



Minutes

Benchers

Date: Friday, March 06, 2020

Present:

Craig Ferris, QC, President	Jamie Maclaren, QC
Dean P.J. Lawton, QC, 1 st Vice-President	Geoffrey McDonald
Lisa Hamilton, QC, 2 nd Vice-President	Steven McKoen, QC
Jasmin Ahmad	Christopher McPherson, QC
Paul Barnett	Jacqueline McQueen
Pinder K. Cheema, QC	Elizabeth J. Rowbotham
Jennifer Chow, QC	Mark Rushton
Barbara Cromarty (via teleconference)	Karen Snowshoe (via teleconference)
Jeevyn Dhaliwal, QC	Thomas L. Spraggs
Lisa Feinberg	Michelle D. Stanford, QC
Martin Finch, QC	Michael Welsh, QC
Brook Greenberg	Chelsea D. Wilson
Sasha Hobbs	Guangbin Yan
Julie K. Lamb, QC	Heidi Zetzsche
Dr. Jan Lindsay	

Unable to Attend: Jeff Campbell, QC
Claire Marshall

Staff Present:

Don Avison, QC	Alison Luke
Barbara Buchanan, QC	Tara McPhail
Natasha Dookie	Jeanette McPhee
Su Forbes, QC	Cary Ann Moore
Andrea Hilland	Lesley Small
Kerryn Holt	Alan Treleaven
Jeffrey Hoskins, QC	Adam Whitcombe, QC
Jason Kuzminski	Vinnie Yuen
Michael Lucas, QC	

Guests: Dom Bautista	Executive Director, Law Courts Center
Jennifer Brun	Vice-President, CBABC
Dr. Catherine Dauvergne	Dean of Law, University of British Columbia
Alexis Kazanowski	Assistant Dean of Law, Thompson Rivers University
Professor Robert Lapper, QC	University of Victoria
The Honourable Peter Leask, QC	Life Bencher
Shawn Mitchell	CEO, Trial Lawyers Association of BC
Caroline Nevin	CEO, Courthouse Libraries BC
Linda Russell	CEO, Continuing Legal Education Society of BC

CONSENT AGENDA

1. Minutes of January 31, 2020, meeting (regular session)

The minutes of the meeting held on January 31, 2020 were approved as circulated.

2. Rule 3-59(5): Cash transactions; correction

The following resolution was passed unanimously and by consent:

BE IT RESOLVED to amend Rule 3-59 (5) by striking “greater than \$1,000”.

3. Creation of Mark Andrews Excellence in Litigation Award

The creation of the Mark Andrews Excellence in Litigation Award was approved as circulated.

REPORTS

4. President’s Report

Mr. Ferris began his report by recognizing that Bencher Jeff Campbell, QC was not present at the meeting as he had been appointed as Judge of the Provincial Court of BC. Benchers congratulated Mr. Campbell on the appointment.

Mr. Ferris then reported the results of the Executive Committee election for the appointed Bencher representative, indicating that Mr. Rushton was the successful candidate.

In light of the opening statements of the Cullen Commission Inquiry into money laundering on February 24, the focus of Mr. Ferris’ President’s Report was on the Federation of Law Societies decision of the Supreme Court of Canada. He provided a history of the decision and the key takeaways from it, stating that the takeaways are vital to the work the Law Society continues to do on the Rules with respect to money laundering, client identification and verification, source of funds and trust accounts. He said it was important to be clear on the lessons from the Federation case and to follow those lessons.

However, before discussing the Federation case, Mr. Ferris acknowledged it had been a busy time since the last Bencher meeting in January, with one milestone being the provincial government’s announcement and introduction of legislation with respect to a no-fault insurance system. He did not make any substantive comments on the government’s plans for a no-fault insurance system; however, did comment on the policy in relation to the Law Society’s section 3 mandate. Specifically, he said it was appropriate for the Law Society to determine whether or not there are rule of law implications and whether or not the rights and freedoms of all people and the administration of justice are dealt with fairly and appropriately. He expected there would be

more to say in the future on the details of the legislation with regard to the Law Society's mandate. He did wish to make one statement publicly about a series of unfortunate political statements laying the blame and seeking to scapegoat lawyers and judges as the reason for the difficulties experienced by ICBC. In his view, such statements are disrespectful and harm the public respect for the administration of justice. Attacks on lawyers and judges detract from the rule of law and the respect of judicial institutions. Mr. Ferris reported that he had spoken to the Attorney General about these comments and asked him to ensure that the government stops making such statements.

Mr. Ferris then returned to discussion of the Federation case. He provided a historical overview and said the issue has been going on for two decades. The judicial history means that the Law Society, as the regulator of the legal profession in BC, has been given an important role by the Supreme Court of Canada and the lower courts in BC. In each decision, reliance was given on the measures the Law Society is taking and the vigour the Law Society is utilizing as a reason why both the legislation was a breach of the Charter and could not be saved under section 1. He said it is important to remember that if the Law Society did not do its job, this section 1 analysis could change in subsequent cases and we must be vigilant. Ways to be vigilant include continually evolving rules and regulations to meet our obligations, including nationally. Enforcement must remain robust and we need to ensure we do not overreach in the use of trust accounts – they are protected for clients and not for lawyers' convenience. Trust accounts are protected for certain circumstances where there is privilege and a duty of loyalty/commitment, and it is important to make sure trust accounts are only used for these purposes.

5. CEO's Report

Mr. Avison attended the Kootenay Bar Association meeting the week prior, which he said was a valuable opportunity to engage with members of the local bar. He provided an overview of the Law Society's priorities and heard directly from lawyers about issues that are top of mind for them. With reference to the ICBC changes that were announced, lawyers have expressed concerns about the changes and what it means for their clients and communities.

Mr. Avison then reported on the Federation meetings he attended earlier in the week. A national survey on health and wellness was proposed, which would be conducted in two phases – the first would be funded by the Law Societies nationally, and the second phase would be funded by research councils. It may take some time to complete the survey, which could be an issue if British Columbia wants to proceed with conducting a provincial survey at an earlier date. Also discussed was the Federation strategic plan and there was an opportunity to discuss what is happening across the country on anti-money laundering efforts. There was considerable interest from other jurisdictions on the Cullen Commission taking place in BC.

Mr. Avison then provided an overview of the opening statements made to the Cullen Commission on February 24. A copy of the opening statement made by the Law Society's counsel would be made available to Benchers. The statement made clear that this is an issue the Law Society takes very seriously and it outlined the action the Law Society has taken; in particular, investments the Law Society has made in key areas such as educating the profession, trust audits and insurance. The level of the Law Society's fiscal allocation to those areas following the Federation case has gone up 30%, and the level of audit activity increased from 400 audits per year to 675 audits in 2019. It was made clear that the Law Society is of the view that engagement and partnership is a key element in how to proceed. Mr. Avison then provided a brief overview of the submissions from the other parties, before turning to discussion of the federal anti-money laundering working group and the Law Society's involvement at that level.

Mr. Avison turned to the recent announcement by the provincial government about no-fault insurance and provided statistics showing the number of articling students potentially affected by the change.

The Law Society Employee Engagement survey was completed in January 2020 and the reports were in the process of being finalized. Mr. Avison indicated sessions with staff would be occurring later in the month and that he would provide more detail to Benchers at the April Bencher meeting.

Ms. Avison then thanked a number of Benchers, Life Benchers and Staff for volunteering to teach portions of the Professional Legal Training Course.

Finally, Mr. Avison acknowledged the extraordinary contributions of Mr. Treleavan to the legal profession as a whole and to the Law Society and thanked him for his years of service.

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

Ms. Cheema spoke about the Federation meetings held earlier that week in Montreal. The first day was a joint forum attended by council members and staff. Topics addressed included the wellbeing of the legal profession in Canada and a proposed national study, emerging legal technology and the NCA Modernization Committee.

She said the issue of wellbeing in the legal profession is front and centre for all jurisdictions in Canada and that the Federation had received a proposal to conduct a national study. Statistics to date have indicated that young lawyers appear to be more affected by severe stress, and that stress can be impacted by area of law. All jurisdictions were in support of a national study being conducted and the proposal was for the issue to go to the Federation Council meeting in June for decision. There would be two parts to the survey: (1) a quantitative survey provided to all Law

Societies in Canada that would take up to 18 months to complete, and (2) a qualitative study funded by granting agencies.

Another issue discussed was emerging legal technology; specifically, technology that lawyers use in private practice that helps lawyers efficiently draft contracts and review documents, and artificial intelligence. The issue was how to assess technology and what role the Federation might have in emerging legal technology. The discussion that took place did not go so far as to say the Federation would proceed with piloting technology.

Finally, the NCA Modernization Committee discussed a ‘gap analysis’ that was completed to identify whether foreign-trained lawyers do not perform as well during articles or in practice than Canadian-trained lawyers. Data was gathered from Ontario, British Columbia and Alberta. Findings confirmed anecdotal evidence that there is a substantial difference in the successful completion of the Professional Legal Training Course between Canadian-trained lawyers and foreign-trained lawyers, with Canadian-trained lawyers performing at a higher level. A competency-based assessment would be considered to assess NCA students, level the playing field and try to narrow the gap.

The next day of business was the general business meeting, where the Federation’s strategic plan was discussed. The goals remain information-sharing, collaboration and stakeholder engagement. The plan was met with approval and would be presented to the Council in June for decision.

Other updates included the Model Code Committee, and an update on strategic priorities; including anti-money laundering. The next meeting of the Federation is scheduled for June 2020.

Benchers asked for clarification about how the proposed national wellbeing survey would fit with the proposed wellbeing survey to be conducted in British Columbia. The plan was to obtain a copy of the Quebec survey questions and consider whether it would meet British Columbia’s purposes, or whether there are additional questions we would want to ask. Further work will be done on this before a path forward is confirmed.

DISCUSSION/DECISION

7. Review of the Law Society’s 2019 Audited Financial Statements and Financial Reports

Mr. Lawton, Chair of the Finance and Audit Committee, introduced the item. Ms. McPhee, Chief Financial Officer & Director of Trust Regulation, then provided a summary of the Law Society’s 2019 audited financial statements and financial reports.

Ms. McPhee said the general fund had a positive year, both from a revenue and expense point of view. Revenue was 28.8 million, which was 1.5 million (5%) over the budgeted amount. Factors that contributed to the increase in revenue included the practice fees received from an additional 189 lawyers (\$343,000), an additional 116 students, D & O insurance recoveries of \$671,000 and income interest of \$132,000.

Ms. McPhee provided an overview of practising membership numbers from 2014 to 2019, which showed an increase in practising members from 11,114 in 2014 to 12,572 in 2019 and a projected increase to 12,846 in 2020. The membership increases by 2% on average each year, but the increase from 2018 to 2019 was closer to 3%. Professional Legal Training Course numbers have also increased since 2014, with a steady increase from 2016 onwards to 540 students in 2018 followed by a marked increase of 656 students in 2019. The number of students projected for 2020 is 638.

The general fund operating results were also positive, with total expenses amounting to 26.4 million (2.1 million under budget). Factors that contributed to the savings included external counsel fee savings, human resources consulting savings, travel and storage savings, and other factors. Ms. McPhee noted that some of the reported savings were the result of timing and that these costs would be incurred in 2020.

Ms. McPhee then turned to the TAF/Trust Assurance program. Revenue for 2019 was slightly lower than the budgeted 4 million at 3.5 million in part due to real estate sales being down by 1.5%, and expenses for 2019 were close to the budgeted 3.4 million at 3.3 million. There is a projected increase in revenue and expenses for 2020.

In terms of the general fund balance sheet, as at December 2019, assets were 62.2 million, liabilities were 35.9 million, capital allocation was 3 million, trust assurance was 2 million, invested in capital assets was 12.9 million and unrestricted net assets were 8.4 million.

Only a few assets were still flowing through the special compensation fund, in the amount of \$58,000 for 2019, and this is largely due to production and recovery costs for some old files. The fund is expected to close in 2020 and any other costs will be charged to the Lawyers Indemnity Fund after that.

Actual revenue for the Lawyers Insurance Fund came in on budget at 16.1 million, and expenses were under budget by 19% at 6.9 million. The provision for claims through income statement was 12.9 million, a decrease of 3.6 million. There was a lower claims provision due to a net adjustment to the prior year claims reserves.

Ms. McPhee said investment returns have been volatile over the last ten years and that it often depends on the budget. 2019 was a great year where there was a 14% return, compared with a 0% return in 2018.

The Lawyers Insurance Fund reserve was 97.9 million for 2019, compared with 76.9 million for 2018 (an increase of 27.3%).

Mr. Lawton then made a motion, which was seconded, that the following resolution be approved by the Benchers:

BE IT RESOLVED to approve the Law Society's 2019 Combined Financial Statements for the General & Special Compensation Funds, and the 2019 Consolidated Financial Statements for the Lawyers Insurance Fund.

The motion passed unanimously.

UPDATES

8. Lawyers Indemnity Fund: Program Overview

Ms. Forbes, Director of the Lawyers Indemnity Fund, provided an overview of the Lawyers Indemnity Fund program. She began by providing a roadmap of the program, followed by information about who works in the program and everyone's roles. Each of the four managers in the program introduced themselves by video and spoke about their different areas and responsibilities. Ms. Forbes described the various functions of the program, including claims management (approximately 80% of the program's work), defence counsel management, excess carriers and insurers, coverage inquiries, risk management (helping lawyers to prevent claims) and the LSBC Directors & Officers Policy, which covers Benchers, staff and volunteers.

Ms. Forbes then provided an overview of Parts A, B & C of the program. Part A coverage is for negligence, provides 1 million of coverage for each "error", with 2 million annual aggregate per lawyer. Defence costs are within limits, with a \$5,000 or \$10,000 deductible. Unlike Ontario, the deductible is not triggered for the payment of defence costs, which means lawyers in British Columbia essentially receive a "free" defence.

In terms of the legal profession in British Columbia, Ms. Forbes provided an overview of the total number of lawyers in British Columbia (15,400), with 12,700 of them practising lawyers and 2,700 non-practising or retired. Of the 12,700 practising lawyers, 9,400 are in private practice and 3,300 are in-house lawyers (who are not covered by the Lawyers Indemnity Fund).

When comparing the indemnity fee with other Canadian jurisdictions, BC has the third largest program in Canada but the tenth largest fee. The fee also includes theft risk, which is not covered by any other jurisdiction.

Of the 9,400 lawyers in private practice in BC, 8,250 of those are full-time and 1,150 are part-time. The number of part-time lawyers has remained relatively flat from 2015 to 2019, whereas the number of full-time lawyers has seen an 11% increase in the last five years.

The number and frequency of reports to the Lawyers Indemnity Fund over the years has remained relatively flat, which is one of the main drivers of the stability of the program. In terms of frequency by area of law, ‘Motor Vehicle – Plaintiff’ and ‘Civil Litigation – Plaintiff’ are the two main areas of law that generate claims. Ms. Forbes compared these areas of law with the complaints statistics previously provided by Ms. Dookie, which showed that family law generates a lot of complaints, but presents fourth on the list for claims reported to LIF. Looking at severity by area of law, Ms. Forbes indicated ‘Commercial – Other’ and ‘Civil Litigation – Plaintiff’ are always near the top.

Turning to claims payment over the last five years, Ms. Forbes said expenses are relatively stable but that indemnity claims can be more volatile. In 2019, 76% of reports were closed with no payment at all, which has been a fairly consistent percentage since 2015. By comparison, Ms. Forbes indicated only 36% of claims in Ontario close without any payment. In Ms. Forbes view, the success in resolving these reports in BC can be attributed to early reporting of matters by lawyers, and the skills of claims counsel in resolving claims.

Part B coverage relates to lawyer theft, \$300,000 is allowed for each claim, with a 17.5 million profession-wide annual aggregate, and there is no deductible. In 2019, there were 18 reports and 16 claims, with a total of \$239,300 paid. The number of reports over the past five years trends slightly towards the positive.

Ms. Forbes then spoke about Part C claims which are intended to cover social engineering frauds, where \$500,000 is allowed for each “error”, there is an annual aggregate per lawyer and firm of \$500,000, a 2 million profession-wide annual aggregate, the lawyer must comply with client identification and verification rules, and there is a 35% deductible. The thinking behind the 35% deductible is that, if lawyers have skin in the game, they will help manage the risk. Very few claims were made from 2015 to 2019.

Ms. Forbes provided an overview of the results of reports, with 45% of reports not resulting in a claim developing. Repairs were the second highest result with 22%.

In terms of challenges and responses, Ms. Forbes outlined the following challenges: recruitment/succession for claims counsel, self-represented litigants, lawyers withholding

information due to fear about how it will be used, expectation of lawyers that the policy covers everything, keeping ahead of changes in the risk, and the growing risk of technology-based fraud & protecting lawyers. Ms. Forbes provided information about the program's responses and strategies to deal with the above challenges.

Finally, Ms. Forbes provided information about feedback received from lawyers about their experience with the program. As a result of service evaluation and risk management forms, positive feedback was received in 185 instances, with only 8 negative comments. Survey results have gone up over the years, with overall response rates regarding lawyer satisfaction with the handling of their claim and interaction with counsel in 2001 at 90%+, increasing to 98%-100% in 2019. In response to the question "How satisfied overall were you with the services provided by claims counsel?", 100% of lawyers who responded in 2019 were satisfied.

In response to a Bencher's question about the impact of the recent ICBC announcement on the Lawyers Indemnity Fund program, Ms. Forbes indicated the number of claims relating to Motor Vehicle matters may go down, but that those claims may go into different areas of law where lawyers are practising with little experience. However, she commented that the strategy was to hold the Indemnity fee at a steady rate.

Bencher's thanked Ms. Forbes for her informative presentation and the continued success of the program.

9. National Discipline Standards Report

Ms. Dookie, Chief Legal Officer, spoke about the Report included in the materials and commented on a few key findings. She said the National Discipline Standards were developed as a Federation of Law Societies of Canada initiative to create uniformly high standards for the handling of complaints and disciplinary matters. The Bencher's approved the adoption and implementation of the standards in 2014.

To date, no Canadian law society has met all of the standards in their entirety. For 2019, the Law Society met 19 of 23 standards, which is similar to the Law Society's performance in 2017 and 2018.

Ms. Dookie indicated that, in areas where the Law Society met the standards we exceeded them, but noted there were some areas where making significant progress can be challenging. In particular, standard 9 requires 75% of all hearings to be commenced within 9 months of the citation being authorized and 90% of hearings be commenced within 12 months of the citation being authorized. In 2019, the Law Society met this standard with 36% and 72% of hearings respectively. Ms. Dookie referred to factors between 2017 and 2019 that impacted the Law Society's ability to meet the standard, but indicated concerted efforts of the Discipline

department in 2019 have made assisted with reducing the backlog. She also commented that, while statistics can be valuable data points, they do not tell the whole story or reflect the complexity of the work.

10. Report on Outstanding Hearing & Review Decisions

Mr. Ferris provided an update on outstanding hearing and review decisions. He referred to National Discipline Standard 10, which requires 90% of panel decisions to be rendered within 90 days of the last submissions. While the Law Society's compliance with this standard has improved from 2018 to 2019, he encouraged Benchers to keep efforts up to meet get decisions out in a timely manner. Mr. Ferris reminded Benchers that, even if they are not writing a decision, they are responsible for pushing the matter forward and trying to ensure the timelines are met.

FOR INFORMATION

11. Of Robes and Robots: Innovation and the Legal Profession – Remarks of the Honourable Chief Justice Robert Bauman

Mr. Ferris said Chief Justice Bauman's remarks were excellent, inspirational and he encouraged all Benchers to read the remarks.

12. Progress update on the Strategic Plan 2018 – 2020

There was no discussion on this item.

13. Three Month Bencher Calendar – March to May 2020

There was no discussion on this item.

The Benchers then commenced the *In Camera* portion of the meeting.

KH
2020-03-06