

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

- MEETING:** Benchers
- DATE:** Friday May 2, 2008
- PRESENT:**
- | | |
|--|-----------------------------|
| John Hunter, QC, President | Peter Lloyd |
| Gordon Turriff, QC, 1 st Vice-president | Jan Lindsay |
| Glen Ridgway, QC, 2 nd Vice-president | David Mossop, QC |
| Rita Andreone | Thelma O'Grady |
| Kathryn Berge, QC | Robert Punnett |
| Joost Blom, QC | David Renwick, QC |
| Robert Brun, QC | Allan Seckel, QC, Deputy AG |
| Ian Donaldson, QC Life Bencher | Meg Shaw, QC |
| Leon Getz, QC | Richard Stewart, QC |
| Carol Hickman | Ronald Tindale |
| Gavin Hume, QC | Dr. Maelor Vallance |
| William Jackson | Art Vertlieb, QC |
| Patrick Kelly | James Vilvang, QC |
| Terry La Liberté, QC | Ken Walker |
| Bruce LeRose, QC | David Zacks, QC |
| Barbara Levesque | |
- ABSENT:** Ken Dobell
- STAFF PRESENT:**
- | | |
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| Tim McGee, CEO | Bill McIntosh |
| Dana Bales | Jeanette McPhee |
| Stuart Cameron | Doug Munro |
| Brad Daisley | David Newell |
| Su Forbes, QC | Alan Treleaven |
| Jeffrey Hoskins | Adam Whitcombe |
| Graeme Keirstead | Carmel Wiseman |
| Michael Lucas | |
- GUESTS:**
- Miriam Maisonville, Vice-president, CBABC
 - Caroline Nevin, Executive Director, CBABC
 - Johanne Blenkin, Executive Director and Chief Librarian, BCCLS
 - Tom Felhauer, QC, Chair, CLE Society
 - Jack Huberman, QC, Executive Director, CLE Society
 - Jamie McLaren, Executive Director, Pro Bono Law of BC
 - Wayne Robertson, Executive Director, Law Foundation of BC
 - Stephen Frame, President, Trial Lawyers Association

1. MINUTES

It was agreed to amend the minutes of the meeting held on April 4, 2008 by deleting the words “*when so ordered by the Court*” from paragraph 7 on page 10 of the draft minutes and substituting the words “*in circumstances the court deems appropriate.*”

The minutes of the meeting held on April 4, 2008 were approved as amended.

2. PRESIDENT'S REPORT

Mr. Hunter circulated a report on his activities on behalf of the Law Society over the previous month. He noted that the Benchers' meeting with government and opposition caucus members was very successful and continued to be useful. He also commented on the success of the annual luncheon honouring recipients of 50-year and 60-year certificates, and said it was gratifying to see so many lawyers practicing for that long. He thanked the Benchers who attended the event.

Mr. Hunter reported on amendments to the *Legal Profession Act* to deal with jurisdictional issues with respect to judicial justices of the peace who are also lawyers. The amendments effectively exempt lawyers from the *Legal Profession Act* when they are acting as JJPs and require the Law Society to advise the Chief Judge of the Provincial Court if the Law Society commences an investigation of a lawyer who is also a JJP.

Mr. Hunter reported that he had been invited to attend the Convocation of the Law Society of Upper Canada, and planned to invite the LSUC Treasurer to a Benchers meeting in the near future.

3. CEO'S REPORT

Mr. McGee circulated a financial report for the first quarter of 2008. He noted that the General Fund was positive to budget overall by over \$1 million, about half of which was due to a greater number of members than estimated. TAF showed a positive variance of approximately \$260,000, mainly due to permanent savings resulting from the time taken to complete hiring of auditors. Overall, the Law Society continues to be in a solid financial position through the first quarter.

Mr. McGee reported on implementation of the maternity loan benefit approved by the Benchers in 2007. It was originally intended that the program would be launched on January 1, 2008 but there are some taxation issues that require the Law Society to obtain advice, which is being done. The Law Society of Upper Canada is launching a similar program and has encountered similar issues. They are seeking an advanced ruling from the Canada Revenue Agency, which should assist in clarifying the Law Society of BC position.

Mr. McGee reported that the Federation of Law Societies had authorized the executive to pursue development of a strategic plan for the Federation. The policy aspects will be dealt with by the Council, but the operational aspects will involve some of the Law Society CEOs. Mr. McGee said he expected to be able to provide some advice on implementing policy decisions either using Law Society resources or increased Federation resources. A preliminary planning meeting will take place in June, 2008.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. CLIENT IDENTIFICATION AND VERIFICATION RULES

Mr. Getz said there had been further developments at the Federation of Law Societies with respect to the model rules on client identification and verification, and some issues raised by Mr. Zacks with respect to the draft Law Society of BC rules had not been resolved. He asked to withdraw the draft rules from the agenda. Mr. Getz noted that only one province, Northwest Territory, had actually implemented client identification and verification rules and other provinces had rules in various stages of development, moving towards completion in October or November. He said the Act and Rules Subcommittee hoped to return an acceptable draft of the rules in September, 2008.

Mr. Walker expressed the concern that members may be unclear on the reasons for implementing client identification and verification rules, and he hoped the Benchers would receive some information to assist them in responding to members' questions.

Mr. Hoskins said the Federation's draft model rule had been posted on the Law Society website with an invitation to members to comment for some time. The level of response has been quite low. Mr. Daisley said the communications department was preparing some "FAQs", which would assist the members in understanding the rules and reasons for them.

6. FAMILY LAW TASK FORCE REPORT

Ms. Hickman reviewed the report and recommendations of the Family Law Task Force. The recommendations were that:

1. It is not necessary to amend the Professional Conduct Handbook, as the Task Force believes the Handbook contains adequate guidelines for professionalism.
2. The Benchers should endorse the creation of best practice guidelines for professionalism in family law, and to monitor the CBA's efforts in that direction with a view to deciding whether to offer assistance of two Benchers in an unofficial capacity and to review any material the CBA creates and decide whether to endorse it either in whole in part.

Dr. Vallance congratulated Ms. Hickman and Mr. Munro for the exhaustive examination of the subject reflected in the report. He said that as a member of the public he was firmly of the belief that it is valuable to prepare best practices guidelines on professionalism in family law. There is a groundswell of concern in this area, largely due to an overzealous, partisan ethic which is particularly problematic in family law. It can be particularly damaging to children. Participants in litigation often seem to be looking for much more than legal representation from their lawyers. They are looking for an ally, and they are disappointed when their ally does not win for them, but there are no winners in family law. Some lawyers become emotionally involved and sometimes brought their own "baggage" into the situation. If it was simply a case of a few lawyers behaving badly, the problem could be dealt with piecemeal but it has gone beyond that. Guidelines would assist young lawyers coming up in the field, and that makes it the business of the Law Society.

Mr. Zacks asked if the Benchers adopted best practices guidelines, would it result in disciplinary proceedings if lawyers do not adhere to them? Ms. Hickman said it would result in disciplinary proceedings only if the guidelines were appended to the Professional Conduct Handbook.

Mr. Zacks did not think the question turned on whether guidelines were appended to the Professional Conduct Handbook. The question was whether the Law Society would see an increase in disciplinary proceedings as a result of promulgating guidelines in an area that apparently is prone to professional problems. Should the Law Society be singling out an area of law with guidelines that could apply more generally? Mr. Zacks said the Law Society should not single out family law practitioners because they would see it as an attack on how they represent their clients. It is unnecessary to do that because the Law Society can remind all lawyers how they should treat people.

Mr. Stewart said the Task Force consulted with the Law Society professional conduct staff, who suggested guidelines would be helpful because they would provide a standard against which conduct could be measured. He said that in his view, family law is sufficiently different in the way it is practiced and the impact it has on people that it should be treated differently.

Mr. Turriff said he and Ms. Schmit were not able to endorse the Task Force's recommendations. One reason was that the Task Force had committed Law Society resources to an inquiry that the Benchers had not endorsed. It should have limited itself to answering the two questions put to it and not gone the further step of recommending guidelines.

Mr. Punnett said a majority of the Task Force members thought it was within the Task Force's mandate to conduct the research it did, and to recommend developing guidelines. There is clearly a problem with professional conduct in the family law bar. It is particularly telling that there are a large number of complaints brought against opposing lawyers. Other areas of litigation do not experience the same problems as frequently. There are family lawyers who find it difficult not to take on their clients' emotional baggage. The Law Society has an obligation to deal with the problem. The general rules of conduct should be sufficient to deal with it, but apparently they are not. Family law does have unique attributes that need to be addressed and there are enough lawyers not behaving appropriately that it is creating a problem for the public.

Mr. Hunter pointed out that complaints about opposing counsel may indicate that the lawyer is behaving improperly or could indicate only that the lawyer is doing their job.

Mr. Vilvang said he started out basically opposed to the idea of creating special guidelines for family law but was persuaded by Dr. Vallance's comments about their potential educational value. However, he said guidelines should not be appended to the Professional Conduct Handbook or be enforced through disciplinary proceedings. He suggested developing guidelines was within the CBA's mandate and it would be better if they came from that source rather than the Law Society.

Mr. Zacks said his concern was not about reminding people how they ought to conduct themselves, but with the impact of how it is done. The Law Society should not set itself up for prosecuting professional misconduct through guidelines, and any guidelines should not be specific to family law because the principles are applicable to other areas.

Mr. LeRose said he was persuaded by Dr. Vallance's comments and by the fact that a number of senior members of the family bar seemed to see the need for best practices guidelines. He acknowledged Mr. Zacks' concerns about enforcement, but noted that hearing panels did not approach the Professional Conduct Handbook as absolute rules. Mr. LeRose said he was not against working with the CBA on the project because that would be an indication that the membership of both organizations is concerned about the problem.

Mr. Vertlieb supported the Task Force's recommendations. The people on the Task Force brought significant knowledge in the area to bear on the problem. The concern expressed that guidelines might result in disciplinary actions is important but the Benchers should see the guidelines first and then decide whether they should form part of the disciplinary apparatus.

Mr. Getz agreed with Mr. Zacks that truculence and other objectionable behavior is not confined to family law, and he questioned whether best practices guidelines would have any effect on behavior.

Ms. Andreone agreed that there was no need to change the Professional Conduct Handbook but took note of the Task Force's recommendation of best practices guidelines, which would be something for lawyers to strive for rather than a description of a baseline level of conduct. No-one will be disciplined for a failure to achieve best practices. The Law Society already provides guidelines in other areas and since a quarter of all complaints come from this area, it seems appropriate to consider guidelines in family law.

Ms. Shaw said all lawyers in BC should be treated equally for disciplinary purposes. She did not think it was right to single out an area of practice and then look for problem practitioners within that area. There are problems in the family law area, but they are not just problems with lawyers, but are problems with the milieu. Family law is a unique area and it is easy for lawyers to get caught up in the emotional content. With respect to protecting the public the question is where is the best place to develop guidelines. The CBA is a good place to start but the Law Society should be involved.

Mr. McGee recalled that the Benchers had established three strategic priority areas: enhancing access to legal representation, enhancing public confidence, and education of the public and others. Family law guidelines would not address access to legal representation but clearly fall within the strategies of enhancing public confidence, and education. Mr. Turriff made a valid point about expenditure of resources in the sense that the Benchers should think about the question in terms of the three priority areas and consider what priority to give it because that will affect the amount of resources assigned to it.

Mr. Turriff said way this had come forward was an example of what the Benchers had decided to avoid, which was task forces directing policy. He said he would be interested in hearing what practitioners such as Ed Mortimer and Ian Maxwell had to say about guidelines.

Mr. Lloyd said he was somewhat surprised that new lawyers are permitted to engage in all areas of practice at all levels. He suggested that the Law Society should consider the possibility that some areas of law should be restricted to lawyers with additional training. He said the public perception of family law lawyers is quite negative.

Mr. Punnett said the task force discussed the possibility of publishing guidelines in a form that lawyers could hand out to their clients so that they would be aware of the expectation placed on their lawyers. This would not change things overnight but would have an impact in time.

Ms. Hickman clarified her earlier comments regarding discipline. She said the task force's focus was on the educational aspect of guidelines aimed primarily at young lawyers entering the field. The task force thought that guidelines would assist young lawyers to resist negative influences. Guidelines might be used as a measure of quality of practice at some time, perhaps in the context of a conduct meeting or conduct review, but any conduct egregious enough to warrant a citation would almost certainly be covered by existing Handbook provisions.

It was moved (Hickman/Vallance) to direct the Family Law Task Force, in collaboration with the CBA, develop guidelines for the practice of family law lawyers.

Ms. Lindsay said this was a complaint driven issue and should be dealt with in that context rather than in terms of specific areas of practice.

Mr. Mossop said the Law Society has been concerned about independence. The Law Society receives a large number of complaints in this area, and the government has suggested that it take some steps to improve. If the Law Society does nothing, it invites interference.

The motion was carried.

Mr. Turriff voted against the motion.

7. **REDUCING FINANCIAL BARRIERS TO ACCESSING JUSTICE**

The Bencher considered a memorandum from staff proposing to establish a task force to collect and summarize information to assist the Benchers in making knowledge-based policy decisions regarding the steps the Law Society might take to reduce financial barriers to accessing legal services, and report to the Benchers by November, 2008.

Mr. Getz was concerned that a task force would be unable to complete its work within the proposed timeframe. He suggested that if the task force was created, consideration should be given to including non-lawyers, such as an economist or statistician.

Mr. Hunter agreed that the timeframe might be too short to complete the work but he said it was imperative that task forces have clear reporting dates. He agreed that non-Benchers should be included in a task force of the kind proposed.

Mr. Zacks agreed that the idea should be pursued but was concerned about the budget for such a task force. Mr. McGee said the 2008 budget reflected the committee and task force budget from 2007, so there was money available for a task force of the proposed nature. It would be up to the task force to determine how to use external resources and to consider its needs in 2009. Mr. Zacks said the Benchers should decide how much money they are prepared to devote the task force before creating it. The proposed task is not simple and could consume significant resources.

Mr. Turriff noted that at the retreat later in the month the Benchers would be examining the question of whether to create different classes of practitioners, which might reduce the cost of access to legal services. The proposed task force should be considered in the context of the retreat subject.

Mr. Hunter said one of the first tasks of a task force would be to prepare a budget, however, he agreed with Mr. Turriff's comments regarding the retreat and suggested that further discussion might be postponed until after the retreat.

It was agreed to postpone further discussion of the matter until after the Benchers retreat.

8. RESPONSE TO THE CIVIL JUSTICE REVIEW TASK FORCE REPORT

Mr. Blom updated the Benchers on the work of the task force created to consider whether the Law Society should make a further response to the report of the CJRTF. He reported that the task force had considered whether there was a Law Society view that could be legitimately put forward on behalf of its members. The task force tentatively concluded that there was. The task force also considered what the Law Society could contribute to the CJRTF work that would be helpful and constructive. The preliminary thoughts of the task force are that the Law Society supports the ends of the report. One of the principle means in the report is the realignment of the respective roles of litigants, lawyers and judges in shaping the litigation process. The proposals envisage a significant curtailment of clients' and lawyers' ability to shape the process. That is a significant limitation on the public, but it may be the price to be paid for the results of improved efficiency and cost-effectiveness. The task force's tentative view is there are significant risks and the benefits may not be realized in a way that would justify the cost. The task force will also consider costs, and the court calendaring system. The task force expects to provide a further report to the Benchers at the meeting at the end of May.

9. PRESENTATION OF THE LAW SOCIETY SCHOLARSHIP

Mr. Hunter presented the Law Society Scholarship to Ms. Abeer Hasan, and congratulated her on behalf of the Benchers and the Law Society.

10. DISCUSSION OF BENCHER CONCERNS

This matter was discussed *in camera*.

DMGN
08-05-20