THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday September 8, 2006

PRESENT:

Robert McDiarmid, QC, President
Anna Fung, QC, 1st Vice-president
John Hunter, QC, 2nd Vice-president
Rita Andreone
Kathryn Berge, QC
Joost Blom, QC
Ken Dobell
Ian Donaldson, QC
Michael Falkins
Leon Getz, QC
Carol Hickman
Gavin Hume, QC
William Jackson
Patrick Kelly
Terry La Liberté, QC
Bruce LeRose
Jan Lindsay
Thelma O'Grady
Robert Punnett
David Renwick
Glen Ridgway, QC
Alan Seckel, QC, Deputy AG
Dirk Sigalet, QC
Richard Stewart
Ronald Tindale
Gordon Turriff, QC
Dr. Maelor Vallance
Art Vertlieb, QC
James Vilvang, QC
David Zacks, QC

NOT PRESENT: June Preston

STAFF PRESENT:

Timothy McGee, CEO
Dana Bales
Stuart Cameron
Mary Ann Cummings
Brad Daisley
Su Forbes, QC
Jeffrey Hoskins
Howard Kushner
Michael Lucas
Jeanette McPhee
David Newell
Jack Olsen
Alan Treleaven
Adam Whitcombe

GUESTS:

Dean Mary Ann Bobinski, University of British Columbia
Frits Verhoeven, President, CBABC
Frank Kraemer, QC, Executive Director, CBABC
Caroline Nevin, Associate Executive Director, CBABC
Johanne Blenkin, Chief Librarian, BCCLS
Wayne Robertson, Executive Director, Law Foundation of BC
Jamie McLaren, Executive Director, Pro Bono Law of BC
Mark Benton, Executive Director, Legal Services Society

1. MINUTES

The minutes of the meeting held on July 14, 2006 were approved as corrected.

2. PRESIDENT'S REPORT

Mr. McDiarmid reported that members attending a meeting of the Salmon Arm Bar Association had expressed considerable and heartening interest in the Law Society's practice standards and professional ethics programs. He reported on his attendance at the Canadian Bar Association National Conference in St. Johns, where he was invited to speak on pro bono programs. He thanked the CBA BC Branch for making that opportunity available and for making him feel very welcome at the meeting. He also thanked Jamie McLaren of PBLBC for his assistance with the presentation.

3. CEO'S REPORT

Mr. McGee gave a brief review of some of the Law Society events taking place in September and October including: the Unbundling of Legal Services Task Force World Café in 108 Mile House, the Law Society AGM, the first public forum produced by Equity and Diversity Committee, and a very large call ceremony split into two sessions for the first time in order to comply with fire regulations. Mr. McGee welcomed Howard Kushner, the Law Society's new Chief Legal Officer, then asked Chief Financial Officer, Jeanette McPhee to report on Law Society finances.

Ms. McPhee reviewed the summary of Law Society finances to the end of July. She reported that overall expenses were positive to plan, largely due to TAF related expenses and the timing of bringing on staff. She reported that TAF revenue in the second quarter was slightly over budget, reversing the trend seen in the first quarter, although TAF revenues remained slightly under budget for the year.

Mr. Zacks noted that the Law Society had fewer members than anticipated and he noted that although the Law Society's commitments to LAP and BCCLS were based on the number of members, the amounts paid to those organizations did not appear to be calculated that way.

Ms. McPhee said some commitments are calculated on the number of members and some are not. In some cases, periodic payments are made in approximate amounts and then adjusted at the end of the year to reflect membership numbers.

Mr. McGee reported on his attendance at a conference of the International Institution of Law Association Executives, where topics discussed included:

- The role of lawyers in society
- Implementation of the Clementi Report recommendations in the UK
- Government relations in United States.
- Association management, including volunteer recruitment and maintenance, and the role of an elected president.

He said the Law Society of BC was on track with respect to identifying issues that need to be attended to and the Canadians attending the conference came away satisfied with how we are dealing with issues. One speaker was a lawyer who was formerly the Mayor of Detroit. He highlighted issues with respect to small firms and sole practitioners, and women in the profession. Most lawyers in the United States practice in firms of between two and ten lawyers, which are the backbone of the legal profession, and regulators must understand how they operate. He estimated that seventy percent of need for access to justice is unmet in the United States. A past president of ABA was asked why we are seeing attacks on the independence of the judiciary and bar. His answer was that the public holds legislators accountable and the legislators look to regulators for solutions. The regulators must look to the rule of law as the basis for solutions. Mr. McGee said the attendees from the European Union were emphatic that they need a common strategy to deal with attacks from the competition bureaus.

With respect to operational matters, Mr. McGee reported that renovation of the fourth floor of the Law Society building was on track and on budget. He reported that the Law Society had retained TWI Surveys Inc. to assist with the design and implementation of an employee survey. The goal is to complete the survey by the end of October and to repeat it as an annual survey

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. REPORT FROM THE MINISTRY OF THE ATTORNEY GENERAL

Deputy Attorney General Alan Seckel gave a presentation on the current work of the Ministry of the Attorney General. A copy of the presentation is attached as Appendix 1. Alan Seckel, QC reported on the work of the Ministry of the Attorney General. Points of interest included:

- The goals of the Ministry of the AG are
    - To lead in law reform and innovative justice processes
        - Greater social and justice system integration
        - Process reform
        - Family and succession law reform
        - Application of technology in courts.
    - Effective criminal and civil justice systems
    - Effective legal services to government.
        - More than 160 lawyers in-house, limited use of outside counsel
        - Fee for service model for ministries.
- Legislative time is scarce and subject to political priorities
- Resources are scarce.

Mr. Seckel suggested that the Law Society, and other participants in the justice system could be less "Vancouver-centric" when thinking about how to help more people understand the system and their functions in it. For example, he said organizations like the Law Courts Education Society could help MLAs and their constituency assistants who function like ombudsmen in their constituencies. He also agreed with the point made by Mr. Getz that people would be more aware of what we do and what issues are important to us if Benchers and others talked about those things with people outside the legal profession or the justice system.

Mr. McDiarmid asked about the consultation process between the federal government and the provincial government with respect to criminal justice reforms being implemented at the federal level. Mr. Seckel said that normally the amount of consultation was very high but not in this case. He said the federal government believes it has an electoral mandate to implement reforms. Delay in implementation is in part the result of concerns expressed by the Provinces.

Mr. McDiarmid asked if the Law Society comes to the attention of the Ministry of the Attorney General through other ministries. Mr. Seckel said it was not a frequent occurrence. He said there was no active project to reform the law relating to self-governing professions, save for discussions about dealing with requests for new self-governing bodies.

Mr. Stewart asked what the Law Society could do to assist the Attorney General with managing the criminal justice system. Mr. Seckel said the justice sector has had difficulty getting its issues on the political agenda, which is a rough approximation of public sentiment, so the real answer is the need to motivate the public.

Mr. Donaldson recalled previous discussions with the Attorney general in which he voiced the opinion of some lawyers believe that some of the problems that result in slipping public confidence in the justice system are a media construct. Mr. Donaldson said his perception was that the system

works for the most part, and he asked how the Law Society could approach the problem of aligning the public perception with reality. Mr. Seckel said one thing all participants in the justice system could do is focus their attention less exclusively on the Lower Mainland, and seek to educate the media and public in other communities. He suggested working with MLAs and their constituency assistants in other parts of the province would be beneficial.

Mr. Getz commented that the legal profession tends to spend a lot of time talking to itself and other justice system participants, and much less time talking to people outside the profession. He said that might be one of the reasons why the profession fails to convey the importance of what it does, or why it is difficult to get its issues on the political agenda. Mr. Seckel agreed with Mr. Getz and said the Ministry of the Attorney General was as guilty as any other participant on that score.

6. CHANGES TO EXECUTIVE LIMITATIONS

Mr. Zacks presented proposed revisions to Part 2 of the Benchers Policy Book, Executive Limitations.

Mr. Vertlieb noted the deletion of paragraphs F(5) and F(6) setting out specific limitations with respect to maternity and parental leave policy, and an equity and diversity plan. He was concerned about how the change might be construed, and he urged that it be referred to the Equity and Diversity Committee for review.

Mr. Zacks said that when the executive limitations were first put in place about ten years previously, the Benchers were in the process of changing the Law Society governance model. Considerable control was given to the Executive Director, but the Benchers retained some control themselves, through the executive limitations. However, the conditions that prevailed at that time have changed, and some of the more detailed limitations are not longer required. The policies and plans that were required by the executive limitations are now an integral part of the Law Society and the more general statements remaining in the executive limitations are sufficient to ensure that the Executive Director continues to operate the Law Society within boundaries acceptable to the Benchers.

Mr. McDiarmid was concerned about the deletion of the section on communication to the Benchers and suggested leaving in the statement that "the Executive Director must provide the Benchers with sufficient information so that they are not uninformed".

Mr. Zacks said that statement, like many of the other general statements in the executive limitations purported to require the Executive Director to do something by expressing a limitation as a double negative. He said most of those statements are now part of the Executive Director's job description.

Mr. LeRose said the Benchers might not have grasped the process the Audit Committee engaged in. The Benchers created an exhaustive and fairly obvious list of limitations. The Audit Committee's view was that a lot of the limitations are sufficiently obvious and the policies that they concern are well entrenched. The Law Society has developed a practical model that does not require so many detailed expressions of limitation on the Executive Director's scope of action.

Mr. Hume agreed that there was a high level of trust between the Benchers and the CEO and the Benchers should give the CEO and executive staff freedom to operate the Law Society in a modern fashion.

Ms. Andreone noted that the Benchers Policy Book, including the Executive Limitations serve as external documents and shore up the Benchers obligations to manage the Law Society appropriately. Her concern was that by taking an old document and making deletions, it invites comparisons that lead to erroneous conclusions.

Mr. Turriff questioned whether it made sense to examine the limitations when the Benchers would be reviewing the entire governance model in the future.

Mr. Zacks said the Audit Committee thought the limitations should be dealt with immediately because the governance review could take considerable time.

Mr. McDiarmid said that in practical terms any time there had been a concern that an executive limitation might be exceeded it was brought to the Benchers and approved. He said there had never been a particular concern about excessive limitation and to some extent the document might be less important to the Law Society than the Carver governance model would have it.

Mr. Vertlieb said the discussion had relieved much of his concern.

Mr. McGee confirmed that the proposed changes to the executive limitations did not change anything in terms of his commitment to equity and diversity and related matters.

Ms. Hickman said her comments reflected those made to her by members rather than her own views. She said members had commented that the Benchers were losing too much control to the Executive Director. She was concerned that members might misperceive the proposed changes.

It was moved (Zacks/LeRose) to rescind Part 2 of the Benchers Policy Book and replace it with Part 2 as set out in Appendix 2.

The motion was carried.

Mr. Zacks presented a schedule setting out who is authorized to agree to and sign various types of agreement on behalf of the Law Society.

It was moved (Zacks/LeRose) to adopt the Schedule of Authorizations as set out in Appendix 3.

The motion was carried.

7. PROPOSED RULE AMENDMENTS – TRUST ASSURANCE PROGRAM

It was moved (LeRose/Zacks) to amend the Law Society Rules as set out in Appendix 4.

Mr. McDiarmid said the proposed subrule 3-43.1(b) appeared to be grammatically incorrect.

Ms. Hickman noted requirements for lawyers to pay judgments within seven days, and she asked if there was any provision for an extension of that time.

Mr. Hoskins pointed out that a lawyer would receive no less than seven days notice before being suspended under Rule 3-79.1 and would have an opportunity to apply to the Discipline Committee for relief.

Mr. McDiarmid noted the provision in Rule 3-79.1 for the Discipline Committee to decide not to suspend a lawyer or to extend the time before a suspension takes effect if there are special circumstances. He said it was important to remember that the proposed rules would replace provisions that do not function well with provisions that help protect the public.

Mr. Ridgway noted that lawyers would still have sixty days to provide trust reports, and he suggested considering a shorter time frame. He said the Law Society not only wanted to catch lawyers dealing improperly with trust funds, but to catch them quickly.

Ms. Hickman was concerned that the proposed Subrule 3-79.1(1) appeared to create a reverse onus buy suspending a member who does not produce required records. She thought automatic suspension was harsh, and the Law Society should be required to demonstrate a basis for suspension.

Mr. Hoskins pointed out that Subrule 3-79.1(1) remained subject to Subrules 379.1(2) and (3), which provided for relief from automatic suspension.

Mr. Lucas noted that lawyers have an ongoing obligation to keep their records up to date and there was some sense that a failure to fulfill that obligation properly casts some obligation on the member to demonstrate why that is so.

The motion was carried by a majority of more than two thirds of the Benchers present. Ms. Hickman voted against the motion.

8. FEDERATION OF LAW SOCIETIES TERRITORIAL MOBILITY AGREEMENT

It was moved (Fung/Hunter) to approve the Federation of Law Societies Territorial Mobility Agreement, attached as Appendix 5, and authorize the President to sign the agreement on behalf of the Law Society of British Columbia.

The motion was carried.

9. PROFESSIONAL CONDUCT HANDBOOK, CHAPTER 8, RULE 1(e)

Mr. Hume briefly reviewed a memorandum from the Ethics Committee concerning the significance of the Supreme Court of Canada decision in *R. v. Lyttle* on Chapter 8, Rule 1(e) of the Professional Conduct Handbook. The Supreme Court held that it is permissible for counsel cross-examining a witness to pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition and there is no requirement of an evidentiary foundation for every factual suggestion put to a witness on cross-examination. The Ethics Committee recommended adding a footnote to Rule 1(e) drawing attention to the *R. v. Lyttle* decision. The Committee also recommended some non-substantive "housecleaning" changes to Chapter 8.

It was moved (Hume/Fung) to amend Chapter 8 of the Professional Conduct Handbook as set out in Appendix 6.

Mr. Punnett was concerned that it might be possible for a lawyer to comply with the requirements of *R. v. Lyttle* but still contravene Rule 1(e).

Mr. Hume said the Committee's view was that the Rule is generally valid but required modification in the circumstances outlined in *R. v. Lyttle*.

Mr. Vilvang agreed with Mr. Punnett that the footnote would be inconsistent with the wording of the Rule.

Mr. Donaldson said that if "assert" in Rule 1(e) means something other than to invite the court to accept as fact, then arguably the Rule is inconsistent with *R. v. Lyttle*. Mr. Turriff agreed, noting that the Handbook appeared to be more restrictive than R. v. Lyttle, and that should not be so because if experienced counsel are prevented from pursuing possible avenues of examination, the truth will not be found in some cases. Mr. Donaldson raised a further concern regarding the proposed change in Rule 19 of Chapter 8. In its current form the rule says a lawyer should not represent an accused family member on an application for judicial interim release when the lawyer acts as surety or in a supervisory capacity, but the proposed change appeared to not only prohibit

the lawyer from representing the accused family member under such circumstances, but in general. He suggested that apparent expansion of the rule might be an unintended effect of the amendment.

Ms. Hickman noted that Rule 21 referred to "*ex parte*" proceedings, but in family law, such proceedings are referred to as "without notice proceedings". Mr. Turriff said the term "*ex parte*" had been abandoned in all civil proceedings in favour of "without notice proceedings"

It was moved (Hume/Donaldson) to amend the motion to omit changes to Rule 19, to omit proposed footnote 1, and to change all references to "*ex parte* proceedings" to "without notice proceedings".

Ms Berge suggested footnote 1 could be added as an interim measure.

The motion to amend was carried.

The motion, as amended, was carried.

It was moved (Hume/Donaldson) to refer Rule 19 and proposed footnote 1 back to the Ethics Committee for consideration of the Benchers concerns.

The motion was carried.

10. DISCLOSURE AND PRIVACY RE S. 39 APPLICATIONS

Mr. Hunter described the section 39 procedure. It involves an urgent situation where the Discipline Committee authorizes a citation and considers it necessary to impose conditions or suspend the member. The decision is referred to any three Benchers. It is not a hearing and it is important that the three Benchers not be constrained as if they were a hearing panel. When there is time to do so the member is informed of the proceeding in advance and the proceeding acquires some of the characteristics of a hearing, but it can be done without notice and very quickly when necessary. The member has an opportunity to have the decision reviewed, and that review is a hearing. The first consideration is whether the hearing like proceedings should be open to the public. The rules are silent in that regard. The Disclosure and Privacy Task Force believes the privacy interest of the member is more important at this stage and the proposed change would make it clear that the referral process is not open to the public. The next issue is disclosure of the result of the referral. The fact of the referral would have an impact on the member even if it did not result in a suspension. The Task Force concluded this should not be made public, but a decision to suspend or impose conditions should be made public. The third question concerns reasons for the decision. Bearing in mind that the process is not a hearing and only an interim decision, Benchers should be quite circumspect in their reasons so as not to say anything that could prejudice the member in the subsequent hearing. However, the Task Force concluded that the reasons should be made public, but if the decision includes imposing private restrictions (such as medical care, etc) then the decision should not be published but made available on request.

It was moved (Hunter/Jackson) to adopt in principle the recommendations of the task force as follows:

1. amend Rule 4-17 to specify that a referral to three Benchers pursuant to Rule 4-17 is not open to the public.

2. amend Rule 4-17 to provide that a decision of three Benchers who have considered a matter pursuant to Rule 4-17 is public but that the Law Society not disclose the fact of the referral pursuant to Rule 4-17 until it has been completed and only proactively disclose the fact of the referral if it results in an order suspending the respondent from practice or imposing conditions or restrictions on the respondent's practice.

3. that the Law Society Rules provide for the Law Society to disclose on the Law Society website decisions to suspend or impose conditions or restrictions imposed on a lawyer's practice as a result of a Rule 4-17 application; that the Rules also provide that if an application is dismissed or if only private conditions are imposed, then the decision will not be published; and that the Reasons on a Rule 4-17 application not be published but may be made available on request.

Ms. Fung agreed with the recommendation with respect to private restrictions, and asked what would happen in the case of mixed, private and public restrictions.

Mr. Hunter said the Task Force did not discuss that situation but the intent of the recommendation was that the private restrictions would be extracted before publication.

Mr. Hume said the Ethics Committee had discussed whether a lawyer should be required to disclose their suspension to their clients, and he asked how that would interact with the Task Force recommendations.

Mr. Hunter said the Task Force had not considered that point but the theme throughout the recommendations is that a suspension is public, which would be consistent with a requirement to disclose it to clients.

Mr. Getz said making reasons available on request would not be of much use if people don't know they can ask for them. He suggested that the website should include the information that reasons can be requested.

Mr. Hunter agreed with Mr. Getz's suggestion.

Mr. LaLiberté was concerned about the potential disclosure of unsubstantiated allegations that could be harmful to the member if no suspension is ordered.

Mr. Hunter said the Task Force was alive to that concern and their recommendations placed some burden on the three Benchers to be circumspect in formulating their reasons so as to limit the potential for harm to the member. Ultimately, the recommendations represent a balancing of competing interests.

Ms. Fung asked if private conditions would be expurgated before reasons are released pursuant to a request. Mr. Hunter said that was the intention of the Task Force recommendations.

The motion was carried.

It was moved (Hunter/Jackson) to adopt in principle the recommendations of the task force as follows:

1. that the Law Society proactively make public any application and decision pursuant to Rule 4-19 including posting notice of the date of the application and the decision and Reasons for decision, if any, on the Law Society's website.

2. amend Rule 4-37to allow the Executive Director to give such other notice of the suspension or disbarment of a respondent as he considers desirable, including posting notice of the suspension or disbarment on the website.

3. that the Executive Director adopt a practice of publishing notice of the suspension or disbarment in the business or main section of the principal newspaper in the community where the respondent practises rather than in the classified advertisement section of such newspapers.

Mr. Vilvang said there should be no interference with the power of panels to impose conditions on publication.

Mr. Hoskins said panels do not have the power to impose conditions on publication except to order anonymous publication where grievous harm would occur.

Mr. Vilvang thought panels should preserve the discretion to direct the form of publication and the Executive Director would not supercede that direction.

Mr. Hoskins said that discretion was delegated to the Executive Director.

The motion was carried.

11. INSURANCE ASSESSMENT FOR 2007

Ms. Forbes gave a presentation, a copy of which is attached as Appendix 7.

It was moved (Hume/Donaldson):

(a) the insurance fee for 2007 pursuant to section 30(3) of the Legal Profession Act be fixed at $1,400;

(b) the part-time insurance fee for 2007 pursuant to Rule 3-22(2) be fixed at $700; and

(c) the insurance surcharge for 2007 pursuant to Rule 2-26(2) be fixed at $1,000.

The motion was carried.

12. APPOINTMENTS TO THE QC ADVISORY COMMITTEE

It was moved and seconded to appoint Mr. McDiarmid and Ms. Fung to the QC Advisory Committee.

The motion was carried.

13. FAIR ACCESS TO REGULATED PROFESSIONS ACT – ONTARIO BILL 124

Mr. Turriff said Bill 124 in Ontario would apparently limit the ability of the Law Society of Upper Canada to decide who can become a member. He said the development would be monitored by the Independence and Self-governance Committee because it has potential impact outside Ontario, including on the functions of the National Committee on Accreditation.

14. *CHRISTIE v. AGBC*

This matter was considered *in camera*.

16. UPDATE ON CLAIMS, INVESTIGATIONS, AND RECOVIRIES IN THE WIRICK MATTER.

This matter was considered *in camera*.

17. SPECIAL COMPENSATION FUND ASSESSMENT

Ms. McPhee gave a presentation, a copy of which is attached as Appendix 8.

It was moved (LeRose/Falkins) to set the Special Compensation Fund Assessment for 2007 at $500.00

The motion was carried.

18. MEMBER RESOLUTIONS PUT FORWARD TO THE ANNUAL GENERAL MEETING

This matter was discussed *in camera*.

DMGN
06-10-03