THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday November 10, 2006

PRESENT:

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

NOT PRESENT: Barbara Levesque; David Zacks, QC

STAFF PRESENT:

Timothy McGee, CEO	Bill McIntosh
Dana Bales	Jeanette McPhee
Stuart Cameron	David Newell
Su Forbes, QC	Alan Treleaven
Jeffrey Hoskins	Adam Whitcombe
Michael Lucas	

GUESTS:

Dean Mary Ann Bobinski, University of British Columbia
Frits Verhoeven, President, CBABC
Frank Kraemer, QC, Executive Director, CBABC
Warren Wilson, QC, Chair, Law Foundation of BC
Wayne Robertson, Executive Director, Law Foundation of BC
Johanne Blenkin, Chief Librarian, BCCLS
Marina Pratchett, QC, Chair, Pro Bono Law of BC
Andrew Kern

1. MINUTES

The minutes of the meeting held on October 13, 2006 were approved as circulated

2. PRESIDENT'S REPORT

Mr. McDiarmid reported on his activities over the previous month, which included:

- A full and frank discussion with the Deputy Minister responsible for publication of BC statutes concerning the availability of up-to-date statutes online.
- Attended the Federation council meeting and conference in Vancouver, at which discussion included:
    - Possible intervention in a Saskatchewan case concerning Law Society access to privileged information during an investigation into a lawyer's conduct.
    - Scope of practice issues focusing on whether Law Societies should directly regulate paralegals.
    - Northern issues, in particular the impact of global warming on Canadian sovereignty in the arctic.
- Attended at the Nanaimo County Bar Association meeting and asked for constructive criticism of the Law Society. One concern was how the new trust assurance program will impact law firms. Staff are working on material that will be available on the Law Society website in the near future.

3. CEO'S REPORT

Mr. McGee's report included:

- A review of Law Society finances. He noted that overall results were tracking to plan, but the General Fund was projected to end the year over budget. Fewer than anticipated members resulted in lower revenue, and increased cost of external counsel arising from several complex cases and the outsourcing of files pending hiring new staff after reorganizing were not adequately provided for in the budget. The net result will be a negative variance of between $400,000 and $600,000. Management will continue to seek ways to minimize the impact.
- Management staff have been busy with the budget planning process for 2007. Department budgets have been built with involvement of department heads, which will result in greater ownership of and accountability for budgets.
- The Law Society CEO's met during the Federation meeting and focused on how the Federation should operate, what resources it requires and how information should flow to the Law Societies.
- The first employee survey was circulated and the results will be available in the coming weeks. The content of the survey was largely recommended by consultants with input from the Employee Council. The results will be used to work with staff to formulate plans and goals for the future.
- Meeting with Godfrey Archbold, CEO of the Land Title and Survey Authority, who strongly endorsed the Juricert System as part of e-filing initiatives.
- The United Way campaign is winding up and the Law Society has continued its history of generosity by meeting or exceeding its target.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. PRO BONO FUNDING TASK FORCE

Mr. Donaldson circulated a memorandum from the Pro Bono Funding Task Force. He said the task force had begun by considering whether the Law Society should provide any funding to external pro bono services. The task force noted that there is a strong argument against taxing members only to give funds away, particularly when many members already donate their time to pro bono causes in any event. However, the task force also noted that the Law Society had already provided funding for Pro Bono Law of BC and the Western Canada Society to Access Justice in the past two years. After considering the practices of other Law Societies, the task force concluded that it would be appropriate for the Law Society to provide some pro bono funding. The task force then considered three questions: how much funding should be provided, from what source, and how should it be distributed? With respect to the first two questions, the task force looked to a proposal first made in 1997 by Law Society Secretary Bryan Ralph, as he then was, to allocate a percentage of the General Fund portion of the annual practice fee to funding pro bono causes. The task force concluded that one percent of the General Fund fee would provide a reasonable amount of money without being unduly burdensome. On the question of how to distribute the funds, the task force noted that the Law Foundation of BC allocates nearly $4 million of its $17 million budget (in 2006) to pro bono initiatives of various kinds, and it is uniquely well suited to determining appropriate recipients of grant funds. Mr. Donaldson said the Law Foundation was willing to receive funds from the Law Society with "strings attached" in terms of its use. This would have the twofold benefit of ensuring that worthy recipients receive the funding, and eliminated the need for the Benchers to consider how to allocate the funds. Accordingly, the task force recommended that the approve in principle transferring 1% of the General Fund portion of the annual practice fee in each year to the Law Foundation to be allocated to pro bono programs on specific terms to be developed and returned to the Benchers for approval.

Ms. Andreone asked if the Law Foundation would provide some comfort that if it received the proposed funding from the Law Society it would not divert its other funds to other projects.

Mr. Wilson thought the Law Foundation could give that assurance. He noted that the Law Foundation could continue its support of pro bono programs at similar levels as it had in the past, and use funds from the Law Society as additional funding in that field.

Mr. LeRose was in favour of the proposal. He asked if it would include funding for Pro Bono Law of BC.

Mr. Donaldson said the task force deliberately decided against considering funding specific organizations in favour of finding a principled basis for funding pro bono activities. The task force's view was that if 1% of the annual fee is contributed to the Law Foundation for funding pro bono activities, no other funding requests would be entertained by the Law Society.

In response to a question from Mr. Stewart, Mr. Robertson advised that the Law Foundation would not charge a fee for administering the funds.

Mr. Getz noted the reference to "community based organizations" among the recipients of Law Foundation funding, and he asked if that was a defined term. Mr. Donaldson said the specific nature of organizations that might receive funds from the Law Society via the Law Foundation was one of the matters that would have to be determined as part of the conditions attached to the money.

Ms. O'Grady asked where the money would come from. Mr. Donaldson said the task force hoped that in the long run the Law Society would not need to raise fees by 1% to fund this commitment. He noted that the Benchers had allocated approximately that amount to pro bono programs in the past two years.

Ms. McPhee said the management team had allocated $65,000 in cash to pro bono programs in the 2007 budget. Any additional amount would be unbudgeted for 2007.

Mr. Turriff agreed with the proposal in principle but questioned whether 1% was the right amount. Plainly the Benchers do not want to discourage lawyers from providing pro bono services on their own, but certainly 1% of the General Fund fee would not do that. He noted that the Law Society provides nearly three times as much to support CanLII.

Mr. Jackson was concerned that 1% of the General Fund fee would represent a net decrease in funding given to pro bono programs. He was also concerned that offloading the decision making process onto the Law Foundation might give the appearance of abandoning Pro Bono Law of BC.

Ms. Preston suggested that one of the conditions attached to the funds might be ongoing support for Pro Bono Law of BC.

Ms. Pratchett said Pro Bono Law of BC appreciated the thought that had gone into the proposal, and endorsed the theory of the recommendation, believing the Law Foundation to be better positioned to respond to grant requests. Ms. Pratchett had some concern about how the proposed 1% allocation might impact Pro Bono Law of BC funding, and she expressed the hope that the in kind support from the Law Society in the form of nominal rent could be continued.

Mr. Donaldson encouraged the Benchers to adopt the proposal in stages. He said the task force was not wedded to the proposed 1% allocation, and might suggest a different amount based on further information.

Mr. Vertlieb suggested that the Benchers could always reconsider the amount after further consultation and experience.

Mr. Ridgway noted that the proposed amount to be provided by the Law Society would be in addition to the millions of dollars already available to pro bono programs from the Law Foundation and the individual contributions of members around the province in the form of actual pro bono services. He said he would not want to stray too far from the proposed 1% figure.

Mr. Wilson said the Law Foundation had supported the organizations that had received Law Society funding in the past and would continue to support them.

It was moved (Donaldson/LeRose) to approve in principle payment by the Law Society to the Law Foundation of British Columbia annually, commencing in 2007, an amount based on a percentage of the General Fund portion of the Law Society Annual Practice Fees collected subject to conditions to be determined to ensure the funds are distributed by the Law Foundation to organizations offering pro bono services to the public.

The motion was carried.

It was moved (Vilvang/LeRose) to set the amount to be transferred to the Law Foundation at 1% of the General Fund portion of the Annual Practice Fee, exclusive of in kind support to Pro Bono Law of BC.

The motion was carried.

6. REPORT FROM THE LAW FOUNDATION

Warren Wilson, Chair of the Law Foundation, gave a report on the foundation. For the benefit of people unfamiliar with the Foundation, he gave a brief description of it. He recalled that prior to the formation of the Law Foundation the financial institutions snapped up the interest on lawyers' pooled trust accounts. The Foundation was formed in 1969 following the lead of New South Wales, Australia, and after that time, interest on pooled trust accounts was paid to the Foundation to use for legal education and research, legal aid, law reform, and establishing and operating law libraries in BC. The Foundation board must include Law Society representatives from all counties.

Mr. Wilson said the Foundation's income had ranged from $6 million to over $20 million. The Foundation tried to make grants in a way that will allow it to weather downturns in the economy, and to that end it maintains a reserve equivalent to about eighteen months' grants. He said it makes a big difference if financial institutions pay favourable interest rates on trust accounts, and the Law Society had been helpful in securing increased rates by publishing the names of both cooperative and recalcitrant financial institutions, and encouraging members to place their accounts with those who pay higher interest rates.

The Law Foundation's contribution to legal aid programs goes mostly to the Legal Services Society, but also to community based advocacy programs. In the legal education field the Foundation provides funding to both law schools, PLTC, and some community education programs such as the Law Courts Education Socieyt and The People's Law School. The Foundation gives more than $2 million annually to the BC Courthouse Library Society, and also gives an annual grant to CanLII. The Foundation is the core funder for the BC Law Institute.

In addition to core funding grants, the Law Foundation also made project grants totaling more than $2 million for projects that included Society Act reform (through the Law Institute), anonymization of family law decisions (through the BCCLS), and pro bono clinic development (through the Western Canada Society to Access Justice).

The Foundation has just completed a three-year strategy review and concluded happily that it is funding the right groups. It is looking forward to healthy finances in the next year and to a number of new projects that will enhance access to justice.

7. REVISED MODEL POLICY ON PREGNANCY AND PARENTAL LEAVE, AND GUIDELINES FOR RECRUITING AND HIRING

Mr. Hume reviewed the history of the model policy on pregnancy and parental leave, which started in 1989 when the Law Society became concerned about improving the situation of women in the profession. Policies developed by the Hughes Commission were adopted and ultimately published on the Law Society website. The Women in the Legal Profession working group proposed revisions to two policies: the policy on pregnancy and parental leave, and the guidelines for recruiting and hiring. The former is the most out of date. The working group tried to take into account the concerns expressed by a number of Benchers and to ensure that it is clear that the model policies are models only that can be adjusted or modified to fit the requirements and abilities of different law firms.

It was moved (Hume/Preston) to approve for publication the model policy on pregnancy and parental leave.

Mr. Jackson asked if it might be improperly discriminatory to specify different leave provisions for natural births and adoptions.

Mr. Hume said the different circumstances merited different treatment.

Ms. Andreone asked if the Law Society would adopt model policy? Mr. McGee said the Law Society already had a policy in place that is not identical but covers the same areas and is essentially consistent with the model policy. He could not say whether the Law Society policy is more or less generous in particular aspects or overall.

Mr. Turriff said Mr. Hunter, who was not present for the discussion, was opposed to approving the policies. Mr. Hunter took the position that the Benchers should only approve them if they were willing to adopt the policies at their own firms.

Mr. Punnett suggested it should be made clear that the policies really applied only to large firms because they could not be implemented at a small firm.

Mr. Vertlieb said the Benchers should be trying to set a standard for a greater purpose, which is to keep women in the profession. He said the idea is to encourage people to think about the issues and provide guidance. If people are not protected, they will leave the profession and that is not in anyone's interests. Mr. Vertlieb did not think the policies would impose an unreasonable burden on small firms because they can adapt them to fit their circumstances based on the larger ideas embodied in the policies.

Mr. Vilvang responded to Mr. Hunter's point, as expressed by Mr. Turriff, saying that the Benchers could vote their conscience without the ability to bind their partners. He said the Law Society routinely recommended that lawyers do things such as continuing education or pro bono work.

Mr. Donaldson agreed with Mr. Vertlieb and Mr. Vilvang. He said it might be that in time Benchers would try to have the model policies adopted at their own firms but that is independent of the Law Society position. He urged the Benchers to approve the model policies for publication.

Mr. Hume reiterated that the policy was intended to provide a resource to members like the many other resources the Law Society makes available. It is not intended to be a requirement. He said he would not like to take a step backwards from 1989 when resources of this kind were not available.

Mr. Turriff said if the Benchers really believed in the importance of the policies, why not put them in the Professional Conduct Handbook and enforce them?

Ms. Berge did not believe that would be the correct balance or use of the policy. She said it was a model or blueprint for all firms and highlighted the things that need to be considered and communicated to make the profession accessible to women and others. The model policies are a real resource that the members expect the Law Society to provide, and firms appreciate having leadership from the Benchers.

The <u>motion</u> was carried.

Mr. Hume said the guidelines for recruiting and hiring were first put in place through the Equity and Diversity Committee in 1999. He said extensive revisions had been made to the original materials, largely to account for changes in the law.

It was <u>moved</u> (Hume/O'Grady) to approve for publication the revised guidelines for recruiting and hiring.

Mr. Jackson noted that the guidelines referred to political belief as a prohibited ground of discrimination, but the Professional Conduct Handbook sections on discrimination did not. He asked if that was a deliberate difference.

Mr. Hume said the reference in the guidelines reflected human rights legislation, and it might be appropriate to review the Professional Conduct Handbook provisions to make sure that they are up to date.

Mr. Stewart noted the provisions respecting criminal and summary convictions and suggested that it might be important to have some further language to permit asking prospective employees about convictions for fraud or honesty related offences.

Mr. Hume said the propriety of such questions would depend on the nature of the position the person was being hired for.

Mr. Stewart suggested that there should at least be some clarification that in some cases such questions may be proper.

Ms. Berge said that in most small firms all employees handle trust cheques, so some guidance as to when questions about honesty related offences may be asked would be helpful.

Mr. Hume said there was some guidance in the footnote, which references authorities, but he agreed that perhaps a more extensive note was needed.

It was agreed to postpone further discussion of the matter to the December Benchers meeting so that the committee could consider further revisions to the guidelines to take into account the concerns expressed by the Benchers.

8. ETHICS IN REAL ESTATE

Mr. McDiarmid welcomed and Mr. Sigalet introduced Andrew Kern, a senior and respected lawyer from Vernon.

Andrew Kern addressed the Benchers with respect to his concerns about professional ethics in real estate practice. He was concerned that business and economic pressures result in lawyers resorting to substandard or unprofessional practices, with the result that many clients in real estate conveyance or financing matters are not adequately advised. Specific examples of Mr. Kern's concerns included:

- Inadequate or no review of non-financial encumbrances on title.
- Creating false equity by placing undisclosed second mortgages.
- Changing mortgage instructions without authority.

Mr. Kern asserted that these problems go undetected because individual clients often do not know there was a problem with title until many years later and most are not in a financial position to litigate if they do discover a problem, and financial institutions are willing to rely on title insurance, despite its limitations.

Mr. Kern exhorted the Benchers to take immediate steps to set and enforce minimum standards for conveyance and mortgage practices in residential real estate.

Mr. Punnett said he believed many of the things Mr. Kern spoke about were in fact happening.

Mr. McDiarmid said that in the materials used by the Chambre de Notaires in Quebec when conducting practice reviews include making sure that proper title searches have been done and that sort of thing. He did not think it was impossible to enforce conveyancing standards.

Mr. Turriff said that for some reason people tend to think that two of the most important things they do in their life, buying a house and writing a will, should not cost very much. He said the Law Society might set minimum fees, although that might attract attention from the Competition Bureau. He suggested the matter might be referred to the Conveyancing Practices Task Force with a direction to give it immediate priority.

Mr. Falkins supported Mr. Turriff's comments. He said Mr. Kern's comments raised a real public interest alarm, and the issues should be looked at very seriously.

Mr. LeRose agreed that it was important to come up with a solution to the cost/quality condundrum because it would otherwise play into the hands of title insurance companies. Possibly the time had come when lawyers should no longer practice in the area and the bigger decision to be made was whether residential real estate should continue to be considered part of the work reserved to lawyers. He suggested that Mr. Kern's remarks be referred to the Title Insurance Issues Task Force for consideration.

Mr. Ridgway emphasized that these issues had many sides and would not be resolved in a short while.

Mr. Getz said the substantial point, as he understood it, was that there is a history of lawyers compromising their principles for the sake of their pockets, which lead him to question the utility of sending the matter to the Conveyancing Practices Task Force, because the task force does not have the mandate to deal with the issues in the broader ethical context. He said it would be difficult to deal with the issues in any way that is not shot through with compromise. It might be the kind of issue where the Law Society would want to have input from non-lawyers in order to deal with them in a principled and convincing manner.

Mr. Kelly said Mr. Falkins had stated the public interest concern quite clearly, and the word "alarm" was probably quite appropriate. Where to go in the future is an open question but lawyers are facing the situation now. It might not be open to a simple resolution but that does not absolve the Law Society from addressing the issue. It is such a fundamentally important public interest matter that the Benchers are compelled to deal with it. It may be a series of tasks that can be done by different committees or task forces either with or without public input, but it would be a fundamental mistake to not deal with it

Mr. LeRose noted that financial institutions have a lot to do with lawyers' fees as well as realtors and developers.

Ms. Berge thanked Mr. Kern for attending. She assured Mr. Kern that there were other lawyers who approached their professional responsibilities in the same way as he did. She said she was not fully aware of the situation Mr. Kern described, but Benchers must pay attention to it. Ms. Berge endorsed asking the Conveyancing Practices Task Force to examine the issues, and also the Title Insurance Issues Task Force, and possibly the Ethics and Practice Standards committees and the Lawyers Insurance Fund, as well.

Mr. Turriff noted that he had said on other occasions that some work traditionally done by lawyers might be done by others, but it would take a lot of work to convince him that real estate conveyancing was such work because it takes a high degree of technical skill. He supported Mr. Getz's suggestion that a broad enquiry was needed, including a consideration of why people object to higher legal fees in conveyancing matters.

Ms. Fung agreed with Mr. Getz that the problem goes beyond conveyancing practice. In some contexts lawyers have compromised their standards for economic reasons, and that may well extend beyond the conveyancing field. It would be a mistake to send the matter to a specialized group like the Conveyancing Practices Task Force when the conveyancing examples are just symptoms of a broader concern. She suggested the matter might be referred to the Futures Committee.

Mr. Punnet responded to Mr. LeRoses comments, saying that if the public interest is in lawyers doing conveyancing work competently, then simply hiving it off to others who would do the work poorly would be abandoning the Law Society's responsibility.

Mr. Vilvang said he would benefit from having examples of problems resulting from inadvertence by lawyers. He said the Benchers must assess the risk/benefit/cost of conveyancing. Useful information might come from examining the experience when the real estate market turned down in the 1980s.

Ms. Lindsay asked if Mr. Kern would permit the Benchers to share his comments with lawyers who practice in real estate to discuss it with them.

Mr. Kern said his only concern was that he had been warned that there would be adverse business consequences for him were he to report even one of the cases he alluded to. He agreed that lawyers must not abandon conveyancing to others. He said the cost/benefit argument was not relevant because if a lawyer commits a deceit to accomplish the task, the profession suffers even if no problem arises.

Mr. Ridgway suggested postponing further discussion to the December Benchers meeting to give time to consider the broader implications of Mr. Kern's comments.

It was agreed to postpone further discussion of the matter to the December Benchers meeting and to ask Mr. McGee to provide some information on insurance claims arising from conveyancing matters and from the wills and estates field.

9. TERRITORIAL MOBILITY RULES

Mr. Hoskins said the Federation of Law Societies interjurisdictional mobility agreement was truly national following acceptance by the remaining common law provinces. He said the territories had agreed to sign on to the permanent transfer aspects of the agreement immediately and in five years either adopt the temporary mobility rules or forego participation in the entire agreement. The rule amendments before the Benchers are intended to implement the inclusion of the territories in the agreement.

It was moved (Fung/Jackson) to amend the Law Society Rules as follows"

1. In Rule 2-10.1, by

a. Rescinding the definition of "reciprocating governing body" and substituting the following"

"reciprocating governing body"

(a) means a governing body that has signed the National Mobility Agreement, and adopted regulatory provisions giving effect to the requirements of the National Mobility Agreement, and

(b) in respect of Rule 2-49.2 before January 1, 2012, includes a governing body that has signed the Territorial Mobility Agreement and adopted regulatory provisions giving effect to the requirements of the Territorial Mobility Agreement;, ***and***

b. adding the following definition:

"Territorial Mobility Agreement" means the 2006 Territorial Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time;

2. In Rule 2-49.2, by rescinding the heading and substituting the following:

Transfer under National Mobility and Territorial Mobility Agreement

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

10. ATTENDANCE OF TRANSFER APPLICANTS AT REGIONAL CALL CEREMONIES.

Mr. LeRose explained that under current Law Society policy, lawyers from other provinces or territories transferring to British Columbia may attend a call ceremony in Vancouver or wait for an articled student to be called in their region and attend that ceremony, but are not permitted to attend a regional call ceremony. In practical terms this often means that transfer applicants intending to practice outside the lower mainland are obligated to travel to Vancouver at their own expense in order to attend a call ceremony. The proposed change in policy before the Benchers would permit transfer applicants to attend a regional call ceremony in their own region without having to wait for an articled student to be called.

It was moved (Ridgway/LeRose) to allow transfer applicants to schedule regional call ceremonies wherever in British Columbia they wish to be called, provided there is a Bencher or local bar association who is willing to hold the ceremony, and an available Supreme Court judge.

The motion was carried.

11. FEE SCHEDULES

Mr. Hoskins explained that most fees for Law Society services (not including the Annual Practice Fee, Insurance assessment and Special Compensation Fund assessment) had not been changed for a long time. Accordingly the proposed fee schedules not only implemented the changes to the General Fund Fee, Insurance Assessment and Special Compensation Fund Assessment previously approved, but also a number of changes to other fees. With the exception of the LLP fee, all the proposed changes are increases intended to account for inflation.

It was moved to amend the Law Society Rules effective January 1, 2007 by:

(a) rescinding Schedule 1 and substituting the appended schedule 1; [Appendix 1]

(b) in Schedule 2, by revising the prorated figures in each column accordingly; and

(c) in Schedule 2 and 3, by striking the year “2006” and substituting “2007”

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

12. UPDATE ON CLAIMS AND RECOVERIES IN THE WIRICK MATTER

This matter was considered *in camera*.

13. DISCUSSION OF BENCHER CONCERNS

This matter was considered *in camera*.

DMGN
06-11-27