THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Friday January 26, 2007	
PRESENT:	Anna Fung, QC, President	Jan Lindsay
	John Hunter, QC, 1st Vice-president	June Preston
	Gordon Turriff, QC, 2nd Vice-president	Robert Punnett
	Rita Andreone	Glen Ridgway, QC
	Kathryn Berge, QC	Allan Seckel, QC, Deputy AG
	Joost Blom, QC	Dirk Sigalet, QC
	Ian Donaldson, QC	Richard Stewart
	Michael Falkins	Ronald Tindale
	Leon Getz, QC	Dr. Maelor Vallance
	Carol Hickman	Art Vertlieb, QC
	Gavin Hume, QC	James Vilvang, QC
	William Jackson	Ken Walker
	Patrick Kelly	David Zacks, QC
	Bruce LeRose, QC	
NOT PRESENT:	Ken Dobell	Thelma O'Grady
	Terry LaLiberté, QC	David Renwick
STAFF PRESENT:	Timothy McGee, CEO	Melissa McConchie
	Stuart Cameron	Jeanette McPhee
	Brad Daisley	Doug Munro
	Su Forbes, QC	David Newell
	Kensi Gounden	Kerry Sheppard
	Jeffrey Hoskins	Alan Treleaven
	Howard Kushner	Adam Whitcombe
	Michael Lucas	Carmel Wiseman
	Bill McIntosh	

GUESTS: The Honourable Chief Justice Brenner, CJSC
Dean Andrew Petter, University of Victoria
Ken Walton, Vice-President, CBABC
Caroline Nevin, Associate Executive Director, CBABC
Wayne Robertson, Executive Director, Law Foundation of BC
Lana Tsang, Barrister and Solicitor

1. MINUTES

The minutes of the meeting held on December 8, 2007 were approved as circulated.

2. PRESIDENT'S REPORT

Ms. Fung outlined her priorities for 2007, which were categorized under four themes:

1. responsiveness

2. accessibility
3. accountability
4. enhanced lawyer competence

Responsiveness concerns how the Law Society relates to the public, members and government. It requires an understanding of the needs and expectations of those served by the Law Society and innovation in how those expectations are met. Ms. Fung said she would like to see the complaints system revamped in 2007 so that there is a way of responding appropriately to different kinds of complaints. She said there should be a system for identifying ungovernable lawyers and dealing with them. Ms. Fung said there would be pilot project on early intervention to deal with matters that will not result in disciplinary action.

The Law Society must be accessible in carrying out its mandate to keep the public trust in its ability to self-regulate. Key messages must be communicated to the pubic in a way that can be understood. One program already underway is the public forums under the direction of the Equity and Diversity Committee, another is the Bencher/MLA contact program from the communications department.

The Law Society must in all its internal and external processes be transparent and accountable for its actions. There must be open communications between benchers and management and staff, and proper governance structure in place to ensure that policy decisions can be made. This may entail change to the way we set practice fees and budgeting process possibly by establishing a longer term process.

All other professions expect, and most require, members to engage in continuous development to maintain competence. If lawyers are continue to have the right to self-govern we must ensure that lawyers remain up to date and continuously maintain competence. The small firm practice course is an example of some steps in that direction and it is being well received in the profession. The Law Society must look at new things such as mandatory professional development, but also at limited licensing certificates and specialization as tools to enhance lawyer competence. The Law Society must recognize that Canadian lawyers are now competing with American lawyers and other international lawyers.

Ms. Fung circulated a written report outlining her activities on behalf of the Law Society over the previous month.

3. CEO'S REPORT

Mr. McGee reported that Ms. Fung had shared her presidential priorities with the management team, which was very helpful. Mr. McGee said senior management supported the themes Ms. Fung set out, and would keep trying to tie back operational activities to them. He outlined three key operational priorities.

One is building the programs launched in 2006. In particular, the trust assurance program and custodianship program are very significant operational activities that will be closely watched in terms of effectiveness, timing and budget.

The second priority is putting in place a new set of performance measures to put all the Benchers in the position where they can confidently state that they know what the objectives of the Law Society's core programs are, how they relate to the Law Society's mandate, and how they are being pursued. The objective is to have this work completed by March and reported to the Benchers in May.

Third are "people initiatives" designed to make the Law Society the model regulator in the profession.

Mr. McGee circulated a written report detailing operational activities over the previous month.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. REPORT OF THE JUSTICE REVIEW TASK FORCE CIVIL JUSTICE REFORM WORKING GROUP

The Honourable Chief Justice Brenner and Deputy Attorney General Allan Seckel, QC gave a presentation on the report of the Justice Review Task Force Civil Justice Reform Working Group. A copy of the presentation is attached as Appendix 1.

Mr. Seckel reported that he and Chief Justice Brenner had spoken with a number of groups including client groups and lawyer groups. Client groups responded very positively, while lawyer groups expressed more concern. Mr. Seckel noted that the Civil Justice Reform Working Group report reflects the thinking of that group, not necessarily the views of the government, the Attorney General, or the Supreme Court.

Chief Justice Brenner thanked the Law Society for the contribution of Richard Margetts, QC. He noted that Mr. Vilvang was also a member of the working group. He said he was committed to the principles underlying the report, but the Justice Review Task Force was listening and wanted to hear from the bar and the public.

In response to a question from Ms. Fung, Chief Justice Brenner said the report was received and unanimously endorsed by the Justice Review Task Force. In response to the suggestion that the Task Force might move ahead with some of the recommendations without waiting for comment, the Chief Justice the JRTF was open to comment on the report but was proceeding to draft new Rules of Court to provide a focus for comment.

Ms. Hickman asked if a distinction would be made in the rules between family and other civil matters. Mr. Seckel said the recommendation is for a separate set of family law rules for use in both Supreme and Provincial Courts.

Ms. Preston was particularly interested in the idea of the information hub as a form of triage. She noted the dependence of the idea on funding in other areas such as language and literacy training. Chief Justice Brenner agreed and said he had discussed with Mr. Seckel the government's commitment. Clearly others such as the judiciary must also be committed to the idea. He said he was very encouraged by the Nanaimo pilot project hub in family law.

Mr. Hunter commented that the propose reforms would significantly change the role of judges, who would be much more involved at the beginning of a case. He asked if the judiciary was prepared to take on that role. Chief Justice Brenner agreed that willing participation by judges would be necessary. He said all judges of the court had received a copy of the report and he was optimistic because of the results of the family case pilot project. He said some judges are skeptical but have become convinced.

Mr. Turriff thought the report contained a number of very good suggestions. His concern was the process that led to the report, which he thought was poor. He said the scholarship behind the report seemed thin, and was built on some false premises. That said, he reiterated that there were good ideas that are worth following up, such as revising the Rules. He expressed the hope that the

Task Force would continue thinking about the issues because there could be other ideas worth considering.

Mr. Stewart said that from his perspective as a family lawyer fewer writs being filed in Supreme Court was not necessarily negative because in his case he issued fewer writs because he was able to settle more actions through alternative dispute resolution. He said there were changes recommended on the civil process side that would bring the same advantages. He said the case conference was particularly helpful in family matters.

Mr. Punnett urged the Task Force to ensure that new rules facilitate access to the courts rather than diminish it. He suggested that changes already made to the chambers process result in many clients not being able to afford chambers applications. Mr. Punnett asked what the physical arrangement of the proposed information hub would be.

Mr. Seckel said that the pilot project hub in Nanaimo is an actual place. The idea is to have a physical location with room for duty counsel and other functions, and bringing information sources and services together in one place. Preferably the hub would be located near or in the courthouse.

Mr. Kelly suggested that increased numbers of unrepresented clients taking cases to trial had implications for the evolution of the common law and would mean that the judge's role would increase in terms of consistent application of common law.

Chief Justice Brenner said that was a valid concern and the judiciary was very concerned about the increasing number of unrepresented litigants. Judges want as many lawyers as possible representing people in court, and for that reason the Law Society's unbundling initiative is particularly important.

Mr. LeRose said that sixteen years ago there were lineups for trials but now there appeared to be underutilization of judges in Nelson. The profession and the courts may be in a sense the victims of their own success at promoting alternative dispute resolution mechanisms. He asked if the working group considered what changed in the last fifteen years.

Chief Justice Brenner said he was concerned that the Supreme Court is becoming less accessible and it is very difficult to know exactly why. He thought the courts were successful in the last twenty years in resolving the backlog and bumping problems, but he remained concerned that it might have been accomplished at the expense of litigants. That is one of the key drivers behind the report.

Mr. Vilvang said that the working group was astonished by the breadth of legally related services available to the public. The justice system's failure to properly utilize and advertise those services is something the hub can fix without large additional cost. With respect to the comments about the depth of scholarship behind the report, Mr. Vilvang said one of the working group's goals was to make the report accessible and readable by non-lawyers but a great deal of scholarly work was considered.

6. FINANCIAL PLANNING SUBCOMMITTEE APPOINTMENT

It was agreed to appoint Mr. LeRose to the Financial Planning Subcommittee.

7. SMALL FIRM TASK FORCE REPORT

Mr. LeRose presented the report of the Small Firm Task Force, containing six recommendations. He said the expected cost of implementing the recommendations is $55,000, which is included in the 2007 budget. Most of that amount is earmarked for technology support. The task force has listened to practitioners who have said that it is the business side of practice that presents

difficulties. The task force believes that the recommendations together with the new firm practice course and trust assurance program will go a long way to establishing support for small firm practitioners.

It was moved (LeRose/Vertlieb) to

approve the following recommendations and direct that they be implemented:

1. **Technology Support:** Plan and deliver a technology support program, designed specifically to assist sole and small firm practitioners;

2. **Bookkeeper Support:** Develop and publish a comprehensive on-line guide to recruiting and working effectively with a bookkeeper;

3. **Articling:** Develop articling program proposals, in conjunction with the Credentials Committee (which has jurisdiction over articling), to promote articling throughout the province, with a focus on sole and small firm practices, and to further facilitate shared articles;

4. **Practice Locums:** Develop a program to promote and support practice locums, which would include the following features:

    - a guide and checklists on how to make a locum arrangement operate effectively, including how to deal with the risk of client conflicts;
    - sample locum agreements, with clauses that could be included to meet the wishes and needs of both lawyers, including remuneration and non-competition terms;
    - an online registry of lawyers who are available to provide locum support, specifying each lawyer's qualifications, system for remuneration and expenses, location availability, timing and practice areas;

5. **Succession and Emergency Planning:** Develop a program to assist lawyers in putting into place law practice succession and emergency plans;

6. **Certified Cheques:** Clarify for the profession when it is inappropriate to demand a certified cheque from another lawyer, and that the Ethics Committee be asked to consider such a clarification the Professional Conduct Handbook, perhaps by way of footnote to chapter 11, rule 8.

To mandate the Practice Standards Committee to monitor the implementation of the initiatives, and to dissolve the Small Firm Task Force.

Mr. Zacks said the Practice Standards Committee welcomed the mandate to monitor implementation of the initiatives. He said staff lawyer Kensi Gounden had done an incredible job on the practice standards programs, particularly in liaising with practitioners experiencing problems. With respect to the certified cheque issue, Mr. Zacks said the law is quite clear that cheques do not clear until they are returned to the bank they are drawn on, and that can take from seven to thirty days. Until then the money remains in the account. The practice developed of asking for a certified cheque so that the receiving lawyer could make an immediate payment out of trust. Mr. Zacks said an "urban myth" developed that big firms were asking for certified cheques from small firms, but in his case that was not so because he asks for certified cheques from all firms regardless of size because he needs the assurance that the funds will be available to honour the cheque. He said if Benchers are prepared to amend the Law Society Rules to allow lawyers to pay out of trust before a deposited cheque clears, that might be acceptable but until then lawyers are at risk unless they obtain certified cheques.

Mr. LeRose said the task force recognized that in most instances the transaction is regulated by contract, and the task force wanted to confirm that lawyers should not change the termso fo the contract because a law firm does not want to complete the transaction on the contract's terms.

Mr. Zacks pointed out that the lawyer is not a party to a contract between clients. He said he would prefer to see a rule that requires all cheques to be certified, and then no one would feel put upon.

Ms. Andreone agreed with Mr. Zacks' comments regarding a rule requiring certified cheques. She noted that many practices extend beyond the lawyer's local area making it difficult for lawyers receiving cheques to have them certified themselves.

Mr. Vertlieb said the task force had considered the arguments Mr. Zacks raised but the nub of the recommendation is to send the question to the Ethics Committee so that it can give a reasoned response. The task force wants to assist small firm practitioners and would like the Ethics Committee to consider the issue in the spirit of the recommendation.

Mr. Walker noted the reference to insurance coverage for small firm practitioners and expressed the hope that the Lawyers Insurance Fund would consider giving small firm practitioners the option of obtaining a further $1 million in coverage.

The motion was carried.

Mr. Donaldson suggested that even if the rules do not change, the Ethics Committee might consider adding a footnote to the rule covering the points made, which are not well understood in the profession.

Mr. LeRose acknowledged and commended Mr. Treleaven and Mr. Gounden, the Law Society staff members on the task force.

8. BENCHER MLA CONTACT PROGRAM

Mr. Daisley recalled that when the Law Society developed its current government relations program, several benchers asked if they could assist personally by meeting with Members of the Legislative Assembly. That was not appropriate at that time because the Law Society needed to develop credibility with the government and to define its key messages. Since then Law Society representatives have had formal meetings with a number of government ministers. The government has responded favourably and has offered to consider some small amendments to the *Legal Profession Act*. The Law Society is now in a position to embark on a Bencher/MLA contact program. The goal is to develop name recognition. It is important that everyone who meets with an MLA communicate the same message. Mr. Daisley emphasized that participation is optional for Benchers. Briefing notes will be on BencherNet and information about MLAs will also be available. The briefing notes provide an overview of the Law Society and what it does. Benchers are encouraged to meet with MLAs local to their work or home, whether they are government or in opposition. The Law Society communications department will keep track of who is meeting with whom.

Mr. Sigalet reminded Benchers to check the Law Society website to find out whether an MLA is a lawyer.

Mr. Falkins suggested that Benchers consider including a Lay Bencher in meetings with MLAs. Mr. Daisley agreed, emphasizing that Lay Benchers are an important part of the governance process and can provide a valuable contribution to the program.

9. PROFESSIONAL CONDUCT HANDBOOK, CHAPTER 12. COMMENTS OF LIF AND COMMITTEES ON THE RECOMMENDATIONS OF THE PARALEGALS TASK FORCE.

Mr. Hume briefly reviewed the history of this matter, which began with the report of the Paralegals Task Force in April, 2006. The Benchers referred that report to the Ethics Committee, several other Law Society committees, and the Lawyers Insurance Fund for comments. Those comments are summarized in the Ethics Committee memorandum before the Benchers. The Ethics Committee concluded that a general theme in the comments is a concern about expanding the role of paralegals to permit appearances before courts and administrative tribunals. The main concern is how the Law Society could set and enforce standards. The Ethics Committee articulated that concern in the form of two questions for the Benchers:

1. If there is to be an expanded role for paralegals that permits court and administrative tribunal appearances by paralegals, do you want the Law Society to set standards to ensure that paralegals who make such appearances are of good character and are properly trained?

2. If the answer to Question 1 is yes, what body should take on the responsibility of examining this question?

Mr. Vilvang favoured going further to set and enforce standards for all people who call themselves paralegals, not only those who appear in court or before tribunals.

Mr. Hume responded that the Ethics Committee understood the concern to focus particularly on paralegals appearing before tribunals because there is no easy way of monitoring them, whereas paralegals working in law firms can be supervised.

Mr. Zacks reminded the Benchers that this matter concerned only paralegals working under the supervision of lawyers, not independent paralegals. The Committees' concern was with paralegals who are not under direct supervision appearing in court or before an administrative tribunal.

Mr. Turriff commented that the Futures Committee was examining what work that has historically been done by lawyers might be done by non-lawyers, and who might regulate them.

Mr. Hunter was in favour of setting standards for paralegals appearing in court or before tribunals.

Ms. Hickman agreed with Mr. Vilvang's earlier comment that all paralegals should be subject to standards whether they work inside our outside a law office.

It was moved (Hickman/Vilvang) that the Law Society will define the qualification requirements of paralegals employed by lawyers with respect to education and testing, and give guidance to lawyers to assist them in determining whether or not a paralegal is sufficiently qualified to engage in increased paralegal activities.

Mr. LeRose asked if it was now the Benchers' intention to start credentialing paralegals? Ms. Fung said that had not been decided, and the question before the Benchers was whether the Law Society should set standards for paralegals.

Mr. Ridgway preferred to take a first step by dealing with the question of whether to set standards, and defer the question of whether the Law Society would credential paralegals.

Mr. Wallace agreed with Mr. Ridgway that the Benchers should approach this field one step at a time. The task force saw an obvious difference between "advocacy paralegals" and those working

under direct supervision in a law office. He cautioned Benchers about taking on a role like the Law Society of Upper Canada. What was proposed was a smaller, more manageable step.

The motion was carried.

It was agreed to refer the matter to the Regulatory Policy Committee.

10. *LEGAL PROFESSION ACT* AMENDMENTS

Mr. Hume introduced two proposed amendments to the Legal Profession Act. The first proposed amendment concerns the quorum of Benchers hearing a review of a hearing panel decision. The objective of the amendment is to address the problem of losing one or more members of a seven Bencher quorum.

It was moved (Hume/Donaldson) to seek amendment to the *Legal Profession Act* to add to section 6 of the Act the following subsection:

> (4) Despite subsection (2), when a quorum of the benchers is conducting a review under section 47, if a bencher participating in the review ceases to be a bencher for any reason after the hearing begins, a quorum continues to exist, provided that the number of benchers participating is no fewer than 5.

The motion was carried.

Mr. Hume described the second proposed amendment, which concerned custodianships. The objective of the amendment is to create some flexibility for the Law Society in the new custodianship program so that it will not be necessary to seek a new court order to change from one in-house lawyer as custodian to another.

It was moved (Hume/Donaldson) to seek amendment to the *Legal Profession Act* as follows:

> ***In section 50(1) by striking*** "a practising lawyer as a custodian" ***and substituting*** "a practising lawyer or the society as a custodian".
>
> ***In section 51 by renumbering as section 51(1) and adding the following subsection:***
>
> (a) When the society is appointed a custodian under section 50 or 54, the society may exercise the powers of a custodian by employing or retaining a practising lawyer for that purpose.
>
> ***By repealing section 54(2)(b) and substituting the following:***
>
> (b) appoint another practising lawyer or the society as a custodian;

Mr. Jackson recalled correspondence from the CBA expressing the concern that the Law Society might employ a non-lawyer to act as custodian.

Mr. Hume said that issue would be reviewed with legislative counsel, but it was unlikely to be a problem. The intention of the amendment is to have a lawyer fulfill the custodian's obligations.

Mr. Walker was concerned that a person would not be able to tell from the court order who is responsible and accountable for the custodian's obligations unless a specific lawyer is named.

Mr. McGee said that as a practical matter a lawyer would always be in charge and that can be communicated from the outset, as well as any change in who is responsible.

The motion was carried.

11. LAW SOCIETY RULE 8-2

Mr. Hume briefly reviewed a memorandum from the Ethics Committee recommending clarification of the limitations on contingency fees in Rule 8-2 of the Law Society Rules. The first objective is to clarify that the percentage in contingency fee agreements applies to trial only, and does not include fees for subsequent appeals. The second objective is to clarify that the limits apply to a single lawyer only, not to successors on the file. The third objective is to include a requirement for an alternative fee arrangement to be included in contingency fee agreements in case the retainer is terminated before conclusion. The final objective is to require a lawyer to notify their client of those points.

It was moved (Hume/Jackson) to amend the Law Society rules as set out in Appendix 2.

Mr. Turriff suggested returning the third proposed change to the Ethics Committee to deal with quantum meruit claims in the event of termination of the retainer.

Mr. Punnett agreed that the maximum percentage allowed in contingency fee agreements should apply to the trial only, but was concerned about the situation that could arise if the client retains a series of lawyers and ends up spending the whole value of their claim on legal fees.

Mr. Turriff suggested that the answer to that problem may be that each of the lawyers on the file will be entitled to quantum meruit and the court could look at the overall fairness of the fees.

Mr. Vertlieb said the issue was not academic but a practical matter that arises regularly. He said many lawyers think fees should be capped notwithstanding how many lawyers are on the file.

Dr. Vallance asked if the maximum percentages applied to cases where liability is not in issue. Mr. Vertlieb said the maximums apply whether liability is an issue or not.

Mr. Vilvang agreed with Mr. Vertlieb but said there is another side to the issue. If a lawyer is forced to stick to the percentage as a total fee, and predecessor lawyers on the file will not agree to compromise on division of fees, people may be precluded from getting counsel because the third or fourth lawyer on the file will not have any prospect for a reasonable fee. He said some flexibility was necessary to deal with such situations.

Mr. Turriff said the recommendation was not making a new rule so much as aligning existing rules with current law. The concern is whether the client knows that they may have to pay more than one lawyer and the answer is often no; consequently, it is a good idea to give them that information. The court has the power to ensure a fair distribution of fees in the situation Mr. Vilvang described. However, he said, there appeared to be enough concern that the matter should be returned to the Ethics Committee for further consideration.

It was agreed to refer the matter back to the Ethics Committee.

12. LAW SOCIETY DELEGATE TO THE FEDERATION OF LAW SOCIETIES

It was moved (Zacks/Jackson) to ratify the appointment of Ms. Fung as the Law Society's delegate to the Federation Council.

The motion was carried.

13. FAMILY JUSTICE

Ms. Hickman briefly reviewed a memorandum outlining the discussions between ad hoc working group of Benchers who practice family law regarding the recommendation of the Family Justice Reform Working Group of the JRTF that the Law Society develop a code of practice for family lawyers to give guidance in balancing the lawyer's partisan role with the potential harm it may cause to other family members, especially children.

It was moved (Vertlieb/Hickman) to create a task force composed of Ms. Berge, Ms. Hickman, Mr. Punnett, Mr. Steward, and Mr. Turriff, with the option of adding a Lay Bencher or community representative, to:

(a) determine whether an amendment to the Professional Conduct Handbook is necessary;

(b) whether a code of conduct or guidelines for family lawyers is necessary, and if so whether it should be mandatory or voluntary, and who should be responsible for developing it; and

(c) report back to the Benchers with its conclusions.

Mr. Zacks noted that the Practice Standards Committee was studying the process for regulating certification of family law mediators. Ms. Hickman confirmed that the task force would not deal with that matter.

Mr. Vilvang opposed creating a task force because lawyers are not specialists and their professional obligations do not change depending on the file they are working on. Different conduct rules for different areas of practice would be misguided.

Mr. Turriff was not persuaded that changes to the Handbook or promulgation of a code of conduct was necessary but agreed the matter should be examined.

Ms. Andreone said she did not practice family law but did see problems arising from it at the Discipline Committee. She suggested that the proposed task force might consider whether the issues can be dealt with through footnotes or commentary on existing provisions of the Handbook.

Ms. Hickman agreed that changes to the Handbook or a separate code of conduct for family lawyers might not be the best answer, but the issue was real and needed to be examined.

Mr. Zacks said his experience on the Practice Standards Committee also suggested a need to look at this issue but like others he was wary of the need for a separate code of conduct, noting that there are differences even among family lawyers themselves.

Mr. Donaldson supported the idea of examining the question because the Complainants Review Committee sees many of the issues of concern. The public interest is in looking into the matter.

The motion was carried.

14. CLAIMS AND RECOVERIES IN THE WIRICK MATTER

This matter was considered *in camera*.

DMGN
07-02 21