

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Wednesday, October 14, 2009

PRESENT:

Gordon Turriff, QC, President	Barbara Levesque
Glen Ridgway, QC, 1 st Vice-President	Jan Lindsay
Gavin Hume, QC, 2 nd Vice-President	David Mossop, QC
Haydn Acheson	Suzette Narbonne
Rita Andreone	Thelma O'Grady
Kathryn Berge, QC	Peter Lloyd
Joost Blom, QC	David Renwick, QC
Robert Brun, QC	Meg Shaw, QC
Leon Getz, QC	Richard Stewart, QC
Carol Hickman	Ronald Tindale
William Jackson	Art Vertlieb, QC
Patrick Kelly	Herman Van Ommen
Stacy Kuiack	James Vilvang, QC
Terence La Liberté, QC	Kenneth Walker
Bruce LeRose, QC	

ABSENT:

Dr. Maelor Vallance	David Zacks, QC
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STAFF PRESENT:

Tim McGee	Jeanette McPhee
Barbara Buchanan	Doug Munro
Stuart Cameron	Lesley Pritchard
Lance Cooke	Susanna Tam
Jeffrey Hoskins, QC	Alan Treleaven
Howard Kushner	Adam Whitcombe
Michael Lucas	Carmel Wiseman
Bill McIntosh	

GUESTS:

Dom Bautista, Executive Director, Law Courts Center
Johanne Blenkin, Executive Director, BCCLS
Dean Mary Ann Bobinski, Faculty of Law, University of BC
James Bond, President, CBABC
Robert Holmes, President, Trial Lawyers Associations of BC
Todd McKendrick, President, CLEBC
Dean Donna Greschner, Faculty of Law, University of Victoria
Jamie Maclaren, Executive Director, Pro Bono Law of BC
Caroline Nevin, Executive Director, CBABC
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Jane Mundy, Reporter, Lawyers Weekly

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on September 11, 2009 were approved as circulated.

2. Consent Resolutions

The following resolution was **passed unanimously and by consent**.

BE IT RESOLVED to amend the *Professional Conduct Handbook*, Appendix 3 by rescinding paragraph 5(e)(ii).

REGULAR AGENDA – for Discussion and Decision

3. President’s Report

Mr. Turriff referred the Benchers to his written report circulated before the meeting. He thanked Benchers and Law Society staff for their support over the past month, including:

- Mr. Hume for attending the Cariboo Bar Association meeting
- Mr. Ridgway for attending the Kootenay Bar Association meeting and a meeting of Law Society Presidents in Swift Current, Saskatchewan
- All those involved in conducting the 2009 Annual General Meeting on September 29th
- Mr. LeRose for his hospitality for two days in Kootenay County last week, and particularly for his assistance with speaking engagements in Trail and Nelson

Mr. Turriff briefed the Benchers on his attendance at the Conference of Regulatory Officers in Perth, Australia in September. He read excerpts from his keynote address on the importance of independence and self-governance of lawyers, and reviewed highlights of his participation in a panel discussion on legal regulation. Mr. Turriff also reported on his attendance at the Conference of the Law Council of Australia — a mixture of legal regulators and lawyer interest groups — and briefed the Benchers on his discussions of a number of issues related to independence and self-governance. He outlined the very different approach to those taken in Australia and Canada and noted his strong preference for the Canadian model.

Mr. Turriff asked Ms. Shaw to deliver remarks. Ms. Shaw then commended all the members of the Executive Committee for the volume and value of the work they have performed on behalf of the Law Society throughout the year. She presented Mr. Ridgway with a scientific device, explaining its purpose as providing a continuously updating account of the weeks, days and hours remaining in 2009.

4. CEO’s Report

Mr. McGee opened his report by noting the passion for independence and community outreach demonstrated by Mr. Turriff throughout his presidential year. Mr. McGee reported that Law Society staff are working on a number of projects to capture highlights of Mr. Turriff’s year as spokesman and ambassador for the Society, particularly his 125th Anniversary President’s Tour, during which he has criss-crossed the province in delivering more than 30 speeches to date.

Mr. McGee confirmed that Chief Legal Officer Howard Kushner will be leaving the Law Society in November to become Deputy Executive Director of the Law Society of Alberta. Mr. McGee observed that Alberta's gain is BC's loss, and that it is a sign of the Law Society's strength that our key people are so highly regarded and sought after. He noted that a search has commenced for Mr. Kushner's replacement and that he will update the Benchers as that process unfolds.

Mr. McGee briefed the Benchers on highlights of his recent attendance at the joint conference of the chief executives of the International Institute of Law Association Chief Executives (IILACE) and the Chief Executives of European Bar Associations (CEEBA) in Dublin, Ireland. He noted that the conference brought together the CEO's of law regulators and representative associations from over 25 countries.

Mr. McGee reported that the eight most common challenges faced by the represented organizations were identified as:

- Retention of lawyers within the first 10 years of practice
- Development and acceptance of meaningful CPD
- Urban/rural; big firm/small firm, differences, needs, resources
- A lack of uniform rules within country or between states/provinces;
- Managing in troubled economies;
- Government interference or intervention;
- Lack of adequate and affordable legal services; and
- The uncertainty around alternative business structures for law practice.

Mr. McGee noted that these challenges are all addressed, at least to a degree, by the Law Society's current Strategic Plan. He then summarized opportunities raised around the table as relating to the difficulty of reconciling two factors that seem common to all participating jurisdictions: on the one hand, many lawyers are underutilized or seeking employment; and on the other hand, there is significant unmet demand for legal services. He reported that in highly developed countries, an increasing gap appears to exist between the provision of legal services by large entities and by small firms or sole practitioners. A range of concerns and issues flowing from this were identified as strategic for both law regulators and representative bodies to address in the years ahead.

After referring the Benchers to his written report for discussion of those issues and others discussed at the conference, Mr. McGee reminded the Benchers that Vancouver will host the 2010 IILACE Conference.

Mr. McGee provided a follow-up report on the 2009 Annual General Meeting confirming that:

- Mr. LeRose was acclaimed as Second Vice-President for 2010
- PricewaterhouseCoopers were appointed as the Law Society's auditors for 2010
- the Benchers' recommended practice fee for 2010 was approved

Mr. McGee also reported regarding approval of two Member Resolutions relating to implementation of recommendations made in the Law Society's 2000 report on "Addressing Discriminatory Barriers facing Aboriginal Law Students and Lawyers." He confirmed that staff are assessing resource implications of

implementation of the resolutions and will include this analysis in the annual review of the Strategic Plan, to be conducted in November, December and January.

Mr. McGee updated the Benchers on planning and preparations for the November Benchers general election and referenda. He also reported on the state of planning for the upcoming (November 4, 2009) Bench and Bar Dinner, advising that both the Lieutenant Governor and Attorney General have confirmed their attendance and willingness to participate in formal recognition of the Law Society's 125th Anniversary. Mr. McGee noted that the BC Branch of the CBA is the lead host for this year's dinner and thanked CBABC for their graciousness in accommodating that recognition and the attending protocol complications in their planning.

Mr. McGee thanked the Benchers who took part in the last PLTC session, and in particular, thanked Mr. Brun and Mr. Vilvang for participating in the mock civil trials.

5. Report on Outstanding Hearing and Review Reports

The Benchers received a report on outstanding hearing decisions.

STRATEGIC PLANNING AND PRIORITIES MATTERS – for Discussion and/or Decision

6. PCH Appendix 6: Proposed Amendments to Sample Joint Representation Letter

Mr. Hume reviewed the report issued by the Ethics Committee (at page 601 of the meeting materials) and confirmed the Committee's recommendation that Appendix 6 of the *Professional Conduct Handbook* be amended to correct an inconsistency between the rule and the sample joint representation letter set out in Appendix 6, and to improve the language of Appendix 6.

Mr. Hume moved (seconded by Mr. Van Ommen) that the Benchers adopt the draft amendments to Appendix 6 of the *Professional Conduct Handbook* as set out in the Ethics Committee report. After discussion the Benchers agreed to a friendly amendment of the motion, such that the proposed amendments be re-drafted to affirm and clarify the sample letter's pre-retainer context.

The motion was carried on the basis of the friendly amendment.

7. Assessing Options for Increased Public Protection: Interim Disciplinary Measures (Amendment of the Act and/or Rules)

Discussed in camera.

8. Access to Legal Services: Co-funding a Research Project with BCLI (Economic Analysis of BC's Justice System)

Mr. Ridgway outlined the issues considered by the Access to Legal Services Advisory Committee in determining the need for a cost / benefit assessment of the current justice system and an analysis of options for and provincial economic benefits that would flow from improved justice funding. He stated that the Committee's view that the justice system, conceived of in the broad sense of the courts, legal aid, and the numerous other programs that support the rule of law, faces funding risks that affect the quality of the system.

Mr. Ridgway moved (seconded by Mr. Walker) that the Benchers endorse the research project described as “Stage 1” at page 803 of the meeting materials, and that the Benchers resolve the Law Society should liaise with the Law Foundation and the Legal Services Society in approaching the BC Law Institute to ascertain whether that body is the appropriate institution for and interested in conducting that project.

Mr. Ridgway noted that the discussions contemplated in the motion are preliminary and do not entail funding commitment. He also confirmed that the scope of the proposed research project was a broad review of the justice system as a whole, rather than a narrow study of legal aid. There was discussion regarding whether the proposed research project overlapped unduly with the work of the Delivery of Legal Services Task Force, leading to consensus that no such undue overlap exists. There was further discussion leading to confirmation that

- no decision to proceed with or commitment to fund the project was contemplated by the motion
- any proposal to proceed or to commit funding that may arise from preliminary discussions with the Law Foundation, LSS and BCLI will be put before the Benchers, supported by an assessment of Task Force and research funding still available in the 2009 budget, together with a review of going-forward commitments already made for that funding.

The motion was carried.

REGULAR AGENDA – Other Matters for Discussion and/or Decision

9. Mirror Imaging Working Group Final Report

Mr. Hume outlined the work conducted by the Working Group since it was created by the Executive Committee in June 2008. He noted that the Working Group’s original membership (Messrs Hume (Chair), LeRose and Ridgway) was bolstered by the addition of Messrs Brun, Punnett (as he then was) and Walker early in 2009. Mr. Hume sketched the variety of powers to deal with members’ records that are available to the Law Society Rule 4-43. Mr. Hume stated the core issue considered by the Working Group as:

- how the Law Society can carry out its investigative function to protect the public interest pursuant to s. 3 of the *Legal Profession Act*, while respecting a reasonable expectation of privacy a member under investigation has in personal information stored on digital records.

Mr. Hume noted that the privacy issue arises from several factors, including:

- many lawyers store both professional and personal information on their office computers
- current technology dictates that a forensic copy of the hard drive of a lawyer’s computer will capture all of the information stored on that computer
- the pre-computer age language and methodology of Rule 4-43’s investigatory powers and obligations are at odds with the practical and privacy challenges posed by current technology

Rule 4-43 provides:

Investigation of books and accounts

- 4-43** (1) If the chair, vice chair or another Benchers member of the Discipline Committee believes that a lawyer or former lawyer may have committed a discipline violation,

that Benchers may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer.

- (2) When an order is made under subrule (1),
 - (a) the Executive Director must designate one or more persons to conduct the investigation, and
 - (b) the lawyer or former lawyer concerned must immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence and must provide any explanations that the persons designated by the Executive Director under paragraph (a) require for the purpose of the investigation.

Mr. Hume referred the Benchers to the report at page 900 of the meeting materials for detailed discussion of the Working Group's analysis and findings, noting that the recommendations are set out on pages 921-926 (appended to these minutes as Appendix 1). Mr. Hume advised that Recommendation 1 provides two options for regulatory processes to govern the application of Rule 4-43 to forensic copying of the hard drives of lawyers' computers. Option A reflects the Working Group's majority view; Option B reflects the minority view, held by Mr. Walker.

Mr. Hume moved (seconded by Mr. LeRose) that the Benchers approve Option A of Recommendation 1.

Mr. Hume reviewed Option A, stating that it represented the majority's view of a robust investigatory process with adequate privacy safeguards. Mr. Walker then outlined his concerns regarding those privacy safeguards and reviewed Option B, noting its premise that the Society's authority to make forensic copies of information on lawyers' computers should be determined by the Court under section 37 of the *Legal Profession Act*. Mr. Hume replied, stating the majority's main concerns with Option B as:

- Hardship
 - S. 37 contemplates seizure of lawyers' files or other records, implying removal and retention of a computer, and imposing greater hardship than taking a forensic copy of the hard drive
- Independence
 - Option B cedes regulatory jurisdiction to the court, whereas Option A retains and applies the Law Society's independent authority to regulate

A full discussion followed. Other members of the Working Group noted the value of Mr. Walker's spirited and principled contributions to the group's work, and reiterated the hardship and independence concerns with Option B. Several Benchers expressed their concerns with the independence implications of Option B. Two Benchers expressed concern with the difficulty of limiting the scope of a forensic copy of a lawyer's hard drive to information properly within the Society's regulatory interest. Mr. Hume emphasized that Option A contemplates that forensic copy will not be retained by the Law Society and in any event is unintelligible until re-formatted. Mr. Hume also noted that in due course the external forensic investigator or contractor will provide the Society with a re-formatted version of the forensic copy, appropriated redacted to exclude information not within the scope of the Society's regulatory authority and investigation.

The motion was carried.

Mr. Hume moved (seconded by Mr. Ridgway) that the Benchers adopt Recommendation 2 (page 924), which provides:

When a member refuses to immediately allow copying of records under a 4-43 order, it places those records at risk of destruction. In light of this the Benchers should either:

1. Direct the Act and Rules Subcommittee to create a rule that requires a lawyer who refuses to comply with a 4-43 order to preserve records as they existed at the time the order was presented to the member; or
2. Instruct the Discipline Committee, or another group, to engage in further analysis of this issue prior to determining whether to create such a rule.

There was discussion of the issue of whether this procedure would impose a proactive duty on a lawyer under investigation to maintain the records forming the subject of the Law Society's investigation, or would provide undue reactive latitude to a lawyer under investigation who refuses to comply with a Rule 4-43 order.

Subparagraph 1 was revised by friendly amendment to remove the following words: "who refuses to comply with a 4-43 order."

The motion was carried.

Mr. Hume moved (seconded by Mr. LeRose) that the Benchers adopt Recommendations 3, 4, 5, 6, 7, 8 and 9 (pages 924-926).

The motion was carried.

Mr. Hume thanked Mr. Munro for his hard and effective work on behalf of the Working Group. Mr. LeRose noted that Mr. Hume and Mr. Munro performed a tremendous amount of difficult and valuable work on this project.

IN CAMERA SESSION

Discussion of Bencher Concerns

This matter was discussed *in camera*.

WKM
2009-10-28

5. RECOMMENDATIONS

Recommendation 1:

Note: In Recommendation 1 the Benchers are asked to choose between Option A (the majority option) and Option B (the minority option).

Option A:

Rules and policies should be created that facilitate the Society's ability to inspect and copy digital records, while maintaining a reasonable expectation of privacy its members have in personal information contained in such records. Staff, working with the Act and Rules Subcommittee will identify which of the steps below are best set out in a new Rule 4-43, and which are best set out in a 4-43 policy and procedure document. In most cases the investigative search parameters will include all practice records. The new Rule 4-43 and attendant policies and procedure should reflect the following:

1. When staff apply for a 4-43 order they should indicate forensic copying is likely to occur, and the issuing Bencher should acknowledge in the order that forensic copying may occur.
2. In order to minimize the chance of the Law Society accessing personal information that is not relevant to a 4-43 investigation, the Law Society should not be the custodian of the forensic copies. For greater clarity, this does not limit the ability of the Society to retain and access records that have been culled from the forensic copies.
3. The investigators present the 4-43 order and covering letter to the lawyer. This information establishes that the lawyer must allow copying of records at the point of request, including making a forensic copy. The lawyer is provided a document setting out the process for how forensic copies are dealt with.
4. The lawyer is encouraged to instruct counsel.
5. If the lawyer refuses to comply with the 4-43 order:
 - a. The lawyer is informed of his or her obligation to preserve records [**note:** this is predicated on such a rule being created];
 - b. Staff determine whether to apply to court pursuant to s. 37 of the Act for an order to seize records.
6. If the lawyer complies with the 4-43 order the following process ensues:

- a. Two forensic copies are made. One copy is to be preserved as a best evidence copy and the other copy is the working copy from which information is abstracted.
- b. It is contemplated that the forensic expert may have to hold on to the forensic copies until agreement can be reached for a third party to hold on to the copies, or until the independent supervising solicitor is appointed.
- c. Staff will attempt to reach an agreement with the member regarding retention and the terms of access to the forensic copies, and if staff and the member cannot agree to the terms of access:
 - i. The member will be provided a list of Law Society approved independent supervising solicitors to choose from to resolve the disputes as to access. If the member does not agree to anyone on the list, the President may appoint an independent supervising solicitor.
- d. In circumstances where staff and the member agree to access parameters, the forensic copies will be held by the person agreed upon (e.g. the forensic expert, counsel for the member, etc.).
- e. In circumstances where an independent supervising solicitor has been appointed, the forensic copies will be held by the supervising solicitor.
- f. If an independent supervising solicitor is appointed, the solicitor will perform a function similar to such a solicitor in *Anton Piller* applications. In circumstances where the lawyer and the Law Society cannot agree as to the scope of access to the computer record, the independent supervising solicitor will determine the scope of access. The process should require that:
 - i. The lawyer and his or her counsel are advised in writing of the search parameters, which in most cases will include all practice records, prior to the LSBC obtaining copies of the information abstracted from the forensic copies. The lawyer is provided a reasonable period of time to object in writing to the scope of the search. The independent supervising solicitor will consider the objection prior to disclosing the information to the Law Society, and after the period of time allowed for a review will provide the information to the Law Society.
 - ii. If there is a dispute as to the decision of the independent supervising solicitor regarding access to the forensic copy, either the member or the Society may seek a review on the merits of the decision of the independent supervising solicitor.

- iii. The Law Society will appoint a retired judge to conduct reviews of the decision of the independent supervising solicitor as contemplated in 6(f)(ii). The retired judge may review the decision of the independent supervising solicitor as to jurisdiction and on the merits, and may affirm or alter decisions as to the scope of access to the forensic copies in order to balance the investigative authority of the Society with a member's reasonable expectation of privacy in information contained in the forensic copy.
 - iv. Following the passage of the time allowed for objecting to the search parameters, the information from the search is provided to the investigators.
- g. If the investigators later require additional search parameters the process is repeated.
- h. Records retention issues should be dealt with as follows:
- i. If the investigation results in a disposition by the Benchers the member has 60 days from the day on which the final appeal period from disposition expires to make a request in writing to the Society for the return of the forensic copies. In circumstances where the member fails to make the application in time the Society may destroy the forensic copies or return them to the member as it sees fit;
 - ii. If the investigation is closed the member has 60 days from the date of notice from the Society that the investigation is closed to make a request in writing to the Society for the return of the forensic copies. In circumstances where the member fails to make the application in time the Society may destroy the forensic copies or return them to the member as it sees fit;
 - iii. If the member voluntarily resigns, retires, ceases practice, or goes on non-practising status prior to conclusion of the investigation or disposition of any proceeding resulting from the investigation, the Society will advise the member that the Society will maintain the forensic copies as the Society may require them in the event the member reapplies for admission; and
 - iv. The Working Group recommends that the Law Society ensure that:

1. its records retention policy establish a process for dealing with records that are culled from the forensic copies and that have been provided to the Society; and
2. its records retention policy establishes a process for dealing with forensic copies it retains in circumstances identified in 6(h)(iii) above.

Option B:

Because of the privacy concerns implicated in forensic copying, the authority of the Society to make forensic copies should be determined by the Court pursuant to s. 37 of the *Legal Profession Act*. The Act and Rules Subcommittee should determine whether s. 37 allows for forensic copying, or if the section should be amended to give the Court the authority to set out the terms on which the Society may copy and access computer records. As part of this review the Act and Rules Subcommittee should consider whether this has any implications for the independent, self-governing status of the profession.

Recommendation 2:

When a member refuses to immediately allow copying of records under a 4-43 order, it places those records at risk of destruction. In light of this the Benchers should either:

1. Direct the Act and Rules Subcommittee to create a rule that requires a lawyer who refuses to comply with a 4-43 order to preserve records as they existed at the time the order was presented to the member; or
2. Instruct the Discipline Committee, or another group, to engage in further analysis of this issue prior to determining whether to create such a rule.

Recommendation 3:

When seeking an order appointing a custodian, the Law Society should as a matter of practice request that the order contain language that identifies the Law Society's authority to make a copy of any storage devices in the lawyer's possession or control that the Law Society has reason to believe contains information related to the lawyer's practice.

Recommendation 4:

The Law Society should ensure that two forensic copies are made at the commencement of a custodianship in order to preserve the forensic integrity of the records in the event the custodian needs to investigate the lawyer's practice.

Recommendation 5:

Because s. 52 of the *Legal Profession Act* pre-dates the in-house custodian program, staff should consider how the section relates to that program. Consideration should also be given, as part of any amendments to the Act, whether there may be circumstances in which it is desirable to have access to the original property and not merely a copy of it.

Recommendation 6:

The Law Society Rules should be amended to require a lawyer to provide the Law Society with the necessary information, including passwords and encryption keys, for the Law Society to access, in a comprehensible form, records in the lawyer's possession or control that the Law Society has reason to believe contain information related to the lawyer's practice.

Recommendation 7:

Lawyers and articling students should be reminded through Law Society communications, practice standards checklists, the Small Firm Practice Course, PLTC, CLE and legal technology conferences, that the Law Society has the authority to inspect and copy computer records, and that articling students and lawyers should take precautions to segregate the storage of work records from personal records, by methods such as partitioning hard drives. These education and communication tools should also be used to remind articling students and lawyers of their obligation to safeguard confidential client information, including preventing unauthorized access to their client's records.

Recommendation 8:

The Act and Rules Subcommittee, as part of any future revision to the *Legal Profession Act*, and as a regular review of the Law Society Rules, should consider whether any amendments are required to avoid mischief caused by technology (e.g. the storage of accounting records on servers that fall outside the scope of Rule 3-68).

Recommendation 9:

The Society should liaise with the Office of the Information and Privacy Commissioner to see if they have any concerns with the policies and procedures being created to copy and access digital records. Staff should inform the Executive Committee of the results of these communications.