSBC award that includes eligibility for non-LSBC members, where non-members advance EDI in the legal system.

<sup>6</sup> Further information on the inception of this award and its full rationale is found in the [July 2019 LSBC Benchers Meeting Agenda](#) at 290-291.

<sup>7</sup> Harry Cayton, "An Inquiry into the performance of the College of Dental Surgeons of British Columbia and the Health Professions Act" (December 2018), online: <<https://www2.gov.bc.ca/assets/gov/health/practitioner-pro/professional-regulation/cayton-report-college-of-dental-surgeons-2018.pdf>> at 8 (section 3.2) [Cayton Report].

the “Cayton Report” in which he states that the “level of accountability to and control by the members creates the persistent perception that the CDSBC exists for the benefit of dentists, that it is a club rather than a regulator and that volunteerism lies at its heart”.<sup>8</sup> In connection with this statement, the Cayton Report later implies that annual awards ceremonies reinforce this misperception of the regulator serving the profession’s interests.<sup>9</sup> The Cayton Report further goes on to highlight that the failure to address perceived conflicts undermines independence and reputation of public bodies.<sup>10</sup>

Though LSBC’s governance structure differs significantly from the CDSBC, the Cayton Report offers suggestions relevant to improving LSBC’s current structure. With regards to the CDSBC, the Cayton Report was also critical of the degree of connection between the Dentists’ College and its relevant dental professional association<sup>11</sup> and made recommendations on how to ensure a demarcation between the two groups.<sup>12</sup> It specifically criticized the fact that the professional association rewarded an elected CDSBC Board member who ran on a platform resisting a recommended regulatory change.<sup>13</sup> If that logic is applied to LSBC, the increased rewarding of LSBC members and the profession generally elevates the risk of perception of LSBC promoting members’ interests at the expense of the general public. This duplication of functions conventionally within the role of bar associations or other groups will only feed the public’s (and likely even some lawyers’) perceptions that LSBC is acting as a professional association and not as a regulator.

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Cayton, *supra* note 9 at 16 (section 3.33).

<sup>11</sup> Cayton, *supra* note 9 at 51 (section 5.21).

<sup>12</sup> Cayton Report, *supra* note 9 at 51-53 (sections 5.22, 5.26-5.28). The Cayton Report also challenges the mixing of financial interests of the professional association and CDSBC, as the CDSBC collects fees for and remits those subscription fees to the professional association automatically. The Cayton Report further recommended the severing of the financial interests by the phased-out stoppage of the automatic professional association subscription fee collection by the College. We are not aware of any such financial connection between the CBABC and LSBC. We also note that LSBC’s awards for students and journalists appear to be for the benefit of non-LSBC members and do not likely raise the same concerns.

<sup>13</sup> Cayton, *supra* note 9 at 51-52 (section 5.24).

There also exists the potential for actual or perceived conflicts with respect to awards potentially granted by patronage. A lay member of the public might view an award as an attempt to reward a law firm connected with a particular Bencher or decision-maker, undermining public confidence. The matter is further complicated by the continued listing of Life Benchers along with active serving Benchers. With more awards being awarded there will be expanding opportunity for some conflict (or perceived conflict) to arise with respect to the interest in giving an award to a recipient and their connection back to a Bencher. That Bencher might in some way materially benefit from the marketing, publicity, or reputational boon the award recipient receives. By way of illustration, a recent recipient of one *Reviewed Award* is the child of a listed Life Bencher. That on its own might not give way to a perceived conflict, but it illustrates a degree of connection that could lead to future concerns.

**(b) Reasonable apprehension of bias created in other decision-making functions**

Similarly, there is potential for perceived conflicts in the form of concerns about impartiality (a reasonable apprehension of bias) for LSBC in the discharge of its disciplinary functions over its members where those members are prior award winners. A member of the public filing a complaint against an award winner, having received LSBC's praise and condonation via a *Reviewed Award*, might meet the threshold test for reasonable apprehension of bias. Reasonable apprehension of bias occurs where "an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude [w]ould [...] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".<sup>14</sup>

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<sup>14</sup> *The Law Society of British Columbia v Pyper*, [2017 BCCA 113](#) at para 30 [*Pyper*] citing *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, [2015 SCC 25](#) at para 20 [*Yukon Francophone*]. See also, *Yukon Francophone, surpa* note 17 at para 26 citing *Wewaykum Indian Band v Canada*, [2003 SCC 45](#) at para 77 [*Wewaykum*] and *Cartwright v Rocky View County Subdivision and Development Appeal Board*, [2020 ABCA 408](#) at para 32 citing *Wewaykum*, *supra* note 18 at para 77.

It is not inconceivable that a delegate on an advisory committee who selects an award could later be empanelled in a disciplinary proceeding against an award recipient; if there are any mechanisms in place to avoid this, they're not apparent.<sup>15</sup> Even absent an individual being placed in this apparent position of conflict, the public might reasonably be concerned about the institution who has presented a lawyer with an award recognising their skills and quality as a lawyer then being the institution who is purporting to impartially investigate allegations of wrongdoing or incompetence of that same lawyer. This might rise to the standard of a past link or an expression of sentiment or an activity illustrating bias meeting the definition of reasonable apprehension of bias. This bias standard clearly applies to LSBC in its own decision-making and in judicial review of its decisions.<sup>16</sup>

**(c) No distinct or unique need or special LSBC expertise justifying Reviewed Awards**

A survey of the Reviewed Awards' inception dates, award criteria, and comparator awards reveals both a lack of need for these awards and a lack of special/sole expertise possessed by LSBC in the areas that would justify the continued granting of the awards.<sup>17</sup> Several of the Reviewed Awards have direct comparator awards focused on BC (LSA, EDIA, and PBA). Where there are gaps, there are other provincial or national awards on related topics (LAA, ELA). Only the FLA appears to have no direct comparator award. On the whole, the Reviewed Awards are not distinct or unique. For the awards lacking provincial direct comparators (LAA, ELA, FLA), even though LSBC's motives are noble in seeking to recognize practitioners in those areas, there is no reason why LSBC could not have requested (or even granted money for and delegated selection authority)<sup>18</sup> to other organizations to do so. LSBC appears to sponsor and delegate such authority for several other awards to law students and the public.

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<sup>15</sup> See, for instance, *Re Catherine Ann Sas, QC*, [2016 LSBC 3](#).

<sup>16</sup> *Pyper*, *supra* note 17 at paras 17 and 29-32.

<sup>17</sup> For more information about LSBC's awards, see its website: <https://www.lawsociety.bc.ca/about-us/awards-and-scholarships/>

<sup>18</sup> This assumes that designating money for such awards and delegating authority to select such awards does not contravene the many other principled reasons noted later in this memo for LSBC not granting awards.

LSBC lacks unique expertise in adjudicating these awards. In establishing the PBA, the Benchers acknowledged recently that there were several other similar awards and failed to articulate a case why the PBA was different or why LSBC should grant a similar award.<sup>19</sup> Some awards have been selected by the Benchers (LSA) and others by delegated advisory committees (EDIA, PBA) or unknown selectors (FLA, LAA, ELA), who have unknown expertise qualifying them to judge the Reviewed Awards). On September 24, 2021, a resolution was approved delegating authority for the selection of EDIA, PBA, FLA, LAA and ELA winners from the Benchers to the Executive Committee going forward. However, Bencher time and resources will still be spent reviewing proposals for any new awards or other forms of recognition after a first vetting by the Executive Committee.<sup>20</sup>

In conclusion, the benefit to the public from the Reviewed Awards is negligible at best. The benefit, if any, is largely for members of LSBC and the legal profession generally. Concerns about the lack of need, uniqueness, or LSBC special expertise justifying awards granting, the potential for conflicts or reasonable apprehension of bias, and the wasteful use of LSBC's regulatory resources (in a time of pronounced access to justice deficits), collectively favour LSBC ceasing to grant awards to its members.

**v. Prepare to Effectively Supervise Non-Lawyers**

New niches to provide and deliver legal services will become critical in the coming years in order to increase diversity and access to justice. It is predicted that lawyers will work with non-lawyers ( e.g. paralegals, online service providers and legal process outsourcers) in a triage-like approach, similar to how nurses and other healthcare practitioners work with medical doctors today. CBABC's position is that in order for the public to rely on these non-lawyers, effective supervision of these non-lawyers should be required by LSBC. LSBC's supervisory process must

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<sup>19</sup> *Supra* note 2 at 191.

<sup>20</sup> Sept. 24, 2021 Memo from the Executive Committee re: Law Awards Recognition, Selection and Approval Process.

be transparent and not conflict with or duplicate the efforts of other regulatory bodies. CBABC's fulsome views on this subject are set out in its March 31, 2020 submission to LSBC entitled "The Future of Legal Services, Legal Practices and the Legal Profession in British Columbia."<sup>21</sup>

In attempt to address the public's unmet legal needs, LSBC recently developed its "Innovation Sandbox" initiative which it describes as "a 'safe space' for those not currently authorized to provide legal services and for existing firms to test ideas in a controlled environment that are likely to benefit the public."<sup>22</sup> It appears that there are still some kinks to be worked out in the Innovation Sandbox. For instance, the standards used and applied by LSBC in approving participants are unclear to CBABC. Another example is LSBC's approval of paralegals working outside BC as participants in the Innovation Sandbox. Paralegals are not regulated in many provinces. Is LSBC undertaking supervision of these individuals and to what extent? Further, we note that LSBC has approved at least one paralegal in Ontario. This could be a conflict as paralegals in Ontario are already regulated by the Law Society of Ontario (LSO). Which body, then, regulates the work of Ontario paralegals approved by the Innovation Sandbox: the LSO or LSBC?

LSBC appears to have focused on furthering access to justice in creating the Innovation Sandbox. It is integral that LSBC consider its mandate—protection of the public—as well. After a proposal is approved, there is no apparent oversight as to whether participants comply with the limitations of their original proposal, or of the quality of service they are providing. There must be a consideration of how unauthorized practice which may be unsupervised reconciles with protection of the public.

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<sup>21</sup> Available online: <https://www.cbabc.org/CMSPages/GetFile.aspx?guid=92f9d62d-aa24-42c8-ac84-26a39f70c5b9>. See also, Cromwell & Antsis, supra note 24.

<sup>22</sup> LSBC. *Innovation Sandbox*. (2021). Online: <https://www.lawsociety.bc.ca/our-initiatives/innovation-sandbox/>



The governance of the Innovation Sandbox does not seem to meet the requirements of transparency in the Standards of Good Governance.

**vi. Reduce the Number of Benchers**

Modern principles of good governance favour a board of directors that is of reasonable size to allow for sufficient deliberation of the issues before it in a timely manner and reflects the diverse demographics of its membership.

A board of over 30 does not seem to meet the first requirement of having a reasonable size to ensure sufficient and timely deliberation. This is apparent at any benchers meeting where only a few speak, and there is pressure to conclude a discussion without robust deliberation. CBABC recommends consideration be given to a board of 15 including three Appointed Benchers.

It is important to emphasize that a high-functioning board will be supported by robust consultation, data-gathering and information-sharing mechanisms that will enable it to make informed decisions. Only with these mechanisms can a board avoid the bias towards decision-making that reflects one's own perspective and experience. With such mechanisms, a small board will thrive in its duties, confident that all perspectives are considered and that those perspectives don't necessarily need to be at the table. In today's legal practice environment of specialization, it is nearly impossible to achieve representation of all practice areas.

Much has been made recently of the merits of a "skills-based" board, and care is taken to identify required skills, attempt recruitment for those skills, and balance elections and appointments to achieve a Board with those overall skills. In 2017 the CBA at its national level introduced a system which sought to balance diversity and skills through a recommended slate and election process. That structure is now under a pre-planned review.

CBABC has found that the skills required of a Board can be reduced to these essentials: the ability to listen, to consider differing perspective, to understand and act in keeping with principles of good governance, and to make decisions. Very similar to what one expects of a

judge. Recommendations of experts in different areas combined with the robust consultation, data gathering and information-sharing referred to above, can support effective governance.

**vii. Consider Implementing a Time Gap Between Service on Advocacy Organizations and LSBC**

The Cayton Report is critical of the tendency of members of the Board of the professional associations moving to becoming members of the Board of the regulatory body in quick succession.<sup>23</sup> The report recommended a three-year time gap before professional association Board members become eligible stand for election and serve as CDSBC Board members. We note that no such restriction appears to exist with respect to the CBABC or other advocacy organizations, and LSBC. Several past CBABC Board members have stood for election and served as Benchers less than three years after serving on the CBABC Board. Given the existing distinctions between the roles of CBABC and LSBC, CBABC does not believe such a restriction is necessary for LSBC. However, given the need to ensure clear delineation of roles and relationships between LSBC and professional organizations, we recommend that LSBC analyze this issue and either produce a clear statement setting out why there is no need for such restriction, or consider implementing a restriction.

**viii. Increase Transparency in Recruitment to Committees and Task Force/Working Group Members and Reconsider their Makeup**

Currently, there is a lack of transparency as to how LSBC appoints individuals to its committees and task forces/working groups. The names of Benchers and lawyers on certain committees, task forces and working groups are listed on LSBC's website<sup>24</sup>, however there is no indication as to how these individuals are selected. The lack of transparency could give rise to concerns that individuals are being hand-picked by members' inner circles. If the members of committees,

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<sup>23</sup> Cayton Report, section 7.1(2).

<sup>24</sup> Online, <https://www.lawsociety.bc.ca/about-us/committees-and-task-forces/>

task forces and working groups tend to be individuals who are familiar to one another, this does not serve the public interest as it can lead to a lack of equality, diversity, and inclusivity in the composition of these groups (the sixth Standard of Good Governance) and thus in LSBC's decision-making. LSBC should make its selection processes for its committees, task forces and working groups public. LSBC may also wish to reconsider how it recruits members to these bodies.

## Conclusion

LSBC has a very important role to play with respect to the protection of the public and the regulation of those authorized to provide legal services in British Columbia. The recommendations of CBABC are intended to focus attention on this mandate, and to ensure that time and resources are properly allocated by LSBC to furthering its mandate in the regulation of the legal profession. CBABC, along with other associations and education providers, have a mandate to serve the legal profession in advocacy initiatives and/or the provision of professional development programming that meets requirements established by LSBC. Consequently, the recommendations provided herein are intended to ensure the separation of these roles so that organizations associated with the legal profession can ensure good governance standards are maintained while retaining a clear focus on those mandates. CBABC believes it is vitally important for the legal profession to self-regulate and that LSBC cannot tolerate governmental interference in its governance structure and activities.

**APPENDIX "A"**



April 18, 2005

Lord Falconer of Thoroton, P.C., Q.C.  
Secretary of State for Constitutional Affairs and Lord Chancellor  
Selborne House  
54 Victoria Street  
London SW1E 6QW  
United Kingdom

Dear Lord Falconer:

**Re: Review of the Regulatory Framework for Legal Services in England and Wales**

I am writing as President of the Canadian Bar Association (CBA), to offer a Canadian perspective on Sir David Clementi's recent *Review of the Regulatory Framework for Legal Services in England and Wales*.

The CBA is a professional, voluntary organization, formed in 1896, and incorporated by an Act of Parliament in 1921. The CBA represents lawyers, judges, notaries, law teachers and law students from all Canada's provinces and territories. Approximately two-thirds of all practising lawyers in Canada are members of the CBA.

In the Canadian context, the CBA is distinguished from provincial and territorial law societies. Each law society is responsible for the regulation of the legal profession in its respective jurisdiction. The law societies conduct their regulatory and governance responsibilities with an over-arching mandate of public protection. The CBA brings the perspective of lawyers to both professional and public interest issues.

In December 2004, we wrote to Sir David:

- i. to emphasize the paramount importance of the preservation of the independence of the legal profession in democratic societies; and
- ii. to share our experiences in Canada with respect to alternate business structures, such as multi-disciplinary practices.

A copy of our letter to Sir David is attached for your ease of reference.

The CBA has followed the debate on the reform of legal services in England and Wales with a great deal of interest. Canada's legal culture has strong historical ties with and is influenced by that of the United Kingdom. The United Kingdom is also a principal player



in the international legal community. Any reforms in England and Wales will extend beyond your borders and influence the governance models of law societies around the world.

Many of the unique characteristics of the profession – the doctrine of privilege most notably – flow from the lawyer’s fundamental role as the intermediary between the citizen and the law. These characteristics are not simply rules laid down by a professional body. Rather, they have evolved in light of the lawyer’s unique function in relation to the citizen as interpreter of the law, legal advisor and representative in the face of the institutions of the state. The characteristics and the principles they are based on have evolved over centuries to ensure both the fairness and effectiveness of the legal system. We are heartened to note that in your statement of March 21, 2005, you indicated:

We will not jeopardise the integrity of the system – we will preserve what we do well.

Indeed, there is much that we do well as a legal profession. Sir David’s report acknowledged that the current system has produced “a strong and independently minded profession, operating in most cases to high standards, able to compete successfully internationally” and recommended that, rather than “starting from scratch”, reforms build on the current model.

The legal profession in Canada (and many other jurisdictions) is both regulated and self-governing. On the one hand, the public interest requires lawyers to be subject to standards of competence and professional conduct and demands an objective regulatory structure to ensure lawyers observe these standards. On the other hand, there is an over-arching public interest in ensuring the profession’s independence from the state.

To ensure independence from state interference, the legal profession must be self-regulating. In Canada, self-regulation is accomplished through the provincial and territorial law societies which are governed by elected “benchers”, the majority of whom are senior lawyers. As well, most of the law societies do appoint lay members to their governing bodies and also to their disciplinary panels. This lay representation adds a level of scrutiny that assists in the law societies being accountable to the public interest.

The experience in Canada has been that independent and self-regulating legal professionals best safeguard the public interest. A regulatory system that would diminish the independence of the legal profession by making it (or creating the perception that it is) subject to the control of government would seriously harm the role of lawyers in a democratic society. Lawyers owe a duty of undivided loyalty to their clients and do not serve as instruments of the state’s control or supervision of its citizens. Furthermore, lawyers are not merely professional service providers, but also hold a public office as Officers of the Court.



Lawyers, through the law societies, must be able to determine the standards of admission into the profession, establish standards and rules which govern members of the profession, and discipline those who fail to meet these standards. Independence requires the profession's freedom from governmental or international pressure in matters of access to the profession or of discipline.

The CBA's view is that law societies need to be given a wide berth in regulating the profession. The CBA urges caution in any proposal for regulatory reform which impinges on the independence of the legal profession, and which may ultimately have implications for the legal profession far beyond England and Wales.

We appreciate the opportunity to provide our views and look forward to further dialogue on these issues as your government unveils its detailed measures on legal services reform.

Yours truly,

Susan T. McGrath

Encls

- cc: Janet Paraskeva, Chief Executive, Law Society of England and Wales
- cc: Edward Nally, President, Law Society of England and Wales
- cc: Guy Mansfield Q.C., Chairman, Bar Council, United Kingdom
- cc: David Hobart, Chief Executive, Bar Council, United Kingdom





December 6, 2004

Mrs. Susan Samuel  
Review of the Regulatory Framework for Legal Services  
2nd floor  
Selborne House  
54-60 Victoria Street  
London SW1E 6QW  
United Kingdom

Dear Mrs. Samuel:

**Re: Review of the Regulatory Framework for Legal Services in England and Wales**

I am writing as President of the Canadian Bar Association (CBA), to offer a Canadian perspective on the issues raised by Sir David Clementi in his *Review of the Regulatory Framework for Legal Services in England and Wales*. Our purpose in commenting at this time is two-fold:

- to emphasise the paramount importance of the preservation of the independence of the legal profession in democratic societies; and
- to share our experiences in Canada with respect to alternate business structures, such as multi-disciplinary practices.

**I. The Profession in Canada — CBA and Law Societies**

The CBA is a professional, voluntary organization, formed in 1896, and incorporated by an Act of Parliament in 1921. The CBA represents over 40,000 lawyers, judges, notaries, law teachers and law students from all Canada's provinces and territories. Approximately two-thirds of all practising lawyers in Canada are members of the CBA.

The CBA is the voice of the Canadian legal profession. The objectives of the CBA include improvement of the law and the administration of justice, promotion of fair justice systems and effective law reform, and protection and promotion of the rule of law and the independence of the legal profession.

In the Canadian context, the CBA is distinguished from provincial and territorial law societies. Each law society is responsible for the regulation of the legal profession in its respective

jurisdiction. The law societies conduct their regulatory and governance responsibilities with an overarching mandate of public protection. The CBA brings the perspective of lawyers to both professional and public interest issues.

## II. Independence of the Legal Profession

### (i) Independence and Self-regulation

The CBA's goals and objectives, as set out in its mission statement, include improvement of the administration of justice by preserving the independence of the legal profession and judiciary. In our view, any reform of the regulatory framework for legal services in a democratic society must preserve the independence of the legal profession, including the right to self-regulation. LeBel J. articulated this right in a recent Supreme Court of Canada decision:<sup>1</sup>

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.<sup>2</sup>

In *A.G. Canada v Law Society of British Columbia*,<sup>3</sup> the Supreme Court of Canada also strongly affirmed the importance of an independent bar:

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.<sup>4</sup>

This right and power to govern itself, free from interference, is an essential part of the independence of the legal profession. The right to self-governance in the legal profession "...means something qualitatively different from what it means for members of other professions. In the legal profession the right of self-governance is at the heart of the independence of the bar."<sup>5</sup>

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<sup>1</sup> *Fimney v. Barreau du Québec* [2004] 2 S.C.R. 36.

<sup>2</sup> *Ibid.* at para. 1.

<sup>3</sup> [1982] 2 S.C.R. 308, per Estey, J.

<sup>4</sup> *Supra* note 3 at 335-36.

<sup>5</sup> G. Mackenzie, "Lawyer Discipline and the Independence of the Bar: Can Lawyers still Govern Themselves?" (1990) 24 *Gazette* 319 at 320.

One of the most important functions of a lawyer is the role in representing clients in their various interactions with government. A lawyer's ability to serve their clients effectively must be free from the interference of the government:

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 by the state. The protection of rights has been an 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 principle of freedom of the profession from interference, let alone control, by government.<sup>6</sup>

The existence of a strong and independent bar is essential to the proper administration of justice and to the effective practice of law. It depends upon lawyers maintaining the highest possible standards of integrity, competence and loyalty. These standards are reflected in the model *Code of Professional Conduct* enacted by the CBA. Chapter IV of the CBA Code provides:

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.

Similar standards are reflected in the Canadian provincial and territorial law society codes, and are rigorously enforced by the respective law societies LeBel J., recognized that the independence of the bar created reciprocal responsibilities for the profession:

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.<sup>7</sup>

The Supreme Court of Canada also recognized that breaches of this supervisory duty by the law societies in Canada "are indeed rare."<sup>8</sup> As well, most of the law societies do appoint lay-members to their governing bodies and also to their disciplinary panels. This lay representation adds a level of scrutiny that assists in the law societies being accountable to the public interest.

As part of its role of protecting the independence of the profession, the CBA has consistently expressed its concerns to government about the effects of proposed legislation upon the solicitor/client relationship. Of particular concern to the CBA are mandatory reporting provisions that require legal counsel to report confidential client information, in conflict with legal, professional and ethical obligations. The CBA has challenged the applicability of such

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<sup>6</sup> G.D. Finlayson, Q.C., "Self-Government and the Legal Profession-Can it Continue?" (1985) 4 Advocate's Society Journal 11.

<sup>7</sup> *Supra* note 1 at para. 1.

<sup>8</sup> *Ibid.* The court acknowledging that a breach had arisen in the context of that particular case.

legislation to lawyers. In several cases, the Supreme Court of Canada has granted intervener status to the CBA on the issue of solicitor/client privilege.<sup>9</sup>

One of the benefits of having a strong and independent legal profession is its ability to also take stands on matters of public interest. The CBA undertakes interventions in cases where it can make a significant contribution to the consideration of matters of compelling public interest. Some of our more notable interventions in the public interest include: tax treatment of childcare expenses; access to legal aid; voting rights and refugee deportation<sup>10</sup>. Many of these matters involve interactions between various levels of government and individual(s). In these circumstances, the independent role of the individual lawyer or the CBA would be greatly diminished if it were perceived as being subject to interference or control from government.

The CBA considers that having an independent bar is a prerequisite to an independent judiciary and the weakening of one necessarily undermines the other. The CBA has an historic commitment to preserve the independence of the judiciary. The CBA has consistently spoken out in defense of judicial independence in the face of unfair public criticism, and on government initiatives on judicial salaries.<sup>11</sup> In the CBA's submission to a Canadian Parliamentary committee reviewing the *Supreme Court of Canada Appointment Process*, we said independence of the judiciary from the executive and legislative branches is a cornerstone of our system of government and, by extension, of Canadian democracy itself.<sup>12</sup> We expressed our opposition to any measure that would give to Canadians the mistaken impression that the judicial branch answers to the legislative or executive branch. The CBA submits the same argument applies in ensuring that the legal profession is truly independent.

## (ii) Implications of an Independent Bar

The experience in Canada has been that independent and self-regulating legal professionals best safeguard the public interest. A regulatory system that would diminish the independence of the legal profession by making it (or creating the perception that it is) subject to the control of government would seriously harm the role of lawyers in a democratic society. In the words of Finlayson:

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<sup>9</sup> *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3 (wiretapping lawyers' conversations); *R. v. Fink*, [2002] 3 S.C.R. 209 (law office searches); *Maranda v. Richer*, [2003] 3 S.C.R. 193 (scope of information protected by solicitor-client privilege); *City of Montreal v. La Société d'énergie Foster Wheeler Ltée* (2004 SCJ 18) (nature of advice protected by solicitor-client privilege).

<sup>10</sup> *Symes v. Canada*, [1993] 4 S.C.R. 695 (tax treatment of childcare expenses); *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 (access to legal aid); *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 (immigration consultants); *Suresh v. Minister of Citizenship and Immigration*, [2002] 1 S.C.R. 3 (refugee deportation); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (prisoners' voting rights).

<sup>11</sup> In 1996, the CBA intervened in the Supreme Court of Canada in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* (PEI Reference) [1997] 3 S.C.R. 3. Recently, the CBA appeared in the Supreme Court of Canada as intervener, where we were principally concerned to see that judicial financial security was protected as part of the conditions of judicial independence. See *Ontario Judges Association v Her Majesty The Queen in Right of the Province of Ontario*: Court File Number 30148. The Supreme Court of Canada has not handed down a decision on this matter heard on November 9 and 10, 2004.

<sup>12</sup> In a March 2004 submission to the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness: [http://www.cba.org/CBA/submissions/main/04\\_10\\_03.asp](http://www.cba.org/CBA/submissions/main/04_10_03.asp).

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 government. It is imperative that the public have a perception of the legal profession as entirely separate from and independent of government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with government.<sup>13</sup>

The CBA urges caution in any proposal for regulatory reform which impinges on the independence of the legal profession, and which may ultimately have implications for the legal profession far beyond England and Wales.

### **III. CBA's Position on Multi-Disciplinary Practices**

In Canada, lawyers admitted to the profession are entitled to undertake both solicitor and barrister work. The exception is in the province of Quebec, where the legal profession is comprised of lawyers and notaries governed respectively by the Barreau du Québec and the Chambre des notaires. For most Canadian lawyers, therefore, the proposals on Legal Disciplinary Practices (LDPs), which would bring lawyers from different disciplines together, is not in issue. The CBA's comments are, therefore, confined to the proposals for the development of alternative business structures. We will comment on the further dimension of the LDPs, that of ownership of the business separate from those who run it, in the context of CBA's position on multi-disciplinary practices (MDPs).

In 1997, the CBA established a committee whose mandate included recommending a policy framework on multi-disciplinary practices (MDPs) that offer legal services to the public. The CBA defined MDPs as:

business arrangements in which lawyers and non-lawyers practice together to provide a broad range of advice, including legal advice, to consumers, and which encompass a variety of forms, from highly integrated organizations with lawyers and non-lawyers working under one ownership structure to loose referral networks.<sup>14</sup>

In August 2000 and February 2001, the CBA Council, our highest decision making body, adopted resolutions endorsing MDPs. These resolutions were adopted after extensive study and consultation within the CBA membership and the profession generally. The debate focused on the initial question, whether MDPs should be allowed at all, and on two issues which were the subject of amendments:

- whether MDPs should be regulated as an entity and thus required to obtain a license as a precondition of delivering legal services; and
- whether MDPs should be controlled by lawyers.

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<sup>13</sup> *Supra* note 6.

<sup>14</sup> CBA Resolution 00-03-A.

The proponents of licensing believed that it was necessary to ensure an MDP's compliance with the core values of the legal profession, including confidentiality and the avoidance of conflicts of interest. Large MDPs would be centrally managed, as opposed to being managed by individual lawyers. The systems developed by MDPs to preserve the core values should therefore be subject to the authority of the law society. Further, individual lawyers in large MDPs might lack the influence to ensure that those MDPs adhere to the core values. To ensure an effective remedy for breaches of the core values, law societies needed adequate control over the entire organization.

The opponents of licensing of MDPs believe that it is more effective for law societies to regulate individual lawyers, as opposed to the MDP entity. Law societies have always regulated individual lawyers, as opposed to the organizations in which they practice. In-house counsel already respect the core values without law societies controlling the companies for which they work. When there are problems, law societies will have an easier time regulating individual lawyers than they would regulating large MDPs. Allowing regulation at the MDP level might mean that these organizations' non-lawyer members would demand a say in the operation of law societies, or in the MDPs delivery of legal services.

The resolution adopted by the CBA calls for the delivery of legal services by MDPs to be effectively controlled by lawyers.<sup>15</sup> A lawyer or lawyers should only be permitted to practice in an MDP if the lawyer or lawyers have effective control over the practice and business of the MDP. Effective control means that the lawyer or lawyers in an MDP can, by way of a partnership agreement or other contractual arrangement governing the relationship of the lawyer(s) and the non-lawyer(s) within the MDP, ensure continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession.

On the control issue, CBA Council debated at length the issue of lawyer control over the entire MDP organization. There was strong concern that the core values of the profession would not be protected without lawyer control over the entire MDP. CBA Council resolved that the protection of the core values of the profession was paramount.<sup>16</sup> These core values of the legal profession include:

- respect for the confidentiality of client information;
- protection of solicitor-client privilege;
- avoidance of conflicts of interest;
- independence of the legal profession;
- avoidance of the unauthorized practice of law; and
- the duty of loyalty to the client.

The CBA resolution also calls on Canadian law societies to develop rules that ensure the necessary structures and precautions are in place within each form of MDP to ensure continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession. Such rules would ensure that lawyers do not practice in MDPs with other service providers having conflicting ethical responsibilities. For example, when a lawyer or lawyers and an accountant or accountants practice together in an

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<sup>15</sup> CBA Resolution 01-01-M.

<sup>16</sup> *Ibid.*

MDP, the contractual agreement governing the relationship shall provide that the accountant(s) shall not provide audit services to any client of the MDP given the clear conflict between the auditor's disclosure obligations and the lawyer's duty to protect client confidentiality and to maintain solicitor-client privilege.

The CBA resolution also seeks to preserve solicitor client confidentiality by requiring lawyers practicing in MDPs to ensure that the necessary systems are in place to maintain the secrecy and confidentiality of a client's affairs and documents when others in the firm may be subject to statutory or regulatory disclosure obligations.

We attach copies of the relevant CBA resolutions on MDPs for your information and reference.

Thank you for the opportunity to provide our comments. We trust that the Canadian perspective will offer some guidance in your deliberations and we hope to comment further upon review of your final report.

Yours truly,

A handwritten signature in black ink, appearing to read "Susan T. McGrath". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Susan T. McGrath

Encls/

1. CBA Resolution 01-01-M
2. CBA Resolution 00-03-A

## **Multi-Disciplinary Practices (MDPs)**

**WHEREAS** CBA Council adopted resolution 00-03-A concerning MDPs at the 2000 Annual Meeting in Halifax;

**WHEREAS** there continues to be concern about the element of control by lawyers in MDPs in order to protect the core values of the legal profession;

**WHEREAS** there is also concern about the ability of sole practitioners and small firms to enter into MDPs;

### **BE IT RESOLVED THAT:**

1. Paragraph 1 of resolution 00-03-A be deleted and replaced with:

“1.a. A lawyer or lawyers should only be permitted to practice in an MDP if the lawyer or lawyers have effective control, as defined below, over the practice and business of the MDP. “Effective control” means that the lawyer or lawyers in an MDP can, by way of a partnership agreement or other contractual arrangement

## **Cabinets multidisciplinaires (CMD)**

**ATTENDU QUE** le Conseil de L'ABC a adopté la résolution 00-03-A concernant les CMD lors de l'Assemblée annuelle 2000 à Halifax;

**ATTENDU QUE** la question du contrôle que les juristes devraient exercer sur les CMD pour protéger les principes fondamentaux de la profession juridique demeure problématique;

**ATTENDU QUE** le problème se pose également au sujet de la capacité des juristes autonomes et des petits cabinets juridiques à intégrer les CMD;

### **QU'IL SOIT RÉSOLU QUE :**

1. le paragraphe 1 de la résolution 00-03-A soit abrogé et remplacé par le suivant :

«1.a. Un(e) ou des juristes ne soient autorisés à exercer dans le cadre d'un CMD que si le ou les juristes exercent un véritable contrôle, tel que défini ci-dessous, sur la pratique et les affaires du CMD. « Un contrôle véritable » signifie que le ou les juristes peuvent, au sein du CMD, par l'entremise d'un contrat de société ou toute autre entente contractuelle



governing the relationship of the lawyer(s) and the non-lawyer(s) within the MDP, ensure continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession.

- b. The core values of the legal profession include:
- respect for the confidentiality of client information;
  - protection of solicitor-client privilege;
  - avoidance of conflicts of interest;
  - independence of the legal profession;
  - avoidance of the unauthorized practice of law;
  - the duty of loyalty to the client.
- c. The partnership agreement or other contractual arrangement between the lawyer(s) and the non-lawyer(s) within the MDP must comply with the requirements of the relevant law society.”

régissant les relations entre juristes et non-juristes au sein du CMD, veiller au respect continu des principes fondamentaux, des obligations éthiques et légales et des normes et règles de conduite professionnelle applicables à la profession juridique.

- b. Les principes fondamentaux de la profession juridique comprennent :
- le respect du caractère confidentiel des renseignements fournis par la clientèle;
  - la protection du secret professionnel;
  - l'exclusion des conflits d'intérêts;
  - l'indépendance de la profession juridique;
  - l'exclusion de la pratique du droit non autorisée;
  - l'obligation de loyauté envers la clientèle.
- c. Le contrat de société ou toute autre entente contractuelle conclu entre les juristes et les non-juristes du CMD doit se conformer aux exigences et obligations prescrites par le barreau compétent. »

2. Paragraph 5 of resolution 00-03-A be deleted and replaced with:
- “5. “Law societies should develop rules for:
- a. ensuring that the necessary structures and precautions are in place within each form of MDP to ensure continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession;
  - b. ensuring that lawyers do not practice in MDPs with other service providers having conflicting ethical responsibilities. For example, when a lawyer or lawyers and an accountant or accountants practice together in an MDP, the contractual agreement governing the relationship shall provide that the accountant(s) shall not provide audit services to any client of the MDP given the clear conflict between the auditor’s disclosure obligations and the lawyer’s duty to protect client confidentiality and to maintain solicitor-client privilege;

2. Le paragraphe 5 de la résolution 00-03-A soit abrogé et remplacé par :
- «5. « Les barreaux élaborent des règles afin de :
- a. Veiller à ce que chaque type de CMD adopte les structures et les mesures de précaution nécessaires au respect continu des principes fondamentaux, des impératifs déontologiques et légaux, et des normes et règles de conduite professionnelle propres à la profession juridique;
  - b. Éviter que les juristes exercent dans un CMD avec d’autres pourvoyeurs de services dont les responsabilités entreraient en conflit avec les leurs. Par exemple, lorsqu’un ou des juristes et un ou des comptables exercent ensemble dans le cadre d’un CMD, l’entente contractuelle gouvernant leurs rapports devra stipuler que le(les) comptable(s) ne devra(devront) pas fournir de services de vérification à un(e) client(e) du CMD en raison du conflit évident existant entre les obligations de divulgation auxquelles est tenu le vérificateur et l’obligation qu’a l’avocat(e) de protéger le caractère confidentiel des relations avec la clientèle et de préserver le secret professionnel;

- c. providing that every client of the MDP shall also be considered the client of each lawyer within the MDP; and
- d. requiring lawyers practising in MDPs to ensure that the necessary systems are in place to maintain the secrecy and confidentiality of a client's affairs and documents when others in the firm may be subject to statutory or regulatory disclosure obligations.”
3. Paragraph 8 and 9 of resolution 00-03-A be deleted.
- c. Prescrire que chaque client(e) du CMD sera considéré(e) comme le(la) client(e) de chaque juriste qui y exerce; et
- d. Exiger des juristes exerçant au sein d'un CMD qu'ils(elles) vérifient que tous les mécanismes nécessaires sont en place pour préserver le secret professionnel et la confidentialité des affaires et des documents de la clientèle lorsque d'autres professionnel(le)s au sein du CMD sont tenus, par la loi ou par le règlement, à divulguer ce type de renseignements. »
3. Les paragraphes 8 et 9 de la résolution 00-03-A soient abrogés.

**Certified true copy of a resolution carried as amended  
by the Council of the Canadian Bar Association at the  
Mid-Winter Meeting held in Mont Ste -Anne, QC  
February 16-18, 2001.**

**Copie certifiée conforme d'une résolution adoptée,  
tel que modifiée, par le Conseil de l'Association du  
Barreau canadien, lors de l'Assemblée de la mi-hiver  
2001, à Mont Ste-Anne QC du 16 au 18 février 2001.**

**John D.V. Hoyles  
Executive Director/Directeur exécutif**

## Multi-Disciplinary Practices (MDPs)

**WHEREAS** in 1997 the Canadian Bar Association established the International Practice of Law Committee, whose mandate includes recommending a policy framework to the CBA concerning multi-disciplinary practices (MDPs) which offer legal services;

**WHEREAS** MDPs are business arrangements in which lawyers<sup>1</sup> and non-lawyers practice together to provide a broad range of advice, including legal advice, to consumers, and which encompass a variety of forms, from highly integrated organizations with lawyers and non-lawyers working under one ownership structure to loose referral networks;

**WHEREAS** the Committee issued its report in August 1999, entitled *Striking a Balance*;

### **BE IT RESOLVED THAT:**

1. Lawyers should be permitted to practice in MDPs provided that the MDP's delivery of legal services is controlled by lawyers.

## Cabinets multidisciplinaires (CMD)

**ATTENDU QU'**en 1997 L'Association du Barreau canadien a formé le Comité sur la pratique internationale du droit, dont le mandat consiste notamment à recommander une politique-cadre pour L'ABC au sujet des cabinets multidisciplinaires (CMD) offrant des services juridiques;

**ATTENDU QUE** les CMD sont définies comme des « ententes commerciales » par lesquelles des juristes\* et des non-juristes unissent leurs pratiques pour offrir un vaste éventail de conseils, y compris des conseils juridiques, aux consommateurs et consommatrices et qui prennent des formes variées, allant d'organisations hautement intégrées regroupant des juristes et des non-juristes sous une structure unique de propriété à des réseaux de consultation plus souples;

**ATTENDU QUE** le Comité a publié son rapport intitulé *Vers un juste milieu* en août 1999;

### **QU'IL SOIT RÉSOLU QUE :**

1. Les juristes soient autorisés à exercer dans le cadre de CMD, à la condition que les services juridiques soient contrôlés par des juristes.

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| <p>2. Lawyers should be permitted to share fees with non-lawyers in MDPs.</p>   | <p>2. Les juristes soient autorisés à partager leurs honoraires avec des non-juristes dans le cadre d'un CMD.</p>  |
| <p>3. The relevant law society<sup>2</sup> should require MDPs to obtain a licence as a condition to offering legal services. Licences should be conditional on the MDP satisfying the law society that it has taken all reasonable steps to comply with the core values, ethical obligations, standards and rules of professional conduct of the legal profession. The law society should be empowered to suspend or withdraw an MDP's licence to offer legal services in the event of non-compliance.</p> | <p>3. Le barreau** exige des CMD qu'ils obtiennent une licence comme condition obligatoire pour pouvoir offrir des services juridiques. Le barreau accordera ladite licence s'il est convaincu que le CMD a pris toutes les mesures raisonnables pour se conformer aux principes fondamentaux, aux obligations éthiques et aux normes et règles de déontologie professionnelle applicables à la profession juridique. En cas de non observance de ces exigences, le barreau est habilité à suspendre ou à retirer à un CMD la licence l'autorisant à offrir des services juridiques.</p> |
| <p>4. MDPs should be regulated under comprehensive principles which apply to MDPs whether the MDPs are fully integrated partnerships, involve "captive" or "affiliated" law firms, operate under the same trade name as another firm or otherwise are held out to the public as constituting one firm or having integrated management or business relations.</p>  | <p>4. Les CMD soient régis par un ensemble exhaustif de principes applicables aux CMD, que ces derniers soient des sociétés pleinement intégrées, des cabinets juridiques<sup>3</sup> « captifs » ou « affiliés », qu'ils opèrent sous la même dénomination sociale qu'un autre cabinet ou soient présentés au public comme constituant un seul cabinet ou encore qu'ils disposent d'un système de gestion ou des relations commerciales de type intégré.</p>  |
| <p>5. MDPs should be required to adhere to the core values, ethical obligations, standards and rules of professional</p>  | <p>5. Les CMD respectent obligatoirement les principes fondamentaux, les impératifs de nature déontologique, les normes et les</p>   |

- conduct of the legal profession. These include, but are not limited to, respect for the confidentiality of client information, protection of solicitor-client privilege and avoidance of conflicts of interest.
6. MDPs should be required to ensure that they comply with the core values, ethical obligations, standards and rules of professional conduct of the legal profession and remain responsible for their failure to do so. Lawyers should not practice in an MDP that fails to comply with these requirements.
7. Law societies should require that the MDP:
- (a) advises clients that the firm includes those who are not subject to the legal profession's values, obligations, standards and rules; and
  - (b) maintains insurance for each lawyer practising in the MDP that is:
    - (i) of at least the same nature, scope and quantum as that required for other practising lawyers; and
- règles de conduite professionnelle propres à la profession juridique. Ce qui comprend, mais sans y être limité, le respect du caractère confidentiel des renseignements fournis par la clientèle, la protection du secret professionnel et l'exclusion des conflits d'intérêts.
6. Les CMD veillent à ce qu'ils respectent les principes fondamentaux, les impératifs de nature déontologique, les normes et les règles de conduite professionnelle propres à la profession juridique et puissent être tenus responsables de leur négligence à s'y conformer et que les juristes refusent d'exercer dans un CMD qui ne respecte pas ces obligations.
7. Les barreaux exigent du CMD qu'il :
- (a) informe la clientèle que le cabinet comprend des personnes qui ne sont pas soumises aux principes, obligations, normes et règles de la profession juridique; et
  - (b) souscrive une assurance à l'égard de chaque juriste exerçant dans le CMD qui soit :
    - (i) de nature, d'une portée et d'un montant au moins équivalents à ce qui est exigé pour d'autres juristes en exercice; et

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| <p>(ii) of such a nature and quantum that no additional risks are added to the insurance coverage carried for lawyers by or on behalf of the law society than would be the case were the lawyers in the MDP not practising with non-lawyers.</p>   | <p>(ii) d'une nature et d'un montant n'entraînant pas l'ajout de risques à la couverture d'assurance souscrite par le barreau ou en son nom à l'égard des juristes comme dans l'éventualité où le CMD ne comprendrait pas de non-juristes.</p>  |
| <p>8. Law societies should develop rules for ensuring that lawyers do not practise in MDPs with other service providers having conflicting ethical responsibilities. For instance, lawyers practising in MDPs should not provide legal services to clients who retain the MDP for auditing services.</p> | <p>8. Les barreaux élaborent des règles visant à s'assurer que les juristes n'exercent pas dans des CMD qui transigent avec d'autres pourvoyeurs de services susceptibles d'entrer en conflit avec leurs responsabilités déontologiques. Par exemple, que les juristes exerçant dans le cadre d'un CMD ne fournissent pas de services juridiques aux clients ayant confié au CMD un mandat pour des services de vérification comptable.</p> |

9. The CBA and law societies should develop rules which will address:
- (a) the protection and preservation of solicitor-client privilege and confidentiality and the avoidance of conflicts of interest within MDPs, and in this latter regard those rules ought to consider every client of the MDP also to be the client of each lawyer within it; and
  - (b) the obligation of lawyers practising in MDPs to maintain the secrecy and confidentiality of a client's affairs and documents when others in the firm may be subject to statutory or regulatory disclosure obligations.

9. L'ABC et les barreaux élaborent des règles qui traiteront :
- (a) de la protection et de la préservation du secret professionnel, de la confidentialité des communications entre le juriste et la clientèle et de l'exclusion des conflits d'intérêts au sein du CMD et, à cet effet, que dans les règles on considère chaque cliente ou client du CMD comme la ou le client de chaque juriste qui y exerce; et
  - (b) de l'obligation des juristes exerçant dans un CMD de préserver le secret professionnel et la confidentialité entourant les affaires et les documents de la clientèle au cas où d'autres personnes du cabinet pourraient être tenues par la loi ou un règlement de divulguer des renseignements.



10. Only lawyers and Quebec notaries should be permitted to practice law in MDPs. Law society regulation governing the unauthorized practice of law should apply to MDPs.

10. Seuls les avocats, avocates et les notaires du Québec soient autorisés à exercer le droit dans les CMD et que les règlements du Barreau ou de la Chambre régissant la pratique non autorisée du droit s'appliquent aux CMD.

*Certified true copy of a resolution carried as amended by the Council of the Canadian Bar Association at the Annual Meeting held in Halifax, NS, August 19-20, 2000.*

*Copie certifiée d'une résolution adoptée, tel que modifiée, par le Conseil de l'Association du Barreau canadien, lors de son Assemblée annuelle, à Halifax N-É les 19 et 20 août 2000.*



**John D.V. Hoyles**  
**Executive Director/Directeur exécutif**

1. "Lawyer" includes Quebec notaries throughout. Tout au long du texte, le terme « juriste » comprend les notaires du Québec.
2. "Law society" refers throughout to all provincial and territorial governing bodies of the legal profession, including the Barreau du Québec and the Chambre des notaires. « Barreau » réfère tout au long de cette résolution aux instances de réglementation de la profession juridique de tous les provinces et territoires, y compris le Barreau du Québec et la Chambre des notaires.
3. « Cabinet juridique » comprend également une étude de notaires.