

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

- MEETING:** Benchers
- DATE:** Friday September 9, 2005
- PRESENT:**
- | | |
|--|----------------------------|
| Ralston Alexander, QC, President | Patrick Nagle |
| Robert McDiarmid, QC, 1 st Vice-president | June Preston |
| Anna Fung, QC, 2 nd Vice-president | Greg Rideout |
| Joost Blom, QC | Glen Ridgway, QC |
| Robert Brun, QC | Patricia Schmit, QC |
| Ian Donaldson, QC | Alan Seckel, QC, Deputy AG |
| Michael Falkins | Dirk Sigalet, QC |
| Carol Hickman | Gordon Turriff, QC |
| John Hunter, QC | Dr. Maelor Vallance |
| William Jackson | Art Vertlieb, QC |
| Patrick Kelly | James Vilvang, QC |
| Terry La Liberté, QC | David Zacks, QC |
| Bruce LeRose | |
- NOT PRESENT:**
- | | |
|------------------------|------------------|
| Gavin Hume, QC | Ross Tunnicliffe |
| Margaret Ostrowski, QC | |
- STAFF PRESENT:**
- | | |
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| Timothy McGee, CEO | Brian McInlay |
| Mary Ann Cummings | David Newell |
| Stuart Cameron | Denise Palmer |
| Brad Daisley | Alan Treleaven |
| Charlotte Ensminger | Ron Usher |
| Su Forbes, QC | Adam Whitcombe |
| Tim Holmes | Carmel Wiseman |
| Jeffrey Hoskins | |
- GUESTS:**
- Russell Law (for item 11)
 - Dean Andrew Petter, University of Victoria
 - Meg Shaw, President, CBABC
 - Frank Kraemer, Executive Director, CBABC
 - Wayne Robertson, Executive Director, Law Foundation
 - Johanne Blenkin, Chief Librarian, BCCLS
 - Dugald Christie (for item 10)
 - Shannon Rupp, Lawyers Weekly

1. MINUTES

The minutes of the meeting held on July 8, 2005 were approved as circulated.

2. PRESIDENT'S REPORT

Mr. Alexander circulated a written report outlining his activities on behalf of the Law Society over the previous two months.

3. CEO'S REPORT

Mr. McGee circulated a written report focusing on his five top operational priorities, and providing a summary of the Law Society finances. Mr. McGee outlined the five priorities as follows:

1. Internal Communications.
 - a. Quarterly "town hall" meetings hosted by Mr. McGee and the senior management team. The first meeting is scheduled for September 27, 2005.
 - b. Creating an "employee council" with members elected by their peers and approved by managers. The council will have a budget and will be asked to deal with a number of matters including employee events and charitable contributions.
 - c. "Tim Bits" will involve regular discussions of matters of interest with groups of employees drawn from different areas of operation.
 - d. Performance reviews, including how they will be conducted and tied in with compensation.
2. Facilities Review Project. The Law Society has not done a comprehensive review of facilities since it moved into the current building. Changes have been made as needed but over time issues have developed with respect to how work gets done. A design company has been chosen to assess work functions and space, stressing functionality.
3. Government Relations. It is a priority to make sure the Law Society has a proper plan in place to ensure a coordinated approach in dealing with the government.
4. 2006 Operational Priorities Plan. Each department head is establishing priorities for the coming year. These will be mapped back to the Benchers' priorities and will be linked to the budget. A provisional plan will be given to the Benchers in November, and a final plan in December.

Mr. Alexander noted that the revenue from the Trust Administration Fee (TAF) was greater than anticipated. He said this was significant in several respects. First, the members are entitled to know, and there will be a report in the next Benchers Bulletin. Second, is the feedback from members indicates that they want the Law Society to account separately for the money. Mr. Alexander said Mr. McGee had anticipated the Benchers' direction with respect to trust compliance initiatives and would have a new initiative coming forward in the Fall. The other important aspect of the revenue is the prospect that some or all of the premium cost for Part B insurance may be covered.

Mr. LeRose agreed that it is critically important from both the members' and the public perspectives that the revenue from the TAF is transparently accounted for and there is no inclination to use it for anything other than its intended purposes.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. EXECUTIVE COMMITTEE BY-ELECTION AND BENCHER VACANCIES

The Benchers conducted a vote pursuant to Rule 1-39(7) to elect a Bencher to fill the vacancy on the Executive Committee left by Anne Wallace's departure. Glen Ridgway, QC was elected to fill the vacancy.

After considering the Executive Committee's recommendation that the Benchers not fill the Bencher vacancies left by the departure of Anne Wallace, Darrell O'Byrne and Grant Taylor, it was moved (Fung/McDiarmid) that the Benchers not appoint anyone to fill the vacancies.

The motion was carried.

6. DISCLOSURE AND PRIVACY TASK FORCE: BENCHER DOCUMENTS

Mr. Hunter reviewed the report and recommendations of the Disclosure and Privacy Task Force regarding documents received or created by Benchers outside the Law Society. He noted that the *Freedom of Information and Protection of Privacy Act* might apply to such documents if they are created or received by Benchers in that capacity, in which case they must be protected from improper disclosure and preserved so that they can be produced if required. Mr. Hunter said the task force had concluded that it was not necessary to determine with finality whether the *FOIPPA* applied to such documents because prudent practices would ensure that documents are dealt with appropriately. Mr. Hunter reviewed the task force's recommendations with respect to six categories of documents.

1. Notes taken during a hearing. These are excluded from the *FOIPPA* and do not have to be disclosed. The task force recommended that they be securely destroyed when the hearing concludes.
2. Notes made at a conduct review. A conduct review is not a quasi-judicial proceeding; consequently, the notes are not automatically excluded from the operation of the *Act*. The recommendation was that Benchers retain their notes and either keep them securely and segregated from non-Law Society files or forward them to the Law Society in a sealed envelope.
3. Correspondence or notes of communications with lawyers seeking ethical or professional conduct advice. The task force recommendation was that it is not necessary to determine in advance whether such communications are privileged or confidential but they must be preserved so that a determination can be made in the future, if necessary. The recommendation was that Benchers either retain the documents or forward them to the Law Society in a sealed envelope at the end of their term as a Bencher.
4. Correspondence or notes of communications with lawyers and members of the public regarding ethics or professional conduct. The recommendation was the same as for the previous category.
5. General Law Society business. The recommendation was that Benchers forward documents relating to other Law Society business to the staff person responsible.
6. Correspondence or notes of communication with members relating to the members' personal business with the Law Society. The recommendation was the same as for the previous category.

In answer to a question from Mr. Nagle, Mr. Hunter said the task force made no distinction between Lay Benchers and elected Benchers with respect to the recommendations.

Mr. Donaldson agreed that notes regarding advice to lawyers ought to be retained but he was concerned about delivering them to the Law Society. If the notes are privileged, that consideration should be paramount and they should be dealt with in the same way as any other client file. To send them to the Law Society in any form is potentially a violation of privilege.

Mr. Hunter noted that the recommendations included the option of Benchers retaining such documents themselves, so long as Benchers take steps to ensure that the documents are dealt with properly and can be produced if required by law.

Mr. Donaldson pointed out that lawyers also contact Life Benchers for advice and to the best of his knowledge; Life Benchers would simply retain their notes.

Mr. Hunter said the task force did not consider the case of Life Benchers.

Mr. Vilvang agreed with Mr. Donaldson. His view was that when advising a lawyer he was acting in his capacity of the lawyer's counsel. He did not think documents arising in that situation could be considered Law Society documents.

Mr. Hunter agreed that notes regarding advice to members represented the weakest case for disclosure under FOIPPA, but that possibility exists, even though it is unlikely. The task force recommendation accommodates the more restrictive view.

Mr. McDiarmid agreed with Mr. Donaldson. He suggested the alternative of requiring Benchers to permanently preserve notes of conversations with members.

Ms. Schmit agreed with Mr. Donaldson in terms of document management but said the question of privilege would turn on the retainer, such as it might be.

Mr. Turriff acknowledged that the task force recommendation was pragmatic, but he still wanted to know whether communications with members regarding ethical advice would be privileged. He pointed out that he sometimes receives messages from members in circumstances where he cannot determine immediately what capacity they are contacting him in. In other cases, he said, it would be appropriate to advise members that if they are contacting him in his capacity as a Bencher, then privilege might not apply.

Mr. Alexander said the Executive Committee could consider whether further work on the question of privilege should be done.

Mr. LaLiberté asked whether the concern was that a member might later contradict what was said to the Bencher, that a complainant might seek disclosure of the Bencher's notes.

Mr. Hunter said the task force's starting point was to try to determine what are Law Society records so that they can be preserved and produced or properly protected as required by the FOIPPA. He said there may not be a definitive answer to the privilege question, consequently, the task force took a pragmatic approach.

Mr. McDiarmid said it was easy to imagine a situation where a lawyer discloses details about a problem with a client who might later complain and make a request under the *FOIPPA*.

7. WESTERN CANADA SOCIETY TO ACCESS JUSTICE FUNDING REQUEST

Dugald Christie gave a brief update on the status of his action against the Provincial Government with respect to PST on lawyers' bills. He said it seemed likely that the Crown would agree that the low-income distinction was administratively unworkable, so the outcome would be all or nothing. Mr. Christie noted that the court challenge was consistent with positions taken by the Law Society

in the past. With respect to pro bono clinics Mr. Christie said the Western Canada Society to Access Justice (WCSTAJ) was working at full capacity and the real task was to ensure that the clinics complied with the requirements of Pro Bono Law of BC so that retired and insurance exempt lawyers could qualify for the special insurance coverage offered by the Lawyers Insurance Fund.

Mr. Alexander noted that in previous presentations Mr. Christie had said this would not be a recurring funding request, and he asked for confirmation that this was so.

Mr. Christie said that unless WCSTAJ could fit within an existing Law Society program, there would be no more requests for funding expansion and the tax case

Mr. Zacks noted the point that WCSTAJ had to devote resources to satisfying the requirements of the Lawyers Insurance Fund. He asked why that would not be a recurring expense if the requirements obliged WCSTAJ to hire and train people.

Mr. Christie said most of the cost was in setting up systems to satisfy the Lawyers Insurance Fund requirements, rather than repeated training.

Mr. Zacks asked if the information the Lawyers Insurance Fund required to be kept would not be kept in the normal course of the program.

Mr. Christie said there was a huge difference between the requirements and the normal practice. For example, the LIF requires that the clinic keep a short statement from the lawyer describing the case. The statement would have to be transcribed into electronic form so that it can be tracked and accessed. In the past, the individual lawyers have taken responsibility to keep those records, but the LIF requirements would entail a second record under WCSTAJ's control.

Mr. McDiarmid recalled that the members passed a resolution at a Law Society AGM encouraging the Law Society to work on effective pro bono assistance to the people of BC. The person who has done the most is Dugald Christie. He has done it all kinds of communities. PBLBC was supposed to become self-funding but it has not attracted money. In contrast, Mr. Christie has attracted \$145,000. He is now asking for a relatively small amount of money for a huge project. This is the most efficient money the Law Society will ever spend and it would a tragedy if it is denied.

It was moved (McDiarmid/LaLiberté) to approve funding to the Western Canada Society To Access Justice of \$35,000 in calendar year 2005, as an exception to the policy on funding external programs.

Mr. Zacks said he supported a lot of what the WCSTAJ did and agreed that it was remarkably successful but if the Benchers are going to approve funding on a regular basis to organizations providing services to the public, they should do so on a more regularized basis because there are other organizations that may want to seek funding.

Mr. Turriff agreed with Mr. Zacks but said he would vote for the motion because it was pragmatic. He said he might not vote in favour if the government used all of the PST collected on lawyers' fees to fund legal aid.

In response to a question from Mr. LeRose, Mr. Christie said the WCSTAJ had received \$62,000 from the Law Foundation in 2005.

Mr. Vilvang agreed that the WCSTAJ program promoted one of the Law Society's Ends and is sufficiently valuable that the Law Society would consider providing the program itself if it was not more efficiently run externally.

Mr. Brun and Ms. Schmit agreed with Mr. Zacks comment that the decision should be made on the basis of a policy.

The motion was carried.

8. SINGLE BENCHER PANELS

Mr. Hoskins reviewed the decisions in principle previously made by the Benchers with respect to single Bencher hearing panels.

It was moved (Zacks/Jackson) to amend the Law Society Rules as follows:

1. *By rescinding Rule 2-64 and substituting the following:*

Appointment of panel

- 2-64** (1) When a hearing is ordered under this Division, the President must establish a panel in accordance with Rule 5-2.
- (2) When a panel has been established under subrule (1), the Executive Director must promptly notify the applicant and Law Society counsel of the composition of the panel.

2. **By renumbering Rule 4-28 as subrule (1) of that Rule and adding the following subrule:**

- (2) When a panel has been established under subrule (1), the Executive Director must promptly notify the respondent and discipline counsel of the composition of the panel.

3. *By rescinding Rule 5-2(1), (2) and (4) and substituting the following:*

Hearing panels

- 5-2** (1) A panel must consist of an odd number of persons but, subject to subrule (2), must not consist of one person.
- (2) A panel may consist of one Bencher who is a lawyer when
- (a) no facts are in dispute,
 - (b) the hearing is to consider a conditional admission under 4-22,
 - (c) it is not otherwise possible, in the opinion of the President, to convene a panel in a reasonable period of time, or
 - (d) one or more of the original panel members cannot complete a hearing that has been commenced.
- (4) All Benchers, all Life Benchers and all lawyers are eligible to be appointed to a panel.

Mr. McDiarmid suggested that the mandatory nature of proposed Rule 2-64 might open up an avenue to judicial review. He suggested the same objective might be better accomplished through a policy rather than a rule.

Mr. Zacks suggested a challenge would focus on the word “promptly” in Rule 2-64 and 4-28.

It was agreed to postpone further discussion of the matter until later in the meeting to permit consideration of a revised draft.

It was moved (McDiarmid/Zacks) to recommend to the President or other Bencher presiding at a Bencher review under section 47 of the *Legal Profession Act* that the review not proceed without at least one Lay Bencher present, unless a quorum including a Lay Bencher cannot be arranged within a reasonable time.

The motion was carried.

On returning to the discussion postponed earlier, the motion was withdrawn and it was moved (McDiarmid/Zacks) to amend the Law Society Rules By rescinding Rule 5-2(1), (2) and (4) and substituting the following:

Hearing panels

- 5-2**
- (1) A panel must consist of an odd number of persons but, subject to subrule (2), must not consist of one person.
 - (2) A panel may consist of one Bencher who is a lawyer when
 - (a) no facts are in dispute,
 - (b) the hearing is to consider a conditional admission under 4-22,
 - (c) it is not otherwise possible, in the opinion of the President, to convene a panel in a reasonable period of time, or
 - (d) one or more of the original panel members cannot complete a hearing that has been commenced.
 - (4) All Benchers, all Life Benchers and all lawyers are eligible to be appointed to a panel.

The motion was carried by a majority of more than two thirds of the Benchers present.

It was agreed to postpone discussion of the remainder of the proposed rule revisions until the next meeting.

9. ADDENDUM TO THE PROTOCOL WITH THE PROVINCIAL COURT

Mr. Ridgway reviewed a proposed addendum to the protocol between the Law Society and the Provincial Court. The addendum would create a process to allow inquiry where the court has a concern that someone is engaged in the unauthorized practice of law before the court.

It was moved (McDiarmid/Ridgway) to adopt the addendum to the protocol.

The motion was carried.

10. APPOINTMENTS TO THE QC APPOINTMENTS ADVISORY COMMITTEE

It was agreed to appoint Mr. Alexander and Mr. McDiarmid to the 2005 QC Appointments Advisory Committee.

11. UPDATE ON CLAIMS AND INVESTIGATIONS IN THE WIRICK MATTER

This matter was considered *in camera*.

It was moved (McDiarmid/Vertlieb) to draft a report to the members outlining findings with respect to the fate of funds misappropriated by Mr. Wirick, and seek court approval to send it to the members.

The motion was carried.

14. DISCUSSION OF BENCHER CONCERNS

Ms. Schmit said the government of BC is the only province that has out-of-date statutes on its publicly accessible website. She wanted to hear from anyone who knows the minister responsible, Mike de Jong.

Mr. Seckel commented that the Ministry of the Attorney General was in the same position as everyone else, and had to pay for access to up-to-date statutes.

It was agreed that the Law Society should renew its efforts to make current statutes freely available to the public.

Ms. Schmit drew attention to price increases for CLE programs in the Fall and asked for feedback on whether members were finding cost to be a barrier to attendance.

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