



Minutes

Benchers

Date: Friday, July 07, 2017

Present:

Herman Van Ommen, QC, President	Jamie Maclaren
Miriam Kresivo, QC, 1 st Vice-President	Sharon Matthews, QC
Nancy Merrill, QC, 2 nd Vice-President	Steven McKoen
Jasmin Ahmad	Christopher McPherson
Satwinder Bains	Lee Ongman
Jeff Campbell, QC	Greg Petrisor
Pinder Cheema, QC	Claude Richmond
Barbara Cromarty	Phil Riddell
Jeevyn Dhaliwal	Mark Rushton
Thomas Fellhauer	Carolynn Ryan
Martin Finch, QC	Daniel P. Smith
Brook Greenberg	Michelle Stanford
Lisa Hamilton	Sarah Westwood
J.S. (Woody) Hayes, FCPA, FCA	Tony Wilson, QC
Dean P.J. Lawton, QC	

Unable to Attend: Craig Ferris, QC
Elizabeth Rowbotham

Staff Present:

Tim McGee, QC	Michael Lucas
Deborah Armour	Alison Luke
Taylor Ashlie	Jeanette McPhee
Renee Collins	Doug Munro
Su Forbes, QC	Lesley Small
Jeffrey Hoskins, QC	Alan Treleven
Lindsay Jalava	Adam Whitcombe
David Jordan	Vinnie Yuen

Guests:	Dom Bautista	Executive Director, Law Courts Center
	Kensi Gouden	CEO, Courthouse Libraries BC
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Derek LaCroix, QC	Executive Director, Lawyers Assistance Program
	Prof. Bradford Morse	Dean of Law, Thompson Rivers University
	Michele Ross	Education Chair, BC Paralegal Association
	Linda Russell	CEO, Continuing Legal Education Society of BC
	Bill Veenstra	Vice President, Canadian Bar Association, BC Branch
	Prof. Jeremy Webber	Dean of Law, University of Victoria

1. Presentation of the 2017 Law Society Scholarship

Mr. Van Ommen presented the 2017 Law Society Scholarship to Naomi Minwalla, who is pursuing her Masters at Oxford in International Human Rights Law. In expressing her gratitude, Ms. Minwalla observed that her chosen field of study touches upon many aspects of our daily lives, our communities and our society as a whole.

CONSENT AGENDA

2. Minutes

a. Minutes

The minutes of the meeting held on June 9 were approved as circulated.

The *in camera* minutes of the meeting held on June 9 were approved as circulated

b. Resolutions

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Benchers adopt the Mandate and Terms of Reference for the Legal Aid Advisory Committee, appended to the materials of the July 7 Bencher agenda.

BRIEFING/DISCUSSION/DECISION

3. Governance Committee Mid-Year Report

Chair Steve McKoen began his report by thanking committee members and staff for their hard work to date. He noted that the committee has met three times during the year, and has focused on the review of the annual Bencher and Committee survey results, as well as the review of general governance issues; the committee brings three items to the Benchers for consideration.

The first is a recommendation that the policy prohibiting Benchers from being from the same firm be struck. While historically the policy was aimed at avoiding conflict situations, the larger number of Benchers now allows the President to manage conflicts more effectively. The Committee's recommendation is also based on the rationale that members should be allowed to elect their chosen candidates.

The second recommendation is for a continuation of the committee evaluation process through survey. Following its assessment of the quality and review of responses from the survey, the Committee has concluded it remains useful, but review of some of the questions is required. Work on this continues.

The third recommendation is for the Executive Committee to review its Agenda setting process to include consideration of how to foster meaningful discussion around table. One suggestion being recommended by the Governance Committee is for a consideration of whether certain substantial items ought to have first and second readings, to facilitate discussion with the first reading and provide time before the second reading and decision for Benchers to review and further consider. He noted that a motion was not required for this recommendation.

Following these recommendations, Mr. McKoen moved (seconded by Ms. Hamilton) that the unwritten policy that two current Benchers cannot be members of the same law firm be formally abolished. Mr. Van Ommen called for discussion.

In response to the question of whether abolishing this policy may result in a concentration of Benchers from larger, Vancouver-based firms, Mr. McKoen noted that the number of votes needed for election is likely to prevent that occurrence. Others commented on the possibility that removal of the policy could affect the diversity of background around the table, while others noted that the number of Benchers from large Vancouver firms appears to be decreasing, perhaps because of the economic realities attendant with Bencher service.

Following a vote, the motion passed with 28 for, 1 opposed.

Mr. Van Ommen noted that no motion was required for the final two recommendations of the Governance Committee, and then invited discussion. One comment was made welcoming a second reading of substantial matters, given the difficulties inherent in a full discussion involving 31 people. An attending member of the CBABC expressed concern that discussion of substantial matters may occur between readings and outside of the Bencher table, eroding transparency.

With no further comments or concerns, the two additional recommendations were taken as confirmed by Benchers.

4. Financial Report – May YTD 2017

Finance and Audit Committee Chair Miriam Kresivo, QC introduced CFO Jeanette McPhee and the year to date Financial Report. She noted that the Finance and Audit Committee is continuing to work on the budget for 2018 which will be presented to Benchers at the September 27 meeting.

Ms. McPhee reported that the Law Society is ahead of budget to date, with a projection of approximately \$500,000 ahead of budget due to an increase in revenue. Expectations are for additional membership revenue, PLTC registration is at budget with 500 students and an increase of approximately \$160,000 over budget for electronic filing revenues, the latter due mainly to an increase in real estate units sold.

There are also expected savings in operating expenses of approximately \$90,000 achieved largely in the legal and consulting fees in the human resources area. Additionally, external counsel fees, a significant part of the budget, are on track for the year at this time.

Though only based on the first quarter TAF receipts, the Trust Assurance Program appears to be slightly over budget, likely due to real estate transactions; it is likely this trend will continue and we will end the year ahead of budget. The Lawyers Insurance Fund is also slightly ahead; investment returns are at 7.3%, which is very good compared to the benchmark of 4.6%.

REPORTS

5. Strategic Plan Review Process:

- **Proactive Regulation**

CLO Deb Armour introduced the topic, outlining a focus on the diversion program and proactive practice reviews of members.

She began by clarifying that proactive regulation refers to regulatory actions that seek to prevent issues before they happen, and often involves supporting lawyers in their practices; she highlighted that support of lawyers is one of the best ways to protect the public.

This is in contrast to our current forms of regulation which are largely reactive, triggered as response to complaints. While complaints will likely always remain a factor in regulation, our aim is to develop ways to try to prevent the conduct that may require disciplinary action, and hopefully avoid the harm that has invariably occurred along the way.

Some of our most successful programs involve proactive work; in our Trust Assurance program, audits reveal issues that would otherwise remain undetected, and provide opportunity for remedial assistance through our auditors. Our practice advisors and Benchers also provide a way for lawyers to reach out for advice and guidance, and are invaluable resources. Our CPD program, educational outreach and website materials are all examples of proactive and beneficial tools. Conduct meetings and reviews provide remedial opportunities, as does the regular interaction with members by the Professional Conduct teams. The Lawyers Assistance Program is another positive example of proactive impact.

Ms. Armour also noted that other law societies have implemented programs such as mentorship, law office support and new lawyer support programs which have also proven successful in proactively assisting before problems become conduct issues.

Diversion:

An important example of a successful program under consideration is diversion, which refers to the diversion of cases involving mental health issues, including substance use, out of the traditional discipline process and toward treatment and support. The goal of diversion is the treatment of the underlying issue, rather than the discipline of the resulting transgression. As has been reported to Benchers previously, the legal profession experiences a disproportionate level of mental health issues as compared with other professions and the general public. A significant number of the complaints dealt with by our professional conduct staff often involve the effects of mental health issues, such as procrastination, missed commitments, erratic behavior with clients and counsel, poor work quality or failure to respond.

It was queried whether the Law Society has a mental health care professional on retainer for consultation or perhaps attendance at practice reviews. Ms. Armour noted that the Credentials department does have a list of professionals to consult as the need arises but professional conduct does not make regular use of such consults; Bencher Brook Greenberg also noted that it is important to avoid compelled treatment, emphasizing the need for an informed and thoughtful approach in each instance.

Should the program be considered for implementation, the involvement of mental health professionals will be an important consideration. Ms. Armour noted that the Nova Scotia program has a committee that decides which cases will be diverted to the program; this committee includes a mental health professional. She also noted that the misconduct involved in these cases is often minor, and participation is voluntary and consensual.

In addition to Nova Scotia, whose program has had only 15 referrals since its inception in 2011, 27 American States have similar programs, as does the Crown. Ontario is currently considering the possibility.

Proactive Practice Reviews:

As with the trust audit review, the proactive practice review provides lots of opportunity for remedial assistance. Both Ontario and Saskatchewan have proactive practice review programs which are designed to be educational and are separate from the regulatory scheme. Significantly, only 3% of all those reviewed in Ontario are referred for investigation; the focus is on remediation. Reviews are random, but risk-based and therefore often determined by area of practice. Approximately 400 reviews are done in Ontario each year, which is fewer than the number of trust assurance reviews. The aim is to review lawyers within their first 8 years of practice, based on statistical analysis which shows a trend towards difficulties beginning in the 9th year of practice.

Similar to the proposals for law firm regulation, a proactive practice review program will not be 'one size fits all' but will be tailored to individual needs. Tools to measure success of any such program remain to be developed. In response to a question, Ms. Armour clarified that diversion and proactive practice reviews are distinct programs. She also noted the importance to both programs of destigmatizing mental health issues, and incorporating the message that we are able to provide help to members beyond just regulating. In response to another question, Ms. Armour noted that there did not appear to be a reduction in complaints since the implementation of the program in Ontario, although the failure of sole practitioners does appear to have declined. One Bencher also noted that the chartered accountants have had practice reviews since the 1970's which are done by firm, rather than individually. They have been accepted by that profession as part of the necessary educational process and though expensive, have proved successful.

- **Public Confidence in the Administration of Justice and the Rule of Law**

Manager of Policy and Legal Services Michael Lucas provided the Benchers with an overview of the importance of the rule of law to public confidence in the justice system. The rule of law, cited in the preamble to the Charter, is fundamental to our personal rights and freedoms and to our constitutional structure. Though esoteric in nature, it is highly relevant to our day to day lives. He noted its pervasiveness on the news regarding current world events; positive events are examples of robust support for rule of law principles while negative ones tend to be characterized by an erosion of the rule of law. Closer to home, rule of law principles are inextricably tied to the Law Society's mandate as set out in section 3 of the Legal Profession Act.

Under that section, the Law Society's mandate and responsibility as regulator is to ensure the public has confidence in the justice system; to do that, we must help people understand it. Surveys taken in 2013 showed that almost half of Canadians did not have confidence in the justice system or our courts. How does this apply to our role as regulator, and to our strategic planning process? Goal 3 of our current strategic plan says the public will have greater confidence in the rule of law and the administration of justice. Working toward that goal, we have undertaken various initiatives to enhance the Law Society's voice, such as the lecture series and the essay contest. Our planning process moving forward should include questions such as what new initiatives can be developed. How can we work better with other advocates? How can we find new ways to make the public more aware, and hopefully more confident in our system? As a justice system stakeholder, how do we work to see that the rule of law is not taken for granted, and its importance appreciated, well before the public's lack of confidence causes the ultimate collapse of our system?

Benchers and others expressed thanks for Mr. Lucas' presentation, and underscored the importance of all justice system stakeholders, both here and abroad, to engage with these issues. It was also noted that, in the context of indigenous peoples' low confidence with the justice

system, and perceived lack of justice for the aboriginal community, our historical systemic notions of justice must be reexamined if we are to move toward true reconciliation.

Mr. Van Ommen noted that this presentation marked the last of the strategic planning briefings to Benchers in advance of planning sessions in the Fall. A skeleton of a plan will be created using the 5 elements of section 3 of the Legal Profession Act as a guide. It is likely the planning process will require an extra, dedicated meeting.

6. Law Firm Regulation Task Force: Second Interim Report

As Chair of the Task Force, Mr. Van Ommen thanked its hard working members as well as Mr. Lucas, Ms. Armour and Policy staff lawyer Alison Luke for their invaluable guidance and efforts.

This report will provide further details for the proposed program as well as one policy development. Mr. Van Ommen noted that 5 focus groups had been formed based on firm size to provide feedback on the self-assessment tool to ensure its ease of use and effectiveness. The results have been collated and compared with developments in other jurisdictions; a key goal is to develop a self-assessment tool that is similar across the country. Noting that the self-assessment tool remains a work in progress, he invited comment and discussion from Benchers on the policy approach taken.

He then reviewed each of the recommendations and some of the policy considerations behind them.

Regarding firm registration, he noted that, provided we could accurately determine who the firms were together with applicable information about them, a pre-populated form could be sent to a firm representative. Regarding a designated representative, he stressed that no personal liability would rest with that designate; all responsibility will rest with the firm, as will any liability resulting from a failure to report.

The self-assessment process is central to the entire regime. As seen in other jurisdictions, it is the process of assessment itself that tends to change behaviours, providing firms with the opportunity to review its practices and procedures.

Mr. Van Ommen identified one policy change from the first report to Benchers: originally the eight achievable elements did not include a specific equity and diversity element; however, following consultation and review of proposed programs in other provinces, the recommendation now is to include the promotion of diversity and inclusion amongst achievable goals.

The recommended development of model policies is aimed in part at assisting smaller firms, for whom the requirement of firm policies to achieve objectives may represent considerable administrative burden. Also being recommended is a schedule for implementation, which proposes that firms register and appoint designated representatives in early 2018. At this stage, firms will also be required to complete a concise self-assessment exercise. The results of this assessment will assist the Law Society in developing model policies; this will require some consideration of the resources required to do so. The estimate is that it may take up to a year to develop policies and potentially engage with external providers to develop helpful resources for firms to use. Accordingly, by 2019 we aim to be asking firms to fill out a revised self-assessment that will be linked to relevant resources and put in place policies to ensure they are meeting objectives. The intention at these first stages of implementation is to emphasize assistance to firms, rather than focus on compliance; however, consideration should be given to the development of a compliance regime that is consistent nationally.

In response to a question, Mr. Van Ommen clarified that we do not intend to regulate the amount of fees being charged by firms, rather, the intention is to have firms consider what reasonable fees may be.

Some Benchers expressed support for the proposals, particularly with regard to the self-assessment which will encourage firms to think about the way they conduct business. Others expressed concern with the definition of “firm”, querying whether different structures such as a collection of incorporated lawyers constitutes a firm. Mr. Lucas noted that the decision to treat collectives of individuals operating as independent legal entities as a “firm” was based in part on the fact that clients would see it that way, and factors such as a shared trust account. However, if distinctions between lawyers was clear to clients, and the only things being shared were meeting rooms, it is unlikely they would be defined as a “firm”.

Concern was also expressed regarding the administrative burden on small firms, as well as the mandatory nature of the policies. Mr. Van Ommen stressed that the intention was not to create a “one size fits all” program, but to tailor the tools and expectations to the different firm sizes. Concern was also expressed regarding the imposition of social policies on firms, and questions arose regarding the timing of firm audits. Mr. Van Ommen noted that the intention was to create a ‘light touch’ regulation, balancing the benefits of law firm regulation with the knowledge that increased regulation could represent increased burden on firms.

7. Mid-Year Advisory Committee Reports

- **Access to Legal Services Advisory Committee**

Chair Martin Finch, QC reported for the Committee, beginning by thanking its members and staff for their hard work. Given the Benchers’ preference for encouragement of pro bono

activities, rather than mandating such activity, this year's work has focused on the development of mechanisms and processes to advance access to legal services and justice. It was recognized that more information on lawyers' pro bono activities was needed, so the Committee has sought to create a questionnaire to canvass the profession on its pro bono and 'low bono' work, and suggests that a voluntary section be added to the Annual Practice Declaration. The Committee has also worked on a vision statement of goals for the profession regarding the commitment to support access to justice, which should be ready for presentation to Benchers in September.

Additionally, the Committee collaborated with the Law Foundation to administer a 2 year pilot project aimed at providing legal access for children. The new Child Advocate will assist youth coming in contact with the legal system; the Committee is recommending continued funding for that project this year. The Committee intends to meet with managers of medium and large Vancouver firms to learn about processes and mechanisms being used to advance access to justice in a larger firm context. Finally, the Committee continues to work to provide guidance and direction regarding potential strategic planning items for our next Strategic Plan.

- **Equity and Diversity Advisory Committee**

Second Vice-President and Chair Nancy Merrill, QC thanked committee members and staff for their hard work. She reported that the Committee has been reviewing the maternity leave benefit program in an effort to increase its effectiveness, and has also been reviewing mental wellness initiatives. A new Equity Ombudsperson is being hired, and the Law Society is now accepting nominations for the new Diversity and Inclusion Award. The Committee is also reaching out to the National Inquiry into Missing and Murdered Indigenous Women and Girls, and is looking to send a representative to attend the Inquiry's Smithers sitting.

- **Lawyer Education Advisory Committee**

Chair Dean Lawton thanked Committee members and staff for their hard work throughout the year. He reported that the Committee has had engaging discussions regarding recommendations surrounding continuing education; Benchers can expect a report toward the end of the year which may also include a 'minority report' to capture the diverging viewpoints. The report will recognize the need for an evolution in approach to CPD and will also take into account our strategic plan goals. Amongst the recommendations coming forward will be the incorporation of lawyer wellness, as well as a number of statistically relevant issues emerging from the 2016 lawyer education survey. The Committee is also looking to consult with the Truth and Reconciliation Advisory Committee on incorporating educational elements to address the calls to action on reconciliation.

- **Rule of Law and Lawyer Independence Advisory Committee**

Vice-chair Mark Rushton began his report by thanking Committee members and staff for their work and support. The Committee has continued its work to create a public awareness around the rule of law, including holding its second annual essay contest, which garnered over 84 essay applications, as well as hosting its first Lecture Series on the Rule of Law. Additionally, the Committee has been engaged on issues such border searches of electronic devices by Canada Border Services Agency; it has met with other interested groups such as Lawyers Rights Watch and the BC Civil Liberties Association, and prepared a letter for the President to the Minister of Public Safety and the Minister of Justice and Attorney General.

- **Truth and Reconciliation Advisory Committee**

Mr. Van Ommen reported as chair of the Committee, thanking its members and staff. He also noted the recent loss to the Committee of member Len Marchand, now Mr. Justice Marchand, given his appointment to the Bench.

The Committee has continued work on challenging issues, such as recommending the removal of the statue of Matthew Begbie from the Law Society lobby given its negative symbolism for the Indigenous community. One function of the Committee is to encourage Benchers discussion and promote change in uncomfortable areas; discussion of this issue by Benchers produced diverging views but ultimately a result that was consistent with the Committee's recommendation.

The Committee is also working to develop a Fall symposium on Indigenous issues. Once a keynote speaker is chosen, dates can be confirmed and the symposium publicly promoted. As part of this symposium, the Committee is also working with CLE to film short vignettes of interviews with Indigenous lawyers regarding their experiences in the legal system.

Additionally, the Committee continues to work with the Executive Committee to develop and deliver cultural competency training to Benchers, and expects to have an initial session in place for the Fall. Additions have already been made to the PLTC curriculum to incorporate education around Gladue Reports and indigenous child welfare issues.

Mr. Van Ommen also noted that Policy and Legal Services staff lawyer Andrea Hilland has been involved in community outreach, speaking to various organizations on behalf of the Law Society.

8. National Discipline Standards: 2015/16 Implementation Report

Ms. Armour provided highlights of the required annual report which was the result of an in depth review by the Federation of Law Societies of Canada's National Discipline Standards Committee of 2015 and 2016 results. The goal of such reporting is to focus law societies on improvements

that can be made to meet the National Discipline Standards. She noted that while there has been improvement, no law society met all the standards during the reporting period. The Law Society of BC is third highest in the country in 2016, with only the following 3 standards not being met:

- The ability to share disciplinary information with other law societies: The Federation has developed a model policy and we are aiming for a Rule change by the end of the year to bring the Law Society in compliance with this standard;
- Easy accessibility of information in our directory regarding a lawyer's disciplinary history: currently information from 2003 onward is easily accessible, but the large task of posting information before that time remains;
- Delivery of decisions of hearing panels: we have never met the standard of delivering final submissions within 90 days of hearing, 90% of the time. Discussions of ways to improve on this important and challenging standard continue.

On the latter standard, Mr. Van Ommen urged Benchers to commit to timely reasons. Following discussion, it was suggested that reducing the size of review panels could assist. The Law Society of BC has much larger review panels than any other law society.

EXECUTIVE REPORTS

9. President's Report

Mr. Van Ommen briefed the Benchers on various Law Society matters to which he has attended since the last meeting. He noted that recruitment of hearing panels continues, and asked Benchers to encourage strong candidates to apply.

He also noted his attendance at the Law Society of Upper Canada's (LSUC) Convocation and end of term dinner. In his address to Benchers there, he noted the importance of consultation and coordination with other Canadian law societies in determining a solution to the licensing crisis in Ontario, given lawyer mobility.

To conclude his report, he noted to Law Society of BC Benchers that meaningful consultation by LSUC would require serious engagement by all law societies, including our own, and a willingness to review our own licencing program.

- Briefing by the Law Society's Member of the Federation Council

Reporting as the Law Society's Federation Council representative, Mr. Van Ommen briefed Benchers on his attendance at the Federation Council meeting in Iqaluit on National Aboriginal Day (to become known as National Indigenous Peoples Day). Council members spent the

morning with local elders and lawyers discussing legal aid and steps that are being taken in response to a number of problems.

The agenda of business also included a review of the National Committee on Accreditation. A consultant was hired to review all associated processes, given the disparity in success rates between Canadian law school graduates and lawyers coming through the National Accreditation process. The resulting report is available now to Benchers and will be made available to the public shortly.

10. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers. Specifically, he updated Benchers on 5 operational priorities, including:

- Full departmental reviews of key performance measures;
- A comprehensive resourcing analysis to ascertain areas requiring additional support;
- Cultural competency training for staff;
- Outstanding file reduction/counsel resourcing plan

He also noted that a telecommuting pilot project has begun which has been set up in phases; for the first phase, participants will report back after 3 months with feedback on productivity, adequacy of technology, quality of work and impacts on teamwork. Following analysis of this first phase, we will determine if it is feasible to proceed to phases 2 and 3.

Following Mr. McGee's report, Mr. Van Ommen acknowledged this as his last Bencher meeting as CEO, and invited Chief Information and Planning Officer Adam Whitcombe to say some remarks.

Mr. Whitcombe related for Benchers the many accomplishments of Mr. McGee since his assumption of the CEO role 12 years ago, citing innovations such as the successful implementation of the Trust Assurance Program, the CPD program and in house custodianships, to name a few. He also put in place a new management structure, key performance measures, a strategic planning process and a comprehensive governance review in 2012.

He thanked Mr. McGee for his professionalism, creativity and steady hand, and also his warmth and approachability, all qualities integral to a true leader. We are a better organization today as a result of his leadership. He will be missed.

Mr. Van Ommen echoed his thanks, noting that Mr. McGee managed a smooth running organization based on sound fiscal policies and modern management techniques. He also praised Mr. McGee's leadership, as evidenced in part by his stellar leadership team. On behalf of the

Bencher, he expressed his gratitude, noting that the public and the legal profession as a whole owe him a debt of gratitude as well.

Mr. McGee replied with thanks of his own, for the moving words and for the farewell functions he has attended. He left Bencher with the observation that his proudest moments as CEO came with his involvement in Call ceremonies; welcoming new lawyers into the profession, and hearing the words of wisdom of successive presidents underscored the hard work and perseverance that preceded those moments, and the energy and hope for the future embodied by the profession's newest members.

He wished his team, and the Bencher well.

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2017-07-07