

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

**DECISION ON RECONSIDERATION OF CLINIC COMMITTEE**  
**DECISION DATED AUGUST 16, 2017**

October 18, 2017.

# **REASONS FOR DECISION**

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## **Part I – Introduction**

On August 16, 2017 this Committee rendered a Decision suspending LAO funding of the African Canadian Legal Clinic (“ACLC”). That Decision indicated that the suspension would be effective as of September 30, 2017 or at such later date as may be mutually agreed by Legal Aid Ontario (“LAO”) and the ACLC.

On September 5, 2017, the ACLC filed a Notice of Request for Reconsideration (“Request for Reconsideration”) of the August 16, 2017 Decision. As it was not entirely clear to this Committee that a clinic subject to a decision such as that of this Committee’s Decision of August 16, 2017, was entitled to request a reconsideration of such a decision, this Committee, through its counsel, sought further advice from counsel for the ACLC and counsel for LAO as to whether such a right to reconsideration exists. In due course, such advice was received and on September 22, 2017, this Committee issued a Decision in which it ruled that such a right of reconsideration is conferred by s.31 of the Dispute Resolution Policy (“DRP”), which, by agreement of LAO with each of its community legal clinics across the province, including the ACLC, governs issues of this kind.

Accordingly, this Committee, through its counsel, invited further written Submissions from the ACLC and from LAO with respect to ACLC’s Request for Reconsideration and convened an oral hearing at which the parties were invited to make oral submissions concerning these matters on October 1, 2017. This Committee, having carefully considered the written and oral Submissions of the parties concerning the Request for Reconsideration, now issues this Decision on the merits of this matter.

As a preliminary matter, it will be useful to briefly review the various stages of this proceeding. The DRP provides for a somewhat elaborate three-stage process for dealing with situations in which LAO becomes concerned about questions of governance and financial management at a community legal clinic funded by LAO. The DRP envisages a three-stage process of increasing levels of intensity, which is designed to ensure that the particular clinic complies with its statutory obligations under the *Legal Aid Services Act*, 1998, S.O. 1998, c. 26 (“LASA”) and the terms and conditions of its funding with LAO. As a result of concerns developed by LAO, in part, as a result of the resignation in protest of two members of the Board of Directors of the ACLC, LAO placed the ACLC under Level 1 of the DRP and retained PricewaterhouseCoopers LLP (“PwC”) to conduct a forensic audit of the ACLC’s finances during the period from April 1, 2007 to March 31, 2010. As a result of further concerns that resulted from that forensic audit and the unwillingness of the ACLC to agree to certain remedial measures, the ACLC was placed under Level 2 of the DRP on July 12, 2012.

On April 3, 2014, LAO staff proposed to this Committee that, on the basis of continued reluctance on the part of the ACLC to engage in a remediation process requested by LAO, this Committee impose Level 3 of the DRP on the ACLC, in which mandatory

conditions can be imposed on a clinic. On September 5, 2014, this Committee released its Decision imposing Level 3 of the DRP on the ACLC and requiring the ACLC to comply with eight remedial conditions which were designed to bring the ACLC into alignment with its statutory and other obligations concerning its management and use of public funds made available to the ACLC by LAO. The evidence of financial mismanagement, as it was available to this Committee on September 5, 2014 is set out in Appendix B. On November 7, 2014, in response to a request from the ACLC, this Committee issued a Decision revising and clarifying certain of those eight remedial conditions. The eight remedial conditions as clarified in this Committee's Decision of November 7, 2014 are reproduced in Appendix A.

On June 20, 2016, in response to a motion to this Committee from LAO Staff, this Committee rendered its Decision, finding that the ACLC had fully complied with only one of the eight remedial conditions and that its funding by LAO should therefore be suspended. The Committee further reasoned, however, that it was obliged to give reasonable notice to the ACLC of its intent to suspend funding and an opportunity to comply with its statutory and other obligations. The Committee therefore determined that six months would constitute such reasonable notice and indicated that LAO funding of the ACLC would be suspended in December, 2016 unless, in the interim, this Committee was persuaded that the ACLC had fully complied with the eight remedial conditions. Following the expiration of that six month period, further contested proceedings ensued in which the question as to whether the ACLC had fully complied with the eight remedial conditions was the subject of dispute.

On January 19, 2017, this Committee rendered its Interim Decision on that matter requesting further information of certain kinds from the parties. Such information and further written Submissions from the parties were received in May and June of 2017. In light of the further information and further Submissions received, this Committee rendered a Decision on August 16, 2017 concluding that the ACLC remained in fundamental breach of its statutory and other obligations and that the appropriate response to these problems was to discontinue LAO funding of the ACLC. A more detailed timeline of these events is set out as Appendix C to this Decision.

In its Request for Reconsideration, the ACLC asserted as a basis for its request the following:

"The Decision of the Clinic Committee was premised on certain findings of fact made by the Committee which reflect a misapprehension of the evidence before the Committee, or which are based on a misunderstanding of the history between ACLC and LAO. Further, the Committee makes findings of non-compliance with the Conditions imposed on the ACLC based on facts or circumstances that cannot reasonably be said to amount to non-compliance".

The Request for Reconsideration then makes a number of submissions concerning inadequacies of the factual analysis set forth by this Committee in its Decision of August 16, 2017.

This Committee invited further written Submissions from the parties concerning the issues raised in the ACLC's Request for Reconsideration. In its written Submissions, the ACLC made an additional submission as to the basis of its Request for Reconsideration to the effect that the sanction of defunding imposed on the ACLC in its August 16, 2017 Decision constituted an unreasonable and disproportionate "punishment" with respect to the ACLC's failure to comply with the eight remedial conditions.

In Part II of these Reasons, this Committee will provide its analysis of the factual errors alleged by the ACLC in this Committee's Decision of August 16, 2017. In Part III of this Decision, the Committee will consider the Submissions of the ACLC, to the effect that the defunding of the ACLC ordered by this Committee in its August 16, 2017 Decision, constitutes an unreasonable and disproportionate response to the wrong-doing of the ACLC.

#### **Part II – Allegations of Erroneous Findings in the Clinic Committee's Decision of August 16, 2017**

In its Request for Reconsideration, the ACLC alleges that this Committee's Decision of August 16, 2017 rests on erroneous findings of fact. More particularly, the Notice states as follows:

"The Decision of the Clinic Committee was premised on certain findings of fact made by the Committee which reflect a misapprehension of the Evidence before the Committee, or which are based on a misunderstanding of the history between the ACLC and LAO. Further, the Committee makes findings of non-compliance with the Conditions imposed on the ACLC based on facts or circumstances that cannot reasonably be said to amount to non-compliance."

If such allegations were warranted, it would follow that this Committee's Decision should not only be reconsidered, but, rather, that it should be reversed on the basis that the ACLC had, in fact, complied with the eight remedial conditions.

In general terms, the LAO Staff responds to these Submissions on several grounds which are summarized in Paragraph 6 of the LAO Staff Submissions of September 30, 2017, in the following terms:

"In ACLC's Notice, the ACLC's Board and management raise complaints with respect to findings of fact made in the Clinic Committee's August 16, 2017 Decision. First, LAO Staff submits that these issues are not properly subject of a reconsideration request. A number of the issues that ACLC's

Board and management now raises could have been, but were not raised in ACLC's earlier submissions. Other issues were raised by ACLC's Board and management and were considered and rejected by the Clinic Committee. Second, as is outlined below, there is no merit to ACLC's submissions. Third, even if there were any merit to the issues raised, the alleged errors of fact are not significant enough to call into question the reasonableness of the Clinic Committee's August 16, 2017 decision."

As will be seen, this Committee is of the view that there is much persuasive force in the LAO Submissions. It is necessary, however, to consider each of the particular allegations of erroneous fact-finding made by the ACLC.

#### Condition #1

Condition #1 set out certain requirements concerning the participation of an LAO Observer at all Board of Director's meetings of the ACLC. During the period that the ACLC was subject to Condition #1, there were extensive problems with respect to ACLC's compliance with Condition #1. These difficulties are summarized in previous Decisions of this Committee including the August 16, 2017 Decision at pages 42 to 45. In that Decision, this Committee noted that the problematic aspects of ACLC's compliance with Condition #1 continued during the period from June 20, 2016 until December 20, 2016. As was there noted, the principal concerns expressed by LAO Staff related to the question of invitations to the ACLC Board of Directors' meetings, access to Board minutes and materials and other financial information including information related to funding received by the ACLC from organizations other than LAO.

With respect to the invitations to meetings, the LAO Staff placed emphasis on the fact that the LAO Observer was not invited to the July 6 and July 9, 2016 meetings. There is no question but that such invitations were not issued, notwithstanding the fact that in this Committee's June 20, 2016 Decision, this Committee clearly indicated that the role of the LAO Observer should be reinstated. On the basis of this instruction, the ACLC should have restored the practice of inviting the LAO Observer to Board meetings, but did not do so. When challenged at the time about the lack of invitations to these rather important meetings, which were to consider the ACLC's financial statements, a matter of considerable interest to the LAO Staff, the ACLC replied by falsely claiming that the ACLC was unaware of the need to reinstate the Observer on July 9, 2016 as a result of the fact that the letter from Vice-President Budgell reminding the ACLC of the need to reinstate the Observer, was not received until after the Board met. Subsequently, evidence which emerged in these proceedings concerning this matter indicated that the ACLC reversed its position and now claimed that the letter from Ms. Budgell had only been reviewed by the ACLC Executive Director late in the day on July 8, 2016 and it was therefore too late to issue such an invitation. In fact, whether or not the letter was not reviewed until later in the day on July 8, 2016, it appears that the letter was considered at the July 9, 2016 ACLC Board meetings, although the minutes of that meeting provided to LAO Staff were redacted in such way as to avoid disclosure of the fact that Ms. Budgell's letter was considered at the time. This failure to provide un-redacted minutes concerning the July 9, 2016 meeting, in itself, constitutes a breach of

Condition #1. Ultimately, however, on March 15, 2017, in response to further protest from LAO Staff concerning the July 9, 2016 meeting, the ACLC conceded that, in fact, Ms. Budgell's letter had been considered at the July 9, 2016 meeting of the ACLC Board. In recounting this episode in this Committee's Reasons of August 16, 2017, this Committee observed as follows:

"This episode again indicates not only a failure to comply with Condition #1, but continuing evidence of the ACLC's unwillingness to engage in dealings with LAO that are characterized by transparency and indeed, basic honesty."

In its Request for Reconsideration, the ACLC ignores the details of this instance and repeats its argument made previously that Ms. Budgell's letter simply arrived too late to make it feasible to invite the LAO Observer to the July 9, 2016 meeting. This submission remains unpersuasive to this Committee. As we indicated in our Decision of August 16, 2017, the submission ignores the fact that clear instructions to reinstate the LAO Observer had been issued by this Committee in its June 20, 2016 Decision.

Even if we assume that Ms. Budgell's letter was received on July 8, 2016, there is no reason why, as counsel for LAO Staff submitted in these proceedings, that the ACLC could not have contacted the LAO Observer with a belated invitation and a willingness to reschedule the meeting if the LAO Observer could not attend on such short notice. The more important point for present purposes is that the ACLC simply dissembled as to what happened when first contacted on the issue.

Other problems with respect to ACLC's compliance with Condition #1 were noted in this Committee's Decision of August 16, 2017. The ACLC continued to redact from minutes made available to the LAO Staff, material related to Human Resources issues, a matter of particular concern to LAO Staff which was subject to a clear instruction from this Committee on a previous occasion, that such information must be disclosed. No response to this finding was made by the ACLC in the Request for Reconsideration nor in its subsequent written Submissions.

This Committee's Decision of August 16, 2017 also noted that the ACLC had apparently made the rather significant decision to split its corporation into two entities, the ACLC, which would continue to operate LAO-funded programs, and the African Canadian Community Services ("ACCS"), which would operate programs funded by sources other than LAO. This Committee concluded that this decision must have been made or confirmed at some point during the relevant period by the ACLC Board of Directors. In its May 5, 2017 Submissions, however, the ACLC claimed that no discussion of this initiative occurred during the relevant period. This Committee further noted that this significant initiative was never discussed at a Board meeting attended by the LAO Observer during this period, nor was it revealed in any of the Board materials provided to her.

In its Request for Reconsideration, the ACLC now provides a new explanation for the fact that no such discussion occurred during the relevant period on the basis that the decision had been made, in fact, at a Board Retreat on April 21, 2012, some time prior to the appointment of the LAO Observer. Minutes of that Retreat were provided in this proceeding. The one-paragraph long Minute records as follows:

“Motion: The Board will engage in a forward thinking process that will result in the development of a new long-term vision and organizational structure for the ACLC.”

The position of the ACLC appears to be that no subsequent discussion or decision by the Board concerning this matter was taken during the period of required attendance at ACLC Board meetings by the LAO Observer.

The LAO Staff have noted in their Submissions that there are a number of problems with the position taken by the ACLC on this matter. First of all, the motion passed at the Retreat does not indicate that a decision was taken to engage in a restructuring of this kind. Thus, it seems more likely that the Board must have made the decision to do so at a time subsequent to the appointment of the LAO Observer. LAO Staff indicated in their Submissions, as follows:

“The suggestion that the decision to restructure ACLC was made in 2012, and was then not discussed by the Board after the LAO Observer was appointed and before the decision was implemented strains credulity.”

Further, whatever the facts are concerning the Board’s decision-making process on this matter, it is a striking fact that during the three-year period that the LAO Observer was meeting with the ACLC Board, this matter was never discussed. In fact, the decision to split the ACLC into two entities was communicated to LAO Staff only on April 1, 2017 in a last-ditch effort by the ACLC to provide a “financial restructuring plan” that would meet with the approval of LAO Staff. A decision of this kind obviously has implications for two important and controversial issues that divided the ACLC and LAO Staff during the Level 3 DRP, that is, information concerning resources provided to the ACLC by other funders and the phenomenon of inter-fund transfers. If such a restructuring was contemplated and/or decided upon as early as 2012 and not disclosed to LAO Staff during subsequent years, this offers yet another example of the lack of transparency and good faith dealings demonstrated by the ACLC. Additionally, the LAO Staff Submissions indicate that these issues were before this Committee in the proceedings leading up to its Decision on August 16, 2017 and that the ACLC could have easily have advanced this information concerning the 2012 Board Retreat in its Reply Submissions dated May 16, 2017. The ACLC chose not to do so and, from the perspective of LAO Staff, it is now too late to do so. We find that there is much persuasive force in that submission, and that it would, in itself, provide a basis for refusing to entertain the new information concerning the 2012 Board Retreat. On this basis, our view is that we are not obliged to consider this new information.

Even if we did take this new information into account, the more important point for present purposes, in the Committee's view, is that even if this Committee incorrectly assumed that the decision to restructure the ACLC must have occurred during the relevant period, this conclusion, if erroneous, does not represent a material defect in this Committee's reasoning, nor does it significantly undermine this Committee's conclusion in its Decision of August 16, 2017, that the ACLC has not fully complied with Condition #1.

#### Condition #4

Condition #4 requires the ACLC to provide, within 90 days of the Clinic Committee's Decision of November 7, 2014, a financial restructuring plan that would meet LAO's approval and which stabilizes the clinic's financial position and improves its financial management. Condition #4 then goes on to stipulate more precisely a number of elements that must be included in any such plan.

There cannot be any doubt about whether the ACLC has successfully complied with this condition. The ACLC made two attempts to provide such a restructuring plan which, as this Committee has previously indicated, did not meet with LAO's approval and this Committee indicated that it found LAO's refusal to approve those plans to be reasonable. More recently, on April 26, 2017, the ACLC submitted to this Committee and to LAO, a further revised financial restructuring plan on the eve of the deadline for written Submissions preceding this Committee's Decision of August 16, 2017. In this Committee's Decision of August 16, 2017, this Committee reviewed at some length the history of the ACLC's attempts to comply with Condition #4 in this respect. This Committee also considered the fact that LAO Staff did not, in fact, approve the April 28, 2017 version of the ACLC financial restructuring plan. As noted in that Decision, this finding is a sufficient basis for determining that the ACLC has not complied with Condition #4. This Committee went on to observe as follows:

"We might add, however, that the reasons offered by LAO Staff for withholding such approval are substantive, in our view, and appear to reflect serious and substantial concerns about various aspects of the April 28, 2017 revised financial restructuring plan. Accordingly, on the basis of the Submissions we have received from both parties, it is our view that withholding of approval by LAO is a legitimate exercise of LAO's discretion to either grant or withhold such approval. Moreover, assuming that this Committee has the authority to "second-guess" the LAO Staff position on this issue, which may be doubtful, this Committee is not inclined to do so."

We note, in passing, what appears to be an error, presumably unintentional, in the written Submissions of the ACLC concerning this matter. Thus, on page 5 of those Submissions, the ACLC asserts the following;

"The Committee also noted that the ACLC had submitted a Financial Restructuring Plan on April 28, 2017, and that it had "successfully

submitted to LAO a financial restructuring plan that meets the approval of LAO” that was in compliance with requirements of Condition #4.<sup>1</sup>”

This is simply not true. The actual passage referred to on Page 60 of this Committee’s Decision of August 16, 2017 reads as follows:

“For present purposes, it is sufficient to determine whether the ACLC has successfully submitted to LAO a financial restructuring plan that meets the approval of LAO. As noted at the beginning of this section, for these reasons, the short answer to this question is that no such approval has been granted by LAO.”

This passage clearly indicates the Committee’s view that the ACLC had not successfully submitted a financial restructuring plan that meets the approval of LAO.

In its Request for Reconsideration and subsequent Submissions, the ACLC challenges the accuracy of certain statements made either by the LAO Staff or by this Committee concerning the history of this matter. LAO Staff, for their part, challenge the accuracy of a number of factual statements made by the ACLC in its Request and following Submissions on this point. It is unnecessary to explore these differences of opinion in more detail, in our view, since none of them undermine the basic finding made by this Committee in its August 16, 2017 Decision, that the ACLC had not successfully submitted a financial restructuring plan meeting the approval of LAO and accordingly, failed to comply with this aspect of Condition #4.

A number of other issues concerning this Committee’s finding of non-compliance with Condition #4 were raised by the ACLC in its Request for Reconsideration. For example, one of the illustrations of financial camouflage related to the requirement of Condition #4 that the ACLC eliminate the \$139,340 deficit in LAO’s General Fund by March 31, 2016. In its Request for Reconsideration, the ACLC maintains, again, that the deficit was eliminated by recording a legitimate receivable from other funds administered by the ACLC. In the course of the PwC review of inter-fund transfers, however, it was revealed that, in fact, the ACLC had no intention of collecting or transferring funds from these other sources in order to actually eliminate the deficit in the LAO General Fund. In its Request for Reconsideration, the ACLC further indicated that the manner in which this deficit was eliminated was done on the advice of the ACLC auditor, using generally accepted accounting practices. It would be surprising if this were, in fact, the case. In the course of the PwC investigation, a similar problem was identified relating to a deficit in the legal disbursement fund. In that case, the auditors indicated that they had understood that a similar inter-fund transfer represented a legitimate liability in the sense that it was a receivable that would be collected in due course. In any event, no evidence of such advice from the auditors in question was provided by the ACLC. Nor does this explanation provided by the ACLC respond to the concerns expressed by LAO Staff that, to the extent that the deficit was to be repaid from other funds provided by the Province of Ontario, those funds would be restricted in such a way that they could not

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<sup>1</sup> ACLC Reconsideration Submissions, September 28, 2017, p.5.

be used to fund deficits in funds provided by other sources such as LAO. In our view, the method adopted by the ACLC to comply with the requirement to eliminate the \$139,340 deficit in the LAO general funds remains illusory.

Further, in its Request for Reconsideration, the ACLC suggests that this Committee erred in holding that the ACLC's failure to account for the use of improperly obtained compensation funds in the amount of approximately \$230,000 constitutes a breach of Conditions #4 and #5.

Presumably, ACLC would not deny that its failure to do so is a significant problem which should cause LAO considerable concern. Rather, it appears to be the ACLC's position that this failure does not constitute technical non-compliance with the precise wording of either Condition #4 or Condition #5. We are not troubled by this point. It is evident, in our view, that the improper use of compensation funding, in part to reduce the deficit in ACLC's LAO general funds, would constitute a breach of Condition #7 and arguably constitute a breach of Condition #4's requirement for improved financial management.

Finally, the ACLC objects to the position taken by LAO Staff with respect to documentation for the use of compensation funding on the basis that no request had been made for such documentation prior to November, 2014 and that the subsequent amount at issue had not been raised until May 5, 2017. We do not find this point persuasive. Certainly, as the Submissions of LAO Staff indicate, the ACLC had been asked for information concerning all employees in LAO-funded programs for the period beginning in FY 2013-2014 in letters dated September 14, 2015 and January 24, 2017. In our view, the fact that the requested information did not refer to a precise amount in issue is not material to the question of whether failure to provide such information constituted non-compliance with the remedial conditions.

#### Condition #5

Condition #5 requires the ACLC to adopt and implement various policies concerning such matters as the use of credit cards, travel, meals and hospitality expenses, and implementation of various financial reporting systems. More importantly for present purposes, Condition #5 requires that any inter-fund transfers between LAO funds and other programs managed by the ACLC be reported to LAO on a monthly basis. The extent to which the ACLC has complied with this requirement concerning inter-fund transfers has been a matter of considerable controversy between the ACLC and LAO Staff. In the face of conflicting submissions on this point, this Committee provided an opportunity for the parties to make further submissions with respect to this issue and suggested that it would be useful to have the matter investigated through LAO's Internal Audit Unit ("IAU") or by some other appropriate party selected by LAO. In the event, LAO retained PwC to undertake a study of the use of inter-fund transfers by the ACLC. That study was made available to the parties and extensive written Submissions were made by both parties prior to this Committee's August 16, 2017 Decision. The PwC study and the Submissions of the parties were considered at considerable length in this Committee's Decision of August 16, 2017. This Committee concluded that there were, in fact, unreported inter-fund transfers during the relevant period and that there were

troubling aspects to some of the transfers which had, in fact, created liabilities owed to the LAO funds from other funding sources that the ACLC had no intention of actually collecting. In its August 16, 2017 Decision, this Committee referred to these instances as exercises in “financial camouflage”.

In our view, none of the Submissions made by the ACLC successfully challenge these conclusions. Although the ACLC does challenge the treatment of particular entries, it is not at all clear that the challenges are accurate or, in any event, that any errors in the treatment of particular items of this kind, constitute a material error.

Thus, for example, the ACLC attempts in its Request for Reconsideration to challenge the accuracy of the discussion concerning the inter-fund transfer from the ACLC – LAO Legal Disbursement Fund to the ACLC – LAO Operating Fund as of April 1, 2016 in the amount of \$72,588. On this point, the ACLC made the following statement:

“The amount of \$72,588 referred to again on page 62, this Journal Entry was not approved by the Board or the Auditors and was reversed, therefore, eliminating the deficit in the Legal Disbursement Fund of \$38,106.62. This reversal in fact created a surplus in the Legal Disbursement Fund of \$17,467 as per the Audited Financial Statement for year end March 31, 2017.”

In its written Submissions, LAO Staff respond as follows:

“ACLC submits that there is a surplus in the legal disbursement fund of \$17,467. As a preliminary matter, LAO notes that ACLC’s submission relies on information (from the year-end financial statements) that was not before the Committee. Also, the submission is misleading. According to ACLC’s audited financial statements (ACLC Notice, Tab 10), at the end of FY 2016/2017, there was \$811 in cash, a receivable of \$1,715 owing from the government for sales tax and \$26,742 owing from ACLC’s Operating Fund. However, ACLC’s Operating Fund only has \$1,093 in cash and has a \$104,582 deficit. Therefore, there is no reason to believe that the \$26,742 can be collected, making the “surplus” of \$17,467 in the legal disbursement fund completely illusory.”

Even if one assumes the accuracy of the ACLC Submissions, it would appear that, once again, inter-fund transfers are being utilized by the ACLC in an illusory fashion.

In sum, it is our view that the ACLC’s Request for Reconsideration and subsequent Submissions did not successfully challenge or undermine our findings concerning the ACLC’s use of inter-fund transfers and its failure to comply with Condition #5.

#### Condition #7

Condition #7 provides for certain arrangements pursuant to which LAO would continue to provide monthly funding to ACLC during the DRP process. More particularly,

Condition #7 provided for the provision of monthly funding on the basis of a schedule of recurring expenses such as rent and salaries, and for reimbursement on the basis of invoices and expense reports for other types of expenditures to be submitted and reviewed by LAO on a monthly basis. LAO Staff were of the view that even during the recent period, the ACLC failed to provide accurate information concerning expenses in the latter category. In considering this issue, it is important to note that a persistent and very substantial problem in the relationship between the ACLC and LAO Staff was the failure and, indeed, refusal of the ACLC to provide accurate information with respect to staff vacancies. The effect of doing so was to enable the ACLC to gain improper access to LAO funds intended as reimbursement for salary expenses and to improperly use these funds for other purposes, unapproved by LAO. This problematic behaviour involved access to substantial amounts of money, the use of which has never been thoroughly or properly explained by the ACLC. Against this background, one might have expected the ACLC to be scrupulous and accurate in its reporting of monthly expenses pursuant to the provisions of Condition #7. In fact, however, the ACLC failed to report that it had stopped using the services of a bookkeeper and continued to obtain reimbursement funding for the salary for that position.

This matter was described at some length in this Committee's August 16, 2017 Decision, not because the amounts involved were substantial – indeed, LAO staff claim that the ACLC had gained improper access to approximately \$20,000 – but rather, because it indicated and further illustrated the problems experienced by LAO Staff in dealing with the ACLC. Once the LAO Staff became concerned about the monthly bookkeeping expenditures and whether the reimbursement funds were being used for appropriate purposes, LAO Staff unsuccessfully sought accurate information concerning the bookkeeping expenses. Eventually, it was disclosed by the ACLC that it was no longer using the services of an external bookkeeper.

In its Request for Reconsideration and subsequent written Submissions, the ACLC maintained that this Committee's findings of fact with respect to this instance are flawed since, in the ACLC's view, it had obtained improper access to merely \$10,215 rather than the \$19,523 claimed by LAO Staff. Although LAO Staff does not accept the accuracy of the ACLC's calculation on this issue, the more important point for present purposes is that, even on the ACLC's version of the facts, it improperly requested and obtained access to \$10,215.

As this Committee observed in its August 16, 2017 Decision

“This instance demonstrates in microcosm, the apparent impossibility of establishing a relationship of transparency and good faith disclosure between the ACLC and LAO.”

In our view, the ACLC submissions in its Request for Reconsideration and subsequent written Submissions on this point do not undermine in any way the conclusion that the ACLC continued to gain improper access to LAO funding and failed to comply with Condition #7.

### State of Compliance

In this Committee's Decision of August 16, 2017, a further alternative ground was articulated for the proposition that the ACLC remained in a state of non-compliance with the eight remedial conditions. As was there noted, even in some cases where partial compliance occurred, that partial compliance occurred only at a very late stage in the process after several years of willful non-compliance. As we indicated in our August 16, 2017 Decision, there arises a very real question as to whether such late attempts at compliance constituted a "state of compliance" with the remedial conditions in question. This Committee's discussion of this issue was set out in that Decision in the following terms:

"Finally, we turn to consider a question raised but not answered in our Interim Decision of January 19, 2017. This issue concerns 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.

In our view, the illustration offered by Mr. Steinecke is quite persuasive. Turning to the present facts, as we have noted above, the ACLC is subject to statutory obligations of disclosure to LAO of, among other items “any other financial or other information relating to the operation of the clinic that the corporation may request”. Both prior to and subsequent to the imposition of the eight remedial conditions in this Committee’s Decision of September 5, 2014, the ACLC has persistently refused to abide by this statutory obligation. The question that arises, then, is whether belated disclosure of requested information on the eve of the expiry of the notice period for the suspension of funding constitutes compliance in the requisite sense.

Two examples may be of assistance. For much of the period subsequent to September 5, 2014, LAO has requested access to information concerning other sources of funding received by the ACLC. Such information would have been of interest and material to LAO for a number of reasons. The ACLC persistently refused to provide such information, however, and improperly excluded the LAO Observer from Board meetings when such matters were discussed. In this Committee’s decision of June 20, 2016, the Committee held that the ACLC’s refusal to disclose such information constituted a “clear breach” of *LASA* and of Section 42 of the Funding Agreement between LAO and the ACLC. Nonetheless, the ACLC continued to refuse to provide this information until a few days before the deadline for Submissions at the end of the six month notice period for suspension of the clinic’s funding.

Similarly, the ACLC was ordered in remedial Condition #1 to make available to the LAO Observer, ACLC Board minutes and materials subject to certain precisely identified permissible redactions. Once

requested by LAO, such information was subject to the ACLC's statutory disclosure obligations. In November of 2014, the ACLC sought permission from this Committee for a further type of redaction to the minutes for "human resources" matters. This Committee declined this request in its Decision of November 7, 2014 on the basis that "much of the past wrongdoing and mismanagement of the ACLC related to matters involving human resources issues". (p. 13). As noted above, we now know, as a result of last minute disclosures by the ACLC that it nonetheless continued to redact discussions concerning human resources issues in the minutes it made available to the LAO Observer.

In either case, it may be asked whether these last-minute disclosures constitute a state of compliance with ACLC's statutory obligations and the obligations imposed by the terms and conditions of its funding. In favour of the view that they do not, it is difficult to conclude that a clinic that has persisted for years in refusing to comply with its disclosure obligations during a period in which it was subject to Level Three of the DRP and indeed, explicit orders of disclosure from this Committee, is now in a state of compliance with its obligations on the basis of last-minute disclosures. As in Mr. Steinecke's example, the obligations to disclose, like the hypothetical obligation he poses to maintain a bank balance of \$5,000.00, is a continuing obligation. Arguably, it is simply not met by making disclosure (or depositing \$5,000.00) at the very last minute after months and/or years of refusal to do so.

This interpretation of the statute is reinforced, in our view, by the practical consideration that last minute compliance of this kind does not provide a basis for confidence that the state of compliance will continue. Thus, the deposit of the \$5,000.00 at the last minute after years of defying the requirement provides little confidence that the required balance will be maintained in the future. Similarly, the fact that the ACLC made certain disclosures on the eve of the expiry of the notice period for suspension of its funding offers no basis for confidence that it would abide by its statutory obligations in the future and, similarly, that it would abide by the obligations imposed by the terms and conditions of its funding agreements with LAO.

In our view, this interpretation of *LASA*, which we find persuasive, offers a separate and independent basis for concluding that the ACLC has not fully complied with the eight remedial conditions and remains in fundamental breach of its statutory and other obligations. In other words, this reasoning is not necessary to our decision, but it does, in our view, provide a separate and independent ground for reaching such a conclusion."

In the ACLC's Request for Reconsideration and subsequent Submissions, the ACLC did not challenge or respond to this analysis. We remain of the view that last-minute compliance with various aspects of the eight remedial conditions does not constitute a state of compliance in the requisite sense. Accordingly, we remain of the view that this consideration provides an additional and alternative basis for concluding that the ACLC has not fully complied with the eight remedial conditions.

### **Part III – The Appropriateness of Defunding**

Finally, in its written Submissions, though not in its Request for Reconsideration, the ACLC submits that this Committee's Decision to defund the clinic is a disproportionate response to the ACLC's failure to comply with the eight remedial conditions. This submission appears to rely on the assumption that this Committee might conclude that the ACLC has not, in fact, fully complied with the eight remedial conditions. As we have indicated above, this Committee has indeed concluded, both in its Decision of August 16, 2017 and in the context of the present Reconsideration of that Decision that, in fact, full compliance with the eight remedial conditions has not occurred. The ACLC's position appears to be that even if this Committee were to reach such a conclusion, it should, nonetheless, refrain from a decision to defund the ACLC on the basis that exercising this Committee's unquestionable statutory discretion to defund the ACLC represents an unreasonable and disproportionate "punishment" of the ACLC.

In our view, the decision of this Committee to defund the ACLC does not represent "punishment" in the sense contended for by the ACLC. Rather, this Committee is of the view that in light of the conduct of the ACLC during the dispute resolution process and, more particularly, in light of its failed attempts to comply with the eight remedial conditions imposed in this Committee's Decisions of September 5, 2014 and November 7, 2014, the decision to defund the ACLC represents an appropriate exercise of LAO's statutory responsibility to monitor the use of public funding made available to clinics by LAO.

In reaching a decision that such an exercise of LAO's statutory discretion is appropriate in all the circumstances, it is this Committee's view that it is reasonable to take into account the nature of the ACLC's conduct in failing to comply with the eight remedial conditions. The nature of that conduct has been the subject of comment in previous Decisions of this Committee including the Decision of August 16, 2017.

Thus, for example, in the August 16, 2017 Decision, this Committee noted with respect to the interactions concerning the ACLC's failure to invite the LAO Observer to the July 9, 2016 Board meeting, the following:

"This episode again indicates not only a failure to comply with Condition #1, but continuing evidence of the ACLC's unwillingness to engage in dealings with LAO that are characterized by transparency and indeed, basic honesty."

Similarly, in that same Decision, this Committee noted that the ACLC had failed to comply with its obligation to provide copies of minutes of Board meetings, from which only certain defined items might be redacted. Nonetheless, the ACLC continued to provide minutes with improper redactions. On this point, this Committee observed as follows:

“Although the package of materials forwarded by the ACLC on February 10, 2017 continued to redact significant portions of the minutes being provided, some of the earlier redactions were corrected. What the new information revealed was that the redactions that had earlier been made with respect to the minutes of April 9, 2016 and May 7, 2016 concerning human resources matters did, in fact, relate to the dates of staff resignations and appointments. This new information plainly reveals that, notwithstanding Condition #1 and notwithstanding this Committee’s explicit instruction to the ACLC on November, 2014, the ACLC simply withheld precisely the type of information that this Committee had explicitly instructed the ACLC to provide. As had been noted elsewhere in these Reasons, a serious form of wrongdoing conducted by the ACLC over a period of years relates to the non-reporting of vacancies. It is perhaps not surprising that the improperly redacted materials relate to resignations and appointments to the ACLC.”

As this episode illustrates, the ACLC simply refused to follow, over a considerable period of time, explicit instructions of this Committee with respect to its compliance with Condition #1.

Similar observations were made by this Committee with respect to the incident relating to claims made by the ACLC for bookkeeping expenses in recent months. In our August 16, 2017 Decision, we observed with respect to this incident as follows:

“One might have expected in light of the foregoing circumstances that the ACLC, in the period following this Committee’s Interim Decision of January 19, 2017, would have been scrupulous in its compliance with Condition #7. Unfortunately, this was not to be the case. In its May 5, 2017 Submissions, LAO asserted that the ACLC’s Board and management, in breach of Condition #7, claimed almost \$20,000.00 in funding for an external bookkeeper, notwithstanding the fact that the ACLC had, some months earlier, stopped using the services of an external bookkeeper. We will describe the incident in some detail, not because the amount of funding obtained in this way was substantial, but rather because this instance demonstrates in microcosm, the apparent impossibility of establishing a relationship of transparency and good faith disclosure between the ACLC and LAO.”

We have also noted above this Committee’s concerns about the manner in which the ACLC purported to comply with its obligation to eliminate the \$139,340 deficit in the

LAO general fund by March 31, 2016. As noted above, the ACLC purported to comply with this obligation by recording a receivable in that account which was not in any meaningful sense an actual receivable. On this point, this Committee observed as follows:

“As a result of the PwC Review, however, LAO has learned that the ACLC had concealed rather than eliminated the deficit by recording receivables in the LAO General Fund that they had no intent to collect.”

Similar instances and similar concerns have been expressed in earlier Decisions of this Committee arising from the present DRP process. In the concluding section of this Committee’s Decision of August 16, 2017, the Committee concluded that the ACLC remains in fundamental breach of its statutory obligations and the obligations imposed by the terms and conditions of its funding from LAO. Against that background and the types of instances and concerns identified above, this Committee went on to conclude:

“The fundamental nature of these deficiencies is heightened or underlined when they are placed in the context of the difficulties in the relationship between LAO and the ACLC that have been revealed in this prolonged process. This Committee is of the view that the record in this proceeding amply demonstrates that the ACLC Board and management are unwilling, even when under the scrutiny of Level Three of the DRP and under the risk of having its LAO funding suspended, to adopt the values of transparency, good faith and basic honesty that are, in our view, a prerequisite for an agency to be entrusted with the expenditure of public funds. The record in this proceeding is replete with illustrations of situations in which the ACLC Board and management have refused to comply with LAO’s inquiries and requests for information, non-disclosure by the ACLC when disclosure is required by statute, the provision by the ACLC of misleading and, on occasion, false information in response to LAO’s inquiries and belated disclosure of information after months and years of improperly refusing to disclose the information in question. Such conduct simply undermines any confident basis for a continuing practice by LAO of providing public funds to an agency that engages in conduct of this kind. As we have noted above, LAO has a statutory obligation under section 37(1) of *LASA* to monitor the conduct of clinics. In order to carry out this obligation and ensure that the public funds with which LAO is entrusted are properly spent by agencies to whom LAO transfers public moneys, LAO needs to be confident that the agencies to whom such moneys are entrusted will deal with LAO in a transparent and straightforward manner. The record before this Committee appears to suggest that one or more members of the Board and management of the ACLC do not share this view.

Enhanced ACLC Board oversight of the ACLC’s Executive Director does not appear to offer an adequate solution to these problems. On the eve of the March, 2016 oral hearing preceding the June 20, 2016 Decision of this

Committee, the ACLC Board made available to LAO a letter it had written to the Executive Director indicating that the Board was deeply troubled by the allegation that the ACLC had received funds that were earmarked for the Director of Legal Services position after that position had become vacant and, further, that the Executive Director was not candid in discussing the matter with LAO Staff. This conduct was said by the Board "to be inconsistent with the degree of integrity that is required of all ACLC staff". The Board further indicated that "if misconduct of this nature reoccurs, the Board will take disciplinary action, up to and including the immediate termination of your employment for cause". The letter further instructed that the Executive Director must report to the Board of Directors at all of its meetings that "all reports to LAO are complete, up-to-date and accurate to the best of your knowledge".

Notwithstanding the continuation of these practices, we are not aware of any disciplinary action or of the filing of the requisite reports.

In our view, none of the submissions made by the ACLC in its Request for Reconsideration and in its subsequent written Submissions adequately responds to these concerns. Accordingly, we remain of the view that the decision to defund the ACLC is an appropriate response to its fundamental breach of its statutory and other obligations.

Two further points, however, must be considered. First, the ACLC has submitted that as a matter of law, this Committee is obliged to impose the "least restrictive" penalty that is appropriate in the circumstances. In the view of the ACLC, the least restrictive penalty would be to provide the ACLC with a further opportunity to comply with the eight remedial conditions. Indeed, the ACLC has proposed that it be given an opportunity to establish a new "Special Compliance & Oversight Committee", to be composed of highly respected members of the African Canadian community, to provide guidance on governance and oversight of the financial and business affairs of the ACLC so as to ensure compliance with the eight remedial conditions. We consider both of these submissions in turn.

With respect to the point of law, the ACLC places reliance on administrative law judicial decisions relating to the imposition of professional discipline. Thus, for example, the ACLC places considerable reliance on the decision of the Ontario Divisional Court in *Strazzeri v. Superintendent of Financial Services*, 203 ONSC 255 (Ont.Div.Ct.). This case concerns a judicial review of a decision of the Financial Services Tribunal to revoke Mr. Strazzeri's license as a mortgage agent. With respect to the penalty imposed, the Divisional Court observed as follows:

"[12] With respect to the penalty imposed, the Tribunal is owed considerable deference. We agree with counsel for the respondent that the precedents cited by the appellant are distinguishable and that the Tribunal was not necessarily bound to follow them. We accept that the

penalty imposed in this case is not outside the range of what was open to the Tribunal in all of the circumstances.

[13] The question is not what penalty we would impose or how we would weigh the various factors in determining what is appropriate. The question is whether the result reached by the Tribunal is reasonable. However, the penalty imposed in this case was the most draconian one available to the Tribunal. The Tribunal gave no indication in its Reasons as to whether it had considered the possibility of a lesser penalty, such as suspension of license, limitations on the license or the imposition of conditions, such as supervision.

[14] We understand that there were no submissions made to the Tribunal with respect to these options. Nevertheless, we consider it was incumbent on the Tribunal to address its mind to the issue and, if it was of the view that revocation was necessary, to provide some reasons, even if brief, as to why it reached that conclusion.

[15] In the result, this matter is remitted back to the same Panel to reconsider the issue of penalty. The Tribunal may exercise its own discretion as to whether it will hear further evidence or submissions from parties on this point.”

We note that this Decision does not question whether the penalty imposed was within “the range of what was open to the Tribunal in all of the circumstances”. Rather, the Decision of the Court was critical of the failure of the Tribunal to address, in its Reasons, the reason why revocation was appropriate and its reasons for reaching that conclusion. Nonetheless, the Decision appears to suggest that draconian penalties should be imposed only where justified by the circumstances.

Although this Committee is of the view that defunding of the ACLC is clearly justified by the circumstances, we also found persuasive the submissions of LAO Staff that judicial decisions dealing with matters of professional discipline are not particularly helpful in the present circumstances. In exercising its statutory authority under the *Legal Aid Services Act* (“LASA”), this Committee is not engaged in the regulation of the conduct of members of a profession. Rather, it is exercising its responsibility to ensure that expenditures of public funds, in the form of transfer payments to community legal clinics, are expended by those clinics in the public interest.

Moreover, it is not at all clear that this Committee is subject to an obligation to impose the least restrictive measure available in the circumstances. It is a well-recognized principle of criminal law that the most severe sentences should be reserved for the most serious offenders. It is not at all clear, however, that a similar principle would apply in the context of a decision of this Committee concerning the failure of a community legal clinic to comply with its statutory and other obligations. Indeed, even in the disciplinary context, it seems doubtful that the criminal law principle is to be applied by analogy.

Thus, in its recent decision in *College of Physicians and Surgeons of Ontario v. McIntyre*,<sup>2</sup> the Divisional Court declined to overturn a decision of the College to revoke the license of a physician who had committed various acts of professional misconduct, including sexual abuse of a patient. The physician had argued that the penalty imposed was not the least restrictive available in the circumstances. On this point, the Court observed as follows:

“The appellant argues that the Committee erred in principle by failing to recognize that it was required to impose the “least restrictive” penalty that was appropriate to the circumstances. In our view, there is no such principle governing the approach of a discipline committee in the imposition of a penalty on its member.

...

First of all, it is not clear that Lee even purports to establish the general proposition that the least restrictive sanction principle as applied in criminal law should be incorporated into the imposition of discipline penalties. Second, even if that was the thrust of the Lee decision, that decision is not binding on the Discipline Committee in this case. Third, if Lee does stand for that proposition, it is wrong.

The principle of the “least restrictive sanction” referred to by the Supreme Court of Canada in *Solomon* [sic.] (which is a criminal case) is a well-known criminal law principle of sentencing imposed by statute under s.718.2(b) of the *Criminal Code*, which requires the sentencing judge to take into account the principle that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.” There is no equivalent statutory provision governing the imposition of penalties by a discipline committee, which is not surprising given that the central function of the discipline committee is not to “punish” offenders, but rather to govern its members for the protection of the public.<sup>3</sup> [Emphasis added.]

In summary, then, it is our view that this Committee is not required by law to impose the “least restrictive possible sanction” in the present circumstances.

Moreover, the suggestion of the ACLC that it should be allowed a further opportunity to comply with the eight remedial conditions rings hollow in the present circumstances. The ACLC was placed under Level 1 of LAO’s DRP on September 7, 2010. As a result of the ACLC’s refusal to cooperate at this stage of the DRP, the ACLC was placed under Level 2 of the DRP on July 12, 2012. As a result of the ACLC’s refusal to cooperate at this stage of the process, LAO presented a motion to this Committee to impose a Level 3 Remedial Response on the ACLC. This Committee, in its Decisions of September 5, 2014 and November 7, 2014 imposed such a Response and required

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<sup>2</sup> [2017] O.J. No. 193 (Div.Crt.), leave to appeal refused by the C.A.

<sup>3</sup> *Ibid.*, paras 45, 47-48

the ACLC to comply with eight remedial conditions. Almost two years later, the Clinic Committee rendered a Decision on June 20, 2016, finding that the ACLC has fully complied with only one of the eight remedial conditions and that it remained in fundamental breach of its obligations under LASA and under the terms and conditions of its funding from LAO. Nonetheless, this Committee decided at that time that it should provide the ACLC with a further opportunity to attempt to demonstrate its compliance with the eight remedial conditions during a six month period that would end in December of 2016. Further proceedings were undertaken at the conclusion of that period and in an Interim Decision of January 19, 2017, this Committee provided a further opportunity to the ACLC to provide information concerning its compliance with the eight remedial conditions. In its Decision of August 16, 2017, this Committee concluded that the ACLC had not successfully done so, that it remained in fundamental breach of its obligations and that the decision to defund the ACLC was appropriate in all of the circumstances. Against this background, it is our view that no further extension of time to permit the ACLC to demonstrate its compliance with the eight remedial conditions is warranted.

With respect to the proposed “Special Compliance & Oversight Committee”, it is our view that the provision of an opportunity to establish such a committee and make further attempts under the guidance of that committee to comply with the eight remedial conditions is also unwarranted. We have a number of reservations concerning the establishment of such a committee. First, the role of the committee would be essentially one of implementing Level 3 of the DRP. This has been attempted under the terms of that process over the last three years without success. The ACLC is proposing that success could be assured by January 1, 2018 if such a committee were established. Past experience with the ACLC’s failure to comply with the eight remedial conditions does not offer a basis for optimism that such an outcome can be achieved. Considerable effort on the part of LAO Staff and considerable resources of LAO have been devoted to the task of trying to ensure compliance by the ACLC with the eight remedial conditions since their imposition almost three years ago on November 7, 2014. Moreover, there would be no LAO participation in the work of the proposed committee and it would, in this respect, lack transparency to LAO. Further, as counsel for the ACLC conceded in the hearing of this matter, this committee has not actually been established, nor have its terms of reference been finally settled. Although three individuals have apparently indicated a willingness to serve on this committee, the ultimate composition of the committee has not yet been determined.

Further, we note that this committee would not have any actual authority to order either the Board of Directors or the Executive Director to engage in practices that would comply with the ACLC’s statutory and other obligations or that would internalize public sector norms of transparency, honesty and good faith in its dealings with LAO.

For all of these reasons we do not view this proposal as a practical or feasible solution to the problems identified in this Decision and in previous Decisions of this Committee concerning this matter.

Finally, counsel for the ACLC has submitted that a decision to defund the ACLC will be disruptive of service provision to the African Canadian community. As we have noted in our Decision of August 16, 2017, LAO Staff, in their November 6, 2015 Submissions, explicitly addressed this issue and indicated a desire to reassure members of the African Canadian community that if defunding of the ACLC should occur, that LAO would continue to provide legal aid services to members of the community in some other fashion. We would encourage LAO to minimize whatever disruption to service provision that might result from this decision to cease funding of the ACLC.

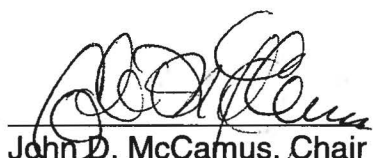
## **Part V – Conclusion**

In summary, then, after careful consideration of the Submissions of the ACLC made in its Request for Reconsideration and its subsequent written Submissions and oral submissions made at the hearing concerning this matter held on October 1, 2017, and the responding Submissions of the LAO Staff, this Committee has reached the following conclusion:

1. The ACLC remains in fundamental breach of its statutory obligations and its obligations under the terms and conditions of its funding with LAO and, more particularly, that it has failed to fully comply with the eight remedial conditions imposed by this Committee in its Decision of November 7, 2014, and
2. In all of the circumstances, the decision to defund the ACLC is the most appropriate decision for this Committee to take.

It follows that, pursuant to s.36 of the DRP, the original Decision of this Committee dated August 16, 2017 to defund the ACLC will become effective within ten (10) days of the issuance of this Decision.

Dated at Toronto this 18th day of October, 2017

  
John D. McCamus, Chair  
Clinic Committee of the Board  
Legal Aid Ontario

## **APPENDIX A – LEVEL THREE CONDITIONS AS REVISED ON RECONSIDERATION BY THE CLINIC COMMITTEE**

### **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 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.

### **Condition 3:**

The ACLC Board of Directors will organize within six months of the Committee's decision and will successfully complete within nine months of the Committee's decision an approved appropriate training experience for all members of the ACLC Board of Directors on the duties and responsibilities of board members including duties of monitoring, oversight and risk management. The organization of the training experience will be done in collaboration with LAO Staff and it will be approved by LAO Staff before it is conducted. Its expense will be borne by LAO. Successful completion will be

demonstrated by a written report by the facilitator(s) of the training experience to LAO Staff on the attendance and outcomes of the training experience.

**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

**Condition 5:**

Within ninety (90) days of the Clinic Committee's decision, the ACLC will have adopted the following policies, directives, best practices and reporting systems:

- Full implementation of the following policies and directives, which apply to all clinics:
  - Travel, Meals and Hospitality Directive
  - Procurement Directive
- Implementation of best practices financial controls including:
  - Corporate Credit Cards:
    - Having only one corporate credit card in the name of the Executive Director, that all other credit cards be cancelled, that no other staff can use the card without prior written authorization for the transaction from the Executive Director, and requiring subsequent review and approval by the Executive Director
    - That the payment of the credit card be done within 30 days of receipt of the credit card invoice
    - That no cash advances be made from the corporate credit card

- Full compliance with PwC recommendations governing the use of the corporate credit card including preparation of expense reports that are reviewed and approved by the Executive Director, a process for reviewing and approving expenditures by all staff including the Executive Director, and quarterly monitoring of expenditures by the Board of Directors to ensure compliance with all applicable policies
- Implementation of the following financial reporting systems:
  - Establishment of detailed budgets for the expenditure of funds within both the LAO General Fund and the LAO Legal Disbursement Fund
  - That the ACLC Board of Directors approve these budgets
  - Report quarterly to LAO on the actual expenses against the approved budget and the reasons for the variances
  - That any inter-fund transfers between the Legal Aid Ontario funds and other programs managed by the ACLC be reported to LAO monthly
  - No bonuses are to be paid to ACLC employees out of Legal Aid Ontario funding unless approved by LAO
  - LAO to be present at the ACLC Board of Directors' meeting when the external auditors present the annual Audited Financial Statements to the ACLC Board
  - Providing LAO's Internal Audit Unit the right to contact ACLC's external auditors

**Condition 6:**

ACLC will co-operate with an independent audit of the compensation time accrual reduction by an auditor of LAO's choice, to be conducted within fifteen business days of the Clinic Committee's decision.

**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 8:**

Within 90 days of the Clinic Committee's decision, ACLC will implement all PwC Forensic Review recommendations. Compliance will be verified by LAO's Internal Audit and Compliance Division within 15 days thereafter. ACLC will fully cooperate with LAO's Internal Audit and Compliance Division, including providing timely and complete access to all documents and background materials requested, and making staff and ACLC Board members available to meet with Division staff upon request, to confirm compliance with the recommendations.

## **APPENDIX B – EVIDENCE OF FISCAL MISMANAGEMENT AS OF SEPTEMBER 5, 2014**

The L3 Staff Report alleges that the ACLC is in fundamental breach of its obligations under *LASA* and its MOU resulting from financial mismanagement, potential misuse of public funds for personal benefit, inadequate governance by the ACLC Board of Directors and lack of accountability to LAO as its funder. In general terms, the ACLC responds that many of these issues have been addressed and as a result some are of mere historical interest. The ACLC further asserts that it has been or will be making sufficient progress with respect to the remaining issues such that a Level Three Response is rendered excessive in all the circumstances.

Much of the evidence relied upon by LAO with respect to fiscal mismanagement is drawn from the Forensic Audit Report materials and the Addendum report on Visa transactions prepared by PwC.

### **1. Large Accumulated Deficit in the LAO Fund**

The L3 Staff Report asserts that there is a large accumulated deficit in the ACLC/LAO general fund which increased from \$179,340.00 in 2007 to \$233,631.00 in 2011. The 2013 ACLC audited financial statements show a deficit of \$139,340.00. The L3 Staff Report further asserts that, in its view, the latter amount is understated by \$50,009.00 on the basis that the ACLC claims as an account receivable from LAO, money that is not payable by LAO.

In its written and oral submissions, the ACLC acknowledges that deficit reduction is essential but further claims that the deficit is largely attributed to unanticipated expenses with respect to a particular project and further, that substantial steps have already been taken to reduce the deficit. Further, the ACLC challenges the extent of the deficit at various points in time and further, asserts that the account receivable is in fact payable by LAO. Further, the ACLC submits that the fact that it has a deficit does not warrant a Level Three Remedial Response. For the purposes of making a decision in the present matter, it is not necessary, in our view, to resolve the differences of opinion between LAO Staff and the ACLC on the precise extent of the deficit at various points in time. The essence of the dispute is the proper treatment of \$50,009.00 of surplus funds relating to the vacant Director of Legal Services position. LAO withheld these funds and the ACLC treated the moneys as a receivable. This had the effect of reducing the ACLC's deficit in its 2013 audited financial statements to \$139,340.00. Vice-President Budgell, in a letter to the ACLC Board on November 26, 2013, explained that, in her view, the Board was not authorized to do this and that the deficit was therefore understated by that amount. Be that as it may, the L3 Staff Report recommends the imposition of a condition on the ACLC that it be required to provide a plan to eliminate its deficit at the reduced amount of \$139,340.00 and that, at the same time, the ACLC write-off the alleged receivable of \$50,009.00. This has the effect, as best we can determine, of reducing the

deficit by the amount of \$50,009.00 of surplus funds. As this was the result sought by the ACLC in treating the amount as a receivable, we assume that this result is satisfactory to both parties.

Further it is not necessary, in our view, to determine whether the deficit in itself would be a sufficient basis for a Level Three Response. Unquestionably, however, the fact that the deficit exists and has been continuing for some period of time provides a signal of the possibility of financial mismanagement and provides a context within which to consider the other points of difficulty identified in the L3 Staff Report as evidence of inadequate management of the clinic's financial resources.

2. \$170,000.00 Lump Sum Bonuses

Thus, for example, notwithstanding the existence of a large accumulated deficit, the ACLC awarded bonuses to staff between fiscal years 2008 and 2011 totalling \$170,000.00. The L3 Staff Report asserts that the bonuses were paid using funding provided by LAO for the ACLC Director of Legal Services, a position that had remained vacant since 2006. According to the L3 Staff Report, such use of these funds is inconsistent with the ACLC's obligations under Section 26 of the funding agreement, under which the funds may be used only to hire "replacement staff" unless LAO approved otherwise. Under that section, surplus funds shall be held by the clinic as a surplus to be applied to the clinic's annual budget for the following fiscal year. The use of the funds to pay bonuses to existing staff members is said to be an improper use of those surplus funds.

Further, the L3 Staff Report asserts that the ACLC does not have a policy establishing an approval process for such bonuses and asserts that the PwC review of ACLC Board minutes did not find Board approval for the bonuses. Although bonuses paid to members of the staff range from a total of [REDACTED] to [REDACTED], the bonuses paid to the Executive Director range from 25% to 38% of her annual salary for a total of \$121,000.00, an amount which the L3 Staff Report claims is "in excess of public sector norms".

The ACLC responds that the bonuses were paid with LAO funds only on two occasions, 2008 and 2010, and moreover, asserts that at least part of the justification for the payment of such bonuses was that additional work performed by the remaining staff may be associated with the existence of vacant positions and therefore can sometimes be considered to be "replacement" in nature. We do not find this to be a convincing justification for such use of surplus funds. The meaning of the phrase "replacement staff" is clear, i.e. a staff member, not already paid for by LAO funds who, in this instance, replaces the missing Director of Legal Services. The use of surplus funds to pay bonuses to several existing LAO-funded staff members is, in our view, a clear breach of Section 26 of the Funding Agreement.

The ACLC also asserts that it does in fact have a policy relating to bonuses and

that all of the bonuses were properly approved by the Board at in-camera sessions. It further asserts that PwC did not seek access to in-camera minutes, although advised by the ACLC that they were in existence. For its part, PwC claims that it asked for all of the Board minutes and that none of them recorded decisions concerning bonus payments. We note in passing that it is surprising that once the existence of bonus payments became a matter of contention, the ACLC would not have made additional efforts to ensure that such minutes were made available to PwC. Nor indeed, were they made available to this Committee. Be that as it may, the payment of substantial bonuses in the context of an accumulated deficit in itself raises an important question of responsible fiscal management even if the Board did approve such bonuses.

3. Accrued Compensatory Time and Liability

In the same vein, the fact that a significant component in the ACLC's accumulated deficit in the amount of \$155,107.00, results from a liability owed to members of ACLC staff for compensatory or overtime payments is a cause for concern especially as 97% of that amount, that is \$150,513.00 for 2,566 hours, was owed to the Executive Director. Although the PwC report claimed that the liability to the Executive Director was inconsistent with existing ACLC policy on payment for overtime, which imposes a cap on such liability, the ACLC responded in Mr. Dewart's letter of November 16, 2012, that PwC had misread the policy and that the provisions concerning overtime did not appear to apply to the Executive Director. Moreover, it is asserted in the ACLC Response that on March 11, 2014, the ACLC Board approved revisions to the applicable policy that, among other things, requires the Executive Director's compensatory time to be approved by the ACLC Board on a monthly basis. In Mr. Dewart's view, then, the problem has been addressed. Mr. Dewart further submitted that, "the Board has also resolved to ensure strict compliance with the Personnel Policy in order to ensure that there is no accumulating liability for compensatory time".

In its written and oral submissions LAO asserts that the ACLC response is unsatisfactory in a number of respects. First, LAO noted that not only had PwC been critical of the accumulation of accrued compensatory time liability, but that the ACLC's own auditors had drawn the ACLC's attention to this problem in years gone by. Nonetheless, it was to take another two years for the ACLC Board to revise this policy. Moreover, the treatment of the Executive Director's accrued liability by the ACLC has been the subject of contradictory explanations by the ACLC and its counsel. It was first claimed by the ACLC that the problem had been resolved by the receipt of a donation in the 2012 fiscal year by a donor who wished to remain anonymous. Counsel for LAO suggests that this explanation does not make sense as it does not appear to be reflected in the record keeping of the ACLC, nor is the ACLC in a position to provide a charitable receipt for tax purposes to a donor of such money. During the oral submissions on August 8, 2014, however, Mr. Dewart offered an alternative and inconsistent explanation that the liability to the Executive Director has been forgiven by the Executive Director and was no longer owed to her. The first explanation –

donation by an anonymous donor – suggests that the liability has been discharged by payment of the anonymously donated funds to the Executive Director. The second explanation does not involve such a payment. The inconsistency in these explanations and the lack of supporting documentation of something alleged to have occurred in the 2012/13 fiscal year is troubling. In our view, LAO was entitled to a clear and documented explanation of the handling of this substantial liability.

#### 4. Co-Mingling of Funds

The PwC forensic audit report was critical of the ACLC's practice of inter-fund transfers. The ACLC receives funding not just from LAO, but from a variety of other funding sources. The L3 Staff Report asserts that in December, 2013, ACLC's auditors "noted that the ACLC continues to operate by managing working capital across funds and that the ACLC's reliance on the timing of cash flow to finance the accumulated deficit must be addressed immediately". The auditors further stated, according to the L3 Staff Report, that "the practice has led to over-expenditures and an accumulated deficit, and that it will be difficult for the ACLC to return to a surplus fund position". In effect, it is alleged, the ACLC has been borrowing money from one program to cover over-expenditures in another. It was further alleged in the L3 Staff Report that in the fiscal year 2013, the ACLC had borrowed \$138,922.00 from another funder to cover liabilities to the ACLC's LAO General Fund, thus creating a debt now owed by the LAO fund to another funder. The ACLC response to this concern is that, acting on the advice of its auditor, ACLC transferred the surplus in its operating fund, "to reduce the deficit" in the LAO general fund.

The PwC Forensic Audit Report made recommendations on this topic requiring that a policy on inter-fund transfers should be established along with monitoring procedures to ensure that the clinic is in compliance with the funding agreement with LAO and its own policies as it relates to inter-fund transfers. No such policy has yet been established although the ACLC claims that LAO has been unhelpful by failing to provide a precedent for such a policy. In a letter dated November 26, 2013, LAO Vice-President, Budgell, did provide guidance on the content of an acceptable inter-fund transfer policy. More particularly, Ms. Budgell requested that the ACLC adopt a policy regarding inter-fund transfers which includes:

- Proper support for all inter-fund transfers including provisions of the LAO-Clinic Funding Agreement and Funding Agreements from other funders where transfers take place.
- Detailed explanation of all inter-fund transfers on financial reports provided to LAO.
- Board monitoring provisions which ensure Board oversight and approval of all inter-fund transfers.
- Evidence of Board review and approval of the policy itself.

No such policy has been adopted notwithstanding the passage of a substantial period of time since this matter has been drawn to the attention of the ACLC

Board, both by its auditors and by the PwC Forensic Audit Report. This Committee remains very concerned by the use of LAO funds for purposes not contemplated by the Funding Agreement.

**5. Use of Clinic Funds to Hire Outside Counsel**

As noted above, the LAO-funded position of Director of Legal Services has been vacant since 2006 (and only very recently filled). In order to represent clinic clients in what the clinic considers to be test case litigation, the ACLC retained outside counsel using LAO funding for the Director of Legal Services position. The expenditures incurred in this way were substantial. In the letter of June 10, 2011 to LAO, the ACLC Executive Director disclosed that actual expenses incurred by the clinic for outside counsel in fiscal 2011 totalled \$307,586.00, broken down in the following fashion:

- \$283,905.00 for a case involving discrimination [REDACTED] involving [REDACTED] (after the retained firm wrote down \$200,000.00 of its billings)
- \$15,855.00 for racial profiling/use of force case
- \$7,826.00 for racial profiling case

The ACLC purports to defend this use of the surplus funds created by the vacancy on the tenuous basis that it constitutes the hiring of “replacement staff” within the meaning of Section 26 of the ACLC Funding Agreement. Even if one accepts this argument (and the Committee does not), it appears very difficult to justify the first item on this list. The first item concerns [REDACTED]. The L3 Staff Report asserts that the costs incurred by the clinic on outside counsel were excessive, created a large over-expenditure and were an irresponsible use of public funds. Leaving aside the question of whether the [REDACTED] was financially eligible for legal aid clinic representation, the allegation that the costs incurred were excessive is difficult to rebut.

**6. Inappropriate Use of Clinic Credit Cards**

The PwC Forensic Audit Report Addendum examined the use of the ACLC credit cards and found a number of inappropriate and/or unexplained purchases and practices. As the L3 Staff Report notes, a random audit of the clinic’s Visa transactions revealed charges at various retail stores totalling \$2,281.00, including:

- Stillwater Spa, \$100.00
- La Senza Lingerie, \$112.00
- William Ashley, \$240.00 and \$62.00 (the \$62.00 item was subsequently returned)
- STC gift certificate (Scarborough Town Centre), \$150.00
- Just Miss (prom dress store), \$142.00
- Lavalife (online dating) \$32.00 and \$31.00
- Rogers and Bell charges, \$1,474.00

In response to the draft audit addendum report, the ACLC indicated that these purchases were made by a particular former employee and that the charges in question were deducted from the employee's salary. PwC asserts that it was unable to verify that such deductions were in fact made. The PwC Visa audit also identified a number of unexplained purchases totalling \$3,989.00, including:

- \$155.00 at Exceptions Writing Instruments
- \$510.00 at Best Buy
- \$487.00 at Wal-Mart grocery
- Four purchases of alcohol totalling \$115.00
- \$1,629.00 at Bell
- \$164.00 at Rogers
- \$456.00 at Final FX
- \$150.00 at Mars Blinds
- \$86.00 at Paypal
- Four purchases at The Bay totalling \$237.00

Whether any of these purchases were for personal rather than clinic purposes is difficult to discern in the absence of appropriate documentation of the expenditures.

A more troubling illustration of the phenomenon of the use of clinic credit cards for personal purchases involves the purchase of a ring for \$754.00 from The Diamond Shop by the Executive Director on March 30, 2007. The materials filed, including a letter from Mr. Dewart to Mr. Forrest on December 18, 2012, indicate that when this matter was raised by PwC, the Executive Director reported that she had explained to the ACLC Board that on the same day that she made the purchase, she had withdrawn an equivalent amount of cash from her own bank account and immediately reimbursed the clinic. Further, she asserted that she had failed to ask for a receipt when she did so. She also said that she indicated to the ACLC Board that she would be willing to make a further repayment of the money if necessary. It is alleged that the Board declined to require repayment at that time. In the exchanges between counsel prior to the present proceeding, Mr. Forrest invited Mr. Dewart to provide banking records of the Executive Director from March and April, 2007, that would demonstrate that funds had, at the appropriate time, been withdrawn from the Executive Director's bank account in order to facilitate the alleged repayment. Mr. Dewart replied on January 10, 2013 that such a request was "grossly insulting to [the Executive Director], asking her to prove the truth of information she provided to the board". The bank records were not provided. Nor was a statement from the bank provided to the effect that such documents cannot be produced if that was indeed the case. With all due respect to Mr. Dewart, this request for documentation of repayment, given the other findings in the PwC audit Addendum, does not seem unreasonable and the refusal to provide the relevant documentation cannot fail to generate suspicion.

The PwC Addendum also reports that between 2008 and 2011, the ACLC's credit card was used on 34 occasions to obtain cash advances totalling

\$6,950.00. In the absence of reporting documentation for all but \$300.00 of those cash advances, the vast majority of the advances are unaccounted for. The circumstances under which the cash advances were obtained are a matter of dispute. The Executive Director, according to the L3 Staff Report, denies knowledge of them. A former office manager, however, has made an allegation that the advances were obtained on her direction in order to facilitate purchases on behalf of the ACLC when no director was available to sign a cheque. If true, such a practice would obviously be unacceptable. What appears to be undeniable, in any event, is that the cash advances appeared on the monthly Visa statements and were paid by the ACLC without any documented explanation for their existence. The cash advances would have been reflected in such statements. This suggests that either the Executive Director and the director responsible for signing the cheques to pay the monthly accounts either neglected to review the underlying documentation with sufficient care or that they approved payment for these advances.

7. Excessive and Inappropriate Spending on Meals, Travel, Accommodation and Gifts

The L3 Staff Report asserts that the ACLC Board of Directors “failed to institute policies and procedures governing meals, accommodation and travel expenses that comply with LAO policy requirements for all clinics”. Moreover, the L3 Staff Report notes that the ACLC Board appears to have taken no action in response to “variances and over-expenditures in the ACLC’s travel, meal and hospitality budget”. The L3 Staff Report goes on to suggest that, in light of the budgetary deficit of the ACLC, expenditures on such items appear to be excessive. The L3 Staff Report and supporting documentation suggest that substantial sums were spent at Toronto restaurants on staff lunches and dinners, some including alcohol that contravened the LAO policy that came into force in September, 2010 prescribing limits on such expenditures. Other expenditures asserted to be excessive or inappropriate in the L3 Staff Report include expenditures on accommodation and catering for staff meetings and planning days, unexplained domestic and international travel, Christmas parties and gifts of various kinds which appear to be of a celebratory nature for members of staff. The ACLC response to this complaint is that many of the expenditures involved did not use LAO funds and that the expenditures are unfairly criticized by LAO. In response to the recommendations of PwC and LAO to adopt appropriate policies with respect to expenditures of this kind, the ACLC submitted a Travel Policy to LAO on October 22, 2013. According to the L3 Staff Report, however, the ACLC Travel Policy did not fully comply with the PwC recommendations on this topic, nor with LAO’s Clinic Travel, Meal and Hospitality Expenses Directive of September, 2010. On the basis of the materials filed it is difficult for the Committee to determine the extent to which such expenditures utilized LAO funds and/or were excessive or inappropriate. Regardless of whether or not LAO funds were used for the expenditures in question, the Committee does not find it acceptable that the ACLC’s policy is not compliant with the recommendations of PwC and with LAO’s Directive.

8. Expenditures on Taxis within Toronto

The PwC forensic audit disclosed that between 2008 and 2011, \$39,007.00 was spent on taxi fares in the Greater Toronto Area by staff, often between the ACLC premises and various residential addresses. The PwC audit report offered the view that these taxi expenditures appear high in light of the number of staff employed by the ACLC. More particularly, taxis were utilized by the Executive Director on a frequent basis. Although the ACLC does have a policy concerning the use of taxis, the L3 Staff Report asserts that the policy is deficient in various respects. On the basis of the materials filed, though the assessment in the PwC forensic audit that the use of taxis appears to be unusually high is a source of concern, it is difficult for the Committee to make a determination with respect to the appropriateness of the extent of taxi expenditures. The more important point for present purposes is that the Committee agrees with the L3 Staff Report to the effect that a satisfactory policy concerning taxi utilization should be adopted by the ACLC.

9. ACLC's Steps to Improve Financial Controls on Credit Cards

The ACLC has taken a number of steps to achieve greater control over credit card use. Thus, the number of credit cards available to ACLC staff has been reduced from five to one. Further, in September, 2013, the ACLC developed a Credit Card Policy. In the November 16, 2012 response to the draft PwC forensic audit, Mr. Dewart indicated that the clinic would develop a new Credit Card Policy corresponding to "all but the 3<sup>rd</sup>, 6<sup>th</sup> and 10<sup>th</sup> bullet points" recommended by PwC. He did indicate, however, a willingness on the part of the clinic to discuss the 3<sup>rd</sup> and 6<sup>th</sup> bullet points. In the L3 Staff Report, it is alleged that the ACLC Credit Card Policy does not comply with PwC's recommendations in various respects. In its ACLC Response, the ACLC concedes that although it has complied with the majority of LAO's directives, it is reluctant to implement certain other recommendations. By way of illustration, the ACLC indicated that it has not adopted LAO's recommendation to prohibit prepayment of its credit card, "because it would limit the clinic's purchasing power, especially with respect to capital purchases", e.g., office equipment for non-LAO funded programs. It is not obvious, however, that the policy of permitting pre-payment on a credit card is either necessary or desirable. PwC had also recommended that pre-payment of the Visa card be prohibited in order "to ensure that the clinic's spending limit is adhered to".

As noted above, the L3 Staff Report also asserts that the ACLC "has not implemented policies that fully comply with LAO's Clinic Travel, Meals and Hospitality Expense Directive" of September, 2010 and that the ACLC has not fully implemented PwC's recommendations on these topics. Accordingly, it is suggested in the L3 Staff Report that "the risk of improper use of public funds and excessive spending on meals, gifts and travel remains". The response to this concern by the ACLC is that the problems identified are essentially historical in nature and that there is "no evidence of continuing concern about improper

expenditures nor is there any evidence that the board is failing to conduct meaningful oversight of expenses". The position taken in the L3 Staff Report that the ACLC should comply fully with the recommendations of PwC and the current policies at LAO does not, in our view, appear to be unreasonable. The Committee concurs with this recommendation given past concerns and the lack of fully compliant policy.

**10. High Levels of Office Manager Turnover**

The L3 Staff Report indicates that there has been a remarkably high level of turnover in the Office Manager position at the ACLC. Since February of 2007, six individuals have held the position, the shortest tenure being two months and the lengthiest, twenty months. From the material filed, it is very difficult to make an assessment of why such a remarkably high rate of turnover has been experienced by the ACLC, nor is there any indication of measures taken by the Board to minimize the risk of recurrence. Whatever the correct explanation for the rapid turnover of incumbents in this position, the phenomenon is obviously a disruptive one that is likely to undermine effective administration of the finances of the ACLC and, in our view, is a matter that requires the attention of the ACLC Board of Directors.

**11. Failure to Report Staff Vacancies**

The L3 Staff Report asserts that the ACLC has, from time to time, failed to report staff vacancies in LAO-funded staff positions. All clinics are required by LAO to do so in order to ensure that LAO is aware of the existence of surplus funds and to ensure that they are properly handled by the clinic in question. The L3 Staff Report, with respect to this matter, notes that "failing to provide notice of staff turnover is particularly problematic given ACLC's past conduct of using funding from vacant positions to pay staff bonuses and hire outside counsel to represent its clients at a cost far in excess of delivering the services through staff." The Committee agrees with this observation. It is important for LAO to receive accurate and timely reports of staff vacancies and it is for this reason that the ACLC is obliged to provide them.

**12. Board Composition**

As noted above, in March, 2010, two lawyer members of the ACLC Board of Directors resigned and provided copies of their emailed letters of resignation to LAO. The allegations made in the letters of resignation are very troubling and suggest a lack of capacity and willingness on the part of the Board to exercise appropriate oversight of the performance of ACLC staff in matters of financial management and of management-staff relationships.

The letters of resignation are also troubling with respect to their implications for the composition of the ACLC Board. Section 10 of the Funding Agreement between LAO and the ACLC, consistently with the MOU between the parties, provides the following with respect to the composition of the Board of Directors of the clinic:

“As set out in the Memorandum of Understanding, the clinic will have a board of directors which is reflective of the diversity of the communities to be served by the clinic and will make reasonable efforts to have a board that includes:

- a) persons representative of the low-income community;
- b) persons with experience working with community agencies
- c) persons with financial skills;
- d) persons with management skills; and
- e) lawyers.

Obviously, this provision is designed, in part, to ensure that by including persons with financial skills and management skills and lawyers, the Board has the capacity to engage in effective oversight of the administration of the clinic. In our view, it is especially important to have persons with these skills on the Board. With the resignations of [REDACTED], there are no longer any lawyers on the ACLC Board of Directors.

In our view, it is especially important, given the problems alluded to above, that the Board of ACLC is composed in the manner set out in Section 10 and that the Board include at least two persons with financial skills and two lawyers. Quite apart from the fact that Section 10 uses the plural form to refer to “persons with financial skills” and “lawyers”, it is our view that a minimum of two in each category would be desirable in order to ensure that informed dialogue can take place on such matters within the deliberations of the Board and further, that at least one individual with each of the relevant fields of expertise would normally be available if the other were unable to attend a particular meeting of the Board. Accordingly, it is our view that it is important that the ACLC live up to its obligations under Section 10 and make “reasonable efforts” to appoint such persons to the Board. In its ACLC Response, the ACLC explained the absence of any lawyers on the board on the basis that, “since 2010, no lawyers have expressed an interest on serving on ACLC’s volunteer Board of Directors”. At the meeting on August 8, 2014, Mr. Dewart was pressed to provide further information on what efforts to recruit lawyers had been made and he undertook to provide further information in due course. In a subsequent email of August 15, 2014, Mr. Dewart reported as follows:

“Please advise the committee that I am instructed that ACLC approached three lawyers directly within the last five years to ask that they consider sitting on the board, and that all three expressed support for the clinic but indicated that their other responsibilities made this impossible.

In addition, the clinic maintains a list of lawyers in private practice to whom clients are referred. There are presently 197 lawyers on this list. After the direct approach to the three lawyers failed to produce results, an email was sent to all lawyers on the referral list, to solicit expressions of interest, but none were received.”

In our view, these efforts to recruit for the Board did not meet the standard of “reasonable efforts” required by Section 10 of the Funding Agreement. Although we understand that recruitment of volunteer Board members in the non-profit sector can be a challenging task, success is more likely to be achieved, in our view, through direct approach rather than mass emails.

With respect to persons on the Board with financial skills, the ACLC reported that the, now former, Chair of the Board and current member, Mr. Holder, holds a university degree in financial accounting and management. As far as we are aware, however, no other member of the ACLC Board has such expertise or qualifications. Accordingly, in our view, reasonable efforts should be made to ensure that there are at least two Board members with financial and/or accounting skills.

### 13. Lack of Cooperation

The L3 Staff Report also asserts that various members of the LAO Staff, in their dealings with ACLC have experienced delays in responding to enquiries from LAO and a lack of transparency with respect to financial matters. For its part, the ACLC similarly asserts that it has experienced delays and lack of cooperation in its dealings with LAO Staff and that LAO Staff timelines provided to ACLC were unreasonably short. In our view, on the basis of the material filed, it is difficult to make explicit findings with respect to particular incidents. Although some of the deadlines imposed by LAO do appear to be short, we are not persuaded that any significant prejudice resulted from them. The brief chronology of events set out above in Part II of these Reasons and in Part III, points 3, 4, 6, 11 and 12 does recount situations in which there was a lack of timely responsiveness to concerns expressed by LAO, and more particularly, with respect to the implementation of the recommendations made by PwC and LAO with respect to policies to be implemented by the ACLC. The L3 Staff Report also indicated some reluctance to cooperate fully with PwC in its forensic audit by refusing, for example, to provide electronic versions of its financial information available, and by insisting that the Executive Director be present for all interviews between PwC and ACLC staff, including the bookkeeper and members of the ACLC Board of Directors. What is undeniable, certainly, is that from the initial expression of concern in 2009 until the present time, various attempts by LAO Staff to get to the bottom of concerns and complaints directed to their attention with respect to financial management and accountability at the ACLC have absorbed an enormous amount of LAO Staff resources and have not resulted in a resolution which is satisfactory from LAO’s perspective during the ensuing five years.

Particularly noteworthy in this regard is the refusal of the ACLC to participate in the Level Two Remedial plan communicated to the ACLC Board of Directors by Vice-President Budgell on July 12, 2012. In light of somewhat alarming findings of PwC’s forensic audit report and other concerns that had emerged over the previous three years, the measures proposed, in our view, were reasonable and the refusal of the ACLC to participate in the remedial plan was not.

## **APPENDIX C – TIMELINE**

The following is a brief timeline of principal dates for the convenience of the reader. A more detailed chronology is set out in Part III of these Reasons.

### **September 8, 2009**

LAO provides detailed statement of concerns with respect to the management of the ACLC.

### **March, 2010**

LAO receives copy of email from lawyer [REDACTED] to ACLC Board members resigning in protest [REDACTED] position as a member of the ACLC Board due to [REDACTED] perception of “gross misconduct and illegalities.”

LAO receives a copy of an email from lawyer [REDACTED] to ALCL Board members resigning [REDACTED] position as an ACLC Board member because of the Board’s failure to address “concerns about financial and governance matters of the ACLC.”

LAO later learned that during this period, similar concerns were raised by the then ACLC Board Chair, whose membership in the ACLC was subsequently revoked making him no longer eligible to serve on the ACLC Board.

### **September 7, 2010**

After meetings with the ACLC Board that did not resolve LAO’s concerns, LAO advised the ACLC that it was being placed under Level One of LAO’s Dispute Resolution Policy (“DRP”). The letter so advising ACLC listed twelve items of concern and advised ACLC that LAO would be retaining an auditor to conduct a forensic audit of the clinic’s finances.

### **April 11, 2011**

LAO retained PricewaterhouseCoopers LLP (“PwC”) to conduct a forensic audit of the ACLC’s finances during the period from April 1, 2007 to March 31, 2010.

### **January, 2012**

PwC completed a draft of its Forensic Audit Report.

### **February, April, 2012**

LAO retained PwC to perform a supplementary audit of certain credit card expenditures during the period from April 1, 2007 to April 30, 2012/

### **May 16, 2012**

PwC presented a draft of its Forensic Audit Report to the ACLC Board. LAO invited feedback from ACLC by June 6, 2012.

### **June 27, 2012**

Having received no feedback on the draft PwC Forensic Audit Report, LAO Vice-President Budgell wrote to the ACLC proposing four remedial measures in light of the findings in the draft PwC Forensic Audit Report.

July 4, 2012

ACLC counsel wrote to LAO objecting to the remedial measures.

July 12, 2012

LAO Vice-President Budgell wrote to ACLC summarizing certain findings in the draft PwC audit, invoking Level Two of the DRP and proposing certain remedial measures to be adopted by the ACLC.

July 20, 2012

ACLC counsel wrote to LAO objecting to the remedial measures.

April 8, 2013

Final versions of PwC Forensic Audit Report and PwC Addendum Report made available to LAO.

April 3, 2014

Vice-President Budgell forwarded a two volume document titled "Dispute Resolution Policy: Level Three Report – African Canadian Legal Clinic ("LAO L3 Staff Report") to this Committee. The document proposed that this Committee invoke Level Three of the Dispute Resolution process and impose eight remedial conditions upon the ACLC and further, proposing that if the ACLC did not comply with the conditions, LAO Staff could return to this Committee and recommend that this Committee exercise its statutory authority to suspend LAO funding of the ACLC.

June 9, 2014

The LAO Clinic Committee received the two volume undated response of the ACLC (the "ACLC L2 Response") to the LAO L3 Staff Report.

September 5, 2014

The Clinic Committee released its decision (the "CC L3 Remedial Response Decision") in the matters raised in the LAO L3 Staff Report and the ACLC L3 Response, imposed Level Three of the Dispute Resolution Policy and imposed the eight conditions upon the ACLC suggested in the LAO L3 Staff Report.

November 7, 2014

In response to the request from the ACLC dated October 7, 2014 for reconsideration of the eight remedial conditions, this Committee entertained written and oral submissions from the parties and issued a Decision revising the remedial conditions in some respects (the revised conditions being set out in Appendix A to this Decision).

November 6, 2015

LAO Staff filed with this Committee a memorandum titled “Failure of ACLC’s Board and Management to Comply with Conditions of Level Three Decision” (the “LAO Staff Compliance Report”) together with two volumes of exhibits, alleging that ACLC had failed to comply with the eight conditions imposed by this Committee in its CC L3 Remedial Response Decision and requesting this Committee to suspend LAO’s funding of the ACLC.

December 23, 2015

ACLC’s written updated response to the LAO L3 Staff Compliance Report is received by this Committee (the “ACLC Compliance Response”).

March 18, 2016

An oral hearing was convened by this Committee to entertain submissions from the parties concerning the matters raised by the LAO L2 Staff Compliance Report and the ACLC Compliance Response.

April, 2016

At the request of the Committee and with the consent of LAO and the ACLC, LAO’s Internal Audit Unit completed and made available to this Committee and LAO and the ACLC an audit report (the “IAU Report”) of ACLC’s compliance with the recommendations in the PwC Forensic Audit Report, pursuant to Condition #8 imposed upon the ACLC by this Committee’s CC L3 Remedial Response Decision, following which written submissions of the parties concerning the significance of the IAU Report were entertained by this Committee.

June 20, 2016

The Clinic Committee rendered its Decision, finding that the ACLC had fully complied with only one of the eight remedial conditions imposed on September 5, 2014, that the ACLC remained in fundamental breach of its obligations under LASA and the terms and conditions of its funding from LAO and therefore that its funding should be suspended. This Decision also acknowledged, however, that having reached such a conclusion, LASA required LAO to give reasonable notice to the ACLC of its intent to suspend funding and an opportunity to comply with its statutory and other obligations. The Committee determined that six months would constitute reasonable notice and therefore indicated to ACLC that its LAO funding would be suspended in December, 2016 unless, in the interim, this Committee was persuaded that the ACLC had fully complied with the eight remedial conditions.

December, 2016

Written Submissions of the parties contesting whether or not the ACLC had complied with the eight remedial conditions were filed by the parties, initial Submissions on December 1, 2016 and Reply Submissions on December 12, 2016.

January 19, 2017

This Committee rendered its Interim Decision indicating continuing issues with compliance, but granting an adjournment to permit the parties to submit further information on certain issues and to facilitate an audit of inter-fund transfer practices of the ACLC.

April 25, 2017

The PwC Review of ACLC's practices with respect to inter-fund transfers is presented to this Committee and to the parties to this proceeding.

April 28, 2017

The ACLC submits to this Committee and to LAO a further revised financial restructuring plan.

May – June, 2017

The parties submit written Submissions and Reply Submissions concerning the new information provided to this Committee during the adjournment order of January 19, 2017 and with respect to the ACLC's revised financial restructuring plan.

August 16, 2017

This Committee rendered its Decision suspending the ACLC from the receipt of further funding from LAO.

September 5, 2017

The ACLC filed a "Notice of Request for Reconsideration" with this Committee seeking a reconsideration of this Committee's Decision of August 16, 2017.

September 22, 2017

This Committee rendered a Decision indicating that the Request for Reconsideration would be entertained by this Committee and that a reconsideration of the Decision would occur. The parties, LAO and the ACLC, were invited to make written submissions concerning the reconsideration and an oral hearing on this matter was scheduled for October 1, 2017.