



Minutes

Benchers

Date: Friday, March 01, 2019

Present:

Nancy G. Merrill, QC, President	Claire Marshall
Craig Ferris, QC, 1 st Vice-President	Geoffrey McDonald
Dean P.J. Lawton, QC, 2 nd Vice-President	Steven McKoen, QC
Jasmin Ahmad	Christopher McPherson, QC
Jeff Campbell, QC	Jacqui McQueen
Pinder Cheema, QC	Phil Riddell, QC
Jennifer Chow, QC	Mark Rushton
Barbara Cromarty	Carolynn Ryan
Anita Dalakoti	Karen Snowshoe
Jeevyn Dhaliwal	Michelle D. Stanford, QC
Martin Finch, QC	Sarah Westwood
Brook Greenberg	Tony Wilson, QC
Lisa Hamilton, QC	Guangbin Yan
Roland Krueger, CD	Heidi Zetsche
Jamie Maclaren, QC	

Unable to Attend: Elizabeth Rowbotham
Michael Welsh, QC

Staff:

Don Avison	Alison Luke
Gurprit Bains	Jeanette McPhee
Su Forbes, QC	Doug Munro
Mira Galperin	Veronica Padhi
Kerryn Garvie	Annie Rochette
Andrea Hilland	Lesley Small
Jeffrey Hoskins, QC	Alan Treleven
David Jordan	Adam Whitcombe, QC
Jason Kuzminski	

Guests:	Kenneth Armstrong	Vice-President, Canadian Bar Association, BC Branch
	Dom Bautista	Executive Director, Law Courts Center
	Dr. Susan Breau	Dean of Law, University of Victoria
	Stephen R. Crossland	Chair, Washington Supreme Court LLLT Board
	Dr. Catherine Dauvergne	Dean of Law, University of British Columbia
	Peter Leask, QC	Life Bencher, Law Society of BC
	Paula C. Littlewood	Executive Director, Washington State Bar Association
	Prof. Bradford Morse	Dean of Law, Thompson Rivers University
	Ian Mulgrew	Reporter, Vancouver Sun
	Caroline Nevin	CEO, Courthouse Libraries BC
	Wayne Robertson, QC	Executive Director, Law Foundation of BC
	Michele Ross	President & Education Chair, BCPA Paralegal Association
	Robert Seto	Program Director, Continuing Legal Education Society of BC
	Kerry Simmons, QC	Acting Executive Director, Canadian Bar Association, BC Branch
	Karen St. Aubin	Membership Director, Trial Lawyers Association of BC

CONSENT AGENDA

1. Minutes of January 25, 2019 meeting (regular session)

The minutes of the meeting held on January 25, 2019 were approved as circulated.

2. Minutes of January 25, 2019 meeting (*in camera* session)

The minutes of the meeting held on January 25, 2019 were approved as circulated.

3. Amendments to Rule 4-38 – Pre-hearing Conference

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 4-38 (8) to (10) and substituting the following:

- (8) The conference may consider any matters that may aid in the fair and expeditious disposition of the citation, including but not limited to
 - (a) simplification of the issues,
 - (b) amendments to the citation,
 - (b.1) any matter for which the Bencher may make an order under subrule (10),
 - (b.2) conducting all or part of the hearing in written form,
 - (c) admissions or an agreed statement of facts,
 - (d) disclosure and production of documents,
 - (d.1) agreement for the hearing panel to receive and consider documents or evidence under Rule 4-41 (3) (e) [*Preliminary matters*], and
 - (e) the possibility that privilege or confidentiality might require closure of all or part of the hearing to the public, or exclusion of exhibits and other evidence from public access.
- (9) The respondent or discipline counsel may apply to the Bencher presiding at the conference for an order
 - (b) to withhold the identity or contact information of a witness,
 - (c) to adjourn the hearing of the citation,
 - (d) for severance of allegations or joinder of citations under Rule 4-22 [*Severance and joinder*],
 - (e) for disclosure of the details of the circumstances of misconduct alleged in a citation under Rule 4-35 [*Application for details of the circumstances*],
 - (e.1) that the Bencher may make under subrule (10), or

- (f) concerning any other matters that may aid in the fair and expeditious disposition of the citation.
- (10) The Bencher presiding at a pre-hearing conference may, on the application of a party or on the Bencher's own motion, make an order that, in the judgment of the Bencher, will aid in the fair and expeditious disposition of the citation, including but not limited to orders
- (a) adjourning the conference generally or to a specified date, time and place,
 - (b) setting a date for the hearing to begin,
 - (c) allowing or dismissing an application made under subrule (9) or referred to the conference under this part,
 - (d) specifying the number of days to be scheduled for the hearing,
 - (e) establishing a timeline for the proceeding including, but not limited to, setting deadlines for the completion of procedures and a plan for the conduct of the hearing,
 - (f) directing a party to provide a witness list and a summary of evidence that the party expects that any or all of the witnesses will give at the hearing,
 - (g) respecting expert witnesses, including but not limited to orders
 - (i) limiting the issues on which expert evidence may be admitted or the number of experts that may give evidence,
 - (ii) requiring the parties' experts to confer before service of their reports, or
 - (iii) setting a date by which an expert's report must be served on a party, or
 - (h) respecting the conduct of any application, including but not limited to allowing submissions in writing.
- (11) If an order made under this rule affects the conduct of the hearing on the citation, the hearing panel may rescind or vary the order on the application of a party or on the hearing panel's own motion.

4. Revised Terms of Reference for Annual Fee Review Working Group

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Annual Fee Review Working Group be continued with terms of reference as attached [in the agenda package].

REPORTS

5. President's Report

Ms. Merrill provided a summary of the matters discussed at the Executive Committee meeting on February 14, including; the design of various Law Society awards, an update on the Counsel Resource Plan, recommended revisions to the annual practice declaration to revise questions about pro bono, a new mandate for the Alternate Legal Service Providers Working Group, formation of a legal aid coalition, an appointment to replace Heidi Zetsche on the CLEBC Board, and the date of the 2019 annual general meeting.

Ms. Merrill reported that she had almost completed populating the Futures Task Force. Mr. Ferris would be Chair and Ms. Dhaliwal would be Vice-Chair.

She said she attended a number of events over the last month, and had been arranging for various interesting and engaging guest speakers to attend Bencher meetings throughout 2019.

A Leadership Workshop for Women Benchers and Selected Guests would be held at the Law Society on April 3 and Respectful Workplace Training for Benchers would take place on May 1.

Ms. Merrill said she had sent a letter to the Attorney General following the release of the budget commenting on the funding of legal aid.

6. CEO's Report

Mr. Avison thanked Benchers and staff for volunteering to teach professional ethics at the PLTC program. He also reported that other Canadian law societies had expressed in our online practice management course and we have recently agreed to license the course to them.

Mr. Avison noted that he and Ms. Merrill both attended the pre-budget "lock up" in Victoria. There were modest funding allocations for legal aid supporting the establishment of eight legal aid clinics.

Mr. Avison reported on engagement over the past week with both Dr. Peter German and his colleagues, and the Maureen Maloney panel, on anti-money laundering. Staff from the Law Society and Mr. Riddell participated. There was a lot of discussion about the role of the Law Society, the audit cycle and areas of high risk.

Mr. Avison said Ms. Natasha Dookie, the new Chief Legal Officer, would be starting the following week and thanked Ms. Bains for her work in the Acting Chief Legal Officer role over the past few months.

The Federation meetings, which Mr. Avison would be attending with the President and senior staff the following week, will be held in Montreal. He said he would speak to a number of issues at those meetings, including continuing efforts to improve funding for legal aid, background to both the Dr. German and Maureen Maloney processes, the status of work in BC on the follow up to the Truth and Reconciliation Commission's Report, the work of the Mental Health Task Force, and the status of work in relation to alternate legal service providers/licensed paralegals.

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

Mr. Van Ommen was unable to attend and provide an update at the Bencher meeting.

GUEST PRESENTATIONS

8. Update on Washington State's Limited License Legal Technician (LLLT) Program

Ms. Merrill introduced and welcomed the guest speakers, Ms. Paula Littlewood, Executive Director of the Washington State Bar Association, and Mr. Steve Crossland, Chair of the Washington Supreme Court LLLT Board.

Ms. Littlewood began by setting the scene with some key points about the Washington State Bar Association and the provision of legal services in Washington State; namely, the legal profession's monopoly on legal services was lost many years ago. Examples given where legal services are not being provided by lawyers were real estate transactions and signing directives before surgery in hospitals. She also referred to the United Kingdom, where giving legal advice is not a reserved activity.

Ms. Littlewood's proposition was that "one size does not fit all" for the provision of legal services and that not every problem needs a lawyer, in the same way that not every medical problem needs a doctor. The issue, as Ms. Littlewood observed, is that there is a shortage of lawyers, public demand is increasing, and consumers are going elsewhere. This problem can be explained by predominantly two factors: declining numbers of law school applications and baby boomer lawyers transitioning out of the profession over the next 10-15 years, expect to be half of the total membership in Washington State, which equates to approximately 20,000 lawyers. She said the United States could triple the number of law schools and the unmet legal need would still not be met.

Ms. Littlewood divided the unmet legal need into four categories: low income (85% unmet need), moderate income (80% unmet need), middle income (50% unmet need) and those people that don't know they have an unmet legal need. She said they were all untapped markets, which have an estimated value of around \$9 billion. The overall untapped market may be worth as much as \$16 billion.

In her view, the issue is how to help lawyers get the work because there is a lot of it. One factor is that there are a number of other avenues or resources, such as Legal Zoom, that the public now use to access information about their legal problems. Much like drastic change that has occurred in other industries because of technology, such as how people book travel online and the online availability of newspapers and books, change is coming to the legal profession and the way in which legal services are provided.

As an example, Ms. Littlewood referred to the disaggregation of medical services in Washington with the creation of nurse practitioners. This role allowed doctors to “practice at the top of their license” and allow other licensed professionals to perform tasks that could be carried out by someone other than a doctor.

Similarly, the Supreme Court in Washington State created the Limited License Legal Technician role. Despite much opposition, a proposed LLLT rule was drafted following a Supreme Court directive. Subcommittees were convened that considered four practice areas: family, elder, immigration and landlord tenant law. Family law was recommended at the first practice area for the LLLT role in 2008. The LLLT Rule was not adopted by the Supreme Court until 2012, at which time the LLLT Board was authorized to administer the program. The Board was charged with creating and drafting the operational details for the license and determining the practice area and education requirements.

Family law was formally chosen as the first practice area and approved by the Supreme Court in 2013. Mr. Crossland then outlined the family law scope of practice and tasks a LLLT would be permitted to complete. Other minimum requirements were also put in place for LLLTs, including proof of financial responsibility and a minimum of 18 years of age.

Mr. Crossland said the Board came up with a pathway to admission, including educational requirements, examinations, an experience component and licensing requirements. Ms. Littlewood then provided more detail about how to become licensed as a LLLT.

The educational component is made up of “core” and “elective” components. The courses can be completed online by live streaming the classes, which she said was a huge advantage for people in rural communities. Ms. Littlewood then compared the cost of completing a law degree with the LLLT program, and said the LLLT program was significantly cheaper and less time-consuming to complete.

In terms of employment, Mr. Crossland provided a breakdown of the LLLTs currently working in Washington State, with 8 working in law firms, 27 LLLTs either jointly or independently owning a law firm, and 1 LLLT with a mixed model of practice.

Mr. Crossland and Ms. Littlewood also recognized that the LLLT program is not going to fix the unmet legal need, but were of the view that it was a good starting place and that the numbers of people seeking to become LLLTs was expected to increase with time. They also felt that, with expanded areas of practice for the LLLT program, the number of people enrolling in the program may increase.

Mr. Crossland and Ms. Littlewood finished their presentation by painting a picture of the future of the legal profession and the LLLT program. They hoped that in 10-15 years people would view the LLLT program as they view nurse practitioners today.

Mr. Crossland and Ms. Littlewood encouraged Benchers to include the public, lawyers and judges in discussions about any potential programs from the beginning and get “buy in” about the fact that there is a problem that needs to be fixed.

DISCUSSION/DECISION

9. Review of the Law Society’s 2018 Audited Financial Statements and Financial Reports

Mr. Ferris introduced the item and asked Ms. McPhee to speak to the report.

Ms. McPhee noted that from an operating point of view, the Law Society had a positive year in 2018. This was mainly due to additional revenue that was received over the course of the year. The general fund revenue was \$26 million, which was 5% over the budgeted \$24.7 million. Ms. McPhee explained the additional revenue, noting D & O insurance recoveries on legal defense files, which amounted to \$514,000, and interest income of \$319,000. There was also practice fee revenue of \$242,000 over budget, custodianship recoveries of \$90,000 and 40 more PLTC students than budgeted.

Ms. McPhee observed that the practicing membership in BC was up 3.2% in 2018 and the number of PLTC students in 2018 increased to 540. The number of PLTC students in 2019 is expected to increase to between 640 and 660 students for 2019.

The Law Society’s operating expenses were budgeted at \$24.7 million and came in under budget at \$24.1 million, which is 2.4%. Ms. McPhee provided reasons for the savings, including compensation savings of \$343,000, external counsel fee savings of \$65,000 and \$174,000, HR savings of \$196,000 in recruiting, legal and consulting fees, Bencher and committee savings of \$113,000, meeting and travel expenses savings of \$73,000.

Ms. McPhee then compared the actual results with the budget in 2018 for the Trust Assurance Fee and Trust Assurance Program. There were some savings because of staff vacancies.

Ms. McPhee then reviewed the general fund balance sheet for December 2018, which is made up of unrestricted net assets (\$5.6 million), assets (\$58.1 million), liabilities (\$33.4 million), capital allocation (\$2.2 million), trust assurance (\$3 million) and capital assets (\$12.9 million).

She then spoke about the Special Compensation Fund, followed by the Lawyers Insurance Fund. For the Lawyers Insurance Fund, there was an increase in revenue of 3% and significant savings in the operational expenses, due to staff vacancies, external counsel fees, and insurance and administrative expenses. In terms of claims, the provision for claims increased from \$13.6 million in 2017 to \$16.5 million in 2018.

The long term investment returns were then reviewed. Ms. McPhee said 2018 was not a good year resulting in a negative return. However, the Law Society has a diversified portfolio and it can expected to go up and down depending on the investment markets. The net assets of the Lawyers Insurance Fund went down 8.7%. There is no concern about the net assets overall because we still have a substantial fund.

Mr. Ferris thanked Ms. McPhee for her presentation. He said he was very satisfied with the work of PricewaterhouseCoopers and that the Law Society was in very good hands with them as our auditors. He then made the following motion, which was seconded.

BE IT RESOLVED to approve the Law Society's 2018 Combined Financial Statements for the General & Special Compensation Funds, and the 2018 Consolidated Financial Statements for the Lawyers Insurance Fund.

The motion passed unanimously.

10. Recommendation on CPD Credit for Pro Bono Work

Mr. Wilson introduced the item and asked Benchers to approve recommendation 10 in the Lawyer Education Advisory Committee's report:

Recommendation 10: The Law Society will not recognize pro bono and legal aid work as eligible for CPD credit.

The motion was moved and seconded.

Mr. Wilson provided background information about the recommendation. While he recognized the range of courses that qualify for CPD credit has expanded over the years, and listed a few examples, the consideration of CPD credit for pro bono and legal activities goes back to December 2017. At that time, the Lawyer Education Advisory Committee unanimously recommended against providing CPD credit for pro bono and legal aid activities because it did not match the objective of the CPD program to promote lawyer competence.

The Lawyer Education Advisory Committee again considered the issue in 2018 and came to the same conclusion that providing CPD credit for pro bono and legal aid activities is not in line with the objective of the CPD program to promote lawyer competence.

The Committee recommended to the Benchers that they approve recommendation 10 as outlined in the report and repeated above.

Mr. Maclaren then proposed the following motion, should the motion proposed by Mr. Wilson fail.

“To promote the objects of greater professional and experiential learning about the barriers to access to justice confronted by low-income British Columbians, and greater capacity to pursue fact-driven legal strategies for overcoming such barriers, the Law Society will grant up to two hours of annual CPD credit for twice the amount of time that a member spends interviewing clients through a pro bono or legal aid program.”

Mr. Maclaren said, by providing CPD credit for pro bono or legal aid work, this would encourage lawyers to get out into their communities to learn more about the access to justice that low-income people confront on a regular basis. This would be a small step to make the profession more relevant to regular working people.

Some Benchers did not agree with the proposition that lawyers are out-of-touch with the needs of low-income people and believed approving such a motion would send the wrong message to the profession and the public. Furthermore, doubts were expressed about the effectiveness of providing CPD credit for pro bono as a means of encouraging pro bono. Rather than expanding CPD credit to pro bono work, there was an appetite for further work to be done to look at what else the Law Society can do to encourage pro bono itself in a meaningful and substantive way.

It was also suggested that by approving CPD credit for pro bono and legal aid, it may look to the public as though the Law Society is providing CPD credit for lawyers representing marginalised groups. In addition, concerns were expressed that this would be providing CPD credit for work that lawyers already know how to do instead of the intended educational component.

Some Benchers showed support for the proposed motion and were of the view that progress has been made in recognizing other forms of CPD credit, and CPD credit for pro bono and legal aid work should also be recognized. It was noted that the Law Society has limited tools available to change or encourage behaviour in the legal profession and CPD credit is one of those tools. Even though providing CPD credit for pro bono and legal aid may not significantly change behaviour, providing CPD credit for pro bono and legal aid would be better than doing nothing. Even if only a small number of lawyers would be impacted by the change, it would be worth it. These Benchers also did not like the optics of taking CPD credit off the table for pro bono and felt that,

on balance, the potential benefit to be gained from providing CPD credit for pro bono and legal aid outweighed the risk to the objectives of the CPD program.

Benchers then voted on the main motion on the understanding that, if it failed, Mr. Maclaren's motion would then be tabled. The motion passed with 15 in favour and 14 opposed.

11. Proposal for Licensed Paralegal Task Force

Mr. Ferris referred to the January 25 Bencher meeting *In Camera* discussion about where to go with what was called the Alternate Legal Service Provider Working Group. He said the matter went to the Executive Committee for consideration at the February 14 meeting, and the report now before Benchers is the product of that process.

Mr. Ferris said Benchers were being asked to approve the following resolution and that he hoped the proposed new Task Force and Terms of Reference were workable and would address the issues:

BE IT RESOLVED that the Benchers establish a Licensed Paralegal Task Force with the following mandate to further develop the work of the Alternate Legal Service Provider Working Group:

1. Consider and identify opportunities, in consultation with the profession and others, for the delivery of legal services in areas where there is a substantial unmet legal need and the public would benefit from the provision of those services by licensed paralegals; and
2. If the Task Force identifies areas of legal services where licensed paralegals may meet an unmet legal need:
 - a) consider the scope of services that would be appropriate for licensed paralegals to provide in relation to the identified areas of legal services;
 - b) consider what education, qualifications, credentials, experience and insurance would be necessary to enable licensed paralegals to deliver legal services in a competent and ethical manner in the identified areas of legal services; and
 - c) make recommendations to the Benchers for a regulatory framework that will ensure that licensed paralegals provide legal services in a regulated, competent and ethical manner only in the identified areas of legal services approved by the Law Society.

Mr. Ferris said the Executive Committee wanted to make clear the reasons why the Task Force was being created and would be looking at licensed paralegals to provide certain legal services. There is an unmet legal need that the Committee believes licensed paralegals can perhaps meet.

Mr. Ferris said, assuming the requirement identified in paragraph 1 of the Terms of Reference is met, the Task Force would then move on to consider areas of legal services, the scope of those legal services and the education requirements.

Mr. Ferris moved the resolution and the motion was seconded.

Mr. McDonald expressed concern that, while the work of the Task Force is important, the scope of the work of the Task Force was not broad enough. He made a motion that the resolution to approve the mandate be amended as follows:

Paragraph 1 – include “affordable and accessible legal services” after “delivery of”, and include “paralegals and/or licensed paralegals”; and

Paragraph 1 – add “paralegals and/or” before every instance of “licensed paralegals”

Paragraph 2(c) – add “affordable” after “competent”

The motion to amend the resolution was seconded. Debate on the motion to amend the resolution proposed by Mr. Ferris commenced.

Some Benchers expressed concern about including reference to affordable legal services and were of the view that it is not the Law Society’s role to regulate the market. In addition, including undefined groups, such as unlicensed paralegals, may create uncertainty and it would be difficult to regulate those groups. Other comments included that by referring to the “public would benefit from the provision of those services”, the language is necessarily broad enough to include consideration of improving access to justice as a whole, which is broader than affordability. The proposal is for licensed paralegals to be looked at as one solution, not the whole answer.

Mr. McDonald referred to “legal advocates” filling an unmet legal need, and that if the purpose of the Task Force is to fill gaps created by an unmet legal need, the mandate of the Task Force should not be limited to licensed paralegals. Other Benchers supported the view that adding “paralegal” to the mandate would broaden the scope of the work and prevent this issue having to be revisited again at a later date.

Three Benchers voted in favour of the amendment to the resolution, one Bencher abstained and the remainder voted against amending the resolution as proposed. The motion to amend the resolution therefore failed.

Benchers then voted on the main motion as outlined in the agenda package and recommended by the Executive Committee. The resolution was passed unanimously.

Life Bencher Mr. Leask, QC was in attendance and asked that the Benchers consider having non-family lawyers on the Licensed Paralegal Task Force.

12. Formation of a Legal Aid Coalition

Mr. Riddell introduced the item. He said the Legal Aid Advisory Committee, in looking at ways to advance the Law Society's vision for legal aid in BC, had studied the best ways in which to encourage the Government to increase funding for legal aid. In the fall of 2018, the Legal Aid Colloquium took place, which involved a number of consumer groups. One of the goals of the legal aid coalition, if established, would be for the Law Society to lead a group of interested organizations to advocate for a legal aid system that works and aligns with the Law Society's vision for legal aid in BC.

Mr. Riddell moved that the following resolution. The motion was seconded.

BE IT RESOLVED that the Benchers authorize the Law Society to engage with other organizations, whose mandates and work align with the Law Society's Vision for Publicly Funded Legal Aid, to work collaboratively in a Law Society led coalition with the objective of increasing funding for legal aid so as to better meet the legal needs of the most vulnerable and disadvantaged citizens of British Columbia.

The resolution was passed unanimously.

FOR INFORMATION

13. BC Legal Profession Demographics

There was no discussion on this item.

14. Three Month Bencher Calendar – March to May

There was no discussion on this item.

KG
2019-03-28