

# THE LAW SOCIETY OF BRITISH COLUMBIA

## MINUTES

- MEETING:** Benchers
- DATE:** Friday July 8, 2005
- PRESENT:**
- |  |                     |
|--|---------------------|
| Ralston Alexander, QC, President                     | June Preston        |
| Robert McDiarmid, QC, 1 <sup>st</sup> Vice-president | Greg Rideout        |
| Joost Blom, QC                                       | Glen Ridgway, QC    |
| Michael Falkins                                      | Patricia Schmit, QC |
| Carol Hickman  | Dirk Sigalet, QC    |
| Gavin Hume, QC                                       | Grant Taylor, QC    |
| William Jackson                                      | Gordon Turriff, QC  |
| Patrick Kelly  | Dr. Maelor Vallance |
| Terry La Liberté, QC                                 | Art Vertlieb, QC    |
| Bruce LeRose   | James Vilvang, QC   |
| Darrell O'Byrne, QC                                  | Anne Wallace, QC    |
- NOT PRESENT:**
- |  |                        |
|--|------------------------|
| Robert Brun, QC                              | Margaret Ostrowski, QC |
| Ian Donaldson, QC                            | Allan Seckel, QC       |
| Anna Fung, QC 2 <sup>nd</sup> Vice-president | Ross Tunnicliffe       |
| John Hunter, QC                              | David Zacks, QC        |
| Patrick Nagle                                |                        |
- STAFF PRESENT:**
- |                                       |                 |
|---------------------------------------|-----------------|
| Tim McGee, CEO and Executive Director | Michael Lucas   |
| Stuart Cameron                        | David Newell    |
| Mary Ann Cummings                     | Neil Stajkowski |
| Brad Daisley                          | Alan Treleaven  |
| Su Forbes, QC                         | Ron Usher       |
| Tim Holmes                            | Adam Whitcombe  |
| Jeffrey Hoskins                       |                 |
- GUESTS:**
- Meg Shaw, VP, CBABC
  - Caroline Nevin, Associate Executive Director, CBABC
  - Johanne Blenkin, Chief Librarian, BCCLS
  - Wayne Robertson, Executive Director, Law Foundation
  - Jamie McLaren, Executive Director, Pro Bono Law of BC
  - Dugald Christie, President, Western Canada Society to Access Justice (for item 14)
  - Bruce Fraser, QC, Chair, Western Canada Society to Access Justice (for item 14)

### 1. MINUTES

Minutes of the meeting held on June 4, 2005 were approved as circulated.

**2. PRESIDENT'S REPORT**

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

Mr. Alexander noted the passing of Lay Bencher Lilian To. He reported that Anna Fung was attending Ms. To's funeral on behalf of the Law Society.

Mr. Alexander congratulated Greg Rideout on the birth of his first grandchild. He also congratulated Margaret Ostrowski on her appointment to the Immigration Appeal Board.

**3. EXECUTIVE DIRECTOR'S REPORT**

Mr. McGee circulated a written report. He noted that his first month as CEO focused on orientation and that was going very well. He said his intended areas of focus in the short-term were:

- Financial reporting. In that regard Mr. McGee drew the Benchers' attention to the summary financial report included in his written report. He said he intended to provide a similar report each month as a "snapshot" of the Law Society's position and departmental performance with respect to budget. The report is not an end in itself but is intended to provide management with a tool to optimize performance. Mr. McGee said the financial situation was solid and the Law Society was running according to plan. He thanked Mr. Stajkowski and his team for excellent work in preparing the report at his request.
- Conducting a deep review of processes in the discipline area.
- Performance reviews. Mr. McGee said all senior staff had been directed to conduct performance reviews by July 15.
- Government relations. Mr. McGee said he and senior staff members had been working with consultants to decide who can assist the Law Society to formulate a government relations plan.

**4. REPORT ON OUTSTANDING HEARING DECISIONS**

The Benchers received a report on outstanding hearing decisions.

Mr. McDiarmid emphasized the importance of preparing written reasons as soon as possible after delivering oral reasons on verdict and penalty because of the thirty day limitation for seeking a review by the Benchers.

**5. RULE AMENDMENTS TO IMPLEMENT THE RECOMMENDATIONS OF THE CONDUCT REVIEW TASK FORCE.**

It was moved (McDiarmid/Ridgway) to amend the Law Society Rules as follows:

**1. In Rule 4-1, by adding the following subrule:**

- (3) In this Part, "**conduct meeting**" means a meeting that a lawyer is required to attend under Rule 4-4(1)(a.2).

**2. In Rule 4-4, by adding**

- (a) the following paragraphs to subrule (1):**

- (a.1) authorize the chair or other Bencher member of the Discipline Committee to send a letter to the lawyer concerning the lawyer's conduct,
- (a.2) require the lawyer to attend a meeting with one or more Benchers or lawyers to discuss the conduct of the lawyer,

**(b) the following subrule:**

- (4) At any time before the Discipline Committee makes a decision under Rule 4-9(6)(a) to (c), the Committee may resolve to rescind a decision made under subrule (1)(b) to require a lawyer to appear before the Conduct Review Subcommittee and substitute another decision under subrule (1).

**3. By adding the following Rules:**

**Conduct letter from the Chair**

**4-6.1** (1) When a letter authorized under Rule 4-4(1)(a.1) is sent to the lawyer, the Executive Director must provide the complainant with

- (a) a copy of the letter, or
- (b) if directed by the Discipline Committee, a summary of the letter.

(2) A letter authorized under Rule 4-4(1)(a.1)

- (a) does not form part of the lawyer's professional conduct record, and
- (b) is not admissible in the hearing of a citation under this Part.

**Conduct meeting**

**4-6.2** (1) A conduct meeting must be held in private.

(2) No record of an order under Rule 4-4(2)(a.2) or of the conduct meeting forms part of the lawyer's professional conduct record.

(3) A Bencher or other lawyer who has participated in a conduct meeting is not permitted to testify in the hearing of a citation as to any statement made by the respondent during the regulatory meeting, unless the matter is put in issue by the respondent.

**4. In Rule 4-9(6), by adding the following paragraph:**

(d) rescind the decision under Rule 4-4(1)(b) to require the lawyer to appear before the Conduct Review Subcommittee, and substitute another decision under Rule 4-4(1).

**5. In Rule 4-10, by striking out the phrase "In complying with Rule 4-9(2)," and substituting the phrase "In complying with Rule 4-9,".**

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

**6. SHORT TERM FINANCING – SPECIAL COMPENSATION FUND**

Mr. Stajkowski circulated a memorandum setting out options for short-term financing of special compensation fund payments approved in the Wirick matter. Mr. Stajkowski proposed increasing

the loan from the Lawyers Insurance Fund to a maximum of \$8 million, and reversing the \$920,000 payment from the Special Compensation Fund to the Lawyers Insurance Fund that was intended to cover liability under Part B insurance coverage but which has not been required for that purpose.

It was moved (Schmit/Falkins) to:

1. Authorize increasing the loan to the Special Compensation Fund from the Lawyers Insurance Fund to a maximum of \$8 million, on the existing terms of the loan; and
2. Authorize repayment of \$920,000 from the Lawyers Insurance Fund to the Special Compensation Fund.

The motion was carried.

**7. MANDATE OF THE INDEPENDENCE AND GOVERNANCE COMMITTEE.**

Mr. Turriff presented a proposed mandate for the Independence and Governance Committee and suggested changing the committee name to the Independence and Self-governance Committee to better reflect the committee's purpose.

It was moved (Turriff/McDiarmid) to change the name of the Independence and Governance Committee to the Independence and Self-governance Committee and to approve the following committee mandate:

1. To monitor issues (including current or proposed legislation) that affect or might affect the independence of lawyers and to develop means by which the Law Society can effectively respond to those issues.
2. To help the Benchers to ensure that the legal profession and the public are properly informed about the meaning and importance, in the public interest, of access to justice and the law through a self-governing profession of independent lawyers.
3. To help the Benchers to ensure that the processes and activities of the Law Society preserve and promote independence and effective self-governance of lawyers.
4. To monitor issues of judicial independence and to support the judiciary, where necessary, in maintaining judicial independence.

Mr. Sigalet asked what the product of the committee might be. Mr. Turriff said the committee was working on a brief that could be called "the case for independence". At the end of the project, the Law Society will have a comprehensive statement of why independence is necessary so that if the government or the public thinks it is appropriate to attack lawyer independence, we will have a positive answer. He hoped to have the brief ready by May or June of 2007 when the Law Society will sponsor a conference on independence of lawyers.

Mr. Sigalet asked if independence would be a subject in the periodic public survey the Law Society conducts. Mr. Whitcombe said it would be possible to add some questions to the survey on the subject of independence.

Mr. Turriff said the committee was having some difficulty deciding how best to tell people about independence because it is not an easy subject to explain to lay people. The committee hopes to develop a program that can be delivered to the public with the help of the Law Courts Education Society.

The motion was carried.

**8. AMENDMENTS TO THE LAW SOCIETY INVESTMENT POLICY**

Mr. Hume introduced proposed changes to the Law Society investment policy. He said the policy was out of step with how Philips, Hager and North, the Law Society's financial advisors, handles pooled investment funds. The amendments would bring the Law Society policy in line with Philips, Hager and North and allow Law Society funds to remain in the pooled investments. The changes would permit increased weighting on investments in financial institutions, and would permit investment in private placements, subject to strict conditions.

It was moved (Hume/Taylor) to amend the Law Society investment policy as follows:

1. *in subparagraph 7.1(b) by rescinding the existing subparagraph and substituting the following:*
  - (b) No more than 110% of the weighting in the TSX may be invested in any single industry classification except the Financial Services classification, and no more than 135% in the Financial Services classification.
3. *in subparagraph 7.3(f) rescinding the existing subparagraph and substituting the following:*
  - (f) Private Placements are permitted subject to the following conditions:
    - i. the restrictions and limitations identified in the Investment Guidelines for publicly traded securities must be adhered to;
    - ii. maximum 5% of the market value of any one private placement; and
    - iii. sufficient liquidity to ensure the sale of the private placement in a reasonable time and at a reasonable price.

Mr. LeRose asked what proportion of the portfolio was held in fixed income instruments, and whether the proposed changes would increase the risk in that part of the portfolio.

Mr. Stajkowski said about 42% of the investment portfolio was in fixed income investments. He said the proposed changes would increase the risk in absolute terms but the increase would be quite small in relation to regularly issued bonds. However, if the change is not made, the Law Society would have to withdraw its funds from the Philips Hager and North bond portfolio and hold the investments directly.

The motion was carried.

**9. PROFESSIONAL CONDUCT HANDBOOK APPENDIX 1**

Ms. Wallace introduced proposed footnotes to Appendix 1 of the Professional Conduct Handbook intended to clarify the circumstances under which a lawyer may or may not take affidavits for use in British Columbia and for or in other jurisdictions.

It was moved (Wallace/Hume) to amend Appendix 1 of the Professional Conduct Handbook by rescinding footnote 1 and substituting the following:

FOOTNOTES

1. **Non-practising and retired members**

Non-practising and retired members are not permitted to act as notaries public or commissioners for the purpose of taking affidavits or solemn declarations. See *Law Society Rules 2-3 and 2-4* for the definitions of non-practising and retired members.

**Interjurisdictional Practice**

A British Columbia lawyer, as a notary public, may administer oaths and take affidavits, declarations and affirmations only within British Columbia: See section 14 of the *Legal Profession Act* for a lawyer's right to act as a notary public, and section 18 of the *Notaries Act*, RSBC 1996, c. 334 for rights and powers of a notary public, including the right to draw affidavits, affirmations or statutory declarations for other jurisdictions.

A British Columbia lawyer, as a commissioner for taking affidavits for British Columbia, has authority to administer oaths and take affidavits, declarations and affirmations outside of BC *for use in BC*: See sections 59, 63 and related sections of the *Evidence Act*, RSBC 1996, c.124.

Notwithstanding Law Society mobility provisions across Canada, a British Columbia lawyer cannot swear an affidavit in another province or territory for use in that jurisdiction unless the lawyer is a member of the Bar in that jurisdiction or the jurisdiction's own legislation allows it. For example, because of Alberta legislation, a member of the Law Society of British Columbia, while in Alberta acting under the mobility provisions on an Alberta matter, cannot swear an affidavit for use in Alberta.

British Columbia lawyers should contact the law society of the other province or territory if they need to check whether they are entitled to swear an affidavit in that jurisdiction.

Likewise, lawyers from other jurisdictions visiting British Columbia may not swear affidavits in BC for use in BC: See section 60 of the *Evidence Act* and the definition of "practising lawyer" in section 1(1) of the *Legal Profession Act*.

The motion was carried.

10. **PROPOSAL TO PROVIDE PLTC TO NUNAVUT STUDENTS**

Mr. Treleven recalled for the Benchers that the University of Victoria law school had delivered its law degree program to students in Nunavut, at its campus in Iqaluit. The program was offered on a one-time basis to assist the Law Society of Nunavut to increase its domestic Bar. Eleven students graduated from the program this year. The Law Society of Nunavut does not have a Bar admission course but will allow students to qualify by taking the Bar admission course from another jurisdiction. However, it runs contrary to the spirit of the program to require the students to travel south to take the course; indeed, most of the graduates are not able to do so. Mr. Treleven said the Law Society of Nunavut approached the Law Society of BC to provide one session of PLTC in Iqaluit on a full cost recovery basis.

It was moved (Falkins/Wallace) to authorize the Executive Director to proceed with arrangements to hold a single session of PLTC in Iqaluit on a cost recovery basis.

Mr. Falkins said the Law Society of BC should be proud to provide the course and facilitate legal education in the North.

Mr. Ridgway asked if the Law Society would design a special program for Nunavut or simply provide the existing program. Mr. Treleaven said the Law Society of Nunavut had asked for the PLTC without alteration, although they may decide to supplement the course with some supplementary lectures on specific matters relevant to local practice.

The motion was carried.

#### **11. CLE SOCIETY VOLUNTEER RECOGNITION AWARD**

Ms. Wallace introduced a request from the Continuing Legal Education Society to be permitted to present a volunteer recognition award at the Bench and Bar Dinner in alternate years when the Law Society is not presenting the Law Society Award.

Meg Shaw said the CBABC Executive had endorsed the proposal subject to Law Society agreement.

It was moved (Wallace/Jackson) to permit the CLE Society to present a volunteer recognition award at the Bench and Bar Dinner in alternate years when the Law Society is not presenting the Law Society Award.

Mr. LaLiberté was concerned that other groups would seek to use the Bench and Bar Dinner as a vehicle for promotion, which would change the tradition of the event. He suggested that other groups might be concerned that the CLE Society gets the opportunity by virtue of being “first in the door”.

Mr. Alexander said other groups might seek similar opportunities but in practical terms there were few if any additional opportunities.

Ms. Wallace noted that the CBA and the Law Society are both partners in the CLE Society, which makes the situation somewhat different.

Mr. LaLiberté pointed out that the Law Society and CBA are also partners in other organizations such as the Lawyers Benevolent Fund Society.

Mr. Turriff said the Benchers should approve the proposal and deal with a flood of additional requests if it happens.

The motion was carried.

#### **12. REFERRAL FROM THE DISCIPLINE COMMITTEE PURSUANT TO RULE 4-40**

The members of the Discipline Committee in attendance, Mr. McDiarmid, Mr. Jackson, Mr. LaLiberté, Ms. Preston, Mr. Vertlieb and Mr. Vilvang, were absent during this discussion.

Mr. Cameron explained that a member, Mr. Laronde, was convicted of fraud over \$5,000, an offence that can be prosecuted only by indictment. Under Rule 4-40 the Benchers may summarily suspend or disbar a member convicted of such an offence. However, Mr. Laronde is appealing the conviction and has undertaken to withdraw from the practice of law pending the outcome of the appeal. The Executive Committee recommended that the Benchers adjourn generally consideration of the matter under Rule 4-40 pending the outcome of the appeal.

It was moved (Rideout/Blom) to adjourn the matter generally.

The motion was carried.

**13. TITLE PROTECTION INITIATIVE OF THE CMHC**

Mr. Alexander circulated a draft letter expressing concern about recently announced plans for the Minister of Housing and Labour and the Canadian Housing and Mortgage Corporation to promote a new national “title protection” plan (title insurance). Mr. Alexander sought the Benchers’ input and approval to send the letter to all government Members of Parliament in BC.

Mr. McDiarmid suggested that it would be better to note that the initiative concerns the four Torrens system provinces, not just BC.

Mr. Alexander agreed to revise the letter to include a reference to the other Torrens system provinces.

Mr. Falkins suggested that the letter could more clearly address the public interest in avoiding unnecessary additional costs.

It was moved (Vertlieb/McDiarmid) to approve the letter.

Mr. Ridgway did not think a “soft” approach would have any effect, and he urged Mr. Alexander to send the letter directly to the Minister responsible.

Mr. Alexander said the Minister had already received some pointed communications.

Mr. McDiarmid suggested the Benchers could deliver the message with a more personal note to the MP’s with whom they have personal connections.

The motion was carried.

**14. WESTERN CANADA SOCIETY TO ACCESS JUSTICE FUNDING REQUEST**

Mr. Alexander briefly reviewed a request from the Western Canada Society to Access Justice (WCSTAJ) for an opportunity to make submissions to the Benchers seeking \$40,000 from the Law Society to support pro bono clinics and the appeal of the Supreme Court of BC decision regarding social services tax on lawyers bills (*Christie v. AGBC et al*). He introduced Dugald Christie and Bruce Fraser, QC, President and Chair of WCSTAJ respectively.

Mr. Christie thanked the Benchers for the Law Society’s contribution of \$15,000 to WCSTAJ approved in December 2004. He said the Law Society’s support was, in his view, instrumental in increasing contributions from other sources. Mr. Christie said that of the \$40,000 sought, \$10,000 would be allocated to the cost of the appeal in *Christie v. AGBC*. He said the WCSTAJ position in that appeal was that social services tax should not be charged to any clients, not just low-income clients. Success on appeal in BC would have a large financial impact, and if the matter goes to the Supreme Court of Canada, it could impact other provinces significantly as well. Mr. Christie said the balance of the money sought would ensure that the Law Society’s contribution remained a constant proportion of the WCSTAJ budget, which had increased.

Mr. Fraser said WCSTAJ had found that it was needed in the legal community. Clients need it because they would not otherwise have access to a lawyer; lawyers need it because they want to help and need an avenue that allows them to do so; and the judiciary needs it because the courts function better when people are represented. He said WCSTAJ had demonstrated its ability to do the job and was providing pro bono clinics in 60 locations. The requested support from the Law Society would help WCSTAJ do the job.

Mr. Alexander noted that the material provided in support of the request was somewhat modest and not sufficient to allow the Benchers to appreciate the worthiness of the request.

Mr. Rideout agreed that the Benchers would need more information to consider the proposal.



Mr. Christie said he could prepare a budget showing what the money would be used for, possibly within a week.

Mr. LeRose was reluctant to put WCSTAJ to the work of producing additional information before the Benchers had decided whether the request fell within the policy on funding external organizations. He said the Benchers must decide as a group if the policy recently adopted means something.

Ms. Hickman said it was important for Mr. Christie to know that most of the Benchers supported the work of WCSTAJ, but the Benchers don't know what the long-term plan is, and whether it will entail coming back to the Law Society year after year seeking funding.

Mr. Christie said the plan was to complete the current expansion project and appeal within the calendar year, after which further funding might be excluded by the policy.

Mr. LaLiberté wanted to know more precisely what the project is.

Mr. Christie said the project was intended to expand and improve the existing program to complete the infrastructure to support 60 pro bono clinics. He said WCSTAJ was hoping to win the American Trial Lawyers Association prize of \$50,000 US for the best pro bono program.

It was moved (Rideout/Vertlieb) to offer WCSTAJ the opportunity to provide further information to the Executive Committee and return the matter to the Benchers at their meeting scheduled in September, 2005 to make a decision with respect to whether the program falls within the Law Society policy on funding external programs.

Mr. LeRose reiterated his view that it would be fairer to make a decision on whether the program falls within the policy before asking for further information.

Mr. Alexander did not think the Benchers had enough information to make that preliminary decision.

Mr. Vilvang suggested putting the same information requirements to Pro Bono Law of BC and then consider the matters at the same time. He encouraged WCSTAJ and Pro Bono Law of BC to coordinate their efforts.

The motion was carried.

## 15. GREEN PAPER ON CIVIL JUSTICE REFORM

Mr. Jackson introduced a discussion paper prepared in response to the Green Paper published by the Civil Justice Reform Working Group of the Attorney General's Justice Reform Task Force. He said the response included the view that the specific reform objectives need to be clearly identified and articulated. A key point is the assertion in paragraph 12 of the response that the government and the Civil Justice Reform Working Group are not the appropriate entities to undertake the review of the civil justice system, and the recommendation for analysis and review by an independent entity such as the BC Law Institute (properly funded). Mr. Jackson recalled that there was much more consultation and review involved in the administrative justice review, and the response recommended using a similar process for civil justice review. Other recommendations included a greater educational component to the agenda, and a thorough evaluation of pilot projects.

Mr. Turriff noted that he was no longer a director of the BC Law Institute, but as a founding member of the institute was in a particular position to say that the Institute would be an ideal candidate for doing at least some of the analysis and reform, if it was properly funded. Mr. Turriff approved of the response, in particular, the comments regarding the need for public education and

input. He said it was important to have ordinary people in the working group. He noted that some quite extensive analysis of reforms in the United Kingdom had been done; in particular, a book by Adrian Zuckerman included considerable analysis of the reforms following the “Woolf Report”.

Mr. Vilvang agreed that the response was a useful piece of work that demonstrated a great understanding of the issues the working group was trying to deal with. He said the working group had considered very early on how much input it could get and the methods by which it could be obtained. He said the group was significantly constrained by its budget. With regard to comparative studies, Mr. Vilvang said the working group had considered reforms in the UK (Woolf and a summary of Zuckerman’s work), Australia, the United States, and Germany. He said every innovation results in criticism from different sources, but one thing that he could say was agreed by the working group was the need for access to a rights based adjudication system.

Ms. Preston commented that access to justice and independence of the Bar are intertwined, and it is important to educate people about the value and importance of independent lawyers as part of their access to justice.

Mr. McDiarmid suggested adding a footnote to paragraph 20 of the response identifying some specific groups that might be consulted. He also suggested adding emphasis to the Law Society’s support for maintaining continued availability of a rights-based adjudication process.

Mr. Turriff was concerned about the lack of funding for the working group. He said civil justice reform is either important or not, but if it is important, the working group should not be limited by inadequate funding.

Mr. Vertlieb praised the draft response but was reluctant to embrace some of the reforms made in the United Kingdom, such as the abolition of civil juries, which are undesirable.

It was moved (Jackson/Taylor) to approve the response as modified by discussion.

The motion was carried.

**16. UPDATE ON SPECIAL COMPENSATION FUND CLAIMS AND INVESTIGATIONS IN THE WIRICK MATTER.**

This matter was considered *in camera*.

**17. DISCUSSION OF BENCHER CONCERNS**

This matter was discussed *in camera*.

DMGN  
05-07-15