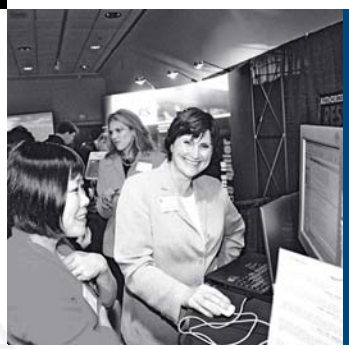
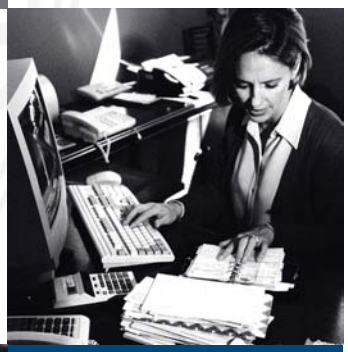
The Law Society of British Columbia



Benchers' Bulletin

A publication of the Law Society of British Columbia
2003: No. 2 March-April



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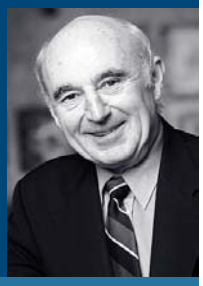

President's View

The CBA and the latest legal challenge

by Howard R. Berge, QC

Compulsory CBA membership in BC, or at least compulsory fee payment, has been canvassed in exquisite detail over the past year, at Law Society and CBA (BC Branch) meetings, in issues of the *Advocate*, the *Benchers' Bulletin* and *BarTalk* and in other forums. I do not propose to revisit the arguments for and against, however intriguing and passionate a debate this might rekindle.

But what is new, what lawyers should know, is that a legal challenge is ahead. A petition brought by Richard C. Gibbs, QC in BC Supreme Court on April 1 — naming the Law Society, the Canadian Bar Association and the Attorney General for BC as respondents — challenges the authority of the Law Society under the *Legal Profession Act* to include as part of the annual practice fee an amount equivalent to the CBA fee. The Law Society is retaining counsel in the matter.

You may recall that the 2003 practice fee, including an amount equivalent to the CBA fee, was approved by a majority of lawyers attending the Law Society Annual General Meeting in September, 2002 under section 23 of the *Legal Profession Act.*

The Gibbs petition seeks a declaratory order that "*the proper construction of the enactment, namely, sections 23 and 24 of the Legal Profession Act, is that the benchers are limited to authorizing the Law Society of British Columbia to act as the agent of the Canadian Bar Association for the purpose of collecting Canadian Bar Association fees from members of the Law Society who are members of the Canadian Bar Association, pursuant to section 24(1)(c), but that the enactment does not permit the Law Society of British Columbia to impose 'an amount equivalent to the Canadian Bar Association fee' as a compulsory aspect of the practice fee required to be paid to the Law Society of British Columbia, pursuant to section 23(1), to engage in the paid practice of law in British Columbia for the calendar year 2003.*

The petition seeks other declaratory relief, including an order that declares as unauthorized or invalid "*the decision deciding or prescribing the legal right, power or privilege of the Petitioner, Richard Charles Gibbs, amongst others, to engage in the paid practice of law in British Columbia in 2003, which decision, made in the purported exercise of the statutory power of decision contained in section 23(1) of the Legal Profession Act, by the majority of the members of the Law Society of British Columbia voting on the resolution at the annual general meeting of September 20, 2002, was to establish a practice fee which imposed an amount equivalent to the Canadian Bar Association annual fee as part of the Law Society of British Columbia's practice fee.*"

A full copy of Mr. Gibbs' petition is on the Law Society website (www.lawsociety.bc.ca): see *What's New*.

If the court determines in favour of Mr. Gibbs, the Law Society's authority to collect a CBA equivalent fee in the future will depend on amendments to the *Legal Profession Act*, and there is clearly no guarantee of these moving onto the legislative agenda. If the court does not agree with Mr. Gibbs' statutory interpretation, the issue remains, as it has for years, politically thorny. What is the right future course of action? Should the issue be part of new consultations within the profession, more polling, a referendum or even politicized Bencher elections?

Whatever the outcome of the current court proceeding, and what flows from it, we should all keep in mind that the Law Society and the BC Branch of the CBA each have certain responsibilities to serve the interests of the same members.

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Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC 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.

Additional subscriptions to Law Society newsletters may be ordered at a cost of $50.00 (plus GST) per year by contacting the subscriptions assistant. To review current and archived issues of the *Bulletin* online, please check out the "Resource Library" at www.lawsociety.bc.ca.

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Canada Post Publication No. 1475525

Proceeds of crime update

Constitutional challenge adjourned to November, 2004

The Federation of Law Societies and the Law Society of British Columbia have agreed to adjourn their constitutional challenge of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)* to November 1, 2004.

The BC Supreme Court ordered the adjournment by consent of the Federation, the Law Society and the Attorney General of Canada on April 15, subject to a number of conditions agreed upon by the parties, including an agreement on costs. The adjourment follows the federal government's decision in March to repeal several regulations that purported to subject Canadian lawyers to the recording and reporting requirements of Part 1 of the *PCMLTFA*.

The repeal of the regulations in fact had no practical implications. BC lawyers have been exempt from recording and reporting on suspicious and large cash transactions under Part 1 since November, 2001 when the BC Supreme Court granted interlocutory relief in the constitutional challenge brought by the Federation and the Law Society. In granting its interlocutory order, the BC Supreme Court noted the requirements on lawyers to report on clients under Part 1 constituted "an unprecedented intrusion into the traditional solicitor-client relationship."

After several Canadian courts followed BC's lead in granting interlocutory orders, the federal Attorney General reached agreement with the Federation (on behalf of the provincial and territorial law societies) in May, 2002 to exempt all Canadian lawyers and Quebec notaries from Part 1. It was agreed this exemption would remain in effect until the constitutional challenge was heard in BC Supreme Court and the Court had decided the case on the merits.

With the adjournment of the constitutional challenge, the Attorney General has now agreed to reimburse the parties for all "costs thrown away" in relation to proceedings for interlocutory relief across the country, including all appeal processes.

Despite relieving lawyers from Part 1 of the *PCMLTFA*, the federal government has announced that it still intends for Canada's anti-money laundering and anti-terrorist financing regime to cover all entities that act as "financial intermediaries," including lawyers and law firms. The government has, however, agreed to consult with the Federation of Law Societies before enacting the new regulations. If those new regulations are unacceptable to the Federation or other parties involved in the constitutional challenge, the federal government has agreed to defer enactment and to consent to injunctions exempting lawyers and Quebec notaries from the *PCMLTFA* until the constitutional challenge is resolved. This agreement applies to any appeals to the BC Court of Appeal and the Supreme Court of Canada if necessary.

Maurice Laprairie, QC, who chairs the Federation's task force on money laundering legislation, said the Federation could not have proceeded in the constitutional challenge without the leadership of the Law Society of BC.

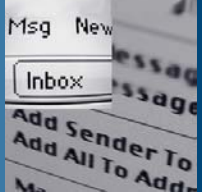
Canadian lawyers remain subject to the provisions on cross-border movement of currency and monetary instruments under Part 2 of the *PCMLTFA*, which took effect on January 6, 2003. However, those reporting requirements typically fall on clients, as the exporters of currency, not on their lawyers.✧

President's view *… from page 2*

As the principle of voluntariness is important to Mr. Gibbs, I would not be in the least surprised, should he be successful in his proceeding, if he were to then rejoin the CBA. I know of no Benchers who do not hold in high regard the services of the CBA. Nor can I name any Benchers who have not "done their time" with the CBA. If the CBA fee (or fee equivalent) were dropped from the Law Society practice fee, and any financial strains within the CBA resulted, I believe the current Benchers would support the worthwhile progams of the BC Branch. This is my assessment, of course. You might do well to ask one of your Benchers whether he or she agrees.

At a recent meeting of the Federation of Law Societies of Canada, Benchers and former Benchers from across the country discussed their relationships with the CBA National and the Provincial Branches. Without exception, all expressed close and positive relations with the elected representatives of the CBA. I am glad to say such relations prevail in BC.

During the resolution of this latest legal challenge, we should avoid assuming this is some kind of a "turf war" or potential threat to CBA existence or viability in this province. The continued goodwill and cooperation of the leaders of both the Law Society and the CBA must continue for the good of our profession.✧



Benchers explore national model code of conduct

With increased lawyer mobility across Canada, the Benchers will begin looking at a national model code of conduct for Canadian lawyers.

While the law societies of Alberta, Saskatchewan and Manitoba have started work on harmonizing their respective codes of conduct, Law Society of BC representatives have flagged that it could prove difficult to adopt one regulatory code that governs the conduct of lawyers in multiple jurisdictions.

A model code, such as that of the American Bar Association, may be more flexible to produce and to update. And in the context of national lawyer mobility, a national model code would be more useful than one that applied only to a region of the country.

BC plans to explore the cost and benefits of law societies developing a national model code.✧

Professional Conduct Handbook changes

Lawyers may take shares in corporate client in lieu of fees

The Benchers have amended Chapter 7, Rule 1 of the *Professional Conduct Handbook* to allow BC lawyers to take shares in their corporate clients in lieu of fees in certain circumstances.

The Ethics Committee recommended the change in recognition that some new companies require legal services, but may lack the resources to pay their lawyers unless they can pay in kind. A lawyer should be able to accept such a retainer, provided the lawyer's professional judgement is not compromised and the client receives independent legal advice.

Lawyers who take shares in lieu of fees must ensure that they comply with Rules 2 and 5 of Chapter 7, which provide:

> **Financial or membership interest in the client**
>
> **2.** A lawyer must not perform any legal services for a client with whom or in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a financial or membership interest that would reasonably be expected to affect the lawyer's professional judgement.
>
> **Financial interest in a client**
>
> **5.** A lawyer must not acquire a financial interest in a client of the lawyer's firm unless
>
> (a) the acquisition is effected on or through the facilities of a stock exchange, or
>
> (b) the client:
>
> (i) acknowledges in writing that the lawyer is not representing the client in the acquisition and the client will not rely on the lawyer's advice in the matter, and
>
> (ii) is independently represented in all aspects of the acquisition.

A new footnote to the Chapter cautions lawyers that acting in certain circumstances may result in a loss of insurance coverage under Exclusion 6 (business exclusion) of the compulsory professional liability policy or similar provisions in other insurance policies. As a result, lawyers should carefully review the wording of the business exclusion in the policy and feel free to contact the Lawyers Insurance Fund regarding the application of the exclusion to their own circumstances.

Lawyers assisting incapacitated persons

The Benchers recently approved *Handbook* changes to guide lawyers in difficult situations when clients become incapable of giving instructions or when incapacitated persons are in need of assistance.

Chapters 3 and 5 of the *Professional Conduct Handbook*, as amended, provide that, if a client cannot, as a result of incapacity, adequately instruct his or her lawyer, the lawyer must maintain a normal client-lawyer relationship to the extent reasonably possible. If the lawyer reasonably believes that the client cannot adequately instruct counsel, the lawyer may seek the appointment of a guardian or take other protective action the lawyer reasonably believes is necessary to protect the client's interests and may disclose the minimum amount of the client's confidential information necessary to take that action.

Pending appointment of a representative of the client, the lawyer may continue to act for the client to the extent that instructions are implied or as otherwise permitted by law: see Chapter 3, Rules 2.1 to 2.3 and Chapter 5, Rule 16.

A lawyer may also provide reasonable and necessary minimal assistance to a person who, because of incapacity, is prevented from entering into a client-lawyer relationship: see Chapter 3, Rule 2.4.

* * *

These *Handbook* changes are reflected in the April *Member's Manual* amendment package, enclosed in this mailing.✧

Students and principals to enter into new form of articling agreement

Under rule changes recently approved by the Benchers, lawyers who serve as principals and their articled students in BC will soon need to jointly file with the Law Society an approved form of articling agreement at the commencement of articles, followed by a mid-term progress report and a final report to certify completion of their respective obligations under the articling agreement: see Rules 2-32.1 and 2-48.

The Credentials Committee is now completing its review of the new articling agreement and related reporting forms. *All lawyers and incoming articled students will be advised as to when the agreement will be available, when it will be in effect and how reports will be filed.*

The new articling agreement and follow-up reports are expected to achieve greater consistency in the quality of articles by ensuring that students gain experience in specific lawyering skills and in at least three areas of practice.

The new Rule 2-32 specifies that, if a student does not live up to his or her obligations under the agreement, the Credentials Committee may extend the student's articling term for up to two years.

Other changes to the admission rules will also apply. Rule 2-44(6) extends the circumstances in which the Credentials Committee may exercise its discretion to exempt an articled student from the Professional Legal Training Course. The Committee retains discretion to exempt, with or without conditions, an articled student who has successfully completed a bar admission course in another Canadian province, but may also exercise that discretion for a student who has engaged in the active practice of law for at least five full years in a common law jurisdction outside Canada.

Finally, a change to Rule 2-30 *(which does not come into effect until May 1, 2004)* will increase from four to seven years the extent of practice experience necessary to become a principal to an articled student. Once the amendment to Rule 2-30 is in effect, each principal will also be limited to having two students at one time.

The new rules are available online in the Resource Library section of the Law Society website and in the enclosed *Member's Manual* amendment package.

These rule changes flow from a restructuring of the Law Society Admission Program, as recommended by an Admission Program Task Force and approved by the Benchers in 2002. For background on the reforms, see the September-October, 2002 *Benchers' Bulletin*.✧

Downtown Vancouver firms to keep articling offers open to August 18

The Credentials Committee has announced that law firms with an office in the downtown core of Vancouver (west of Carrall Street and north of False Creek) must keep open all offers of articling positions they make this year until at least **12:00 noon** on **Monday, August 18, 2003**.

This date is set each year pursuant to Rule 2-31 to ensure students have an opportunity to consider more than one firm's offer in interviewing for articles. The rule applies to offers made to second-year or first-year law students, but not to offers to third-year law students or offers of summer positions (temporary articles).✧

Law Society opposes limits on lawyers in real estate sales

The Law Society has asked the Minister of Finance, Gary Collins, to make no legislative changes to restrict lawyers in the sale of real estate in BC.

The Law Society's concern was prompted by a discussion paper from the Ministry of Finance entitled *Real Estate Act Review*, which proposes the following limitation on lawyers:

> The new Act will clarify that the lawyers' exemption *[from licensing requirements of the Real Estate Act]* only applies to real estate trades which arise in the ordinary course of law practice. For example, a lawyer could sell property, without obtaining a real estate licence, where the sale is ancillary to settling an estate, administering a will, or effecting a marriage settlement, but would not be allowed to solicit new listings or show property outside of these kinds of circumstances.

In his letter to the Minister, Law Society President Howard Berge, QC pointed out lawyers are properly exempt from any licensing requirements when selling propery in BC and that the public interest is fully protected by the Law Society Rules, insurance and Special Compensation Fund. He emphasized that no policy or regulatory objectives could be met by limiting the exemption for lawyers and that any further regulation of lawyers by the Real Estate Council would only confuse consumers and increase costs.

The Law Society plans a formal submission to the Ministry of Finance.✧

Failures in mortgage discharges: BC lawyers to file reports online

BC lawyers who need to file reports of mortgage discharge failures under new Rule 3-89 should do so online via the Law Society website at www.lawsociety.bc.ca in the "Resource Library/Forms" section *(**direct path: www.lawsociety.bc.ca/library/frame_forms_mortgage.html**)*.

New Rules 3-88 and 3-89 require a BC lawyer to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of any real property transaction closing March 1 or later. The new rules also oblige a lawyer to report to the Law Society the failure of another lawyer or a notary to provide satisfactory evidence that he or she has filed a registrable discharge of mortgage as a pending application at the Land Title Office within that 60-day period. A lawyer has five business days to report under the new rules.

In addition to ordinary mortgages, the new reporting rules apply to debentures and trust deeds containing a fixed charge on land or an interest in land.

Reports filed under the new rules are intended to provide the Law Society information on 1) the business processes of financial institutions and the practices of the profession, and whether certain institutions are unable to discharge mortgages within a particular timeframe and 2) whether there are situations that require attention or intervention from the Law Society.

The Society will not draw adverse inferences against a lawyer by reason of his or her failure to obtain a discharge of a repaid mortgage from a financial institution, in the absence of evidence of a breach of undertaking or defalcation.

For more information on filing under the rules, please contact David Newell, Corporate Secretary (dnewell@lsbc.org).✧

Nidus eRegistry™ for enduring powers of attorney and representation agreements

Lawyers who prepare enduring powers of attorney or representation agreements for clients will want to be aware of the Nidus eRegistry™, a voluntary, user-pay registry sponsored by the non-profit Representation Agreement Resource Centre in Vancouver.

The Nidus eRegistry (www.nidus.ca) offers online registry services for notices of representation agreements and enduring powers of attorney, or copies of those documents. The service allows a registrant to authorize the disclosure of a notice, the name of his or her representative or attorney and the location of a representation agreement or power of attorney, to certain third parties such as hospitals, financial institutions or government bodies. The registry assists those third parties to ascertain and locate the right person if it becomes necessary to seek financial, legal or health instructions respecting a registrant and the registrant is unable to provide those instructions directly.

Gateway File Systems™ of Victoria, a company involved in the initial set-up of the BC Organ Donor Registry, has provided technical support on the Nidus eRegistry project, and Juricert™ (the Law Society's online authentication service) is authenticating the professional status of lawyers or notaries public who serve as agents for their clients in registering documents. A lawyer who is likely to file documents in the Nidus eRegistry for clients can seek the necessary online authentication from Juricert by visiting www.juricert.com.

Nidus offers two options for registration:

1. Registration of a notice of a representation agreement or enduring power of attorney, which includes the name of the representative or attorney and the location of the document. (Revocations may also be registered.)
2. Registration of both a notice and a copy of the representation

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US Securities Commission update

Law Society flags concerns over alternative to noisy withdrawal

In a submission to the US Securities & Exchange Commission on April 3, the Law Society has expressed concern over the impact of proposed new securities rules on the lawyer-client relationship and on lawyer independence.

The Commission had originally proposed a "noisy withdrawal" rule. Under that rule, a securities lawyer representing an issuer before the Commission who has identified and reported to that client a material violation by the client of securities laws would subsequently need to take certain steps. Ultimately, the rule could require the lawyer to withdraw from representing the client, to notify the Commission of the withdrawal and to disaffirm submissions on behalf of the client.

The proposed noisy withdrawal rule elicited widespread concern in the legal profession. The Law Society of BC joined in a submission by the Federation of Law Societies late last year to oppose the proposed "noisy withdrawal" rule since such a rule would force a lawyer in Canada to breach duties of loyalty and confidentiality owed to a client — duties that are fundamental to the lawyer-client relationship.

The Commission has since proposed an alternative rule under which a lawyer might still be required to terminate a retainer, but need not report his or her withdrawal (that obligation would fall on the client). Nor would the lawyer need to disaffirm submissions made on the client's behalf.

In its recent letter of submission, the Law Society observed that the alternative rule is preferable to "noisy withdrawal" in that it does not force the lawyer to disclose privileged or confidential information about a client. Nevertheless, such a rule risks a negative impact on the relationship between lawyers and their clients.

As noted in the Law Society submission, "a requirement on an issuer to notify its regulatory authority that a lawyer has withdrawn for professional reasons may still make the issuer reluctant to confide in its lawyer or present its lawyer with the full facts of a particular matter because of the fear of the possible reporting requirements should the lawyer feel compelled to withdraw. To avoid such public disclosure, issuers may be inclined to simply not seek advice from counsel on difficult matters."

In a broader sense, the Law Society opposes any move by the Commission to regulate the lawyers who appear before it as this would substantially compromise lawyer independence.

Canadian and other foreign lawyers who are not admitted in the United States and who do not advise clients on US law are not covered by the proposed rule. However, Canadian and other foreign lawyers who provide legal advice regarding US law would be covered by the rule to the extent that they appear or practise before the Commission, unless they provide such advice in consultation with US counsel.

For more information, see *Proposed Rule on Implementation of Standards of Professional Conduct for Attorneys* (Final Rule 33-8185 and Proposed Rule 33-8186) at www.sec.gov.✧

Nidus eRegistry *… from page 6*

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agreement or power of attorney.

The Registry does not assume the role of verifying or interpreting the content of a notice or a document, or its validity.

A registrant (or the lawyer or notary representing a registrant) receives a Nidus registration number and a personal password to access the registrant's own records online. Any third parties, such as health and financial institutions and government bodies, must be pre-authorized by the Representation Agreement Resource Centre and Juricert to search for registrants' records online. In addition, it is the prerogative of each registrant to decide whether to allow third parties access to his or her records and, if so, what categories of third parties may have access.

The registry permits registrants to allow disclosure to 1) financial and legal institutions (banks, financial advisors, Public Guardian and Trustee), 2) health and personal institutions (hospitals, care facilities, mental health teams, social workers or Public Guardian and Trustee), or 3) both. The general public does not have access to such records in the registry.

Lawyers and notaries who register to access the registry on behalf of clients will be listed as registry agents on the Nidus and Representation Agreement Resource Centre website. For more information, visit the Resource Centre website at www.rarc.ca or call (604) 408-7414.✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

♪ Little things I should have said and done
I just never took the time
You were always on my mind
You were always on my mind … ♪

Words and music by Wayne Thompson, Mark James and Johnny Christopher, recorded by Willy Nelson

Management moment

Question: What is the hottest and most cost-effective method of legal marketing today? *Answer:* A legal e-newsletter.

An electronic newsletter (an email broadcast to many recipients) is sent directly to a recipient's inbox. It costs little more than your time to develop and it can be easily passed along to interested parties. In these days of tough markets and lawyers looking for ways to expand their client base, e-newsletters offer incredible potential. However, there are ethical and legal pitfalls in marketing via electronic newsletters. Here is a quick overview of the major considerations in launching an electronic newsletter:

Opt-in: One of the first law firms to send out a broadcast electronic newsletter ended up in ethical hot water for "spamming" the Internet — in other words, sending out its newsletter indiscriminately. Today, the acknowledged way to start an electronic newsletter is for recipients to opt in or subscribe to the service. How do you obtain email addresses for your list? For starters, ask your existing clients if they would like to receive a newsletter and have them provide you with their email addresses. Or give a presentation and ask the audience to sign a sheet if they wish to receive your newsletter. Have your latest newsletter on your website along with instructions on how interested parties can subscribe. You can also send a sample periodically to your clients and ask if they wish to receive further editions. Whatever you do, don't obtain commercial lists of email addresses and spam the list.

Format: (HTML or plain text?): Until very recently, it was recommended that most newsletters be in plain text format. However, the later versions of most email programs, including Outlook, Eudora and Netscape Communicator, are now able to handle HTML email, which allows for graphics and formatting to jazz up the newsletter. However, if someone is not able to receive HTML email, the newsletter ends up being almost unreadable and will probably be discarded. While plain text is universal, it is a harder medium to capture and keep a reader's interest.

Confidential: Newsletter email lists can grow to be substantial. There are dedicated newsletter email sites that will look after the maintenance of your lists and delivery to your email recipients. If you do use a commercial email service, you must make them aware of the confidential nature of the email list and have them agree to not divulge the names on it.

To start off your newsletter, MS Outlook is a good product as you probably already have it in your office. It allows you to keep information on each potential client in a database and then aggregate the clients into group email lists, such as Family_Law, Construction_Law and Business_Law. By building separate newsletter lists, you can develop different newsletters for different groups of potential clients. When you send out your newsletter to your group or groups, address it to a dummy email address in the firm (such as To: *Newsletter@law firm.com*) and have the group email list name in the Bcc (blind copy) area such as: *Bcc: Business_Law*. This allows you to keep your potential and current client email addresses and names confidential, since the individual email addresses will not appear with every copy of the newsletter. This is important as lawyers have an ethical obligation to not divulge information on their clients. The *From: Editor@lawfirm.com* address should be directed to someone in the firm who can follow up on any replies to the newsletter for further info, requests to be removed from the list or bounced email addresses.

Schedule: Once you launch your newsletter, set a schedule for further editions and stick to it. You could send it out monthly, every two months or even every two weeks — whatever is comfortable for you. Recognize that clients will become accustomed to receiving the newsletter, and your reputation for following through on initiatives will be on the line.

Content: Your newsletter should be concise and to the point. Use headings and spaces between sections. The content should reflect your knowledge of current issues in your area of practice. It is not a bad idea to "tease" the audience into calling you to find out more. Keep in mind the requirements of Chapter 14 (Marketing) of the *Professional Conduct Handbook* when drafting your newsletter.

Credit: Give billable hours credit to the lawyer who is editing and managing the newsletter — after all, the editor is doing marketing for everyone in the firm! If you fail to give this credit, your editor will likely resign and it may prove difficult or impossible to find a replacement.

Contact: Always put three things in your newsletter: One, a paragraph that reminds readers that they are free to send the newsletter

along to their friends. Two, information on how to unsubscribe. Three, information on how to subscribe. Remember, the purpose of the newsletter is to introduce yourself to strangers, create in their minds a positive impression and turn them into clients.

Subject: Use a good "Subject" line in the email, to avoid the newsletter looking like spam and being trashed without being read.

Research: Subscribe to other good email newsletters for ideas on how to improve yours.

* * *

Q & As on accounting

Is it okay to endorse over a cheque received in trust?

Q: *I am a lawyer who has received a cheque in trust. The cheque represents funds that are payable to another person. Can I endorse it over to the eventual payee or do I have to deposit it into my trust account? As the cheque is not certified, I don't wish to put it through my trust account if possible.*

A: Rule 3-54, "Cheque endorsed over" reads as follows:

> If a lawyer receives a cheque payable to the lawyer in trust and, in the ordinary course of business, pays the cheque to a client or to a third party on behalf of the client, in the form in which it was received, the lawyer must keep a written record of the transaction and retain a copy of the cheque.

It is strongly advised that the lawyer endorse the cheque with the words "without recourse" to avoid potential trust liability if the cheque should not be honoured.

Must I file a Form 47 for endorsed cheques?

Q: *I don't maintain a trust account, but I have endorsed over trust cheques to third parties in the course of my practice over the last year. Do I have to file a Form 47 Accountant's Report with the Law Society?*

A: A lawyer is exempted from filing a Form 47 Accountant's Report if he or she complies with the provisions of Rule 3-73:

> (1) A lawyer is exempt from the filing of an accountant's report for a time period referred to in Rule 3-72(1), (2) or (3) during which the lawyer has
>
> (a) not received any funds in trust,
>
> (b) not withdrawn any funds held in trust, and
>
> (c) complied with this Division.

Since you received trust funds (the cheques that you endorsed over were trust funds notwithstanding that you didn't deposit them to any trust account), you are not entitled to take advantage of the exemption in Rule 3-73 and accordingly should file a Form 47 Accountant's Report.

Where should I deposit GST and PST prior to remittance?

Q: *I have been told by my accountant that I should be depositing the GST and PST billed on my invoices into my trust account until I make a remittance. Is this in*

continued on page 10

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 BC 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 BC 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 BC 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.

Practice Tips *… from page 9*

accordance with general practice?

A: Both the federal and provincial governments deem GST and PST amounts to be trust funds under their respective legislation. For example, the *Social Services Tax Act* states:

> **Tax collected deemed to be held in trust for government**
>
> 102 If a person collects an amount of tax under this Act or collects an amount as if it were tax under this Act,
>
> (a) the person is deemed to hold the amount in trust for the government and for the payment of the amount to the government in the manner and at the time required under this Act and the regulations, and
>
> (b) the amount collected is deemed to be held separate from and does not form a part of the person's money, assets or estate, whether or not the amount collected has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount.

However, deeming the tax amounts to be trust funds and requiring them to be held in a lawyer's trust account are two different matters. According to the Chartered Accountants Institute of BC, Chartered Accountants need not require GST and PST on legal accounts to be deposited to a lawyer's trust account.

Where is legal assistant time reflected on bills?

Q: *Our retainer agreement allows us to charge for legal support/assistant time in addition to lawyer time. Should that time be included in the "professional fee" portion of the invoice, or should it be shown as a disbursement?**

A: It should be included as part of the professional fee. It is no different from charging for the work of a student. If an outside legal assistant is used, and that person bills the lawyer, the charge would be shown as a disbursement.

** Thanks to Gordon Turriff for his assistance on this Q&A.*✧

Pacific Legal Technology Conference 2003

Vancouver Bencher Anna Fung, QC takes in one of the many demonstrations and exhibits at the Pacific Legal Technology Conference last Fall. The 2003 Conference is set for November 7 in Vancouver.

It is in demand. And it is coming back this Fall. Mark your calendars now for the 2003 Pacific Legal Technology Conference on **November 7** at the **Vancouver Convention & Exhibition Centre**.

Pacific Legal Tech gives you the chance to explore many of the practical advantages the latest technology offers your own law practice as demonstrated in presentations by leading lawyers, legal administrators, librarians and technologists.

Last year's conference drew glowing praise from conference participants. This year's conference is not to be missed.

Watch for your conference information and registration package.✧

> *Excellent program in all respects. Very timely as well, since the legal profession now seems ready to implement technology into document management, practice management & other areas.*
>
> *I hope there is another conference next year to build on the momentum.*
>
> — Lawyer attendee at the 2002 Pacific Legal Tech conference

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Practice Watch, by Felicia S. Folk, Practice Advisor

The 2003 Practice Checklists

The 2003 Practice Checklists are now available on the Law Society website for you to download and adapt for your firm's needs: see Resource Library at www.lawsociety.bc.ca. If you are using hard copies of previous checklists, please be sure to bring them up to date as there are significant changes in the new version. Highlights for 2003 include the incorporation of Aboriginal issues throughout the checklists and the introduction of a human rights checklist.

Complaint withdrawal as a bargaining chip

It is improper to offer to withdraw a complaint against a lawyer as part of settlement negotiations, or to impose as a condition of settlement a requirement that a complaint to the Law Society be withdrawn. Several lawyers have been the subject of investigation and discipline hearings for such conduct.

The Benchers have said that such conduct constitutes professional misconduct and that the public must have confidence the Law Society will investigate the integrity and standards of its members, notwithstanding private settlements.✧

Lawyers taking affidavits (erratum)

A headline in the last issue of the *Bulletin*, "Lawyers may not take affidavits in other provinces," could cause confusion. As the article itself correctly explains, a BC lawyer cannot take an affidavit in Alberta for use in Alberta under the legislation of that province. Likewise, a lawyer from another province cannot take an affidavit in BC for use in BC.

What should be clarified is that a BC lawyer, as a commissioner for taking affidavits for British Columbia, *does* have authority to administer oaths and take affidavits, declarations and affirmations outside of BC for use in BC: see section 59 and related sections of the BC *Evidence Act*.✧

Ethics Committee opinion

The Ethics Committee has approved this opinion for publication as guidance for the profession as a whole.

Whether a lawyer can represent both spouses in a divorce action
(Ethics Committee: October, 2002)

In 1998 the Committee gave an opinion, which it reaffirmed in 2000, that lawyers should not act for both spouses in bringing a joint action for divorce. After reviewing these opinions, the Committee is now of the view that there are special circumstances in which the prohibition need not apply. A lawyer, including a lawyer who has acted as a mediator for the spouses, may act for both spouses in a joint action for divorce provided:

- all relief sought is by consent, and
- both parties have received independent legal advice in relation to the matter.✧

Interlock: the Members Assistance Program

If you would like help on a personal, family or work-related problem, call Interlock.

Each year the Interlock Members Assistance Program provides independent and confidential counselling services to hundreds of BC lawyers and articled lawyers, and to their spouses and dependent family members. The Law Society contracts with the Interlock Employee and Family Assistance Corporation to provide these services at no direct cost to individual lawyers.

Interlock counsellors are experienced and qualified professionals — registered social workers, psychologists and clinical counsellors who must meet ethical standards, including duties of confidentiality. Interlock reports to the Law Society only aggregate statistical information on program use.

Interlock services are available throughout BC. To set up an appointment with a counsellor in your community, call 1-800- 663-9099 or 604 431-8200 in the Lower Mainland.✧

Demands that lawyer produce documents under the Income Tax Act

Lawyers who receive a Notice of Requirement to Produce Documents under section 231.2 of the *Income Tax Act* should be alert to their professional obligation to protect client privilege.

Canada Customs and Revenue Agency (CCRA) has a broad power under s. 231.2 to require that a person provide, within a reasonable time, any information or document. CCRA frequently relies on this section to seek records from law firms with respect to clients.

When faced with a s. 231.2 notice, a lawyer must comply with Chapter 5, Rule 14 of the *Professional Conduct Handbook,* which states:

> A lawyer who is required, under the *Criminal Code*, the *Income Tax Act* or any other federal or provincial legislation, to produce or surrender a document or provide information which is or may be privileged shall, unless the client waives the privilege, claim a solicitor-client privilege in respect of the document.

The lawyer's obligation extends to documents or information that *may be privileged,* and it is not always easy to determine at law what is privileged and what is not. If you receive a s. 231.2 notice and have any doubt as to whether or not the information sought from you is privileged, you must obtain the instructions of your client (or former client).

Privilege belongs to the client, not the lawyer. Accordingly, your client must be given the opportunity to determine whether or not the information should be produced, or whether to make a claim of privilege. If you are unable to locate the client or former client and you have any doubt as to whether or not the information you have been asked to produce is privileged, you ought to claim privilege to ensure that you meet your obligations under Chapter 5, Ruling 14.

Section 232(1) of the *Income Tax Act* defines "solicitor-client privilege" as:

> the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

Of note, this definition purports to exclude the accounting records of a lawyer from the protection of solicitor-client privilege. Nevertheless, it is unclear whether certain information in a lawyer's accounting records that would otherwise be privileged (such as the name or address of a client, the nature of the file or any information identifying the nature of the legal services) has to be produced simply because it appears in those records.

Because a lawyer is obligated to claim solicitor-client privilege in respect of any document or information that is or may be privileged, you ought to claim privilege over such information in accounting records unless your client instructs you otherwise. For background on this issue, see "The *Income Tax Act*, Solicitor-Client Privilege and Solicitor-Client Confidentiality" in the May, 1994 issue of *The Advocate*.

Sections 231.2 and 232(3.1) of the *Income Tax Act* set out procedures to follow when a claim of privilege is made. These sections, however, must be viewed in light of the Supreme Court of Canada decision in *Lavallee* v. *The Attorney General of Canada* 2002 SCC 61 in which the Court struck down s. 488.1 of the *Criminal Code* as contrary to s. 8 of the *Charter*. Section 488.1 of the *Code* sets out a procedure for protecting privilege in law office searches — procedures very similar to those under s. 232 of the *Income Tax Act*.

The Court in *Lavallee* found that the protections for safeguarding privilege were inadequate in a number of respects, including the fact that privilege had to be claimed within a strict timeline and could be lost should a lawyer fail to claim it, even though notice had not been given to the client.

The BC Court of Appeal has adopted the reasoning of *Lavallee* in *Festing et al.* v. *Attorney General (Canada)* 2003 BCCA 112.

In *Lavallee*, the Court stated that:

> Solicitor-client privilege is a rule of evidence, an important civil and legal right, and a principle of fundamental justice in Canadian law.

The Court further stated that:

> Solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a

> balancing of interests on a case by case basis … Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled … to adopt stringent norms to ensure its protection. Such protection is ensured by labelling as unreasonable any legislative provision that interferes with solicitor-client privilege more than it is absolutely necessary.

In the wake of the *Lavallee* and *Festing* cases, it appears that CCRA has, on some occasions, concluded that the procedures in s. 232 of the *Income Tax Act* may not be valid and has not relied on them. CCRA has instead brought proceedings before a judge, naming the lawyer as the respondent, in order to have the documents produced to the court. It is therefore important to determine exactly what procedure CCRA intends to follow with respect to a particular demand to produce documents.

The Law Society is seeking a meeting with CCRA officials to discuss the protection of solicitor-client privilege, taking into account recent caselaw, the circumstances in which s. 231.2 notices are properly issued to lawyers and the procedures that CCRA investigators and lawyers should follow in response to such notices.

Who to contact

If you receive a s. 231.2 Notice of Demand to Produce Documents from Canada Customs and Revenue Agency, please contact any of these staff lawyers at the Law Society promptly to seek direction on your obligations:

Michael Lucas, Staff Lawyer, Policy & Legal Services (mlucas@lsbc.org)
Kensi Gounden, Staff Lawyer, Professional Conduct (kgounden@lsbc.org)
Tim Holmes, Manager of Professional Conduct (tholmes@lsbc.org)
Jean Whittow, QC, Deputy Executive Director (jwhittow@lsbc.org).

All can be reached by telephone at 604 669-2533 (toll-free within BC: 1-800-903-5300.✧

Public Guardian and Trustee fees increase

The provincial government has increased a number of fees charged by the Public Trustee and Guardian: *BC Regulation 83/2003 amending BC Regulation 312/2000*.

Effective April 1, the fees for the Public Trustee and Guardian to review, on behalf of a person under age 19, the reasonableness of a litigation settlement respecting claims for personal injury or wrongful death of a guardian will increase from the current fee of $75-600 to $100-3,000 (depending on the amount of the settlement).

There are also fees changes under the *Patients Property Act*, effective April 1: 1) a new monthly administration fee when the Public Trustee as committee of a client continues in its role pending appointment of an executor or administrator of that person's estate and 2) fee increases for the Public Trustee to respond to a notice of application to appoint a committee, to examine an application for relief/variance of a court order relating to how an incapable adult can best be protected or to attend on the passing of committeee accounts.

Finally there are fee changes under the *Estate Administration Act* effective April 1: 1) a fee increase for reviewing notices under section 112 and 2) elimination of the file opening fee and introduction of a minimum capital commission ($3,500 or 7% of the estate, whichever is greater). Effective July 1, a new fee will also be introduced for tracing and proving heirs to an estate.✧

Employment Standards Branch searches

The fee to search Employment Standards Branch records increased from $10 to $35 effective April 1.

The Branch typically receives search requests from lawyers who represent the purchasers of businesses for the purpose of ascertaining whether there are any outstanding employment-related complaints against a business that may affect a purchase and sale.

All search requests must now be mailed or faxed to the Victoria field office of the Branch at PO Box 9571 Stn Prov Govt, Victoria, BC V8W 9K1 (F: 250 356-1886), rather than to a local office. The Branch requires payment prior to conducting a search.✧

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.

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 summaries of the written reasons of the Committee. These summaries are published with respect to paid claims, and without the identification of claimants.

Martin Wirick

Vancouver, BC

Called to the Bar: May 14, 1979

Resigned from membership: May 23, 2002

Custodian appointed: May 24, 2002

Disbarred: December 16, 2002 (See DCD 03/05.)

Decision involving claims 20020058, 20020139, 20020328 and 20020427

Decision date: February 5, 2003
Report issued: March 25, 2003

Claimant: A Credit Union
Payment approved: ***$169,749.50***

The M Avenue property

In November, 2001 Mr. P purchased a property on M Avenue in Vancouver for $240,000, with financing of $168,000 from A Credit Union secured by a first mortgage.

In December, 2001 Mr. P executed a power of attorney in favour of Mr. G, a client of Mr. Wirick. Mr. P also executed a trust declaration in favour of V Ltd., a construction company of which Mr. G was the sole director. In the trust declaration, Mr. P stated that he had no beneficial interest in the property, but rather held it in trust for V Ltd.

Two individuals, L and H, subsequently agreed to purchase the property from Mr. P for $245,000 and to retain V Ltd. to construct a house on the property for $180,000. These purchasers obtained mortgage financing of $183,750 from B Bank to complete the purchase. Mr. Wirick acted for the vendor by power of attorney in this transaction.

On April 5, 2002 the purchasers' lawyer sent Mr. Wirick purchase funds of $235,602.04 in trust on Mr. Wirick's undertaking to discharge the A Credit Union mortgage. Mr. Wirick did not comply with the terms of his undertaking. Instead he paid the funds to unauthorized payees, with the bulk of the funds paid to a company owned by Mr. G.

Had the transaction proceeded as the purchasers anticipated, they would have received their interest in the property subject only to the B Bank mortgage that they had arranged. Instead, their interest was also subject to the A Credit Union mortgage.

In considering the eligibility of claims for compensation from various parties to this transaction, the Committee noted that Mr. Wirick had received trust funds in his capacity as a lawyer. He had paid out funds in breach of his undertaking in circumstances that suggest, not negligence or error, but an intention to deceive. Mr. Wirick misled the lawyer for the purchasers and breached his undertaking to facilitate the misappropriation of purchase money and he did in fact misappropriate and wrongfully convert the funds.

The Special Compensation Fund Committee exercised its discretion to give early consideration to the claims, given the hardship of the claimants and given that Mr. Wirick had already been disbarred and that further discipline proceedings were not anticipated. The Committee also decided that it would not require the claimants to exhaust their civil remedies in this case by obtaining a judgment against Mr. Wirick, as he had made an assignment into bankruptcy, his debts greatly exceeded his assets and there was little hope of recovery from him.

The Committee resolved to pay the claim of A Credit Union, including interest at a specified rate, subject to certain releases, assignments and conditions. This payment would allow A Credit Union to discharge its mortgage and would restore the purchasers, L and H, and B Bank to their intended positions.

The Committee noted that, on the face of the documentation, Mr. P had no interest in the property, and the Committee accordingly adjourned his claim pending receipt of further information.

Decision involving claim 20020014

Decision date: January 22, 2003
Report issued: February 24, 2003

Claimant: M Corporation
Payment approved: ***$3,604,801.01***

The G Road property

In February, 2001 C Company purchased two properties on G Road in Abbotsford for a total of $3.6 million. Mr. Wirick's client Mr. G was a director of C Company.

C Company obtained $2.7 million in mortgage financing from E Credit Union, secured by an *inter alia* mortgage against the two lots. The lots were subsequently consolidated into one.

C Company obtained second mortgage financing secured by an *inter alia* mortgage for $2 million against the

consolidated Abbotsford property and a property in Vancouver. The mortgage lenders were two individuals, A and B, who advanced $1.35 million of the funds.

In February, 2002 M Corporation agreed to lend C Company $9.2 million, supported by the personal convenants of Mr. G and the President of C Company. The loan was to be secured by a mortgage against the G Road property. Mr. Wirick acted for C Company in the transaction.

The lawyer for M Corporation forwarded the mortgage documents to Mr. Wirick for execution, confirming that the mortgages of E Credit Union and of A and B would be discharged. The lawyer subsequently sent to Mr. Wirick cheques for $2,928,910.12 as the first advance of mortgage funds, for $92,000 payable to C Company as a "refundable commitment fee" and for $568,585.87 as the second mortgage advance.

Mr. Wirick did not use any of these funds to discharge the mortgages as he had undertaken to do. Although he did pay $82,021.26 to the city for outstanding property taxes, he paid the balance of the funds to unauthorized recipients, including $201,554.93 toward the purchase of a hotel.

After Mr. Wirick admitted his breach of undertaking, Mr. G granted M Corporation a covenant, promissory note, general security agreement and second mortgage over the hotel lands. The hotel, which was in receivership and under foreclosure, was ultimately sold and the remaining sale proceeds of $1,594,000 were held in trust by Mr. G's trustee in bankruptcy.

Had the transaction proceeded as envisioned by M Corporation, the Corporation would have received a first charge against the G Road property. Instead it held a mortgage third in priority behind the mortgages of of E Credit Union and of A and B.

The Special Compensation Fund committee found that Mr. Wirick had misappropriated and/or wrongfully converted funds entrusted to him as a lawyer in breach of his undertaking to pay out and discharge mortgages. He had breached his undertaking and misled M Corporation as to the nature of its security to facilitate this misappropriation and wrongful conversion.

The Committee decided that it would not require the claimant to exhaust its civil remedies in this case, noting that there was little hope of recovery against Mr. Wirick and requiring the claimant to try to recover on its security in the hotel might be difficult and expensive.

The Committee approved M Corporation's claim in the amount of $3,604,801.01, including interest at a specified rate and subject to certain conditions, releases and assignments. The Committee noted that the amount approved did not include the funds that Mr. Wirick had paid on outstanding property taxes. The Committee denied claims by M Corporation for various consequential costs, such as legal fees and insurance.✧

Appointments to other bodies

Federation of Law Societies – On April 4 the Benchers endorsed the creation of the new Council of the Federation of Law Societies of Canada (constituted of one representative from each law society in Canada) to replace the current Federation board under a new restructuring plan.

The Benchers accordingly appointed Second Vice-President **Peter J. Keighley**, QC, of Abbotsford, to serve on the new Council. Mr. Keighley's appointment will take effect shortly, once new Federation bylaws are approved and in force. In the interim, former Treasurer Trudi Brown, QC, of Victoria, will continue to represent the Law Society on the Federation board and President Howard Berge, QC of Kelowna will serve on a *pro tem* board.

CBA National and Provincial Councils – The Benchers have appointed Benchers **Grant C. Taylor** of New Westminster to the CBA National Council and **John Hunter**, QC of Vancouver to the CBA Provincial Council.

Legal Services Society – The Benchers have appointed **D. Brent Adair**, QC of Chilliwack, **Gregory Bowden**, QC of Vancouver, **Barbara Fisher,** of Vancouver and **John Hogg**, QC of Kamloops to the new Legal Services Society board of directors.

Under the *Legal Services Society Act*, as amended, the Law Society is responsible for appointing four of the nine members of the Legal Services Society board of directors. The new board is scheduled to take over governance of the Legal Services Society in May, 2003.

President Howard Berge, QC thanks the 45 BC lawyers who volunteered to serve the public and the profession as Law Society appointees to the LSS board, in response to a Law Society call for expressions of interest in March.

UBC Law Faculty Council – The President has appointed Law Society Director of Education and Practice **Alan Treleaven,** of Vancouver, to the UBC Law Faculty Council for a two-year term beginning March 26, 2003.

Vancouver International Airport Authority – The Benchers have reappointed **Thomas English**, QC, of Vancouver, to the board of the Vancouver International Airport Authority for a second three-year term (2003-2006).✧

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