The Law Society of British Columbia

Benchers' Bulletin

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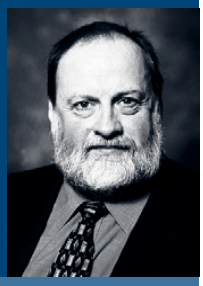

President's View

The dues we have to pay: mandatory, Randatory, or no tory at all?

I am no longer a CBA member — I delivered my letter of resignation on May 16, 2002. The reasons for my leaving the CBA have been publicized [*Lawyers Weekly*, May 31, 2002], but they are not germane to my topic today.

At the Benchers' retreat meeting on Saturday, June 29, 2002, CBA National President, Eric Rice, QC, BC Branch President-elect, David Paul and BC Branch Secretary-Treasurer, Robert Brun addressed the Benchers with a view to having the Benchers continue the 54-year practice of including the CBA fee in the annual practice fee resolution.

In the course of his presentation, Mr. Rice assured the Benchers that he would quickly introduce a provision whereby Law Society members who are "conscientious objectors" to CBA membership would not have to join the CBA but would have to pay the CBA annual fee. This was referred to in his presentation, and in Bencher questioning of him, as a "Rand Formula." Let us be quite clear then that we have seen the death of universal CBA membership in BC. All that is under consideration is whether "universal pay" will be substituted for it.

Following the presentations by Messrs. Rice, Paul and Brun, the Benchers voted overwhelmingly to include an amount equivalent to the CBA fee in the annual practice fee resolution they will put forward to the Law Society membership at the AGM on September 20, 2002. From discussion with my colleagues at the Bencher table, it was clear that the "Rand Formula" found favour with them.

Let's recall that Justice Ivan Rand in 1947 acted as arbitrator in a strike of 17,000 workers against the Ford Motor Company. He reasoned that all workers in a bargaining unit benefited from a union-negotiated contract and that, as a result, they should all have to pay union dues even though they need not join the union. This is the "freeloader" argument. Let's see how that applies to BC lawyers who choose not to belong to the CBA.

President Rice informed the Benchers that BC lawyers send about $3 million to the CBA in annual dues. The National Office of the CBA retains about $1.8 million of that for national purposes. The CBA National Office sends about $1.1 million back to the BC Branch for its provincial work. The split is roughly 60:40 of BC lawyers dues for national : provincial purposes.

Additionally, the BC Branch of the CBA levies Law Society members $65 each, which goes directly to it for provincial CBA purposes; that levy raises about $585,000 annually.

The total cost per senior (5+ years in practice) BC lawyer is $437.74 annually. So, what do BC lawyers get for their Randatory $437.74 if they don't get the benefits of CBA membership?

Then CBA (BC Branch) President Margaret Ostrowski, QC, addressing the Benchers April 1, 2001, described the CBA as "a uniquely political voice for the lawyers of British Columbia." I think Ms. Ostrowski spoke accurately when she so described the CBA. However, that fact is precisely what undercuts this aspect of the case for compelled universal membership. Within our membership will be found the whole spectrum of political views, from the left of Marx to the right of Newt Gingrich. So, what's the case for compelling association with a "uniquely political voice"?

Even if former President Ostrowski meant that the CBA was a "political voice" for the profession in that the CBA takes up matters that do not

Benchers' Bulletin

The *Benchers' Bulletin* and related bulletins are published by the Law Society of British Columbia to update B.C. lawyers and articled students on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities.

The views of the profession on improvements to the Bulletin are always welcome – please contact the editor.

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engage the Law Society's mandate to protect the public but are otherwise of significant importance to the profession, do members get a sufficient benefit from that voice that they should be compelled to financially lubricate its throat?

The decision of the BC Branch of the CBA to announce a "constructive engagement" agreement with the Attorney General on the morning of the Law Society's Special General Meeting of April 12, 2002 led rather directly to the BC Branch being requisitioned to hold its own Special General Meeting on June 12, 2002, at which the membership directed cancellation of the constructive engagement agreement.

What is the argument for compelling Law Society members, as a condition of their practice, to financially support a political voice with which they may passionately disagree? Doesn't it more accord with our values to let folks voluntarily sing in a choir with the CBA's basso profundo?

In May, 2002, the Law Society hired MarkTrend to poll our membership on the question of voluntary versus compulsory membership in the CBA. The sample of 404 members was balanced for proportion to the total membership in terms of gender, practice location, insurance status and years of call. The results should be accurate +/- 4.9%, 19 times out of 20. (Survey results are available in Resource Library/Surveys at www.lawsociety.bc.ca.)

To the question *"In your opinion, should membership in the Canadian Bar Association be compulsory for all BC lawyers or should it be voluntary?"* the sample of the membership responded: Voluntary 54%; Compulsory 42%; Don't Know 4%.

The spread of 12% cannot be covered by the margin of error.

As a result, we can safely say that more lawyers in BC believe that CBA membership should be voluntary than believe it should be compulsory, and that those who believe it should be voluntary are likely an absolute majority of the lawyers in BC.

Over the past five years, turnout for the Law Society Annual General Meeting has averaged about 2%. It is a simple matter for the CBA to mobilize its stalwarts to defeat a voluntariness resolution when the turnout is no more that 200-300 lawyers. Funnily enough, compulsory membership is thereby imposed on the majority who say it should be voluntary.

What does the CBA get for comfort?: 74% of BC lawyers said they would join the CBA if it was voluntary; 12% would not join if membership was voluntary. (Of the balance, 8% said it would depend on how much it would cost; 1% said it would depend on who would pay for it; 5% said they didn't know.)

In Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Prince Edward Island, Newfoundland, Yukon Territory, Northwest Territories and Nunavut, CBA membership is voluntary; only New Brunswick and British Columbia make their members join the CBA. Each CBA National press release concludes, "Some 37,000 lawyers, notaries, law teachers, and law students from across Canada are members."

According to the affidavit of Jean Whittow, QC, Deputy Executive Director of the Law Society of BC, filed in our *Proceeds of Crime (Money Laundering and Terrorist Financing) Act* litigation, there are 81,000 lawyers and Quebec notaires in Canada. Simple arithmetic tells us that 46% of Canadian lawyers belong to the CBA. Can it really be true that 54% of Canadian lawyers are "freeloaders," taking the benefits of CBA membership without paying their fair share?

Those in the Randatory camp inevitably raise the importance of CBA sections for the continuing legal education of lawyers and for fostering collegiality and professional values among lawyers. This contention can only be phrased as an opportunity to engage in section activities, as we Benchers don't mandate any compelled CLE and as section activities are only available in the larger centres in the province while lawyers in remote communities are still required to buck up for the CBA.

Further, membership in, say, the Trial Lawyers' Association, and participation in its listserv, would go a long way to providing CLE opportunities and fostering collegiality. The major vehicle for CLE in the province is, obviously, the Continuing Legal Education Society of BC with its courses, publications and website. There are other entities putting on CLE for lawyers (e.g., the Federation of Law Societies' Criminal Law and Family Law Programs). Private companies advertise their CLE offerings.

CBA sections are available in most, if not all, of the voluntary membership jurisdictions in Canada: I counted 63 sections on the Alberta CBA website, for instance. Can it be said that non-CBA members in Alberta are "freeloaders" for not paying dues to support Alberta CBA sections?

What's the situation in the medical profession? The BC Medical Association negotiates changes in the schedule of benefits payable to physicians under the provincial health care plan. It is a voluntary association claiming 75% membership from physicians in British Columbia. The Ontario Medical Association introduced a Rand formula in November, 1997, by which it would send the Ontario Health Insurance Program a list of those physicians who had not paid dues and OHIP would deduct the $990 to pay OMA fees for the 1,600 Ontario doctors who choose not to belong to OMA. The

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Attorney General's administrative justice project

Law Society cautions against omnibus reforms to administrative tribunals

The Law Society has asked the provincial government not to pursue a "one size fits all" approach to administrative justice reform, but to undertake a tribunal-by-tribunal review within its administrative justice project.

The Attorney General launched a broad legal and policy review of the administrative justice system last year, with a focus on the mandates and processes of 60 administrative justice agencies in BC.

To date the Ministry has released seven discussion papers — *1) Human Rights Review, 2) Standard of Review on Judicial Review or Appeal, 3) Administrative Agencies and the Charter, 4) Statutory Powers and Procedures, 5) Levels of Appeal, 6) Reviewing Original Decisions: Guiding Principles and Options* and *7) Appointments: A Policy Framework for Administrative Tribunals* — and has announced that a white paper will be issued shortly on proposed legislative reforms.

In April and June this year the Law Society made submissions to the administrative justice project, expressing support for the overall goals of the review and stressing the importance of public confidence.

"The Law Society supports the stated goals of the administrative justice project, but wishes to ensure that reforms are based on substantive considerations, and not simply on financial ones," the report said. "The Law Society believes that the results of the reforms to the administrative justice system in British Columbia must leave the public with a sense of having a significant increase in their access to the justice system for the resolution of disputes with the government on administrative matters, and also with a sense of faith in the independence and integrity of that system."

The Law Society has put forward key recommendations for the administrative justice project:

- Reform to the administrative justice system should not be attempted by generic or omnibus legislation designed to apply to all components of the system.

- The reform process should include a tribunal-by-tribunal review. This review would allow a thorough examination of the issues, such as the needs, expertise and subject matter of each component of the system. Such a review could include the work already undertaken by the government's core review process.

- A tribunal-by-tribunal review should be completed *before* legislation designed to clarify process is proposed.

- The reform process should consider creating a "council of tribunals" to undertake the proposed review. Such a council may be given an ongoing function beyond the present review process but, if so, the Law Society recommends against granting it any formal power of review of specific decisions or actions of any tribunal, board or agency.

  Such a council ought to have the power to make recommendations and act as an independent advisory council to government on the administrative justice system.

- The administrative justice project should consider who should be given a right of audience before any tribunal, board or agency.

- The administrative justice project should not be the end of the process. There should be (possibly through a council of tribunals or some similar body) a process allowing for the continual review of the administrative justice system.

The Law Society has also emphasized that, no matter what process is chosen for administrative justice reform, much will depend on the appointments process.

"The quality of appointments has a significant effect on the quality of decisions made, as well as on the manner in which the tribunal operates," the Law Society has told government. "The appointments process has a considerable effect on the cost of the administrative justice system, and very importantly, in how much respect is afforded to the system by those who use it. The two most important aspects of appointments policy and procedure centre around the level of independence given to the decision maker and the quality and competence of the decision maker."

The Law Society submissions are available in "What's New" on the Law Society website at www.lawsociety.bc.ca. For more on the Ministry of Attorney General administrative justice project, see www.gov.bc.ca/ajp.✧

BC lawyers vote non-confidence in Attorney General

BC lawyers attending a Law Society Special General Meeting on May 22 passed a motion expressing a loss of confidence in Geoff Plant, QC as the Attorney General of British Columbia. The motion passed by a 70% majority vote (754:325). Lawyers at the meeting also called on the Attorney General to immediately cease the diversion of funds from the provision of legal aid and to allocate all the revenues received through the special tax on legal services and from the federal government to the provision of legal aid. That motion passed 717:83.

The Special General Meeting — requisitioned by over 150 members under Law Society Rule 1-9 and held by the Benchers as required under that Rule — drew over 1,140 lawyers at the main meeting site in Vancouver and 20 audioconference locations across BC.

In speaking to his motion of non-confidence, Victoria lawyer Michael Mulligan said that the Attorney General is not a mere member of Cabinet, but a minister of justice with an obligation to see justice done, and legal aid funding cuts had to be viewed in that light. "Mr. Plant's failure to meet his moral and ministerial duty will leave thousands of persons without legal representation in family law, poverty law and human rights matters," he said. "Let there be no misunderstanding: the rights and freedoms of those persons will go unprotected."

Mr. Mulligan noted that BC is the only province to collect a tax on lawyers' accounts, which generated $91.6 million in the past year, in addition to the $9 million received from the federal government for criminal legal aid. He said that Mr. Plant has proposed a plan to reduce legal aid funding to $54 million, while at the same time the government is increasing the tax rate from 7 to 7.5%.

"I expect today you will hear words to the effect that there should not be a personal attack on the Attorney General. Please recall that my resolutions are not with respect to Mr. Plant in his personal capacity, but rather in his performance as minister of justice," Mr. Mulligan said. "However, to the extent that he is made to feel uncomfortable, that pales in comparison to the effect of his plan on the powerless who will be denied access to justice."

Phil Rankin, of Vancouver, seconded the motion. He cited the Attorney General's closure of courthouses without consultation and dismissal of the Legal Services Society board as examples of failing to work with those parts of the legal community. Mr. Plant had also criticized the former government for not directing the legal services tax to legal aid, Mr. Rankin observed. "Why shouldn't he be criticized by us, or has the political process been so debased that we just don't expect anyone in office to have to stand by what they have said?" he said.

Geoffrey Cowper, QC spoke against the motion. He said he could attest to the personal honour and integrity of Mr. Plant and believed that the motion before the meeting would not help legal aid, but rather could imperil the profession's reputation. In his view, the motion was inaccurate, unfair and improperly personal.

Mr. Cowper said that, while Mr. Plant had considered it his responsibility to call on the former government to fulfil its promises with respect to the tax, the Attorney also made it clear that he did not wish people to misunderstand the position of a new government, which

D. Geoffrey Cowper, QC urges lawyers at the May 22 Special General Meeting to reject the motion of non-confidence in Mr. Plant as Attorney General, as put forward by Michael Mulligan (left). But the motion passed by more than a two-thirds majority, and lawyers called on the Attorney General to allocate all revenues collected by government from the legal services tax to legal aid.

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was that the tax, if it could not be abolished, would go to general revenue.

He urged lawyers that this was not a motion to be passed at a Law Society meeting. "It allies us with the worst of our political culture; it allies us with personal attacks; it allies us with incomplete statements that are political in nature," Mr. Cowper said. "And finally, we don't elect the Attorney General; he doesn't have the office at our confidence. We elect a government, the Premier selects his Attorney and the Attorney fulfils his functions. It is only when his past as a lawyer is in question that we have any purchase over him, and we ought to defeat this resolution."

Derek Corrigan, who said he was addressing the resolution as a Burnaby councillor, said the Attorney General had moved the goal posts when Burnaby council attempted to save the Burnaby courthouse from closure. He said council offered to meet the government's stated concerns by defraying the costs of building rent, maintenance, utilities and taxes. The government had then asked Burnaby to pay $1 million toward courthouse staffing.

Brenda Mulliner, managing staff lawyer at the Legal Services Society in Prince Rupert, flagged that she was seeing women in difficult circumstances needing representation who were denied legal aid under the recent cuts. Hazelton lawyer Linda Locke of the Upper Skeena Counselling and Legal Assistance Society spoke about closing that office and the severe impact on those in the native community. "This is not about Mr. Plant," Ms. Locke said of the motion. "This is about the poor, the impoverished, the women, the children, the aboriginal peoples, the trauma. This is about people who come to the door and are looking at me with tears in their eyes, this is about people losing their houses, this is about bankruptcy." Recalling words of Harry Rankin, she noted, "Finally we are talking about something that counts."

New Westminster lawyer Margaret Hollis noted that, while Mr. Plant may not have broken any promises, as he hadn't made any, it didn't follow that what was wrong for the previous government isn't wrong for this government. "If it was wrong before, it's wrong now," she said.

At the outset of the meeting, President Richard Gibbs, QC had proposed that voting on the substantive motions be by secret ballot and the three motions expected to be introduced at the meeting be voted on together. He asked the meeting to decide this issue. Motions submitted in advance of the meeting were those of Mr. Mulligan and an amended motion of Richard Margetts, QC of Victoria, which Mr. Cowper said he intended to support.

The Margetts motion would have encouraged the Attorney General to vigorously ensure an accessible justice system and would have called on the provincial government to increase legal aid funding, to allocate the revenues from the tax on legal services (if that tax were retained) to legal aid, to consult and to work with other participants in the justice system and the legal profession.

A majority of lawyers at the meeting rejected a proposal to vote on the Mulligan and Margetts motions simultaneously. After the Mulligan motions passed, Mr. Margetts told the meeting he had decided against putting forward his own motion.

Lawyers denounce CBA's joint statement of "constructive engagement" with AG

Over 60% of lawyers at a CBA special general meeting on June 12 called on the BC Branch to withdraw its support for a joint statement signed by the BC Branch President and the Attorney General on April 12. Paul Pearson of Victoria and Phil Rankin of Vancouver introduced the motion, which passed 168:62.

That joint statement had committed the CBA to a strategy of "constructive engagement," working cooperatively with the Attorney General to review the justice system and identify potential cost efficiencies and revenue streams that could be used to improve access to justice, in particular legal aid and court facilities.

BC Branch President Carmen Overholt announced the agreement just prior to the start of the Law Society Special General Meeting on April 12 (the meeting was later adjourned to May 22).

Lawyers also resolved (183:4) that "any further 'constructive engagement' with the Attorney General begin from the proposition that, so long as it is collected, the special 7.5% tax on legal services be dedicated to the provision of legal aid."✧

President Richard Gibbs, QC thanked all who attended the meeting for their participation in what he believed to be the largest meeting of the profession in BC.

* * *

Resolution passed by the members at the May 22 Special General Meeting

1. WHEREAS Geoff Plant, the Attorney General, publicly condemned the former government for profiting by $15 million from the legal aid system by diverting funds collected pursuant to the special tax that was imposed on lawyers' accounts;

   WHEREAS Mr. Plant stood up in the legislature on May 11, 2000 and said the following "I'm sure we can quibble about the numbers, but the larger public policy question still remains. Isn't there something wrong with the government taking all this money from legal accounts as a result of a tax which was imposed, the justification of which was for legal aid, yet it doesn't actually really direct all of that revenue into the legal aid system";

   WHEREAS Mr. Plant now plans to divert more than $48.5 million a year in funds collected from the special tax on lawyers' accounts away from the provision of legal aid;

   WHEREAS Mr. Plant's plan to divert these funds will leave thousands of British Columbians who are poor, disadvantaged, and disproportionately female without legal representation;

   WHEREAS Mr. Plant has failed to uphold and protect the public interest in the administration of justice;

   THEREFORE the Law Society of British Columbia has lost confidence in Mr. Plant as the Attorney General of British Columbia.

2. THAT the Law Society of British Columbia demands that the Attorney General uphold and protect the public interest in the administration of justice, immediately cease the diversion of funds from the provision of legal aid, and allocate 100% of the revenue received through the special tax on legal services and from the federal government to the provision of legal aid.✧

Cards go up as lawyers at the Vancouver SGM site vote on one of several procedural motions. A majority of those at the meeting called for the substantive motions to be debated and voted on separately, not simultaneously. The substantive motions proceeded by secret ballot.

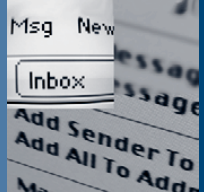
Maximum Bencher terms will not change

The Benchers have decided not to seek a change to Law Society Rule 1-1, which limits Benchers to a maximum of four two-year terms (eight years) of service.

Some Benchers have expressed concern that the current limit is insufficient to allow the more experienced Benchers to contribute fully to the Law Society. As well, for any Bencher who is elected in a by-election to complete a partial term, that partial term counts as a full term in calculating the maximum number of terms.

Any proposed change to Rule 1-1 would require approval of the membership by referendum.

After discussion of the issue at the Benchers table in April, the majority view was that the current limits ensure a healthy turnover of Benchers, an infusion of new viewpoints and ideas as well as an opportunity for more lawyers to serve as Benchers, and that these strengths outweigh the disadvantages.✧



New concepts for Securities Regulations

Society opposes role for BC Securities Commission in prohibiting a lawyer's practice

The Law Society has made submissions to the BC Securities Commission that oppose the Commission having the power to prohibit the practice of lawyers before it — matters of lawyer discipline that properly fall to the Law Society.

The BC Securities Commission recently released *New Concepts for Securities Regulations*, which states the following proposal for consideration under "New Enforcement and Public Interest Powers" (Concept 5):

> A Commission could prohibit professionals from engaging in practice involving that Commission if the professionals' conduct related to trading in securities is so egregious or grossly incompetent as to be contrary to the public interest.

While the Commission already has the power to investigate lawyers for alleged breaches of the *Securities Act* or Rules and to penalize (within the powers available to it under the *Securities Act)* any lawyers who conduct themselves contrary to its provisions, the Commission does not have the power to temporarily or permanently prohibit a professional from practising law.

The proposed concept, if developed, would give the Commission the power to regulate the conduct of legal professionals who make filings with, or appear before, the Commission.

The Law Society has made submissions to the Commission against this proposed concept and raising the following points:

- While the Securities and Exchange Commission in the United States has jurisdiction to sanction lawyers this way, the regulatory regime of professionals is different in the United States than it is in Canada. The sanction of lawyers in the United States is, in many states, undertaken by the courts.

  In Canada, courts generally do not regulate the conduct of counsel before them; rather such jurisdiction is given by statute to provincial law societies.

- The independence of the legal profession from the government of the province would be adversely affected by affording the Commission the power to regulate and sanction the professional conduct or competence of lawyers making filings with or appearing before it.

  Although the Commission independently administers the *Securities Act*, and its Executive Director is not a government official in the true sense of the word, the Commission is statutorily an agent of the government. The Commission cannot be construed to be independent of the government in the same manner as the courts are independent of the government.

  It would therefore be dangerous to afford the Securities Commission the power to regulate the professional conduct or competence of lawyers because the independence of the profession from government would be compromised.

- Affording the Commission the jurisdiction to sanction the professional conduct of lawyers would not serve the public interest as lawyers may be inhibited from making the fullest possible case for their clients, or from representing a client who may be in disfavour with the Commission, for fear of reprisal by the Commission.

- If the Commission were allowed to sanction the professional conduct of lawyers, the public interest would not be protected because of an overriding danger that serious transgressions dealt with by the Commission may not thereafter be brought to the attention of the Law Society. This could result in lawyers, who should be suspended or disbarred from *all* practice of law, being suspended only from practice in a particular area.

The Law Society has submitted that, because the Commission's jurisdiction could never extend to regulating a lawyer's conduct beyond a limited scope, it made little sense to duplicate the Law Society's regulatory machinery. The Society, with its statutory mandate of regulating all professional conduct and competence of lawyers, is the logical body to perform this regulatory task and has been doing so for over 100 years.

For the full text of these submissions, see "What's New" on the Law Society website at www.lawsociety.bc.ca.

* * *

Questions may be directed to Michael Lucas, Staff Lawyer, Policy and Planning, by telephone at (604) 443-5777 or 1-800-903-5300 (toll-free in BC) or by email to mlucas@lsbc.org.✧

New deadline for submissions: October 1, 2002

Government issues consultation paper in Civil Liability Review

The Law Society's Futures Committee, Access to Justice Subcommittee and Independence of the Bar Subcommittee urge lawyers to look at the critical issues raised in the provincial government's civil liability review. The committees also invite lawyers to send the Law Society a copy of any submission they prepare for government or to bring forward any questions, concerns or issues of importance they wish the Law Society to consider.

The Ministry of Attorney General recently announced a law reform initiative to review provincial civil liability laws. As part of this Civil Liability Review, the Ministry has issued a consultation paper and a feedback questionnaire to solicit the views of interested parties.

The deadline for responses, originally set for June 15, has been extended to **October 1, 2002**.

According to the Ministry, the primary focus of the Civil Liability Review is to consider "whether it is appropriate to impose reasonable limits on civil liability where it is fair to do so and consistent with our expectations that the justice system be efficient, accessible and affordable."

The civil liability review will canvass six topics:

1. Limitation laws
2. Joint and several liability
3. Costs in class action suits
4. Vicarious liability holding employers responsible for the actions of their employees
5. Non-delegable duty doctrine
6. Alternatives to traditional "lump sum" damage awards

The government invites lawyers and others to raise additional topics of interest or concern and to suggest other areas of civil liability they think should be considered for reform.

In the Civil Liability Review consultation paper, the Ministry specifies that, in the area of motor vehicle injury claims, it will not be considering such options as threshold, first-offer or no-fault insurance.

The Ministry of Attorney General's consultation paper, questionnaire and background materials are available at www.ag.gov.bc.ca/liability-review.

If you are planning a submission to the Attorney General, or have already sent one, please send a copy to the Law Society for consideration by the Futures Committee, Access to Justice Subcommittee and Independence of the Bar Subcommittee.

If you are not planning a submission, but have comments or concerns you would like to draw to the attention of the Law Society, please do so. Copies of submissions and any comments can be sent for consideration by the Futures Committee and its subcommittees to:

Charlotte Ensminger,
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Foundation gains new agreement with Royal Bank of Canada

As of April 1, 2002, under a new tiered-rate agreement with the Law Foundation, the Royal Bank of Canada will pay a net rate of return on lawyers' pooled trust accounts of prime less 3% on global average balances.

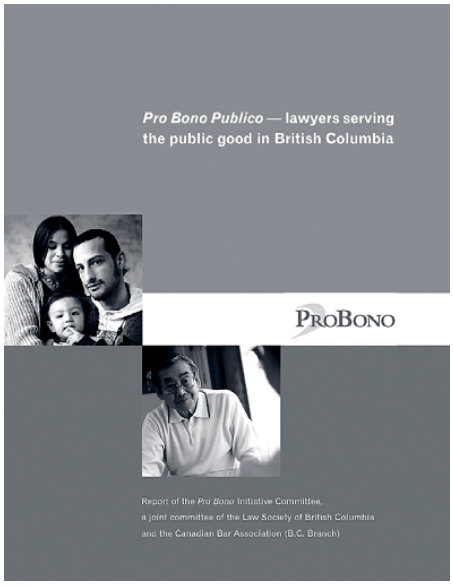
Law Foundation Chair, Don Silversides, QC, commends the Royal Bank for its commitment to paying a rate of return on lawyers' pooled trust accounts that ensures a spot on the Law Foundation's recommended list of financial institutions.

In particular, the Foundation thanks Diane Osatuik, Industry Manager, and Carolyn Davies, Senior Account Manager, Public Sector, Commercial Markets, Greater Vancouver for supporting the initiative for the new agreement.

Increased revenues enable the Law Foundation to fund programs that make the justice system more accessible to British Columbians, particularly those people who have the greatest access problems as a result of their economic, social, physical or mental special needs. The funded programs include both professional and public legal education, law reform, legal research, legal aid and law libraries.

The Law Foundation, Law Society and Canadian Bar Association (BC Branch) encourage lawyers to consider which financial institutions provide the best support to the Law Foundation when deciding where to place their trust accounts.✧

New report maps plan for *pro bono* in BC



The joint Law Society / CBA *Pro Bono* Committee issued its final report in June, culminating four years of work and laying the groundwork for a new *pro bono* society to coordinate, support and promote ongoing *pro bono* legal services in BC, a foundation to undertake fundraising and a website to allow community organizations to better communicate their *pro bono* needs to lawyers.

The Committee is sending its report, *Pro Bono Publico — lawyers serving the public good in British Columbia*, to those who participated in its study and consultations and in *Pro Bono* Forum 2001 last October. Lawyers who wish to access an online copy of the report, including a synopsis report of the *Pro Bono* Forum, can visit the Law Society website at www.lawsociety. bc.ca (Resource Library/Reports).

As previously reported, the new *pro bono* society will not deliver *pro bono* legal services directly, but will assist lawyers in finding suitable *pro bono* opportunities and will support community groups to facilitate the effective and coordinated delivery of *pro bono* through approved service providers. In its first three years, the society will focus on community development, lawyer and law firm recruitment, development and maintenance of a *pro bono* website, fundraising and lobbying for a properly funded legal aid system.

One of the lessons learned at the *Pro Bono* Forum is that effective liaison with community organizations is essential for this initiative to succeed in providing greater access to justice. The *pro bono* society has accordingly decided one of the first priorities will be to establish a community advisory council.

Introduction of a *pro bono* website (probononet.bc.ca) this year will be an important component of the *pro bono* society's work, thanks to development funding from the Law Foundation. The site will deliver legal information and resources to *pro bono* lawyers and community groups in all areas of the province.

The Lawyers Insurance Fund confirmed last year that it would provide coverage for *pro bono* work undertaken by exempt lawyers (such as those employed by government), as well as non-practising and retired lawyers. To qualify for the coverage, a lawyer must perform *pro bono* services through an approved *pro bono* service organization and the services cannot be for the benefit of a person previously known to the lawyer. The joint *Pro Bono* Committee had recommended insurance coverage as an important way to expand the pool of lawyers willing to offer *pro bono* services.

The work of the Pro Bono Committee, and the future work of the new *pro bono* society, is in keeping with initiatives elsewhere. As noted in *Pro Bono Publico*: "There is an international movement underway on *pro bono* which, significantly, is based to a large degree on a growing awareness of the importance of, and the value in, serving the greater good. The Committee supports the efforts of the new Board to ensure that the *pro bono* ideal and a strong *pro bono* culture become a reality in British Columbia."✧

New rules on credentials reviews

New Law Society Rules provide that an articled student whose enrolment is subject to a Bencher review cannot be called and admitted before the Benchers have issued a decision on the review: see Rule 2-48(4).

Other recent amendments require a party initiating a Bencher review of a credentials or discipline decision to set out the issues in a Notice of Review. The rules also automatically stay the panel's decision in the case of call and admission or reinstatement, or on application in other cases, and allow for a pre-review conference, with the presiding Bencher empowered to order exchanges of arguments and authorities: see Rules 5-1 and 5-12 to 5-19.

These Rules are set out in the *Member's Manual* amendment package, enclosed in this mailing.✧

Proceeds of Crime (Money Laundering) and Terrorist Financing Act

Lawyers across Canada exempt from all Part I recording and reporting provisions

In mid-May the Attorney General of Canada announced an agreement with the Federation of Law Societies of Canada (on behalf of provincial and territorial law societies) that all Canadian lawyers will be exempt from all of the provisions of Part I of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, including the recording and reporting provisions, until the Federation's constitutional challenge is heard in BC Supreme Court and the Court makes a decision on the merits.

Should the Federation of Law Societies be successful in its challenge in BC Supreme Court, the Attorney General has agreed that lawyers in all provinces will remain exempt from all Part I requirements pending the outcome of any appeal to the BC Court of Appeal. Should the Federation be successful before the BC Court of Appeal, lawyers in all provinces will remain exempt from the legislation pending the outcome of any appeal to the Supreme Court of Canada.

On June 12, 2002 new regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* came into effect.

Under these regulations, law firms were to be one of the entities required to record and report suspicious transactions, as well as large cash transactions, to the federal agency FINTRAC.

As a result of the agreement dated May 15, 2002 between the Federation of Law Societies and the Attorney General, however, lawyers and law firms in Canada remain exempt from these recording and reporting requirements, both with respect to suspicious transactions and large cash transactions.

Consent orders reflecting this exemption from Part I of the legislation were entered in BC Supreme Court on June 12 and in courts across Canada as close to June 12 as possible. The exemption will remain in effect so long as the Federation of Law Societies is successful in the litigation underway in BC with respect to the legislation, whether on the hearing of the petition or at various levels of appeal.

The BC Supreme Court hearing, originally scheduled for June 24, 2002, has been adjourned by consent. A new date has not been set, but the constitutional challenge is unlikely to be heard before 2003.

The May 15, 2002 agreement between the Federation and the federal Attorney General addresses the order in Alberta in which Watson, J. had required lawyers to provide sealed reports to the Law Society of Alberta, and the Law Society to hold such reports pending the outcome of the constitutional challenge. The agreement provides that the Attorney General would consent to a variation of the order in Alberta such that the Law Society of Alberta may dispose of any reports it may have received pursuant to Watson, J's original order.

Since the Attorney General has agreed that any such reports may be destroyed it seems clear that, even if the constitutional challenge is eventually unsuccessful, lawyers will not be required to report retroactively, that is, lawyers will not be required to report previous transactions.

Lawyers should not, therefore, collect from clients information that is required to comply with Part I of the Act unless, of course, the information is otherwise relevant to your retainer and collected in the interests of the client.

Law firms are also exempt from the requirement to set up a "compliance regime," which is included in Part I of the Act.

The principle of solicitor-client confidentiality is therefore preserved at least until the hearing of the constitutional challenge.

Please note that, on June 22, 2002, the Cross-Border Currency and Monetary Instruments Regulations were published in the *Canada Gazette*. These Regulations, when they come into force later this year, will implement Part II of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which requires persons to report to Canada Customs and Revenue Agency customs officers the importation or exportation of amounts over $10,000 of currency and monetary instruments in bearer form, whether carried across the border or imported or exported by mail, courier or by any other means. There is no requirement to report bank drafts or cheques or other negotiable instruments that are made payable to a named person and that have not been endorsed.

Lawyers will not be exempt from the Regulations implementing Part II of the Act.

If you have questions, please contact Felicia S. Folk, Practice Advisor, by telephone at (604) 669-2533 (toll-free 1-800-903-5300) or email her at advisor@lsbc.org.✧

Law Society investigates Wirick

The Law Society has recently received a number of queries from members, financial institutions and the general public concerning the recent resignation of Vancouver-based real estate lawyer Martin K. Wirick.

Mr. Wirick voluntarily resigned his Law Society of BC membership on May 23, 2002. Information received at that time contained allegations of substantial financial and procedural irregularities in his real estate practice, including breaches of undertakings. He is now a former member, but remains subject to the Law Society's complaints and discipline process.

On application by the Law Society of BC, and with Mr. Wirick's consent, the BC Supreme Court appointed a custodian for Mr. Wirick's practice on May 24, 2002 (Vancouver registry #L021598). The custodian is Gordon Bennett, a Vancouver-based real estate lawyer.

The Law Society is conducting an investigation into allegations against Mr. Wirick, which includes a financial audit of his practice. The investigation is, however, complex and in the early stages.

Lawyers may hear speculation within the profession or in the media respecting allegations against Mr. Wirick or the impact on the Law Society's Special Compensation Fund. Such speculation is not based on information from the Law Society and should not be relied on as fact.✧

Lawyers Insurance Fund

Coverage available to lawyers employed by legal aid and public advocacy groups

Lawyers who are employed by community law offices or public advocacy associations to provide legal services to the public at no cost will be able to purchase professional liability insurance coverage from the Lawyers Insurance Fund, beginning in August. The Benchers gave approval to the plan in June.

For lawyers employed by community law offices, the insurance coverage currently extended to them through the Legal Services Society will end on August 31, 2002 when the Legal Services Society ceases its funding of community law offices.

The challenge for these organizations is that the private insurance market has seen considerable hardening in rates, exacerbated by the events of September 11 and the recent Enron crisis. For this reason, lawyers employed by legal aid or public advocacy groups will have difficulty finding affordable insurance, if they can find insurance at all, Law Society Director of Insurance, Susan Forbes, reported to the Benchers in June.

"Without access to adequate professional liability insurance, clinics and public advocacy groups may not be able to attract qualified lawyers to provide legal services to the clientele they serve, with the further result that these legal service groups may not be able to continue to operate, reducing service to the public," Ms. Forbes noted in her report.

In recommending that insurance also be offered to lawyers working for legal aid and public advocacy groups, the Lawyers Insurance Fund noted that this change did not appear to represent a greater risk to the insurance program than that presented by lawyers in private practice.

Lawyers working for legal aid and public advocacy groups will be able to purchase from the Lawyers Insurance Fund the same insurance coverage as lawyers in private practice, at the same premium. There are two conditions: 1) the lawyer's employer is a not-for-profit organization and 2) the legal services are provided at no cost to the public.

If you would like more information, please contact Margrett George at (604) 443-5761 or mgeorge@lsbc.org or Susan Forbes at (604) 443-5760 or sforbes@lsbc.org at the Lawyers Insurance Fund.

Please note: *The Lawyers Insurance Fund program has traditionally exempted from coverage lawyers who provide legal services exclusively for their employers. The rationale is that employers do not need the protection of this insurance as do individual members of the public. However, if there is sufficient interest among in-house counsel in obtaining insurance from the Lawyers Insurance Fund for claims against them by members of the public, the Fund will review the existing policy. f you are an employed lawyer and are interested in participating in the program, the Lawyers Insurance Fund would like to hear from you. Please write (see back cover for address) or e-mail Margrett George at mgeorge@lsbc.org*✧

Society seeks to clarify articled student practice in Provincial Court

The Benchers have asked the Chief Judge of the Provincial Court to look at a discrepancy that appears to exist between the Law Society Rules and the Provincial Court Rules — or the interpretation of those rules — on the scope of practice for articled students.

Rule 2-43(1)(d) of the Law Society Rules states that articled students may appear in Provincial Court:

(i) on any summary conviction offence or proceedings;

(ii) on any matter in the family division or small claims division; or

(iii) where the Crown proceeds by way of indictment, for the purposes only of

(A) speaking to an application for an adjournment, or

(B) setting a date for preliminary inquiry or trial.

Lawyers have flagged for the Law Society that some judges do not allow students to appear at family law case conferences, arraignment hearings or trial confirmation hearings and that some registries do not allow students to search family law files.

Family law case conferences

Some judges have expressed concerns about articled students (rather than counsel) attending family law case conferences on the basis that case conferences require counsel who are experienced, who are familiar with the process of the court and who understand the likelihood of the outcome of the matter should it proceed to trial.

As Law Society Rule 2-43(1)(d)(ii) provides that an articled student may appear in the Provincial Court on any matter in the family division, the Law Society has assured the Chief Judge that it expects students appearing under the rule to have been properly instructed by their principals as to the likely outcome of matters should they proceed to trial.

Similarly, the Society expects principals to satisfy themselves that their students adequately understand the issues so that case conferences can proceed in a useful manner. A principal who has any doubt should not send a student to attend a case conference.

Criminal Caseflow Management Rules

The Criminal Caseflow Management Rules created two new pre-trial proceedings: the arraignment hearing and the confirmation hearing. These hearings provide the court some assurance that the prosecution and the defence have given sufficient consideration to all the issues and that there is a proper time estimate for the trial. Both rules are silent with respect to the attendance by students at such hearings.

It appears some judges interpret these rules as prohibiting attendance by students, at least with respect to indictable offences. There appears to be some disagreement as to whether the Criminal Caseflow Management Rules, and specifically Rule 8(1) and Rule 10(1) and (2), are purely procedural rules by which dates are fixed, or whether there are substantive matters that may be addressed at these hearings.

The Law Society has noted for the Chief Judge that, if the appearance relates simply to adjournments or the setting (or confirmation) of court dates, the Law Society Rules appear to permit a student's appearance. Again, a principal should only send a student who is properly instructed and has an adequate understanding of the issues.

Registry searches

Provincial Court (Family) Rule 20(10) provides that no one is entitled to search a registry file respecting an application under the *Family Relations Act*, an agreement filed under s. 121 of that *Act* or an application under the *Family Maintenance Enforcement Act*, unless that person is a party, a party's lawyer, a person named in the application as a respondent or named as a party to the agreement, a family justice counsellor or a person authorized by the judge.

While Law Society Rule 2-43(1)(d) allows an articled student to *appear* in Provincial Court on any matter in the family division, the Provincial Court Rules do not appear to allow students access to the client's file in that registry. Although the discrepancy has not proved a problem at every registry, it can result in difficulties or embarrassment for students.

* * *

The Chief Judge is considering the matters raised by the Law Society.✧

Benchers confirm that all transfer applicants must write exams

Lawyers from other provinces who wish to come to BC, not on a temporary basis but on transfer, will not be relieved of the requirement to write the qualification exam even if they intend to assume non-practising membership.

The Credentials Committee, after considering an Ontario lawyer's request to transfer to BC as a non-practising member without writing the exam, flagged concern over whether it would adequately protect the public to admit to membership lawyers who have never practised or qualified to practise law in BC. The Committee recommended, and the Benchers agreed, that the Rules not be changed.✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

♪ *All for One and One for All* ♪

Words by Alexandre Dumas, sung by
D'Artagnan, Athos, Porthos and Aramis

Can a lawyer witness be compensated for preparation?

Q: I am acting in a contested will case. The lawyer who drew the will has been asked to prepare an affidavit in the proceedings, which he has done. He has rendered an invoice for his time. He may also be called to give evidence at the trial.

Is there a general rule to compensate this lawyer at his hourly rate, or at some other rate, for his time spent as a witness, drafting the affidavit and giving evidence during trial?

Furthermore, if we agree to compensate this lawyer for his time, can that be used to impeach his evidence?

A: Section 4 of Schedule 3 of Appendix C to the Rules of Court entitles parties to recover reasonable amounts paid to some witnesses, including the lawyer in question, for preparing to give evidence when, as here, the preparation was necessary:

> *4. For any witness other than a party or a present officer, director or partner of a party to a proceeding, a reasonable sum shall be allowed for the time employed and expenses incurred by the witness in preparing to give evidence, when that preparation is necessary.*

If the cost is recoverable (that is, the work was done and the overall charge is reasonable relative to the issues involved) and given this section in the Rules of Court, counsel who might seek to impeach the testimony of this lawyer witness would have to do so on grounds other than the fact that the witness was compensated a reasonable amount for preparing and giving evidence in court.

How do we bill work done by an independent contractor?

Q. We are using an independent contract lawyer to work with us on some of our files. When it comes time to bill the client, can we charge an amount in excess of what the contract lawyer charges us for this work?

A: It depends on how you are able to charge out this contract lawyer's work. If you are restricted by your retainer agreement to show this work as a disbursement, then you should only charge the client the exact amount that you have been billed for these services.

In some cases it may not be proper to even charge this amount as a disbursement (for example, where you are on a contingency fee agreement and this disbursement would push the total fees charged above the maximum remuneration permitted for personal injury actions in Rule 8-2 of the Law Society Rules or would otherwise be unreasonable: s. 8-2(b)). When not inconsistent with your retainer agreement or the Law Society Rules, it is not wrong to include this lawyer's services as part of your overall fee, provided that the overall fee is reasonable in all the circumstances. (Rule 1 of Chapter 9 of the *Professional Conduct Handbook* states: "A lawyer shall not charge an excessive fee.")

The writer wishes to acknowledge the assistance of Gordon Turriff of Stikeman Elliott in answering the previous two Q & As.

How should I send funds to a US beneficiary?

Q: We have been acting on an estate file that will involve sending funds to the beneficiary who is a US resident. What is the preferred route to transmit the funds?

A: Recently, we were notified of a situation where a BC law firm sent a trust cheque to the US, only to have it treated as being drawn in US dollars and not Canadian funds. Needless to say, this caused a problem for the law firm that had to deal with a trust shortage: (Rule 3-66(1): A lawyer who discovers a trust shortage must immediately pay enough funds into the account to eliminate the shortage. (2) If the trust shortage referred to in subrule (1) is greater than $2,500, the lawyer must immediately report the shortage, and the circumstances surrounding it, in writing to the Executive Director).

Furthermore, this firm will have an exception to report on its Form 47 and a problem in attempting to recover the excess funds in the hands of the US resident.

In practical terms, the preferred method for sending amounts in foreign currency is to write a trust cheque to the client payable in Canadian funds, take that cheque to the law firm's bank and have the cheque converted into a bank draft in the currency of the payee. Unfortunately, lawyers have no control over how a foreign bank will treat a Canadian cheque. Sending a bank draft in the currency of the jurisdiction where it will be cashed avoids the problem of interpretation (and possible alteration) by a foreign banking system.

What do I need to consider when office sharing?

Q: What issues should we consider before entering into an office-sharing arrangement?

A: From the Law Society's perspective, there are a number of matters you should turn your mind to before entering into an office-sharing arrangement, starting with a review of Rules 6.1 and 6.2 of Chapter 6 of the *Professional Conduct Handbook*:

> **Space-sharing arrangements**
>
> 6.1 In Rules 6.1 to 6.3 and 7.1,

"sharing space" means sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.

6.2 Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:

(a) that an arrangement for sharing space exists,

(b) the identity of the lawyers who make up the firm acting for the client, and

(c) that lawyers sharing space with the firm are free to act for other clients who are adverse in interest to the client.

There are further explanatory footnotes in the Handbook for these sections.

The Handbook places a clear onus on all lawyers sharing space to affirmatively draw it to their respective clients' attention in writing if the lawyers could be acting for clients adverse in interest. The only alternative to this would be for all the lawyers to agree not to act for any parties adverse in interest — and in consequence set up a conflicts-checking system sufficient to catch any conflicts among any of the space-sharing lawyers before they occur.

Lawyers can also share space with non-lawyers. Therefore, in any type of office-sharing situation, I would take care to ensure that:

1. All written communications (mail, fax, courier) are not opened by or capable of being read by anyone other than one of the lawyer's employees. This necessitates that the lawyers have their own separate fax machines and fax numbers (a lawyer has been disciplined after confidential client information on a shared fax machine was read by an employee of one of the other lawyers who shared the space). This also necessitates having separate computer networks among those sharing the office. Legal files should be kept in secure cabinets and not left lying on desks. Law office cabinets, offices and work areas should be kept secure when unoccupied if they contain files or confidential information.
2. All employees in the office-sharing arrangement (not just those employed by the lawyer) should be made aware of the lawyer's special professional duties to maintain confidentiality. Law office employees must understand that they are not to discuss client matters with any others in or out of the office. Consider having employees sign a confidentiality agreement (available on the "Services for Lawyers / Practice and Ethics" section of the Law Society's

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Practice Advice

Dave Bilinsky

Felicia S. Folk

Jack Olsen

Practice management advice

David J. (Dave) Bilinsky is the Law Society's Practice Management Advisor. His focus is to develop educational programs and materials on practice management issues, with a special emphasis on technology, to increase lawyers' efficiency, effectiveness and personal satisfaction in the practice of law. His preferred way to be reached is by email to daveb@lsbc.org (no telephone tag). Alternatively, you can call him at (604) 605-5331 (toll-free in B.C. 1-800-903- 5300).

Practice advice

Felicia S. Folk, the Law Society's Practice Advisor, is available to give advice in confidence about professional conduct, including questions about undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships, lawyer-lawyer relationships and other ethical and practice questions. All communications between Ms. Folk and lawyers are strictly confidential, except in cases of trust fund shortages. You are invited to call her at (604) 669-2533 (toll-free in B.C. 1-800-903- 5300) or email her at advisor@lsbc.org.

Ethical advice

Jack Olsen is the staff lawyer for the Ethics Committee. In addition to fielding practice advice questions, Mr. Olsen is available for questions or concerns about ethical issues or interpretation of the *Professional Conduct Handbook*. He can be reached at (604) 443-5711 (toll-free in B.C. 1-800- 903-5300) or by email at jolsen@lsbc.org. When additional guidance appears necessary, Mr. Olsen can also help direct enquiries to the Ethics Committee.

You can also reach Mr. Bilinsky, Ms. Folk or Mr. Olsen by writing to them at:

The Law Society of BC
8th Floor – 845 Cambie Street
Vancouver, BC V6B 4Z9
Fax: (604) 646-5902.

Practice Tips *… from page 15*

website). Particular care must be taken with a shared receptionist to guard client confidentiality.

3. All telephone conversations must be kept confidential. This is of particular concern in secretarial areas, meeting rooms or reception areas.

Lawyers should also review Chapter 13, Rule 6 of the *Professional Conduct Handbook* on the professional responsibilities of lawyers operating in apparent partnerships or associations:

> 6. Any lawyer held out as practising in partnership or association with one or more lawyers shall be deemed to have the same professional responsibilities to the general public, other lawyers and to the Law Society, for the actions of any lawyer or lawyers with whom he or she is practising in an apparent partnership or association, as the lawyer would have if carrying on practice with such lawyer or lawyers in a partnership.

There is also the matter of liability. While every situation will be determined on its facts, lawyers who wish to demonstrate that they are separate for liability purposes would be expected to have taken all reasonable steps to demonstrate this — such as by not practising under a joint name, but rather having separate practice names, telephone numbers, letterhead and domain names, and conducting separate marketing efforts.

In other words, if you do not wish to be thought of as a partnership or apparent partnership, you must take as many steps as possible to provide the degrees of separation that would allow a judge, acting reasonably, to conclude that you are in fact, separate legal businesses.

When you choose to go into practice in concert with others, you should take care to remain separate and distinct — otherwise you will be held to the maxim *All for One and One for All.*✧

Precedent bank

In the September-October 2001 *Bulletin*, I stated my intention to build a series of precedents on law office management for lawyers on the Law Society website.

Although demand for precedents has been strong, to date I have received two submissions. ***This is a call to arms!*** If we wish to develop a useful series of precedents for lawyers to reference, we need to have lawyers submit precedents for the bank.

If you have any practice management precedent that you are willing to submit — office-sharing agreement, retainer agreement, contingency fee agreement, partnership agreement, letter offering staff employment, staff performance review checklist — kindly email them to daveb@lsbc.org. *Thanks!*

Credentials Committee reviews collaboration of PLTC students

By referral under the PLTC rules, the Credentials Committee recently reviewed the conduct of two students who had collaborated on two of the written PLTC assessments.

The students stated that they had started out merely working together, but ended up making changes to their initial assessments. The final documents they submitted were substantially the same.

The students noted that the PLTC rules prohibited their conduct, but said, at the time, they did not think they were contravening the policy.

The Credentials Committee reviewed the students' performance on the other PLTC assessments and examinations, as well as their explanations of how they came to be involved in the collaboration. The Committee also considered how important it is to the PLTC program that the students not engage in plagiarism or collaboration on assignments, assessments or examinations.

In the circumstances, the Committee decided that each student's enrolment in the Law Society Admission Program be extended for a further six months and the students be the subject of an anonymous publication in the *Benchers' Bulletin* detailing their actions and the Committee's decision. One student was ordered to re-do PLTC in its entirety, while the other was required to complete the remedial assessments that the student had failed.✧

Practice Watch, *by Felicia S. Folk, Practice Advisor*

Deficiency holdback languishing in your trust account?

How do you avoid having a deficiency holdback sitting in your trust account for months or even years after a closing?

If you give an undertaking carelessly, you may find yourself dealing with an unhappy purchaser client who demands money you are holding in trust because a vendor still has not remedied deficiencies to the satisfaction of your client, or at all. How do you close that conveyancing file without breaching your undertaking "to hold money in trust until deficiencies are remedied" when there is no time limit on your obligation?

When used properly, undertakings can expedite otherwise cumbersome transactions. When used improperly, undertakings can be the source of expensive and burdensome problems.

If you undertake to hold funds until the happening of a certain event, include an alternative if the event does not take place, that is, if the undertaking or conditions to the undertaking cannot be met. If you undertake to hold funds until deficiencies are remedied, include a mechanism to deal with the deficiency holdback in the event the vendor does not do the work or there is a dispute about the quality of the work.

You might want to set out the circumstances under which you may pay the disputed amount into court after a certain date as an acceptable fulfilment of your undertaking, or provide some other means of relieving your firm of obligations with respect to a deficiency holdback.

You should discuss with your client the possible outcomes and reach a clear understanding about what your role might be in the event of a dispute over the holdback and when your role as solicitor in the conveyancing transaction will be at an end.

Tort claim may trigger the application of the Workers' Compensation Act

When an individual is involved in an accident that gives rise to a tort claim, the Workers' Compensation Board may, on request, make a determination that he or she was a worker pursuant to section 11 of the *Workers Compensation Act.*

If such a determination is made, the worker may not be entitled to pursue the tort claim, although, if the accident involved a motor vehicle, the worker's Part 7 claim remains alive. Depending on the circumstances, the claim may need to be pursued. If, in acting for the injured worker, the worker's lawyer does not initiate a WCB claim within time limits prescribed by s. 55 of the Act (one year from the date of the accident), the Workers' Compensation Board may decide that he or she is ineligible for WCB benefits.

In addition to the problems that may then be encountered in attempting to obtain benefits from the WCB, the section 11 determination may enable an automobile insurer to recover costs and benefits paid out for the period before the WCB claimed jurisdiction.

It is prudent practice to commence, not only the WCB claim within the time limits prescribed by s. 55 of the *Act*, but also the tort claim and any applicable Part 7 benefit claim, within their respective limitation periods.

The Workers' Compensation Board will accept a provisional claim that satisfies the requirement to file within one year of the date of accident. All remedies are then left open, and the section 11 determination will ultimately determine whether the tort action can be pursued.✧

Closed Files

Please note that one of our most requested papers, ***Closed Files — Retention and Disposition,*** has been revised and is now on the Law Society website. Watch the "Services for Lawyers/Practice and Ethics" section of the site at www.lawsociety.bc.ca as new and updated practice resource materials are frequently added.

Theft of law firm website behind investment scam

Lawyers should be aware of a new scam involving "theft" of law firm websites and identities to give credibility to phoney investment schemes.

Victoria law firm McConnan Bion O'Connor & Peterson discovered firm photos and lawyer names had been taken from their website (www.mcbop.com) and used to create a website for a fictitious Vancouver firm called Bion McConnan & Associates with the URL www.bionandassociates.com.

A company called First Independent Capital Resources Inc., purportedly from Tokyo, then began soliciting investments in Australia claiming "Bion McConnan & Associates" was its

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News from the Courts

BC Supreme Court

Notices to the Profession
From Chief Justice Donald I. Brenner
1) **New Family Law Procedures** (Rule 60E) (May 13, 2002)
2) **Rule 60E – Family Law Judicial Case Conference Pilot Project – Supreme Court Website Material** (June 26, 2002)

Practice Direction
From Chief Justice Donald I. Brenner
Judicial Case Conferences in Family Law Proceedings under Rule 60E
(June 26, 2002)

The Chief Justice has issued two notices to the profession and a practice direction respecting new procedures in family law matters in effect as of July 1 and introducing a two-year pilot project on family law judicial case conferences.

The text of these notices and the practice direction can be found on the superior courts website at www.courts.gov.bc.ca/SC/sc-pdir.htm.

Practice Direction (June 7, 2002)
from Chief Justice Donald I. Brenner
Release of written reserved judgments

A new practice direction provides that, effective June 17, counsel and self-represented parties will receive notice of written reserve judgments 24 hours in advance of their release to the public and the media, subject to a discretion in the presiding judge or master to issue the reasons to the public and the media at the same time they are released to the parties. The text of the practice direction is available on the superior courts website at www.courts.gov.bc.ca/SC/sc-pdir.htm.

Practice Direction (May 10, 2002)
from Chief Justice Donald I. Brenner
Citation of unreported judgments in submissions to the court

This practice direction provides that counsel and self-represented parties should not rely on unreported reasons for judgment in the course of making either oral or written submissions to the court without first providing a copy of the reasons to the opposing party. The text of the direction is available on the superior courts website at www.courts.gov.bc.ca/SC/sc-pdir.htm.✧

Prince George LTO closes

On June 28, 2002 the Prince George Land Title Office was closed and its records consolidated with the records of the Lower Mainland Land Title Office. The Prince Rupert government agent office has also ceased accepting applications for the Prince George LTO.

Commencing July 2, 2002, all applications submitted to the Prince George Land Title Office (either directly or through the Prince Rupert Application Receiving Centre) on or before June 28, 2002 must be dealt with through the Lower Mainland Land Title Office. As of July 2, 2002, all applications dealing with titles in the Prince George or Prince Rupert Land Title Districts are to be submitted for registration to:

Lower Mainland Land Title Office
88 – 6th Street
New Westminster BC V3L 5B3
Telephone: (604) 660-2595

Also as of July 2, 2002, anyone wishing to contact the Lower Mainland Land Title Office respecting applications or matters pertaining to the Prince George or Prince Rupert land title districts may call toll-free at 1 (866) 660-3223. The contact person for Prince George / Prince Rupert applications is Deputy Registrar Brian Bigras.✧

Corporate and Personal Property Registries move to e-filing

The Corporate and Personal Property Registries have announced changes in filing procedures, including the discontinuation of some telephone and fax services and new e-filing requirements.

As of July 2, all BC company annual reports must be filed electronically, and telephone and fax services will be discontinued for searches of the Personal Property Registry, Manufactured Home Registry and Corporate Registry (including name reservation requests). For more detail, see www.fin.gov.bc.ca/registries/CARS.

As of July 29, the Personal Property Registry will require all base registration, renewals, discharges, changes and amendments to be filed electronically through BC Online. The Registry plans to discontinue printing turnaround documents and most verification statements, other than verification statements for the secured party of a discharge, change or amendment if the secured party is not the registering party. A print confirmation facility remains available to clients while registering documents. For more detail, see www.fin.gov.bc.ca/registries/pprpg.✧

Scam … from page 17

transfer agent for the investment. First Independent's website lists a number of impressive deals the company has allegedly been involved in and provides a link to the fictitious "Bion McConnan & Associates" website. First Independent has also been circulating a fictitious letter purportedly signed by one of the Bion McConnan & Associates lawyers, confirming that certain items would be held in escrow by Bion McConnan & Associates as part of the bogus deal.

Because the fictitious website used the names of real BC lawyers, anyone checking their status in telephone books, law directories or with the Law Society would see that they were Law Society members.

McConnan Bion O'Connor & Peterson only learned of the impersonation when a Vancouver law firm called them on behalf of its Australian affiliate, which was looking into the investment scheme. The police are now involved and the fictitious website has been shut down. The bogus letter-scare, however, is still in circulation.

The Law Society urges lawyers and law firms to search the internet regularly to see if anyone is using their names, firm names or other information improperly. Search engines such as Google.com or Altavista.com will assist.

Lawyers should also check regularly to see if anyone has registered domain names similar to theirs. Websites such as Easywhois.com, Namedroppers.com and Targetdomain.com allow you to search for registered domain names. You may also consider registering domain names for common variations of your firm's name.✧

Ethics Committee opinions

The Ethics Committee has approved these opinions from the past year for publication — as guidance for the profession as a whole.

Whether a lawyer can limit retainer under criminal case flow management

Chapters 8 and 10 of the *Professional Conduct Handbook*
(Ethics Committee: November, 2001)

The Criminal Case Flow Management Rules in BC Provincial Court were implemented on September 1, 1999, in phases at different provincial courts throughout the province. Case flow management is the coordination of court processes and resources to move cases in a timely fashion from filing to disposition. The purpose of the program is to ration court time so that only those cases that will be disposed of at trial are scheduled for trial.

A lawyer asked whether it is proper under the Criminal Case Flow Management Rules for counsel to enter into an agreement with an accused person to act at trial only, and not to act for the accused in any procedural matters leading up to the trial.

The Committee noted that Chapter 10, Rule 10 of the *Professional Conduct Handbook* contemplates that a lawyer may act in a limited capacity for a client, provided the lawyer discloses promptly to the court and to any other interested person in the proceeding the limited retainer in any case where failure to make disclosure would mislead the court or that other person.

The Committee was of the view that there is no necessary conflict between Rule 10 and the Criminal Case Flow Management Rules. It was therefore the opinion of the Committee that it is proper for counsel to enter into an agreement with an accused person to act at trial only, and not to act for the accused in any procedural matters leading up to the trial. Of course, counsel would have an obligation to explain to the client any risks that a limited retainer of this nature might carry for the client.

Does counsel for accused have an obligation to admit service?

Chapter 1, Rule 4(3) of the *Professional Conduct Handbook*
(Ethics Committee: March, 2001)

A lawyer asked whether it is proper for counsel who is served by the Crown with a Notice of Intention to Produce Certificates of Analysis (identifying a drug in question), pursuant to the provisions of the *Controlled Drugs and Substances Act*, to return the documents and advise that he has no instructions to accept service on behalf of his accused client.

The Committee noted the authorities that hold that personal service on counsel is valid service on the accused. However, it was the Committee's view that defence counsel has no obligation to assist the Crown in proving service in these circumstances, and it would be wrong for counsel to do so if it is contrary to client instructions. Counsel for the Crown is, of course, free to argue that its service on defence counsel is effective in spite of defence counsel's refusal to accept such service, but that argument must be directed to the court.✧

Society obtains new unauthorized practice undertakings and orders

[redacted]

The B.C. Supreme Court has ordered, by consent, that **Gary Carlsen,** also known as **Gary Sir John Carlsen III**, of Abbotsford, be prohibited from appearing as counsel or advocate; drawing documents for judicial or extra-judicial proceedings, wills, trust deeds, powers of attorney or probate or estate documents, documents under a statute or instruments relating to real or personal estate; giving legal advice or offering or holding out as qualified or entitled to provide these services for fee: *March 6, 2002.* The Law Society was awarded costs.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

On application of the Law Society, the B.C. Supreme Court has ordered that **Lee Hanlon** of Chilliwack be prohibited from appearing as counsel or advocate, drawing documents in any judicial or extra-judicial proceeding, negotiating claims or demands for damages; giving legal advice; or offering or holding out that he is qualified or entitled to do any of these things unless he becomes entitled to practise law in BC. The order specifies that nothing prevents Mr. Hanlon from providing legal services in accordance with paramount federal or provincial legislation that specifically authorizes the provision of such services by a non-lawyer for a fee: *January 11, 2002.*

The B.C. Supreme Court has ordered, by consent, that **Walter A.E. Hick** and **W.A.E. Hick & Associates Ltd.**, of Victoria, be prohibited from appearing as counsel or advocate in enforcement proceedings under the *Liquor Control Licensing Act* or before the Liquor Appeal Board, drawing documents for use in a judicial or extra-judicial proceeding or relating to enforcement under the *Liquor Control Licensing Act*, giving legal advice or offering or holding out as entitled to provide such services for a fee: *March 21, 2002.*

The BC Supreme Court has ordered, by consent, that **Harold Huebner**, of Coquitlam, doing business as "Compensation Consulting Services" or under any other name, be prohibited from appearing as counsel or advocate, drawing documents relating to proceedings under the *Workers Compensation Act*, negotiating for the settlement of claims, giving legal advice or offering or holding out as qualified or entitled to provide these services for fee: *March 5, 2002.*

[redacted]

[redacted]

[redacted]

Jacob Mendelsohn, of Victoria, has consented to a Supreme Court order that he be prohibited from holding out as a lawyer and from appearing as counsel or advocate, drawing corporate documents or documents for use in a judicial or quasi-judicial proceeding, negotiating for the settlement of a claim or demand for damages or giving legal advice for a fee or offering or holding out that he is qualified or entitled to do so: *April 16, 2002.*

[redacted]

[redacted]

The BC Supreme Court has ordered, by consent, that **Steven Serenas** and **S. Serenas & Associates (1988) Inc.,** of Vancouver, be prohibited from drawing corporate documents, wills, trust deeds, powers of attorney, probate and estate documents or documents relating to proceedings under statute;

giving legal advice or offering or holding out as qualified or entitled to provide these services for a fee: *March 6, 2002*. The Law Society was awarded costs. Mr. Serenas had previously undertaken not to engage in unauthorized practice: see May-June, 1999 *Benchers' Bulletin*.

[redacted]

[redacted]

Reinstatements

The following people have been reinstated to membership in the Law Society. These reinstatements do not relate to discipline proceedings.

As of April, 2002: Roger Jeremy Duncan, of Vancouver; Sandra Marie Staats, of New Westminster. **As of May, 2002**: Valerie Barbara Seager, of Vancouver. **As of June, 2002**: Siobhan Nicola Mahaffy, of Vancouver; Nghia Dinh Nguyen, of Toronto.✧

Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, is available to compensate persons who suffer loss through the misappropriation or wrongful conversion of money or property by a BC lawyer acting in that capacity. Although instances of misappropriation in the profession are rare, the Special Compensation Fund is a public protection the profession takes seriously.

The Special Compensation Fund Committee makes decisions on claims for payment from the Fund, in accordance with section 31 of the *Legal Profession Act* and Law Society Rules 3-28 to 3-42.

Rule 3-39(1)(b) allows for publication to the profession of a summary of the written reasons for decisions of the Committee.

* * *

James Edwin Marks

Nanaimo, B.C.

Called to the Bar: January 9, 1987

Ceased membership: January 1, 2000

Custodian appointed: January 20, 2000

Admitted misappropriation and professional misconduct to the Discipline Committee: July 20, 2001 (see July, 2001 Discipline Digest)

Claimant: K Estate
Payment approved: ***$225,537.31***
Decision date: November 20, 2001
Report issued: February 6, 2002

Between February, 1997 and December 9, 1999, while acting as the solicitor for K estate, Mr. Marks received in trust a total of $293,749 respecting the estate.

Mr. Marks misappropriated $217,104.12 of these funds from trust, in part to cover trust fund shortfalls on unrelated files of two other clients and in part for his personal use.

The Special Compensation Fund Committee approved payment of $217,104.12 to the estate in relation to the misappropriation, and further exercised its discretion to pay $8,433.19 for legal fees incurred by the estate in obtaining a civil judgment against Mr. Marks.

Claimant: D and W
Payment approved: ***$415***
Decision dates: October 29, 2001
Report issued: January 21, 2002

While representing D, the purchaser of a residential property in 1999, Mr. Marks was obligated pay $415 from funds held in trust for the property transfer tax. He issued a cheque to the Minister of Finance for the tax, but the cheque was returned NSF.

Mr. Marks subsequently transferred funds, including the funds designated for payment of the property transfer tax, from his trust to his general account.

The purchaser's son W himself paid the tax, as well as penalties and interest.

After finding that Mr. Marks had misappropriated the funds, the Committee approved payment of $415 to D and W for the tax, but declined to pay the penalty and interest portions of the claim.✧

Supreme Court denies audience to suspended Alberta lawyer

The BC Supreme Court has refused to allow Brad Kempo, a suspended lawyer from Alberta, to appear in court *pro bono* on behalf of a corporate litigant: *Avance Venture Corporation and Hughes Maritime Corporation* v. *Noram Relations Group Corporation*: BC (January 22, 2002) BCSC Vancouver Registry S010729.

Mr. Justice Henderson noted in his ruling that, while the court will allow persons who are not members of the BC bar to appear from time to time on behalf of corporate litigants, the occasions when a suspended or disbarred lawyer from another jurisdiction will be allowed to appear "are non-existent."

"The Law Society of Alberta, like other law societies in this country regulates lawyers in that province for the public benefit," Mr. Justice Henderson stated in his ruling. "It is manifestly in the public interest and in the interest of the courts, both in Alberta and elsewhere, that a suspension imposed upon a member of the bar by the Law Society be respected. If I were to allow this application, I would simply be permitting a circumvention of the attempt by that Law Society to prevent Mr. Kempo from practising his profession for reasons which, I assume, appear valid to that Law Society."

On the related issue of non-lawyers appearing in court as agents, the Court flagged as instructive a recent decision of the BC Court of Appeal: *R.* v. *Dick* 2002 BCCA 27. In that case, the court considered the position of a non-lawyer who sought to appear for the accused as agent, both in Supreme Court and in the Court of Appeal, respecting certain orders. The Court in *R.* v. *Dick* noted that, subject to statutory provisions otherwise, "it lies within a court's discretion to permit or not to permit a person who is not a lawyer to represent a litigant in court."

The Court in *R.* v. *Dick* also noted with approval comments in *Venrose Holdings Ltd.* v. *Pacific Press Ltd.* (1978) 7 BCLR 298 (BCCA) that "the discretionary power to grant a privilege of audience to other persons should be exercised 'rarely and with caution.'"✧

How to check the status of counsel

Most lawyers are aware that, subject to certain exceptions, the *Legal Profession Act* prohibits non-lawyers from offering legal services to the public for a fee or representing themselves as lawyers: see section 15 of the Act.

Section 15 (3)(a) of the Act also prohibits the practice of law in BC by a lawyer who has been suspended or disbarred, or who resigns or otherwise ceases membership as a result of discipline proceedings. Section 15(3)(b) likewise prohibits from practising in BC a lawyer from another jurisdiction who is suspended or otherwise prohibited from practice in the other jurisdiction for disciplinary reasons. These prohibitions stand whether or not the lawyer intends to charge a fee to the client.

From time to time, lawyers may have reason to question the membership status of the person representing another party. *Is the person a practising member of the Law Society of BC? Or is the person a lawyer from another province entitled to practise in BC under the interjurisdictional practice protocol? Or might the person be a non-lawyer?*

It is useful to know how to check the status of a lawyer and how to raise concerns of possible unauthorized practice.

Check with the Law Society

Is the person a BC lawyer? – The Law Society can verify the membership and practising status of a BC lawyer. Call (604) 669-2533 (toll-free in BC 1-800-903-5300).

In the coming months, the Law Society website will also feature a look-up service to allow lawyers and members of the public to find this information online. Please watch for details.

Is the person a lawyer from another province? – To enquire about the status of a lawyer from elsewhere in Canada who may be practising in BC, you can take steps to check with other law societies. The Law Society of BC is currently testing a shared database of lawyers from Alberta, Saskatchewan, Manitoba and Nova Scotia and will soon be able to field telephone enquiries on the status of lawyers from those provinces.

Could this be unauthorized practice? – If you suspect unauthorized practice, please raise your concerns with Carmel Wiseman, Staff Lawyer, Unauthorized Practice at cwiseman@lsbc.org or (604) 443-5774 (toll-free in BC 1-800-903-5300).✧

President's View *… from page 3*

move was highly controversial — for an example, go to www.opaonline.com to see what the Ontario Physicans' Association thinks of it.

For my purposes, it is noteworthy that BCMA remains a voluntary association and OMA a Randatory association, even though those associations actually negotiate the fee schedules from which all physicians benefit. How can it be said that the CBA does anything comparable for which it would be entitled to a Randatory fee?

When we, as members at the Annual General Meeting, act in the name of the Law Society of British Columbia to set the practice fee, we are utilizing the coercive power of the state-given monopoly to extract money from our members for the privilege of practising law, for the privilege of earning their livelihoods and serving their clients. I have no wish to enter the debate before the courts as to whether we can make CBA membership compulsory; now that we have CBA-lite, I want to take up the question of the morality, the appropriateness, of making our members pay fees to the CBA when they choose not to belong to that organization. So far as I am concerned, we have no business using delegated state power in that way.

News of my resignation from the CBA brought a letter from William H. Hurlburt, LL.D. (Hon.), QC, of Edmonton. Bill was a Bencher of the Law Society of Alberta for many years and it was in that capacity that I met him. He is the author of a wonderful little book published in 2000: *The Self-Regulation of the Legal Profession in Canada and in England and Wales*. Bill wrote:

> There is, in my submission, no legitimate reason for a law society to use its delegated powers to compel its members to belong to, or to pay dues to or for the benefit of, a private organization of the legal profession. No doubt there are many lawyers, possibly a majority of lawyers, who want a strong voice for the legal profession and who perceive the CBA as being that strong voice and who feel strongly that all lawyers should belong to the CBA and support it.
>
> No doubt the CBA wants, or even needs, the compulsory fees, and wants to be able to claim that it speaks for all lawyers in those provinces with universal membership. But the fact that a private group wants to have a strong voice does not, in my submission, justify a law society in using its public powers to compel individual lawyers to pay fees or to be formally recorded as members of that strong voice. Nor does resentment of free riders, if it exists, justify applying the force of the state to compel non-CBA members to make a contribution to the CBA.
>
> … LSBC's powers are held by LSBC for the purpose of regulating the legal profession — or, if you prefer, upholding and protecting the public interest in the administration of justice — and the resulting fact, in my submission, that it is not right to use those powers to require individual lawyers to contribute their money or their names to a private organization the primary function of which is to serve lawyers, judges, law teachers and law students.

Bill winds up writing:

> To put my submission in a nutshell, neither the governing body of a law society nor the majority of its members ought to use its powers, which are delegated to the law society for the regulation of the legal profession in the public interest, to compel a minority of the law society's members into membership of, or contribution to, an organization, however worthy, the primary purpose of which is to serve, not the public, but the members of the organization.

Bill is no anti-CBA crank; he has been a member of the CBA since he started practice and has had an honorary life membership bestowed on him by the Alberta Branch such that they no longer ask him for annual dues.

I have a strong belief that we've had this issue wrong for many years now. I also believe that the CBA has been denied the benefit of the discipline that it would impose on itself if it had to compete for members' support. I consider it long past time that we join the principled provinces that leave it to their members' own good judgement whether to join the CBA.

Some members will, I expect, move to amend the practice fee resolution this year. (This can be done only by resolution of at least two members submitted by August 12, 2002: see Rule 1-6(6).) It is my hope that a principled and vigorous debate of this important issue will occur at this September's AGM. But, as I expect to be in the chair instead of being one of the debaters, I'll get my points across in this forum. A friend of mine said it well recently: "Freedom does not need to justify itself; coercion bears the onus of justification."✧

Errata

Please note the following corrections to the Appointments notice in the March-April issue of the *Benchers' Bulletin*:

Warren Wilson, QC, not Jeffrey Hayes, is the President's nominee to the BC Courthouse Library Society Board of Directors. **Robert McDiarmid**, QC and **Patricia Schmit**, QC are first-time appointments to the Board, not reappointments, as stated. Our apologies.✧

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