

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Saturday June 2, 2007	
PRESENT:	Anna Fung, QC, President	Bruce LeRose, QC
	John Hunter, QC, 1 st Vice-president	Barbara Levesque
	Gordon Turriff, QC, 2 nd Vice-president	Jan Lindsay
	Ralston Alexander, QC, Life Bencher	Thelma O'Grady
	Rita Andreone	June Preston
	Kathryn Berge, QC	Robert Punnett
	Joost Blom, QC	David Renwick
	Ken Dobell	Glen Ridgway, QC
	Ian Donaldson, QC	Dirk Sigalet, QC
	Leon Getz, QC	Richard Stewart
	Carol Hickman	Dr. Maelor Vallance
	Gavin Hume, QC	Art Vertlieb, QC
	William Jackson	James Vilvang, QC
	Patrick Kelly	Ken Walker
	Terry La Liberté, QC	
NOT PRESENT:	Allan Seckel, QC, Deputy AG	David Zacks, QC
	Ronald Tindale	
STAFF PRESENT:	Timothy McGee, CEO	Michael Lucas
	Stuart Cameron	Jeanette McPhee
	Brad Daisley	David Newell
	Su Forbes, QC	Alan Treleaven
	Jeffrey Hoskins	Adam Whitcombe
	Howard Kushner	
GUESTS:	Jim Peacock, QC, President, Law Society of Alberta	
	Perry Mack, QC, President-elect, Law Society of Alberta	

1. MINUTES

The minutes of the meeting held on May 4, 2007 were approved as corrected.

2. CONSENT AGENDA

The following resolutions were passed unanimously and by consent:

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 3-90 and substituting the following:

Reporting criminal charges

3-90(0.1) This Rule applies to lawyers, articulated students, practitioners of foreign law and applicants.

(1) Subject to subrule (2), a person who is charged with an offence under a federal or provincial statute must provide to the Executive Director written notice containing all relevant information as soon as practicable after each of the following events:

- (a) laying of the charge;
- (b) disposition of the charge;
- (c) sentencing in respect of the charge;
- (d) commencement of an appeal of the verdict or sentence;
- (e) disposition of the appeal.

(1.1) A person charged with an offence must provide the Executive Director with a copy of any statement of the particulars of the charge immediately on receipt.

(2) No notification is required under subrule (1) if a person is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act*.

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

1. In Rule 5-9, by rescinding subrule (7).

2. In Rule 5-10, by rescinding subrules (1) and (4) and substituting the following:

(1) An applicant or respondent may apply for

- (a) an extension of time
 - (i) to pay a fine or the amount owing under Rule 5-9, or
 - (ii) to fulfill a condition imposed under section 21, 22, 32 or 38 of the Act or accepted under section 19 of the Act, or
- (b) a variation of a condition referred to in paragraph (a)(ii).

(4) An applicant or respondent must do the following by the date set by the hearing panel or the Benchers or extended under this Rule:

- (a) pay in full a fine or the amount owing under Rule 5-9;
- (b) fulfill a practice condition as established under section 21, 22, 32 or 38 of the Act or accepted under section 19 of the Act, or varied under subrule (3)(c).

(5) If, on December 31, an applicant or respondent is in breach of subrule (4), the Executive Director must not issue to the applicant or respondent a practising certificate or a non-practising or retired membership certificate, and the applicant or respondent is not permitted to engage in the practice of law.

2. **PRESIDENT'S REPORT**

Ms. Fung thanked Mr. Hunter, Mr. McGee and Law Society staff for putting together the Benchers retreat and meeting.

Ms. Fung circulated a written report highlighting her activities on behalf of the Law Society over the previous month, which included attending the council meeting of the Federation of Law Societies. Among matters considered at that meeting were:

- A proposed deficit budget for 2007 – 2008, resulting from the expense of moving offices and hiring a full time CEO. Council rejected the budget and asked the Federation Executive Committee to prepare a balanced budget contemplating an increase in the Federation levy between \$0.25 and \$2.00 per member.
- Presentation of a model code of conduct for approval by council as the Federation's model code. Council members were asked to seek authority from their respective Law Societies to approve the model code as the Federation model code. It was not intended that the model code of conduct apply to individual Law Societies, although it is hoped that it will form the basis for harmonizing codes of conduct in the future.
- Draft response to the Competition Bureau's request for information from all Law Societies. The Federation has drafted a collective response based on information received from the individual Law Societies. The council was left with the impression that there is a great deal of international pressure on the Competition Bureau to relax some barriers to entry for foreign-trained lawyers. When the submission has been made public, it will be circulated to the Benchers.

Ms. Fung reported that the House of Commons Justice Committee had issued a report supporting the Federation's view with respect to the composition of judicial appointment advisory committees. The report recommends returning the earlier structure of the committees on which there was no permanent place for law enforcement officials. The report also recommended returning to the practice of sorting candidates for judicial appointment into three categories (not recommended, recommended, highly recommended) rather than the current two (not recommended, recommended).

Ms. Fung reported that she, Mr. Kushner, and Ms. Wiseman had been working with the Chief Judge of the Provincial Court to draft a protocol regarding overlapping jurisdiction to regulate the conduct of lawyers who are appointed as Judicial Justices of the Peace. Implementing the protocol will likely require some rule changes to allow disclosure of complaints information relating to applicants for appointment as JJPs.

It was moved (Hume/Donaldson) to authorize the President as council member for the Law Society of BC to approve the Federation Model Code of Conduct.

Ms. Andreone asked what the intended purpose of the code was if it did not apply to individual Law Societies, and what implications did it have for the CBA Code of Conduct?

Ms. Fung said the ultimate goal was to harmonize the codes of conduct across the country, and the model code could provide the basis for doing that. With respect to the CBA code, Ms. Fung noted that the Federation had not specifically recognized the CBA code as authoritative.

Mr. Steward was concerned about approving a model code that might be inconsistent with the existing Professional Conduct Handbook.

Ms. Fung acknowledged Mr. Stewart's point, but noted that the Federation has no regulatory authority, so the Professional Conduct Handbook would continue to apply in BC.

Mr. Hunter said it would be desirable to have all the provinces agree on and adopt a common code all at once, but that was considered too difficult to accomplish, so the first step is the Federation model code. He said the Law Society of BC would not agree if there was something in the model code that the Benchers could never accept, but there was no doubt that the Law Societies are moving towards a national code.

Ms. Andreone was concerned from a governance perspective. The Benchers were being asked to approve a model code before having an opportunity to review it in detail. Inconsistencies could have an impact on the Law Society's discipline proceedings. Ms. Andreone preferred that the Federation Council approve the code on their own authority, rather than having the Benchers specifically authorize it.

Mr. Hume said the Ethics Committee had examined aspects of the model code and had work with the Law Society's representatives on the model code committee.

Ms. Andreone suggested that if the consensus was to grant authority to approve the code, the resolution include a statement that the Benchers do so as approval in principle.

Mr. Hunter said the Benchers were asked only to authorize the President to approve the model code when she is satisfied with it, based on further analysis to be done over the next few months.

Ms. Berge asked if the Benchers would receive an update on the analysis from the Ethics Committee. She also commented with respect to the CBA Code of Conduct, noting that it was recently updated. She said there are still some jurisdictions that rely on the CBA Code in the absence of a model code of conduct. The CBA did consult with the Federation before updating the CBA code and were hopeful that the Federation would enter the field, but in the absence of a Federation initiative at that time, proceeded with the update. Ms. Berge said the CBA had always understood that a Federation model code would be a welcome and proper exercise of the Federation's jurisdiction.

Ms. Fung said the complete model code had not yet been officially referred to the Ethics Committee but it would come back to the Benchers for discussion at a future date.

The motion was carried.

3. CEO'S REPORT

Mr. McGee circulated a written report. He thanked the Benchers who participated in the PLTC session in Vancouver and in Victoria. He said the Law Society had received a letter from a large law firm representing other large firms bringing to the Law Society's attention that there is a shortage of space in some PLTC sessions. He said PLTC management would be looking at the scheduling to see if the problem could be reduced.

Mr. McGee reported that the Audit Committee would be presenting new performance measures at the next meeting. He also reported that the senior management team would be presenting the 2008 fee recommendations together with associated budgets to the Financial Planning Subcommittee in the next few weeks in preparation for presentation to the Benchers in July.

Mr. McGee was thrilled to report that the Law Society's legislative amendments received Royal assent on the previous Thursday. The amendments are not inconsequential. Comments on both sides of the House are testimony to the work that went into the amendments. Mr. Hoskins had a great deal to do with the drafting, and Ms. Fung and Mr. McDiarmid used their office effectively. The speed of passage illustrates the value and effectiveness of the Government Relations committee.

Mr. McGee reported that the Federation's response to the inquiry from the Competition Bureau is fairly comprehensive and underlines two things: one, the regulatory landscape in Canada is significantly different from other jurisdictions where change has been found to be necessary, and, two, the constitutional requirement for independence of the bar. The Bureau has released a report that is a compilation of data, which is troubling. The Federation is seeking to address points in that report, and that has delayed sending the response.

Mr. McGee reported that the Small Firm Practice Course was honoured with a significant international award in the category for use of technology. This recognized the work of the task force and the staff, Kensi Gounden, Debra DeGauze, and Doug Munro, led by Mr. Treleaven. The course has more than 320 users, 84 of whom have completed it.

Mr. McGee reported that a breakthrough might be imminent with respect to free online publication of up-to-date BC Statutes. The Law Society has put forward a proposal to put the updated information currently available only through QP Legaleze on the public website without any of the other value added parts of QP Legaleze. The Minister of Labour has asked for the proposal in writing.

Mr. McGee reported that the Law Society is monitoring follow-up questions from members with respect to the Supreme Court of Canada decision in *Christie v AGBC*. He said there had not been a large number of questions, and information posted on the Law Society website appeared to be adequate.

Mr. McGee congratulated Ms. Fung on receiving the YWCA 2007 Woman of Distinction Award in the Business and Professions Category.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. PROFESSIONAL CONDUCT HANDBOOK, APPENDIX 3

Mr. Hunter reviewed a memorandum from the Ethics Committee recommending that "flip" transactions be excluded from the definition of "simple conveyance". The Ethics Committee concluded that complexity was not an issue, but the problem was a lack of disclosure. The Committee recommended that if a lawyer acts for both the vendor and the purchaser and there is information that cannot be disclosed equally to both clients, the transaction cannot be treated as a simple conveyance. He said Mr. Dobell questioned why the exclusion was limited to residential conveyances, and having discussed that with Mr. Hoskins, proposed to change the proposed amendment to make it applicable to any transaction.

It was moved (Hunter/Donaldson) to amend Appendix 3 of the Professional Conduct Handbook by adding subparagraph 5(g) as follows:

5(g) a conveyance of property in which the nature of the matter or the lawyer's instructions do not permit the lawyer to make full disclosure of all relevant information to all clients for whom the lawyer proposes to act.

Mr. Jackson said the argument could be made that the existence of a flip is not relevant to the vendor, and suggested that there might be an added gloss to that effect.

Mr. Donaldson agreed with Mr. Jackson but suggested the issue could be dealt with by removing the word "relevant". He did not think there was a need for a relevance test.

Mr. Vilvang agreed with Mr. Donaldson. He was concerned that passing the proposed change could weaken the existing rule by creating the impression that there is a circumstance where a lawyer could receive instructions to withhold information from the client.

Ms. Andreone had similar concerns, noting that the whole exclusion was triggered by instructions to the lawyer to withhold information.

Mr. Hunter noted the concerns and suggested that further consideration by the Ethics Committee might be needed. One way of dealing with the issue might be to re-affirm the obligation to make full disclosure to clients.

The motion was withdrawn. It was agreed to refer the matter back to the Ethics Committee for further consideration.

6. PROFESSIONAL CONDUCT HANDBOOK, CHAPTER 1: WHETHER A SUSPENDED LAWYER MUST TELL CLIENTS OF THE SUSPENSION.

Mr. Hunter reviewed a memorandum from the Ethics Committee. He said the issue was apparent: if a lawyer is suspended, should there be an obligation on the lawyer to inform clients?

Ms. Andreone asked if the rule would not apply to financial suspensions but only to disciplinary suspensions. Mr. Hunter said it was only intended to apply to disciplinary suspensions.

Mr. Hunter said that regardless of whether lawyers are obligated to advise clients of a disciplinary suspension, the Ethics Committee recommended developing a set of instructions for suspended or disbarred lawyers similar to that used by the Law Society of Upper Canada.

It was moved (Hunter/Berge) to approve in principle amending the Professional Conduct Handbook to require lawyers who have been suspended by the Law Society for disciplinary reasons, subject to being relieved of the obligation by the disciplinary panel imposing the suspension if it is satisfied that it would be reasonable to do so, to inform clients who have a reasonable expectation that the lawyer would be attending to their affairs during the period of suspension and prospective clients who inquire about the availability of the lawyer's services during the suspension period:

- (a) of the period the lawyer will not be practicing,
- (b) what arrangements the lawyer has put in place to protect the client's interests during the time the lawyer will not be practicing, and
- (c) that the lawyer is not practicing during the relevant period because he or she has been suspended by the Law Society.

And to develop a set of instructions for suspended or disbarred lawyers to be considered a later date.

The motion was carried.

7. MINISTRY OF THE ATTORNEY GENERAL'S REVIEW OF UNNECESSARY REQUIREMENTS FOR SWORN STATEMENTS

Mr. LaLiberté reported that there was no quorum at the last meeting of the Access to Justice Committee so it was unable to make a formal recommendation. He said there has been too much reliance on the formality of sworn statements. He noted that the BC Law Institute had examined the meaning of oaths, and acknowledged that many people do not feel as bound by a solemn oath

as they have in the past. The essence of the Institute's recommendation is that most requirements can be met by making it an offence to sign a false declaration. The requirement for Land Title Office documents is an appropriate exception.

Mr. Punnett observed that he gets numerous requests from people wanting to swear documents and most of them are an unnecessary interruption of lawyers' work and an unnecessary expense for the people. Making a false declaration an offence would probably be more meaningful than the idea of divine retribution.

Mr. Vilvang asked if there would be a requirement that there be a statement printed on forms alerting the signatory that making a false statement is an offence?

Mr. LaLiberté said he did not know if that would be a requirement but thought it was a good idea.

It was moved (Donaldson/Punnett) to send the letter attached as Appendix A revised to recommend a requirement that there be a statement on forms to the effect that making a false declaration is an offence.

The motion was carried.

8. ATTORNEY GENERAL'S REVIEW OF THE *LIMITATION ACT*

Mr. LaLiberté commented that there are a lot of concerns regarding the current Limitation Act. As for the previous item, the lack of a quorum prevented the Access to Justice Committee from making a recommendation on the matter, but the main thing of concern is whether it is within the Law Society's mandate to make representations on this subject.

Mr. Punnett said that the members of the Access to Justice Committee who were able to attend the last meeting were in favour of responding. The greatest concern was with respect to when the limitation period starts to run because in many cases people do not know they have a cause of action until the damage is discovered. The committee was not in favour of a limitation period that begins at the time of tortious conduct.

Mr. Blom did not agree with the position on accrual of limitation time. He found the Law Institute's reasons for why an ultimate limitation period should begin at the time of conduct quite convincing. That said, he was not certain this was a matter the Law Society should be commenting on in that there is no aspect of professional regulation to the issues.

Mr. Vilvang was opposed to sending a substantive response because it could have a different impact on different clients. He suggested that the matter should be postponed until the work of the Civil Justice Review Task Force is complete because they are considering significant changes to pleadings practice that could be significant in terms of limitation periods.

Ms. Andreone was mindful of the times when government did not consult the Law Society and thought the Law Society should respond if only to acknowledge the opportunity.

Mr. Turriff observed that there were two questions: should the Law Society respond, and if so, what should that response be. He said the Law Society should respond because there is a public interest in access to the courts, and limitations are a barrier to access. He said he might be persuaded to Mr. Blom's point of view but would like to postpone a decision to allow further consideration and recommendations from the Access to Justice Committee.

It was agreed that the Law Society would respond to the consultation and to refer the matter back to the Access to Justice Committee to further develop the response.

Mr. McGee noted, *a propos* limitation periods, that the Lawyers Insurance Fund had published “Beat the Clock”, which is designed to help lawyers avoid missing limitation periods. It is a very powerful risk management tool, and is very user friendly. He acknowledged the work of Ms. Forbes and her team for their work on the project.

9. TITLE INSURANCE ISSUES TASK FORCE REPORT

This matter was considered *in camera*

10. UPDATE ON CLAIMS AND RECOVERIS IN THE WIRICK MATTER

This matter was discussed *in camera* .

11. DISCUSSION OF BENCHER CONCERNS

This matter was discussed *in camera* .

DMGN
07-07-03

APPENDIX A

Ms. Carol Anne Rolf
Executive Director
Strategic Planning and Legislation Office
PO Box 9283 Stn Prov Govt
Victoria, BC
V8W 9J7

Dear Ms. Rolf:

Re: Consultation regarding the requirement for sworn statements

The Law Society appreciates the opportunity to provide comments regarding the British Columbia Law Institute Report, *Unnecessary Requirement for Sworn Statements*, and is grateful for being provided an extension to consider the Report and its recommendations.

The Law Society approves of the recommendations in the Report and the reasoning that supports them. The recommendations of the Law Institute are the result of a thorough and thoughtful review process. They are built on the strong foundation of the work performed by the Law Reform Commission of British Columbia some 30 years ago. We believe that the scope of the recommendations are properly limited, and do not have an adverse affect on the ability of the public to access justice, nor compromise the public perception of the integrity of the justice system.

Although we approve of the recommendations in the Report as whole, we wish to make particular notice of our support for recommendation No. 9:

Part 5 of the *Land Title Act* should be excepted from recommendation 1.

As noted in the Report, the requirements in Part 5 of the *Land Title Act* are both practical and principled. The sanctity of the land title system is of paramount importance and the justifications for relaxing the requirement for sworn statements in various other schemes are not persuasive when dealing with land. Real property transactions form an important part of the British Columbia economy, and property rights lie at the core of the development of the common law. Our present system should not be relaxed to favour expediency over certainty. If you have any questions, please do not hesitate to contact us.

Yours truly,