THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Friday February 6, 2004	
PRESENT:	William Everett, QC, President	Darrell O'Byrne
	Peter Keighley, QC, 1st Vice-president	Margaret Ostrowski, QC
	Ralston Alexander, QC, 2nd Vice-president	June Preston
	Ian Donaldson, QC	Glen Ridgway, QC
	Michael Falkins	Patricia Schmit, QC
	Anna Fung, QC	Dirk Sigalet, QC
	Carol Hickman	Grant Taylor
	Gavin Hume, QC	Ross Tunnicliffe
	John Hunter, QC	Gordon Turriff, QC
	William Jackson	Dr. Maelor Vallance
	Patrick Kelly	Art Vertlieb, QC
	Terry La Liberté, QC	James Vilvang, QC
	Bruce LeRose	Anne Wallace, QC
	Robert McDiarmid, QC	
	Patrick Nagle	
NOT PRESENT:	Joost Blom, QC	David Zacks, QC
	Lilian To	
STAFF PRESENT:	James Matkin, QC, Executive Director	David Newell
	Mary Ann Cummings	Neil Stajkowski
	Brad Daisley	Alan Treleaven
	Su Forbes, QC	Ron Usher
	Jeffrey Hoskins	Adam Whitcombe
	Michael Lucas	
GUESTS:	Associate Dean Robin Eliot, University of British Columbia	
	Associate Dean John McLaren, University of Victoria	
	Robert Brun, President, CBABC	
	Caroline Nevin, Associate Executive Director, CBABC	
	Sylvia Teasdale, Chief Librarian, BCCLS	
	Thomas Broeren	
	Janice Vurdela	
	Mike Wilhelmson, Lawyers Weekly	

1. MINUTES

The minutes of the meeting held on December 12, 2003 were approved as corrected.

2. PRESIDENT'S REPORT

Mr. Everett welcomed new benchers and guests.

Mr. Everett reported on his activities as president since the last meeting. He said he had been asked to judge some essays on ethics written by law students at UBC for an award to be given to the best two. Mr. Everett reported Mr. Turriff had telephoned him on a Saturday morning regarding an editorial in The Sun newspaper, which was highly critical of Mr. Justice Dohm. As a result, he met with Mr. Matkin and Mr. Daisley that morning and drafted a letter to the editor in response, which was published a few days later. Mr. Everett reported that he had been thanked by the Chief Justice of the Supreme Court, and had received positive comments from the Bench and Bar, and perhaps most significantly, from non-lawyers.

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Matkin reported that Kensi Gounden, formerly a staff lawyer in the professional conduct department, had been appointed to the position of staff lawyer – practice standards following an internal competition.

Mr. Matkin reported that senior staff was in the process of collecting and analyzing monitoring information for 2003 in order to prepare a report to the Benchers on organizational performance, as reported previously. He said the report would be presented to the Audit Committee and Financial Planning Subcommittee before coming to the Benchers. Mr. Matkin reported that he would be meeting with the Executive Committee to discuss the Executive Director's performance instrument, organizational structure, and succession planning.

Mr. Matkin said in future reports to the Benchers he planned to identify strategic operational issues. For example, he said two matters currently being discussed were whether to use outside counsel for discipline cases more frequently, and whether to increase the use of random audits using the Executive Director's authority. Mr. Matkin welcomed the Benchers input on these issues.

Mr. Matkin referred to the honoraria paid to the President and Vice-presidents of the Law Society. He recalled that the Blue Ribbon Committee that recommended the current honoraria in 1999 concluded that a further increase should be considered approximately five years later. Mr. Matkin suggested that the Benchers constitute a new Blue Ribbon Committee comprising the same people as the previous committee plus Mr. Everett.

It was moved (Nagle/McDiarmid) to create a Blue Ribbon Committee to be composed to the degree possible of the same people as the 1999 Blue Ribbon Committee with the addition of Mr. Everett.

The motion was carried.

Mr. Matkin reported that he had been invited to participate in a an international committee on international cooperation and affairs. He said the committee included representatives from the United States and from New South Wales. One of the key focuses of the committee would be disciplining of lawyers, another would be the GATS, which has potential to affect the delivery of legal services.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. LAND TITLE OFFICE ONLINE REGISTRATION PROJECT

Mr. Usher gave a presentation on the Land Title Office Online Registration Project. A copy of the presentation is attached as Appendix 1.

6. APPOINTMENT TO THE SURREY FOUNDATION BOARD OF DIRECTORS

It was moved (McDiarmid/Turriff) to appoint Heather Blatchford to the Board of Directors of the Surrey Foundation for the remainder of the term of appointment vacated by Mary Jane Wilson, ending on August 31, 2005.

The motion was carried.

7. 2004 SCHEDULE OF FEES

It was moved (Alexander/Fung)to adopt as schedules to the Law Society Rules Schedules 1, 2 and 3 as set out in Appendix 2, effective January 1, 2004.

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

8. PACIFIC LEGAL TECHNOLOGY CONFERENCE

Mr. Alexander reported that the second Pacific Legal Technology Conference held in September, 2003 was as or more successful than the 2002 conference. He said the feedback from presenters and participants was very positive.

It was moved (Alexander/Fung) to record the Benchers' recognition of the extraordinary effort of key personnel involved in the conference: Hazel Mason, Denise Palmer and David Bilinsky, of the Law Society staff, Carla Terzariol, Executive Director of the Trial Lawyers Association.

9. COURT SERVICES ONLINE DEMONSTRATION

Mr. Everett welcomed and introduced Thomas Broeren and Janice Vurdela, of the Court Services Branch. Mr. Broeren and Ms. Vurdela gave a demonstration of the Court Services online file search and filing service under development.

Ms. Hickman commented that the ability to electronically search a family court file immediately after it is opened could affect a party who files an *ex parte* application.

Ms. Vurdela said a new file would be available for online searches as soon as it is opened, as was the case in the existing system. She acknowledged that the electronic search facility would make it easier for a party to search the file. Ms. Vurdela said the final version of the service would be subject to approval by the judiciary before being made available. Ms. Vurdela noted that the file would include information about all appearance events that have been held or are scheduled, as well as the "clerk's notes" with respect to what happened at each appearance event. With respect to electronic document filing, Ms. Vurdela explained that documents would have to be submitted in "pdf" format. Lawyers will be able to prepare documents as they normally would, then convert them to "pdf" format for submission to the registry. A convenience fee of $7.00 will be charged in addition to the usual filing fee.

Mr. McDiarmid asked if lawyers would be required to retain the original document.

Mr. Broeren said the Rules Committee was examining some details, but it appeared likely that original affidavits would have to be retained. However, in many cases, the electronic document will be treated the original.

Mr. Everett noted that it would be relatively easy for someone to forge a signature on a document to be submitted in "pdf" format, and he asked if Juricert digital credentials would be of any interest.

Mr. Broeren said it had been concluded that the online system did not increase the security risks beyond the current system, and additional security systems such as Juricert were not contemplated. Ms. Vurdela noted that nothing would be granted by virtue of filing documents, and further steps would always be required, unlike registration of a document at the Land Title Office; consequently, the same degree of security would not be required.

Ms. Hickman asked how affidavits would be verified.

Mr. Broeren said affidavits were a special case. He said lawyers might be required to have the original document sworn and witnessed as usual, and then scanned for electronic submission. The lawyer would then retain the original document.

Mr. Hunter asked if consideration had been given to using a "fillable" pdf form.

Mr. Broeren said the system was intended to increase convenience. He noted that there were over 200 different forms and lawyers have different ways of creating documents. The benefit of the system is that lawyers would not be required to give up their usual way of preparing documents in order to conform to a single form.

Mr. Broeren said the service would be piloted from April to August 2004 with a view to offering it generally in September, 2004.

10. POST-CALL EDUCATION SURVEY REPORT

Ms. Schmit drew the Benchers attention to the results of a survey of the legal profession's needs and wants with respect to post-call education. She said the Lawyer Education Task Force would be presenting an interim report with recommendations and proposals to the Benchers at their meeting in March.

Mr. Treleaven said the survey involved telephone surveys of approximately 400 lawyers around the province, and was intended to give a basis for further consultation using a variety of information gathering techniques.

11. ANNUAL PRACTICE FEE, AMOUNT EQUIVALENT TO THE CBA FEE.

Mr. Hoskins recalled the Benchers' previous decision to defer consideration of what to do with the amount equivalent to CBA fees collected as part of the 2004 annual practice fee from lawyers who are not members of the CBA. He noted that the decision in *Gibbs v. LSBC and CBA* was under appeal, and he reviewed the options for dealing with the funds.

It was moved (Jackson/Fung) to delay a decision on the disposition of the funds concerned until the appeal in *Gibbs v. LSBC and CBA* has been resolved.

The motion was carried.

12. ANNUAL PRACTICE FEE REFERENDUM

Mr. Hoskins reviewed a memorandum setting out a proposal to set the annual practice fee for 2005 by a referendum of the members, pursuant to section 23(1)(a) of the *Legal Profession Act*. He proposed that a referendum deal with the fee in two parts. The first question would deal with the part of the annual practice fee that does not relate to the CBA, and the second question would

deal with an amount equivalent to the CBA fee, either as a mandatory or voluntary component. He said the approximate cost of conducting referendum would be a maximum of $24,000.

Mr. Ridgway asked if setting the fee by referendum would ultimately lead to the elimination of satellite meeting locations for the Annual General Meeting.

Mr. Everett said that question could not be answered at this time but it could be examined at a later date.

In answer to a question from Ms. Ostrowski, Mr. Hoskins confirmed that the referendum would be passed by a simple majority.

Mr. McDiarmid noted that the existing situation showed that the Benchers did not have to implement a resolution made at the AGM with respect to how to disburse funds collected from lawyers who are not CBA members. He suggested that it ought to be part of a referendum that the money collected as an amount equivalent to CBA fees must be paid to the CBA.

Mr. Hoskins said it could not be made mandatory in an enforceable way because the management of Law Society funds is given to the Benchers.

Mr. McDiarmid said that the Benchers ought to commit to following a decision made by referendum.

Ms. Wallace noted that the possibility of a referendum was apparently discussed at a recent CBA Provincial Council meeting, and asked if Mr. Brun could disclose what was said.

Mr. Brun said the consensus at the council meeting was that the Law Society annual practice fee should be set at the AGM because it provides a forum for debate and traditionally been where the question has been decided. Mr. Brun urged the benchers not to put the question to a referendum. He was somewhat concerned with the suggestion that the AGM lacks democratic process. He said the Law Society existed on the principle that matters such as this are discussed debated and voted on, in this case at the AGM. The referendum process does not permit members to come forward and speak. Mr. Brun suggested that, contrary to some opinions, a referendum might not deal with the issue because there would there be another referendum next year and the year after that, and so on. He said the issue would remain contentious, particularly if the vote is very narrow. Mr. Brun said there were concerns about the referendum process, such as how to set the right question or what happens if the fee is not passed. Mr. Brun said every year the AGM is a confirmation of how Law Society members view the CBA. It has been pointed out that the number of members at the AGM is small, and at any time five percent of the members could bring on a special meeting to do away with the mandatory collection of equivalent to CBA fees. He acknowledged that a slight majority opposed mandatory membership but a majority would join voluntarily, but asked where was the cry for a referendum? He said the question was not something that warranted going into the uncharted waters of a referendum. Mr. Brun referred to an article on the subject published in *Bar Talk* and circulated with the agenda. He said the article provided something of a counterpoint to and illustrated some of the concerns surrounding the issue, particularly in light of events in Queensland, Australia. He said the agreed division of roles between the Law Society and the CBA was something of an inoculation against similar developments in British Columbia. If the CBA lost its position as a mainstream force in the legal community and its role in supporting the profession, a vacuum would be formed into which the Law Society and the Law Society might be drawn into that role, thereby heightening the risk of a Queensland situation.

Dr. Vallance said referenda should be kept for very special circumstances, and a referendum at this time could undermine the AGM process. He said there was no opportunity to debate in a referendum.

Cameron Ward (Member, Vancouver) said he wanted to address a fairly narrow aspect of the issue of mandatory payment of CBA fees or their equivalent, but before doing that he commended the Benchers for their decision to exclude the amount equivalent to CBA fees from their resolution to the 2003 AGM. He said a referendum would be a democratic way to settle the question, and expressed disappointment with Mr. Brun's remarks to the contrary. He said the CBABC's position was consistent with that taken in New Brunswick where the CBA "scuttled" a referendum. He noted that New Brunswick was the only other mandatory payment jurisdiction. He said the CBA wanted to take money from every lawyer's pocket but did not want the opinion of members about whether they should be allowed to do so. Mr. Ward addressed the issue of financial accountability of the CBA. He said he had tried quite hard to find out what happened to the money paid to the CBA but the audited financial statements did not show much. He said how the money was spent was something he was entitled to know and he asked that if a mandatory payment regime was to continue, the Benchers consider a system of independent financial oversight so that members could know exactly how the money was spent.

Gail Davidson (Member Vancouver) described her work in the human rights field, particularly with Lawyers' Rights Watch Canada, and asserted that it would be contrary to the public interest to deny her membership in the Law Society because she did not want to support the CBA. Ms. Davidson recalled the circumstances that led to her decision to withdraw from membership in the CBA but said the Law Society's requirement that she pay the equivalent to CBA fees denied her ability to withdraw meaningfully. She noted that the requirement to pay $500 as an equivalent to CBA fees meant that she could not afford to belong to other organizations that were more relevant to her work. Ms. Davidson supported holding a referendum on the issue of mandatory payment of CBA fees.

In response to a question from Mr. Ridgway, Mr. Ward said that from his perspective a referendum that resulted in a continued requirement to pay CBA fees would put the issue to rest because it would be a democratic decision.

Mr. Kelly drew a parallel to the democratic process within the Law Society and in Canada as a whole, noting that it was based on a tradition of representative democracy rather than person-to-person democracy. He said that when difficult decisions have to be made, the elected representatives were expected to make them. He noted that in the poll of Law Society members about 43% said the Law Society should hold a referendum and a slightly larger number said the Law Society should not. Mr. Kelly agreed with Dr. Vallance that the Benchers would be shirking responsibility to make a difficult decision if they decided to conduct a referendum. He said a referendum would add unnecessary expense and put further pressure on the Law Society's budget.

Ms. Preston asked what conditions the CBA had experienced in jurisdictions where payment of fees is not mandatory. She asked whether the lack or loss of mandatory fee payment had led to an irreversible decline for the CBA, a "slippery slope". Ms. Preston questioned whether there was evidence that the work of the CBA was at risk if payment of fees was not mandatory. Ms. Preston agreed that a referendum might not provide the same opportunity for debate as a general meeting, but she suggested that the Law Society members had already had several opportunities to debate the issues.

Mr. Vilvang noted that only about four percent of the members attended the 2003 AGM and only a quarter of them, or one percent of the Law Society members, voted against compulsory payment. He suggested that this was an indication that the status quo was fairly acceptable to most members.

Mr. La Liberté opposed a referendum. He said the AGM had provided a democratic process that was healthy and functioned to keep the CBA's "feet to the fire". Mr. La Liberté disagreed with the assertion that the small number of people attending the AGM lacked the moral authority to decide the issue. With respect to accountability, Mr. La Liberté recalled that finances were debated at the Provincial Council meeting.

Mr. Ward said that he saw the number of members attending the AGM in a different way. Extrapolating from the vote at the AGM, one could say that about 3000 lawyers were opposed to being required to pay an amount equivalent to CBA fees. That number ought to concern the Benchers and warranted putting the matter to a referendum. With respect to the financial details discussed at the CBA Provincial Council, Mr. Ward said he had reviewed the minutes in detail and was unable to glean much useful information.

Mr. Turriff agreed with Dr. Vallance and Mr. Kelly that the question to be answered was whether the issue should be dealt with by referendum. The first question was whether there would be an opportunity for debate. Mr. Turriff thought there would be, because there were methods for the CBA to get its message out, and for members to exchange views. Mr. Turriff also agreed that the Benchers were expected to make hard decisions. He said the Benchers did make such a decision when they put their fee resolution to the AGM in 2003, but were "trumped", and they now had to ask whether that outcome truly reflected the wishes of the membership. One argument was that members did not attend the AGM in greater numbers because they were satisfied by the status quo, but another argument was that members did not attend because they were confident that the Benchers' decision would prevail.

Ms. Davidson said voluntary payment of CBA fees was not contrary to the public interest. She said over 85% of lawyers in Canada have the right to choose which professional associations they belong to. Approximately 38% of lawyers outside British Columbia and New Brunswick choose to belong to the CBA but there is no suggestion that those who don't practice law at a lower standard than those who do.

Mr. LeRose questioned why a referendum of Law Society members was proposed when the issue might be more appropriately settled by a referendum of CBA members.

Mr. Everett noted that the debate arose at the Law Society because the Law Society Rules permit the annual practice fee to be set by referendum and mandatory CBA membership or fee payment is derived from the requirement to pay the fee in order to obtain a practice certificate.

Mr. Donaldson spoke in favour of holding a referendum. He noted that there were some things the Executive Director did on his own authority, other matters come to the Benchers for decision that can be delegated or decided by a simple majority, and others that require a two-thirds majority; finally, there are some decisions that must be authorized by a referendum of the members. The Rules require this issue to be determined either at the AGM or by referendum. It is not a matter that the Benchers can decide; therefore, it is not a question of the Benchers shirking their duty to make hard decisions. Mr. Donaldson agreed that a referendum did not preclude debate. He said the CBA could use its own considerable resources to communicate with members. He suggested that the Benchers should be neutral on the issue. Mr. Donaldson disagreed that a referendum would lead into "uncharted waters" and that there was no cry for a referendum. He suggested that this was the sort of issue, like changes to term limits for Benchers, that by statute must be decided by the members. He noted that unlike a corporate general meeting, the Law Society AGM did not permit proxy voting so members had no alternative means of casting a vote.

Mr. Alexander agreed with Mr. Turriff and Mr. Donaldson, noting that although they each analyzed the issue differently, they came to the same conclusion. He reminded the Benchers that the issue was not voluntary versus mandatory membership because that question had already been decided in favour of voluntary membership. The question was compulsory payment. Mr. Alexander agreed that this was one of the issues that ought to be put to the members. He noted that some members in Victoria did not attend the AGM because they did not have time, and some because although they cared about the issue, could not afford to take the time away from their practices. Mr. Alexander noted that the poll conducted earlier suggested the membership was about equally divided on the issue, but the AGM did not reflect the demographics of the

profession. The fact is, he said, the CBA is able to "get the vote out" to the AGM, but the issue needed the benefit of wider consideration.

Mr. O'Byrne noted that he had to drive a considerable distance to attend the AGM but he was willing to do so to debate the issue. He said the issue required the opportunity for debate available at the meeting.

Mr. McDiarmid said the decisive factor from his perspective was the degree of participation in the AGM. Historically, referenda have had greater participation than AGMs and that is sufficient to tip the balance in favour of a referendum.

It was moved (McDiarmid/Jackson) to instruct the Executive Director to make preparations for conducting a referendum to set the annual practice fee and to draft a question or questions for the referendum for consideration by the Benchers.

The motion was carried.

13. WOMEN LAWYERS FORUM LEADERSHIP INSTITUTE

Ms. Wallace briefly outlined a proposal by the CBA Women Lawyers Forum to hold a "Leadership Institute" designed to provide about 40 women lawyers with leadership skills training. Ms. Wallace said the Equity and Diversity Committee favoured the proposal. Ms. Wallace emphasized that the request for Law Society support did not include financial support. Ms. Wallace introduced Cheryl Stephens who offered to answer questions regarding the proposal.

It was moved (Wallace/Ostrowski) that the Law Society work with the CBA to hold the leadership institute.

Ms. Stephens said the institute would focus on skills training and would likely involve about 40 participants, although a larger number would be invited to a keynote speech during the luncheon.

Mr. Sigalet asked what kind of support was sought from the Law Society and how would the Women Lawyers Forum know if the institute had been successful.

Ms. Stephens said the goals were long range and success would not be measured only in immediate outcomes or attendance.

Ms. Wallace said the nature of the support being sought was promotion through Law Society membership mailings and participation in the planning and the event itself.

Mr. Kelly encouraged the Benchers to support the proposal as important symbolic support for women in the legal profession taking on leadership roles.

Mr. Hume agreed that the proposed institute addressed issues of concern at his own firm and elsewhere, and it was worthy of support.

Ms. Fung suggested that the Law Society could promote the event by including a mention of it in the next "President's View" column in the Benchers' Bulletin.

The motion was carried.

14. DISCLOSURE AND PRIVACY TASK FORCE REVIEW OF PROGRESS TO DATE

Mr. Keighley gave a presentation on the work of the Disclosure and Privacy Task Force and the progress made to date. A copy of the presentation is attached as Appendix 3.

15. DISCLOSURE AND PRIVACY TASK FORCE

Mr. Keighley reminded the Benchers that they had considered previously the task force's recommendations with respect to disclosure of information to law enforcement agencies and had raised questions that required further development by the task force. Mr. Keighley explained that typically when the Law Society wants to release information to law enforcement authorities, there is a complainant who is willing to consent to disclosure, but in some cases that is not so, such as when the information arises from a credentials or practice standards investigation. He said the task force took the view that the Law Society should be able to inform a broader range of law enforcement authorities, and that the Credentials and Practice Standards Committees have the same authority to disclose as the Discipline Committee.

It was moved (Keighley/Ridgway) to approve in principle amending the Law Society Rules to allow the Discipline Committee, in its discretion but subject to the Legal Profession Act, to approve the release of information or documents which the Discipline Committee reasonably believes may be evidence of an offence to a law enforcement agency.

The motion was carried.

It was moved (Keighley/Alexander) to approve in principle amending the Law Society Rules to allow the Credentials Committee or the Practice Standards Committee, in their discretion but subject to the Legal Profession Act, to approve the release of information or documents which the either Committee reasonably believes may be evidence of an offence to a law enforcement agency.

The motion was carried.

Mr. Keighley reviewed the task force's analysis and recommendations regarding whether successful applicants in credentials hearings should be permitted to apply for anonymous publication of the decision. He said the application for anonymous publication would be made to either the hearing panel or the credentials committee.

Mr. McDiarmid suggested the procedures should be similar to those used in discipline matters. The applications should generally be made at the same time as the decision.

Mr. Donaldson noted that credentials hearings often delved into some very private matters, such as psychiatric treatment or addictions. He was not persuaded that publication of those decisions is required in the public interest when the hearing panel is satisfied that the member should be admitted.

Mr. Taylor was unsure when candidates for admission should be advised that details of a hearing would be published. He suggested it might be as early as on application to law school, but he questioned whether the Law Society had the authority to put a warning in law school applications.

Mr. Alexander supported Mr. Donaldson's view. He agreed that credentials hearings often intruded into very unhappy history, and he was not satisfied that the public interest was served by publication. On balance he favoured protecting the privacy of applicants.

Mr. Hunter agreed with Mr. Donaldson as well. With respect to giving prior warning, he said the only reason for doing so would be to discourage people from applying to law school or to salve the Benchers' consciences at a later stage.

Mr. La Liberté agreed that warning people entering law school that their personal history could become public at some time in the future would only discourage people from entering law school or the profession.

Mr. Nagle suggested seeking a middle ground where matters that are entirely personal to the applicant would not be publicized and matters relating to the law and professional competence would be.

Mr. Keighley reminded the Benchers that Credentials hearings were generally open to the public and the question was whether to place some restriction on an otherwise open process. He noted that the Benchers had already decided that information disclosed at an open hearing should be made public, and the only question that remained was whether to allow for anonymous publication under some circumstances. He suggested that was the middle ground. With respect to the public interest, Mr. Keighley said the test should be whether the action the Law Society takes instills in the public confidence that it is dealing properly with matters, and required a balance between the interest of the individual to pursue a vocation they have trained to and the interest of the public in disclosure. The balance may tip in favour of the public interest if the public starts to lose confidence in the Law Society.

It was moved (Donaldson/Alexander) that successful applicants in Credentials hearings be permitted to make application for anonymous publication.

The motion was carried.

It was moved (Keighley/Nagle) that the application for anonymous publication should only be allowed when publication would result in grievous harm to the applicant or another person.

The motion was carried.

Mr. Keighley reviewed the task force recommendation that decisions in Credentials hearings in which the applicant for admission was unsuccessful should be published anonymously.

It was moved (Keighley/Taylor) to publish Credentials decisions anonymously when the applicant is not admitted.

Mr. Vilvang suggested there might be circumstances where publishing the name of an unsuccessful applicant would be appropriate, such as when the person was accused of unauthorized practice of law.

Mr. McDiarmid suggested the Law Society should have a discretion to apply to publish the name of the applicant when it would be in the public interest to do so.

Mr. Keighley noted that the information would remain available but it would not be published on the Law Society website.

The motion was carried.

16. RULE AMENDMENTS – DISCLOSURE AND PRIVACY ISSUES

Mr. Keighley reviewed the proposed rule changes to implement decisions in principle with respect to disclosure and privacy in the areas of credentials, practice standards, and disclosure to law enforcement authorities.

It was moved (Keighley/Fung) to amend the Law Society Rules

1. by adding the following Rules:

Application for enrolment, admission or reinstatement

Disclosure of information

2-26.1 **(1) When an application has been made under this Division, the Executive Director may**

(a) disclose the fact that the application has been made and the status of the application, and

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

(2) For the purpose of subrule (1)(a), the status of an application is its stage of progress in processing the application, including, but not limited to the following:

(a) received and under review;

(b) granted, with or without limitations and conditions;

(c) referred to the Credentials Committee;

(d) hearing ordered, whether or not a hearing has been scheduled;

(e) withdrawn;

(f) refused.

(3) Before the Executive Director sends material to a governing body under subrule (1)(b), the Executive Director must be satisfied that privacy of the applicant will be protected where possible, unless the material has been put in evidence in a public hearing.

(4) With the consent of the Credentials Committee, the Executive Director may deliver to a law enforcement agency any information or documents obtained under this Division that the Committee reasonably believes may disclose evidence of an offence.

Credentials hearings

Pre-hearing conference

2-63.1 **(1) The President may order a pre-hearing conference at any time before a hearing ordered under this Division commences, at the request of the applicant or counsel for the Society, or on the President's own initiative.**

(2) When a conference has been ordered under subrule (1), the President must

(a) set the date, time and place of the conference, and

(b) designate a Bencher to preside at the conference.

(3) Counsel for the Society, and the applicant or applicant's counsel or both, must be present at the conference.

(4) Any person may participate in a conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present under subrule (3).

(5) The conference must consider

(a) the possibility of agreement on facts in order to facilitate the hearing,

(b) the discovery and production of documents,

(c) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public, or that exhibits and other evidence be excluded from public access,

(d) setting a date for the hearing,

(e) any application by counsel for the Society to withhold the identity or locating particulars of a witness, and

(f) any other matters that may aid in the disposition of the application.

(6) The Bencher presiding at a pre-hearing conference may

(a) adjourn the conference to a specified date, time and place,

(b) order discovery and production of documents,

(c) set a date for the hearing, and

(d) allow or dismiss an application under subrule (5)(f).

Publication of credentials decision

2-69.1 **(1)** **Subject to Rule 2-69.2, the Executive Director may publish and circulate to the profession a summary of the circumstances and of any decision of a hearing panel on an application under this Division and the reasons given for the decision.**

(2) When a publication is allowed under subrule (1), the Executive Director may also publish generally

(a) a summary of the circumstances of the decision of the hearing panel and the reasons given for the decision, or

(b) all or part of the report of the hearing panel.

(3) When the Executive Director publishes a document under this Rule by means of the Society's website, the Executive Director must remove the publication from the part of the website for current decisions and may relocate it to an archive part of the website when 6 months have elapsed from the decision of the hearing panel.

(4) This Rule must not be interpreted to permit the disclosure of any information subject to solicitor and client privilege or confidentiality.

Anonymous publication

2-69.2 **(1)** **Except as required or allowed under this Rule, a publication under Rule 2-69.1 must identify the applicant.**

(2) If the application that is the subject of the hearing is rejected, the publication must not identify the applicant unless the applicant consents in writing.

(3) The panel may order that publication not identify the applicant if

(a) the application is approved without limitation or conditions on the practice or articles of the applicant, and

(b) publication will cause grievous harm to the applicant or another identifiable individual that outweighs the interest of the public and the Society in full publication.

(4) An applicant may apply to the panel for an order under subrule (3)

(a) in writing or on the record in the course of a hearing, and

(b) no later than 7 days after the written hearing report is issued or oral reasons delivered.

(5) The Executive Director must not publish under Rule 2-69.1 until

(a) 7 days after a hearing report is issued or oral reasons given, unless the applicant waives the right to apply under subrule (4), or

(b) an application under subrule (4) is resolved or withdrawn.

(6) If a panel orders that a respondent's identity not be disclosed under subrule (3), the panel must state in writing the specific reasons for that decision.

(7) If, on a review of a panel decision rejecting an application, the Benchers approve the application, the applicant may apply to the Benchers under subrule (4), and subrules (3) to (6) apply as if the Benchers were a panel.

3. in Rule 3-3 by

(a) striking out the period at the end of subrule (2)(b) and substituting a semi-colon, and

(b) adding the following paragraph:

(c) with the consent of the Discipline Committee, deliver to a law enforcement agency any information or documents that the Committee reasonably believes may be evidence of an offence.

4. by rescinding Rule 3-16 and substituting the following:

Confidentiality of Practice Standards Committee deliberations

3-16(1) **Subject to subrules (2) and (3) and Rule 3-17, the following must be treated confidentially, and must not be disclosed except for the purpose of complying with the objects of the Act or, with the consent of the lawyer concerned, in responding to an enquiry made for the purpose of a potential judicial appointment:**

(a) all of the information and documents that form part of the Practice Standards Committee's consideration of a complaint;

(b) any action taken or decision made by the Committee;

(c) any report prepared for or on behalf of the Committee.

(2) If a matter referred to or considered by the Practice Standards Committee has become known to the public, the Executive Director may disclose

(a) the fact that the matter is or has been before the Committee,

(b) the status of the matter, including, if the matter is concluded, the general basis on which it was concluded, and

(c) any additional information necessary to correct inaccurate information.

(3) With the consent of the Practice Standards Committee, the Executive Director may deliver to a law enforcement agency any information or documents that the Committee reasonably believes may be evidence of an offence.

5. by rescinding Rule 4-6(5) and substituting the following:

Confidentiality of Discipline Committee deliberations

4-6 **(5) Despite subrule (1), with the consent of the Discipline Committee, the Executive Director may deliver to a law enforcement agency any information or documents that the Committee reasonably believes may be evidence of an offence.**

6. by rescinding Rule 4-38.1(4)(b) and substituting the following:

(b) no later than 7 days after the written report on findings of fact and verdict is issued or oral reasons delivered.

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

17. *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*, SUBMISSION TO REVIEW COMMITTEE

The Benchers considered a draft submission to a special committee of the Legislature reviewing the *Freedom of Information and Protection of Privacy Act*.

It was moved (Falkins/Keighley) to send the submission to the special committee.

Mr. McDiarmid noted that Section 14 of the *Act* did not expressly refer to confidential information, as distinct from privileged information and he suggested seeking an expansion of Section 14 to encompass confidential information.

The motion was carried.

18. EXEMPTION FOR LAWYERS UNDER THE *REAL ESTATE ACT*

Mr. Alexander circulated proposed revisions to the *Professional Conduct Handbook* dealing with the work permitted to be done by employees of lawyers engaged in the sale of real estate as part of their practice. Mr. Alexander explained that some months previously the Real Estate Association began an initiative to have the exemption for lawyers from licensing under the *Real Estate Act* removed. The Benchers created a task force to examine the issue and determine whether a middle way could be found that would satisfy both the Law Society and the Real Estate Association. Mr. Alexander said the Real Estate Association's primary concern was the possbility lawyers' employees, unlicensed under the Real Estate Act, might engage in activities they would not be

permitted to do if they were employed by realtors. The result was the draft revision to the *Professional Conduct Handbook* to regulate the activities of employees. He said the draft rules generally paralleled the rules in the real estate industry. Mr. Alexander said the proposed rules and excision of the reference to employees of lawyers from the *Real Estate Act* would likely put the matter to rest

It was moved (Alexander/Nagle) to approve in principle the combined initiative of adopting rules in the *Professional Conduct Handbook* and excising references to employees from the licensing exemption for lawyers in the *Real Estate Act*.

Mr. McDiarmid commented that the strongest case for lawyers selling real estate was that lawyers were engaged primarily in preparing the contract of purchase and sale. He was concerned about weakening that argument by any suggestion that lawyers were simply engaged in placing signs or witnessing signatures.

Mr. Alexander said it would be permissible to remove those references.

Mr. Ridgway was concerned that the rules implied that the lawyer must show properties to prospective buyers because an employee would not be permitted to.

Mr. Alexander said the task force had concluded that an employee could attend at a property with a prospective buyer, open the home and act as security while the prospective purchaser viewed the home, and could provide a pre-prepared information package.

Mr. Hunter was concerned about including rules relating to real estate selling activities in the *Professional Conduct Handbook*, particularly with explicit reference to the lawyer "as real estate seller". He said that was different from the practice of law and he was opposed to importing it into the *Professional Conduct Handbook*.

Mr. Alexander acknowledged Mr. Hunter's concern but said there was an element of pragmatism in the proposal. He said it was likely the only step that would preserve the ability of lawyers to engage in this kind of work, and he was mindful that there were some members who felt strongly that they wanted to continue to do so.

Mr. McDiarmid commented that in other jurisdictions where lawyers were substantially involved in real estate sales, the public appeared to be well served by high quality work done for substantially lower fees.

Ms. Fung shared Mr. Hunter's concerns, saying that by including the rules in the Professional Conduct Handbook lawyers would be exposed to discipline for activities outside the practice of law.

Mr. Vilvang asked whether consideration had been given to incorporating the restrictions into regulations under the *Real Estate Act*.

Mr. Alexander said the object of the exercise was to preserve the Law Society's majesty over the regulation of lawyers. He said lawyers could easily apply for licensing as realtors but the Law Society did not think that was a good idea. The Benchers had specifically concluded that when conducted by a lawyer, the sale of real estate is the practice of law.

Mr. Turriff agreed with Mr. Hunter, noting that at some point a hearing panel would have to decide what penalty to impose on a lawyer who permitted an employee to engage in proscribed activities.

The motion was carried.

19. UPDATE ON WIRICK INVESTIGATION

This matter was discussed *in camera.*

20. LIMITED LIABILITY PARTNERSHIPS

This matter was discussed *in camera*.

21. LAND TITLE OFFICE AUTHORITY

This matter was discussed *in camera.*

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