THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Friday May 7, 2004	
PRESENT:	William Everett, QC, President	Darrell O'Byrne
	Ralston Alexander, QC, 1st Vice-president	Margaret Ostrowski, QC
	Robert McDiarmid2nd Vice-president	June Preston
	Joost Blom, QC	Greg Rideout
	Ian Donaldson, QC	Glen Ridgway, QC
	Michael Falkins	Patricia Schmit, QC
	Anna Fung, QC	Alan Seckel, QC, Deputy AG
	Carol Hickman	Dirk Sigalet, QC
	Gavin Hume, QC	Grant Taylor
	John Hunter, QC	Gordon Turriff, QC
	William Jackson	Dr. Maelor Vallance
	Patrick Kelly	Art Vertlieb, QC
	Terry La Liberté, QC	James Vilvang, QC
	Bruce LeRose	Anne Wallace, QC
	Patrick Nagle	David Zacks, QC
NOT PRESENT:	Ross Tunnicliffe	Lilian To
STAFF PRESENT:	James Matkin, QC, Executive Director	Michael Lucas
	Stuart Cameron	David Newell
	Mary Ann Cummings	Jack Olsen
	Brad Daisley	Denise Palmer
	Felicia Folk	Neil Stajkowski
	Tim Holmes	Alan Treleaven
	Jeffrey Hoskins	Ron Usher
GUESTS:	Associate Dean Robin Eliot, University of British Columbia	
	Robert Brun, President, CBABC	
	Frank Kraemer, Executive Director, CBABC	
	Caroline Nevin, Associate Executive Director, CBABC	
	Sylvia Teasdale, Chief Librarian, BCCLS	
	Bill McNaughton, Chair, CLE Society	
	Rick Gambrel, President, Trial Lawyers Association	
	Mike Wilhelmson, Lawyers Weekly	

1. MINUTES

The minutes of the meeting held on April 2, 2004 were approved as circulated.

2. PRESIDENT'S REPORT

Mr. Everett reported on the Federation of Law Societies meeting in Fredricton, New Brunswick. Among the topics discussed at the meeting were:

- Money laundering,
- Mobility,
- Appointments to the Supreme Court of Canada,
- Law office search protocol,
- Federation intervention policy,
- Proposed legislation in Newfoundland to exempt government lawyers from payment of Law Society fees,
- Conflicts.

Mr. Everett reported that all these topics would be discussed either later in the meeting or in the near future.

Mr. Everett introduced and welcomed Francis Gervais, President of the Federation of Law Societies and Batonnier of the Barreau du Quebec.

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Matkin introduced Stu Cameron, the newly appointed Director of Regulation. Mr. Matkin reported that other staff had been busy preparing for the Federation meeting, and the Benchers retreat.

Mr. Matkin reported that the provincial government had introduced the new Real Estate Act, which contrary to the understanding reached previously, did not include an exemption from licensing. He said the government had been engaged in discussions on that issue.

4. REPORT ON OUTSTANDING HEARING DECISIONS

Mr. Everett noted that Mr. Alexander was responsible for one overdue hearing report; however, he said Mr. Alexander had confirmed that the report would be completed shortly. He noted that Mr. Alexander had been extremely busy with important Law Society business.

Mr. Everett noted that Mr. Donaldson was responsible for an overdue conduct review report; however, he said Mr. Donaldson had confirmed that the report would be delivered later in the day.

Mr. Everett noted that Mr. Ridgway had conducted a hearing the previous day and had already completed the report on verdict and penalty.

5. PROFESSIONAL CONDUCT HANDBOOK, CHAPTER 6, ACTING AGAINST A CURRENT CLIENT

Mr. Zacks recalled that the Benchers had previously approved in principle a change in the Professional Conduct Handbook provisions on acting against a current client. However, before new rules could be approved, the Supreme Court of Canada decided the case of R. v. Neill. The Ethics Committee discussed the matter further in light of the Neill case, and received recommendations from the bar. The committee brought the matter to the Benchers in December 2003, but the Benchers requested further consultation. Consultation was concluded in March 2004. Some of the responses were circulated with the Committee's report and additional comments were circulated after the report. Further comments were received only in the previous

week. Some of the responses favoured the proposed changes, but others were opposed. Mr. Zacks said the Ethics Committee wished to continue the consultation process and bring the matter back to the Benchers in September or October 2004.

6. PROFESSIONAL CONDUCT HANDBOOK, CHAPTER 13, RULE 5, EMPLOYING A FAILED APPLICANT.

Mr. Zacks described a situation in which a credentials hearing is ordered but for one reason or another the hearing does not go forward, such as when the applicant withdraws their application. He said the Credentials Committee and the Ethics Committee both held the view that lawyers should not employ people whose fitness to be called and admitted remains in question. Mr. Zacks said the proposed rule change would prohibit lawyers from employing a person in respect of whom a hearing has been ordered, whether or not the hearing has been completed.

It was moved (Zacks/Fung) to amend the Chapter 13 of the Professional Conduct Handbook as set out in Appendix 1.

Mr. Vilvang was concerned about how to define a person whose character and fitness is in question.

Mr. Zacks said the test is under s. 19 of the *Legal Profession Act* and is administered by the Credentials Committee. If the committee orders a hearing on that basis, that is a determination that the applicant's character and fitness is in question.

Mr. Donaldson shared Mr. Vilvang's concern, because the amendment might place a burden on a member to determine the reason why an application was before the Credentials Committee.

Mr. Zacks said matters that are properly before the Credentials Committee are by definition matters in which character and fitness are in issue. The point of the proposed amendment was that the Ethics Committee does not think those people should be dealing with clients or have access to trust funds, and the committee did not want people to simply withdraw their application and then be employed by a law firm.

Mr. Hunter agreed with the objective of the Ethics Committee but did not think the proposed rule was sufficiently clear. He said it would expose lawyers to discipline if they did not check the credentials history of prospective employees.

It was agreed to amend the proposed rule to remove the words "whose character and fitness are in question" from the heading to rule 5 and the words "whose character and fitness to be a member of the Bar is in question, including, but not limited to, a person" from rule 5

The amended motion was carried.

7. ANNUAL PRACTICE FEE, AMOUNT

Mr. Stajkowski reviewed the four components of the proposed annual practice fee for 2005 (excluding a CBA component). Mr. Stajkowski reported that the General Fund ended 2003 with an accumulated surplus of approximately $3.6 million, which was the largest reserve since 1991. He said the accumulated surplus in 1991 was allocated to the purchase of the Law Society building. The reserve was lowest in 1993 but has been accumulating since then. Mr. Stajkowski explained that the proposed fee was based on a long-term view that would use the surplus over a period of years by allocating it to specific areas. He said the Financial Planning Subcommittee had examined both the expense side and revenue side of the general fund, looking at key program areas. In areas that need expansion, a budget increase of approximately 6% was anticipated, while other programs would be held at about a 2% increase. The forecast was developed on those

assumptions and a $50 dollar reduction in the annual practice fee. Mr. Stajkowski noted the importance of not creating an artificially low fee by using the surplus too aggressively, with the result that a relatively large increase is needed in the future. He said the multi-year plan could be achieved with a $50 decrease in fees in 2005. Mr. Stajkowski explained that after the amount required to operate the Law Society, the next larges component of the fee was the BC Courthouse Library funding, which would be unchanged from 2004. The third component was the LAP funding, which included a $3 per lawyer increase. The fourth component was the Advocate subscription, which was unchanged.

Ms. Fung suggested it might be premature to approve a proposed budget because of the anticipated proposal to increase the budget of the Equity Ombudsperson program.

Mr. Stajkowski said he was presenting only a forecast to support the proposed annual practice fee, and the final budget for 2005 would not be proposed for some time.

It was moved (Nagle/Jackson) to set the Annual Practice Fee for 2004 at $980.50.

The motion was carried.

8. ANNUAL PRACTICE FEE, REFERENDUM

Mr. Hoskins reviewed the proposed referendum question to set the Law Society annual practice fee and determine whether that fee would include an amount equivalent to CBA fees.

It was moved (Alexander/Donaldson) to approve the form of question as set out in Appendix 2.

Mr. Brun asked if the CBA would have an opportunity to review any additional materials that would be sent to members with the referendum ballot.

Mr. Everett confirmed that the Benchers would not be taking a position on which resolution to vote for, and the materials accompanying the ballot would be largely descriptive and explanatory. He said the CBA would be able to review and comment on the material before it was sent.

Mr. Brun sought confirmation with respect to calculation of a majority. For example, he asked what the result would be if 49 out of 100 members voted for resolution A and 48 out of 100 members voted for resolution B, and the remaining 3 members voted for C.

Mr. Hoskins said section 23 of the Legal Profession Act requires that a majority of members voting in the referendum set the practice fee. In the example there would be no majority, neither resolution would pass. The Benchers would then have to decide how the fee would be set.

Mr. Everett noted that the calculation of a majority was ultimately a matter of interpretation.

The motion was carried.

9. RULE AMENDMENTS ARISING FROM THE BUSINESS CORPORATIONS ACT, AND OTHER MATTERS.

It was moved (Fung/Wallace) to amend the Law Society Rules as follows:

1. ***In Rule 1, by rescinding the definition of*** **"company" and substituting the following:**

   "company" means a company as defined by the Business Corporations Act;

2. ***In Rule 3-45(5), by striking out*** "section 114(1)(d) of the Company Act" ***and substituting*** "section 124 of the *Business Corporations Act*".

3. ***In Rule 3-56(3.2), by striking out the word*** "printed".

4. ***In Rule 3-59(4), by rescinding paragraph (b) and substituting the following:***

   (b) periodic bank statements;

5. ***In Rule 3-63(2), by striking out*** "general books and accounts" ***and substituting*** "general account records".

6. ***In Rule 3-83(3), by striking out*** "that is considers desirable" ***and substituting the words*** "that he or she considers desirable".

7. ***In Rules 9-5(3)(c) and 9-6(3), by striking out*** "under the *Company Act*" ***and substituting*** "under the *Business Corporations Act*".

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

10. DISABILITY WORKING GROUP REPORT AND RECOMMENDATIONS

Ms. Wallace introduced Greg Tolliday and Tom Patch from the Equity and Diversity Committee Disability Working Group. She explained that the Disability Working Group was examining ways in which the Law Society and legal profession could better help lawyers with disabilities practice law.

Mr. Tolliday said the work of the group arose because over ten to twenty years law schools have become more sensitive to students with disabilities, with the result that there are many more lawyers with disabilities. The legal profession relies primarily on intellect rather than physical ability so disabled people find opportunities in the profession where their disabilities have less impact. The working group report is based on an examination of barriers and ways they can be addressed. The recommendations address both physical barriers and attitudinal barriers, the latter being more difficult to overcome. Mr. Tolliday said discrimination often results from a lack of information or understanding about disabilities. He drew the Benchers attention to the executive summary in the report. Mr. Tolliday said the working group would like the Benchers to receive the report and support the recommendations in principle.

Mr. Patch commented that there are laws that prohibit discrimination and are intended to encourage disabled people to participate in all aspects of society. People with disabilities have difficulty maintaining positions in the legal profession. He said the solutions were not simple, and the working group was seeking broad structural change.

It was moved (Ostrowski/Nagle) to receive the report and approve publication of it.

Mr. Turriff asked if the working group made a distinction, for example, between someone who was born blind and someone who was blinded as the result of their own failing? Mr. Turriff said he needed assistance in defining disability, and in particular whether it was defined subjectively or objectively. He said he would need some guidance when particular issues were returned to the Benchers for consideration.

Ms. Wallace suggested that some of those questions could form part of the initial objectives.

Ms. Ostrowski agreed that some definition of disability was needed and that was why it was the first recommendation.

Mr. Zacks asked who would publish the report and would publication suggest that the recommendations were approved.

Mr. Everett said it would be approved for publication but the particular recommendations would not be specifically approved at that time.

Mr. LeRose noted that the fourth recommendation (provide draft equity and diversity workplace policies to legal employers) was particularly important for smaller firms that don't have the resources to develop policies on their own.

Mr. Matkin noted that mentoring was something that could be included in the articling program. He recalled his own experience in graduate school when he was invited to mentor a blind student. He said it was a very positive experience, and the student did very well and now works for the government of Florida. He suggested mentoring be given some priority.

Ms. Wallace said Benchers could pay attention, solve some small problems, and raise awareness of how the profession can accommodate people.

The motion was carried.

11. REPORT FROM THE EQUITY OMBUDSPERSON

Mr. Everett introduced Anne Chopra.

Ms. Chopra thanked the Benchers for the opportunity to discuss the equity ombudsperson program. She explained that the program, although funded by the Law Society, is neutral and independent, and for that reason people feel comfortable contacting the ombudsperson. People who contact the ombudsperson are people dealing with discrimination or harassment, or are senior practitioners having to deal with such matters in a firm. Ms. Chopra said she tried to take people through their options for dealing with the problem. That is the reactive part of the program. Ms. Chopra said there is also a proactive component to the program that involves education, and the visible support provided by the Law Society is an important aspect of that component. Ms. Chopra reviewed some of the common scenarios she deals with, noting that many of the people involved simply want to resolve their problems and move on with their careers, and are grateful for the assistance the program provides. Ms. Chopra noted that the number of women leaving the profession was a matter of some concern to the Benchers. She said the ombudsperson program could detect some of the reasons why women leave, and what might be done to retain them. She said the program was aligned with human rights and enhanced the reputation of the profession. She noted that all other provinces had adopted similar programs. Ms. Chopra thanked the Benchers for their continued support of the program and also thanked Mr. Everett for his recent President's View column in the Benchers Bulletin on the subject of discrimination.

Mr. Everett noted that a report on the budget and mandate of the Equity Ombudsperson program would be submitted to the Equity and Diversity Committee for a full work-up and would then be returned to the Benchers for consideration.

Ms. Ostrowski understood that the ombudsperson sometimes received calls from the public. She asked why people would contact the ombudsperson rather than the Law Society professional conduct department.

Ms. Chopra said most people were just seeking access to the system, and in general she simply passed them on to the Law Society.

Ms. Ostrowski asked if there was a role for the ombudsperson in handling some of those matters.

Ms. Chopra said she had discussed the possibility of increasing the scope of the program to include public access in certain restricted areas. She said two other Law Societies had programs that were open to the public.

Mr. Everett thanked Ms. Chopra for her report.

12. ADDRESS FROM FRANCIS GERVAIS, PRESIDENT OF THE FEDERATION OF LAW SOCIETIES OF CANADA.

Mr. Gervais addressed the Benchers

Mr. Everett thanked Mr. Gervais on behalf of the Law Society and presented him with a gift of appreciation.

13. PROPOSED AMENDMENTS TO FEE PAYMENT RULES

Mr. Stajkowski introduced a proposal to change the date on which payment of the annual practice fee is due and associated changes with respect to the penalty for late payment, waiver of penalties or extension of time to pay, and pro rating fees for members leaving practice. Mr. Stajkowski explained that under the existing rules members are required to pay the annual practice fee by December 31 of each year. Subject to a late payment penalty, members can pay the fee any time up to January 31 of the following year, and if they do so, they are deemed to have been members in good standing retroactively from January 1. Mr. Stajkowski noted that this leads to the situation where the status of members who have not paid by December 31 is unclear until they pay their fees or fail to do so by January 31. As well, Mr. Stajkowski said, January 31 tends to become the *de facto* deadline for payment. Changing the deadline for payment to November 30 would eliminate the uncertainty, as members would remain members unless they failed to pay their fees by December 31.

It was moved (Alexander/Hume) to amend the Law Society Rules as set out in Appendix 3.

Mr. Ridgway asked if this would simply make December 31 the *de facto* payment date.

Mr. Stajkowski said members could delay payment until December 31 and pay the penalty but the Law Society would be able to tell members of the public with certainty that such members were in good standing.

Mr. Nagle asked if there was any explanation for why an increasing number of members were paying their fees late.

Mr. Stajkowski said the increasing number of late payments was partly because the number of members increased and partly because it had become easier to pay late.

Mr. Nagle was concerned that the change would result in a double billing in the first year.

Mr. Stajkowski acknowledged that the change would mean members were billed twice in the same calendar year, but he noted that the fees would be payable only 30 days earlier than under the existing rules. He said if the Benchers changed the rules as proposed, the Law Society would give members plenty of advanced warning of the new payment date so that they could make arrangements to pay the fees without undue hardship.

Ms. Hickman asked if the late payment penalty could be waived in the first year, while keeping December 31 as the final deadline for payment.

Mr. Stajkowski said it was possible but would likely result in a large number of reinstatement applications being made in January because people would be late. He noted that the proposed changes included reducing the late payment penalty from $200 per lawyer to $100 per lawyer. Mr. Stajkowski said he had received feedback from members in favour of moving the deadline from December.

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

Mr. Stajkowski introduced the next part of the proposal, to reduce the penalty for late payment of fees from $200 per member to $100 per member, for practicing members, $25 for non-practicing members, and no penalty for retired members. He said the Law Society took in about $50,000 per year in late payment penalties, which would be reduced by the proposed change. However, that would be partly offset by increased administrative efficiencies associated with the earlier payment date.

It was moved (Hume/Alexander) that the late payment fee be set at $100 for practicing members, $25 for non-practicing members, and $0 for retired members.

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

Mr. Stajkowski introduced the next part of the proposal, which was to give to the Executive Director the discretion to waive the late payment penalty or to extend the time to pay. Under the existing rules the Credentials Committee has that discretion. Mr. Stajkowski said that as the number of requests for waiver or extension of time has increased, it has become administratively difficult to deal with them through the Credentials Committee. He said the change would be in keeping with other discretions given to the Executive Director.

It was moved (Alexander/Ostrowski) to give the Executive Director discretion to extend the due date for fee payments under Rule 2-72(2), and to waive the penalty for late payment in special circumstances under Rule 2-72(7).

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

Mr. Stajkowski introduced the last part of the proposal, which concerned pro rating fees for members who die or are appointed to the Bench. Under the existing rules, the Law Society must deduct the amount of the non-practicing fee before pro rating the balance. The proposed rule change would require the Law Society to refund the full amount of pro rated fees less a $50 administration fee.

It was moved (Ridgway/Hume) to refund the full amount of pro-rated fees, less an administrative fee of $50, in the case of judicial appointment, death or total incapacity.

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

14. APPOINTMENT TO THE CANLII BOARD OF DIRECTORS

It was moved (Fung/Wallace) to appoint Catherine Best to the Board of Directors of CanLII for a three-year term beginning on October 1, 2004 and ending on September 30, 2007

The motion was carried.

15. APPOINTMENT TO THE BOARD OF DIRECTORS OF PRO BONO LAW OF BRITISH COLUMBIA

It was moved (Fung/Ostrowski) to appoint William Jackson to the Board of Directors of Pro Bono Law of British Columbia for the balance of the term of office of Peter Keighley, QC.

The motion was carried.

16. APPOINTMENT TO THE FEDERAL JUDICIAL APPOINTMENTS COMMITTEE FOR BRITISH COLUMBIA.

It was moved (Alexander/Jackson) to nominate Jo Ann Carmichael for appointment to the Federal Judicial Appointments Committee.

The motion was carried.

17. LAND TITLE OFFICE FEES

Mr. Everett circulated a draft letter to the provincial government supporting a small increase to $4.75 in the fees payable to the proposed Land Title Authority.

It was moved (Nagle/Fung) to authorize sending the letter.

The motion was carried.

18. SUBMISSION TO THE PROVINCIAL COURT COMPENSATION COMMISSION

It was moved (LaLiberté/Blom) to make a submission to the Provincial Court Compensation Commission setting out the Law Society's views on the principles that should be applied by the Commission, without making specific recommendations as to amount.

Mr. Ridgway asked if the government had accepted previous recommendations made by the commission.

Mr. Seckel said the government response had been mixed. In the last round, most of the commission's recommendations were accepted. Mr. Seckel said the Law Society should also have received an invitation to make a submission with respect to Judicial Justices of the Peace.

It was agreed to amend the motion to authorize including the Law Society's views with respect to compensation of JJPs.

Mr. Turriff noted that the Independence and Governance Subcommittee had not considered the matter. He suggested that if timing would permit it, the subcommittee could consider the matter at its next meeting.

Mr. Everett said the subcommittee's guidance would be welcome.

The motion was carried.

19. BENCHERS RETREAT BUDGET

Mr. Stajkowski presented a budget of for the Benchers retreat based on reimbursement of travel expenses and per diem amounts of $300 plus $75 if accompanied by a spouse. Mr. Stajkowski commented that this formula had worked well in the previous three years.

It was moved (Donaldson/Jackson) to approve the budget and per diem amounts as presented.

The motion was carried.

20 LAW SOCIETY SCHOLARSHIP

It was moved (Fung/Hume) to award the 2004 Law Society Scholarship to Jana Katherine McLean, and if Ms. McLean is unable to take up the scholarship, then to Russell Steward Brown.

The motion was carried.

21. OPEN DISCUSSION OF BENCHER CONCERNS

Mr. Everett reported on correspondence received from the Law Society of Newfoundland and Labrador indicating the provincial government's intention to introduce legislation exempting government employed lawyers from payment of Law Society fees while deeming them to be members in good standing of the Law Society.

It was moved (Ridgway/Hume) to send a letter to the government of Newfoundland and Labrador supporting the Law Society of Newfoundland's opposition to the legislation.

Mr. Turriff said this was a very serious matter should be considered by the Independence and Governance Subcommittee but there was no need for that to delay sending the proposed letter of support.

Mr. Ridgway asked what impact the legislation would have on the Law Society of Newfoundland's budget.

Mr. Everett said the Law Society would lose fees from sixty members from a total of less than one thousand. He said the amount was approximately $145,000.

The motion was carried.

22. APPOINTMENTS TO THE SUPREME COURT OF CANADA

Mr. Turriff noted that there had been a great deal of public debate with respect to the process for appointing new judges to fill the two vacancies soon to arise on the Supreme Court of Canada. He said the debate had taken place with the assistance of the Federation of Law Societies, the Law Society of Upper Canada, and the CBA, all of whom were expressly opposed to adopting an American model of confirmation hearings. In general, a balance between confidentiality and transparency was common to most positions and all are clear that neither may be permitted to undermine the independence and integrity of the court. Each group has recommended forming some kind of committee. Mr. Turriff said the Benchers should ask themselves whether the process should be public. If it is, would some candidates not come forward, would it reveal useful information, and would it affect the independence or integrity of the court. He said the Independence and Governance Subcommittee was generally of the view that the two imminent appointments should not force the Law Society to rush into recommending a new process that might not be fully thought out. Rather, it would be better to see the two vacancies filled using the existing process and then open the discussion about change. Mr. Turriff offered his own view, which was that the process need not be public provided it is properly explained, with a clear articulation of the problems caused by public scrutiny in the form seen in the United States.

Mr. Everett said the Federation was expecting the Law Society to advise of its views as quickly as possible so that a submission can be prepared.

Mr. Nagle opposed any further political involvement in the appointment process. He said the constitution was intended to separate the judiciary from the political arm of government. He said the public does not understand what is involved in appointments to the Supreme Court of Canada, and the debate has been poorly managed by people seeking to influence the construction of the

court. Mr. Nagle favoured a debate over the long-term structure of the court, but the existing appointment process had worked very well and there was no need to change it for politically expedient reasons.

Mr. Ridgway said he had always been concerned about the lack of public, as distinct from political, participation in the judicial selection process. He said there was a wave of public opinion in Canada that people want to be involved in determining who sits in judgment, particularly when decisions have a social policy component. He said the American approach may be flawed but he was in favour of some solution that opens the process up to public involvement.

Mr. Everett said that Canada had moved from parliamentary supremacy to constitutional supremacy and the Supreme Court had moved to a more legislative role. Under such circumstances, he said, more public input into the selection of people in that role may be important. Mr. Everett said he would not go so far as the American process but there might be a way to involve the public and public representatives in examining candidates provided the ultimate choice remained the prime minister's.

Mr. Turriff did not think public participation and confidentiality were mutually exclusive. He said there is a place for public input, as is the case in appointments to the superior courts, but if the process moved into a public setting, it would reduce the pool of candidates and in some cases force candidates to take positions on issues that could constrain them in their decisions in the future.

Mr. Matkin said there was a lot of misunderstanding about how the American system works, and whenever the topic arises, people tend to think of the very few problematic cases. He said there was no universally held view that federally appointed judges in the United States were superior to those subject to confirmation hearings. He noted the comment of Professor Peter Hogg that if you want the public to understand and endorse the process, changing one secret process for another will not do.

Mr. McDiarmid suggested that one way of reaching a compromise between confidentiality and transparency would be to have a committee with some non-lawyer public participation.

23. NATIONAL MOBILITY PROTOCOL AND FEDERAL GOVERNMENT LAWYERS

Mr. McDiarmid reviewed the federal Department of Justice's concern that under the new national mobility protocol, federal government lawyers might be required to belong to as many as 14 Law Societies, and for that reason took the position that the protocol would be unconstitutional as applied to them. The proposed solution would require a federal government lawyer who regularly appears as counsel in the provincial courts to belong to the Law Society in that province, but otherwise federal government lawyers may belong to the Law Society in the jurisdiction where they have the closest economic nexus. Mr. McDiarmid said this was viewed unanimously as a sensible approach.

It was moved (McDiarmid/Turriff) to endorse the proposed protocol.

The motion was carried.

24. UPDATE ON WIRICK INVESTIGATION AND SPECIAL COMPENSATION FUND CLAIMS.

This matter was considered *in camera.*

25. INVESTMENT OPPORTUNITY

This matter was considered *in camera*

26. *REAL ESTATE ACT*

This matter was considered *in camera*.

27. FEDERATION OF LAW SOCIETIES SEARCH WARRANT PROTOCOL

Mr. Lucas drew the Benchers' attention to a draft protocol for dealing with search warrants executed on lawyers' offices. He said the Federation of Law Societies was seeking comment on the protocol, which was based on the protocol in place in British Columbia for some years.

It was agreed to circulate the draft protocol to members of the criminal law section of the CBA for comment, and then return the matter to the Benchers.

DMGN
04-05-30

Appendix 1

CHAPTER 13

RESPONSIBILITY TO THE LAW SOCIETY

Reporting another lawyer to the Law Society

1. Subject to Rule 2, a lawyer must report to the Law Society another lawyer's:

   (a) breach of undertaking that has not been consented to or waived by the recipient of the undertaking,

   (b) shortage of trust funds,[1] and

   (c) other conduct that raises a substantial question as to the other lawyer's honesty or trustworthiness as a lawyer.

2. In making a report under Rule 1, a lawyer must not disclose any confidential information respecting the lawyer's client acquired in the course of the professional relationship or any privileged communications between them, unless the client expressly or implicitly consents.

Responding to Law Society correspondence

3. A lawyer must reply promptly to any communication from the Law Society.

The Law Society's disciplinary and competence procedures

4. A lawyer must not use the Law Society's disciplinary and competence procedures, or suggest to a client that such procedures be used, vexatiously or solely to further the client's civil claim against another lawyer.

Employing a person [whose character and fitness are in question *deleted by amendment*]

5. Except with the written approval of the Law Society, a lawyer must not employ or retain in any capacity having to do with the practice of law a person [whose character and fitness to be a member of the Bar is in question, including, but not limited to, a person *deleted by amendment*] who, in any jurisdiction:

   (a) is suspended from the practice of law,

   (b) is disbarred,

(c) as a result of disciplinary proceedings, is no longer permitted to practise law,

(c.1) failed to complete a Bar admission program for reasons relating to lack of good character and repute or fitness to be a member of the Bar,

(d) has been the subject of a hearing ordered, whether commenced or not, with respect to an application for enrolment as an articled student, call and admission, or reinstatement, unless the person was subsequently enrolled, called and admitted or reinstated in the same jurisdiction, or

(e) was required to withdraw or was expelled from a Bar admission program.

Apparent partnerships and associations

6. Any lawyer held out as practising in partnership or association with one or more lawyers has the same professional responsibilities to the general public, other lawyers and to the Law Society, for the actions of any lawyer or lawyers with whom he or she is practising in an apparent partnership or association, as the lawyer would have if carrying on practice with such lawyer or lawyers in a partnership.

FOOTNOTE:

1. Law Society Rule 3-66 imposes additional duties on lawyers respecting their own trust shortages or their inability to deliver up trust funds when due.

Appendix 2

REFERENDUM ON LAW SOCIETY PRACTICE FEE FOR 2005

Introduction

The Benchers of the Law Society have called for this referendum in order to give all members the opportunity to vote on an important question that has been an issue at the Law Society Annual General Meeting for the past several years and the subject of several recent lawsuits against the Society.

That issue is **whether the Law Society should require all practising lawyers to pay an amount equivalent to the Canadian Bar Association (CBA) membership fee, whether or not they are members of the CBA.** In order to give members an opportunity to make a final decision in the referendum, the Benchers determined that the members should set the fee for 2005 in final form by referendum. That requires a majority of the members voting in the referendum to vote in favour of a resolution setting the fee.

For that reason, the Benchers have proposed two **alternative** resolutions to set the 2005 practice fee. Both are based on the amount of **$980.50** that the Benchers have determined is required to operate the Law Society and its programs for 2005. **The Benchers recommend that members vote for <u>one of</u> Resolution A or Resolution B**.

Resolution A would require practising lawyers to pay the amount recommended for Law Society purposes (**$980.50**) plus **$497.70** (**$293.70** for members in their first five years of practice), which is equivalent to the CBA membership fee, as part of the mandatory fee, for a total of **$1,478.20** or **$1,274.20**.

Resolution B would require practising lawyers to pay a fee at the amount recommended for Law Society purposes–**$980.50**, and would not include an amount equivalent to the CBA membership fee.

If you are **in favour** of requiring all practising lawyers to pay an amount equivalent to the CBA membership fee, **vote for Resolution A**.

If you are **not in favour** of requiring all practising lawyers to pay an amount equivalent to the CBA membership fee, **vote for Resolution B**

Members also have the option of voting not to approve either resolution in this referendum. If neither fee resolution achieves a majority, the decision on the practice fee for 2005 will have to be made at the AGM in September.

VOTE BY INDICATING YOUR PREFERENCE AT THE BOTTOM OF THE PAGE:

RESOLUTION A (mandatory CBA fee)

WHEREAS:

1. The Benchers have determined that the amount of **$980.50** per practising lawyer is required to maintain and operate the programs of the Law Society for the year 2005;

2. The Canadian Bar Association ("CBA") membership fee is as follows:

    - **$497.70** for lawyers who have been in practice five full years or more;

    - **$293.70** for lawyers who have been in practice less that five full years; and

3. The Benchers have resolved that, if this resolution is passed, all money collected as "an amount equivalent to the CBA fee" will be remitted to the CBA (subject to the decision of the BC Court of Appeal in *Gibbs v. The Law Society and CBA*);

BE IT RESOLVED THAT, for the practice year commencing January 1, 2005, the practice fee be set, pursuant to section 23(1)(a) of the *Legal Profession Act*, at

- **$1,478.20** for lawyers who have been in practice five full years or more;

- **$1,274.20** for lawyers who have been in practice less that five full years.

RESOLUTION B (voluntary CBA fee)

WHEREAS the Benchers have determined that the amount of **$980.50** per practising lawyer is required to maintain and operate the programs of the Law Society for the year 2005;

BE IT RESOLVED THAT, for the practice year commencing January 1, 2005, the practice fee be set, pursuant to section 23(1)(a) of the *Legal Profession Act*, at **$980.50**

I vote in favour of (vote for <u>one</u> only):

RESOLUTION A (mandatory CBA fee).....( )

RESOLUTION B (voluntary CBA fee).....( )

NOT SETTING A PRACTICE FEE
IN THIS REFERENDUM .....( )