

# THE LAW SOCIETY OF BRITISH COLUMBIA

## MINUTES

**MEETING:** Benchers

**DATE:** Friday, December 9, 2005

**PRESENT:**

Ralston Alexander, QC, President	Patrick Nagle
Robert McDiarmid, QC, 1 <sup>st</sup> Vice-president	Margaret Ostrowski, QC
Anna Fung, QC, 2 <sup>nd</sup> Vice-president	June Preston
Joost Blom, QC	Glen Ridgway, QC
Robert Brun, QC	Patricia Schmit, QC
Ian Donaldson, QC	Allan Seckel, QC, Deputy AG
Michael Falkins	Dirk Sigalet, QC
Carol Hickman	Ross Tunnicliffe
Gavin Hume, QC	Gordon Turriff, QC
John Hunter, QC	Dr. Maelor Vallance
William Jackson	Art Vertlieb, QC
Patrick Kelly	James Vilvang, QC
Bruce LeRose	David Zacks, QC

**BENCHERS ELECT:**

Rita Andreone	Robert D. Punnett
Kathryn A. Berge, QC	David M. Renwick
Leon Getz, QC	Richard N. Stewart
Thelma O'Grady	

**NOT PRESENT:** Terry La Liberté, QC

**STAFF PRESENT:**

Timothy McGee, CEO	Jack Olsen
Mary Ann Cummings	Neil Stajkowski
Charlotte Ensminger	Alan Treleaven
Su Forbes, QC	Ron Usher
Jeffrey Hoskins	Adam Whitcombe
Michael Lucas	Carmel Wiseman
David Newell	

**GUESTS:**

Dean Mary Ann Bobinski, University of British Columbia  
Dean Andrew Petter, QC, University of Victoria  
Meg Shaw, President, CBABC  
Frank Kraemer, Executive Director, CBABC  
Wayne Robertson, Executive Director, Law Foundation of BC  
Johanne Blenkin, Chief Librarian, BCCLS  
Jamie McLaren, Executive Director, Pro Bono Law of BC  
Mark Benton, Executive Director, Legal Services Society (for item 9)  
Derek LaCroix, QC, Executive Director, LAP

**1. MINUTES**

Minutes of the meeting held on November 10, 2005 were approved as circulated.

**2. PRESIDENT'S REPORT**

Mr. Alexander circulated a written report detailing his activities on behalf of the Law Society over the previous month.

**3. REPORT ON OUTSTANDING HEARING DECISIONS**

The Benchers received a report on outstanding hearing decisions. Mr. Alexander noted that there were no delinquent hearing reports, and he congratulated the Benchers.

**4. OPERATIONAL PRIORITIES FOR 2006**

Mr. McGee presented an operational priorities plan for 2006 setting out five top priority projects that followed from Benchers' previously expressed priorities. He said the management team had chosen projects that would achieve the greatest benefit to the Law Society in the next year, and he believed the goals could be accomplished. In brief, the priority projects were:

- ◆ Trust Assurance program reform.
- ◆ Internal resourcing of the Law Society's custodianship obligations.
- ◆ Post-call education – small firm and sole practice management course.
- ◆ Government relations
- ◆ Bencher support.

Mr. Nagle asked if there would be a further opportunity to debate details of the government relations plan.

Mr. McGee said the plan contemplated establishing priorities, and the Executive Committee and Benchers would consider details of the individual projects as necessary.

**5. TRUST ADMINISTRATION FEE EXPENDITURES IN 2005**

Mr. Stajkowski reviewed a memorandum regarding the allocation of Trust Administration Fee (TAF) revenue received in 2005.

It was moved (Zacks/LeRose) to approve allocation of TAF revenue received in 2005 to the following 2005 program expenses in the approximate amounts indicated:

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|--|-----------------------|
| 1. Trust review                        | \$425,000 (estimate), |
| 2. Audit and Investigations department | \$525,000 (estimate), |
| 3. Non-Wirick custodianship costs      | \$500,000 (estimate), |
| 4. Part B Insurance funding            | \$1,725,000; and      |

to receive an update of the allocation with final actual cost amounts in February, 2006.

Mr. Vilvang asked what the long-term expectations were for the cost of the trust review program.

Mr. Stajkowski said this was the trust assurance program Mr. McGee referred to in the operational priorities plan. He said the costs were expected to be about \$1.3 million in the first year, with possible incremental change in following years.

The motion was carried.

**6. GENERAL FUND BUDGET FOR 2006**

Mr. Stajkowski circulated information with respect to the 2006 General Fund budget. He noted that the Benchers had previously decided to allocate the costs of the audit and investigations program and custodianships to the General Fund. Those costs amount to approximately \$3.2 million. In 2006 TAF revenue will cover the costs of the trust assurance program, custodianships, and forensic audits. The other program changes outlined in the operational priorities plan are built into the budget. Mr. Stajkowski said additional revenue sources made it possible to balance the budget with only a \$0.5 million contribution from the general fund reserve. The expected 2005 results would reduce the general fund reserve to approximately \$1.3 million. Mr. Stajkowski said it was likely that the annual practice fee would have to be increased in 2007 to sustain programs; however, by 2009 the Special Compensation Fund assessment is expected to be much smaller and members will be paying less overall.

Mr. McDiarmid asked what progress was being made in repayment of Juricert costs.

Mr. Stajkowski said the capitalized cost of setting up Juricert was approximately \$1 million spread over three years. He said the Law Society had received about \$400,000 in revenue so far, and expected a further \$300,000 in revenue in 2006 and subsequent years.

Mr. Brun noted that the TAF revenue was significantly greater than the originally budgeted, and he asked if some explanation would be provided to the members.

Mr. Stajkowski said the "President's View" column in the most recent Benchers Bulletin included a discussion of the TAF. Mr. Stajkowski said the inaccuracy of the original estimate resulted from a lack of reliable information about the volume of transactions.

**7. FEE SCHEDULES**

It was moved to amend the Law Society Rules effective January 1, 2006:

- a) in Schedule 1, by striking the figure "980.50" in line A1 and substituting the figure "1,065.50";
- b) in Schedule 2, by revising the prorated figures in the first column accordingly; and
- c) in Schedules 1, 2 and 3, by striking the year "2005" and substituting "2006."

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

**8. DISCLOSURE AND PRIVACY ISSUES WITH RESPECT TO PART B TRUST PROTECTION COVERAGE**

Mr. Hunter recalled the Benchers' previous discussion with respect to Part A insurance in which they took the general approach that preserving privacy would re-affirm the barrier to disclosure that encourages early reporting of potential claims. He also recalled the discussion regarding Special Compensation Fund claims in which greater disclosure was contemplated. Mr. Hunter suggested that Part B insurance lay somewhere between those two points. The Task Force did not think there was any privacy concern regarding information about the policy or statistical information about claims, but was more concerned with information relating to specific claims.

Where there is information relating to theft or fraud arising from a hearing where the lawyer could defend himself or herself, then it is appropriate to disclose the findings to the public; however, many Part B claims will be dealt with without a hearing process. The Task Force recommended that:

1. the Law Society publish periodic reports compiling statistical information on the program. The reports could include information on the number of claims received, number of claims paid, number of claims denied, amounts paid, number of lawyers involved, areas of law involved, and the time required to pay or deny claims;
2. the Law Society publish the lawyer's or former lawyer's name and circumstances of a claim where a hearing report or Reasons for Judgment deal with the matter and find that the lawyer misappropriated the claimant's property;
3. the Law Society be able to disclose a lawyer's or former lawyer's name and circumstances of a particular claim where the claim is part of a larger scheme considered in a hearing report or Reasons for Judgment or the facts are not disputed or are admitted by the lawyer or former lawyer;
4. the Law Society be able to disclose a lawyer or former lawyer's name and circumstances of a particular claim if the lawyer's misappropriation is known to the public.

It was moved (Hunter/Fung) to adopt the recommendations as set out above.

Mr. Nagle questioned why a claim would be paid if the facts are in dispute.

Mr. Hunter said a disputed claim could be compromised as a matter of prudent management of the insurance program. In such circumstances the lawyer would not have the benefit of due process in a hearing, and the implication of wrongdoing is potentially very damaging.

Mr. Vilvang noted that in Ontario there has been a call for some kind of publication when a lawyer is under investigation, and he asked if that was considered.

Mr. Hunter said the Task Force did not specifically consider publication prior to a decision, although a claim might involve some investigation but not a formal adjudication. The Task Force did not recommend publication because of the extremely damaging nature of the implications of an investigation.

Mr. Brun noted the additional concern that different standards of proof are involved in determining the validity of a claim under the insurance policy and a finding of professional misconduct in a hearing.

Ms. Schmit said it was important to remember that in many cases there will be parallel disciplinary proceedings that will be transparent, and the insurance claim is only one aspect of what the Law Society does in relation to allegations of misappropriation.

Mr. McDiarmid asked if all Part B Claims received to date had also been discipline matters.

Ms. Forbes said they had not, but there had been full disclosure of information. She said most claims arose directly from professional conduct matters.

Mr. McDiarmid said people should not be able to escape punishment or the consequences of disclosure by ceasing membership in the Law Society.

Mr. Zacks opposed any suggestion that the Law Society should publish the fact of a payment under Part B on the basis of an allegation of misappropriation when there has been no adjudication of the facts but only an administrative decision.

Ms. Schmit agreed with Mr. Zacks. She said claims might be paid when the cost of the claim is small compared to the potential cost of defense, or where there are evidentiary problems.

Mr. Turriff acknowledged Mr. Nagle's position in favour of disclosure, but supported the recommendation. He suggested that the way to deal with Mr. McDiarmid's concern would be to institute disciplinary proceedings in appropriate cases.

The motion was carried. Mr. Nagle voted against the motion.

Mr. Hunter drew the Benchers' attention to a printout from the Law Society website showing how lawyers would be presented with the option of having their email address excluded from the "Lawyer Lookup" facility or membership lists.

**9. UNBUNDLING OF LEGAL SERVICES TASK FORCE, WORKPLAN AND BUDGET PROPOSAL.**

Ms. Hickman briefly reviewed the work done by the Task Force to date. She said in some areas of practice unbundling of legal services already takes place. One of the main objectives of the Task Force is to find ways to make legal services available to the public. Ms. Hickman said this was an important issue throughout the United States and Canada, and the Law Society of BC would be one of the leaders in the field. The issues include requirements for written retainers, dealing with conflicts of interest, representation in court and notification of courts of limited retainer, and the consequences to insurance programs. Regarding consultations, Ms. Hickman said the World Café held in Vancouver included people from the Vancouver and Victoria areas and was paid for by the Legal Services Society. The Task Force proposed to hold two more such events in order to obtain the input from people in other parts of the province. The Task Force believes the form of unbundling in remote areas could be quite different than in urban areas.

It was moved to extend the time for the Task Force to complete its work to early 2007, and to approve a budget of \$37,100 to support its work.

Mr. Benton, in his capacity as a member of the Task Force, spoke in support of the Task Force's proposals. He said the work was central to the Law Society's mandate, and talking to more lawyers and non-lawyers would be important in crafting recommendations.

Mr. McDiarmid said he supported the Task Force's work but thought it could be accomplished without the need to spend money on travel for further consultations. He suggested that the portion of the budget not related to the World Cafes should be approved.

Mr. Ridgway agreed with Mr. McDiarmid.

Mr. Zacks noted a portion of the proposed budget was for research and writing the Task Force's final report, and he questioned why that was necessary in view of the in-house resources available to the Task Force. He also expressed concern about the length of time required for the work in view of the fact that a great deal of work on the subject has already been done by others.

Mr. McGee said holding consultations outside the Lower Mainland was partly his idea, which he suggested because there will be other events that could be coordinated with the World Café that would increase efficiency. He said if the consultations go ahead, steps would be taken to ensure that they are done effectively and that the Law Society gets the most value for its money.

Mr. Brun favoured approving the funding as proposed. He said he attended the World Café in Vancouver and thought a lot of good information came out of it. He said a lot of people took advantage of the opportunity to come and give their perspective as non-lawyers, and the Law Society might miss important information if consultations are limited to the Lower Mainland.

Mr. Jackson said the issues are important. He said resources in the North are generally far less and it is important that community partners and lawyers delivering services should be consulted because there are different considerations in smaller centres and rural areas. He noted that unbundling was also an important aspect of the Access to Justice Committee's work and any information the Task Force gained would be useful to the Access to Justice Committee.

Mr. Turriff had some concerns about the depth and breadth of the project. He alluded to his extensive experience in advising lawyers and clients on their relationships and said retainers were not all or nothing matters, indeed, he said, many if not most retainers are limited in some way. The mechanisms already exist to deal with most of the issues that arise in the unbundling of legal services. He suggested that the Task Force should be able to deal with the issues fairly easily.

Ms. Preston commented that although the legal community was familiar with the nature of Mr. Turriff's practice, many members of the public were not, and the work of the Task Force, including public consultations, was an important public relations exercise. She said it was a wonderful opportunity for people and agencies to connect with the Law Society that had value beyond the specific topics being discussed. Even if unbundling is already working, this is an opportunity to reinforce it.

Mr. Hume said he too attended the World Café and agreed with Mr. Brun that it was an excellent opportunity to learn something and meet with the public.

Mr. Hunter said most of his concerns had already been expressed. Mr. Hunter recalled two points of discussion at the Executive Committee. First, while there is no doubt that consultation is valuable and the Law Society should consider how to do more without additional cost, in this case the proposed consultations were an unnecessary expenditure. Second, there was a sense that this project could be moved forward more directly to draft rule changes and supporting material such as precedent agreements and the like.

Mr. LeRose, noting his tendency to parsimony, said that if the Task Force thinks the consultations are important in order to deliver the best package for consideration by the Benchers, the Benchers should support it.

Mr. Donaldson said that if the Legal Services Society thought the project was valuable enough to justify spending \$6000 of its limited budget, the Benchers should take note. The Benchers must be sensitive to how the Law Society rules impact lawyers outside the Lower Mainland. He said the Benchers should approve the proposal in the knowledge that if there is a less expensive way of conducting consultations, the Task Force will consider it.

Mr. Zacks asked why the budget included an amount for research and writing when the Law Society has in-house resources.

Ms. Ensminger explained that there was an expectation that the Task Force might have to outsource some of the final report.

Mr. Turriff said he was familiar with most of the key issues identified in the proposal, and suggested that it would be useful for the Task Force to meet with him so he could pass on his experience in the field.

Ms. Hickman said the Task Force would be pleased to have the benefit of Mr. Turriff's knowledge and experience. With respect to the concerns about the possibility of a low turnout to the World Café, Ms. Hickman noted that the event is arranged by invitation and there would be an effort on the part of local Benchers to ensure an adequate turnout. The event would not proceed without an adequate turnout. Ms. Hickman said the Task Force would like to complete its work under budget but wanted to be realistic about possible costs.

The motion was carried.

#### 10. REPORT FROM THE WOMEN IN THE LEGAL PROFESSION TASK FORCE

Mr. Hume reviewed the work of the Task Force to date.

It was moved (Hume/Ostrowski) to:

1. extend the Task Force's mandate for another six months, such that it would present its final report to the Benchers at their July 2006 meeting;
2. authorize the Task Force to retain an actuary to project the potential usage and cost of a maternity leave benefit for sole practitioners who must take time away from practice to give birth; and
3. instruct Law Society staff in initial communications with law firms that contract with the Law Society to insert the following language, encouraging them to consider equity and diversity initiatives:

*"The Law Society of BC has recognized in its policies that it is important for the Society to value the principles of equity and diversity, accessibility and inclusiveness. These principles guide the Law Society as a business organization, not only in its internal operations, but also in its relations with suppliers and service providers.*

*We ask that you, as a new supplier/service provider, to join us in this commitment, and examine your business practices for ways to improve compliance with these principles."*

Mr. Zacks was concerned that exploration of the "glass ceiling" concept might be limited to large law firms. He did not think the phenomenon was exclusively a large firm issue. Mr. Zacks opposed the inclusion of the proposed language in communications with law firms.

Mr. Nagle asked how the Task Force envisioned the proposed maternity benefit.

Mr. Hume said the benefit would consist of a payment or payments to birth mothers in the first few months of their time away from practice.

Mr. Hunter asked if the Task Force intended to examine the use of locums as an alternative means of supporting sole practitioners who must take time away from practice to give birth. He noted that there are issues with respect to clients as well as the lawyer in that situation. He also asked if the Task Force intended to consult with the Small Firms Task Force.

Mr. Hume said both Mr. Hunter's suggestions were excellent and would be taken up by the Task Force.

Mr. Vilvang asked if the proposed maternity benefit would be funded by a levy on the membership.

Mr. Hume said the method of funding would depend on the cost involved, and that was why the Task Force wanted to retain an actuary.

Mr. Vilvang thought there would be outrage among the members if a levy were made. Members in firms would see themselves as paying twice – once within their firm, and again for sole practitioners. Mr. Vilvang suggested the program would be more appropriate for the CBA, which could be promoted as a benefit of membership.

Ms. Schmit thought it would be hard to gain the members' approval for the proposed maternity benefit, and suggested the Task Force examine how to advise sole practitioners on how to position themselves to fund their own maternity leave.

Mr. Turriff said the Benchers could not know whether to try to shift the initiative to the CBA without obtaining information about the cost, and the Law Society ought to spend a reasonable amount of money to obtain the information to inform the debate. With respect to the language proposed to be included in communications with law firms, Mr. Turriff suggested eliminating the second paragraph, which he described as paternalistic.

Mr. Donaldson was in favour of the proposals. He noted that two of the factors influencing one third of people not practicing law are children and a spouse's career. He said it was vitally important that the Law Society support women to stay in the profession and remove barriers to women continuing in the profession.

Mr. Brun also supported the proposal. He agreed that the first step was to determine the likely cost. If the maternity benefit could be provided on a cost-efficient basis, then presumably the Benchers could seek support for it at the AGM or by referendum.

Mr. McDiarmid said there was enormous overlap with some of the issues and matters being considered by the Small Firms Task Force and it would make sense to encourage the two groups to meet and discuss them. He agreed that the Task Force should engage an actuary to find out about costs.

Mr. Kelly was in favour of the proposal. He said the Benchers had a critical leadership role to play, which should be based on principles that start from zero discrimination against women in the profession. He noted that the survey showed one third of women lawyers felt they were discriminated against.

Mr. Zacks agreed with Mr. Turriff regarding the second paragraph of the language proposed to be included in communications with law firms. He said the language implied that the supplier did not reach the Law Society's standards, when in fact some law firms might exceed the Law Society's standards.

It was agreed to amend the proposed language in part 3 of the motion to delete the phrase "*and examine your business practices for ways to improve compliance with these principles*".

The motion, as amended, was carried.

## 11. FEDERATION OF LAW SOCIETIES MODEL CODE OF CONDUCT

It was moved (Hume/Zacks) that:

1. the Federation Model Code Committee should be asked to complete work on the conflicts portion of the Model Code, which will require the Committee to request Canadian Law Societies to make representations about the current draft conflicts rules, and might require the Committee to request and consider representations from the profession across Canada;



2. to make representations to the Federation that 1, above, should occur; and
3. to ask the Ethics Committee to consider what changes need to be made to the draft conflicts portion of the Model Code to improve it, and to report back to the Benchers after that consideration has taken place.

Mr. Zacks said the conflict of interest rules were the first the Committee tackled. The Committee continues to work on the full code and it is possible that the work will be complete before the June Federation meeting, but in the meantime, the conflicts rules are a particularly urgent matter.

The motion was carried.

**12. SELECTION OF THE LAW SOCIETY OF BC DELEGATE TO THE FEDERATION OF LAW SOCIETIES COUNCIL.**

Mr. McDiarmid said the Federation of Law Societies is becoming increasingly important. The Federation has four meetings per year: two with the council and two with the executives of all the Law Societies. The council shapes the agendas and is responsible for oversight. In recent years, the Law Society of BC has sent the President and both Vice-presidents to the larger meetings, and the President to the council meetings as the Law Society of BC delegate. The advantage of this has been that the LSBC delegate has a close connection to the Law Society and some authority to speak on its behalf. The inability of some other delegates to deal effectively with issues has delayed some matters. A disadvantage of the LSBC's practice is the loss of the opportunity to take the presidency of the Federation. Another disadvantage is the loss of influence resulting from frequent turnover. There is some value in having a council member who is not the Law Society President, because it would allow some continuity and appropriate influence. Accordingly, the Benchers should consider changing the model for selecting the LSBC delegate. That said, there would have to be significant reporting obligations placed on a non-Bencher delegate.

Ms. Fung recalled that one of the reasons for changing the model to have a sitting Bencher as the LSBC delegate was the difficulty in maintaining adequate communication with a non-Bencher delegate. Ms. Fung said it was important that the delegate is a sitting Bencher because the delegate needs to attend Benchers meetings to understand the LSBC viewpoint. She said there might be some value in having someone on the council for more than three years, but that must be balanced against other considerations.

Mr. Hunter agreed with Mr. McDiarmid's and Ms. Fung's comments.

Mr. McDiarmid, Ms. Fung and Mr. Hunter excused themselves for the remainder of the discussion of this matter.

Ms. Ostrowski agreed that the delegate should be a sitting Bencher.

Mr. Vilvang said he was in a somewhat difficult position in that he was very interested in the Federation and hoped he might be selected as the LSBC delegate.

Mr. Donaldson noted that some of the Benchers present would not be directly affected by the decision, while newly elected Benchers, who would be affected, were not able to vote until January 2006. Accordingly, he proposed postponing the decision until the first meeting in 2006.

Ms. Hickman urged the Benchers to reach a conclusion immediately in order to take advantage of the wealth of experience of the Benchers who would not be present in 2006.

It was agreed to postpone further discussion of this matter until the meeting scheduled for February 3, 2006.

**13. APPOINTMENTS TO THE CBA NATIONAL AND PROVINCIAL COUNCILS**

It was agreed to appoint Bill Jackson to the CBA National Council.

It was agreed to postpone discussion of the appointment to the CBA Provincial Council until the meeting scheduled for February 3, 2006

**14. 2006 COMMITTEE APPOINTMENTS**

Mr. McDiarmid circulated a list of committee appointments for 2006.

It was moved (McDiarmid/Fung) to amend the LS Committee and Task Force structure as follows:

1. by eliminating the Public Affairs Committee and establishing a Government Relations Subcommittee of the Executive Committee;
2. by merging the Legal Information and Technology Committees; and
3. by establishing a Small Firms Task Force.

The motion was carried.

**15. DISCUSSION OF BENCHER CONCERNS**

Ms. Ostrowski commented as the outgoing chair of the Access to Justice Committee that the Committee hoped to receive more frequent reports from the Law Society representative on the Attorney General's Justice Reform Task Force.

The rest of this matter was discussed *in camera*.

**16. UPDATE ON CLAIMS AND INVESTIGATIONS IN THE WIRICK MATTER**

This matter was discussed *in camera*.

DMGN  
06-01-13