

# THE LAW SOCIETY OF BRITISH COLUMBIA

## MINUTES

- MEETING:** Benchers
- DATE:** Saturday June 4, 2005
- PRESENT:**
- |  |                        |
|--|------------------------|
| Ralston Alexander, QC, President                     | Darrell O'Byrne, QC    |
| Robert McDiarmid, QC, 1 <sup>st</sup> Vice-president | Margaret Ostrowski, QC |
| Anna Fung, QC, 2 <sup>nd</sup> Vice-president        | June Preston           |
| Joost Blom, QC                                       | Greg Rideout           |
| Robert Brun, QC                                      | Glen Ridgway, QC       |
| Ian Donaldson, QC                                    | Patricia Schmit, QC    |
| Michael Falkins                                      | Dirk Sigalet, QC       |
| Carol Hickman  | Grant Taylor, QC       |
| Gavin Hume, QC                                       | Lilian To              |
| John Hunter, QC                                      | Gordon Turriff, QC     |
| Patrick Kelly  | Dr. Maelor Vallance    |
| Terry La Liberté, QC                                 | Art Vertlieb, QC       |
| Bruce LeRose   | James Vilvang, QC      |
| Patrick Nagle  | Anne Wallace, QC       |
- NOT PRESENT:**
- |                  |                 |
|------------------|-----------------|
| William Jackson  | David Zacks, QC |
| Ross Tunnicliffe |                 |
- STAFF PRESENT:**
- |  |                 |
|--|-----------------|
| Tim McGee, CEO & Executive Director            | Michael Lucas   |
| Sholto Heberton, QC, Acting Executive Director | David Newell    |
| Stuart Cameron                                 | Neil Stajkowski |
| Su Forbes, QC                                  | Alan Treleaven  |
| Jeffrey Hoskins                                | Adam Whitcombe  |
- GUESTS:**
- Doug McGillivray, QC, President, Law Society of Alberta
  - Mona Duckett, QC, President Elect, Law Society of Alberta
  - Don Thompson, QC, Executive Director, Law Society of Alberta
  - Mike Fisher, QC President, Law Society of Saskatchewan
  - Alan Fineblit, QC, Chief Executive Officer, Law Society of Manitoba

### 1. MINUTES

The minutes of the meeting held on May 6, 2005 were approved as corrected.

### 2. PRESIDENT'S REPORT

Mr. Alexander circulated a written report on his activities on behalf of the Law Society during the previous month.

**3. ACTING EXECUTIVE DIRECTOR'S REPORT**

Mr. Hebenton circulated his final report as Acting Executive Director, and welcomed Tim McGee as the new CEO and Executive Director of the Law Society. Mr. Hebenton read from the introduction to his report, concluding:

*"In summary, the Law Society staff have great attitude and ability. They are performing complicated, frequently sophisticated, tasks in what is often a difficult environment. You are well served by your staff. I leave their companionship with a profound debt of gratitude for the way that they, despite the disrupting events both preceding and resulting from my arrival, continued to carry the ball."*

**4. REPORT ON OUTSTANDING HEARING DECISIONS**

The Benchers received a report on outstanding hearing decisions.

**5. REVISIONS TO RULE 3-51.1 (THE "NO CASH" RULE) AND RELATED RULES**

Mr. Lucas reviewed proposed amendments to Rule 3-51.1. He noted that the differences between the rule after the proposed amendments would differ only in small ways from the model rule promulgated by the Federation of Law Societies. He said the greatest difference was the reduction of the threshold amount to \$7,500 from 10,000.

Mr. Donaldson noted that the Law Society of Alberta had adopted a lower limit on the amount of a trust refund that would be required to be paid in cash. He suggested that such a *de minimus* provision would be helpful. He said that if a lawyer receives cash for bail and pays it into court, then gets the bail money back for the client, the court pays the money by cheque. Under the proposed rule that cheque would have to be converted into cash before being returned. He proposed amending the propose rule to include a similar provision to the Alberta rules.

It was moved (Donaldson/McDiarmid) to amend the Law Society Rules as set out in Appendix 1.

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

**6. RULES TO IMPLEMENT DECISIONS RESPECTING DISCLOSURE AND PRIVACY OF RESTRICTIONS AND CONDITIONS ON MEMBERS' PRACTICES.**

Mr. Hunter introduced rule amendments to implement decisions made in principle with respect to disclosure of practice restrictions and conditions.

It was moved (Fung/Hunter) to amend the Law Society Rules as set out in Appendix 2.

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

**7. APPOINTMENT TO THE VANCOUVER BUILDING PERMIT BOARD OF APPEAL**

It was moved (Ridgway/Fung) to nominate Arlene Henry for appointment to the Vancouver Building Permit Board of Appeal for a further term of three years beginning on July 1, 2005 and ending on June 30, 2008.

The motion was carried.

## 8. GUIDELINES FOR CHARITABLE GIVING

It was moved (LeRose/Hume) to adopt guidelines for charitable giving by the Law Society as follows:

- (1) Charitable giving means donation to or financial support by the Law Society to organizations, causes or events unrelated to the Law Society's statutory mandate or Ends.
- (2) The Executive Director, in his or her discretion, may authorize charitable giving up to an aggregate amount of \$15,000 in each calendar year.
- (3) Charitable giving to a particular organization, cause or event should not exceed \$3000 in any calendar year.
- (4) Organizations, causes or events receiving donations or support from the Law Society should be primarily philanthropic or educational in nature.
- (5) Charitable giving should foster the morale of Law Society staff through such methods as sponsorship of staff participation in fundraising events (e.g. Vancouver Food Bank), and should support personal giving by the Benchers and/or the Law Society staff, through such methods as matching donations. In addition to charitable giving, the Executive Director may authorize the Law Society to support personal giving by the Law Society staff through such methods as payroll deductions or payroll advances.
- (6) The Executive Director will report annually to the Benchers on charitable giving by the Law Society.

The motion was carried.

## 9. SINGLE BENCHER HEARING PANELS

Mr. Hoskins reviewed a memorandum outlining the use of one-Bencher hearing panels in BC and other provinces, and the issues that arise from that practice.

Mr. McDiarmid asked if Life Lay Benchers could not be on hearing panels. Mr. Hoskins said the current rule required that panel members be current Benchers or a lawyer. Consequently, Life Lay Benchers are excluded. Mr. McDiarmid suggested changing the rules to permit Life Lay Benchers to sit on hearing panels.

Mr. Nagle asked if there was value in having Lay Benchers sit on every hearing panel.

Mr. McDiarmid said the different perspectives Lay Benchers bring to a hearing panel are valuable.

Ms. Preston said Lay Benchers are appointed for the public's benefit and to indicate to the public that the Law Society values the opinion of non-lawyers. She said that her own experience was that sitting on hearing panels built expertise.

Mr. Ridgway did not favour requiring Lay Benchers on all panels because of the practical problems of doing so, but thought they should be required on all review panels.

Mr. Vilvang did not favour seeking a statutory amendment increasing the number of Lay Benchers or appointing people to hearing panels who are neither lawyers nor Lay Benchers.

Mr. Falkins and Mr. Nagle agreed with both Mr. Ridgway and Mr. Vilvang.

It was moved (McDiarmid/Wallace) to:

1. recommend that Lay Benchers be appointed to hearing panels whenever possible
2. require that the quorum for a Bencher review of a hearing decision must always include one or more Lay Benchers, and
3. to recommend rule changes to allow Life Lay Benchers to sit on hearing panels.

Mr. Hunter was concerned that requiring Lay Benchers on review panels might make scheduling difficult. He suggested recommending that a Lay Bencher be on all review panels but not requiring it.

Mr. Hoskins suggested considering a rule similar to the Law Society of Upper Canada's that gives a panel Chair the discretion to go ahead without a Lay Bencher if including a Lay Benchers would cause undue delay (because of scheduling difficulties).

Ms. Preston favoured the wording of the Ontario rule.

The motion was carried.

With respect to single Bencher panels, Mr. Ridgway favoured continuing the possibility of using single Bencher panels in at least some circumstances.

It was agreed to continue the possibility of using Bencher panels.

Ms. Fung did not think single Bencher panels were appropriate for long hearings.

Mr. Donaldson suggested that the question of when a single Bencher panel is appropriate might turn on whether the matter is contested or uncontested. In general, he favoured the *status quo*.

Mr. Turriff said three Benchers should hear matters when the facts or penalty are in issue, except in special circumstances.

Mr. McDiarmid agreed with Mr. Turriff. He expressed an interest in hearing from the guests from the Prairie Provinces.

Mr. Fisher said that the Law Society of Saskatchewan may use a two Bencher panel if there is a guilty plea on agreed facts. He said in contested matters panel members needed someone to talk to about the hearing.

Ms. Duckett said the Law Society of Alberta did not have provision for single Bencher panels, but tried to reduce costs by using videoconferences or local Benchers when possible.

Mr. McGillivray said the Law Society of Alberta could use a panel of two but generally used three.

Mr. Vilvang favoured the *status quo*. He said it was easier for a single Bencher to write a decision and there was no demonstrated history of problems with single Bencher panels.

Mr. Turriff valued the exchange between panel members because it can improve the quality of decisions.

Mr. Vertlieb asked what mischief was being addressed.

Mr. Alexander said he had suggested previously that there had been instances of poor decisions from single Bencher panels. He thought three member panels produce better decisions and also send a message to the members about the seriousness of discipline matters.

Ms. Wallace agreed with Mr. Alexander. She said it is valuable to have other Benchers to consult, even with an agreed statement of facts.

Mr. McDiarmid said single Bencher panels would be inconsistent with the decision to have Lay Benchers on panels whenever possible. He favoured three Bencher panels.

Ms. Hickman said that having heard a complex matter as a junior Bencher, she would not have done the hearing as a single Bencher panel.

Mr. Vertlieb asked if the concern was the same if the facts and penalty were agreed.

Mr. Alexander said the concerns remained. For example, he said, it may be difficult for a single Bencher to over-rule an agreed statement of facts and penalty.

Ms. Schmit was concerned that minimizing the use of single Bencher panels could increase costs to the Law Society.

Mr. Alexander said that the issue concerned independence of the profession and protection of the public; consequently, cost should not weigh heavily as a factor.

Mr. Turriff reiterated his view that three Bencher panels should be the norm but in special circumstances, such as when it is impossible to convene a three Bencher panel in an acceptable period of time, a single Bencher panel may be used.

A straw poll showed near-unanimous support for Mr. Turriff's view.

Mr. Donaldson suggested allowing a two Bencher panel to continue with a hearing when a three Bencher panel begins the hearing but one Bencher is conflicted out part way through.

Mr. Alexander raised the final point for consideration, which was whether the respondent and counsel for the Law Society should be advised of the composition of the hearing panel in advance of the hearing.

Mr. Donaldson suggested that in view of the decisions made on other points, in particular that three Bencher panels would be used except in special circumstances, there was no reason not to tell the parties who would be on the hearing panel.

It was agreed that both the respondent or respondent's counsel and counsel for the Law Society should be advised of the panel composition in advance of the hearing.

**10. REPORT ON LATE MORTGAGE DISCHARGE REPORTS**

Mr. Newell gave a presentation on the late mortgage discharge reports received by the Law Society under Rule 3-88 in the previous 24-month period. A copy of the presentation is attached as Appendix 3.

**11. UPDATE ON CLAIMS AND INVESTIGATIONS IN THE WIRICK MATTER**

This matter was discussed *in camera*.

**12. OPEN DISCUSSION OF BENCHER CONCERNS**

These matters were discussed *in camera*.

DMGN  
05-06-26

## Appendix 1

***BE IT RESOLVED to amend the Law Society Rules as follows:***

**1. *In Rule 3-47, by***

***(a) rescinding the definition of “currency”, and***

***(b) adding the following definitions:***

**“cash” means**

- (a) coins referred to in section 7 of the *Currency Act* (Canada),
- (b) notes intended for circulation in Canada issued by the Bank of Canada under the *Bank of Canada Act*, and
- (c) coins or bank notes of countries other than Canada;

**“cash receipt book” means the book of duplicate receipts referred to in Rule 3-61.1(1);**

**“public body” means**

- (a) a ministry or department of the government of Canada or of a province or territory, or
- (b) a local public body as defined in paragraphs (a) to (c) of the definition in Schedule 1 to the *Freedom of Information and Protection of Privacy Act*;

**2. *By rescinding Rule 3-51.1 and substituting the following:***

**Cash transactions**

**3-51.1(1)** This Rule applies to a lawyer when engaged in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

- (a) receiving or paying funds;
- (b) purchasing or selling securities, real property or business assets or entities;
- (c) transferring funds or securities by any means.

(2) This Rule does not apply to a lawyer when

- (a) engaged in activities referred to in subrule (1) on behalf of his or her employer, or
- (b) receiving or accepting cash
  - (i) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

- (ii) pursuant to the order of a court or other tribunal,
- (iii) to pay a fine or penalty, or
- (iv) from a savings institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer must not receive or accept an aggregate amount in cash of \$7,500 or more in respect of any one client matter or transaction.

(3.1) Despite subrule (3), a lawyer may accept or receive an amount of \$7,500 or more in cash for professional fees, disbursements, expenses or bail, but any refund greater than \$1,000 out of such money accepted or received must be made in cash.

(4) For the purposes of this Rule, foreign currency is to be converted into Canadian dollars based on

- (a) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily Memorandum of Exchange Rates in effect at the relevant time, or
- (b) if no official conversion rate is published as set out in paragraph (a), the conversion rate that the client would use for that currency in the normal course of business at the relevant time.

3. ***In Rule 3-56, by rescinding subrule (1.3) and substituting the following:***

(1.3) A lawyer must not make or authorize the withdrawal of funds from a pooled or separate trust account, except

- (a) by cheque as permitted by subrule (2) or (3),
- (b) by electronic transfer as permitted by subrule (3.1) or (3.2),
- (c) by instruction to a savings institution as permitted by subrule (4), or
- (d) in cash if required under Rule 3-51.1(3.1).

4. ***In Rule 3-60, by rescinding paragraph (a)(ii) and substituting the following:***

- (ii) the source and form of the funds received;

5. ***By adding the following Rule:***

**Records of cash transactions**

**3-61.1** (1) A lawyer who receives any amount of cash for a client that is not the lawyer's employer must maintain a cash receipt book of duplicate receipts and make a receipt in the cash receipt book for any amount of cash received.

(2) Each receipt in the cash receipt book must

- (a) be signed by

- (i) the lawyer who receives the cash or an individual authorized by that lawyer to sign the receipt on the lawyer's behalf, and
  - (ii) the person from whom the cash is received, and
- (b) identify each of the following:
  - (i) the date on which cash is received;
  - (ii) the person from whom cash is received;
  - (iii) the amount of cash received;
  - (iv) the client for whom cash is received;
  - (v) the number of the file in respect of which cash is received.
- (3) A lawyer who withdraws funds in cash from a pooled or separate trust account must make a record of the transaction signed by the person to whom the cash was paid and identifying:
  - (a) the date on which the cash was withdrawn,
  - (b) the amount of cash withdrawn,
  - (c) the name of the client in respect of whom the cash was withdrawn,
  - (d) the number of the file in respect of which the cash was withdrawn, and
  - (e) the name of the person to whom the cash was paid.
- (4) The cash receipt book must be kept current at all times.
- (5) A lawyer is not in breach of this Rule if a receipt is not signed by the person from whom the cash is received if the lawyer makes reasonable efforts to obtain the signature of that person.

## Appendix 2

### ***BE IT RESOLVED to amend the Law Society Rules as follows:***

#### ***1. In Rule 2-26.1:***

***(a) by rescinding subrule (1)(b) and substituting the following:***

- (b) on the request of a governing body, provide to the governing body copies of all or part of the contents of the application and related material., ***and***

***(b) by adding the following subrules:***

- (5) The Executive Director may disclose the existence and nature of a condition or limitation imposed or agreed to under this division if the condition or limitation
- (a) is ordered as a result of a hearing under this Division,
  - (b) restricts or prohibits a lawyer's practice in one or more areas of law, or
  - (c) is imposed by Rule 2-35, 2-49.1 or 2-54.
- (6) If the Executive Director discloses the existence of a condition or limitation under subrule (5) by means of the Society's website, the Executive Director must remove the information from the website within a reasonable time after the condition or limitation ceases to be in force.

#### ***2. In Rule 3-3:***

***(a) by striking out the period at the end of subrule (2)(c) and substituting a semicolon,***

***(b) by adding the following paragraph to subrule (2):***

- (d) if, in the course of the investigation of a complaint, a lawyer has given an undertaking to the Society that restricts, limits or prohibits the lawyer's practice in one or more areas of law, disclose the fact that the undertaking was given and its effect on the lawyer's practice., ***and***

***(c) by adding the following subrule:***

- (3.1) If the Executive Director discloses the existence of an undertaking under subrule (2)(d) by means of the Society's website, the Executive Director must remove the information from the website within a reasonable time after the undertaking ceases to be in force.

3. ***In Rule 3-16:***

(a) ***by striking out the phrase in subrule (1) “Subject to subrules (2) and (3)” and substituting the phrase “Subject to subrules (2) to (4)”, and***

(b) ***by adding the following subrules:***

(4) When a lawyer gives an undertaking under this division that restricts, limits or prohibits the lawyer’s practice in one or more areas of law, the Executive Director may disclose the fact that the undertaking was given and its effect on the lawyer’s practice.

(5) If the Executive Director discloses the existence of an undertaking under subrule (4) by means of the Society’s website, the Executive Director must remove the information from the website within a reasonable time when the undertaking is no longer in force.

4. ***In Rule 3-46, by adding the following subrules:***

(7) When conditions or limitations are imposed on the practice of a lawyer under subrule (4), the Executive Director may disclose the fact that the conditions or limitations apply and the nature of the conditions or limitations.

(8) If the Executive Director discloses the existence of conditions or limitations under subrule (7) by means of the Society’s website, the Executive Director must remove the information from the website within a reasonable time after the conditions or limitations cease to be in force.

5. ***By adding the following Rule:***

**Disclosure of practice restrictions**

**4-38.2** (1) When, under this Part or Part 4 of the Act, a condition is imposed on the practice of a lawyer or a lawyer is suspended from the practice of law in one or more fields of law, the Executive Director may disclose the fact that the condition or suspension applies and the nature of the condition or suspension.

(2) If a lawyer gives an undertaking that restricts, limits or prohibits the lawyer’s practice in one or more areas of law, the Executive Director may disclose the fact that the undertaking was given and its effect on the lawyer’s practice.

(3) If the Executive Director discloses the existence of a condition or suspension under subrule (1) or an undertaking under subrule (2) by means of the Society’s website, the Executive Director must remove the information from the website within a reasonable time after the condition or suspension ceases to be in force.

**6. *In Rule 9-11, by adding the following subrules:***

- (7) When a panel imposes a condition or limitation under which a law corporation may continue to provide legal services to the public under subrule (2)(c), the Executive Director may disclose the fact that the condition or limitation applies and the nature of the condition or limitation.
- (8) If the Executive Director discloses the existence of a condition or limitation under subrule (7) by means of the Society's website, the Executive Director must remove the information from the website within a reasonable time after the condition or limitation ceases to be in force.