



# Minutes

## Benchers

Date: Friday, November 04, 2016

Present: David Crossin, QC, President  
Herman Van Ommen, QC, 1<sup>st</sup> Vice-President  
Miriam Kresivo, QC, 2<sup>nd</sup> Vice-President  
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  
Nancy Merrill, QC  
Greg Petrisor  
Phil Riddell  
Elizabeth Rowbotham  
Mark Rushton  
Carolynn Ryan  
Michelle Stanford  
Sarah Westwood  
Tony Wilson

Excused: Satwinder Bains  
Christopher McPherson  
Claude Richmond

Daniel P. Smith  
Lee Ongman

Staff Present: Deborah Armour  
Taylore Ashlie  
Renee Collins  
Lance Cooke  
Su Forbes, QC  
Andrea Hilland  
Jeffrey Hoskins, QC  
David Jordan

Michael Lucas  
Alison Luke  
Jeanette McPhee  
Doug Munro  
Alan Treleaven  
Adam Whitcombe  
Vinnie Yuen  
Kerryn Garvie

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Mark Benton, QC	Executive Director, Legal Services Society
	Johanne Blenkin	CEO, Courthouse Libraries BC
	Dr. Catherine Dauvergne	Dean of Law, University of British Columbia
	Gavin Hume, QC	Law Society of BC Member, Council of the Federation of Law Societies of Canada
	Claire Hunter	Partner, Hunter Litigation Chambers
	Caroline Nevin	Executive Director, Canadian Bar Association, BC Branch
	Michele Ross	Education Chair, BC Paralegal Association
	Prof. Jeremy Webber	Dean of Law, University of Victoria
	Michael Welsh	President, Canadian Bar Association, BC Branch

## CONSENT AGENDA

### 1. Minutes

#### a. Minutes

The minutes of the meeting held on September 30, 2016 were approved as circulated.

The *in camera* minutes of the meeting held on September 30, 2016 were approved as circulated

#### b. Resolutions

The following resolution was passed unanimously and by consent.

*BE IT RESOLVED* to amend the Code of Professional Conduct for British Columbia by:

- (a) rescinding rules 3.4-17 to 3.4-26, their associated Commentaries, and Appendix D;
- (b) adopting new rules 3.3-7 and 3.4-17 to 3.4-23, and their associated Commentaries, as recommended by the Ethics Committee; and
- (c) replacing the words “The guidelines at the end of Appendix D” in Commentary [1] to rule 3.4-11 with the words “The guidelines following Commentary [3] to rule 3.4-20.”

*BE IT RESOLVED* that the Benchers ratify the appointment of Second Vice-President Miriam Kresivo, QC as the Law Society’s representative on the 2016 QC Appointments Advisory Committee.

*BE IT RESOLVED* to amend the Law Society Rules, effective January 1, 2017, as follows:

1. In Schedule 1, by striking “\$2,057.09” at the end of item A 1 and substituting “\$2,125.57”, and
2. In Schedule 2, by revising the prorated figures in each column accordingly; and
3. In the headings of schedules 1, 2 and 3, by striking the year “2016” and substituting “2017”.

## **EXECUTIVE REPORTS**

### **2. President's Report**

Mr. Crossin briefed the Benchers on various Law Society matters to which he has attended since the last meeting.

He attended and spoke at the American Bar Association's Commission on Legal Assistance Programs (CoLAP) National Conference being held in Vancouver. On behalf of the Benchers he noted the Law Society's support for the LAP in BC, both the institution and the individuals committed to it, commending them for their efforts of outreach and openness which have created a culture of early intervention in BC. More people are now reaching out before it's too late, before irreparable damage has been done in their lives.

He regretted his inability to attend the recent Federation Conference and meetings, but noted that reports would be provided to Benchers by both Gavin Hume, QC and Tony Wilson, who will report on the conference topic of legal education.

He also attended and spoke at the Indigenous Bar Association's (IBA) national conference being held in Vancouver, the theme of which was "Redefining Relationships – With or Without You". In his remarks he emphasized the Law Society's continuing engagement and commitment to discovering and building new relationships, and was humbled by the expressions of gratitude he received from a wide variety of participants who applauded the legal profession for its public commitment to these important justice issues. Of note, Law Society staff lawyer Andrea Hilland was singled out by IBA leaders for her excellent work in support of that commitment. Mr. Crossin added his own commendations for Ms. Hilland's work, noting that the Law Society is fortunate to have such a talented person in its midst.

Finally, Mr. Crossin reminded Benchers of the upcoming deadline for submission of nominations to the Executive Committee for 2017, as well as the deadline for submission of expressions of interest for 2017 committees generally.

### **3. CEO's Report**

Mr. McGee, who was attending the International Institute of Law Association Chief Executives, provided his monthly written report to the Benchers prior to the meeting. As that report consisted solely of in camera matters, Adam Whitcombe, Chief Information Officer and Acting CEO, provided highlights of that report to Benchers during the in camera session.

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

Gavin Hume, QC briefed the Benchers as the Law Society's member of the Federation Council.

Reporting on the recent Federation Conference and Council meetings, he began by briefing Benchers on the third day of the gathering which was a day of strategic planning led by Allan Fineblit and Joanne Brodeur. The interesting session was a review of 18 functions the Federation engages in on behalf of law societies, including ownership of CanLII, administration of national mobility, and approval of common law degrees, to name a few. The session involved both larger presentations and small group discussions regarding the current activities and possible directions for moving forward. The next steps will involve collating the various small group discussion details with a view to producing a draft strategic plan for input at the December 13<sup>th</sup> Council meeting. Mr. Hume noted that a consistent emerging theme was the role of the Federation as a facilitative, coordinating organization rather than a regulatory one, and a representative voice once consensus is reached.

At the council meeting, Richard Scott, former President of the Nova Scotia Barristers Society, was elected as the 2<sup>nd</sup> Vice-President of the Federation. Additionally discussed were the processes to be adopted by the Public Affairs and Government Relations Committee, whose role it is to look at issues of interest to the Federation and law societies and work towards developing common positions. Discussions involved defining an approach for building consensus and seeking approval in the development of those positions. Included in the consultation will be Federation Council members, Presidents and CEOs to ensure full disclosure and consensus. One challenge that was identified was a suitable process for matters involving a shortened response period. It was agreed that, when the response time required is too short to allow for consensus to be reached, the Federation will provide no response, unless it is a topic upon which the Federation and law societies have already reached agreement.

Also discussed at the Council meeting was the topic of anti-money laundering and the Federal Government's apparent focus on lawyers. The review of the National Committee of Accreditation (NCA) also moved forward, with a decision made to retain a consulting firm to facilitate the process. A topic of focus in that discussion was the challenge of NCA candidates not meeting law societies' expected standards.

The National Requirement Working Group tabled a discussion paper on non-discrimination as a factor in law degree approvals, but the decision was made to defer any further discussion until after the Supreme Court of Canada's hearing of the appeal in the TWU action.

The TRC Working Group presented its report and action plan that mirrored BC's, but approval was deferred until after the strategic plan is settled, given the potential role of the Federation as a coordinator, rather than a regulator.

A new Board for CanLII was approved, which included CRT Chair Shannon Salter. The budget for CanLII will be discussed at the December meeting with few expected changes.

Reports were received on the progress being made by the national criminal law and family law programs. The reports showed that the programs are well received and successful, but there remains debate regarding whether the Federation's continued engagement in such programs is inconsistent with its coordinating role amongst law societies. It was Mr. Hume's opinion that the Federation's continued engagement is valuable.

Following Mr. Hume's report, Mr. Crossin recognized Mr. Hume's last meeting as the Law Society representative on the Federation Council, thanking him for his tireless efforts and his unfailing dedication. Alan Treleaven, Director, Education and Practice, also paid tribute, noting particularly Mr. Hume's invaluable contributions to the design, implementation and ongoing amendments of the Federation Model Code of Professional Conduct. He presented Mr. Hume with a certificate of service, and his heartfelt thanks on behalf of the Law Society.

In his gracious response, Mr. Hume provided thanks of his own, noting simply that he has received far more than he has put in.

## **DISCUSSION/DECISION**

### **5. Law Firm Regulation Task Force: Interim Report**

Mr. Van Ommen reported as Chair of the Task Force. He began by thanking Task Force members Jan Christiansen, Martin Finch, QC, Peter Lloyd, FCPA, FCA, Lori Mathison, Sharon Matthews, QC, Angela Westmacott, QC, Henry Wood, QC, and Michael Lucas for his invaluable staff support.

The Task Force began its mandate by conducting two consultations with the profession, travelling to 11 different locations in BC and meeting with members directly. During these consultations, Mr. Van Ommen outlined the benefits of regulating law firms. Most firms have systems in place to standardize such practices as file choice, file intake, conflicts, accounting and billing. Under our current regulatory system, individual members are held responsible for these decisions and these practices that, for the most part, are largely controlled by their firm. Law firm regulation aims to hold firms responsible for conduct they control.

In his consultations, Mr. Van Ommen also noted for members that law firms generally influence behavior as well, and are well placed to encourage a culture of ethical and responsible practice. Firms are also uniquely positioned to help lawyers experiencing challenge. Engaging at the law firm level may help remedy difficulties before they reach a level warranting complaint or discipline.

Having its origins in Australia, law firm regulation is occurring around the world; in Canada Nova Scotia's proposals are most fully developed, while task forces continue at work in Ontario, the three prairie provinces and here in BC. The prospect of regulation at the law firm level is particularly important for national firms, and presents the opportunity to standardize practices across the country. To date, the various provincial law societies have worked well in collaboration; moving forward, collaboration with the Federation isn't precluded given the national implications.

Mr. Van Ommen then briefed Benchers on the 10 Task Force recommendations, noting that the approach recommended is to require firms to have in place professional infrastructures to ensure lawyers are competent, ethical and not acting in conflict. The recommendations emphasize proactivity and are outcomes based, rather than prescriptive. In other words, a firm will be expected to have in place policies and procedures to avoid conflict, for example, but the specific methods will be left to the firm to best determine. Additionally, the recommendations acknowledge the differences between traditional law firm structures and sole practitioners. During the consultations, we received important input from sole practitioners who resisted the imposition of additional administration, but who also expressed interest in receiving training and education around office procedures and office management. Further, the recommendations do not include regulation for in house counsel, crown counsel and lawyers acting in a pro bono capacity.

He referred Benchers to the Interim Report for the proposed elements of structure which include:

- Competence
- Practice management
- Client relations
- Confidentiality
- Conflict of interest
- File management
- Appropriate fees and disbursements
- Financial management
- Compliance with legal obligations

He noted that the proposed structure is a registration rather than a licensing scheme; the Task Force does not propose duplication of our current individual licensing of each lawyer. Firms will be required to designate a person who will have contact with the Law Society. Unlike the securities industry, there will be no personal liability imposed on this person. Regulation will be through self-assessment, with firms being responsible for determining if the necessary policies and procedures are in place.

Data has shown that implementation of a self-assessment process alone has produced an important shift in behavior. In Australia, complaints dropped by one third. Nova Scotia has begun the development of a toolkit which contains model policies and useful suggestions for implementing the infrastructure elements. The goal is not necessarily to have information flow back to the Law Society; rather it is to focus attention on the structural elements at the firm level, and change behaviors before they result in complaints.

Mr. Van Ommen did note that rules and policies to address non-compliance will need to be developed. Compliance reviews, which could be akin to periodic trust audits, are one possibility for addressing non-compliance, but more work on this area remains.

He also stressed that implementation will require resources and time to develop model policies and toolkits, and to assist firms with their own implementation. If the recommendations are approved, the next steps involve further consultation with the profession, including work with focus groups such as sole practitioners, large firms, and space sharing professionals. He asked Benchers for their input and guidance. Mr. Crossin noted that no motion was before them, but sought consensus on the recommended approach.

It was observed by a Bencher that, in the financial services industry, the presence of a compliance officer actually served to distance individuals from their professional obligations. The concern was expressed that something similar could occur with the current proposals. Mr. Van Ommen emphasized that the Code of Professional Conduct would remain and individuals would still retain professional obligations.

The importance of focus groups of sole practitioners and those sharing space was stressed by others, who observed that these lawyers often provide services that increase access to justice for very little money. Increased administrative burden could have a deleterious effect. Mr. Van Ommen reiterated the intention to provide ongoing support with both implementation and self-assessment tools.

Following discussion. Mr. Crossin confirmed with the Benchers that there was consensus to move forward with the Task Force's recommended approach.



## **6. Access to Legal Services Advisory Committee - Policy Discussion: Lawyers' professional responsibility to promote access to legal services**

Mr. Crossin introduced committee member Claire Hunter to facilitate the discussion on lawyers' professional responsibility to promote access to legal services. Ms. Hunter, who clerked at the Supreme Court of Canada prior to her call to the Bar, is actively involved in community work, including as a provider of pro bono legal services. She was recently elected Chair and President of the Access Pro Bono Society of BC, represents BC on the CBA's national pro bono committee, and has won numerous awards for her pro bono service.

Ms. Hunter framed the discussion by noting that the Access to Legal Services Advisory Committee, which customarily looks at discreet projects, took a "step back" this year to consider foundational questions such as "what do we mean by access?" and "what is our role in the provision of access?" One proposition that has been advanced is there exists a collective professional responsibility on the legal profession, given its monopoly on legal services. If it is indeed our responsibility to ensure access to legal services, what is the scope of need? There is little data on whose needs are not being met, who chooses self-representation and who is most affected by the lack of affordability of legal services. It is difficult to claim responsibility for something that is hard to define.

Currently, there are no jurisdictions mandating pro bono services, although the American Bar Association has an aspirational rule suggesting 50 hours per year of service. Caveats include the recognition that individual states can choose a higher or lower limit, and those unable to perform service can provide monetary donations to service organizations. The CBA adopted a similar aspirational goal of 50 hours in 1998. To date, only 15% of lawyers are providing at least 50 hours of pro bono service.

In light of this, the Committee discussed whether pro bono work alone was the best way for lawyers to discharge their responsibility, and queried whether other mechanisms could be more effective. She invited discussion of other models or innovations that could meet unmet needs and help facilitate increased access to legal services, and posed the questions:

- Is there a collective obligation to make legal services accessible and available?
- If so, what if anything is required of individual lawyers?
- Do we have the information we need to answer questions, and if not, what do we need?

As Chair of the Committee, Mr. Van Ommen encouraged Benchers to consider systemic changes to effect change and create institutions able to resolve disputes in ways that work, rather than simply debating the merits of mandating pro bono services.

Many Benchers expressed their appreciation for Ms. Hunter's remarks, thanking her for her many contributions.

Some observed that any discussion of lawyers providing pro bono services should include the recognition that lawyers experiencing emotional or mental health challenges may not be best able to provide pro bono services. Others noted that "pro bono" work takes many forms, including providing initial consultations free of charge, that often go unrecognized.

Ms. Hunter clarified the Committee's perspective, that discussion of the profession's responsibility to facilitate access to legal services should be framed to include a wide variety of mechanisms beyond just the provision of pro bono services. Many Benchers agreed, and endorsed the notion of a collective responsibility, but struggled with how some types of specialized lawyers could contribute.

Still others emphasized the need for differing models and mechanisms to reflect differences in the profession, such as urban versus rural, and large firm versus sole practitioner. Others noted the importance of changing the culture to embrace such responsibility, and work with our moral authority rather than our regulatory one. The Law Society has the opportunity to be a leader in this area, and should help facilitate access as well as promote public awareness of the programs and services that exist.

One Bencher applauded the notion of a broadened concept of increased access to legal services, and provided various examples of innovative solutions found in the family law Bar such as becoming trained parenting coordinators, or sitting on Rules revision committees. Another suggested that, if the responsibility flows from being the sole provider of legal services, a possible solution might be to allow others to provide legal services as well, particularly at a level of service that is not currently being met by lawyers.

Other suggestions included: the importance of law reform initiatives, including statutory and Rules reform on practical levels, such as permitting review of builders' liens in Provincial Court rather than Supreme Court; the more widespread use of unbundling as a highly effective mechanism to meet need; and, public recognition of those already providing pro bono work, to applaud their efforts and hopefully act as a catalyst for others to do the same.

It was also recognized that the current social services tax was meant to provide funding in this area, but in fact has not. The suggestion was made that we should take the position that the provincial government should be directing the proceeds of that tax towards its originally intended purpose. Another suggestion was made that the public expects action on this issue, rather than more study or incremental changes; further, that the Law Society already mandates a "tax" to increase access to legal services, in the form of an annual levy on members for Access

Pro Bono. The lack of “pushback” indicates a tacit acknowledgment that such measures are necessary.

Mr. Van Ommen thanked the Benchers for a fruitful and productive discussion. He also asked for approval of the Committee recommendation to include a new question on the Annual Practice Declaration (APD) regarding types of pro bono activities lawyers are currently engaged in. He noted it would also be helpful to engage with law firms to see how they can collaborate towards increased access.

Mr. Crossin advised that the Executive Committee would be charged with approval of a revised APD, but noted no opposition to the recommendation. One Bencher did note that an APD question on access could be expanded beyond pro bono to include all activities lawyers are engaged in to increase access.

Mr. Crossin thanked Ms. Hunter for her helpful contributions to the discussion.

## **REPORTS**

### **7. Report on the Outstanding Hearing & Review Decisions**

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

### **8. Financial Report – September YTD 2016**

Miriam Kresivo, QC, Chair of the Finance and Audit Committee, began her report by thanking the hard working committee members and staff.

She briefed Benchers on the review of the Lawyers Insurance Fund (LIF) investments, for which outside consultants are retained. The \$156,000,000 fund investments returned 6% which exceeds the benchmark. Investment managers are required to report annually; following last year’s building sale, two new managers were hired to oversee investments of the proceeds in the areas of real estate and mortgages.

Ms. Kresivo also reported on the commencement of the audit by the firm PriceWaterhouseCoopers, whose fee will increase this year from \$90,000 to \$91,000.

Jeanette McPhee, Chief Financial Officer, noted that the finance report generally is positive. The General Fund is currently \$1 million above budget; but some of that is timing of revenue and expenses. The year-end projection is to have a positive variance of \$765,000 (3%), which is mainly due to revenue. Member numbers are projected to be 2% over 2015, and although PLTC student numbers are projected below the 2016 budget at 470, electronic filing revenues are over

due to the real estate market. It should be noted that the real estate market is projected to slow down to the end of the year. Operating expenses currently have a positive variance of 1% mainly due to savings in credentials and forensic external fees. She noted that there are a large number of files currently out in the regulation area, so potentially those costs could carry over to next year, resulting in additional corresponding savings in this year.

She also noted that TAF has a positive variance of \$700,000 with 6 months of receipts in, mainly due to real estate transactions. As mentioned, this has been declining recently but we are still projecting a positive variance at year end. Operating expenses in Trust is below budget due mainly to travel savings.

LIF is on track; fees are over by 3% and expenses are under by 10% mainly due to vacancy savings.

### **9. Lawyer Education Advisory Committee: Update on Federation Conference**

Chair Tony Wilson briefed Benchers on the Federation Conference topic of “Legal Education: Building a Continuum”, one aim of which was to develop a continuing collaborative relationship between academia and the law societies. Paula Littlewood, Executive Director of the Washington State Bar Association, spoke to the conference on what the profession and the judiciary will look like in 20 years, and how we should be preparing for the future. She noted that unmet needs, together with internet legal service providers and a changing demographic, will present increasing challenges to the profession. In Washington State, they have begun to address these factors by regulating limited scope practices in which practitioners are trained through law schools and can offer limited areas of practice at reduced rates. The first limited licensing program is for family law practitioners.

Ms. Littlewood’s address was followed by presentations and small group discussions, during which law school representatives and law society regulators discussed various perspectives; some emphasized the autonomy of law schools to shepherd legal education through these challenges, while others stressed collaboration, saying that there should be an effective continuum of legal education through law schools and law societies, who have a joint responsibility to educate future lawyers. Implementing the TRC calls to action will require effective co-operation.

Jeremy Webber, Dean of the University of Victoria Faculty of Law, commented that the conference was excellent for helping to bridge tensions that have developed in recent years between law societies and law schools. In his observation, it has been difficult historically for law schools to engage with the Federation given the relatively few Federation meetings and the lack of regular direct communication. The conference was successful in gathering diverse voices across the table and allowing for meaningful discussion of important issues, amongst which were

the diversity of roles lawyers fill, and the obligation of all participants to prepare for new directions for the profession. He added that the Deans of the BC law schools have appreciated the collaborative relationship and openness that exists between the Law Society of BC and the three BC law schools.

Mr. Hume also noted that the area of ethics, and the Model Code of Conduct, is proving to be an area of improving communication between educators and law societies.

### **10. TRC Advisory Committee Update**

Mr. Crossin invited staff lawyer Andrea Hilland to report to Benchers on behalf of the committee, noting his appreciation for her extraordinary contributions and the excellence of her work for the Law Society.

Ms. Hilland reported that the committee last met on October 31 and discussed the implementation of an outreach strategy that had been devised following the previous meeting. Key to this will be the development of a direct relationship with Indigenous lawyers and community members.

To that end, she noted that Mr. Crossin had been invited to speak at the upcoming Indigenous Bar Association national conference. The First Nations Summit, which represents those First Nations engaged in treaty negotiations, also extended an invitation to the Law Society to speak at its recent meeting; Appointed Bencher Dan Smith spoke on behalf of the Law Society.

Also discussed at the recent meeting of the TRC Advisory Committee were different educational options available to improve cultural competency. It was noted that the TRC calls to action were helping inform review of the PLTC curriculum efforts. CLE is also reviewing their current course list and seeing where they need to develop courses to fill in gaps. The Committee also discussed how to provide training and education to those senior lawyers who may not have had any educational background in this area. Ms. Hilland noted that future training could focus on providing basic historical information on colonization in BC, as well as types of effective communication styles that work best.

Mr. Crossin noted that there is a consensus at the Committee that the work to date has created optimism, excitement and a momentum for the work ahead in years to come. He thanked Ms. Hilland once again for helping to lead the way.

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