

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday September 5, 2008

PRESENT: John Hunter, QC, President
Gordon Turriff, QC, 1st Vice-president
Glen Ridgway, QC, 2nd Vice-president
Haydn Acheson
Rita Andreone
Kathryn Berge, QC
Joost Blom, QC
Robert Brun, QC
Ian Donaldson, QC Life Bencher
Leon Getz, QC
Carol Hickman
Gavin Hume, QC
William Jackson
Patrick Kelly
Stacy Kuiack

Terence La Liberté, QC
Bruce LeRose, QC
Barbara Levesque
Jan Lindsay
Peter Lloyd
David Mossop, QC
Thelma O'Grady
Robert Punnett
David Renwick, QC
Meg Shaw, QC
Richard Stewart, QC
Ronald Tindale
Art Vertlieb, QC
James Vilvang, QC
Kenneth Walker
David Zacks, QC

ABSENT: Allan Seckel, QC, Deputy AG

STAFF

PRESENT: Tim McGee, CEO
Dana Bales
Stuart Cameron
Su Forbes, QC
Jeffrey Hoskins
Michael Lucas
Cara McGregor

Bill McIntosh
Jeanette McPhee
David Newell
Carol Oakley
Susanna Tam
Alan Treleaven
Adam Whitcombe
Carmel Wiseman

GUESTS: Johanne Blenkin, Executive Director and Chief Librarian, BCCLS
Chief Justice Donald Brenner, Supreme Court of BC
Dean Mary Ann Bobinski, Faculty of Law, University of British Columbia
William Everett, QC, Life Bencher and Chair of the BC Justice Review Task Force
Tom Fellhauer, Past Chair, CLE Society
Stephen Frame, President, Trial Lawyers Association of BC
Madame Justice Nicole Garson, Supreme Court of BC, Member of the Rules Revision Committee,
Robert Goldschmidt, Member of the Civil Justice Reform Working Group
Dean Donna Greschner, Faculty of Law, University of Victoria
Robert Holmes, First Vice-President, Trial Lawyers Association of BC

Jack Huberman, QC, Executive Director, CLE Society
Jamie Maclaren, Executive Director, Pro Bono Law of BC
Miriam Maisonville, President, BCCBA
Jane Mundy, Correspondent, The Lawyers Weekly
Caroline Nevin, Executive Director, BCCBA
Wayne Robertson, Executive Director, Law Foundation of BC

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on July 4, 2008 were approved as circulated.

The following resolutions were passed unanimously and by consent.

2. Bencher Interviews with Articled Students

Resolved: to adopt the following recommendations of the Credentials Committee regarding Bencher/student interviews:

- Articled students will continue to be required to attend an interview with a Bencher, which will be scheduled to occur within three months of the start of the student's articles.
- Benchers will endeavor to cover the following subjects in a checklist
 - The importance of adhering to the highest standards of ethical practice and integrity;
 - Encouragement to contact Benchers, senior lawyers, or Law Society staff resources for advice and assistance;
 - The importance of maintaining good mental health and balanced life; and
 - Encouragement to be involved in pro bono activities and play an active role in the affairs of the profession through the Law Society, CBA and other professional organizations.

3. Amendment to Rule 1-45

Resolved: to amend the Law Society Rules by rescinding Rule 1-45 and substituting the following:

1-45 The Executive Director is designated as the head of the Society for the purposes of the *Freedom of Information and Protection of Privacy Act*.

REGULAR AGENDA

4. President's Report

Mr. Hunter outlined his activities and appearances on behalf of the Law Society between July 5 and September 5, 2008, highlighting two matters: the ongoing civil justice reform process; and the laying of criminal charges against Messrs. Wirick and Gill. Regarding the latter, Mr. Hunter thanked Communications Officers Dana Bales and Cara McGregor for their assistance in preparing him for several media interviews, and in their own

effective engagement with the media to convey the Society's determination and decisive action to protect the public interest.

5. CEO's Report

Mr. McGee referred to his September 5 written report for a review of various completed and ongoing matters, highlighting the following:

a. Financial Report

Mr. McGee noted that the Law Society's year-to-date financial position was solid. CFO Jeanette McPhee added that General Fund revenues and expenses are both showing favourable variance, and that TAF revenues and expenses are tracking to budget — notwithstanding weakness and uncertainty in the markets, which may impact TAF revenues and will continue to be closely monitored. Ms. McPhee also confirmed that both LIF and SCF operating results are on or favourable to budget.

b. Free Online Access to Current Legislation

Mr. McGee commended the excellent work of Law Society staff (notably Adam Whitcombe), Deputy Attorney General Allan Seckel, QC and Law Foundation Executive Director Wayne Robertson, leading to the conclusion of terms of a proposed agreement among the Law Society, the Law Foundation, CANLII and the Queen's Printer to implement free public online access to current legislation. The Queen's Printer will be kept whole regarding expected lost revenue under an indemnity to be provided by the Law Foundation through the 2-year term of the agreement. When the agreement expires the Queen's Printer will continue to provide public online access to current legislation free of charge.

The Benchers were unanimous in their approval of the agreement's completion.

c. Title Insurance Task Force Report – Implementation Update

Mr. McGee referred the Benchers to two brochures on the Western Law Societies Conveyancing Protocol, prepared by a staff working group to implement the task force's last outstanding recommendation. The Benchers requested that the *Guide to the Protocol for BC Buyers and Borrowers* brochures be re-worked to improve its clarity.

d. 2008 Annual General Meeting

Mr. McGee confirmed that the second Notice of AGM has been mailed to the profession, and Bencher Briefing Notes have been prepared for questions that may arise at the AGM regarding the 2009 Practice Fee resolution. Mr. McGee noted that the text of a member's resolution on civil justice reform was set out in the notice, together with a statement of the Benchers' position regarding that resolution.

e. National Labour Mobility Agreement

Mr. McGee reported on the ongoing process of consultation between the provinces and territories regarding proposed amendments to the Agreement on Internal Trade, such that by January 1, 2009, any worker certified for an occupation by any one provincial or territorial regulatory authority will be recognized as qualified to practise that occupation by all other provinces and territories (exceptions allowed). Mr. McGee also noted that given the National Mobility Agreement already in place for lawyers in Canada, the impact of these amendments on the legal profession is not expected to be significant.

6. Report on Outstanding Hearing and Review Reports

The Benchers received a report on outstanding hearing decisions.

7. Justice Review Task Force Presentation and Discussion of Civil Justice Reform and the BC Supreme Court Draft Rules

a. Introduction

Mr. Hunter welcomed four guests: Chief Justice Donald Brenner, (Co-chair of the Justice Review Task Force), Madam Justice Nicole Garson (member of the Rules Revision Committee), William Everett, QC and Robert Goldschmidt (member of the Civil Justice Reform Working Group). Mr. Hunter then outlined various developments that took place over the summer months of 2008, noting particularly a meeting on August 6 attended by Chief Justice Brenner, Mr. Everett and Mr. Goldschmidt on behalf of the JRTF, and by Mssrs Hunter, Blom and McGee on behalf of the Law Society, followed by a letter from Mr. Everett dated August 26, 2008. Mr. Hunter described the August 6th meeting as a productive review of the issues, and acknowledged Mr. Everett's letter as a detailed and helpful response to many of the issues raised by the Law Society at the August 6th meeting. Mr. Hunter noted that the extension of the draft Rules consultation period to December 31, 2008 provides the Benchers with an opportunity to support the civil justice reform process launched at the Bencher table over six years ago. Mr. Hunter also described the extended consultation period as an opportunity to address widespread concerns about access to legal resources and services.

b. JRTF Presentation

Mr. Everett expressed his appreciation for the opportunity to participate in Bencher Room discussion of important issues once again, and outlined the focus of the remarks to be made by the other JRTF representatives. Mr. Everett described his letter of August 26 as the result of very hard work by the task force to address the various Law Society concerns raised at the meeting of August 6th with both substance and balance, and asked the Benchers to recognize that effort and to respond in that light.

Chief Justice Brenner opened his remarks by quoting from Mr. Hunter's letter dated June 11, 2008 to Mr. Everett:

The Law Society's mandate is to uphold and protect the public interest in the administration of justice, which we believe requires the promotion of an accessible system of resolution for civil disputes on their *merits* under the aegis of an impartial

decision maker. Accordingly, the Law Society believes that the goal of civil justice reform ought to be to reduce cost and delay in the determination of disputes on their merits through a rights-based adjudication process.

The Chief Justice said he agreed with that statement “100 per cent” and believed the task force’s recommendations will achieve the goal of civil justice reform as described in Mr. Hunter’s letter.

Chief Justice Brenner reviewed the historical background of the development of the current draft Rules. He pointed out that since the concept draft was released in July 2007, it has been presented to about 50 groups around the province in consultation sessions conducted by either or both of the Chief Justice and Deputy Attorney General Allan Seckel, QC, and has undergone six major re-writes. Chief Justice Brenner then addressed the issue of consultation, outlining in some detail the quality and quantity of the consultation efforts made on behalf of the task force. He referred to expressions of concern about the adequacy of the public consultation process regarding the proposed reforms by the Law Society, Supreme Court judges and other parties, and noted that in June 2008 the task force extended the consultation period on the proposed new Supreme Court rules of civil procedure to the end of the year.

Chief Justice Brenner described the substantive concerns about the proposed new Rules presented on behalf of the Law Society at the August 6 meeting as “very specific” and acknowledged that similar concerns have been raised by a number of other parties and groups. He said that Mr. Everett’s 20-page, single-spaced letter dated August 26th represented the JRTF’s best effort to address those concerns, and urged the Benchers to reflect on the contents of that letter in that light.

Chief Justice Brenner outlined the process followed by the Rules Revision Committee in reaching its consensus on the draft Rules in April of this year. He said that the judicial members of the Rules Revision Committee had met about 30 hours per month for three months commencing in November 2007, and then the full committee (including lawyer and lay members) met for several days in April. The Chief Justice outlined the legal process — governed by the *Court Rules Act* — for promulgation of changes to the Rules of Court by the Department of Attorney General in consultation with the Chief Justice, and pointed out that in practice, in the past 30 years no changes to the Rules have ever gone forward without the approval of the Rules Revision Committee.

Madam Justice Garson then described in some detail the collaborative approach employed by the Rules Revision Committee and the Civil Justice Reform Working Group in working through successive versions of the draft Rules. She explained that the members of the RRC reached a consensus (with one strong dissent) on the current draft Rules at the conclusion of a two and a half day retreat in April 2008.

Madam Justice Garson said that the Rules Revision Committee will continue to meet regularly through the balance of 2008, reviewing feedback received to the current Concept Draft Rules and making further revisions, with the goal of presenting a recommendation to the Attorney General in early 2009.

c. Discussion

Mr. Hunter pointed out that many lawyers have expressed concerns about apparent front end-loading of costs in the judicial process contemplated by the current draft Rules. Mr. Hunter also noted control of process costs does not appear to receive the same emphasis in Mr. Everett's letter of August 26th as a number of other motivating factors and objectives for civil justice reform which are set out in some detail, and then asked the presentation group to address the issue of costs for the benefit of the Benchers.

Chief Justice Brenner replied that reducing costs is a key objective of the proposed reforms. He addressed the Woolf Report's recommendations for civil justice reform in Britain, and identified two resulting areas of front-end load cost-ineffectiveness:

- the pre-trial protocol was too cumbersome
- the government of the day saw an opportunity to get out of civil legal aid business and introduced a form of contingency fee allowing lawyers to double their hourly rates – a development never recommended by Lord Woolf.

Chief Justice Brenner said that BC's current draft Rules focus on the BC context more than they apply the Woolf reforms, endeavouring to build on successes in the existing Supreme Court Rules and to leave conduct of litigation in the hands of the lawyers wherever they can agree. After stressing that the draft Rules do not contain a pre-trial protocol, the Chief Justice pointed out that the Rule 18A summary trial procedure and the family law procedures in the current Supreme Court Rules represent recent reforms that have received overwhelmingly positive response from the bench, bar, and public for savings of time and cost, despite widespread fears regarding the front end cost implications of their procedural requirements.

Mr. Stewart inquired as to what extent the Rules Revision Committee has reconsidered the policy positions approaches taken by the Civil Justice Reform Working Group.

Madam Justice Garson replied that while the RRC has endeavoured to approach the CJRWG's policy views with respect, the Committee has not hesitated to depart from the Working Group's policy positions when it considered such departure appropriate. She added that the RRC had particular concerns in the area of front end costs, and acted on those concerns in its re-drafting work.

Several questions and responses between Mr. Turriff and Chief Justice Brenner addressed a number of background issues underlying the work of the task force and its various working groups and committees, including funding, budgeting, bibliographical sources, research methodologies and communication protocols.

Mr. Turriff asked the panel to discuss the JRFT perspective on lay litigants in BC courts.

Chief Justice Brenner said the growing numbers of unrepresented parties appearing in BC courts is a serious issue, noting that in 2006-2007, at least one party appeared without counsel in one-third of the Family Court cases conducted in BC. He also said the task force views the proposed new Rules as a vital element of a broad strategy for reducing the cost of legal representation in the judicial process, but not as a panacea. The Law Society's unbundling project and increased legal aid funding for civil matters were two

other elements identified by the Chief Justice as keys to facilitating public access to the judicial process in general, and to legal representation in particular.

Madam Justice Garson added that the Rules Revision Committee has kept the issue of lay litigants in mind throughout its work on the draft Rules, and that all aspects of the proposed reforms reflect the Committee's efforts to simplify procedures and forms for the benefit of all parties, including unrepresented litigants. She mentioned the new Form 18 (Case Plan Consent Form) as an example of this simplified approach.

Mr. Turriff asked whether BC's judiciary, as a whole, supports the proposed reforms.

Chief Justice Brenner said that some of BC's 130 judges and masters are opposed, some are in favour, and some are waiting to see what the Rules Revision Committee ultimately recommends. He added that BC is fortunate to have a Rules Revision Committee composed of both judges and lawyers; every aspect of every reform proposal is fully vetted and vigorously debated.

Mr. Kelly expressed encouragement regarding the JRTF's responsiveness to calls for additional consultation, and regarding the intensity of the debate that is underway. He said that the ultimate success of the reforms will be judged by the nature and quality of public response. Public participation and recognition of public interest must be reflected in the reform process itself, as well as in the resulting technical rule changes, he added.

Mr. Brun endorsed the public interest theme expressed by Mr. Kelly and cautioned against allowing the complexities inherent in the reform process to foreclose movement toward improvement.

Mr. Mossop raised the possibility of a pilot project as a way to test and evaluate the cost-effectiveness and impact of the proposed rule changes. He expressed concern about seeing rules reform as a key to increasing access to legal services and to the courts, emphasized the need for more legal aid funding.

Chief Justice Brenner agreed that the idea of a pilot project was appealing, but expressed doubt about the feasibility of such a project, given the wide-ranging nature of the proposed reforms. He indicated that the task force is open to suggestions from the Law Society on that issue.

In response to a question from Mr. Punnett, Chief Justice Brenner said the JRTF is not currently focused on identifying and tracking civil justice system costs, both current and going forward. , The Chief Justice added that while he would like to see such an evaluation take place, the task force lacks the necessary resources and information, and must rely largely on the profession in that regard.

Mr. Tindale described the focus on system and process costs as laudable, but questioned whether that approach addresses the issue of perception of fairness. He added that applying and enforcing the proportionality principle will place huge responsibility on the shoulders of the judiciary, especially in personal injury cases, where the importance of a claim to a litigant may not be amenable to quantification.

Chief Justice Brenner acknowledged the merit of Mr. Tindale's point and noted that the bar works well together in addressing such intangibles. He then pointed out that every

day judges must assess evidence and make difficult decisions that determine the advancement of claims and cases. The Chief Justice asserted that commitment to the principle of proportionality could be a key to some lower-value cases being able to go forward. He said that while the principle of proportionality is not a panacea, its entrenchment in the Rules of Court would help judges to prevent deep-pocketed parties from exploiting every procedural tool in the Rules to obstruct and delay claims.

Chief Justice Brenner said the members of the bar and the judiciary are reaching a fork in the road in this judicial reform process: essentially facing a choice between retaining the *status quo* and limiting change to incremental improvements; or embracing the changes in the proposed reforms and making constructive suggestions before they are implemented, to make the new Rules as good as we can possibly make them.

No new commitments were given or decisions made in the course of the presentation and ensuing discussion. Further Bencher discussion continued *in camera*.

LAW SOCIETY BENCHER REPRESENTATIVE REPORTS

CBA National Meeting

Mr. Jackson gave an entertaining account of the proceedings at the 2008 CBA Canadian Legal Conference, held August 17-18, 2008 in Quebec City.

Federation of Law Societies Council Meeting

Mr. Donaldson reported on his attendance on behalf of the Law Society at the FLS Council meeting in Ottawa on June 2, 2008.

8. Client Identification and Verification Rules

Mr. Getz reported on behalf of the Act and Rules Subcommittee of the Executive Committee regarding their efforts to develop a body of Law Society Rules that will give effect to the Federation of Law Societies's model rule on client identification and verification. He said the Subcommittee viewed the primary policy environment for its deliberations as the imminent prospect of federal regulatory intervention.

It was moved (Getz/Zacks) to amend Part 3 of the Law Society Rules as set out in Appendix 1.

The Benchers discussed some of the difficulties inherent in broad rules for client identification and verification. A particular concern was noted with respect to the impact of client identification rules on lawyers acting as duty counsel who routinely receive telephone calls in the middle of the night and provide summary advice. Some Benchers questioned the utility and necessity of obtaining the detailed information contemplated by the client identification rules under such circumstances. Some Benchers discussed the desirability of obtaining basic client identification information — as a matter of prudent practice — and questioned the difficulty of obtaining such basic client information, even in the nocturnal duty counsel circumstances previously noted. Some Benchers stressed the significance of two practical and political realities: on the one hand, the present federal government is determined to proceed with aggressive regulation in the context of money-laundering that would impose more onerous obligations on BC lawyers than

would the proposed new Rules; on the other hand, the model rule is a Federation initiative that 11 of Canada's 13 law societies have already implemented.

Mr. Getz withdrew his motion and the Benchers asked the Act and Rules Subcommittee of the Executive Committee to re-work its draft resolution for presentation at the October Benchers meeting. The Benchers also requested Mr. Donaldson to canvass the Federation of Law Societies regarding restriction of the new "know-your-client" rules to the context of financial transactions, and regarding the possibility of exempting the 'unidentified duty counsel scenario' from the model rule.

9. Scope of Practice – follow-up from the Benchers Retreat

Mr. Hunter referred the Benchers to the Executive Committee memorandum and supporting material at Tab 9.

It was moved (Punnett/LeRose) that a task force be formed for the purposes of:

1. Identifying the existing knowledge base and gaps in information that would be required for the Benchers to discuss the substantive policy issues around the scope of practice;
2. Developing a plan for acquiring the information that is missing (through consultations, economic studies etc.); and
3. Developing a timeline for reporting to the Benchers.

The motion was carried.

WKM
08-09-25