



Minutes

Benchers

Date: Friday, June 09, 2017

Present: Herman Van Ommen, QC, President
Miriam Kresivo, QC, 1st Vice-President
Jasmin Ahmad
Satwinder Bains
Jeff Campbell, QC
Pinder Cheema, QC
Barbara Cromarty
Thomas Fellhauer
Craig Ferris, QC
Martin Finch, QC
Brook Greenberg
J.S. (Woody) Hayes, FCPA, FCA
Dean P.J. Lawton, QC

Sharon Matthews, QC
Steven McKoen
Christopher McPherson
Lee Ongman
Greg Petrisor
Phil Riddell
Elizabeth Rowbotham
Mark Rushton
Carolynn Ryan
Daniel P. Smith
Sarah Westwood
Tony Wilson, QC

Unable to Attend: Jeevyn Dhaliwal
Lisa Hamilton
Jamie Maclaren

Nancy Merrill, QC
Claude Richmond
Michelle Stanford

Staff Present: Tim McGee, QC
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
Annie Rochette
Lesley Small
Alan Treleaven
Adam Whitcombe
Vinnie Yuen

Guests:	John Arnesen	Volunteer, Lawyers Assistance Program
	Dom Bautista	Executive Director, Law Courts Center
	Mark Benton, QC	Executive Director, Legal Services Society
	Chris Bungay	Volunteer, Lawyers Assistance Program
	Prof. Joost Blom, QC	Chair, CLE Governance Committee
	Dr. Catherine Dauvergne	Dean of Law, University of British Columbia
	Ron Friesen	CEO, Continuing Legal Education of BC
	Derek LaCroix, QC	Executive Director, Lawyers Assistance Program
	Sylvan Lutz	Runner-up, Rule of Law Essay Contest
	Linda Russell	CEO, Continuing Legal Education Society of BC
	Priyan Samarakoone	Program Manager, Access Pro Bono Society of BC
	Angela Tian	Winner, Rule of Law Essay Contest
	Rolf Warburton	Board Chair, Continuing Legal Education Society of BC
	Prof. Jeremy Webber	Dean of Law, University of Victoria
	Jennifer Webber	Director, Member Services CBA BC

1. Presentation of the Winner and Runner-up of Rule of Law Essay Contest

Mr. Van Ommen presented Rule of Law Essay Contest winner Angela Tian and runner-up Sylvan Lutz with their prizes and certificates. He also thanked the Rule of Law and Lawyer Independence Advisory Committee for their good work in developing and promoting this successful contest which has expanded from 17 essay submissions last year, to an impressive 84 essay submissions this year. He also thanked Chair Craig Ferris, QC and committee members Jeff Campbell, QC and Professor Arlene Sinclair for their diligent review of all 84 submissions.

CONSENT AGENDA

2. Minutes

a. Minutes

The minutes of the meeting held on May 6, 2017 were approved as circulated.

The *in camera* minutes of the meeting held on May 6, 2017 were approved as circulated

b. Resolutions

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to award the 2017 Law Society Scholarship to Naomi Minwalla.

GUEST PRESENTATIONS

3. LAP Presentation

Mr. Van Ommen introduced Lawyers Assistance Program Executive Director Derek LaCroix, QC. Mr. LaCroix noted the importance of a culture shift in the legal profession away from one characterized by alcohol-centric activities. He encouraged lawyers to think about making their social lexicon more inclusive, such as changing phrases like “let’s go for drinks” to a more neutral invitation. Such changes are key to changing the culture, as is the messaging around those who have problems with alcohol or other substance use. Studies show alarming statistics regarding the numbers of lawyers, as compared with the wider professional population, who have drinking problems, engage in alcohol or substance abuse or who suffer from mental health disorders. Equally alarming are the statistics indicating that the majority do not seek help because of the stigma surrounding such issues. He lauded the efforts of the over LAP 300 volunteers, and encouraged all lawyers to consider volunteering.

He also thanked the Benchers for inviting him and his colleagues to speak, as increasing openness and encouraging dialogue will help reduce the stigma. He then introduced two colleagues, John Arneson and Chris Bungay, both lawyers who have sought the assistance of LAP, noting the courage it takes to come forward and speak.

Mr. Arneson and Mr. Bungay shared with Benchers their stories of struggle and despair, and of recovery and success. Both emphasized there is no generic type of alcoholic, that recognizing and acknowledging a problem is key to help and recovery, and that the support found at LAP saved their lives. Both also stressed the importance of having a support organization specifically for lawyers, as it made it easier to seek help.

Mr. LaCroix thanked both Mr. Arneson and Mr. Bungay for their courage and their openness. He encouraged everyone in the legal community to be compassionate and honest with each other, to practice self-awareness, to listen and be engaged in the welfare of others, and to lead by example.

Mr. Van Ommen thanked all three guests for their willingness to share, and for the important work they do to support LAP.

DISCUSSION/DECISION

4. Selection of Benchers' Nominee for 2018 Second Vice-President

Mr. Van Ommen announced the nomination of Craig Ferris, QC for 2018 Second Vice-President, and called for any additional nominations. Hearing none, he declared Mr. Ferris nominated for 2018 Second Vice-President by acclamation.

5. Strategic Plan Review Process: Disclosure and Privacy

Jeff Hoskins, QC, Tribunal and Legislative Counsel and Michael Lucas, Manager, Policy and Legal Services provided the Benchers with an overview of statutory requirements, rules and policies related to disclosure and privacy, together with an overview of the strategic importance of the topic to the Law Society as an organization. They divided their presentation into two areas: what information the Law Society is permitted or required to disclose, and what information we are not prepared or not allowed to disclose.

The Law Society must always exercise its discretion concerning the collection, use or disclosure of information with a view to balancing transparency, openness and accountability with the fundamental value of protection of privacy. How that balance is struck affects public perception and confidence in us and the legal profession at large. Historically, Law Society decisions skewed heavily in favour of privacy; however, views began to change and more openness was

valued. In 1983, we became one of the first professional bodies in Canada to open the hearing process to the public (albeit anonymized). For 10 years we voluntarily provided disclosure, doing our best to balance that with the protection of privacy. In 1995, as a public body the Law Society became subject to the requirements of the Freedom of Information and Protection of Privacy Act (FOIPPA). This legislation codified our legal obligations of disclosure and privacy protection.

In 2002, Benchers created the “Disclosure and Privacy Task Force,” which examined the public interest principles of transparency and disclosure, the interests of individuals, the interests of the profession in a fair regulatory process, and how all of these changes to disclosure and privacy affected Law Society operations. Following the Task Force’s first report, the Benchers approved the publication of citations served and full hearing decisions, and charged hearing panels with the responsibility of protecting privacy rights by way of motions closing the hearing or sealing documents.

In total, the Task Force operated for 4 years and made over 115 recommendations, most of which were adopted. Since its final report in 2006, there has been further evolution of the law of privacy and disclosure, with law being created and continuously refined through the many decisions being rendered by the Privacy Commissioner. Technology has also changed dramatically, search engines are more powerful and information is easier than ever to obtain. Public interest in disclosure has also increased; though we have become more transparent as a consequence, we must remain mindful of the privacy of sensitive personal information.

Thus, it is important to include privacy and disclosure in our strategic planning. Decisions made in this area 10 years ago must be revisited in light of the significant developments of the last decade, and our decisions must be consistent across a host of interrelated areas. In addition to being closely monitored by the Privacy Commissioner under FOIPPA, public confidence in the profession’s self-regulation requires as much transparency and openness as is permitted, while still recognizing the need for privacy.

Some specific issues to consider include:

- Anonymous publication after review of previously published decision
- Dealing with rescinded citations
- Publication of interim suspensions
- Anonymous publication of conduct reviews
- The right to be forgotten, which is not a law but an increasingly relevant privacy concept
- Considerations around hearing and credentials decisions

- Sharing information with other law societies
- Reports to law enforcement agencies that allow us to remain consistent with our obligations

In response to questions, Mr. Lucas reiterated the need to strike the right balance between transparency and privacy protection in the protection of the public interest and also in the discharge of our legal obligations. He also noted the importance of preserving information, and noted that decisions regarding archiving information should be considered through a privacy and disclosure lens moving forward.

Strategic Plan Review Process: Economics of the Legal Profession

Chief Information and Planning Officer Adam Whitcombe began his presentation by noting the limited amount of data and analysis of the legal profession in Canada. The leading work was published in 1990 and little has changed since. In 2013 the Canadian Bar Association (CBA) published a report on the future of legal services that noted its analysis was hampered by a lack of hard data in the area. The Legal Aid Task Force Report noted that advocating for changes to the system may require the collection of hard data upon which to build a business case. Following the recent survey to Benchers, the Governance Committee recommended that Benchers should be more informed about the legal market given our participation in it through our decisions.

Mr. Whitcombe noted that we have been regulating the profession with little knowledge of many aspects of a lawyer's practice, including how services are billed, how clients pay and what lawyers earn. He framed the strategic planning question as: how can we benefit from an economic analysis of the profession?

Mr. Lucas provided further information about the potential benefits:

- Making a case for increasing the legal aid tariff, based on the overhead costs of maintaining a legal practice;
- Expanding the pool of alternative legal service providers with evidence of the viability of the business model;
- Providing alternatives to the billable hour structure which can serve to increase access to legal services
- Improving access to justice generally, which requires some knowledge of the legal services market and what it actually costs to provide legal services

Mr. Lucas also suggested that thought can also be given to the cost to society for failing to resolve legal problems. Some economic analysis of the cost of our courts as compared with other mechanisms of resolution could assist in the development of more efficient and effective systems and help to focus our regulatory activities to improve justice.

Mr. Lucas noted that some initiatives are already underway, such as our partnership with the Legal Services Society (LSS) and the Law Foundation to gather information on the cost of legal services to low and middle income clients, ultimately in support of an increase to the legal aid tariff. Leading the development of other initiatives would be ground-breaking and would assist us in furthering our mandate to protect the public interest.

In response to this presentation, there was the suggestion that we should also be reviewing the cost of compliance to see whether there is a disproportionate burden on some lawyers such as sole practitioners.

Mr. McGee noted that increased information in this area can allow the Law Society to evolve as a regulator and think strategically about its capabilities and the needs of the profession in the years ahead.

Mr. Van Ommen thanked Mr. Hoskins, Mr. Lucas and Mr. Whitcombe for their informative presentations.

6. Recommendations Concerning a Reconsideration of Policy Decisions on the Publication of Credential Hearing Reports

Credentials Committee Vice-Chair Martin Finch, QC reported on this item. Providing background, he noted that it is the role of the committee to determine whether applicants should be deemed fit for entering the profession. Relevant considerations include issues regarding character, which may include allegations of past misconduct. Such reviews often involve highly personal or sensitive information. For those applicants that are subjected to a formal hearing, some are rejected; others are approved or approved on condition.

The current policy concerning publication of hearing reports purports to balance the public's right to know against the applicant's right to be able to move beyond a past transgression. Currently, if an application is rejected, the hearing report is anonymized; if the application is approved, it is published naming the applicant. If a successful applicant, who has been found to be of good character and repute, wishes to have the hearing report anonymized he or she must prove that publication without anonymization would cause grievous harm to the applicant or to a third party. The Committee considers this to be anomalous; when balancing transparency with privacy, it questions how it makes sense to publish a successful applicant's history in a manner than names the applicant when a rejected applicant is permitted anonymity.

The Committee recognizes that it is in the public interest to maintain transparency with regard to hearing decisions. It is concerned with the current policy that anonymizes publication of a hearing decision concerning a rejected applicant. Information contained in such decisions could be relevant to other law societies or other regulators in the event the rejected applicant applies for admission elsewhere, which is made more difficult to do where the publication is made anonymously.

The Committee is also concerned that a successful applicant, who has been found to be of good character and repute, is nonetheless burdened with the public knowing about their past for an indeterminate time by virtue of the fact that the decision is published naming the applicant.

However, the Committee also recognizes that Credentials Hearings are public and transparency in Law Society processes favours ensuring that the public know the outcome of a public hearing process.

The Committee is recommending implementation of the following procedures to better balance the public's right to know with the applicant's right to privacy:

- Naming all applicants in publication of hearing decisions to maintain transparency and be consistent with the public nature of the hearings;
- Anonymizing published hearing reports, for applicants admitted without conditions, 6 months after the original publication, and continuing to permit these applicants to apply for immediate anonymization in the case of the current test relating to grievous harm;
- Anonymizing published hearing reports, for applications with conditions, 6 months after the completion of the conditions;
- Publishing the name of an applicant who is denied admission, but also permitting that applicant to apply for anonymization if the current test relating to grievous harm is established;
- Anonymizing published hearing reports, for applicants previously denied admission but later admitted, 6 months after the original publication (including the earlier rejected application), and continuing to permit these applicants to apply for immediate anonymization in the case of grievous harm ensuing;
- Consideration be given to applying these new rules retrospectively

Mr. Finch noted that Bencher Jamie Maclaren provided his input by way of email, given his anticipated absence today. He expressed some concerns with the recommendations on publication of information regarding unsuccessful applicants except in cases where that applicant

can establish grievous harm. He preferred either the status quo, or the recommendation of the same procedure that will apply to successful applicants, namely the anonymization of their reports 6 months after the original publication. He is concerned that the current recommendations do not consider that an applicant may not foresee having to detail their life for the record in a proceeding they did not initiate; he is also concerned that these recommendations will have the effect of discouraging certain societal groups from applying to be lawyers. Information-sharing with other law societies can be achieved through disclosure to the Federation or law societies directly and needn't require full publication.

Many Benchers had questions or concerns. Some agreed with Mr. Maclaren's concerns, but expressed concern with general publication of successful applicant history as well, querying the relevance of past history if an applicant was found to be of good character and repute. The presumption of anonymous publication was suggested, subject to an assessment by the panel if there are arguments to the contrary.

Others agreed in principle with Mr. Maclaren's concerns, but suggested a presumption of publication with a less onerous test for anonymizing the material. A central data base of information for law societies was also suggested. It was also queried whether the choice to anonymize or not should be the applicant's, rather than have a presumption either way. Some also took issue with the 6 month period before which information was anonymized, noting that once information is online, it is difficult if not impossible to remove completely. Issues of privacy were questioned, as were issues of readmission following voluntary resignation and disbarment. Some questioned the need to publish at all.

Ms. Armour emphasized the importance to the public interest of transparency and openness in the publication of these hearing reports, and noted that the practice of other law societies is in keeping with the current Credentials Committee recommendations.

Mr. Van Ommen summarized the discussion, noting that the Committee is being asked to continue working towards recommendations that take the Benchers' discussion into account.

7. Legal Aid Advisory Committee: Legal Aid Award

Committee member Sarah Westwood spoke on behalf of the Committee. She began by correcting a reference on p. 75, which should read "Legal Aid Task Force" rather than "Advisory Committee".

She then detailed the Committee's recommendation for the establishment of a Legal Aid Award to demonstrate and celebrate the profession's commitment to the legal aid system. As a modest first step along the path toward advancing its vision for legal aid in BC, the Committee considers this a symbolic but effective message for both the profession and the public at large.

Bencher provided their thanks to the Committee for their work, and for this valuable idea that recognizes the unsung heroes who are passionate about access to justice and who do this work for little money.

Ms. Westwood moved for the creation of a Legal Aid Award as outlined in the materials (seconded by Mr. Fellhauer); it was passed unanimously.

Mr. Van Ommen noted that the Bencher have now approved 3 new awards, the Equity and Diversity Inclusion Award, the Family Law Award and the Legal Aid Award, all of which will be presented in conjunction with the Life Bencher Dinner later this year.

8. CLE Society of BC (CLEBC) Proposed Constitution and Bylaws – Input requested

Mr. Van Ommen introduced the Chair of the CLEBC Board Rolf Warburton and the new CLEBC CEO Linda Russell, and paid tribute to retiring CEO Ron Friesen. He noted that this would be Mr. Friesen's last Bencher meeting, and congratulated him on his 32 years of distinguished service and good work with CLEBC. He also introduced Joost Blom, QC, Chair of CLEBC's Governance Committee to brief the Bencher on the proposed changes to that organization's by-laws.

Professor Blom described the original model for CLEBC which contemplated Board representation for the Law Society, the CBA and the two law schools that existed in the 1970's. Since the opening of a law school at Thompson Rivers University (TRU), the Board has felt it appropriate to amend the by-laws to give TRU Board representation as well.

The decision to amend the by-laws to effect this change has resulted in a number of other attendant changes. After review, the CLEBC Governance Committee has suggested that the member voting balance between the Law Society, CBA and law schools should remain, with the Law Society and CBA retaining 2/3 of the member votes, necessitating an amendment changing the number of representatives of each organization. A new membership structure was also required to include TRU. Changes were also made to the structure of the directors, regularizing the director position of the Minister of Justice's appointee and removing the position of the CLEBC CEO to achieve consistency with good governance principles.

Currently, each law school has 2 directors, but the addition of 2 for TRU would bring the total number of law school directorships to 6. Accordingly, the number of directors for each law school has been reduced to 1 each to achieve balance and a more manageable Board size. Finally, under the new Society Act, the by-laws cannot be amended without also bringing them into compliance with that Act, with the result that the original proposed amendment review

process became a much more comprehensive review and revision. These proposed amendments are being put to members for feedback.

After calling for questions and hearing none, Mr. Van Ommen thanked Professor Blom for his helpful presentation.

EXECUTIVE REPORTS

9. President's Report

Mr. Van Ommen briefed the Benchers on various Law Society matters that have occurred since last meeting. He began by noting the exemplary service of Mr. Whitcombe, who responded on a Friday night to a call reporting that the contents of a law office had been left on the street, and then personally attended to secure any confidential files and wait for the police to secure the premises.

- **TRC Advisory Committee Update**

Mr. Van Ommen reported that the TRC was actively engaged on two major issues. The first is the development of a symposium directed at the profession, members of the Indigenous Bar and members of the larger Indigenous community, to be focused on what the Law Society should be doing to implement the Calls to Action and work toward reconciliation. The aim is to host the symposium some time in November, but the date remains flexible to accommodate the scheduling of potential key note speakers.

The second area of focus is cultural competence training for Benchers. The Executive Committee has reviewed some recommendations from the TRC and continues to work with that committee to develop a long-term, stepped approach to training. The goal is to implement a program by the Fall of this year.

- **Benchers Calendar**

Mr. Van Ommen noted the upcoming Gold Medal ceremonies at each of the BC law schools, and also noted that the UVIC Gold Medal will be awarded at the September Benchers meeting as the recipient is currently travelling abroad.

He also detailed other upcoming events, including Call ceremonies in Nanaimo and Kelowna, the Welcoming Ceremony for former Benchers and now Judge Lynal Doerkson, and the Federation meetings in Iqaluit, which will also coincide with National Aboriginal Day (now known as National Indigenous Peoples Day). Following his attendance at the Federation meetings, he will attend the Law Society of Upper Canada end of term dinner, and then address Convocation the following day.

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

As mentioned above, Mr. Van Ommen will attend the Council meeting in Iqaluit, at which the Council will review the draft Strategic Plan, proposed budget, National Requirement Review Committee's proposed changes to the National Requirement, and consider the external consultant's review of the National Committee on Accreditation (NCA) assessment process. Implementation of the recommendations will be considered at the Federation Conference in Victoria in October.

- **Report on Outstanding Hearing & Review Decisions**

Mr. Van Ommen noted that Hearing Panel members are not meeting timelines for hearing and review decisions, and stressed that timeliness should be improved.

10. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers, which included the successful recruitment for key positions within the organization. He welcomed Sheila Redel, the former Director of Professional Development and Competence in Manitoba, to fill the position of Manager, Standards, Professional Development and Practice Advice. He also welcomed Tara McPhail, who will fill the position of Manager, Intake and Early Resolution. Ms. McPhail is the former Head of Employee Relations at Metro Vancouver Transit Police and was also previously a Professional Conduct lawyer at the Law Society. Andrea Langille, whose last position was that of Director of Corporate Services for the Auditor General, was also welcomed as the new Law Society Controller.

Mr. McGee noted that the position of Manager, Discipline and Unauthorized Practice, remains to be filled and the recruitment process is actively underway.

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