

CLINIC COMMITTEE OF THE
BOARD OF DIRECTORS, LEGAL AID ONTARIO

In the matter of

THE IMPOSITION OF LEVEL THREE REMEDIAL RESPONSE,
PURSUANT TO S.22 OF THE DISPUTE RESOLUTION POLICY
FOR THE AFRICAN CANADIAN LEGAL CLINIC

Committee members:

John D. McCamus, Chair
Nancy Cooper
John Liston
James McNee
James Yakimovich

INTERIM DECISION

January 19, 2017

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Introduction:

The present proceeding arises against the background of a lengthy process of attempts by LAO to effectively monitor and seek improvement of the management and governance practices of the African Canadian Legal Clinic (ACLC). A concise chronology of the major events in this process as set forth in the Executive Summary of the previous Decision of this Committee of June 20, 2016 dealing with this matter reads, in part, as follows:

“This Decision [of June 20, 2016] of the Clinic Committee of the Board of Directors of Legal Aid Ontario (“LAO”) arises in the following circumstances. Under its governing statute, the *Legal Aid Services Act* (“LASA”), Legal Aid Ontario (“LAO”) may provide funding to community legal clinics across the Province. One of the clinics currently funded by LAO is the African Canadian Legal Clinic (“ACLC”). LAO provides annual funding to the clinic of approximately 35% of the clinic’s total annual income.

Under the terms of the *LASA*, LAO is required to monitor the operations of the clinics funded by it. In order to enable LAO to discharge this statutory responsibility, obligations of transparency and accountability are imposed on the clinics by the legislation. In particular, clinics are obliged to provide “any financial or other information related to the operation of the clinic that the corporation may request”. LAO enters into Memoranda of Understanding and Funding Agreements with each of the clinics it funds, which impose further obligations of accountability and transparency on each clinic. The *LASA* also imposes a statutory obligation on clinics to comply with the terms and conditions of their funding by LAO. The statute also provides that where LAO believes that a clinic is not complying with its statutory obligations or the obligations imposed under the terms and conditions of its funding, LAO may reduce or suspend the funding of the clinic. This regulatory framework is described in greater detail in Part II of these Reasons.

As early as 2009, LAO staff (“LAO Staff”) responsible for the funding of the ACLC began to develop grave concerns about the financial management and governance practices at the ACLC. These concerns were heightened in 2010 when LAO received copies of emails to the ACLC from two lawyer members of the Board of Directors of the ACLC who were resigning in protest their membership on the ACLC Board because of concerns pertaining to “financial irregularities”, “gross misconduct and illegalities”

and “concerns about financial and governance matters of the ACLC”. LAO also learned that the [REDACTED] who had raised similar concerns was effectively removed from [REDACTED] position on the ACLC Board.

In the months following LAO’s awareness of these allegations, LAO Staff met with the ACLC, but did not develop a confident sense that their concerns were being appropriately addressed by the ACLC Board. Accordingly, in September, 2010, LAO invoked Level One of its Dispute Resolution Policy (“DRP”), thereby signalling that there were problems that, in LAO’s view, needed to be addressed. The DRP process is a three-level procedure imposed as one of the conditions of clinic funding which is designed to provide a means of remediation in circumstances where LAO is concerned that a clinic is not complying with its obligations under *LASA* or under the terms and conditions of its funding. Level One of the DRP envisages voluntary collaboration between LAO and the clinic involved to resolve the issues in question.

LAO also retained PricewaterhouseCooper LLP (“PwC”) to conduct a forensic audit of the clinic’s finances. The audit conducted by PwC identified a number of troubling aspects of ALCL’s financial management and proposed remedial measures to address them. Accordingly, LAO proposed a series of remedial measures to the ACLC Board in June, 2012. The Board declined to reply to the proposal, but, rather, retained counsel and challenged LAO’s authority to propose remedial measures at Level One. Subsequently, LAO indicated to the ACLC its decision to place the ACLC in Level Two of the DRP. Under Level Two of the DRP process, LAO has the authority to require the clinic to follow various aspects of a remediation plan. In essence, the ACLC declined to participate in the Level Two remediation process.

In due course, LAO determined that the matters it had raised were not being satisfactorily resolved by the ACLC and on April 3, 2014, LAO Staff filed with this Committee a Report (the “LAO L3 Staff Report”), alleging that the ACLC was in “fundamental breach” of its obligations and that a Level Three Remediation Response should be imposed by this Committee. In Level Three of the DRP, the process becomes more formal and enables LAO to impose a Level Three Remediation Response which may include special terms of funding for the clinic and the issuance of directions to the clinic to ensure compliance with its obligations. Level Three also envisages the possibility that LAO may decide to reduce or suspend the clinic’s funding if it is not satisfied that satisfactory compliance with the clinic’s statutory and funding obligations has been achieved.

After entertaining written and oral submissions from both the LAO Staff and the ACLC, this Committee released its Decision on the matter on

September 5, 2014. That Decision imposed a Level Three Response on the ACLC which required the ACLC to comply with eight remedial conditions within a certain timeframe, failing which the LAO staff were invited to consider whether to recommend that LAO suspend its funding of the ACLC. A brief chronology of the events leading up to this Committee's September 5, 2014 Decision is provided in Part III of [this Decision of June 20, 2016].

The present proceeding arises by virtue of the fact that the LAO Staff have concluded that the ACLC has not fully complied with the eight remedial conditions imposed by this Committee and the LAO Staff has further recommended that this Committee should exercise its statutory authority to suspend LAO funding of the ACLC.

The eight remedial conditions imposed on the ACLC in this Committee's Decision of September 5, 2014 (as revised in a subsequent Decision of this Committee dated November 7, 2014), can be sub-divided into two categories. The first category of remedial conditions was designed by this Committee to address deficiencies in financial management. Thus, in light of the ACLC's substantial operating deficit and other problems, Condition #4 required the development by the ACLC of a financial restructuring plan for LAO approval. Condition #5 required the ACLC to adopt certain policies relating to expenses such a travel, meals and hospitality and to adopt best practices and controls regarding the use of credit cards. The PwC Forensic Audit had identified inappropriate purchases using the clinic credit cards. Condition #5 also required the implementation of certain financial reporting systems including the establishment of detailed budgets for the expenditures of the ACLC funding provided by LAO. Condition #6 required the ACLC to cooperate with an independent audit of the reduction of a compensatory time accrual awarded to the ACLC Executive Director. Condition #7 stipulated the manner in which LAO would provide monthly funding and attempted to ensure transparency with respect to ACLC expenditures. Condition #8 required full implementation of all PwC Forensic Audit recommendations, such implementation to be verified by LAO's Internal Audit and Compliance Unit ("IAU").

The object of the second category of conditions related to strengthening the willingness and capacity of the ACLC Board of Directors to engage in effective supervision of the operations of the clinic. Condition #1 set out arrangements under which a Legal Aid Ontario Observer would be permitted to attend all ACLC Board of Directors' meetings. Condition #2 required the ACLC to bring its composition of the Board into compliance with the funding agreement which required that the Board include more than one person with financial skills and more than one lawyer. Condition #3 required the ACLC to organize within six months and to complete within nine months an appropriate training experience for all members of

the ACLC Board of Directors on the duties and responsibilities of Board members, such experience to be organized in collaboration with and upon the approval of LAO staff.

On November 6, 2015, LAO Staff filed a report with this Committee alleging that the ACLC had failed to comply with the remedial conditions imposed upon the ACLC by this Committee's September 5, 2014 and November 7, 2014 Decisions and recommending that the LAO funding of the ACLC be suspended. In response, the ACLC filed an extensive reply to these allegations which this Committee received on December 23, 2015. [Subsequently a hearing of the Committee was held at which oral submissions of the parties were entertained]

In substance, this Committee concluded that the ACLC had only fully complied with one condition, that being Condition #6. With respect to the other conditions, there were failures to fully comply with the conditions in question that caused this Committee considerable concern. Particularly troubling was the ACLC's failure to comply with Condition #7 with respect to payment to the ACLC with respect to its recurring expenses. In essence, the ACLC provided misleading information concerning its recurring expenses relating to staff salaries in the quarterly reports of actual expenses required by Condition #5, thereby securing improper access to LAO funds and used such funds in a manner not permitted by the terms of the LAO/ACLC Funding Agreement. There are a number of troubling aspects to this misconduct. First, the ACLC has engaged in this form of wrongdoing on several occasions in the past and has been consistently advised by LAO that it must not do so. Section 26 of the LAO/ACLC Funding Agreement provides that funds accumulated by reason of staff vacancies may be expended only for the purpose of employing "replacement staff" or for any other purpose approved by LAO. The wrongful conduct in question involves declining or refusing to report staff vacancies in order to use the money thus accumulated for purposes not approved by LAO. For example, misconduct of this kind was drawn to the attention of the ACLC in July, 2012 when LAO learned that vacancy funding was used to pay additional lump-sum of bonus payments to staff totalling \$170,000.00, of which \$121,000.00 was paid to the Executive Director.

Remarkably, in the period following this Committee's Decisions of September 5, 2014 and November 7, 2014, LAO learned independently that two staff positions had been vacated and the money that was accumulated had been spent for unauthorized purposes. The ACLC had not reported the vacancies to LAO. Indeed, the ACLC declined several requests from LAO for information concerning these positions and, moreover, provided misleading and false information to LAO concerning

them. The accumulated surplus was spent by the ACLC for a purpose not approved by LAO.

The ACLC did not make reasonable efforts to provide a financial restructuring plan as required by Condition #4. The ACLC did not engage in a budgeting exercise in accord with Condition #5. With respect to Condition #8, which required full implementation of the recommendations in the PwC Forensic Audit report, LAO's Internal Audit Unit found that the ACLC had complied with a majority of the recommendations (78%), but had not complied with the others.

With respect to the conditions relating to strengthening Board performance, the ACLC did permit a Legal Aid Ontario Observer to attend most, but not all, Board meetings. In breach of Condition #1, it refused to allow the LAO Observer to attend Board Committee meetings, including meetings of the Board Finance Committee. It also improperly excluded the Observer from Board discussions pertaining to funding received from other funders and refused to share with LAO financial information concerning other funding sources. The ACLC failed to fully comply with Condition #2 relating the Board composition and did not succeed in organizing a training program of the kind required by Condition #3.

Accordingly, this Committee concluded that the ACLC has failed to comply with seven of the eight remedial conditions and that it remains in "fundamental breach" of its statutory obligations and the obligations imposed by the terms and conditions of its funding. Indeed, the available evidence raises serious concerns as to whether the ACLC will genuinely comply with the terms and conditions on an ongoing basis. In this Committee's view, therefore, it is appropriate to approve the recommendations of LAO Staff that LAO's funding of the ACLC be suspended.

In [a subsequent part of this June 20, 2016 Decision], this Committee discusses an issue relating to the proper interpretation of Section 39(5) of *LASA*. This sub-section applies in circumstances where LAO determines that a clinic is not compliant with the statute or with the terms and conditions of its funding and decides to reduce or suspend the funding of the clinic pursuant to Section 39(4). In such circumstances, Section 39(5) requires that LAO shall give the clinic Board of Directors "notice of its intent and a reasonable opportunity to comply with this Act or the terms and conditions or direction or to meet the operational standards". As we indicated in Part VII of our Reasons, this Committee is of the view that in order to give effect to our intention to suspend LAO's funding of the ACLC, LAO must give the ACLC Board of Directors reasonable notice of its intention to do so and an opportunity to engage in further remediation efforts.

This Committee determined that six months' notice would be quite reasonable and accordingly, LAO is giving notice to the ACLC Board of Directors in the form of this Decision that unless the ACLC fully complies by December 31, 2016, to the satisfaction of this Committee, with the eight remedial conditions imposed by this Committee, LAO intends to suspend its funding of the ACLC as of that date. This Committee's conclusion and corresponding Decision is briefly set out in Part VIII of [this Decision of June 20, 2016].

The present proceeding is thus intended to determine whether, in fact, the ACLC has fully complied with the eight remedial conditions by December 31, 2016 to the satisfaction of this Committee. In order to facilitate this particular proceeding, the parties were notified of potential dates for a hearing and of proposed deadlines for submissions of written materials in advance of that hearing. The ACLC and its counsel indicated that they were unavailable on those dates and proposed other, dates for the hearing in December which were not available to this Committee. In response, this Committee suggested that the hearing could be held on a weekend date or during evenings, or if the parties preferred, the matter could be determined on the basis of written submissions. On this basis, the ACLC agreed, with LAO's concurrence, that to proceed on the basis of written submissions would be acceptable to both parties. Each party was invited to and did provide initial written submissions on December 1, 2016 and reply submissions on December 12, 2016.

In brief, the positions taken by the parties in these submissions on the critical question – has the ACLC successfully and completely complied with the eight remedial conditions? – are diametrically opposed. LAO takes the view that the ACLC has not fully complied with the conditions. The ACLC takes the view that it has. What follows in these reasons

is the Clinic Committee's determination with respect to the extent to which the ACLC has successfully complied with the eight remedial conditions. The discussion is focussed on those Conditions with respect to which the questions of compliance is a matter of dispute between the parties.

Condition 1

ACLC will notify LAO staff in writing of all ACLC Board of Directors meetings as soon as they are scheduled and will permit an LAO observer to attend all ACLC Board of Directors meetings. The observer would not be a Board member or have voting rights, but he or she will be provided with Board meeting materials, in advance of the meetings and be permitted to provide LAO staff perspectives on the issues discussed. LAO staff is to have access to financial eligibility and resource allocation information concerning particular clients and such information is not to be redacted from Board materials made available to the LAO staff observer. The ACLC Board may meet in camera, without the LAO staff observer present, to discuss (i) matters pertaining to the Dispute Resolution Process in which the ACLC and LAO are adverse in interest, and (ii) matters pertaining to the Association of Community Legal Clinics of Ontario (ACLCO). If, in addition, the ACLC wishes to withhold material or meet in camera with respect to matters to which it maintains that solicitor-client privilege applies, it must provide, before doing so, sufficient description of the information or documentation and/or the subject matter of the proposed in camera discussions, without disclosing details that would result in the disclosure of the content of privileged solicitor-client communications, to enable LAO to determine whether it agrees that ACLC's claim of privilege is a reasonable one in all the circumstances. The Chair of the ACLC Board of Directors will meet with the LAO observer on a monthly basis or on some other schedule mutually agreed to by the Board Chair and the LAO observer in order to ensure that the observer is kept abreast of activities at the ACLC. This condition will remain in force during the fulfillment of the other conditions and then for one year after the fulfillment of the other conditions.

Condition #1 provides, among other requirements, that the ACLC Board invite the LAO Observer to attend all ACLC of Directors' meetings and to provide the Observer with Board meeting materials in advance of the meetings. The Condition goes on to stipulate

exceptional circumstances in which the Board meeting may be held *in camera* in the absence of the LAO Observer; that is, where the Board proposes to discuss matters relating to the current dispute with LAO or matters relating to the Association of Community Legal Clinics of Ontario (ACLCO). As well, the ACLC is permitted to redact materials on these topics from the materials provided to the LAO Observer, together with materials subject to solicitor-client privilege. In its June 20, 2016 Decision, this Committee directed that during the period following that Decision, while the ACLC remained in the Level 3 Remedial Response, full compliance with the eight remedial conditions will include “reinstatement of the LAO Observer pursuant to Condition #1”.

In December of 2016, extensive written submissions by both parties were filed with this Committee on the question of whether the ACLC had properly complied with these instructions and, further, whether it had provided relevant information to the LAO Observer concerning Board minutes and materials and other information requested by LAO. As LAO emphasizes in its written submissions, all clinics funded by LAO, including the ACLC are required by Section 37(2)(d) of the *Legal Aid Services Act* (LASA) to provide AO with “any financial or other information relating to the operation of the clinic that [LAO] may request”. Obligations of transparency and accountability are also imposed on the ACLC by the LAO/ACLC Memorandum of Understanding (MOU) and Funding Agreement (FA). The refusal on the part of the ACLC to provide requested information of various kinds in the past has severely strained the relationship between LAO and the ACLC and severely impaired LAO’s statutory obligation to monitor the handling of public funds by the ACLC.

The December written submissions of the parties deal with the question of invitations to the ACLC Board meetings, access to Board minutes and materials and other financial information including information relating to funding received by the ACLC from organizations other than LAO. For present purposes, it is unnecessary to review these written submissions and the many controversies and differences of opinion that they set forth. A brief discussion of the main points will suffice.

The main concern expressed by LAO with respect to notification of ACLC Board meetings to the LAO Observer relates to the meeting of July 9, 2016, to which the LAO Observer was not invited. The purpose of this meeting included a review of ACLC's 2015/16 Audited Financial Statements and approval of a detailed budget for the general Legal Disbursements Fund. One might have thought that in light of the important purpose of this meeting and in light of the clear instruction in this Committee's Decision of June 20, 2016, that such an invitation would have been issued by the ACLC Board. The Board did not invite the LAO Observer to the July 9, 2016 meeting. The Board's explanation for not doing so is that it had not been adequately notified by LAO itself that the LAO Observer intended to attend future meetings. Although Vice-President Budgell sent a reminder of the need to invite the LAO Observer to the ACLC by letter dated July 6, 2016, the ACLC, in its submissions asserts that the letter was not seen by the Executive Director until late in the day on July 8, 2016, at which point presumably it was considered to be too late to issue the invitation. LAO claims, but cannot prove, that the letter was discussed at the July 9, 2016 Board meeting because, although discussion of

a letter from Vice-President Budgell is noted in the Minutes, the date of the letter has been redacted from those minutes. In our view, the failure to invite the LAO Observer to the July 9, 2016 meeting constitutes a failure to comply with the Committee's instructions to reinstate the LAO Observer.

In other respects, however, it appears that the LAO Observer was invited to subsequent Board and Committee meetings and, among materials filed by LAO in this proceeding, was a briefing note dated November 30, 2016 reporting the observations of the LAO Observer arising from attendance at such meetings.

As far as access to Board materials is concerned, on July 6, 2016, LAO requested copies of the Minutes and Board packages from past Board meetings held in recent months, which the LAO Observer had not attended. The ACLC initially refused to provide this information but eventually did supply substantially redacted versions of the minutes on November 29, 2016, a few days before the deadline for written submissions in this matter. The ACLC did not provide Board packages for these meetings, however. The initial explanation given by the ACLC for the substantial redactions was that the minutes in question dealt with human resources matters. This is simply not an acceptable explanation for the redactions. Previous request by the ACLC to this Committee to redact such material had been denied by this Committee on the basis that much of the past wrongdoing and mismanagement of the ACLC related to matters involving human resources issues. In its reply submissions of December 12, 2016, however, the ACLC offered an alternative explanation; that the redacted human

resources matters did not relate to LAO-funded employees and were, in any event, subject to solicitor-client privilege. As noted in Condition #1, in such circumstances, the ACLC is obliged to provide sufficient information concerning the redacted materials to permit LAO “to determine whether it agrees that ACLC’s claim of privilege is a reasonable one in all the circumstances”. The only information provided by the ACLC was essentially its claim that these were human resources matters subject to solicitor-client privilege.

As far as access to other types of information is concerned, LAO has, over the years and repeatedly since the June 20, 2016 Decision of the Clinic Committee, requested information concerning funding to ACLC provided by sources other than LAO. The ACLC had persistently refused to provide such information and more recently took the view that it required legal advice before it could do so. Information concerning other funders was provided, again, within a few days of the deadline for written submissions on December 1, 2016. In its June 20, 2016 Decision, this Committee indicated its view that refusal to provide such information is a clear breach of both LASA and the LAO-ACLC MOU and FA. The reluctance of the ACLC to comply with this obligation in this regard and its belated willingness to do so are difficult to understand.

Condition #2:

“ACLC is required to comply with its obligation in Section 10 of its Funding Agreement with LAO, that it make reasonable efforts to have a Board that includes “persons with financial skills” and “lawyers”, and that the ACLC report to LAO staff, when requested to do so, on such reasonable efforts to ensure that there are at least two persons with financial skills and two lawyers on the Board of Directors of ACLC. The reasonable efforts will include identifying at least five suitable candidates for each vacant position

each month and approaching them by telephone or in person in addition to a written approach. This condition will be met on the date on which all four of the described Board positions have been filled.”

In its June 20, 2016 Decision, this Committee concluded that the ACLC had not complied with Condition #2 with respect to the composition of its Board of Directors. Section 10 of the LAO/ACLC Funding Agreements sets out a number of requirements concerning the composition of the ACLC Board and, more particularly, requires, in the list of categories of persons who must appointed to the Board, persons with financial skills and lawyers. In the Committee’s view, this has the effect that the ACLC Board must include in its membership, at least two lawyers and at least two persons with financial skills.

As the Committee noted in its June 20, 2016 Decision, the ACLC Board, as then composed, contained only one lawyer. In its submissions to this Committee in June, the ACLC claimed compliance with the requirement concerning persons with financial skills on the basis that it had appointed an accountant to the Board and that the Board already had included an individual with a university degree in financial accounting and management, that being Mr. Christopher Holder. With respect to this requirement, the Committee observed in its June 20, 2016 Decision that in determining “whether an individual could be fairly characterized as a person with financial skills” it would be useful to have the inclusion of the person’s education in financial matters and their experience in financial work.

In their December 1, 2016 submissions, the ACLC asserts that it has now fully complied with Condition #2, having appointed another lawyer, the Honourable Donald McLeod of

the Ontario Court of Justice to the Board and by providing a resumé for [REDACTED] that indicates that [REDACTED] has taken some university courses concerning financial matters. Further, the ACLC is asserted that [REDACTED] financial and management experience includes “managing budgets exceeding \$10 million dollars.” With respect to the ACLC’s reliance on [REDACTED] as meeting the definition of a person with financial skills, LAO objects, in its submissions, that [REDACTED] past participation as a member of the ACLC Board belies this claim as [REDACTED] was present for some of the past misconduct in financial matters of the ACLC over which the ACLC Board failed to provide adequate management and supervision, and moreover, that [REDACTED] was a member of the Board at the time when the ACLC claimed that it could not comply with the requirement of LAO that it prepare a budget unless a budget template was provided by LAO. In response, the ACLC, in its December 12, 2016 submission, indicated that in fact, [REDACTED] joined the Board [REDACTED] months after the wrongful conduct alluded to by LAO. Further, the ACLC indicated that [REDACTED] resumé had been forwarded to the LAO CEO on August 12, 2016 and accordingly, if LAO had concerns about [REDACTED] financial expertise, LAO should have drawn their concerns to the ACLC’s attention so that it could address them in a timely fashion. In this Committee’s view, whatever reservations that LAO may have about the effectiveness of [REDACTED] participation in the deliberations of the ACLC Board, it is difficult, in light of [REDACTED] resume, to reach a conclusion that [REDACTED] does not meet the requirements of being a “person with financial skills”.

With respect to the lawyer category, Justice Donald McLeod is unquestionably a lawyer and, indeed, in our view, it would be a very positive development if an individual of

Justice McLeod's stature were to take an active role in the deliberations of the ACLC Board. We confess mild surprise, however, that a sitting judge is able to accept such an appointment. Thus, it would be very disappointing if Justice McLeod felt that he could not participate in Board deliberations concerning test case and other litigation strategies, matters on which his advice would no doubt be invaluable to the ACLC Board. It would also be very disappointing if Justice McLeod, on reflection, ultimately determined that he could not continue to serve in this capacity. To demonstrate compliance with the composition requirements, this Committee seeks reassurance that Justice McLeod will be able to be a fully active member of the Board and that his appointment has been approved by the Chief Justice of the Ontario Court of Justice.

Condition 4:

Within 90 days of the Clinic Committee's decision, ACLC will submit a financial restructuring plan to LAO for approval, which stabilizes the clinic's financial position and improves its financial management. In order to obtain LAO approval the plan must include:

- *The write-off the \$50,009.00 accounts receivable from LAO shown in the ACLC's March 31, 2013 Financial Statements.*
- *The elimination of the \$139,340.00 deficit in the Legal Aid Ontario Funds by March 31, 2016 and any other deficit that may be incurred by the ACLC in their 2013/14 fiscal year*
- *Subject to Condition 6, the production of all relevant information and documentation related to the write-off of the accrued liability related to accrued vacation and compensatory time. The documentation is to be attested by the ACLC Board Chair for completeness and accuracy. In the event that there exists material information and documentation subject to solicitor and client privilege that the ACLC cannot or will not waive, the ACLC should provide the LAO Staff with a sufficient description of the information or documentation, provided that such description does not disclose details that would have the effect of disclosing the content of privileged solicitor-client communications, to enable the LAO Staff to determine whether it agrees that ACLC's claim of privilege is a reasonable one in all the circumstances. Even in such cases, however, the ACLC should attempt to disclose relevant information and documentation by redaction of the privileged information where possible*

- *The elimination of any remaining accrued compensation liability for all employees without compromising client service.*

The ACLC asserts that it has successfully implemented the four bullet points contained in this Condition and in its Submissions, LAO does not challenge this claim. Accordingly, we assume that these aspects of Condition #4 have been satisfied. The only point of contention remains, then, is whether the ACLC has successfully complied with the requirement that “within 90 days” of the date of the L3 Decision, “ACLC will submit a financial restructuring plan to LAO for approval, which stabilizes the clinic’s financial position and improves its financial management”. Condition #4 went on to identify a number of specific matters that must be dealt with by the financial restructuring plan in order to obtain LAO’s approval. Those matters included the write-off of the \$50,009.00 account receivable from LAO shown in the ACLC March 31, 2013 Financial Statement, eliminating the \$139,340.00 deficit in the Legal Aid Ontario funds transferred to the ACLC as of March 31, 2016 and a subsequent deficit incurred by those funds and certain issues relating to the write-off of accrued liability related to accrued vacation and compensatory time.

The ACLC’s first attempt to comply with this aspect of Condition #4 was set out in a letter to LAO dated February 17, 2015, which asserted that its Financial Restructuring Plan was as follows:

LAO Dec. 1/16 para. [67]

1. Through cost reduction measures that are ongoing, the ACLC has been successful in significantly reducing its deficit as follows:
 - As at March 31, 2014, the deficit was reduced significantly to \$4,807.

- It is expected that the deficit will be reduced further, or eliminated, as at March 31, 2015.
 - By March 31, 2016, the ACLC anticipates that its deficit will be eliminated.
2. Accrued compensation liability has been eliminated.
 3. The auditor has advised that ACLC that the \$50,009.00 accounts receivable from LAO cannot be written off almost three fiscal years later. However, in an effort to comply with this condition, the ACLC and its counsel will meet with the auditor to discuss the options to write-off the \$50,009.00 accounts receivable from LAO and will provide you with an update in the near future.

In this Committee's Decision of June 21, 2016, the Committee found that the foregoing paragraph did not constitute a "reasonable attempt to comply with this aspect of Condition #4",¹ noting that "the above paragraph does not actually provide any information as to the measures taken or that will be taken to reduce the deficit, nor does it indicate what measures are being taken or will be taken to stabilize the clinic's financial position and improve its financial management."²

Subsequent to the June 20, 2016 Decision, then, it was incumbent upon the clinic to make a further attempt to comply with this Condition. In the ACLC's August 12, 2016 letter to LAO, the ACLC's Board and management promised to submit a revised Financial Restructuring Plan by August 31, 2016. In the event however, the ACLC did not make such an attempt until November 16, 2016, shortly before the deadline for the delivery of written submissions with respect to the present proceeding. The draft plan submitted at that time reads, in part, as follows:

ACLC Dec. 12/16 para. [98]

¹ Clinic Committee's June 20, 2016 Decision, p. 39.

² Clinic Committee's June 20, 2016 Decision, p. 38.

"Stabilizing the Clinic's Financial Position

1. At the end of the 2013-14 fiscal years, the deficit in the General Fund of \$139,340 was drastically reduced to \$35,677.
2. Although the deficit increased in fiscal year 2014-15 to \$117,886 due in large part to the Clinic's office moving on two (2) occasions in 2014, the Clinic incurred a surplus of \$85,485 in fiscal 2015-16. In consultation with the Clinic's auditors, prior year adjusting entries were made to eliminate the remainder of the deficit of \$32,400 in the General Fund to a balance of \$0 as of March 31, 2016.
3. The ACLC's General Fund had a surplus of \$85,485 at the end of the 2015-16 fiscal year.
4. The deficit in the ACLC's General Fund has been eliminated, as required, by March 31, 2016
5. The ACLC's Legal Disbursement Fund had a surplus of \$24,318 at the end of the 2015-16 fiscal year
6. In order to eliminate or reduce the overall deficit the ACLC is working with the Finance Committee to reduce expenses and costs in areas such as, but not limited to travel, communications, meals, audit fees, storage and printing.

The ACLC also provided the following information in the Financial Restructuring Plan (FRP) that addresses the requirement with Condition #4 to improve its financial management.

As part of the FRP the ACLC has implemented the following controls and measures to improve its overall financial management and address the concerns raised by LAO:

1. The ACLC will conduct a monthly budget variance analysis to identify expenses with significant increase, reason for the increase and take cost-cutting measures to keep expenses in line with the budget.
2. The ACLC will send a monthly budget variance analysis to the Board and Quarterly Financial Reports to the Finance Committee for review and recommendations.
3. The ACLC's Finance Committee has been re-activated. The Committee met on March 19, 2016 and November 10, 2016. The LAO Observer was present at the November 10th meeting of the Finance Committee.
4. The Finance Committee reviewed the Auditor's Management Letter and will be providing on-going advice on the implementation of the recommendations contained in the Management Letter,
5. The ACLC has developed and approved an inter-fund Policy which incorporates LAO's inter-fund Policy template. This Policy will monitor and guide all inter-fund activity.
6. A monthly bank reconciliation report is prepared for review and approval by the Executive Director and Treasurer.

7. Implementation and on-going monitoring of the recommendations made by LAO's Internal Audit Unit.
8. A quarterly report of staff vacation and compensation time is prepared for review and approval by the Office Manager, Executive Director and Treasurer to reduce the risk of excessive compensation and vacation time accrual.
9. Monthly review of the Clinic's credit card by the Executive Director and Treasurer. Monthly reconciliation and payment of the credit card are conducted by the Office Manager.
10. The Treasurer, who is a Chartered Accountant, meets with the Office Manager on a weekly basis to monitor the budgets, expenditures and the implementation of the recommendations, measures and controls from LAO's Internal Audit Unit, the Auditor's Management Letter and the Finance Committee."

Although this version obviously represents an attempt to comply with this aspect of Condition #4, it is this Committee's view that it does not constitute a satisfactory compliance with Condition #4 in a number of respects. As with some other attempts to belatedly comply with the Level 3 Conditions, it arrived very late in the day and in circumstances where there was no meaningful opportunity for LAO to provide feedback on the plan and ultimately grant its approval or disapproval. Certainly, the revised plan did not achieve LAO's approval.

More importantly, the revised plan does not provide particulars with respect to measures that have been or will be taken to reduce the deficit in question. As with the predecessor plan's reference to "cost reduction measures that are ongoing", the revised plan has avoided specific details with respect to this aspect of the plan and indicated simply that "ACLC is working with the Finance Committee to reduce expenses and costs in areas such as, but not limited to, travel, meals, audit fees, storage and printing".

In short, some two years after this Committee initially imposed the requirement on the ACLC to develop a Financial Restructuring Plan, it has still not identified any specific measures or plans with respect to the important question of cost reduction. The commitment of the ACLC does not represent a plan for cost reduction but rather an undertaking to develop such a plan in the future.

A further concern is that six days before the submission of the revised plan, the plan was submitted to the ACLC's Finance Committee at a meeting attended by the LAO Observer. In her report, the Observer noted that it came to the Finance Committee's attention at that meeting that the deficit in the LAO General Fund had been reduced by using the surpluses from funds provided by other funders. At that meeting, the LAO Observer explained that this was, in her view, probably inappropriate and that a better solution would be to identify the manner in which LAO funded expenses would be reduced and to seek LAO's permission to use any surplus LAO funding to reduce the deficit in the LAO General Fund. These comments and an appropriate response of some kind from the ACLC are not reflected in the revised plan submitted to LAO on November 16, 2016.

In summary, then, it is this Committee's view that the ACLC has still not successfully complied with this aspect of the requirement of Condition #4.

Condition #5:

- *“Implementation of the following financial reporting systems ...*
- *That any inter-fund transfers between the Legal Aid Ontario funds and other programs managed by the ACLC be reported to LAO monthly ...”*

Condition #8:

“Within 90 days of the Clinic Committee’s decision, ACLC will implement all PwC Forensic Review recommendations...”

Condition #8 requires the ACLC to implement various measures recommended by the PwC Forensic Audit Report dated April 8, 2013. Amongst other measures, the report recommended the development of a policy on inter-fund transfers. The ACLC receives funding from a variety of sources. Indeed, a majority of its funding comes from sources other than LAO. The PwC Forensic Audit Report expressed some concern about the practice of lending or transferring funds from one source to fund expenses in programs funded by other sources. Presumably, the purpose of the 2012 recommendation of PwC to develop a policy dealing with inter-fund transfers was to make such transfers more transparent and to facilitate compliance with any applicable restrictions on such transfers. No such policy had been adopted by the ACLC at the time of this Committee’s Decision on June 20, 2016. Since that time, however, the ACLC Board adopted such a policy and subsequently revised that policy in light of a model “inter-fund transfer policy” prepared and made available to the ACLC on October 14, 2016. The ACLC forwarded to LAO a revised policy on inter-fund transfers, incorporating LAO’s suggestions on October 25, 2016. In its December 1, 2016 submissions, LAO made no objection to the content of ACLC’s inter-fund transfer policy and this Committee concludes therefore that the ACLC has complied with this aspect of Condition #8.

The ACLC policy on inter-fund transfers essentially provides that such transfers are not to occur with respect to funds provided to the ACLC by LAO, although the revised policy would permit such transfers with the prior written consent of LAO. LAO staff are of the

view, however, that notwithstanding the adoption of this policy and assertions made by the Executive Director of the ACLC, in recent months, that no such transfers were occurring with respect to LAO funds, such transfers continue to occur. If this is the case, this would constitute a clear failure to comply with Condition #5 which requires that the ACLC report any inter-fund transfers between LAO funds and other programs managed by the ACLC be reported to LAO on a monthly basis. In its submissions, the ACLC repeats its assertion that no such transfers are occurring. LAO's December 1, 2016 submissions stated in part the following:

LAO, Dec. 1/16

[140] "In a letter dated August 12, 2016, ACLC's Executive Director wrote to LAO stating

The ACLC does not engage in inter-fund transactions between LAO funds and other ACLC funds. This practice was dis-continued [*sic*] before the Clinic Committee issued this Condition and confirmed by LAO's IAU at page 11 of its Report. This element of the Condition is complete.

[141] ACLC Executive Director reiterated this position in a subsequent letter dated October 25, 2016, stating that ACLC does not engage in **inter-fund borrowing of any kind between Accounts**. [Emphasis in original.]

[142] These assertions are contradicted by ACLC's own financial statements. In ACLC's 2014/15 Audited Financial Statements, ACLC's LAO funds owed \$64,000 to its other funds. In the 2015/16 Audited Financial Statements, however, ACLC's other funds and operating fund owed \$50,000 to its LAO funds. The change in the inter-fund payable/receivable balance from a payable to a receivable position reflects that there has in fact been inter-fund borrowing during FY 2015/16. That is, ACLC's Board and management repaid the \$64,000 in funds owed from its LAO funds to its other funds and loaned an additional net \$50,000 from its LAO funds to its other funds.

NOTE: *Reproduction of portions of the Financial Statements have been deleted.*

[143] Further, the Auditor's Management Letter dated August 18, 2016 noted that, due to cash constraints and the fact some ACLC funds share a bank account, ACLC's Board and management pay expenses of individual

funds using other funds. This results in an inter-fund receivable and payable because ACLC's Board and management are essentially transferring money between funds as loans to pay for other funds' expenditures. The Management Letter also confirms that ACLC's Board and management do not accurately record or reconcile these inter-fund transfers in a timely manner. As a result, ACLC's auditors were required to manually reconcile all of ACLC's inter-fund transfers for the 2015/16 Audited Financial Statements.

[144] The Management Letter provides in part:

Recommendation

We recommend that approximately one month after year end, management review the previous year's folder as well as the next year's folder to ensure that invoices have been placed in the right folder and make the necessary adjustments.

Reconciliation for Inter-fund payable and receivable:

Observation

Inter-fund payable and receivable happens when one fund pays for expenses or receives money of another fund. Usually the inter-fund payable and receivable balance of all funds should be zero. During our audit work, we noted that some funds share the same bank account and due to tight cash flow, some fund expenses were paid by another fund. The payable/receivable were not recorded under both the funds concerned when payment was made by one fund to another.

Impact

As a result, a lot of time was spent to reconcile the inter-fund payable and receivable balance by going through all the inter-fund accounts one by one

[145] The financial documents provided two days ago similarly demonstrate that ACLC's Board and management have engaged in inter-fund borrowing with LAO funds as recently as October, 2016. For example, ACLC' quarterly reports for the period from July to September, 2016 and the Statement of Profit and Loss for the LAO General Account show that there have been changes in the payables between the ACYJP and LAO General funds. ACLC's Board and management did not inform LAO of these inter-fund transfers and in fact have repeatedly denied engaging in inter-fund borrowing.”

In its December 1, 2016 submissions, the ACLC dealt with this matter by making the following assertion:

ACLC, Dec. 1/16, page 16, last line

“There are no inter-fund transfers between LAO funds and other ACLC programs. This was confirmed by LAO’s internal audit unit at page 11. (In addition, the ACLC instituted an inter-fund policy).”

In its December 12, 2016 submissions, LAO returned to this subject in the following manner:

LAO, Dec. 12/16

[45] “Page 16 of ACLC’s December submissions also states, “There are no inter-fund transfers between LAO funds and other ACLC programs. This was confirmed by LAO’s internal audit unit at page 11.” A similar assertion was made by ACLC’s Board and management in ACLC’s August 12 letter. Upon receipt and review of ACLC’s 2015/16 Audited Financial Statements, LAO wrote to ACLC’s management, “it appears from the audited financial statements that the LAO general fund is owed funds from other funder accounts”. As noted at para. 141 of LAO’s December submissions, ACLC’s Executive Director responded to this letter on October 25, 2016, stating that ACLC does not engage in **“inter-fund borrowing of any kind between Accounts”** [Emphasis original].

[46] The representations of ACLC’s Board and management are, however, inaccurate. First, LAO notes that the IAU review examined a narrow time frame for compliance from February 17, 2015 to July 31, 2015, and therefore is at most a statement about what happened during that limited time-frame. Second, since there was no disclosure in ACLC’s 2015/16 Audited Financial Statements, it is unknown if the \$39,338 prior adjustment in the 2015/16 Audited Financial Statements relates to prior inter-fund transfers, a correction of an error, or a change in accounting policy. Third, as outlined at paras. 140-145 of LAO’s December submissions, ACLC’s Board and management loaned LAO funds to other funds that have bank indebtedness, or little or no liquid assets to repay the amounts owing. That ACLC’s Board and management have engaged in inter-fund transfers for FY 2015/16 was confirmed by ACLC’s own auditors and financial statement.”

ACLC responded to the allegations made by LAO and quoted above, in the following manner:

ACLC, Dec. 12/16

[130] "In response to paragraph #140, the ACLC asserts and maintains its position that it does not engage in any inter-fund loans or borrowing with any of its funds. However, with programs that have shared common expenses, these amounts are distributed by funds and payments made by the individual funds for their respective share of the expense. Each program will pay its share of the expense. As a result, the vendor may receive several cheques for one invoice.

[131] There are certain expenses where inter-fund transfer may occur with non-LAO funded programs in order to pay a shared common expense such as rent or payroll. In the case of the LAO General and Legal Disbursement accounts, no inter-fund transfers, borrowing or lending occurs. This was confirmed in LAO's Internal Audit Unit's Final Report.

[132] The monthly Bank Reconciliations for 2015-16 and 2016-17 will support that no inter-fund loans or borrowing have taken place.

[133] In response to paragraph #142, there are historical inter-fund balances in prior years that are, in some cases, over ten years old. In the Audited Financial Statements for 2014-15 and 2015-16, there were changes to the inter-fund accounts. These changes reflect adjusting journal entries made by the Auditor to clear off the historical inter-fund balances. No actual cash was transferred or borrowed between funds and the ACLC's Board and management did not use LAO funds to repay \$64,000 or an additional \$50,000.

[134] In response to paragraph #143, some ACLC funds do share bank accounts. However, the LAO funds do not share bank accounts with any of the ACLC's non-LAO funded programs.

[135] In response to paragraph #144, the statement in the Auditor's management letter referring to the cut-off for invoices is a very helpful recommendation. This recommendation refers to two invoices from vendors that were received subsequent to the year-end cut-off period. It does not relate to inter-fund activity or any activity the ACLC has control over.

[136] The statement in the Auditor's management letter referring to the reconciliation of inter-fund payables and receivables concern one funder that pays for several of ACLC's programs. This concern was not raised

regarding LAO funds. Moreover, this item in the management letter was stated as a recommendation to the ACLC to assist in improving the organization's reconciliation of inter-fund payables and receivables. The primary reason the Auditor provided this recommendation to ACLC was due to the considerable amount of time the Auditors spent as part of the audit to reconcile the inter-fund payables and receivables balance. This recommendation was made to avoid this happening in the future.

[137] The Auditor further recommended the reconciliation of the inter-fund balances. The ACLC has acted upon this. The Office Manager has diligently prepared quarterly reconciliations of the inter-fund balances. As inter-fund reconciliation was prepared for the first and second quarters (April to September) of fiscal 2016-17.

[138] These quarterly inter-fund balances are reviewed and signed by the Treasurer and the Executive Director.

[139] The recommendation in the Auditor's Management Letter does not suggest any inter-fund impropriety.

[140] The ACLC finds this recommendation to be helpful as a monitoring tool, as part of the Financial Management portion of the FRP and in preparation for the annual audit."

An additional concern with respect to such transfers noted by LAO in its December 1, 2016 submissions related to collectability of receivables in LAO's fund. This concern was expressed in the following terms:

LAO, Dec. 1/16

[90] "ACLC's 2015/16 Audited Financial Statements report that at March 31, 2016, ACLC's LAO Legal Disbursements Fund had a fund between \$24,318 and the LAO General Fund had a fund balance of exactly \$0. The net assets in ACLC's LAO funds includes a net receivable of \$50,000 owing from ACLC's other funds. Specifically, as discussed beginning at para. 140, in direct contravention of Condition #5, ACLC has engaged in inter-fund loans and used LAO funds to pay expenses on behalf of ACLC's other funds.

[91] At March 31, 2016, ACLC's other funds, including its general operating fund either have bank indebtedness, or little or no liquid assets (cash or receivables) to repay the amounts owing to the LAO funds. Unless ACLC obtains other sources of financing or other funder agrees to

provide funding to ACLC that would allow the Clinic to reimburse LAO, the \$50,000 owed to LAO will be uncollectable. This raises questions as to whether ACLC's LAO funds will remain in a positive net asset position.

[92] Also, on a net basis, as of March 31, 2016, ACLC's operating fund and three of its restricted funds (DOJ, MEDEI and Trillium) owe a total of \$195,000 to ACLC's other funds, including to ACLC's LAO funds. The operating fund alone owes \$92,000. However, as of March 31, 2016, the operating fund has liquid assets of only \$15,000 to repay the other funds. Similarly, ACLC's DOJ, MEDEI and Trillium funds had few liquid assets to repay the amounts owed to other funders. ACLC will not be able to repay the amounts owed to the other funds, including ACLC's LAO funds, unless it obtains additional unrestricted operating grants or financing."

In its December 12, 2016 reply submissions, the ACLC responded to these allegations in the following terms:

ACLC, Dec. 12/16

[118] "In response to paragraphs #90-92 of LAO's submissions of December 1, 2016, the ACLC strongly reiterates that it does not engage in any inter-fund loan or borrowing. This is a balance sheet item, not an issue related to operations. These are prior year positions that the ACLC is working with its Auditor to resolve and clear up going forward. This is not an indication of any inter-fund transfers, loans, borrowing or activity of any kind. This is not an indication of any inter-fund activity whatsoever in the current year. These are historic balances that go back for close to 10 years. The Balance Sheet shows a consolidated inter-fund balance (payables/receivables) of \$0. LAO Staff submissions on this point are misleading and all about nothing.

[119] There are no inter-fund loans or borrowing with any ACLC funds, in particular, the LAO funds. In general, the \$195,000 cited at paragraph #92 of LAO's submissions is made up of balances selected by LAO on the Balance Sheet. These are old balances that will be cleared in current and subsequent years in consultation with the ACLC Auditors. This is all part of the ACLC Financial Restructuring Plan. It is important to note, that there are contra entries equal to \$195,000 also on the Balance Sheet with will clear the balance to zero."

LAO and ACLC obviously have very different perspectives on various factual issues relating to the continued existence or non-existence of inter-fund transfers involving LAO

funds. This Committee does not find it possible on the basis of the written materials filed by the parties, to determine which version of the facts is correct. This is most unfortunate as this issue is, indeed, an important one. One way of resolving the issue would be to rely on the proposition that the burden is on the ACLC to establish compliance with Condition #5 in this regard and that the ACLC has not discharged its burden of doing so. We do not consider this to be a satisfactory basis for resolving the issue, however, and would prefer to have the matter investigated either by LAO's Internal Audit Unit, or by some other appropriate party selected by LAO with respect to the time period following the time period initially examined by the LAO Internal Audit Unit, that if from February 17, 2015 to July 31, 2015.

Condition #7:

LAO will provide monthly funding based on:

- *a monthly schedule of recurring expenses such as rent, salaries and equipment leases in a format approved by LAO. For such expenses, payment will be released by LAO on the first day of each month*
- *receipt of invoices and expense reports for all other expenditures which ACLC will submit, and which LAO will review, in a timely manner. Where LAO has no problems or questions, LAO will release these funds within seven business days of receipt. Where LAO has concerns or questions, LAO will communicate those concerns or questions to ACLC within seven business days. In cases where an expense claim is rejected, LAO will advise ACLC of the basis of the rejection within seven business days of receipt. Where LAO receives further information or explanation in response to its questions or concerns, LAO will either pay for or deny the expense within seven business days of the receipt of the additional information or explanation*

LAO approval will be based on its assessment of whether expenses are permitted and comply with the LAO-Clinic Funding Agreement, applicable policies and directives.

Condition #7 sets out the arrangements on which monthly funds would be provided to the ACLC during the Level 3 Remedial Response. In essence, it provides that two types of monthly funding will be provided. The first covers so-called "recurring expenses such as

rent, salaries and equipment leases”, payment for which was to be made to the ACLC by LAO on the first day of each month on the basis of recurring expense estimates provided by ACLC. The second type related to other ACLC expenses which required invoices and expense reports to be provided to and approved by LAO. In its June 20, 2016 Decision, the Committee noted that there were very serious compliance problems resulting from the fact that the ACLC did not transparently disclose vacancies and thus secured improper access to LAO funds. The Committee found this phenomenon to be particularly troubling as it arose against the background of rather severe wrongdoing of this kind that led, in part, to the initial imposition of the Level 3 Remedial Response. In its June 20, 2016 Decision, the Committee described the context of the continuing problems of this kind in the following terms:

Clinic Committee June 20/16 Decision, pg. 59

“This Committee has concluded that there was a very substantial problem of non-compliance by the ACLC with respect to its recurring expenses. In essence, the ACLC provided misleading information concerning its recurring expenses relating to staff salaries and thereby secured improper access to LAO funds and used such funds in a manner not permitted by the terms of the LAO/ACLC Funding Agreement.

The Funding Agreement provides in Section 21 that funding provided for personnel expenses cannot be used for non-personnel expenses. Section 26 of the agreement provides that funds accumulated by reason of staff vacancies may be expended for the purpose of employment of “replacement staff” and may only be expended for some other purpose with the approval of LAO. We find that there occurred two staff vacancies since the issuance of this Committee’s CC L3 Remedial Response Decision that were not reported to LAO in the required manner, and further, that the ACLC continued to claim funding for these purposes, which it then spent without LAO approval in an unauthorized fashion.

There are a number of troubling aspects to this misconduct. First, the ACLC has engaged in this form of wrongdoing on several occasions in the past and has been consistently advised by LAO that it must not do so. Misconduct of this kind was drawn to the attention of the ACLC by LAO in

September of 2010 when the ACLC was placed under Level One of the DRP. Further misconduct of this kind was drawn to the attention of the ACLC in July of 2012 when LAO learned that vacancy funding was used to pay additional lump-sum or bonus payments to staff totalling \$170,000, of which \$121,000 was paid to the Executive Director.

A third instance of this misconduct was the subject of discussion in this Committee's CC L3 Remedial Response Decision which related to the use of vacancy funding to hire highly expensive outside counsel to undertake test-case litigation, in one instance involving a [REDACTED] as the client. Fees totalling \$283,905 (after the retained firm wrote down \$200,000 of its billings) were expended on this particular case. In its CC L3 Remedial Response Decision, this Committee noted that this misconduct on the part of the ACLC was particularly problematic in light of its recurring nature. For this reason, it is both surprising and troubling to learn that this form of misconduct recurred in the period following the CC L3 Remedial Response Decision.

Second, it is troubling that when LAO obtained from independent sources knowledge of the fact that there were vacant positions at the ACLC, LAO staff sought, on several occasions, to obtain accurate information from the ACLC, as to when the staff in question had left their positions. The ACLC simply declined to provide that information. Even more troubling is the fact, conceded by the ACLC Board, that the Executive Director was not candid in discussing this matter with LAO staff. Refusal to provide information and the provision of false or misleading information to LAO concerning financial matters is not only a breach of the ACLC's statutory obligations and its obligation under the Funding Agreement it has entered into with LAO, but it undermines the relationship of trust and confidence between LAO and the ACLC, which is necessary to a successful and functional funding relationship. It is our view that the misuse of vacancy funding and the provision of false and misleading information concerning vacancies constitutes a "fundamental breach" of the ACLC's statutory obligations and its obligations to LAO under the Funding Agreement.

Finally, in light of the history of this form of misconduct by the ACLC and several warnings given by LAO on this point to the ACLC, the provision of false and misleading information on this issue by the ACLC to LAO provides support for our conclusion that the wrongdoing of the ACLC on this issue was intentional."

This Committee concluded that the ACLC had not satisfactorily complied with Condition #7. Against this background and in light of the precarious position the ACLC had placed

itself in with respect to its funding from LAO, one might have expected that the ACLC Board or the Executive Director, perhaps on the advice of counsel, would have adopted a policy of immediately reporting vacancies once it became aware of their occurrence and to refrain from claiming compensation for vacant positions in its monthly recurring expense claim. Surprisingly, it appears that no such instructions were issued by the Board or adopted by the Executive Director. Indeed, in its December 1, 2016 submissions, LAO claims that on at least four occasions, the ACLC continued to obtain improper access to LAO funding for vacant staff positions and that in most instances, LAO learned independently of the fact that the positions were vacant or that letters of resignation had been forwarded to the ACLC by the employee in question.

In its December 1, 2016 submissions, LAO described these instances in the following terms:

LAO, Dec. 1/16

[24] ACLC's Board and management continue to obtain LAO funds for staff positions which are vacant and to use this money improperly.

[25] ACLC's employment contracts require its employees to provide one month's notice of their resignation. LAO learned independently of ACLC that the [REDACTED] provided one month's notice of [REDACTED] resignation in a letter dated March 18, 2016 – the date of ACLC's oral hearing before the Clinic Committee. ACLC's Board and management did not inform LAO of [REDACTED] resignation or submit an updated schedule of recurring expenses on this date.

[26] LAO also learned independently of ACLC that [REDACTED] last day of employment at ACLC was April 15, 2016. ACLC's Board and management also failed to submit an updated schedule of recurring expenses or otherwise inform LAO of [REDACTED] resignation on or before this date.

[27] Having heard nothing from ACLC's Board and management regarding ██████████ departure, on May 26, 2016. LAO wrote to ACLC's Board and management requesting the date of ██████████ departure, a completed staff change form, and an explanation as to why ACLC's Board and management had not to date submitted a staff change form.

[28] ACLC's management did not submit a completed staff change form until May 30, 2016, more than two months after ██████████ provided notice of ██████████ resignation. ACLC's management inaccurately reported that ██████████ resigned on April 27, 2016. A letter accompanying the staff change form from ACLC's Executive Director stated that ACLC's Board and management failed to provide earlier notice of this vacancy because ACLC "was waiting to confirm the new staff before submitting the change form". As a result of this failure to provide a timely report, ACLC's Board and management obtained \$10,816 in LAO compensation funds for a vacant position.

[29] On June 9, 2016, LAO wrote to ACLC's Executive Director to advise: "When ██████████ employment at ACLC ended, ██████████ salary ceased being a recurring or actual expense. ACLC failed to inform LAO of this fact and instead accepted approximately \$6,550 in compensation funding on the basis of inaccurate information. As noted by the Clinic Committee, it is important for LAO to receive accurate and timely reports of staff vacancies. A "timely" report is one that occurs when ACLC becomes aware of a staff resignation or departure date, not once a vacancy is filled."

[30] LAO requested that ACLC's Executive Director provide, *inter alia*, an updated monthly schedule of recurring expenses, reflecting these and any other changes to ACLC's expenses, and timely reports of any other current or upcoming vacancies.

[31] On June 17, 2016, LAO received a completed staff change form indicating that the ██████████ resigned from ██████████ employment, effective May 31, 2016. LAO learned independently of ACLC that ██████████ provided one month's written notice of ██████████ resignation as required in ACLC's employment contracts. The staff change form further advised that ACLC hired ██████████ to replace ██████████, effective June 16, 2016. As a result of this delay in reporting, ACLC's Board and management obtained \$3,452 in LAO compensation funds for a vacant position.

[32] In a letter dated May 31, 2016, ACLC's Board and management requested that the compensation funds forwarded to ACLC for ██████████

██████████ position be used to hire a ██████████ from June 1, 2016 to August 31, 2016, \$7,242 (\$2,414 per month) of which was funded by LAO.

[33] Further, in a letter dated June 27, 2016, ACLC's Board and management advised that beginning July 16, 2016, ██████████ would be working only three days per week, instead of five. In a subsequent letter dated September 1, 2016, ACLC's Board and management requested that it be permitted to use the surplus compensation funding resulting from ██████████ reduced working hours and the remaining surplus compensation funding resulting from the vacancies of ██████████ and ██████████ to continue to employ ██████████ from September 1, 2016 to December 31, 2016, and to hire another ██████████ for the same time period.

[34] As a result, despite ██████████ reduced working hours, ACLC continued to receive full funding for the ██████████ position in the amount of approximately \$6,905 per month. According to the recurring expense form submitted on September 23, 2016, \$2,414 of the funding for the ██████████ position has been used for the ██████████ position. Thus, since July 16, 2016, ACLC has requested and received \$10,863 for the ██████████ position.

[35] LAO learned, independently of ACLC, that ██████████ was no longer employed at ACLC. LAO staff understands that ██████████ left ██████████ employment in September, 2016. In a letter dated November 17, 2016, LAO requested that ACLC provide ██████████ date of departure. On November 21, 2016, ACLC's Executive Director wrote to LAO to advise that in fact ██████████ had never been hired into the position. This suggests that ACLC, in breach of Condition #7, accumulated a surplus of \$10,647 for which it has to date failed to account.

[36] On November 22, 2016, ACLC notified LAO that ██████████ resigned from ██████████ employment effective November 18, 2016. This suggests that an additional \$1,883 of the \$6,904 provided for the ██████████ position on November 1, 2016 was provided for what is now a vacant position. Presumably, ██████████ like other ACLC employees, was required by ██████████ employment contract to provide one month's notice of her resignation. As such, it is likely that ACLC's Board and management could have provided notice of ██████████ resignation in advance of the November release of ACLC's recurring monthly funding.

[37] The Committee will recall that at the oral hearing before the Clinic Committee, and on the same day ACLC's ██████████ resigned, ACLC's counsel presented to the Committee a letter dated two

days earlier from ACLC's Chair to the Executive Director. The letter expressed concern that the Executive Director "received funds from LAO that were earmarked for the [REDACTED] position, after that position had become vacant" and was not candid in discussing the matter with LAO staff. The Chair advised that the Executive Director would henceforth be required to provide the Board with written confirmation that all reports to LAO were complete, up to date and accurate and that these reports would be included in the Board's minutes. The Chair further warned that if misconduct of this nature reoccurred, the Board would "take disciplinary action, up to and including immediate termination for cause".

[38] LAO notified ACLC's Chair of the Executive Director's failure to provide notice of [REDACTED] departure by letter dated June 17, 2016. LAO is not aware of any disciplinary action having been taken by the Board against the Executive Director.

[39] Further, in a letter dated July 6, 2016, LAO requested that ACLC's Chair provide minutes and materials from previous meetings of the Board, including meetings that occurred in March, April, May, and June, 2016. As is outlined further in para. 119, ACLC, until two days ago, failed and refused to provide these materials. When they were provided, almost all references to personnel matters were redacted. LA thus has no evidence or confidence that the Board has taken any meaningful action with respect to the concerning rate of staff turnover at ACLC or to ACLC's reporting obligations to LAO.

In its December 1, 2016 submissions, the ACLC notes that concerns have arisen with respect to ACLC's reporting of staff changes, but nonetheless, offers various explanations for these instances which, in the view of the ACLC, should allay these concerns. The first explanation, we must say, lacks plausibility. In its December 1, 2016 submissions, the ACLC suggests that since the LAO Staff Information Change Form contains sections in which one can report both incoming and outgoing staff, that means that the form needs only to be completed with respect to a vacancy once the position has been refilled. In the case of [REDACTED] when the ACLC was advised by LAO on May 26, 2016 that LAO had received information that [REDACTED] had provided one month's notice of [REDACTED] resignation in a letter dated March 18, 2016, the ACLC responded by letter

on May 30, 2016, submitting the Staff Information Change Form and explained that it had been waiting for the replacement staff person's acceptance of an offer of employment, which had just been received.

The suggestion that the format of the form carries with it the implication that one does not have to report vacancies until the position is refilled is simply not credible. As LAO noted in its December 12, 2015 submissions, this would mean that there was nothing improper in ACLC's prior practice of not notifying LAO of vacancies for as long a period of 20 months and accumulating surplus compensation funds during that period. This explanation is particularly implausible in the context of LAO's persistent criticism of this practice of the ACLC and the requirement that it must report vacancies in a timely fashion. Moreover, as LAO pointed out in its December 12, 2016 submissions, the ACLC has submitted Staff Information Change Forms with only outgoing or incoming staff listed on as many as six occasions in the last couple of years. This strongly suggests that the ACLC understood perfectly well that it is not LAO's intention that the change form be filed for a vacant position only once the position has been filled.

The second explanation offered by the ACLC is that it was complying with the reporting practices of other clinics. Apparently, rather than simply asking LAO or this Committee for clarification of what was intended by the Committee with respect to the requirement of "timely" notification of vacancies, the ACLC conducted a survey of some other clinics, asking about their reporting practices concerning vacancies and discovered that some report within 30 days, others within 60 days and some upon the appointment of

replacement staff. Accordingly, in the ACLC's view, since it had reported the vacancies, or in one case, a reduction of the workload from five to three days per week, within 30 days of the termination of employment in question, it was complying with the practices followed by other clinics and to hold it to a higher standard would amount to discriminatory treatment.

When made aware that the ACLC was taking this position, Vice-President, Budgell, responded to this point on August 16, 2016 by letter to the ACLC's Executive Director in the following term:

LAO Dec. 1/16 , Appendix A-35, p. 3, paras. 3 - 8

"Finally, you note that LAO's previous correspondence and the decision of the Clinic Committee failed to provide guidance as to what was meant by "timely reporting" of vacant staff positions. ACLC consulted with several clinics as to the timeframe used to report staff vacancies to LAO. Some report within thirty (30) days, some within sixty (60) days and some when they have hired a new staff member. You maintain that ACLC reported the vacancies left by [REDACTED] and [REDACTED] within one (1) month of their departure.

Due to ACLC's involvement in the DRP, the Clinic Committee's finding that ACLC continues to be in fundamental breach of its obligations, and the Committee's imposition of conditions on ACLC's continued funding, ACLC is in a different position relative to other clinics.

Condition #7 in particular was imposed as a result of the Committee's finding that ACLC has repeatedly failed to report staff vacancies for lengthy periods of time, claimed funding for these positions, and then used this funding for unauthorized and inappropriate purposes. No similar findings have been made with respect to other clinics. No similar conditions have been imposed. As such, ACLC should not model its practices after those of other clinics, and must instead comply with the conditions imposed on it by the Clinic Committee.

Given the context in which Condition #7 was imposed, what is meant by "timely reporting" of vacant staff positions is clear; i.e. if reporting results in

compensation funding flowing from LAO to ACLC for a vacant position, the reporting of that vacancy is not timely.

Failing to report vacancies when they occur, and failing to ensure that the recurring expense form is kept up-to-date and accurately reflects actual expenses, perpetuates the situation where ACLC is claiming and accepting funding to which it is not entitled under the Clinic Committee conditions. This conduct is repeated and ongoing, and constitutes a failure to comply with the Clinic Committee conditions.

In its December 1, 2016 submissions, the ACLC quoted briefly Vice-President Budgell's statement of the results of the ACLC survey in this letter and then quoted, arguably out-of-context, and italicized the phrase, "ACLC should not model its practices after those of other clinics". In a letter to Vice-President Budgell dated September 1, 2016, the ACLC Executive Director suggested that to impose a higher standard of timeliness than that observed by other clinics would constitute discriminatory treatment of the ACLC and that such discriminatory or differential treatment was not authorized by the Level 3 Remedial Response conditions.

In its December 12, 2016 submissions, LAO responded as follows:

ACLC, Dec.12/16

[58] "LAO notes that paras 45, 48 and 53 of ACLC's December submissions reproduce the portion of the paragraph above that provides that "ACLC should not model its practices after those of other clinics." ACLC's Board and management have taken this quotation out of context in an attempt to suggest differential and discriminatory treatment. However, in its proper context, it is clear that this statement conveys that ACLC is not in the same position as any other clinic, because, as a result of persistent financial mismanagement and inadequate board governance, it has been found in fundamental breach of its statutory obligations and is subject to a condition that it only receive monthly funding based on: (1) a monthly schedule of recurring expenses such as rent, salaries and equipment leases, and (2) invoices and expense reports for all other expenditures."

This Committee is of the view that it was quite obvious in the context of the history of this matter and previous Decisions of this Committee concerning the ACLC, that the ACLC should report vacancies in such a fashion as not to obtain funding for vacant positions and that the ACLC has, in the last six months, persisted in refraining from doing so. With respect to the fact that the ACLC continues to file recurring monthly expense form that include compensation for vacant positions, LAO, in its December 12, 2016 submission, indicated that the ACLC's failure to disaggregate compensation expenses by position, as had been required by LAO, obscured how much funding flowed to each position and asserted that this led to excessive compensation claims on at least three occasions in March, April and October of 2016.

In response, in its December 12, 2016 reply submissions, the ACLC asserted that it did provide accurate information concerning surpluses either when requested or on its own initiative and in particular, requested permission to use the funds to employ replacement staff.

With respect to the surplus resulting from the vacancy of [REDACTED] the ACLC noted that the surplus was less than claimed by LAO and that the amount in question had been accounted for and reported to Vice-President Budgell in a letter dated September 1, 2016.

In our view, while we agree that the ACLC again has not fully complied with Condition #7 with respect to the reporting of vacancies, we note several differences between these recent instances and the level or gravity of ACLC wrongdoing which preceded and followed the imposition of the Level 3 Remedial Response. Unlike previous episodes, there have been, in the recent incidents, accurate responses to questions raised by LAO and there appears to be no evidence of the previous practice of intentionally providing false and misleading information to LAO with respect to vacancies. Further, the periods of delay in reporting are much shorter and the amounts of surplus funding involved are much smaller. At the same time, it remains troubling that LAO's knowledge of three of the vacancies came from independent sources rather than from the ACLC itself and it is understandable that LAO lacks confidence in the genuineness of the effort by the ACLC to comply with Condition #7 in this respect.

A somewhat similar exchange between LAO and the ACLC relates to duplicate expense claims filed by the ACLC. In its December 1, 2016 submissions, LAO claims that the ACLC has, on multiple occasions, sought to obtain duplicate funds for expenses. Essentially, this has involved filing separate invoices for expenses that were included within the monthly recurring expense claims. From LAO's perspective this involves an improper attempt to obtain LAO funds to which the ACLC is not entitled. In its reply submissions of December 12, 2016, the ACLC takes the position that there was absolutely no intentional misleading by the ACLC as to these expenses, that perhaps LAO should have caught all of these problems and that the ACLC "should not be

penalized for this joint mistake”. In any event, it asserts that inaccuracies in reporting the ACLC expenses resulted from human error rather than intentional wrongful conduct.

Conclusion

The foregoing analysis has identified a number of deficiencies in ACLC’s compliance with the eight conditions, notwithstanding the additional six month period extended by this Committee’s Decision of June 20, 201 for the ACLC to effect complete compliance with all eight conditions. LAO Staff’s view of the conduct of the ACLC during the past six months merely confirms their reservations about the ACLC’s ability to comply with their statutory obligation of transparency and accountability. In their December 1, 2016 submissions they summarize their position as follows:

LAO, Dec.1/16

[185] “The ongoing conduct of ALCL’s Board and management demonstrates that they have not and will not comply with the Clinic Committee’s Conditions, LASA, the MOU and the Funding Agreement. They still refuse to provide accurate and up-to-date information. They continue to conduct themselves in a manner that precludes trust and confidence on the part of LAO, which is essential to a successful funding relationship. They refuse to be transparent and forthright. They still fail and refuse to act in good faith. They refuse to use the funds provided by LAO for their intended purpose. Their conduct prevents LAO from discharging its statutory obligation to ensure the proper use of public funds. They refuse to engage in financial restraint or otherwise improve their financial management and oversight.

We have considerable sympathy with these sentiments given the lengthy and protracted nature of these difficulties in the relationship between LAO and the ACLC. We are nonetheless of the view that some progress, if belated, has been made. We note, for example, that it finally appears to be the case that, apart from the continuing and

unresolved concerns relating to inter-fund transfers, the recommendations from the 2012 PwC Forensic Audit Report appear to have now been completely adopted by the ACLC. Steps have been taken to improve the composition of the Board of Directors. The Board training program required by Condition #2 was finally, in fact, held on October 15, 2016 and was attended by all but two members of the Board. The LAO Observer was present for this program and reported that the trainer and materials were excellent and that the Board members in attendance were engaged during the course of the day. The LAO Observer attended a meeting of the Finance Committee of the ACLC Board and noted that the Committee includes in its members, Mr. Manswell, Mr. Holder and two other non-Board members who are accountants. The LAO Observer reported that the members who are accountants appear to be competent accountants. She did express regret, however, that the Committee was not convened to review the draft unaudited financial statements and meet with the auditors, matters which fall squarely within the terms of reference of the Committee. Nonetheless, the Committee appears to be appropriately composed and functional. Further, although the continuing reluctance of the ACLC Board to provide information requested by LAO remains alarming, it must be said that, however belatedly, the ACLC has recently been more forthcoming in its discharge of its statutory obligations to provide information to LAO.

At the same time, the prolonged nature of this process, the apparent reluctance of the ACLC through much of the process to respond to LAO's overtures to improve management and governance practices and the last-minute nature of the compliance with a number of the remedial conditions remains troubling. These circumstances also

raise a difficult question of interpretation of the governing legislation. The particular issue was raised by Counsel to the Clinic Committee, Mr. Richard Steinecke at the March 18, 2016 hearing of this Committee which preceded the issuing of this Committee's Decision of June 20, 2016. As Mr. Steinecke noted, this Committee is deliberating on the question of whether to suspend LAO funding of the ACLC pursuant to sections 39(4) and 39(5) of the (LASA). Those provisions stipulate as follows:

Non-Compliance by clinic

(4) If the board of directors of the Corporation is of the opinion at any time that a clinic funded by the Corporation is not complying with this Act or with the terms and conditions attached to its funding or with a direction issued under section 38 or is not meeting the operational standards established by the Corporation, the board of directors may reduce or suspend the funding of the clinic.

Notice to clinic

(5) Before taking any action under subsection (4), the board of directors of the Corporation shall give the board of directors of the clinic notice of its intent and a reasonable opportunity to comply with this Act or the terms and conditions or direction or to meet the operational standards. 1998, c. 26, s. 39.

As Mr. Steinecke noted, these provisions deal with the issue of current non-compliance, but it is not entirely clear what this concept envisions. In the absence of judicial authority interpreting the concept, it was his opinion that current compliance must mean that the clinic in question is in a "state of compliance" with the Act or the terms and conditions of its funding. Mr. Steinecke provided the following illustration:

"Assuming there is a direction that the clinic have \$5,000.00 in its account at all times and it has \$5,000.00 in its account consistently, but the day before the hearing, something unusual arises and on the date of the hearing, it has something less than \$5,000.00 in the account. In my opinion, the clinic would still be considered to be in a state of compliance, even though something unusual caused a state of last-minute non-compliance. Conversely, if it is not in compliance the entire time and the

day before the hearing, it deposits sufficient money to satisfy the \$5,000.00 condition, one could find that it is not in "a state of" compliance.

Arguably, then, when the ACLC after years of refusing to respond fully to LAO's requests for, in the wording of section 37(2)(d), "financial or other information relating to the operation of the clinic" and then provides the information on the eve of the expiry of the deadline for compliance, it may be seriously questioned whether the clinic is in a state of compliance.

The practical aspect of this issue is that it is very difficult, perhaps impossible, for LAO to have confidence that the ACLC will remain in a state of compliance in the future.

Moreover, the cost of monitoring the ACLC and seeking to ensure its compliance with the statute and the MOU and FA with LAO is, the experience of the last several years indicates, a very burdensome and expensive exercise for LAO, draining away resources that could otherwise be devoted to client service. We are not determining at this point, however, whether a "state of compliance" has or has not, in fact, been achieved by the ACLC.

In its written submissions of December 12, 2016, the ACLC requests that "it be given until the end of the fiscal year (March 31, 2017) to remedy any outstanding deficiencies of the conditions". In light of the progress that has been made in recent months, this Committee is of the view that a brief adjournment of this proceeding in order to provide an opportunity to provide further information concerning compliance with the eight conditions should be accorded to the ACLC. During this period of adjournment, the eight

remedial conditions are to remain in full force and effect. Some additional time would also permit the LAO Internal Audit Unit or other party designated by LAO to ascertain the facts relating to the inter-fund transfer issue referred to above. We are not of the view that an adjournment to the end of the fiscal year would be appropriate, however.

Accordingly, this Committee has determined to adjourn the proceeding to the end of February, 2017, so as to permit the presentation of further information to this Committee by the parties in an attempt to demonstrate whether or not the ACLC has engaged in full and complete compliance with the eight conditions. By that time, the ACLC must satisfy this Committee that it fully complies with the eight conditions and, more particularly:

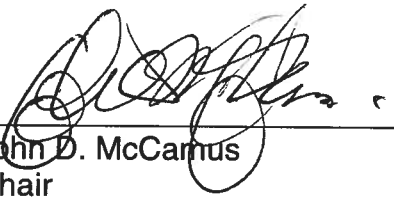
- That it has successfully established a financial restructuring plan that meets the approval of LAO, or failing that, this Committee,
- That it has established in an audit conducted by LAO's Internal Audit Unit or other auditor selected by LAO that it has provided accurate information with respect to inter-fund transfers and has implemented its policy on this subject in the period subsequent to July 31, 2015,
- That it has provided all information requested by LAO, relating to compliance with the eight conditions,
- That the ACLC will provide assurances in the form of a written statement acceptable to LAO, or failing that, this Committee, signed by the Justice of the Ontario Court of Justice recently appointed to the ACLC Board, that he will be able to take a full and active role in Board deliberations and that his acceptance of the appointment to the ACLC Board has the approval of the Chief Justice of that Court,
- That, in the meantime no new non-compliance has occurred.

If LAO staff does not indicate in writing that the ACLC has fully complied with the eight conditions, including as specified above, prior to February 28, 2017 and the ACLC believes it has so complied, the ACLC shall file such proof in writing with the Committee by February 28, 2017. LAO staff should also file with the Committee in writing, any proof that would demonstrate non-compliance by the same date. The written proofs shall be

delivered on the same side at the time of filing and both parties will have until March 7, 2017 to respond to the proofs presented by the other side. The Committee would ask that any reply be restricted to new issues raised by the other party in the earlier proofs and not repeat previous points or contain new submissions.

Should the ACLC fail to meet this deadline for demonstrating complete performance of the Level 3 Remedial Response Conditions, its funding from LAO will be suspended as of March 31, 2017.

January 19, 2017.



John D. McCamus
Chair