



Minutes

Benchers

Date: Friday, April 08, 2016

Present: David Crossin, QC, President
Herman Van Ommen, QC, 1st Vice-President
Miriam Kresivo, QC, 2nd Vice-President
Satwinder Bains
Jeff Campbell, QC
Pinder Cheema, QC
Lynal Doerksen
Thomas Fellhauer
Craig Ferris, QC
Martin Finch, QC
Brook Greenberg
Lisa Hamilton
J.S. (Woody) Hayes, FCPA, FCA
Dean P.J. Lawton
Jamie Maclaren
Sharon Matthews, QC
Steven McKoen
Christopher McPherson
Nancy Merrill, QC
Maria Morellato, QC
Lee Ongman
Greg Petrisor
Claude Richmond
Phil Riddell
Elizabeth Rowbotham
Mark Rushton
Carolynn Ryan
Michelle Stanford
Sarah Westwood
Tony Wilson

Excused: Not Applicable

Staff Present: Tim McGee, QC
Deborah Armour
Taylore Ashlie
Renee Collins
Charlotte Ensminger
Su Forbes, QC
Andrea Hilland
Jeffrey Hoskins, QC
David Jordan
Michael Lucas
Jeanette McPhee
Lesley Small
Alan Treleaven
Adam Whitcombe
Vinnie Yuen

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Mark Knauf-Nakamura	Director of Knowledge Management, Courthouse Libraries BC
	Anne Chopra	Equity Ombudsperson, Law Society of BC
	Carla Terzariol	Executive Director/CEO, Trial Lawyers Association of BC
	Ron Friesen	CEO, Continuing Legal Education Society of BC
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Yves Moisan	President, BC Paralegal Association
	Jennifer Muller	Access to Justice BC Executive and Leadership Group
	Wayne Robertson, QC	Executive Director, Law Foundation of BC
	Monique Steensma	CEO, Mediate BC
	Prof. Jeremy Webber	Dean of Law, University of Victoria

CONSENT AGENDA

1. Minutes

a. Minutes

The minutes of the meeting held on March 4, 2016 were approved as circulated.

The *in camera* minutes of the meeting held on March 4, 2016 were approved as circulated

b. Resolutions

The following resolutions were passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 3-44 (1) and substituting the following:

- (1) On demand, a lawyer must pay in full to the Society any of the following amounts paid under the Society's insurance program on behalf of the lawyer:
 - (a) a deductible amount;
 - (b) any other amount that the lawyer is required to repay or reimburse the insurer under the policy of professional liability insurance.

BE IT RESOLVED to amend the Law Society Rules as follows:

1. By rescinding Rule 5-15 (3) and substituting the following:

- (3) Delivery of documents to a respondent or applicant under Rules 5-15 to 5-28 may be effected by delivery to counsel representing the respondent or the applicant.

BE IT RESOLVED to amend the Law Society Rules as follows:

1. By rescinding Rule 2-96 (6) (a) and substituting the following:

- (a) adjourn the conference generally or to a specified date, time and place,

2. By rescinding Rule 2-98 (5) and substituting the following:

- (5) After a hearing has commenced, the chair of the panel may adjourn the hearing, with or without conditions, generally or to a specified date, time and place.

3. By rescinding Rule 5-25 (9) (a) and substituting the following:

- (a) adjourn the conference or the hearing of the review generally or to a specified date, time and place,

4. *By rescinding Rule 5-26 (5) and substituting the following:*

- (5) After a hearing has commenced, the chair of the review board may adjourn the hearing, with or without conditions, generally or to a specified date, time and place.

EXECUTIVE REPORTS

2. President's Report

Mr. Crossin provided a brief report to Benchers on various Law Society matters. He noted that Mr. Hume's Federation Council report would be deferred to the May meeting, and recognized the attendance of Deputy Attorney General Richard Fyfe, QC as well as guest presenter Jennifer Muller. He also noted that item 1.4 from the Consent Agenda will be moved to the Discussion/decision section of the Agenda at the request of a Bencher.

He noted that the recent announcement of Mr. Justice Cromwell's retirement effective September 1, 2016, which prompts discussion of the Supreme Court of Canada judicial appointments process. Benchers have raised this issue with him and asked if the Rule of Law Committee might prepare for Bencher consideration in June a process consistent with transparency and integrity. If Benchers agree on the proposed process, Mr. Crossin suggested that the Law Society of BC could make submissions to the Minister in that regard.

He also noted his recent attendance at the New West Bar dinner, at which he spoke on the Law Society's work on the Truth and Reconciliation Commission (TRC) recommendations and its commitment to adequate legal aid funding. He described the members as engaged and interested in the work of the Law Society, and observed that our recent public demonstration of interest in such topics appears to have created a restored hope in members and the public. Other topics of discussion included the Justicia project and the importance of our continued efforts to combat gender bias and to retain women in our profession.

Mr. Crossin briefed the Benchers on his attendance, with Mr. McGee, the Ladder and senior staff, at the Federation Council Meeting in Banff, at which he reported to the other provincial law societies on our current issues of focus, Mr. Van Ommen reported on Law Firm Regulation, and Ms. Kresivo reported on our engagement on the TRC recommendations.

He and the Ladder attended the QC Ceremony at Government House; he acknowledged the recent Queen's Counsel designations awarded to Ms. Merrill and Mr. Campbell. While in Victoria, he also spoke to a criminal law class at UVIC.

In his report on the recent Executive Committee meeting, he noted that the Executive discussed having staff provide their presentation on Core Values to the Benchers. The Executive also discussed the upcoming expiration of Mr. Hume's final term as the Federation Council representative, triggering the nomination and appointment process for his replacement, as well as

the Steering Committee to assist the Law Society with the TRC recommendations. Members of that committee met with the Ladder, Maria Morellato, QC Tim McGee, QC and staff and engaged in a wide ranging discussion which will be detailed under the Strategic Plan Implementation agenda item.

3. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers.

He began by acknowledging the positive tone set by the Law Society's engagement on key issues such as legal aid, the TRC recommendations and law firm regulation, and thanked both Mr. Crossin and staff for their considerable efforts in this regard.

Operationally, he noted that a redesign of the Law Society website was in development, and encouraged Benchers to provide their valued input through an upcoming survey. On the building restoration, he confirmed that the bidding process for contractors was complete, and work could likely begin soon. The hope was to have the premises fully restored in time for the July Bencher meeting, but unfortunately it was not definitive. He also noted that, in the context of the restoration work, staff would seek direction on a minor renovation to the Hearing Room to provide a separate entrance for panel members.

Mr. McGee also briefed Benchers on the Skills Enrichment Program recently implemented for staff with the goal of increasing our technological skill set and improving the quality, accuracy and efficiency of staff work. He acknowledged those Benchers who have already expressed an interest in taking part, and extended the offer once more to the remainder.

He also briefed Benchers on the work being done by staff to assess the appropriate level of resourcing for external counsel work. Specifically, the project will try and determine the appropriate mix between outsourcing work and investing more heavily on internal resources.

Touching on the recent Federation meeting, Mr. McGee related that the important governance changes at the Federation level result from the strong message from law societies that the Federation is not a stand-alone regulator. It can, however, play a pivotal role regarding national standards. Two governance mechanisms designed to help facilitate that role are the enhanced President's Forum, whose function is to gauge how individual law societies' positions fit into national agendas, and the newly constituted CEO's Forum, which collects the insights of law society CEO's and for the first time allows them to speak with one voice.

Finally, Mr. McGee noted recent media stories suggesting that the London-based Freshfields may be opening a Vancouver office to "offshore" commoditized work using paralegals and lower cost associates. According to his inquiries, no decision has been made as of yet, but he would brief Benchers as information became available in the weeks to come.

4. Briefing by the Law Society's Member of the Federation Council

Gavin Hume, QC's regular briefing was deferred to the next meeting.

GUEST PRESENTATIONS

5. Unbundling of Legal Services: Presentation by Jennifer Muller

Mr. Crossin introduced Jennifer Muller, a member of the Access to Justice BC Executive Committee and former self-represented litigant, to speak on challenges facing self-represented litigants in our justice system, and the ways in which "unbundling" of legal services can provide some relief.

Ms. Muller related her personal story of retaining counsel to assist with her family litigation matter, but being unable to continue given the significant expense. With self-representation as her only option, she described a bewildering, demoralizing experience in which she lacked any useful knowledge of the system, its language or its protocols. Finding herself apologizing for missteps at every turn, she approached several lawyers, proposing to pay for their time and guidance on a limited basis, so that she could continue to represent herself, but with the advice of counsel periodically. Most rejected her proposals; one agreed, and was instrumental in assisting her with the preparation and conduct of her case which culminated in a 9 day trial.

Ms. Muller, who has a Master's degree in Human Learning and Counselling Psychology, typifies the average self-represented litigant (SRL) who tends to be middle class and college educated. Statistics show that 57% of litigants in family cases are SRL's. In some cities the figure is as high as 70%. According to Ms. Muller, most would prefer to have a lawyer, they simply cannot afford one for protracted periods of time. Ironically, most also earn too much to qualify for legal aid. And most are unaware it is possible to hire a lawyer on a limited basis, with what is known as a "limited scope retainer" or "unbundled legal services".

Having navigated the system as an SRL, it is Ms. Muller's observation that the public should be made more aware of the possibility of hiring a lawyer on a limited scope retainer; lawyers themselves should be made more aware of their ability to take on such work.

In answer to a question, Ms. Muller clarified that, being unfamiliar with the terms "unbundled legal services" or "limited scope retainer", when she approached lawyers for help she proposed paying "on a task by task basis". Most SRL's she speaks with now are equally unaware of the terms, or of the service. She also describes an almost covertness amongst lawyers who are willing to provide such service. Most do not publicize it in any way.

Ms. Muller also recognized the prevailing perception of SRL's as unpleasant, uncooperative or adversarial. While acknowledging there will always be some who are disgruntled, the National Self-represented Litigants Project Report by Dr. Julie McFarlane found that 90% would have chosen to be represented by a lawyer.

Mr. Crossin noted that this issue should form part of the discussion of the Access to Justice Committee; Mr. Van Ommen, chair of that committee, confirmed "unbundling" had been a topic of conversation at the last meeting and would welcome the input. At the least, the committee agree the terminology is difficult, and does not best describe the service offered.

It was noted by a Bencher and by staff that since the 2008 Report of the Unbundling of Legal Services Task Force, the Law Society has permitted the "unbundling" of legal services, but few lawyers seem to be taking advantage of the ability. Staff will be reviewing the creation of templates and business models to provide to lawyers to promote this type of practice; it was also suggested a "roster" of lawyers providing this service be made available to the public.

Mr. Crossin thanked Ms. Muller for her inspiring presentation.

DISCUSSION/DECISION

6. 2016 First Quarter Financial Report

Ms. Kresivo, Chair of the Finance and Audit Committee, introduced this item and thanked staff, particularly Chief Financial Officer Jeanette McPhee, for their invaluable contributions. She confirmed that the Law Society is on track regarding revenue, and noted that, while it is still early in the year, there is no indication of any issues to date. Ms. McPhee then briefed Benchers on the details of the First Quarterly Financial Report, noting that the first three months saw a positive variance of \$300,000, but only because of timing; expectations of being on budget with regard to numbers of members and students remain, while TAF revenue is expected to be over budget as a result of the real estate market. The Lawyers Insurance Fund is operating on budget, but investment returns for January and February are negative, as is the benchmark; the market recovered slightly in March resulting in an overall position of negative 1%, similar to the benchmark.

On that note, Ms. Kresivo indicated that, while changes to the investment policies are brought to Benchers as needed, the investments themselves are not generally reported on to Benchers. To ensure Benchers have a fuller understanding of our investments, there will be a presentation to Benchers at the next meeting.

REPORTS

7. Lawyers Insurance Fund: Program Report for 2015

Su Forbes, QC, Director of the Lawyers Insurance Fund (LIF), made a presentation on LIF's performance in 2015 for Benchers (the Power Point for which is attached as Appendix A). For the benefit of new Benchers, she also provided a brief overview of the program and its operations, naming key staff and their positions.

She outlined the functions of claims counsel, detailing the differences between negligence claims under Part A and theft claims under B, and setting out their various duties which include investigating coverage, assessing liability and quantum, negotiating settlements and otherwise resolving claims through repair or defence. She noted that a defence counsel "InForum" is held each year which provides opportunity for our outside defence counsel to discuss ethical issues, best practices, and how best to serve insured lawyers.

Last year, the program handled about 300 insurance and coverage inquiries. This is a reduction from years past, largely due to the addition of the website page "My insurance policy: questions & answers" which provides information on what is, and especially what is not, covered under the policy. Members are appreciative of this resource, with the page receiving over 8000 hits last year. Program lawyers are also very actively involved in risk management, helping lawyers manage their practice to avoid claims.

Ms. Forbes noted that there almost 11,400 practicing lawyers in BC, 2800 of which are "in house" and therefore not insured by the program. Accordingly, 8600 lawyers in private practice are insured through LIF, with approximately 7400 full time and 1160 part time. The frequency of claims from 2011 to now has remained essentially unchanged, with a slight increase in 2015. Two thirds of the reports received are potential claims or incidents; lawyers by and large comply with their duty to self-report, which provides opportunities for early investigation and resolution, and "repair" of a problem before it becomes a claim.

Total payments on claims (indemnities and defence costs) are about \$12-15 million per year; defence costs are consistent, but indemnities (settlements) are variable year over year. Last year's relatively low total payments of \$9.5 million is likely due to timing of some settlements and trials, but they will continue to monitor monthly for indication of trend.

After last year's report, the question of how age relates to claims was asked. Upon review of eleven years of data, the most claims appeared in the 40-54 age group, with relatively fewer claims in the 20-39, 55-64 and over 65 years age groups as compared with the number of lawyers in those age ranges. As claims relate to practice areas, civil litigation, real estate and commercial-other produced the most claims. Commercial leasing, securities and criminal

produced among the fewest. LIF generally closes as many files as it opens, and last year 75% closed without any payment. Between 15-20% of claims are successfully “repaired”.

As compared to programs across the country, we have the third largest program but the tenth largest fee.

Ms. Forbes also detailed Part B coverage for lawyer theft. LIF pioneered this coverage; Alberta has now followed suit. Since its inception, we have received claims regarding 81 lawyers, but only 18 have actually presented a risk to the program. A key goal of the trust protection regime was the more timely payment of claims. We are achieving this goal, with over one third of claims paid by 3 months, and 70% paid by 9 months.

Finally, service evaluation forms completed by claimants under Part B show that they are very happy with LIF's handling of their claims when asked to rate the service on timeliness, fairness, courtesy and satisfaction. Feedback from insured lawyers under Part A recognizes timely service and the insight, expertise, creativity, diplomacy and sensitivity of claims counsel.

In response to a question, Ms. Forbes confirmed LIF does not prorate premiums according to practice area, despite the differences in rates of claims, given that our fees are comparatively among the lowest in the country. When asked how it is we are able to keep fees so low, Ms. Forbes credited the skillful claims management group and leadership of the two managers, the high level of self-reporting amongst members, our efficient, streamlined program, and our investment performance.

Also, Ms. Forbes clarified that LIF provides a “declining limits” policy with defence costs within limits, as is typical in lawyers professionally liability programs throughout the world. Alternative policy models are challenging to underwrite and create much higher insurance levies. Moreover, many practices - for example, some administrative, criminal, family, and insurance defense firms - don't need greater coverage and if higher limits were provided at additional cost, lawyers who don't need additional coverage would be subsidizing those who do. She observed that additional layers of coverage are readily available on the commercial market and generally the firms that need them, buy them.

Report on Proposed Young Lawyers Initiative

Nancy Merrill, QC reported on the proposed development of a Young Lawyers initiative, with a view to providing a platform for collaborative input by that demographic on such issues as mentoring, student loan interest relief, Inns of the Court program, easier recording of CPD, quality of articles, and unpaid articles.

The next steps will involve a review by the Equity and Diversity Committee, to determine the potential viability of the initiative.

8. Report on Legal Aid Task Force

As Chair, Ms. Merrill also reported on the Legal Aid Task Force, whose mandate is to develop a principled vision for publicly funded legal aid, identify ways to fund legal aid plans, enhance Law Society leadership regarding legal aid and collaborate with other law societies. The Task Force has had three meetings thus far, and anticipates holding a full day retreat on April 23 to develop and refine the mandate and develop a conceptual framework.

9. 2015-2017 Strategic Plan Implementation Update

This report involved two aspects of the Strategic Plan: TRC's recommendations and the Law Firm Regulation Task Force.

Reporting on the TRC Steering Committee, Mr. Crossin confirmed that the Committee will be meeting to shape and discuss the Retreat agenda. He envisions hearing only from indigenous leaders on the Friday, and providing opportunity at the Bencher meeting the following day for discussion and consideration of next steps. He noted the delicate balance to be struck between the immediacy of the calls to action in the TRC report, and the advisability of ensuring consultation and understanding before action.

Maria Morellato, QC underscored the importance and value of the commitment that has been made by the members of the Steering Committee. Mr. Crossin thanked policy lawyer Andrea Hilland for her tireless contributions and for being a wonderful spokesperson for the Law Society.

Reporting on the Law Firm Regulation Task Force, Chair Herman Van Ommen, QC briefed the Benchers on the Task Force's consultations around the province, thanking those Benchers able to join the sessions in their districts. He also thanked Chief Legal Officer Deb Armour and Manager of Policy Michael Lucas for their assistance throughout. Using the information gathered at these sessions, the Task Force will refine its policy recommendations and work toward having a report to Benchers by early Fall.

Feedback included the common theme of resistance to increased regulation for sole practitioners and small firms, with the suggestion of mandatory education for firms of four or fewer instead. The areas of conflicts, accounting and marketing emerged as clear areas to be regulated at the firm level, given that these areas are largely managed at the firm level in any event.

Mr. Van Ommen noted that, nationally, virtually all law societies are looking at law firm regulation and are in various stages of consultation, moving separately but on similar paths. He

will be speaking at the Saskatchewan Annual General Meeting in June on the topic, and expects a clearer picture of law firm regulation across the country to emerge by the end of the year.

10. Report on the Outstanding Hearing & Review Decisions

Written reports on outstanding hearing decisions and conduct review reports were received and reviewed by the Benchers.

Mr. Van Ommen also noted that he will be implementing an earlier reminder system, as we are not meeting the National Standards. Ms. Armour confirmed that at 55% we are in fact the lowest in the country; however, she did also note that we have experienced an inordinate number of reviews recently which may be contributing.

Mr. Van Ommen also noted that a committee has been struck to develop a code of conduct for all panel members which will include a section on the responsibilities of individual panel members in this regard.

11. Tab 1.4 of Consent Agenda - Record of Review On Hearing Decisions

Mr. Van Ommen framed the question at hand as, to what extent are we expecting the person seeking the review to bear cost of producing the record? Increasing numbers of requests for review are significantly taxing resources. What is being proposed is the model used by the Courts, in which the party seeking to review bears burden of preparing the record. A mechanism has been included to allow a member to ask to be relieved of cost due to hardship.

Discussion ensued, with some Benchers noting this presents an opportunity to review whether electronic records should be implemented, and others questioning the quality of the record produced if left to the party seeking review, noting that the Law Society may be in a better position to ensure a complete and appropriate record. Still others questioned whether requiring parties to prepare the record presents an access to justice issue, observing that the mechanism for seeking relief due to financial stress is overly formal and cumbersome.

Others spoke in favour of the underlying model, noting that as the number of reviews increases, our costs increase which ultimately is borne by our members. However, they also agreed that the proposal could benefit from further consideration to simplify the process for relief.

It was decided the matter will return to the Executive Committee for further consideration.

RTC
2016-04-08