



Interim Report of the Tribunal Program Review Task Force

Tribunal Program Review Task Force

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Prepared for: Benchers
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Purpose: Decision

A. Introduction

1. The Tribunal Program Review Task Force was struck by the Benchers in May 2014. It comprises Benchers Ken Walker, QC (Chair), Haydn Acheson, Pinder Cheema, QC, and David Mossop, QC, along with non-Bencher lawyer David Layton and public representative Linda Michaluk. Tribunal and Legislative Counsel Jeff Hoskins, QC and Hearing Administrator Michelle Robertson provide staff support.
2. This was the resolution adopted by the Benchers at that time:

BE IT RESOLVED to form a task force of Benchers and others to

- review the progress of the changes to the tribunal system implemented since 2011;
 - recommend changes for the improvement of the system and correction of any problems;
 - identify any further reforms that the benchers should consider at this time;
 - report to the Benchers as soon as possible, and in any event before the end of 2014.
3. The materials before the Benchers at the meeting in May included 16 topics and issues for the Task Force to consider and make recommendations for the consideration of the Benchers. Mr. Walker reported at the October 31 meeting of the Benchers on the progress of the Task Force toward a final report, which we now anticipate will be available to the Benchers by mid-year 2015.
 4. In the meantime, the Task Force has identified two topics that require immediate attention by the Benchers for the continued good governance of the tribunal program. We provide the background for each below, make recommendations and suggest resolutions for adoption by the Benchers.

B. Hearing panel pool appointed three years ago

5. After nearly two years of task forces, working groups, amending rules and recruiting non-Benchers, 25 lawyers and 25 non-lawyers were appointed to a “hearing panel pool” late in 2011. At the same time, the Benchers resolved that there would be a review of the new way of doing things at the end of three years, with a view to making improvements and, possibly, further changes to the tribunal process.
6. In the intervening years there has been some natural attrition to the groups due to judicial appointments and other career changes. Almost all members of the “pool” remain ready and willing, if not enthusiastic, about continuing to participate in Law Society Tribunals. A

number of new appointments have also been made, all of them Life Benchers leaving the ranks of current Benchers.

7. When appointments were made in 2011, no expiry date was specified. However, a three-year term was mentioned in the materials considered by the Benchers and others used to recruit pool members.
8. The review at the end of three years is underway by this Task Force. Among the matters to be considered in that process are issues relating to terms of appointments, performance appraisal, appointment and re-appointment criteria and continuity and renewal in the hearing panel pool. We expect that a final report with recommendations will be ready for consideration by the Benchers around mid-year 2015.
9. To ensure the continuity of the current hearing panel pool, we recommend that the Benchers extend the appointment of current members of the pool who are willing to continue. We expect that most members of the pool will be willing.
10. The length of the extension should be long enough to ensure that there is time for the Task Force's recommendations to be fully considered and implemented. We consider that an extension to the end of 2015 should allow sufficient time for Bencher decisions about the term, composition and recruitment of the hearing panel pool, if made mid-year, to be put in place and implemented.

Suggested resolution

11. The Task Force recommends that the Benchers adopt a resolution such as this:

BE IT RESOLVED TO extend the appointment of those members of the hearing panel pool of non-Bencher lawyers and public representatives willing to accept the extension, to January 1, 2016.

C. Hearing panel member unable to continue

12. The Act and Rules Committee discussed this issue and referred it to the Executive Committee for a discussion of the policy issues involved and a recommendation to the Benchers as to how to proceed to remedy the problems outlined below. The Executive Committee considered the question in 2012, but was unable to come to a consensus for a recommendation to the Benchers. It was one of the issues referred to this Task Force by the Benchers.
13. We bring this matter to the attention of the Benchers now because the question of continuity of hearing panels is current and ongoing, and the risk that hearing proceedings might be lost as a result of the inability of a hearing panellist to continue with a matter continues to be

present. Tackling this difficult question was delayed for some time so that it could be considered in the context of the review the Task Force is undertaking. The Task Force is now prepared to make a recommendation that we consider would reduce the risk of a lost hearing in the future.

14. As you know, Law Society tribunals have changed from hearing panels composed entirely of Benchers to a composition in which only the chair of the panel is a current lawyer Bencher and the other members (“wingers”) include a non-Bencher lawyer and a non-lawyer member of the public.

Winger unable to continue

15. Under the current Rules, if one of the members of the panel is unable to continue for some reason the hearing may continue in some, but not all, circumstances. Rule 5-2(2)(d) allows the hearing to proceed and conclude with one Bencher sitting alone as chair.

- (2) A panel may consist of one Bencher who is a lawyer if

- (d) one or more of the original panel members cannot complete a hearing that has begun.

16. That Rule continues in force. In the event that the non-Bencher lawyer or the non-lawyer member of the panel is unable to complete the hearing, the Rule will allow the hearing panel to continue. That would allow the hearing to continue and the reduced panel would continue to comply with Rule 5-2(3):

- (3) A panel must be chaired by a Bencher who is a lawyer.

17. However, the panel cannot continue with just one winger because of Rule 5-2(1):

- (1) A panel must consist of an odd number of persons but, subject to subrule (2), must not consist of one person.

18. Since only the lawyer Bencher member of the panel can continue as a single Bencher panel, the other “winger” would have to be excused. This result is inconsistent with the program initiated by the Benchers in 2011 that involves the participation of a non-Bencher lawyer and a member of the public in every discipline or credentials hearing.

Bencher unable to continue

19. There is a bigger problem when it is the lawyer-Bencher chair who cannot continue. Under the old regime, if a Bencher chair of a hearing panel was unable to proceed, one of the other Benchers could assume the chair and proceed as a single-Bencher panel. Now there is only one lawyer-Bencher on each panel. If that Bencher cannot continue, there is no one else on the hearing panel who can fulfill the requirement of Rule 5-2(3) that a Bencher who is a lawyer must chair the panel.

20. As a general proposition, an adjudicator who has not heard all of the evidence on which a decision is to be made must not participate in the decision. It would not be an option, in the midst of a hearing, to replace the Bencher-chair who cannot continue with another lawyer-Bencher who has not been present and heard the evidence up to that point.
21. As a result, the hearing must be abandoned and a new hearing begun with a new panel. That would cause a delay and potentially waste a lot of time and money. It could cause significant unfairness to the individual respondent or applicant who is the subject of the hearing.

Problems

22. The Law Society has gone to a great deal of effort some and expense to include members of the public and non-lawyer Benchers in the hearing process. This has engendered significant good will with the public and the media and, less demonstrably, one would expect with many members of the profession as well. Terminating public involvement or non-Bencher lawyer involvement in the event that the other winger is unable to continue seems to go contrary to the purpose of the reforms to involve members of the public and non-Bencher lawyers in the process.
23. Terminating a hearing and starting again in the event that the one lawyer-Bencher on the panel cannot continue would have the same effect, as well as causing a delay and potentially wasting a lot of time and money.

Options

24. When the hearing panel member who is unable to continue is the Bencher chair, one solution would be to give the President the discretion to allow the non-Bencher lawyer to continue as a single-member panel to complete the hearing. This would have the advantage of avoiding delay and costs thrown away by re-starting the hearing with a whole new panel. However, the appearance of excluding the public representative from the hearing and favouring the non-Bencher lawyer over the non-lawyer would be undesirable.
25. In the long run, the Task Force will consider the requirement that a Bencher must chair every hearing panel. It may be that members of the hearing panel pool who are not lawyer-Benchers, with the appropriate training in conducting hearings, could be allowed to act as chair in the ordinary course, and then it would not be an issue if the Bencher-chair cannot continue with a hearing. The Task Force will report on that consideration in its final report to the Benchers.
26. A further option would be to allow the President the discretion to continue both the non-Bencher members of the panel in the absence of a Bencher. This would require a relaxation of the Rule requiring an odd number of members of a panel for this sort of situation, as well as the requirement for a lawyer-Bencher chair in all cases.

27. The odd-number rule is intended to avoid a tie vote, in effect, by a hearing panel. The risk of that happening would be a disadvantage of this approach to the problem. It would also be inconsistent with the intention of the Benchers that individual lawyer-Benchers should continue to be involved in each hearing panel, albeit now one at a time. However, it would have the advantage of allowing proceedings to continue without sending an offensive message in relation to the involvement of non-lawyers and non-Benchers in the hearing process.
28. Without further direction in the Rules, the failure of the two panellists to agree would mean that there was no decision, and the hearing would have to be started over from the beginning with a new panel. That obviously would result in even greater delay and waste of time and money than restarting the hearing at the time that the Bencher became unable to continue.
29. It may also give rise to an argument that the citation should be dismissed for delay. The Rule change could require that both parties consent to the matter continuing with a panel of two and/or an undertaking that a delay argument would not be raised as a result.
30. If continuing with a panel of two is accepted when a Bencher chair is unable to continue, there is no reason why that would not also apply when one of the “wingers” is unable to continue. That would avoid the problem of having to excuse the other non-Bencher member of the panel who is able to continue.

Recommendation

31. The Task Force considered the options discussed above, as well as some other more unorthodox approaches. It is the view of the Task Force that the best option to avoid future problems is to allow two non-Bencher members of a panel to conclude a hearing when the lawyer-Bencher chair of the panel cannot continue for any reason. On the whole, the risk that there may be a “tie vote” in the end is outweighed by the certainty of an unnecessary departure from the established principles, as described above.
32. The Task Force is also of the view that the same factors lead to allowing any two members of a hearing panel to continue when a third member cannot continue. This would require amendments to the governing rules to allow an exception to the rule that a panel must consist of an odd number of panel members. Another exception to the rule that a lawyer-Bencher must act as chair would also be required to allow for the case where the chair is the panel member who cannot continue.
33. The Task Force considered that the President should have the discretion to decide whether to allow the two remaining members to continue as a panel. There may be circumstances where that may not be appropriate. That would also allow the President to consider factors such as the positions of the parties and whether delay is likely be a factor in each of the options available to the President.

34. The Task Force also considered the case of review boards. The current rules require an odd number of members of each board. The Task Force recommends a change to the rules to allow all the remaining members of the review board to continue, even if that leaves an even number of members.

Suggested resolution

35. The Task Force recommends that the Benchers adopt a resolution such as this:

BE IT RESOLVED TO

1. approve in principle changes to the Law Society Rules to allow for
 - (a) the remaining two members of a hearing panel to continue to conduct a hearing when one member is unable to continue for any reason, and
 - (b) the remaining members of a review board to continue to conduct a review when one member is unable to continue for any reason;
2. refer the matter to the Act and Rules Committee to recommend rule amendments to implement the changes.