

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday December 8, 2006

PRESENT:

Robert McDiarmid, QC, President	June Preston
Anna Fung, QC, 1 st Vice-president	Robert Punnett
Kathryn Berge, QC	David Renwick
Joost Blom, QC	Glen Ridgway, QC
Ian Donaldson, QC	Patricia Schmit, QC, Life Bencher
Michael Falkins	Dirk Sigalet, QC
Carol Hickman	Richard Stewart
Gavin Hume, QC	Gordon Turriff, QC
William Jackson	Dr. Maelor Vallance
Patrick Kelly	Art Vertlieb, QC
Bruce LeRose	James Vilvang, QC
Barbara Levesque	Ken Walker, Bencher Elect
Jan Lindsay	David Zacks, QC
Thelma O'Grady	

NOT PRESENT:

John Hunter, QC, 2 nd Vice-president	Terry La Liberté, QC
Rita Andreone	Allan Seckel, QC, Deputy AG
Leon Getz, QC	Ronald Tindale

STAFF PRESENT:

Timothy McGee, CEO	Bill McIntosh
Lane Brownell	Jeanette McPhee
Stuart Cameron	Doug Munro
Brad Daisley	David Newell
Su Forbes, QC	Alan Treleaven
Jeffrey Hoskins	Adam Whitcombe
Howard Kushner	Carmel Wiseman
Michael Lucas	

GUESTS:

Dean Mary Ann Bobinski, University of British Columbia
Dean Andrew Petter, University of Victoria
Peter Ramsay, QC
Frits Verhoeven, President, CBABC
Frank Kraemer, QC, Executive Director, CBABC
Mark Benton, Executive Director, Legal Services Society
Jamie McLaren, Executive Director, Pro Bono Law of BC
Johanne Blenkin, Executive Director and Chief Librarian, BCCLS
Ken Walker, Chair, CLE Society
Jack Huberman, QC, Executive Director, CLE Society
Andrew Kern, member (Vernon) by telephone for item 7 only

1. MINUTES

The minutes of the meeting held on November 10, 2006 were approved as corrected.

2. PRESIDENT'S REPORT

Mr. McDiarmid welcomed Bencher-elect Ken Walker from Kamloops, and guests.

Mr. McDiarmid reviewed his activities on behalf of the Law Society over the previous month, which included:

- Meeting with Mr. DeJong the Government House Leader regarding amendments to the Legal Profession Act.
- Attendance at the CBA National Conference, Port Alberni and Courtney/Comox Bar Association meetings.
- Completion of recommendations from the QC advisory committee.
- Bench and Bar Dinner with two SCC judges in attendance for the first time.

3. CEO'S REPORT

Mr. McGee's report consisted of two parts, the first, a report on the employee survey results, and second the 2007 budget.

Ryan Williams of TWI Surveys Inc. presented summarized results of the employee survey conducted in November 2006. The results were broken down into several clusters characterizing different aspects of the Law Society as a workplace. Mr. Williams noted that the overall ratings in the areas of "team work" "organizational culture" and line management ("my manager") were good and considerably higher than benchmarks derived from large-scale sampling of other organizations. The areas where the ratings were not as high, although still at or above benchmarks, were "communication" and "leadership". Mr. Williams described that result as a providing a strong foundation on which to build improvements to create a high-functioning organization.

Mr. McGee said the survey gives the Law Society a benchmark and a tool to help make the Law Society a better place for staff and the people who rely on it. He said it was not acceptable to simply be at the norm and the management team would be working with all departments to plan ways to move to more positive results.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. UBC FACULTY OF LAW CURRICULUM COMMITTEE REPORT

Peter Ramsay, QC, gave a report on the work of the UBC Faculty of Law Curriculum Committee. He reported that the proposed changes he reported on a year ago had been approved by the UBC Senate and were being implemented. The first year program changes are further ahead than the changes to the upper year curriculum. To give some context, Mr. Ramsay gave some information about the first year class in 2006-2007.

- 208 students were admitted
- 160 were admitted under the regular admissions category. Their undergraduate marks average more than 81%. Their LSAT scores are in the 90th percentile or higher.

- 17 First Nations students were offered admission. They come from a wide variety of backgrounds.
- 23 students were admitted under the discretionary category (of 279 applications). They are generally mature students with experience in different walks of life. Their presence enhances everyone's education, often by providing practical insight and context for the curriculum.
- The ration of female to male students is 52/48
- 65% are BC residents.

Changes to the first year program include:

- reduced class size from about 75 to 40, which allows instructors to use a wider variety of instructional techniques.
- two "bridge weeks" have been introduced. The first of these concentrated on professional responsibility and alternate dispute resolution.
- greater emphasis on legal writing with twelve written assignments in first year up from the previous four.

Changes in the upper year program include:

- Requirement that students choose at least one course from each of five categories.
- Greater emphasis on research and writing.
- New option to focus on business law.
- New "internship" program, which is like a clerkship in Provincial Court.

Mr. Ramsay said that the information provided by the Law Society to assist students with course selection has been publicized and a number of information sessions are provided that give students good information. Additionally, there is an increase in the number of students who obtain "summer articles" and they often return with insight into what courses they want to take.

6. BUDGET 2007

Mr. McGee introduced and Ms. McPhee presented the 2007 General Fund Budget. Mr. McGee noted the close involvement of the Financial Planning Subcommittee in developing the budget. He emphasized that the budget is balanced and operating and capital plans are fully funded from 2007 revenue. Regulatory programs will have a full staff complement in 2007. The Credentials and Education areas are developing new tools such as the practice refresher course and the small firm practice course. In those areas the budget is investing in win-win projects. The Policy and Legal Services department will continue to provide policy support and support to the Benchers. The Budget includes Trust Account Fee supported initiatives such as the new custodianship and trust accounting programs. Budget risks include lower than expected membership or other factors resulting in reduced revenue; higher than expected external counsel or custodianship costs, and significant capital deferrals. Mr. McGee commented on the need for a multi-year capital plan and budget.

Ms. McPhee gave a presentation outlining the proposed 2007 budget. A copy of the presentation is attached as Appendix 1.

7. ETHICS IN REAL ESTATE PRACTICE

Andrew Kern, a member from Vernon, joined the meeting by telephone for this matter.

Mr. McDiarmid recalled for the Benchers that discussion of this matter was postponed from the previous meeting. He invited Ms. Forbes to highlight information provided to the Benchers regarding the claims experience of the Lawyers Insurance Fund in the area of real estate conveyancing.

Ms. Forbes reported that over the previous twenty years claims arising from real estate transactions have comprised around eleven percent of all claims, but have dropped in recent years despite increased market activity.

Mr. Kern said his concern was primarily with the ethical aspects of real estate practice rather than with the insurance impact. He gave a recent example of a property that had been subdivided some time ago. The title to the parent lot had a reservation of mineral rights in the original grant of title from the Crown. A subsequent document registered on the title to several of the subdivide lots was a surrender of mineral rights to a third party, which was fundamentally inconsistent with the Crown grant, and in one instance was registered against the wrong lot. Since 1994 that property had been transferred nineteen times with the assistance of several law firms yet the title was never corrected, despite the obvious nature of the error. Mr. Kern said he thought the insurance statistics likely reflect the fact that lawyers deal with non-financial encumbrances by obtaining from their clients a waiver of that requirement. He recalled a comment from the previous meeting that perhaps lawyers ought not abdicate responsibility to untrained clients. He suggested also that in some cases clients do not fully understand the implications of such waivers.

Mr. Zacks commented that Mr. Kern assumed that the lawyers involved in transferring the title did not see the problem with the grant of mineral rights. He said the lawyers might have noted the inconsistency but advised their clients that there was no harm done because the mineral rights were already reserved to the Crown, so the purported grant did not diminish the property.

Mr. Kern acknowledged that Mr. Zack's scenario was possible, but he said there were many other instances where non-financial encumbrances imposed real limits on the owner's use of property.

Mr. Zacks said the Conveyancing Practices Task Force was examining the sort of concerns Mr. Kern raised, including looking at whether the Law Society should publish a statement of minimum standards in real estate practice. He said the task force had met with real property sections to obtain input. So far there is disagreement among practitioners about what the standards are or ought to be, as there are different practices in different areas of the province. That said, Mr. Kern's comments were troubling and ought to be troubling for all the Benchers.

Mr. Kern said one of his greatest concerns was that the Law Society might not have the ability to measure how serious the problem is. Mr. Zacks agreed that measuring the magnitude of the problem is difficult, but he agreed the problems are real and the task force is aware of them. Mr. Kern asked how he might assist the task force, and Mr. Zacks invited him to join it.

8. REVISED GUIDELINES FOR RECRUITMENT AND HIRING

Mr. Hume reviewed the previous discussion of revisions to the guidelines for recruiting and hiring published by the Law Society, and in particular the concerns regarding the circumstances in which it is proper or improper to ask questions of a prospective employee about criminal convictions. Mr. Hume said clarification had been made in the form of an additional footnote to the guidelines (footnote 22)

It was moved (Hume/Fung) to approve the guidelines for publication on the Law Society website.

Mr. Turriff asked if the test set out in the case cited in the footnote had been considered in the courts. Mr. Hume said the Woodward case was affirmed in the Supreme Court of British Columbia.

Mr. McGee noted that during the discussion at the previous meeting there was a question about whether the Law Society's own parental leave and hiring policies were in line with the guidelines. He said the Law Society's pregnancy and parental leave policies while different in details were very similar in their overall result to the model policy the Benchers had approved. With respect to the recruitment and hiring guidelines, he said he was satisfied that the Law Society's procedures met or exceeded the guidelines.

The motion was carried.

Mr. Hume said the Women in the Legal Profession working group had not quite finished all the tasks it set out to accomplish but hoped to complete them within a few months. He asked the Benchers to extend the working group's mandate too the end of June 2007.

It was moved (Hume/Fung) to extend the mandate of the Women in the Legal Profession Working Group to the end of June 2007.

The motion was carried.

9. WITHDRAWAL OF CANDIDACY IN BENCHER ELECTIONS

The Benchers considered a proposal to amend the Law Society Rules to specify a time limit for a member to withdraw as a candidate in a Bencher election.

It was moved (LeRose/Ridgway) to approve in principle amending the Law Society Rules to specify that a candidate in a Bencher election may withdraw their candidacy by notifying the Executive Director in writing not later than seven days after the close of nominations.

Mr. Vilvang favoured leaving the Rules silent on withdrawal of candidacy because a candidate who does not wish to stand for election but is forced to do so because the deadline for withdrawal has passed will simply resign immediately upon election and force an unnecessary by-election.

Mr. Jackson agreed with Mr. Vilvang, and suggested that a better solution would be to implement an electronic voting system. Ms. Berge and Mr. Turriff agreed.

Mr. LeRose withdrew the motion.

10. LAWYER EDUCATION TASK FORCE INTERIM REPORT

Mr. Turriff introduced a preliminary report from the Lawyer Education Task Force proposing a framework for developing mandatory continuing legal development for members of the Law Society of BC. Mr. Turriff said the task force was looking at the subject very carefully to ensure that it is examined from all angles, and was still considering what recommendations it might make, but the task force wished the Benchers to know what conclusions had been reached so far, and ask for the Benchers' endorsement of further work. Mr. Turriff recalled that the task force was created in June 2002 as the next stage of a process starting with the Admission Program Task Force. Its purpose is to look at post-call education. Much of the task force's work was accomplished through the efforts of Pat Schmit as Chair, with the support of staff members Alan Treleaven and Michael Lucas. The task force's first recommendation, adopted by the Benchers, was mandatory reporting of voluntary professional development, but the task force believes the Law Society must go further than that. The task force has used the term "mandatory continuing professional development" ("MCPD") deliberately because it has in mind something broader than continuing education. The

task force took into account that the Law Society's focus is on regulation of conduct and debated whether the Law Society should help people comply. The MCPD concept is the result of the conclusion that the Law Society should do so. Mr. Turriff noted that until now there has not been any real rules with respect to post-call education. The question of mandatory continuing education was debated about thirty years ago and has waxed and waned since then without coming to any fruition. Mr. Turriff emphasized that the task force did not reach its conclusion easily and still had many questions. The percentage of lawyers reporting at least the minimum recommended amount of continuing education has declined since reporting became mandatory. More young lawyers are undertaking continuing development. More senior lawyers may have difficulty finding courses that are useful. MCPD would give credit to senior lawyers for helping others develop. Cost is another factor. Development programs must be made available at reasonable cost. There are very few professions that do not have mandatory continuing development requirements, and although nobody is certain that it works as intended, it does no harm and there is potential for negative public perception in its absence. The task force has worked from the premises that a MCPD program should complement the educational opportunities presented by day-to-day practice, and should be more than "December in Hawaii" seminars. A program should stress mentorship and using the experience of senior lawyers, and should encompass a wide range of activities. The preliminary report sets out four options. The task force has not settled on any one option, and might adopt a mix of more than one. If the Benchers endorse the principle, the task force will continue to examine the four options with a view to seeking input from stakeholders starting in the middle of 2007 and, if all goes well, implementation in 2009.

It was moved (Turriff/LeRose) to endorse the concept of mandatory continuing professional development and approve in principle development of a MCPD program.

Ms. Schmit said the task force had studied this matter extensively and noted that some members of the task force remained skeptical. However, she said, endorsing the principle was an important step the Benchers could take to mandate the task force to continue working on the options.

Mr. Sigalet spoke against endorsing the principle of MCPD. He said it was difficult to speak against a case so ably put by Mr. Turriff on a topic that is arguably good for its own sake. However, he said, he was opposed to the idea because it would be too intrusive. Mr. Sigalet said he also feared that the cost would turn out to exceed the benefits, which are very difficult to measure in any event.

Ms. Hickman spoke in favour of the motion. She agreed with Mr. Sigalet that the Law Society must be mindful of the cost to lawyers. She also agreed that it is very important to make continuing development opportunities available that are meaningful to experienced lawyers.

Mr. Hume was in favour of the motion. He said he liked the broader approach, noting that the Ethics Committee has been concerned about the lack of ethics training and this would be a good way of improving that situation. It could also provide opportunities for training in equity and diversity issues.

Dr. Vallance said working as a member of the task force had been one of the more interesting things he had done as a Lay Bencher. He said not all lawyers are well motivated to continue their development and the Law Society has an obligation to ensure that they are. It is important to bear in mind that most lawyers work on their own, and there is an important element of collegiality in continuing development programs. He said there is a need for greater diversity in how lawyers can receive credit for continuing development, including extensive online programs and mentorship.

Ms. O'Grady spoke in favour of the motion. She said she began as a "non-believer" in MCPD but had changed her view. She said she did not want to see situation like the United States where there are huge bureaucracies devoted to determining what qualifies for credit and what doesn't but was convinced by section 7 of the report.

Mr. McGee said senior management had discussed this subject at their retreat and were very excited by the prospect. He said this could be the most important strategic decision the Benchers make in recent years and for some time. Fundamentally, it would represent the Law Society becoming proactive in a very positive way. He said there would be many operational decisions to be made but the principle is strategic.

Mr. Ridgway said he was skeptically supportive. He said he appreciated Mr. Sigalet's comments and acknowledged that speaking against potentially popular initiatives is very difficult. He urged the Benchers to get lawyers involved early in the development process and to ensure that programs are something lawyers want as well as have to participate in.

Mr. Jackson complimented the task force on a thoughtful proposal. He said MCPD was fundamentally a control mechanism and he questioned whether people might just go through the motions.

Mr. Zacks supported the proposal entirely but for some different reasons. He said solicitors have to deal with complicated issues and people need a lot of help. Lawyers are trying to make a living and not looking at what they are doing because they don't have the time or the resources. If the Law Society can find ways to bring to solicitors ways to enhance and continue their development, the profession and the public will be better off.

The motion was carried.

11. FINAL REPORT OF THE DISCLOSURE AND PRIVACY TASK FORCE

Ms. Preston presented the final report of the Disclosure and Privacy Task Force and on behalf of the Chair, Mr. Hunter, thanked the task force and staff team led by Ms. Wiseman for the work they did. She said it was remarkable that when she started as a Bencher the public had seen the Law Society as very closed but now, five years later, a Lay Bencher was reporting on the wide range of disclosure recommendations that have been implemented, placing the Law Society of BC in a leadership position to other Law Societies and regulatory bodies across Canada. Ms. Preston said it was also important that the task force had developed and left as a legacy a framework of principles for dealing with future disclosure and privacy issues. She noted there was one final issue that could not be dealt with yet because it involved a matter currently being considered in a disciplinary hearing. That matter might be dealt with either by reconvening the task force or by referring it to the proposed Regulatory Policy Committee.

It was moved (Jackson/Preston) to accept the report and wind up the Disclosure and Privacy Task Force.

The motion was carried.

12. JUSTICE REFORM TASK FORCE FAMILY LAW REFORM WORKING GROUP RECOMMENDATION #36

Mr. Hume drew the Benchers' attention to Recommendation #36 in the Report of the Family Law Reform Working Group, a working group of the Justice Review Task Force. Recommendation #36 is that the Law Society should recognize the changing roles and duties of family lawyers and develop a code of practice for family lawyers to give guidance in balancing the lawyer's partisan role with the potential harm it may cause to other family members, especially children. Mr. Hume said the recommendation had been reviewed by the Access to Justice Committee, the Independence and Self-governance Committee, and the Ethics Committee. The Ethics Committee concluded that educating lawyers in understanding their role in guiding client conduct was consistent with the Law Society's mandate. The decision remains for the Benchers to decide what to do with respect to Recommendation #36.

Mr. Turriff said the Independence and Self-governance Committee concluded that the Benchers should take the option of having the Ethics Committee examine the matter closely, and that the Law Society should express its willingness to discuss with government how it might educate lawyers, but should discourage anything that would interfere with a lawyer acting in his or her client's best interests.

Ms. Hickman suggested that the issues were important enough to consider appointing a separate task force to deal with them.

Ms. Berge noted that although the JRTF includes representatives from government, its recommendations are not those of government; consequently, independence issues might not arise from the recommendations. The issues raised are important and deserve further attention, possibly through a separate task force.

Mr. Vilvang agreed that there was nothing in the recommendation that ran contrary to the Law Society's rules and the Law Society should avoid opening the door to government interference and take the initiative.

Mr. Zacks was concerned that despite the existence of a fairly comprehensive code of conduct, there was a perceived need for a specialized code for family lawyers, which might lead to calls for other specialized codes in other areas of law. He did not think it was clear that a specialized code of conduct in family law was needed.

Mr. Stewart said he his main concern was the governance issue. He said the Law Society should take charge of the process, noting that there is a statutory basis in the *Divorce Act* for distinguishing family lawyers from other lawyers and imposing special requirements on them.

It was agreed to postpone further discussion of this matter and refer it to a working group composed of Ms. Hickman, Mr. Punnett, Mr. Stewart, Ms. Berge and a member of the Independence and Self-governance Committee to be appointed by Mr. Turriff.

13. UNBUNDLING OF LEGAL SERVICES TASK FORCE INTERIM REPORT

Ms. Hickman gave a presentation outlining the work to date of the Unbundling of Legal Services Task Force. A copy of the presentation is attached as Appendix 2.

Mr. Zacks asked if the work of the task force was limited to litigation. Ms. Hickman said the task force was examining solicitor's practice as well, and there were solicitors on the task force. Mr. Zacks said there was nothing in the report directly on solicitor's practice or relevant to it, and that was most likely because issues did not arise from unbundling services in solicitor's practice. He suggested that it should be made clear if the report would be irrelevant to solicitor's practice.

Mr. McDiarmid asked the Benchers to consider the preliminary recommendations in the report and provide feedback directly to the task force.

14. COMMITTEES AND TASK FORCES FOR 2007

Ms. Fung said the Disclosure and Privacy Task Force had completed its work successfully, noting that it had adopted a very systematic approach and reported back frequently. She said that was a good model for task forces. Ms. Fung said the Fee Review Task Force submitted its report after a lengthy delay. The Executive Committee considered the report and referred it to Mr. Turriff as an expert in the field to develop recommendations for the Benchers.

It was moved (Fung/Turriff) to wind up the Fee Review Task Force as at December 31, 2006.

The motion was carried.

Ms. Fung proposed to constitute a Regulatory Policy Committee to complement the existing regulatory committees such as Discipline, Credentials and Practice Standards, which have heavy workloads that often prevent them from spending time on policy issues. The Regulatory Policy Committee will assist the Benchers to develop consistent and integrated policy in the regulatory areas.

It was moved (Fung/Donaldson) to constitute the Regulatory Policy Committee.

The motion was carried.

It was moved (Fung/Jackson) to direct the Regulatory Policy Committee to formulate a committee mandate for the Benchers to consider.

The motion was carried.

15. UPDATE ON CLAIMS AND RECOVERIES IN THE WIRICK MATTER

This matter was considered *in camera*.

DMGN
06-12-22