

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Friday October 29, 2004	
PRESENT:	William Everett, QC, President	Margaret Ostrowski, QC
	Ralston Alexander, QC, 1 st Vice-president	Greg Rideout
	Joost Blom, QC	Glen Ridgway, QC
	Ian Donaldson, QC	Patricia Schmit, QC
	Michael Falkins	Alan Seckel, QC, Deputy A.G
	Gavin Hume, QC	Dirk Sigalet, QC
	John Hunter, QC	Grant Taylor
	William Jackson	Ross Tunnicliffe
	Patrick Kelly	Gordon Turriff, QC
	Terry La Liberté, QC	Dr. Maelor Vallance
	Bruce LeRose	James Vilvang, QC
	Patrick Nagle	Anne Wallace, QC
	Darrell O'Byrne	David Zacks, QC
NOT PRESENT:	Robert McDiarmid 2 nd Vice-president	Lilian To
	Anna Fung, QC.	June Preston
	Carol Hickman	Art Vertlieb, QC
STAFF PRESENT:	James Matkin, QC, Executive Director	David Newell
	Stuart Cameron	Neil Stajkowski
	Mary Ann Cummings	Alan Treleaven
	Brad Daisley	Ron Usher
	Su Forbes, QC	Adam Whitcombe
	Jeffrey Hoskins	
	Michael Lucas	
GUESTS:	Associate Dean Robin Elliot, University of British Columbia Faculty of Law	
	Michael Woodward, President, CBA (BC Branch)	
	Frank Kraemer, Executive Director, CBA (BC Branch)	
	James Baird, Chair, CLE Society	
	Janice Mucalov	

1. MINUTES

The minutes of the meeting held on October 1, 2004 were approved as circulated.

2. PRESIDENT'S REPORT

Mr. Everett reported on his activities on behalf of the Law Society over the previous month. He noted that the Life Benchers Dinner, which was combined with the presentation of 50 year and 60

year certificates, was a great success. He thanked Donna Kokot of the Law Society staff, and Life Bencher Gerry Lecovin for their work.

Mr. Everett circulated the annual report of the Provincial Court of British Columbia, and a number of thank you letters to the Benchers for hosting the evening of remembrance in honour of the late David Gibbons, QC.

3. EXECUTIVE DIRECTOR'S REPORT

Ms. Forbes circulated a written report on Law Society operations over the previous month. Ms. Forbes noted that the Land Title and Survey Act was in force and the panel selecting the first board members for the Authority was about two weeks away from making an announcement. Ms. Forbes acknowledged Mr. Alexander's effort in making the Authority a reality for the BC public. Ms. Forbes announced the appointment of Michael Lucas as Administrator of Policy and Planning, which she said was a very positive move for the Law Society.

Mr. Matkin reported on the International Institute of Law Association Chief Executives conference held in Auckland, New Zealand. He circulated a paper presented by Gavin MacKenzie entitled "Regulatory Models and Options for the Legal Profession in the 21st Century", which gave a sense of the discussions at the meeting.

Mr. Matkin also drew attention to a headline from the daily newsletter produced during the conference, which read "Profession's Core Values Under Threat". The headline concerned anti-money laundering legislation being introduced in many jurisdictions that would require lawyers to report on their clients. Mr. Matkin said there was some interest in the "no cash" rule developed by the Federation of Law Societies. Mr. Matkin reported that government regulation of the profession was a "showcase" topic on the conference agenda, and Sir David Clementi, who has been commissioned to review the system of lawyer regulation in the United Kingdom, addressed the conference by audio-conference. Mr. Matkin said it was clear that Sir David was strongly influenced by events in New South Wales, referring to the creation of a legal services board with members appointed by the profession and by government, with plenary power to regulate the profession. One option likely to be included in the final report of the Clementi Commission is to do away with the Law Society altogether in favour of a different regulator. Apparently, consumer groups support that option.

Mr. Matkin said the tension between the dual roles of many law societies (regulator and professional association) was being worked out around the world, with most law societies (or their equivalents) guarding their representational role and allowing governments to take over the regulatory function. He said the biggest surprise was the degree of complacency in the law societies about that process.

Mr. Matkin noted that Sir David Clementi's terms of reference also include examining alternate business models for the legal profession, and it appeared likely that he would recommend permitting Legal Discipline Practices ("LDPs"), which would be much like MDPs. The key issue will be ownership of such practices.

Mr. Matkin said he asked Sir David had considered the Canadian regulatory model, and he indicated that although he had not, he would do so.

Mr. Matkin referred to the paper by Gavin MacKenzie noting that all law societies outside Canada lack the power on their own to discipline lawyers. In all other jurisdictions disciplinary power lies at least partly outside the law societies; in the United States, for example, with the Courts. He said it was important to note that in these jurisdictions disciplinary power is exercised through some sort of court or tribunal, and no one is proposing to change those tribunals.

Mr. Ridgway asked who pays for independent boards. Mr. Matkin said in New Zealand the cost is borne by the profession, who must pay a fee to obtain a practice certificate, although membership in the Law Society is voluntary. In some other jurisdictions the cost is covered by the equivalent of Law Foundation funds.

Mr. Hunter noted that the President of the Law Society of Upper Canada has suggested consideration of publicly owned law firms, and he asked whether that was discussed at the conference. Mr. Matkin said the issue was involved in the question of ownership of LDPs, and it was suggested that it would be possible to separate ownership from control in a corporate structure.

Mr. Turriff said the discussions at the conference demonstrated the need for the Law Society to increase the work done on independence and governance. He said he would propose that the President and Executive Director be made full members of the Independence and Governance Subcommittee to stress how important the Law Society considers the issue to be. He said it might be appropriate to elevate the status of the subcommittee to a full committee.

Mr. Everett suggested that the Benchers could consider changing the status of the subcommittee at a future meeting.

Mr. Nagle asked if public support for government in other jurisdictions was so strong that people believed it could do a better job of regulating lawyers. Mr. Matkin said it was more a case of public support for lawyers being so weak that no one is prepared to push back.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. REVIEW OF PART B INSURANCE

Ms. Forbes gave a brief description of the terms of Part B insurance coverage.

6. DISCLOSURE AND PRIVACY TASK FORCE, DISCLOSURE OF PRACTICE HISTORIES.

Mr. Hunter recalled for the Benchers the decision in principle to disclose members' practice histories on request.

It was moved (Hunter/Zacks) to amend the Law Society Rules by adding the following Rule"

Practice History

2-9.1 (1) In this Rule "practice history" means a record of

- (a) the dates and places that a lawyer or former lawyer has practiced law or been enrolled in the admission program, including the name of the firms through which the lawyer or former lawyer practiced law, and
- (b) dates of any periods since call and admission during which the lawyer or former lawyer has been a non-practicing or retired member or a former member;

- (2) On request by any person, the Executive Director may disclose all or part of the practice history of any member or former member of the Society.

Ms. Schmit asked what the practice history would show if a member was suspended and not practicing.

Mr. Hoskins said the suspension would not show in terms of the member's practice history, but could be disclosed.

The motion was carried.

7. CANADIAN BAR ASSOCIATION, ISSUES AND REQUESTS

Mr. Stajkowski outlined a request from the CBA (BC) for Law Society membership data, primarily for the purpose of producing the CBA lawyer directory. He noted that the Law Society has provided the information in the past, but 2005 would be the first year in which there was a possibility that a significant number of Law Society members will not be CBA members.

Mr. Ridgway asked what the rationale for providing the information was. Mr. Stajkowski said the general view was that having comprehensive information made the CBA directory more useful. Mr. Ridgway agreed that including all Law Society members made sense for directory purposes, but the CBA should not be permitted to sell the membership data to others.

It was moved (Vilvang/Ridgway) that the Law Society continue to supply the same membership data to the CBA (BC) as it has done in the past.

It was moved (Donaldson/Jackson) to amend the motion to specify that information be supplied to the CBA solely for the purpose of producing the lawyer directory.

Mr. Laliberté noted that the CBA had in the past provided the membership list to the Lawyers Benevolent Fund for its purposes.

Mr. Woodward confirmed that the CBA had in the past shared the list with the Lawyers Benevolent Fund, but assured the Benchers that the CBA would not sell the list to telemarketers or anything of a similar nature.

Mr. Kraemer said the CBA had also shared the list with the Lawyers Assistance Program and local and county bar associations.

Mr. Donaldson clarified that the amendment was intended only to prevent commercial exploitation, not the sort of use described by Mr. Woodward and Mr. Kraemer.

Mr. Zacks asked if the CBA intended to charge non-members more than members for the directory.

Mr. Woodward said the CBA had always offered the directory to its members at a discounted price, and would continue to do so.

Mr. Turriff said the question for the Benchers was whether providing the information to the CBA was in the public interest or not. He thought giving the list to local bar associations was likely in the public interest, but questioned whether the public interest was served by giving the information to an organization such as the Benevolent Fund Society, which solely benefits lawyers.

Mr. Donaldson and Mr. Jackson withdrew the motion to amend. Mr. Donaldson asked for an assurance from the CBA that the Law Society membership list would be used only for the purposes described earlier but not used for commercial purposes.

Mr. Woodward said he could not bind future CBA executives but could give an assurance that for the present that the CBA would not sell the list to commercial enterprises.

Mr. Kelly asked if the holder of a license to access the CBA directory online could obtain information that could then be used for commercial purposes.

Mr. Kraemer commented that the same thing could be done by purchasing the print directory.

Mr. Rideout supported the motion.

Mr. Zacks said the issue was not entirely whether the list was sold. He noted that the CBA has relationships with suppliers of goods and services. Mr. Zacks said he did not want his name given to those suppliers.

Mr. LeRose asked whether there had been any problems in the past with commercialization of the Law Society membership list, and if not, whether something had changed to raise a concern. Mr. Stajkowski said the change was that there could be a significant number of non-cba members included in the Law Society membership list for the first time. Mr. LeRose suggested that if a problem arose, it could be dealt with at that time.

The motion was carried.

8. TRUST ADMINISTRATION FEE

Mr. Stajkowski reported that although the Benchers had decided in principle to make the requirement to pay the Trust Administration Fee subject to a threshold of \$5000, discussions with law-firm administrators revealed that the threshold might be more of a nuisance than a benefit, and they would prefer there to be no threshold at all. However, Mr. Stajkowski also noted that all the information published to the profession on the subject had referred to the \$5000 threshold, so most members would be expecting that to be in the rules when the fee is implemented. Mr. Stajkowski favoured implementing the fee with the threshold and then considering changing the rules if further information indicates that it is not beneficial.

It was moved (Alexander/Zacks) to amend the Law Society Rules by adding the rules set out in Appendix 1.

It was moved (O'Byrne/Sigalet) to amend the motion by substituting the words "*any money in trust*" for the words "*in trust at least \$5,000 in total*" in Subrule 2-72.2(1) in Appendix 1.

Mr. Alexander recalled that the original thought behind the threshold was to relieve firms of the need to process trust administration fees for small amounts held in trust. Consequently, if it would be easier to administer without the threshold, it should be omitted.

Mr. Vilvang did not think it would be easier to administer if every trust transaction attracted the fee.

Mr. Turriff said if the Benchers were satisfied that the group of people consulted were sufficiently expert in the matter and representative of the people who would have to administer the fee, then they should listen to them and accept the recommendation to remove the threshold.

Mr. Zacks recalled that the threshold was intended to prevent the administration fee being imposed on amounts less than \$5000. He did not think the threshold would add a great deal of complication to the administration of the fee.

The motion to amend was carried.

The main motion, as amended, was carried by a majority of more than two-thirds of the Benchers present.

9. CANLII FUNDING

Mr. Tunnicliffe introduced a new item not on the published agenda, concerning funding for CanLII. He explained that CanLII funding would be on the agenda at the Federation of Law Societies meeting in November, and the President would be called upon to present the Law Society of BC's position. He said CanLII proposed funding at the level of \$20.35 per member, which was \$0.30 more than their estimate. The increase was attributed to increased telecommunications costs and salaries. However, Mr. Tunnicliffe said, the amount would still be less than the 2004 levy. In response to a question from Mr. Zacks, Mr. Tunnicliffe confirmed that the contribution per member was conditional on the same contribution from other Law Societies.

It was agreed to support funding at the proposed level of \$20.35 per member.

10. WESTERN CANADA SOCIETY TO ACCESS JUSTICE FUNDING REQUEST

This matter was postponed to the December 3, 2004 meeting.

11. PAST PRESIDENT OF THE LAW SOCIETY

Mr. Everett and Mr. Alexander were not present during this discussion. Mr. Falkins assumed the chair for this matter.

It was moved (Rideout/Taylor) to create the position of immediate Past-President as a voting member of the Executive Committee in the year following their term as president.

Mr. Vilvang spoke against the motion. He was concerned that the past president could exert too much influence over the sitting president and executive.

Ms. Ostrowski supported Mr. Vilvang's comments. She said the president makes a huge commitment to the membership, and in her experience the position of immediate past-president was not particularly useful. In any event, the past-president can be consulted without a formal position on the Executive Committee.

Ms. Wallace said creating a past-president position would ease the transition of the President out of office. She said it was a shame that the Law Society simply "cut the President" adrift at the end of his or her term of office. Ms. Wallace did not think the immediate past-president would exert undue influence over the sitting president.

Mr. Hume spoke in favour of creating the position. He said he had served in other organizations as president and past-president, and had found the past-president position to be very valuable.

Mr. Zacks was not in favour of creating the position. He said he too had been president and past-president of other organizations and had not found the past-president position to be particularly beneficial. He disliked the idea that the past president would have a vote on the Executive Committee when he or she would not have a vote at the Bencher table. He noted that the

Executive Committee had the ability to make policy decisions and should be elected. He also noted that the members had not approved more than four terms for Benchers.

Mr. Hunter opposed the motion, and agreed with Mr. Vilvang's comments. He said there was often value in having the past-president's opinion, but that can be obtained without creating a formal position.

Mr. Laliberté supported the motion for the same reasons given by Mr. Hume. He said he was aware of the counterargument presented by Mr. Vilvang, but had discussed it with others who had regretted the sudden break at the end of a presidential term. He did not think there was a real danger of undue influence.

Mr. Taylor favoured the motion, saying he had spoken to a number of past-presidents who had voiced the same concern about the sudden break, and would have preferred a more gradual departure. He did not think it was necessary to give the past-president any formal voting power either at the Executive Committee or the Bencher table because the position would be advisory.

Mr. Rideout said the Westminster County Bar Association had always had a past-president, who acted in an advisory capacity only. He said the position was important for continuity. Mr. Rideout had no objection to the past-president having a vote on the Executive Committee.

It was moved (Taylor/Donaldson) to amend to motion to substitute the word "non-voting" for the word "voting".

Mr. Ridgway said the amendment would make the appointment pointless. If the past-president's views are wanted, he or she can be made to feel welcome at the Bencher table.

The motion to amend was defeated

The main motion was defeated.

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

This matter was considered *in camera*.

13. ADMINISTRATIVE POLICY AND THE BENCHERS' ADJUDICATIVE ROLE

This matter was considered *in camera*.

14. FIRST CANADIAN TITLE INSURANCE, APPOINTMENT OF COMMISSIONERS

This matter was discussed *in camera*.

15. OPEN DISCUSSION OF BENCHER CONCERNS

Mr. Zacks suggested that more editorial review of the Benchers Bulletin was warranted because some matters in the most recent edition were not entirely accurate. In particular he noted the representation that a breach of the "no cash" rule is in the nature of an absolute liability offense.

Ms. Ostrowski raised the question of legal aid funding for immigration and refugee matters.

Mr. Seckel said the provincial government took the view that immigration and refugee matters were purely federal and therefore the Province would not provide legal aid funding.

Mr. Turriff said he had spoken with a member who had received a telephone call from a Law Society Professional Conduct lawyer investigating a complaint against him and was unsettled by the experience, having found the Professional Conduct lawyer somewhat confrontational. He asked if there were any guidelines in place for conducting complaints investigations by telephone.

Mr. Cameron said he would obtain information about the specific matter and the general question and report at the next meeting.

There being no further business the meeting was terminated.

APPENDIX 1

Application and definition

- 2-72.1** (1) Rules 2-72.1 to 2-72.5 apply to client matters undertaken on or after March 1, 2005.
- (2) In Rules 2-72.1 to 2-72.5, “**client matter**” means any distinct matter on which a lawyer is retained to represent or advise a client, including but not limited to the following:
- (a) a transaction of any kind;
 - (b) a claim or potential claim by or against the lawyer’s client;
 - (c) a proceeding.

Trust administration fee

- 2-72.2**(1) A lawyer must pay to the Society the trust administration fee specified in Schedule 1 for each client matter undertaken by the lawyer in connection with which the lawyer receives in trust at least \$5,000 in total, not including fees and retainers.
- (2) Only one trust administration fee is payable in respect of a single client matter in which
- (a) a lawyer represents joint clients, or
 - (b) more than one lawyer in a law firm acts.
- (3) For each quarter year ending on the last day of March, June, September or December, a lawyer must remit the following to the Society within 30 days of the end of the quarter year to which they apply:
- (a) trust administration fees that have become payable under subrule (1) during the quarter year;
 - (b) a completed trust administration report in a form approved by the Executive Committee.

Late payment of trust administration fee

- 2-72.3** A lawyer who fails to remit the trust administration fee and report by the time required under this Rule must pay a late payment fee of 5 percent of the amount due for each month or part of a month from the date the lawyer is required to remit the fee and report under Rule 2-72.2(3) until the fee, including the late payment fee, and the report are received by the Society.

Executive Director's discretion

- 2-72.4** The Executive Director may
- (a) decide what constitutes a client matter under Rule 2-72.1, in individual cases, and

- (b) extend or vary the time for remitting the trust administration fee and report under Rule 2-72.2(3).

Referral to Executive Committee

- 2-72.5** (1) The Executive Director may refer any matter for decision under Rule 2-72.4 to the Executive Committee.
- (2) On the written request of a lawyer affected by a decision made by the Executive Director under Rule 2-72.4, the Executive Director must refer the matter to the Executive Committee, and the Committee may
 - (a) confirm the decision of the Executive Director, or
 - (b) substitute its decision for that of the Executive Director.