THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

To the Intervention Policy Review Committee:

On behalf of the BC Executive Committee, I am pleased to provide you with the attached BC Branch submission. It is a compilation of information received from BC members through the online survey, and from consultations with members of Provincial Council (78 Section/Forum Chairs and 46 Elected Members), including two in-person discussions with full Council, led by Policy Review Committee members Bill Veenstra and Margaret Mereigh. You will note that some conflicting themes have been identified in terms of the CBA's overall role, but there is also very useful data regarding members' views about in what instances and against what criteria the CBA should be considering proposed interventions.

It became clear to us in our local consultations that the original survey questions did not address some of the key process concerns that we have heard over the past year. In our in-person discussions with Council, we probed a bit deeper on process issues. You can see those results in the attached report, but I will highlight a few key points here:

· One of the key issues identified by BC members is an expectation that in today's electronic age, broad consultation is very feasible and should occur as early in the process as possible.

· On the same basis, the full Board should receive early notice of intervention proposals, and only the full Board should have the power to approve an intervention (not Executive Officers).

· While there is an important role for staff to provide corporate history and a quick analysis of an intervention proposal against clear criteria, there is also an expectation that the Board will be provided with more comprehensive input at an earlier stage in the process. There may be a role for the Legislation and Law Reform Committee in providing that early analysis, as is the case in BC when it comes to submissions.

· Also, if it is decided that Branches should seek local Sections/Forums/Committees input, it will be important to identify a process that avoids duplication of efforts and multiple requests from both National and Branch.

I mention these few specifics only to emphasize the importance of a clear process being developed, articulated and followed as a result of the Review Committee's work and further consultation with the Board. We believe that to be an essential outcome from this Review.

If you have any questions about the BC Branch submission, please feel free to contact me directly.

Regards,

Alex Shorten
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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

CBA INTERVENTION POLICY REVIEW
Consultation with CBA Branches, Conferences, Sections and Standing Committees

The Intervention Policy Review Committee is seeking input from CBA Branches, Sections, Conferences and select Standing Committees, to assist in developing an Intervention Policy that has the confidence of the CBA membership.

Now is the time for your group to have its say. We want to hear from you about all aspects of the Intervention Policy. For each part, we summarize what the current policy says, then ask questions about what works and what should change.

Please enter your responses directly on this form. Once you have completed the questionnaire for your group, please save the document and e-mail it to lawreform@cba.org.

We look forward to hearing from you by **Friday 6 March 2015.**

Intervention Policy Review Committee
Tom Irvine, Chair Pascale Giguère, Vice Chair

Background

In November 2014, CBA President Michele Hollins established a committee to review the CBA Intervention Policy. The Intervention Policy outlines:

- the criteria for determining whether a particular intervention is appropriate; and
- the process for approving and conducting the interventions.

While concerns surrounding the decision to approve and then reject a recent proposed intervention were the impetus for the review, the Review Committee's task is not limited to addressing the issues raised in a single case. Rather, we will review every aspect of the Intervention Policy so members can have confidence in the principles and processes in selecting and conducting interventions.

The Review Committee will look at the Intervention Policy to ensure that it serves the advocacy goals and objectives of the CBA and reflects CBA's high standards of transparent and effective processes.

We will study and make recommendations on:

- criteria for appropriate interventions
- responsibilities and processes for review and authorization of proposed interventions and factums, including the scope and timing of input from CBA constituent bodies
- scope and timing of input from CBA constituent bodies

We will report our recommendations to the Board of Directors by 1 May 2015.

Objectives of the CBA Intervention Policy

Current Intervention Policy

- CBA interventions are limited to appellate level to advance advocacy goals with greater precedent value, recognizing limited resources.

1. Should the Intervention Policy serve other CBA objectives? If so, which ones?

See attached response to question 1.

Criteria for CBA Interventions

Current Intervention Policy

- Permits interventions that would constitute a significant contribution to the consideration of the issues involved, where the position sought to be advanced is:
    - consistent with previously adopted CBA policy of the Canadian Bar Association
    - a matter of compelling public interest which the Board of Directors then adopts as policy of the Association
    - a matter of special significance to the legal profession.
- The CBA should not merely restate arguments advanced by the parties.

2. How would your Branch, Section, Conference or Standing Committee define the criteria for CBA interventions in court proceedings?

See attached response to question 2.

3. Please rate the importance of the CBA intervening in each of the following types of cases from 1 to 10 (with 1 being the least important and 10 being the most important):

- Matters having an impact on lawyers in the practice of law
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9 ◉ 10 ○
- Promoting equality in the legal profession
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ◉ 9 ○ 10 ○
- Promoting equality in the justice system
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ◉ 9 ○ 10 ○
- Preventing government incursion on solicitor-client privilege
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9 ◉ 10 ○
- Defending the independence of the legal profession
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9 ◉ 10 ○
- Defending judicial independence
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ○ 9 ◉ 10 ○
- Matters that protect the public interest
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ◉ 7 ○ 8 ○ 9 ○ 10 ○
- Improving the law in a specific area of practice
  1 ○ 2 ○ 3 ○ 4 ○ 5 ◉ 6 ○ 7 ○ 8 ○ 9 ○ 10 ○
- Improving access to justice
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ◉ 9 ○ 10 ○
- Improving the administration of justice
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ○ 8 ◉ 9 ○ 10 ○
- Promoting ethical standards of lawyers
  1 ○ 2 ○ 3 ○ 4 ○ 5 ○ 6 ○ 7 ◉ 8 ○ 9 ○ 10 ○

4. Are there other types of court cases where you think important for the CBA to intervene?

See points discussed in response to question 1 above.

5. Are there types of court cases where you think it is important for the CBA not to intervene?

See attached response to question 5.

Scope of CBA Interventions

Current Intervention Policy

- Interventions must be at appellate level, usually at the Supreme Court of Canada.
  - Rationale: leverage limited resources to maximize precedent value of interventions.
- Interventions must be in name of CBA, except if the CBA Board of Directors authorizes a Branch intervention on a local or regional issue.
  - Rationale: CBA and Branches are legal entities with standing to seek leave to intervene. Clear message to the courts that the CBA speaks with one voice.

6. On what types of cases should CBA Branches be authorized to intervene in a court proceeding? (Please indicate all that apply)Why?

- [ ] Matters before the trial courts in their province or territory
- [x] Matters before the appellate court in their province or territory
- [ ] Local or regional matters before the courts in their province or territory
- [x] Matters before the courts in their province or territory, where invited by the Court
- [x] Matters before the courts in in their province or territory, where other lawyer organizations may be intervening
- [ ] None

See attached response to question 6.

7. Who should decide whether a CBA Branch can intervene? Why?

- [ ] Branch Executive
- [ ] CBA Board of Directors
- [x] Both

The BC Branch would support leaving the final decision on interventions to the national Board of Directors. However, any decision on an intervention within a province should only be made after consultation with - and generally only on the recommendation of - the Branch executive.
It is also important to keep in mind that the fact that the CBA is taking a position on a matter at the provincial level does not eliminate the need for appropriate consultation to be undertaken. The same level of scrutiny should be applied whether an intervention is proposed to be taken before the Supreme Court of Canada or a provincial / territorial appellate court.

8. On what types of cases should CBA Sections, Conferences or Committees be authorized to intervene? (Please indicate all that apply)Why?

- ☐ Matters before the trial courts on that area of law
- ☐ Matters before the appellate courts on that area of law
- ☐ Matters before the courts with a unique impact on the members of the CBA Section, Conference or Committee
- ☐ Matters before the courts, where invited by the Court
- ☐ Matters before the courts, where other lawyer organizations may be intervening
- ☑ None

This question provoked a variety of responses from British Columbia respondents. The majority were not in favour of having individual sections, conferences or committees intervene in cases. Sections, conferences and committees have traditionally been heavily involved in advancing potential CBA interventions to the CBA. They should continue in that role. However, the decisions on interventions advanced thereby should be made by the Board of Directors.

9. What mechanism should exist to avoid potentially conflicting interventions by different CBA bodies (in similar cases before courts in different jurisdictions, or before the same court)?

Generally speaking, the CBA should speak with one voice where possible and if there are many voices, the CBA should remain mute. It may be that an effective consultation process may allow reconciliation of different views, or that at some point the Board of Directors may choose one position to advance. The final decision should be that of the Board of Directors.

Consultation and Input

Current Intervention Policy

- proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- CBA staff sends copy of request etc to every Section, Committee or other CBA body that appears to have an interest in the subject matter of the proposed intervention

10. Who should be consulted about potential CBA interventions? (Please indicate all that apply)

- ☑ Sections, Conferences and Standing Committees that appear to have an interest in the subject matter of the intervention.
- ☑ Branches uniquely impacted by the intervention.
- ☐ All Sections and Conferences.

11. Would you suggest any changes to the consultation process for CBA interventions?

See attached response to question 11.

Review and Authorization

Current Intervention Policy

- Proposals made to President and Senior Director, Legal and Governmental Affairs (L&GA)
- Proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- Legislation and Law Reform Committee (L&LR) recommends to the Board of Directors whether intervention should be authorized. Board not bound by L&LR recommendation.
- Board of Directors authorizes intervention, or Executive Officers if the Board cannot act in time
- L&LR Committee reviews the factum on behalf of the Board; certifies that it is of high quality and a fair representation of CBA policy
- Board approves factum (Executive Officers between meetings of the Board)

12. Would you suggest any changes to the process for reviewing and authorizing CBA interventions?

As set out above, the BC Branch is of the view that the decision whether or not to intervene should be made by the Board of Directors in every case. Our comments on the consultation process are also set out above.
The involvement of the LLRC in reviewing the factum is also useful and the BC Branch would recommend that it continue. The LLRC can provide a consistency of approach and can ensure that the intervenor maintains focus on the CBA's advocacy goals and resists any temptation to simply support one side or the other in a case.

Timelines

Current Intervention Policy

- Every effort should be made to give sufficient time for thorough consideration of requests and factums
- Requests should be submitted at least three weeks before the application for leave to intervene must be filed.
- Factums must be submitted at least three weeks before it must be filed.

13. What would constitute "sufficient time" for thorough consideration of intervention requests at the Supreme Court of Canada? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

- (●) Three weeks
- ( ) Two weeks
- ( ) Another period (please specify)

If possible to increase this to 4 weeks then that would be preferred. The CBA must also recognize that, in some cases, timelines will be compressed. What is essential is that the consultation begin as soon as the CBA is aware that an intervention proposal may be made. The wait for a complete proposal can not be allowed to cause shortened timelines.

14. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial Courts of Appeal? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

- ( ) Three weeks
- ( ) Two weeks
- (●) Another period (please specify)

Four weeks. Typically a Court of Appeal will not have a leave process and the sort of compressed timeline that one sees in the Supreme Court of Canada.

15. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial trial courts? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

- ( ) Three weeks
- ( ) Two weeks
- (●) Another period (please specify)

Same as for Court of Appeal (see section 14 above). As noted above, interventions at the trial level should be very rare.

General

16. Any other thoughts you would like to share?

See attached response to question 16.

BC BRANCH RESPONSES TO INTERVENTION SURVEY – ATTACHMENT

1. Should the Intervention Policy serve other CBA objectives? If so, which ones?

This question was difficult to respond to in that the "CBA objectives" in issue are not clearly defined. Generally speaking, responses from British Columbia members to questions regarding the purpose of interventions evidenced a dichotomy as between (a) those who would prefer the CBA to limit its intervention advocacy to those situations where the interests of CBA members as lawyers are directly impacted and (b) those who would prefer a broader approach which would include a focus on more general goals such as access to justice, equality in the legal profession and the justice system, and promoting the rule of law generally. The BC Branch would support ongoing participation in interventions in all of these areas.

The question of interventions on matters of substantive law had less support in the responses obtained from British Columbia members. At the same time, it should be recognized that many sections and conferences will have strong views on issues of law within their area of expertise that require clarification or change. The British Columbia branch would suggest that proposed interventions on matters of substantive law that are not directly rooted in the issues and values described in the first paragraph above should be more carefully scrutinized both in terms of the allocation of resources (recognizing that an intervention draws on resources beyond just the sponsoring section or conference) and in terms of ensuring broad support across the organization for the position that is proposed to be taken.

2. How would your Branch, Section, Conference or Standing Committee define the criteria for CBA interventions in court proceedings?

The BC Branch would support the last of the criteria noted above: that the CBA should not merely restate arguments advanced by the parties. The CBA should focus on providing important perspective to a case rather than just a "me too" endorsement of one side or the other in a case.

With respect to the other criteria, reference to existing policy will often be a useful first step in the analysis of a prospective intervention. Those areas in which the CBA has chosen, in the past, to enunciate policy - separate and apart from the contemplation of any litigation – will often reflect the sorts of values that are important to the membership of the CBA as a whole. However, there are many areas in which the CBA has not previously adopted policy. As well, it may be that a policy adopted in the past may no longer fully reflect the values of today's CBA membership. In addition, there may be cases in which competing policy interest will be at play and it will not always be appropriate for those interests that may have, for whatever reasons,

found their way into a resolution to take precedence over others that are equally or perhaps more important.

The BC Branch would agree that the Board of Directors is the appropriate body to make decisions on proposed interventions in which previously undefined policy interests or competing policy interests may be at stake. The Board of Directors is broadly representative of the membership across the country – yet a small enough group that it can be called together by conference call or video-conference on short notice to review an issue. It should also in most cases have a strong sense of member sentiment – especially if there has been an appropriately broad consultation on a proposed intervention.

At the same time, it would be useful to define more clearly the sorts of policies and underlying values that should be a focus of the CBA's intervention resources. In that regard, it would be useful for the criteria to include reference to some of the more important values as discussed in our response to question 1 above.

5. Are there types of court cases where you think it is important for the CBA not to intervene?

As set out above, the CBA should not intervene in a case in which its role would be primarily that of restating arguments advanced by one of the parties.

The CBA should also be cautious in intervening in cases in which there are conflicting broadly held views within the membership. At the same time, analysis of a proposed intervention needs to be tied to the mission and values of the CBA. While some parts of the CBA's mission statement are too general to provide useful guidance in cases of conflicting views, others – such as its focus on the rule of law, independence of the judiciary and the legal profession, access to justice, promotion of equality in the legal profession and the justice system, protection of solicitor client privilege and promoting the interests and positions of lawyers and the legal profession – will in many cases assist in determining the appropriate course of action.

Any time there is a conflict within the CBA membership, the need for broad consultation comes to the fore. It will be absolutely essential for CBA leadership to have an informed sense of membership views before making a decision whether or not to intervene. For that reason, the BC Branch strongly advocates for a strong consultation process in connection with the intervention program, and for the national Board of Directors to be the decision-making body in every case.

6. On what types of cases should CBA Branches be authorized to intervene in a court proceeding?

Respondents from the BC branch strongly supported the idea of Branch interventions before the appellate courts in a province, and more generally in interventions where invited by the Court. Respondents were roughly split on the idea of intervening where other lawyer organizations may be intervening. The BC Branch would support interventions in this latter category only where important CBA values are implicated.

Respondents from British Columbia noted that most matters never proceed beyond the provincial courts, so limiting intervention advocacy to the Supreme Court of Canada may leave many important issues for determination without CBA input.

Concern was, however, expressed that a proliferation of interventions may make overall control of the intervention process and positions taken difficult to maintain, and that the CBA may lack resources to adequately deal with a large number of interventions. For those reasons, the BC Branch would recommend that participation in interventions at the provincial level be carefully scrutinized and that the number of interventions be limited and focused on matters of high importance and that are likely to have significant precedential value.

The BC Branch would support leaving the decision on whether to intervene within a province to the national Board of Directors. That would allow for consistency of approach across the country and due consideration to the appropriate allocation of resources. However, once the decision to intervene is made it would be appropriate for the Branch executive to take a significant role in overseeing the conduct of the intervention. This may assist in ameliorating the resource allocation issue.

11. Would you suggest any changes to the consultation process for CBA interventions?

The BC Branch believes that a strong and effective consultation process is essential to enable the deciding body to have a better sense of the membership views before making a decision to intervene. The BC Branch would recommend a number of changes to the consultation process.

1. Consultation should begin as soon as CBA officials are aware that an intervention may be proposed. Consultation should not wait for receipt of a fully formulated intervention proposal. In many cases, that will only happen a matter of days before the deadline for a decision to be made. If the deadline for completion of the consultation cannot be moved back, then we need to make every effort to start the consultation as soon as possible.
2. Every branch executive should be given the opportunity to provide input on every intervention proposal. In many cases, the branch executive is the best conduit to grassroots sentiment. This opportunity will also give the branch presidents an opportunity to inform themselves of views within their branch in advance of a Board of Directors meeting at which a decision will be made.
3. When determining which sections, conferences and committees need to be consulted on a proposed intervention, those deciding should err on the side of inclusiveness. If in doubt, <u>don't</u> leave them out.
4. Decisions in and about the consultation process should be made by elected and accountable volunteer members. In a straw poll conducted at the recent BC Provincial Council meeting, the members were asked who should decide which sections or conference are consulted on an intervention request. The responses were as follows:
    a. The proponent – 3%
    b. LLRC staff – 7.5%
    c. LLRC committee – 24%
    d. Board of Directors – 29%
    e. None of the above – every request goes to everyone – 36%
5. The involvement of the Legislation and Law Reform Committee should continue. As a small and specialized committee, it can provide consistency of approach and provide a useful recommending role. It can also provide accountable, volunteer oversight of the consultation process.
6. The decision should be made by the national Board of Directors in every case. The Board should not delegate important decisions like those on interventions to the table officers. The technology is available to allow the Board to meet either by conference call or by video-conference and it should be making use of that technology.

16. Any other thoughts you would like to share?

There was a diversity of views amongst BC respondents as to whether, in general, the scope of interventions should be increased or decreased. The following two comments illustrate the difference:

- "I think it is reasonable not to advance the proliferation of interventions. The CBA has enough on its plate dealing with its' out of court advocacy."
- "The CBA is conspicuously absent in interventions at the trial and appellate levels, where interventions are only increasing. The CBA ought to be at the forefront of intervenors where a decision is made that the matter is of importance to members and improvement of the law. The CBA is going through a re-think to be relevant to members and prospective members. Leading on interventions at the trial and appellate level would send a strong message that the CBA is still relevant."

With respect to this latter point, the recent comments of the Supreme Court of Canada [Carter v A.G. Canada, 2015 SCC 5 at § 44] on the ability of trial judges to revisit prior appellate authority in appropriate circumstances may give grounds to take a closer look at interventions in the trial and provincial appellate courts in some cases.

Overall, the BC Branch supports the ongoing use of interventions to advance the CBA's advocacy goals. Interventions – if selected properly through a robust consultation process – can be an important value driver for those members to whom law reform and advocacy are important. However, in order for the CBA's intervention program to be a positive aspect of membership, the BC Branch recommends improvements to the consultation process including:

- The earliest possible start date, to allow for as much consultation as possible;
- Strong leadership in the consultation process by elected and accountable volunteers;
- A broad and inclusive process that includes all branches and any section that might conceivably have an interest in a topic; and
- Decision-making by the Board of Directors – through conference calls or video-conferences if necessary.