The Law Society of British Columbia

Benchers' Bulletin

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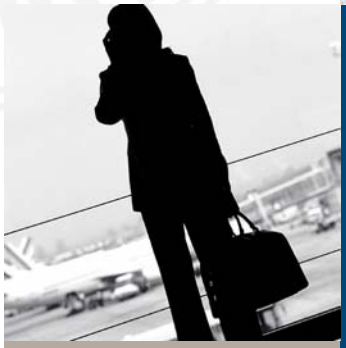

Inside

President's View

Why criticism of judges is a concern

"It is reasonable that every one who asks justice should do justice."
— Thomas Jefferson

by William M. Everett, QC

One Saturday morning early this year, I opened the *Vancouver Sun* to a blistering lead editorial about a high-profile case before the courts. It described a BC Supreme Court judge as "cavalier," as unable to grasp the concepts of "normal" or "judicious" and as running a courtroom filled with "antics" and "a law unto itself."

On behalf of the Law Society I took immediate steps to remind the editor, and *Sun* readers, of a few key points. While critical comments on the substance of the judge's ruling are perfectly acceptable, those designed to attack the personal integrity of the judge cross beyond the limits of responsible journalism. The *Vancouver Sun*, which acted both as media outlet and litigant in that case, had full right to disagree with the ruling, but this did not justify personal criticism of an experienced and respected judge.

Around the same time as the *Sun* editorial, an *Abbotsford News* columnist was on a completely separate romp — tossing off unsubstantiated suggestions that BC's judges are financially indebted to "drug-peddling low-lifes." The thrust of the piece was to denigrate judges and the courts rather than to criticize the substance of any particular case. Again, the Law Society publicly challenged the comments.

There are other times when criticism is best left alone — and this is clearly a judgement call. We chose not to counter a few off-base newspaper comments on a high-profile sentencing decision because the majority of the reporting and editorial commentary in the paper was accurate and fairly explained the judge's scope in sentencing.

When is it appropriate for the Law Society — or an individual lawyer — to challenge media criticism of the courts?

Our courts are open, which means open to public scrutiny and criticism. Apart from the parties most intimately involved, most people will never step inside the courtroom or read the reasons for judgment. They will rely on the media to tell them the story.

This is a big responsibility for reporters who are expected to grasp the facts and points of law, describe the players and deliver a story of interest, all within hours and within set word counts. Some reporters do an admirable job in achieving accurate, quality reporting under these pressures; others fall short. In the wake of the reporters' work, editorialists take aim at the more salient and controverisal aspects of a case.

How far wrong does a story need to go, how unfair must a criticism be, before the legal profession should intervene with a counter viewpoint?

As noted by Cory J.A. (as he then was) in the Ontario Court of Appeal decision in *R.* v. *Kopyto*, judges are to expect criticism, even intemperate criticism:

> *Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy.*

If criticism of the courts is expected, our counterpoints are best directed at those instances in which the media have truly crossed the line into unfounded, miguided or personal

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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criticism.

As lawyers, we recognize that judges get just one chance to decide and explain a case. If a party believes that decision is wrong, it can be appealed. But judges cannot engage in a debate of their decisions or defend themselves against unfair criticism. It would be very dangerous to place judges in the midst of public controversy in this way, as they could appear to the public as susceptible to outside influences on how they decide cases. This would be an untenable compromise of judicial independence.

The legal profession has to counter unfair criticism of the judiciary, especially in high-profile matters that will have a serious or lasting impact on public perception. This is particularly important when the criticism amounts to a personal attack on a judge or is founded on a serious lack of understanding about the role of the judge. Such criticism is not only unfair to judges personally, but can improperly undermine public confidence in the justice system.

There should be no doubt: the legal profession has special responsibilities in upholding the independence and integrity of the courts. The *Canons of Legal Ethics* put it this way: "Judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint."

The American Bar Association's Commission on Separation of Powers and Judicial Independence a few year ago recognized this dilemma of needing to respond to criticism, but not to all criticism. The ABA Commission suggested state bar associations focus on these circumstances:

- when the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
- when the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding;
- when the criticism is materially inaccurate, the inaccuracy should be a substantial part of the criticism so that the response does not appear to be nit-picking.

I agree that the legal profession has to counter unfair criticism of the judiciary, especially in high-profile matters that will have a serious or lasting impact on public perception. This is particularly important when the criticism amounts to a personal attack on a judge or is founded on a serious lack of understanding about the role of the judge. Such criticism is not only unfair to judges personally, but can improperly undermine public confidence in the justice system.

It is a responsibility of the Law Society to show leadership in this regard. But individual lawyers can also have a role, particularly in countering criticism of judges that may have an impact within a local community. I am reminded of a compelling letter to the editor of the *Delta Optimist* earlier this year written by counsel for a young offender whose sentence was a matter of local controversy. Taking the high road, the lawyer tactfully pointed out that the editor "did not meaningfully contribute to civil debate" by referring to judges as "clowns" and their judgments as a "joke." He also took the time to point out things the average reader would not know about the case — the character evidence that was before the court and the objectives of sentencing behind the *Youth Criminal Justice Act*.

When lawyers do choose to respond to criticism of the courts, such as by a letter to the editor, I pass on some of the suggestions of the ABA that statements in the letter:

- be concise, accurate and "to the point," with no emotional, inflammatory or subjective language;
- be informative and not argumentative or condescending;
- include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- write in lay terms suitable for inclusion in a newspaper story;
- include the point that the judge had no control or discretion (e.g., decision required by law);
- include an explanation of the process involved (e.g., sentencing, bail, temporary restraining order), where appropriate;
- not attempt to discredit the critic, that is, attack the competence, good faith, motives or associates of the critic;
- consider the cause of the criticism or controversy, which might not be immediately apparent.

It is common sense to show respect, in criticism as well as praise. Be it media commenting on judges, or lawyers commenting on media, we would all do well to remember the words of Jefferson, to do justice as we seek justice.✧

Fee will fund a variety of trust initiatives

Trust administration fee delayed to October 1, 2004

The new trust administration fee, approved by the Benchers earlier this year to fund Law Society trust assurance initiatives, will come into effect on **October 1, 2004**, instead of on July 1, 2004 as originally scheduled. The Benchers are expected to consider new Rules to implement the fee at their meeting in July, and the Law Society's trust review staff intend to issue an interpretation bulletin on the fee, to be available on the Law Society website.

Beginning October 1, 2004, BC lawyers who maintain one or more trust accounts will be required to remit to the Law Society a $10 trust administration fee for each trust transaction (or series of trust transactions relating to one client matter) over $5,000.

The proceeds of this trust administration fee (TAF) will fund various Law Society trust administration programs, including the audit and investigations program, the custodianship program and a new program of trust reports that will replace the Form 47 accountant's report over the next year.

The funding of these trust initiatives through the TAF will be on a go-forward basis.

In the future it is possible that a portion of the fee may also be allocated towards the new innocent insured coverage now provided by the Lawyers Insurance Fund. If a portion of the trust administration fee is allocated as a contribution towards the innocent insured coverage, this would be on a go-forward basis only (and not to pay any claims made against the Special Compensation Fund). Any such allocation would mean that lawyers who carry out trust transactions in effect contribute a greater portion of the overall risks associated with those transactions.

The Law Society's trust administration programs are important in monitoring the proper handling of trust funds within the profession. To date, all practising lawyers have funded these programs. However, since the programs relate to lawyers who hold trust funds and carry out trust transactions, it is appropriate for those lawyers to bear a larger portion of the overall expense. The Benchers recognize, however, that lawyers will need to adopt administrative procedures to calculate and remit the fee.

It is important to note that only one fee will apply per client file or matter; accordingly, multiple trust deposits and disbursements in relation to one client matter will not incur multiple trust administration fees. The deposit or payment of money for legal fees and disbursements will not attract the fee.

Lawyers will be asked to report the fees they owe for the quarters ending March 31, June 30, September 30 and December 31, and to remit those fees by the end of the following month. A penalty of 5% plus interest at a prescribed rate will apply to late payments. As the TAF is not scheduled to take effect until October 1, 2004, the first reporting period would end December 31, with the first remittance due January 31, 2005.✧

PLTC rule changes

The Law Society Rules respecting examinations and assessments in the Professional Legal Training Course have been revised.

Rule 2-44(5.1) now provides that, if a student fails part of PLTC, the Executive Director may allow the student one further attempt to pass the examination or assessment concerned. If a student fails examinations twice and applies to the Credentials Committee for a review of his or her failed standing under Rule 2-45(1), the Committee has discretion to permit one further rewrite.

Rule 2-28 has been amended to reduce from two years to one year the period of time in which a student who has failed PLTC is prohibited from re-enrolling in the admission program, reflecting the current practice of the Credentials Committee.

A student who has failed in three attempts to pass PLTC may not make an application to the Credentials Committee for a review of his or her failed standing: see Rule 2-45(1) and (1.1).

The text of these Rules is available in the Resource Library section of the Law Society website at www.lawsociety.bc.ca and in the June *Member's Manual* amendment package enclosed in this mailing.✧

2005 Law Society fees are due November 30, 2004

Beginning this year, the annual billing for all Law Society membership fees (including the first insurance instalment payable by insured practising members) will be due on **November 30** for the following year. Accordingly, members can expect to receive their 2005 fee billing notices in October this year, with a payment due date of November 30, 2004.

In past years, members had until December 31 to pay Law Society fees for the following year. Members who renewed between January 1 and January 31 were assessed a late payment fee, and those who did not renew by January 31 ceased membership.

This year members are expected to renew by the November 30 due date. If a member renews late (between December 1 and December 31), he or she must pay a late payment fee: Rule 2-72(1). That fee, however, is now lower than in previous years. The late payment fee will be $100 for practising members (down from $200) and $25 for non-practising members (down from $75). There will be no late payment fee for retired members, who previously paid $25. All members who have not renewed by December 31 will have their membership terminated.

In moving up the date for payment of fees, the Benchers are sensitive to the fact that this timing may impact on the cash flow of some lawyers this year. The change, however, is necessary. There were significant problems associated with permitting late renewals in January of the membership year, in particular for practising members.

Until a practising member actually paid all the necessary fees, his or her membership status was uncertain. A lawyer who paid by January 31 was deemed to be a member in good standing during the period for which fees remained unpaid (in other words, the lawyer's membership was made retroactive to January 1). If a lawyer failed to pay by January 31, however, he or she ceased membership. Such a lawyer may have practised law during the month of January without being licensed or insured to do so. The Benchers have concluded that such an anomaly is not in the interests of the profession and does not protect the public.

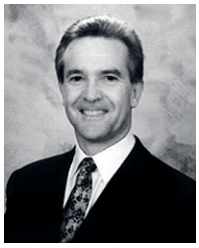
By setting an earlier fee payment date of November 30, 2004 and by lowering late payment fees, the Benchers have sought to establish a fair billing timeline and ensure reasonable penalties.

The Benchers have also amended the rules on applications for an extension to pay fees. A lawyer may apply for an extension of time to pay fees, or to have the late fee waived or reduced, provided special circumstances exist and provided the application is made before December 31 (since the lawyer's membership will cease after that date). Applications for an extension will now be reviewed by staff since the discretion rests with the Executive Director, rather than with the Chair of the Credentials Committee or (in the case of waiving late fees) with the Executive Committee: Rule 2-72(2) and (7).

Lawyers who are appointed to the Bench, pass away or cease membership by reason of total incapacity will be entitled to a prorated return of membership fees, less the CBA component (if applicable) and a modest administrative fee: Rule 2-75(3). Previously, such refunds were reduced by the amount of a prorated non-practising fee. The effect of this change will be to return a greater portion of fees to a member or to his or her estate.

To consult the relevant rules, see the *Member's Manual* amendment package enclosed in this mailing or consult the Resource Library section of the Law Society website at www.lawsociety.bc.ca.✧

Rideout elected Bencher for Westminster



In what proved to be a tightly contested by-election on May 4, Gregory M. Rideout was elected a Bencher for Westminster District in the 8th round of a preferential ballot in a field of nine candidates. He now joins Westminster Benchers Grant C. Taylor and Carol W. Hickman at the Benchers table for the balance of the 2004-2005 term, replacing Peter J. Keighley, QC who was appointed a master of the BC Supreme Court earlier this spring.

Called to the bar in 1979, Mr. Rideout practises criminal law with Rideout Riddell in Coquitlam.

Among his commitments to the profession, Mr. Rideout has served as Secretary-Treasurer, Vice-President and President of the New Westminster Bar Association, as Vice-Chair and Chair of the CBA (BC Branch) New Westminster Criminal Justice Section, as a member of the Tariff Review Committee of the Legal Services Society and as a guest lecturer for CLE and PLTC. As a Bencher, Mr. Rideout is now a member of the Ethics Committee.✧

New Second Vice-President for 2004

Kamloops Bencher **Robert W. McDiarmid**, QC has been acclaimed as the Law Society's new Second Vice-President for 2004.

The Benchers earlier elected Mr. McDiarmid to serve in the role on an interim basis, after First Vice-President Peter J. Keighley, QC was appointed a BC Supreme Court master in February and Victoria Bencher Ralston S. Alexander, QC assumed the office of First Vice-President. As the Benchers' nominee for the position for the balance of 2004, and with no further nominations received under Rule 1-3(6), Mr. McDiarmid is elected to the position of Second Vice-President by acclamation and will assume the position of First Vice-President in 2005 and President in 2006.

A partner with Morelli Chertkow in Kamloops, Mr. McDiarmid practises primarily civil litigation, with emphasis on construction and commercial issues, and in the fields of employment law, administrative law and the law of professional negligence. Since first elected a Bencher in 1998, Mr. McDiarmid has chaired the Special Compensation Fund, Audit and Practice Standards Committees, co-chaired the Pro Bono Initiative Task Force, served on the Executive Committee, Futures, Credentials and Discipline Committees and participated on the Trust Assurance Reform Task Force and Libraries Task Force. His various community commitments have included past service as chair of the BC Housing Management Commission, as trustee of the Board of Directors of Royal Inland Hospital and as a director of Thompson County Community Futures.✧

Appointments

BC Courthouse Library Society – The Benchers have appointed Vancouver Bencher **Russ Tunnicliffe** of Clark, Wilson to the board of directors of the BC Courthouse Library Society to complete the term of service of Bencher Patricia Schmit, QC, ending December 31, 2004.

Surrey Foundation – The Benchers have appointed **Heather Blatchford** of Kane, Shannon & Weiler in Surrey as the Law Society appointee to the board of directors of the Surrey Foundation, to complete the term vacated by Mary Jane Wilson, ending August 31, 2005.✧

Chapter 13, Rule 5 of the Professional Conduct Handbook

When character or fitness is in question — restrictions on employment

The Benchers have amended Chapter 13, Rule 5 of the *Professional Conduct Handbook* to clarify that a BC lawyer has a duty not to employ or retain in any capacity having to do with the practice of law "a person whose character and fitness to be a member of the Bar is in question," without written approval of the Law Society. Rule 5 continues to prohibit lawyers from employing a suspended or disbarred lawyer or a person who has been refused enrolment as an articled student, call and admission or reinstatement on the grounds of lack of good character or fitness.

The Ethics Committee recommended a further clarification of the rule to cover a person who withdraws an application for enrolment or call and admission. Any credentials hearing that was previously ordered in such instance would not proceed and there would be no "refusal" of the application. It was not intended that an applicant in this situation should fall outside the scope of Chapter 13, Rule 5, and the Benchers have specified that the restrictions in the rule extend to a person with respect to whom a credentials hearing has been ordered.

With the addition of paragraphs (c.1) and (d), Rule 5 now reads (in part):

> 5. Except with the written approval of the Law Society, a lawyer must not employ or retain in any capacity having to do with the practice of law a person whose character and fitness to be a member of the Bar is in question, including, but not limited to, a person who, in any jurisdiction,
>
> … (c.1) failed to complete a Bar admission program for reasons relating to lack of good character and repute or fitness to be a member of the Bar,
>
> (d) has been the subject of a hearing ordered, whether commenced or not, with respect to an application for enrolment as an articled student, call and admission or reinstatement, unless the person was subsequently enrolled, called and admitted or reinstated in the same jurisdiction.✧

Downtown Vancouver — articling offers open to August 16

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 16, 2004**.

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).✧

Handbook allows BC lawyers to share fees with foreign lawyers

In recognition that BC lawyers form affiliations with other lawyers, both across Canada and internationally, the Benchers have amended Chapter 9, Rules 2 and 6 of the *Professional Conduct Handbook* to allow the sharing of fees with lawyers outside British Columbia.

Rules 2 and 6 previously allowed a BC lawyer to pay a referral fee to another BC lawyer, to act for a client on a referral where another BC lawyer had charged the client a referral fee and to share fees with another BC lawyer.

The rules did not contemplate BC lawyers sharing fees with other Canadian lawyers, although it was clear that any prohibition on forming partnerships or associations with lawyers in the rest of Canada would be contrary to the 1988 decision of *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591. In *Black* the Supreme Court of Canada found that rules of the Law Society of Alberta prohibiting its members from practising in association with lawyers who were not ordinarily resident in Alberta infringed lawyers' mobility rights under section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*, and could not be justified as a reasonable limit under section 1.

For BC's *Handbook* to be consistent with *Black*, the Ethics Committee asked that Rules 2 and 6 be revised to reflect that BC lawyers may participate in referrals or fee sharing with other lawyers in other parts of Canada. But the Committee went a step further by recommending that the Benchers also contemplate fee arrangements in international practice.

"…[A]s a matter of policy, we think Rules 2 and 6 should apply to lawyers outside of Canada, as well, provided the lawyers are members of a recognized legal profession in a foreign jurisdiction and the arrangement is in compliance with the law of the jurisdiction where the foreign lawyers practise," the Ethics Committee advised the Benchers. "Changing the rules to reflect this principle would permit British Columbia lawyers to affiliate, when appropriate, with lawyers in any jurisdiction. Such a change recognizes the reality that the contemporary practice of law inevitably has interjurisdictional dimensions and British Columbia lawyers ought to be able to enter affiliations that take account of that reality."

As now revised, Rules 2 and 6 of Chapter 9 of the *Handbook* contemplate that a BC lawyer may pay a referral fee to "another lawyer," may act for a client when another lawyer has been paid for the referral or may share fees with another lawyer. In this context, "another lawyer" is now defined as including a lawyer "who is a member of a recognized legal profession in any other jurisdiction and acting in compliance with the law and any rules of the legal profession of the other jurisdiction." The rules continue to prohibit payment of referral fees and fee sharing with non-lawyers, subject to one exception for law firm staff: see footnote 1.

> *… the contemporary practice of law inevitably has interjurisdictional dimensions and British Columbia lawyers ought to be able to enter affiliations that take account of that reality.*
>
> – Ethics Committee

Chapter 9, as amended, is set out in the enclosed *Member's Manual* amendment package. The Chapter also reflects some minor, non-substantive wording changes.✧

Trust protection coverage now in effect

The 2004 compulsory professional liability insurance policy, a copy of which is enclosed in this mailing as *Member's Manual* amendment pages, now provides coverage, not only for negligence (Part A), but for claims arising from the theft of money or property by any BC lawyer relating to his or her practice of law (Part B or "trust protection" coverage). With the addition of Part B coverage, the Law Society has consolidated the processes for responding to claims in which a member of the public suffers a loss when dealing with a lawyer.

Part B coverage responds to claims previously dealt with by the Law Society's Special Compensation Fund. Although the Special Compensation Fund will continue to resolve existing claims, all new claims made on or after May 1 will be considered and dealt with under Part B and handled by the Lawyers Insurance Fund.

For details, see the May-June *Insurance Issues*.✧

Professional development remains voluntary in BC, but the Benchers urge lawyers to target a minimum of 12 hours of coursework and 50 hours of self-study each year

BC lawyers to report annually on voluntary continuing legal education

BC lawyers will be required to report to the Law Society on an annual basis their professional development (continuing legal education) activities for the preceding 12 months. This report will be added to the Annual Practice Declaration beginning this summer.

The Benchers approved this new reporting requirement at the recommendation of the Lawyer Education Task Force, which presented its first interim report in March. The Benchers also now encourage each practising lawyer in BC to complete a minimum of 12 hours of coursework (the equivalent of two full course days) and 50 hours of self-study each year. The targets are set as minimum expectations for the profession and are not mandatory. Continuing legal education remains voluntary for BC lawyers.

The Lawyer Education Task Force, chaired by Cariboo Bencher Patricia Schmit, QC, has contemplated a range of options for the professional development of lawyers, as a means of maintaining and enhancing the delivery of quality legal services.

The Benchers set up the Task Force in June 2002 to develop proposals for a comprehensive, strategic approach to promoting the excellence and competence of lawyers through post-call learning and information support. The Task Force was guided by one of the central goals of the Law Society's strategic plan: "To ensure that lawyers are competent throughout their careers to provide quality legal services."

For BC lawyers, staying current on the law has always been a matter of professional responsibility. Rule 1, Chapter 3 of the *Handbook* provides that, with respect to each area of law in which a lawyer practises, he or she must acquire and maintain adequate knowledge of the substantive law, knowledge of the practice and procedures by which that substantive law can be effectively applied and skills to represent the client's interests effectively.

The Task Force concluded that, by setting recommended minimum expectations for professional development coursework and self-study and by requiring BC lawyers to report on their professional development, the Law Society would publicly affirm its commitment and that of the profession to continuing legal education. The

Society will also be able to collect comprehensive data for tracking continuing education in the profession and determining the future needs of BC lawyers.

Although mandatory continuing legal education (common in the great majority of US states) may possibly lie ahead in BC, the Task Force has concluded that its specific minimum expectations for professional development, combined with mandatory reporting, will meet the Law Society's objectives at present.

A lawyer who does not meet the recommended minimum expectations for professional development, or takes no professional development over the course of a year, faces no consequences on reporting that fact to the Law Society — with one exception. If complaints or concerns have arisen over a lawyer's competency, and if the Practice Standards Committee orders a review of that lawyer's practice, the lawyer's record of professional development activities may be considered in the course of the practice review and be noted in the resulting practice review report. As a result, the issue could be considered by the Practice Standards Committee or by a hearing panel should the lawyer's conduct or competence ultimately warrant a formal hearing.

The mandatory reporting of continuing legal education is not a new idea. Lawyers in both Ontario and Alaska are subject to such reporting requirements, and the issue was raised by Law Society committees in BC dating back to the 1980s.

In recognition of the fact that any new reporting requirements present some inconvenience to lawyers, the Law Society intends to make this report as simple as possible by incorporating it into the Annual Practice Declaration.

Lawyers will be asked to report the continuing legal education courses and programs they have attended in the preceding 12 months, and also to specify how much of that time was devoted to professional ethics or practice management material. They will also be asked to report on the hours they devoted to self-study during that period, excluding any research or review of material undertaken in connection with specific files in their practice.

The Lawyer Education Task Force is developing guidelines to assist lawyers in determining what constitutes coursework and what constitutes self-study. In general terms, it is anticipated that reported hours of coursework will include time a lawyer has committed to:

- live programs, workshops and conferences, such as those offered by the CLE Society of BC, Trial Lawyers Association of BC, Canadian Bar Association, Federation of Law Societies and other continuing education providers,
- in-house legal education programs offered to employees by law firms and in-house legal departments,
- telephone programs, such as teleseminars,
- interactive online programs, such as those of the CLE Society of BC,
- video replay programs in an organized group setting,
- organized education discussion groups, such as at CBA section meetings,
- participation in a post-LL.B. degree program, and
- preparation for and teaching in PLTC, continuing professional education programs and law school programs.

Reported hours of self-study are expected to include hours a lawyer has spent in the study of legal material in the following media:

- print material (such as publications of continuing legal education providers, legal texts, case law and articles in the *Advocate*, Law Society publications, *Canadian Bar Review*, *BarTalk* and other legal journals),
- internet material, including online versions of the publications noted above,
- CD-ROM,
- videotape (other than in an organized group setting), and
- audiotape.

Lawyers will receive more information on the filing of their Annual Practice Declaration in advance of their next filing deadline.

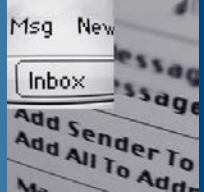
If you have any questions about reporting on professional development activities, please contact Alan Treleaven, Director of Education and Practice, at atreleaven@lsbc.org or 604 605-5354 (toll-free within BC 1-800-903-5300).✧

Annual Practice Declaration will be filed online beginning this summer

The new professional development reporting requirements will be incorporated into the Law Society's Annual Practice Declaration beginning this summer.

In the months ahead, the Law Society will introduce online filing of the Annual Practice Declaration by practising lawyers in BC. The Declarations of individual lawyers in a law firm will be filed in the same timeframe as the firm's filing of its annual Trust Report, which means filing deadlines will vary from firm to firm. Firms will receive details on their filing requirements from the Law Society's trust review staff in advance of their filing dates.

Practising lawyers who are exempt from insurance, such as in-house counsel and Crown Counsel, will file the Annual Practice Declaration in September.



Footnote added to Handbook to affirm prosecutorial discretion

The Benchers have amended Chapter 8, Rule 18 "Duties of prosecutor" in the *Professional Conduct Handbook* by adding a footnote to clarify that the rule is not intended to interfere with the proper exercise of prosecutorial discretion.

The change was made in light of the Supreme Court of Canada decision in *Krieger* v. *Law Society of Alberta*, [2002] 3 S.C.R. 372; 2002 S.C.C. 65 (see below). In that case, the Court found that the exercise of the prosecutorial discretion must be treated with deference by the courts, the executive branch of government and provincial law societies. A law society could, however, review an allegation that a prosecutor, acting dishonestly or in bad faith, failed to disclose relevant information.

Chapter 8, Rule 18 of the *Handbook*, as amended by footnote 1, reads:

Duties of prosecutor

18. When engaged as a prosecutor the lawyer's prime duty is not to seek a conviction, but to see that justice is done. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or to an unrepresented accused of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.[1]

[1] In view of the policy, legal and constitutional considerations that favour permitting prosecutors to function independently, this rule is not intended to interfere with the proper exercise of a prosecutor's discretion. See *Krieger* v. *Law Society of Alberta*, [2002] 3 S.C.R. 372 and other cases.✧

Krieger v. *Law Society of Alberta*

In *Krieger*, a prosecutor in Alberta was assigned to prosecute an accused charged with murder. Prior to the commencement of the preliminary hearing, the prosecutor received the results of DNA and biological tests conducted on blood found at the scene of the crime, which implicated a different person than the accused. Ten days later, he advised counsel for the accused that the results of the testing would not be available in time for the preliminary hearing. Defence counsel only learned of the testing results at the preliminary hearing and complained to the Deputy Attorney General that there had been a lack of timely and adequate disclosure.

The prosecutor was reprimanded and removed from the case after a finding that the delay was unjustified. Six months later, the accused complained to the Law Society of Alberta about the prosecutor's conduct. The prosecutor sought an order that the Law Society had no jurisdiction to review the exercise of prosecutorial discretion by a Crown prosecutor and an order that the Rule of the Alberta *Code of Professional Conduct* requiring a prosecutor to make timely disclosure to the accused or defence counsel was of no force and effect. The prosecutor's application was dismissed in the Court of Queen's Bench, but that decision was overturned by the Court of Appeal.

On further appeal to the Supreme Court of Canada, the Court held that the Rule and Commentary in the *Code of Professional Conduct* were *intra vires* the Legislature of Alberta.

The Court determined that the exercise of prosecutorial discretion must be treated with deference by the courts and members of the executive, as well as by statutory bodies such as provincial law societies. As such, it will not be reviewable except in cases of flagrant impropriety, such as dishonesty or bad faith. Without being exhaustive, the core elements of prosecutorial discretion encompass whether to: (a) bring the prosecution of a charge laid by police; (b) enter a stay of proceedings in either a private or public prosecution, (c) accept a guilty plea to a lesser charge, (d) withdraw from criminal proceedings altogether and (e) take control of a private prosecution.

The Court found that the disclosure of evidence is not a matter of prosecutorial discretion but rather is a legal duty of the prosecution. It followed that the Law Society had the jurisdiction to review an allegation that a Crown prosecutor, acting dishonestly or in bad faith, failed to disclose relevant information. This was so notwithstanding that the Attorney General had reviewed the conduct from the perspective of an employer.✧

Benchers pass rule to fight money laundering

As earlier reported, the Benchers have adopted a new financial rule to ensure that BC lawyers are at the forefront of the fight against money laundering. The new rule took effect on May 7, 2004.

Under Rule 3-51.1 (set out below), lawyers are prohibited from accepting $10,000 or more in cash, other than in circumstances in which the lawyer receives the funds from a law enforcement agency; pursuant to a court order; in the lawyer's capacity as executor of a will or administrator of an estate; or as professional fees, disbursements, expenses or bail.

Like the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* regulations, the new rule defines a cash transaction as the receipt of $10,000 or more in cash in a single transaction or the receipt of two or more cash amounts in a 24-hour period that total $10,000 or more. Clients who wish to deposit $10,000 or more in cash with a lawyer must convert the cash into negotiable instruments through a financial institution before depositing the money with a lawyer.

PC(ML)TFA regulations require all professionals who accept $10,000 or more in cash to report the transaction to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). Lawyers are currently exempt from *PC(ML)TFA* reporting requirements after the Law Society of BC, along with the Federation of Law Societies of Canada, obtained an injunction from the BC Supreme Court in November, 2001. The law societies argued that the *PC(ML)TFA* violated the constitution because it required lawyers to report privileged client matters to the government, contrary to the concept of an independent legal profession. The BC Supreme Court ordered that lawyers be exempt from the reporting requirements of this legislation until the constitutional issue could be heard. The BC Court of Appeal upheld the decision, and the superior courts in several other provinces granted similar injunctions.

The federal government later agreed to be bound by the exemption in all Canadian jurisdictions until the court case is concluded. The trial is set for November, 2004. A number of law societies across the country are now considering rules similar to Rule 3-51.1.

While there are few cases of lawyers knowingly laundering money on behalf of criminal or terrorist organizations, the Law Society of BC recognizes that the legal profession must take steps to prevent money laundering or being led unwittingly into advancing criminal schemes. Rule 3-51.1, along with longstanding Law Society rules prohibiting lawyers from engaging in illegal activity, will ensure that BC lawyers effectively combat money laundering without the need for government intrusions into lawyer-client privilege and confidentiality.

Rule 3-51.1 reads:

Cash transactions

3-51.1 (1) This Rule applies to a lawyer when engaged in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

(a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;

(b) purchasing or selling securities, real property or business assets or entities;

(c) transferring funds or securities by any means.

(2) This Rule does not apply to a lawyer when

(a) engaged in activities referred to in subrule (1) on behalf of his or her employer, or

(b) receiving or accepting currency

(i) from a peace officer, law enforcement agency or other agent of the Crown,

(ii) pursuant to a court order, or

(iii) in his or her capacity as executor of a will or administrator of an estate.

(3) While engaged in an activity referred to in subrule (1), a lawyer must not receive or accept an amount in currency of $10,000 or more in the course of a single transaction.

(4) For the purposes of this Rule,

(a) foreign currency is to be converted into Canadian dollars based on

(i) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily Memorandum of Exchange Rates in effect at the relevant time, or

(ii) if no official conversion rate is published as set out in paragraph (a), the conversion rate that the client would use for that currency in the normal course of business at the relevant time, and

(b) two or more transactions made within 24 consecutive hours constitute a single transaction if the lawyer knows or ought to know that the transactions are conducted by, or on behalf of, the same client.

As amended, Rule 3-47 defines "currency" to include "current coins, government or bank notes of Canada or any other country."

This Rule is included in the enclosed *Member's Manual* amendment package.✧

From Pro Bono Law of BC

The future of pro bono in Canadian law firms

Law firms in Canada have a long history of delivering pro bono legal services, thanks to the efforts of individual lawyers who believe in the work. Why do lawyers take on pro bono cases? Not surprisingly, the reasons vary. It can be inspired by a sense of professional duty, personal commitment to a cause or a sense of moral obligation. It may also reflect the lawyer's interest in expanding his or her horizons and skills, doing something different from the firm's day-to-day work or enhancing opportunities for advancement or recognition within the bar.

But if individual lawyers have consciously stepped up to the challenge of helping poor people in need, law firms are just now starting to look at a formal commitment to pro bono programs.

It is true that many firms have encouraged their lawyers to take on pro bono work, and some have even adopted written pro bono policies. But as recently pointed out by Paul Schabas, a partner at Blake, Cassels and Graydon LLP in Toronto, the problem with these policies is that they "say the right things" but are generally short on substance. As a result, the pro bono efforts of law firms have remained largely unstructured.

Most Canadian law firms have yet to build pro bono into their corporate culture, and have yet to derive the benefits of making pro bono part of their corporate identity. But that is changing.

Canada's national law firms are in the midst of that change. Managing partners of several national firms were among the 150 participants from across Canada who attended the first national conference, held May 6-7 in Toronto under the banner of "*Building the Public Good: Lawyers, Citizens and Pro Bono in a Changing Society*." Organized by Pro Bono Law of Ontario and hosted by the Law Foundation of Ontario, Legal Aid Ontario, the Law Society of Upper Canada and the Ontario Bar Association, the conference served as a think-tank for law firms and leaders in the legal profession and judiciary, including the Chief Justice of Canada, the Treasurer of the Law Society of Upper Canada and the national President of the Canadian Bar Association.

Will pro bono become part of our corporate culture? Canada's first national pro bono conference, held May 6 and 7 in Toronto, drew lawyers from across the country interested in formalizing a commitment to pro bono.

For several of the national firms, the future path is clear. They intend to take a more formal, organized approach to pro bono. Through new pro bono policies, they expect to address such pivotal issues as what office resources will be available for pro bono work and what credit they will give to lawyers who participate in a firm's pro bono program. In particular, the challenge is for law firms to give actual credit for pro bono work toward a lawyer's billable hour targets. Paul Schabas summed it up succinctly, "you must put your money where your mouth is."

The business case for pro bono was the focus of one session at the Toronto conference. Without a doubt, most firms want some empirical evidence so as to be persuaded of the value of a pro bono policy. Some lawyers even raised the perplexing matter of budgeting for pro bono — is it a cost or is it revenue? Among the best evidence for skeptics, proponents pointed to the list of the 100 most profitable law firms in the United States, published in *American Lawyer*. All these leading US firms have highly developed pro bono policies. According to conference speaker Esther Lardent, President and Chief Executive Officer of the Pro Bono Institute at Georgetown University Law Center, profitability has not suffered in these firms from the implementation of pro bono policies;

in fact, in many cases, profitability has increased.

While adopting a pro bono policy will always involve some leap of faith, several of the national law firms are finding that a strong business case can be made. Some clients of law firms with international offices, for example, may expect to be advised of the firm's pro bono policy as a matter of corporate social responsibility.

From a law firm perspective, an attractive pro bono policy also serves as a recruitment tool and offers opportunities for professional development, team-building and a feeling of loyalty and pride. In the view of conference speaker Michael Barrack, a partner with McCarthy Tétrault, LLP, a pro bono policy improves the quality of life in a law firm and that leads to workplace satisfaction which, in turn, leads to retention of the firm's lawyers.

Canadian law firms are just now joining a pro bono movement that has already firmly taken root in the United States and Australia.

Future issues of the *Benchers' Bulletin* will feature news on pro bono policies in BC and the options a law firm can explore in developing its own policy. A firm might, for example, identify the types of cases or clients most suited to the firm's practice or might commit to an ongoing partnership with one or more community organizations in need of pro bono services. All speakers at the Toronto conference noted the need for a law firm to "start small" and to develop a highly successful project to maintain credibility.

Pro Bono Law of BC can offer ideas for partnerships between law firms and community groups in BC, and create opportunities for connection.

For more information, please contact Pat Pitsula, Executive Director, Pro Bono Law of BC at ppitsula@probononet.bc.ca or call at 604 893-8932, ext. 1.✧

Benchers help Pro Bono Law of BC

The Benchers have approved a $15,000 grant to Pro Bono Law of BC for 2004.

Pro Bono Law of BC is a non-profit society that strives to facilitate the provision of pro bono legal services and to raise the profile of lawyers who deliver pro bono services in BC.

A joint initiative of the Law Society of BC and the BC Branch of the Canadian Bar Association, Pro Bono Law of BC has been funded primarily by the Law Foundation of BC and the Law Society.

Pro Bono Law of BC plans outreach to the profession to explain the value of pro bono in law firms and to promote the pro bono opportunities that BC lawyers can pursue, from individual participation in clinical programs to pro bono partnerships between law firms and community organizations.

This past year, Pro Bono Law of BC has worked with the Law Society on the extension of insurance coverage to non-practising and retired members who wish to provide services through approved pro bono programs, and currently is one of several organizations working on a BC Supreme Court civil duty counsel project.

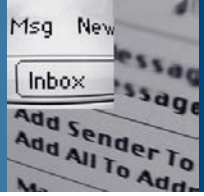
Electronic publications ahead

On the advice of the Law Society Technology Committee, the Benchers have approved the electronic distribution of the *Benchers' Bulletin* and other Law Society publications to BC lawyers, beginning in 2005, subject to any necessary Rule changes. Lawyers who wish to continue to receive the publications in print, however, will be given the choice to do so at no cost.

While the Law Society already sends regular broadcast email to the profession and maintains online versions of it publications (www.lawsociety.bc.ca), the transition from mail to electronic distribution of print publications is expected to facilitate timely delivery and cost savings.

As a means of the Law Society reaching the profession with electronic communications, the Benchers have also accepted a Technology Committee recommendation that the Society create, provide and maintain for each member a webmail address to which Law Society electronic publications will be delivered. Under a webmail system, a lawyer would be able to retrieve material from his or her webmail box by logging into a section of the Law Society website or, alternatively, by forwarding the webmail box to the lawyer's office email so that messages are automatically forwarded.

The webmail system is expected to be introduced later this year.✧



Online learning for lawyers comes of age

CLE courses online

This spring over 500 BC lawyers and support staff from 65 communities across the province took courses from the comfort and convenience of their own office, or from home — by choosing the new real-time web-conferencing option offered by the CLE Society of BC. These online courses included an in-depth look at the new efiling systems at the Land Title Branch, the Corporate Registry and the Manufactured Home Registry, as well as "year in review" sessions on various areas of law.

CLE delivers web-conferencing courses through video and synchronized PowerPoint slides at the desktop and through audio via a telephone conference connection. It is easy, and it saves on travel time. If you are intrigued by online CLE, you are not alone — even before the first courses were available, six in 10 BC lawyers said they planned to try one. Watch for the upcoming offerings in CLE's fall calendar, expected to mail and be available online (www.cle.bc.ca) in late June.

Another initiative just ahead is *Anytime Online*, a service that allows lawyers to select individual sessions from recent CLE courses for purchase and on-screen viewing. With flexibility to choose course modules, lawyers can access the updates they need, when they need them. Each module is 25 to 30 minutes long and includes the video portion of the course, along with speakers notes on PowerPoint, which can be synchronized with the presentation, viewed separately or downloaded for later reading. Watch for details from CLE at the end of June.

Practice manuals on the web

Also making an online debut this summer are six of CLE's most popular manuals: the *BC Real Estate Practice Manual*, *BC Family Practice Manual*, *Family Law Sourcebook for British Columbia*, *BC Company Law Practice Manual*, *BC Motor Vehicle Accident Claims Practice Manual* and *BC Probate and Estate Administration Practice Manual*.

The online versions will offer several advantages for the busy lawyer, including speed of access and searchability. The manuals will feature links from commentary to full-text cases and legislation as well as downloadable forms and precedents. CLE will announce details soon.

Thanks to the Law Foundation of BC for its generous funding towards both of these online initiatives.✧

A look at the 2004 Equity and Diversity Committee

This year's Equity and Diversity Committee, together with its four working groups, is as diverse and energetic as the BC bar as a whole. At the end of 2003, a number of long-term committee members completed their service of assisting the Law Society on such issues as multiculturalism, gender equality, disability and sexual orientation. Here are the current members:

Anne K. Wallace, QC – Committee Chair; Bencher from Victoria; Crown Counsel in Youth Court

Patrick Kelly – Committee Vice-Chair; member of the Women in Law working group; Lay Bencher from Vancouver; Director with Indian and Northern Affairs Canada

Aleem Barmal – CBA Liaison; Vancouver lawyer with the Community Legal Assistance Society

Halldor Bjarnson – Chair of the Disability Research working group; Vancouver lawyer at Andrews, Bjarnson

Professor Gerry Ferguson – Chair of the Aboriginal Law Graduates working group; professor at the University of Victoria

Lisa Fong – Member of the Court Interpreters working group; Vancouver lawyer with Ng & Ariss

Elizabeth Hunt – Member of the Aboriginal Law Graduates working group; sole practitioner in Aboriginal law at Alkali Lake

Wynn Lewis – Member of the Women in the Law working group; Victoria lawyer with the Ministry of the Attorney General

Karen McMillan – Vancouver lawyer at Lawson, Lundell

Margaret Ostrowski, QC – Chair of Women in the Law working group; Bencher from Vancouver; sole practitioner

Lila Quastel – Member of the Women in the Law and Disability Research working groups; occupational therapist consultant in Vancouver

Lillian To – Member of the Interpreters working group; Lay Bencher from Vancouver; Executive Director of SUCCESS

Baldwin Wong – Chair of the Interpreters working group; Multicultural Social Planner for the City of Vancouver.

Other volunteers sit on the Committee's working groups. Each working group sets its priorities for the year and does the leg work to accomplish its goals. Working group reports are discussed by the Committee and may be referred to the Benchers.

From time to time, positions open up on the working groups. If you are interested in more information or would like to be considered for a position, please contact Kuan Foo at 604 443-5727 or kfoo@lsbc.org.✧

Aboriginal Practice Points ... a free online resource

Aboriginal rights and legal issues affect practice in almost every area of law in BC. Thanks to Law Foundation funding, the CLE Society has recently helped to bridge the educational gap by producing materials that will assist lawyers when acting for Aboriginal clients or on legal matters involving Aboriginal interests.

Introduced on the site last fall, these papers will be maintained and updated through funding from the Law Society.

Visit the "Practice Desk" at the CLE website (www.cle.bc.ca) to browse the collection of 19 papers covering nine areas of law, including both key practice points and in-depth consideration from leading lawyers in the field.

Consider, for example, the set-up of a business on a reserve. Here are some of the questions to canvass:

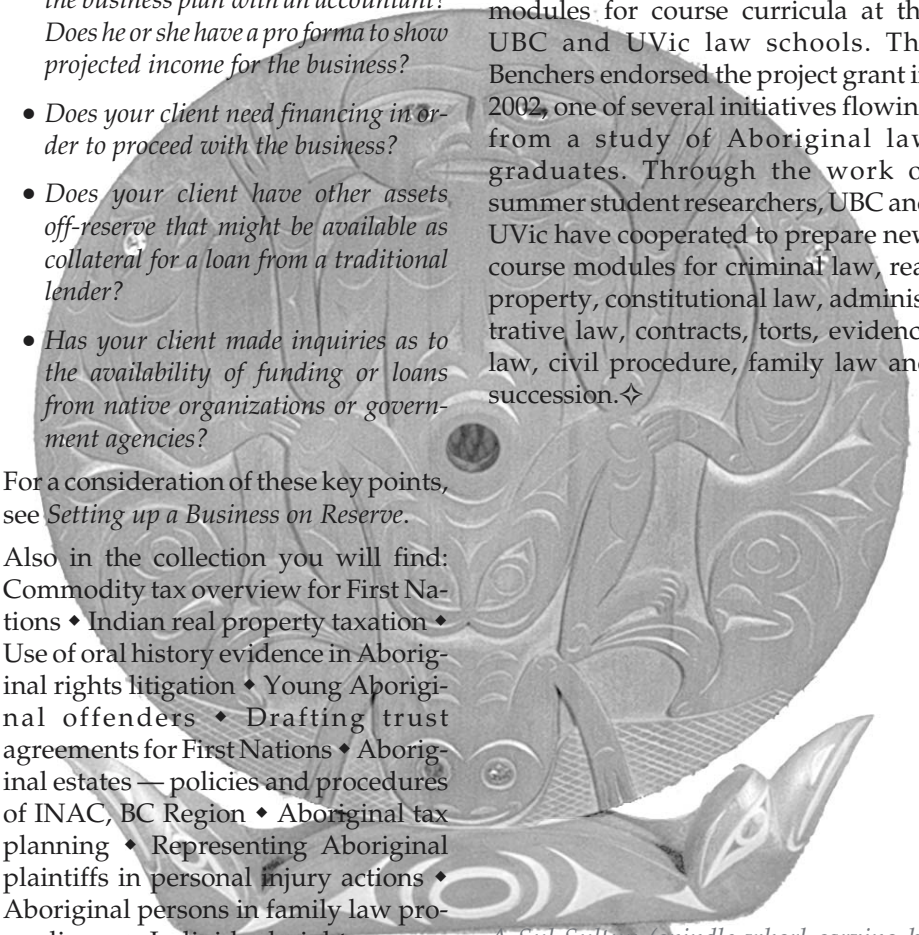
- *What is the nature of your client? Are you dealing with a band, a tribal council, an Indian or a status Indian? If the party is not certain as to his, her or its status, this must be determined from the band or INAC.*
- *Do you know the nature of the proposed business, and whether or not there are any special requirements arising from the business?*
- *Does the client intend to set up the business on a reserve and, if so, does the client have any property rights on the reserve?*
- *If the client does not have a Certificate of Possession, Certificate of Occupancy or a Custom Holding, does the client intend to lease property from another party? If the client is not a band member, he or she may not be able to lease except under ss. 28 or 58 of the Indian Act.*
- *Who is the other party, and what is the nature of the land interest?*
- *Does the band have any special zoning bylaws that might restrict use of the property?*
- *Does the band have any special taxation bylaws that might affect your client?*
- *Is there any provincial legislation of a general nature that might affect this particular business?*
- *Does your client intend to take any partners into the business and, if so, what is their status?*
- *Does your client have a business plan to determine the financial viability of the business? Has he or she discussed the business plan with an accountant? Does he or she have a pro forma to show projected income for the business?*
- *Does your client need financing in order to proceed with the business?*
- *Does your client have other assets off-reserve that might be available as collateral for a loan from a traditional lender?*
- *Has your client made inquiries as to the availability of funding or loans from native organizations or government agencies?*

For a consideration of these key points, see *Setting up a Business on Reserve*.

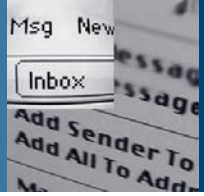
Also in the collection you will find: Commodity tax overview for First Nations ◆ Indian real property taxation ◆ Use of oral history evidence in Aboriginal rights litigation ◆ Young Aboriginal offenders ◆ Drafting trust agreements for First Nations ◆ Aboriginal estates — policies and procedures of INAC, BC Region ◆ Aboriginal tax planning ◆ Representing Aboriginal plaintiffs in personal injury actions ◆ Aboriginal persons in family law proceedings ◆ Individual rights on reserve ◆ Acquiring interests in reserve lands ◆ Duty of business to consult with and accommodate First Nations ◆ Understanding the development process: Structuring the lease for marketing and financing concerns ◆ Estates under the *Indian Act* ◆ Aboriginal families and the *Child, Family and Community Service Act* ◆ Division of marital property when assets are located on a reserve ◆ Wills for First Nations persons ◆ Creditors' remedies under the *Indian Act* ◆ Indian Lands Registry.

New Aboriginal law components for BC law schools

In 2004 the Law Society is expected to complete its funding of a three-year project to fund Aboriginal law modules for course curricula at the UBC and UVic law schools. The Benchers endorsed the project grant in 2002, one of several initiatives flowing from a study of Aboriginal law graduates. Through the work of summer student researchers, UBC and UVic have cooperated to prepare new course modules for criminal law, real property, constitutional law, administrative law, contracts, torts, evidence law, civil procedure, family law and succession.✧



A Sul-Sultun (spindle whorl carving by Charles Elliott) has adorned the UVic Faculty of Law since 1996, a symbol of hope for healing, harmony and balance between Anglo-Canadian and First Nations legal traditions.



Benchers will consider rules for limited liability partnerships

The *Partnership Amendment Act, 2004* (Bill 35) — which introduces limited liability partnerships in BC — passed Third Reading in the Legislature on May 4 and is expected to be proclaimed in effect late this fall.

Consequential amendments to the *Legal Profession Act* will permit the Benchers to pass rules to authorize lawyers and law corporations to practise law through limited liability partnerships (LLPs) and to set the conditions and requirements for doing so: see sections 30, 83.1 and 84 of the *Legal Profession Act* in the enclosed *Member's Manual* amendment package. *The Benchers are expected to consider rules in the coming months to regulate the use of LLPs by lawyers — please watch the Law Society website and the Benchers' Bulletin for updates.*

A limited liability partnership structure shields an individual partner from personal liability for the debts of the partnership or for negligence and wrongdoing of other partners, except to the extent of the partner's share in the partnership's assets. Individual partners continue to incur personal liability for their own negligence or wrongful acts and for failing to take action when they know of another's negligence or wrongful act.

On proclamation of Bill 35, section 104 of the *Partnership Act* will provide:

Limited liability for partners

104 (1) Except as provided in this Part, in another Act or in a partnership agreement, a partner in a limited liability partnership

(a) is not personally liable for a partnership obligation merely because that person is a partner,

(b) is not personally liable for an obligation under an agreement between the partnership and another person, and

(c) is not personally liable to the partnership or another partner for an obligation to which paragraph (a) or (b) applies.

(2) Subsection (1) does not relieve a partner in a limited liability partnership from personal liability

(a) for the partner's own negligent or wrongful act or omission, or

(b) for the negligent or wrongful act or omission of another partner or an employee of the partnership if the partner seeking relief

(i) knew of the act or omission, and

(ii) did not take the actions that a reasonable person would take to prevent it.

(3) Subsection (1) does not protect a partner's interest in the partnership property from claims against the partnership respecting a partnership obligation.

To obtain and maintain LLP status, every limited liability partnership in BC will need to register at the Corporate Registry, notify clients of its change in status, include the letters "LLP" in its business name and make an up-to-date list of partners available to the public at all times. A limited liability partnership from another province that intends to practise in BC must register extraprovincially.

In the case of the professions, including the legal profession, section 97 of the *Partnership Act* further provides:

97 If a partnership that wishes to register as a limited liability partnership is a professional partnership, that partnership must not register as a limited liability partnership unless

(a) members of that profession are expressly authorized by or under the Act by which that profession is governed to carry on the practice of the profession through a limited liability partnership, and

(b) any prerequisites to that authorization that have been established under that Act have been met by the partnership.

The Law Society's Limited Liability Partnership Task Force is expected to bring forward rule recommendations to the Benchers this summer on the requirements for lawyers to participate in limited liability partnerships.

The Law Society's Limited Liability Partnership Task Force, chaired by Bencher David Zacks, QC, with members Bruce LeRose and Jocelyn Kelley of Blake Cassels, is expected to bring forward rule recommendations to the Benchers this summer on the requirements for lawyers to participate in limited liability partnerships in the practice of law.✧

Task force appointed

Presidential honoraria come under review

An independent blue ribbon task force is reviewing the annual honoraria paid to the Law Society President and Vice-Presidents. Any recommendation the task force might make for an increase in these honoraria would first be put to the profession for approval in a referendum and would not take effect this year.

An honorarium for the Law Society President was first introduced in 1991. In 2000 the President's honorarium increased from $50,000 to $75,000 and the First and Second Vice-Presidents were accorded an honorarium of $25,000 each. These amounts were approved by BC lawyers voting in a referendum in February, 2000 at the recommendation of a committee comprised of R. Paul Beckmann, QC, Trudi L. Brown, QC, G. Leigh Harrison, QC and Martin R. Taylor, QC. The honoraria have not increased since that time.

An honorarium is intended to provide some compensation to a President for time spent in service to the profession, and to enable the President to devote more professional time to Law Society affairs. The payment has also been supported as a way to permit Benchers who are sole practitioners or members of small firms to stand for election as President, thus expanding candidacy to a broader cross-section of the profession.

Offering an honorarium in each of the three years of the presidential track recognizes that increased responsibilities, and the financial impact of those responsibilities, begin as soon as a Bencher is elected Second Vice-President.

The committee that reviewed the presidential honoraria in 2000 recommended a regular review in future years.✧

Restrictions on lawyers enforcing liens are dropped from Handbook

The Benchers have removed a footnote in Chapter 10 of the *Professional Conduct Handbook* because it could unnecessarily compromise a lawyer's right to assert a possessory lien over a client's file in the collection of an unpaid fee.

Chapter 10, footnote 2 of the *Handbook* previously read:

> 2. When, upon severance or withdrawal, the question of a right to a lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.
>
> Before accepting employment, the successor lawyer should be satisfied that the lawyer formerly acting for the client has withdrawn or has been discharged. It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any account owed to the lawyer formerly acting, especially if the latter withdrew for good cause or was capriciously discharged. However, if a trial or hearing is in progress or is imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

The Benchers agreed to remove this footnote at the recommendation of the Ethics Committee. "At law a lawyer has a right to a possessory lien over files, documents, funds or other personal property of a client in the lawyer's possession until the client has paid all outstanding accounts owing to the lawyer," the Ethics Committee observed in its report to the Benchers in April. "Footnote 2 could create a conflict between a lawyer's right to assert a lien over a client's file and a lawyer's ethical obligation to ensure that the client is not prejudiced materially in an uncompleted matter."

The Ethics Committee pointed out that a solicitor's lien encourages clients to pay or arrange payment of their lawyers' bills and that footnote 2 of the *Handbook* removed that incentive. Most significantly, section 77 of the *Legal Profession Act* already provides sufficient legal protection for clients. Any client who believes that he or she will be prejudiced if a lawyer retains the client's file can apply to a court to the have the file delivered on appropriate terms.

The removal of the footnote from Chapter 10 of the *Handbook* is reflected in the *Member's Manual* amendment package in this mailing.✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

The criminal law advantage: basic tools get the job done

♪ Tell him to bring me a loaf of bread, a bottle of the very best wine,
And not to forget the fair young lady as did release him when close confined. ♪

Traditional English ballad

Ah, the simple life! It has many virtues. Fortunately, criminal law can come closer to technological simplicity than perhaps any other area of practice. The systems needed are straightforward and easily implemented. Moreover, they are easily integrated into the busy criminal lawyer's day and way of work.

The heart of any criminal lawyer's practice is the calendar. The office needs to know a lawyer's schedule to make appointments with potential and existing clients. In court, the lawyer needs to know the appointment schedule to maximize court bookings. Avoiding conflicting appointments is equally important.

All client, witness and associated names and the contact information for each file must be easily accessible, both in the office and out. If conversations need to be reduced to writing, that should be done while they are still fresh. As well, the criminal lawyer needs to record all time spent on files, for billing purposes.

Mobile communication is a necessity since the criminal lawyer is constantly on the road and may receive calls from potential clients at all hours of the day and night. The system should provide notification of upcoming appointments, both in and out of the office. Office bring-forward or court call-forward dates should be incorporated into an office tickler system that prompts the firm to take action well in advance of court dates or other critical events. This is especially important when the firm is dependent on having funds in trust well prior to court dates — as failure to monitor and replenish retainers in advance of trial can lead to hurried applications to be taken off the record or, worse yet, being unpaid for work following completion of the trial (when the chances of being paid are near zero).

In the office, the criminal law secretary needs a basic word processing and document assembly capability, as criminal lawyers typically do not draft documents as complicated as in other areas of practice. A well-organized document precedent system increases workflow and efficiency. If possible, client, witness and expert contact information should be merged from the practice management system directly into letters, pleadings and other documents to reduce errors and increase efficiency (enter-it-once, reuse-it-many-times technology).

The accounting system should accumulate WIP and track all disbursements incurred on a file for ease of billing. Since the Legal Services Society prefers e-billing, the office accounting system should be able to easily create and transmit e-bills to increase cash flow, particularly since e-billing results in easier and faster payments to lawyers. About 1,200 lawyers in BC currently take LSS referrals and could register to bill LSS using e-billing (only about half take advantage of this option). Accordingly, it would be desirable for the practice management system to collect time and billing data concurrent with task completion and to transmit that information directly to the accounting system, to avoid duplicate keystrokes, to increase workflow and cash flow and to allow for quick rendering of accounts.

Conflicts should surface quickly and easily, particularly for a lawyer who does ad-hoc Crown work as well as defence work. Accordingly, the lawyer should be able to carry a complete listing of the contacts of the firm, including all clients, witnesses and other people incidentally involved with other files, both active and closed.

So what are the technologies a criminal lawyer can look to for support? While a paper calendar is easy to carry, it must be updated and checked

manually against the master calendar in the office. This is a tedious process at best and one potentially fraught with error. A PDA (personal digital assistant), interfacing with the office electronic practice management system, should allow automatic synchronization of both calendars (PDA and office master) upon a lawyer's return to the office. It should also be able to display warnings if any conflicts have occurred between the two systems. Systems that meet this need are:

1. Amicus Attorney and any PDA with a Palm operating system, such as:
   - Palm Zire or Palm Tungsten W (which is both a PDA and a cell phone)
   - Sony Clie
   - Kyocera 7135 smartphone (which combines a cell phone with a Palm PDA)
   - Treo 600 (which is also a cell phone and a Palm PDA).

   All of these systems allow a lawyer to synchronize directly with the Amicus Attorney practice management system and therefore carry a lawyer's full calendar, contact list and to-do's. Furthermore, since there is a notepad feature in all of these devices, the lawyer can write down billable time or acquire a Palm application that will track time and transfer it to the accounting system.
2. Amicus Attorney or Time Matters and any Pocket PC device, such as:
   - PDAs from Toshiba, Dell and Hewlett Packard
   - Audiovox Thera (which combines a cell phone and Pocket PC)

   These devices would synchronize the practice management calendar, contact information and task data via Microsoft Outlook.
3. Amicus Attorney or Time Matters and a Blackberry.

   The Blackberry can synchronize with Amicus Attorney or Time Matters via Microsoft Outlook (you need the client-server version of Amicus Attorney V or the Premier Edition of Amicus Attorney X). The Blackberry allows for a travelling criminal lawyer to communicate via email with the office by virtue of its "always on" email capability.

A word of warning — no device equipped with a digital camera is permitted in BC courthouses as recording devices are prohibited. So while lawyers may use their regular cell phones, pagers and beepers in public areas of a courthouse and carry them into a courtroom (provided the devices are turned off), camera phones are prohibited.

Amicus Attorney or Time Matters, as well as other legal practice management systems, can perform the back-end office organization for the practice by associating all relevant parties with their appropriate files and by keeping witness and contact information and to-do lists. They allow the office to keep all files up to date by automatically generating BF reminders, either based on individually created BFs or, better yet, based on a "linked event" precedent. For example, a lawyer would wish to have one global linked-event criminal trial precedent that generates reminders for each of the following events, based on the trial date:

- automatically checking for a full retainer X number of days before trial
- sending letters to the client to advise of the upcoming court date
- reminding the lawyer to serve all subpoenas on witnesses X days before trial
- checking to see that all subpoenas were in fact served
- checking for the production of all Crown evidence before trial.

Both Amicus Attorney and Time Matters allow for the creation of linked precedents that incorporate all relevant events — and these can be reused on any criminal file once the trial date is known. Creating such a reminder precedent and using it over and over again allows a lawyer to concentrate on meaningful work and not on file tickler and preparation minutia.

An advantage of having all dates in the office master electronic calendar (such as that in Amicus Attorney or Time Matters) is that, if a lawyer is ever absent due to illness or other cause, anyone in the firm can open up the lawyer's calendar, see the upcoming appointments and take appropriate

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SCC updates

In addition to having technologies that complement a criminal law practice, a criminal lawyer needs to know what is happening in the courts. As a quick reference, consider the Supreme Court of Canada L@wLetter, published by Eugene Meehan, QC, which includes an email summary of:

- leaves to appeal granted
- leaves to appeal dismissed
- reconsideration of leaves to appeal
- current court session
- next court session
- next motion day.

This free resource is very helpful for those in the criminal law area (as well as other practice areas). To subscribe, send an email to emeehan@langmichener.ca.

Interlock Member Assistance Program

Grief, trauma and lawyer response

by Nancy Payeur, Regional Director, Interlock

Monday morning, just after a staff meeting, one of the senior partners doubles over, clutching his chest in pain. Moments later a colleague attempts to revive him, while others call 911. He loses consciousness and is rushed to hospital where he later dies.

A much beloved office manager is diagnosed with terminal cancer. After a year of aggressive chemotherapy and radiation, and several months away from work, the call comes from her husband that she has passed away in hospital.

A former client has made a series of verbal and physical threats to law firm staff. Staff are feeling extremely anxious and unsafe. While all possible actions have been taken with police, and security measures have been implemented, many employees continue to discuss their fears at length.

All of these situations* involve loss or trauma in the workplace.

Our reactions and the kind of support we require from others during a time of trauma depends on many factors — the nature and intensity of our involvement, our personality and preferred coping strategies and the overall level of stress in our lives at the time.

Interlock has been providing confidential, professional counselling services to members of the Law Society since 1981 through the Members Assistance Program.

Over the years, Interlock has responded to many calls from lawyers and firms dealing with difficult situations. While the range of reactions and coping styles has been diverse, and while it can be risky to make generalizations about any group, we have learned a few lessons in working with lawyers:

Lawyers prefer one-on-one help

In most situations, the lawyers who contact Interlock express a strong preference for an individual response, rather than for any kind of group meeting or worksite intervention. While there may be several factors contributing to this preference, it appears at least partly based on a strong sense of personal privacy. Group sessions that Interlock has facilitated have generally been more highly attended by administrative and support staff than by lawyers.

Lawyers' training sometimes works against them

It appears that a lawyer's professional training may, at times, work against certain natural coping skills. One counsellor notes that legal training means learning to think and problem-solve in a disciplined, logical and analytical way. The development of these skills is essential to lawyers in carrying out their professional duties. But following a tragic or traumatic event, highly developed analytical skills may be somewhat "out of balance" and at times counter-productive to effective coping. They may, in some circumstances, serve as a barrier to effectively dealing with an event that involves strong affective responses.

Lawyers unrealistically expect to stay in perfect control

Society views lawyers as highly educated, intelligent professionals, and lawyers themselves value independent, critical thinking and personal autonomy. They have chosen a field in which they are sought out for guidance, advice and expertise. They are problem-solvers who are used to being in charge and who often have their skills on public display. They tend to be high achievers in many areas of their lives. Our experience shows that many lawyers, when faced with tragedy or trauma, have an unrealistic expectation that they will remain in perfect control. They are often extremely hard on themselves when they experience the normal reactions to loss and tragedy, including intense feelings of anger, fear or sadness.

* * *

Lawyers have told Interlock that they were initially hesitant to call. Once that hurdle is overcome, however, they appreciate the opportunity to discuss a personal trauma with a neutral, professional counsellor who can help them address their sense of fear or anxiety.

Part of Interlock's work in traumatic situations is helping our clients accept that they may experience a range of emotional reactions in a time of loss or trauma so they can avoid being immobilized and can move beyond self-judgement.

We also encourage lawyer clients to

look after their physical and emotional well-being in a variety of ways, since the tendency for many professionals is to carry on as though it's "business as usual." It is important for lawyers to share their experience with trusted friends or family members, to take time to reflect on the meaning of the events for their own lives and to ensure overall self-care (adequate sleep, healthy food and leisure time).

Interlock invites you to call for information on our confidential and professional counselling services. The Members Assistance Program is funded by the Law Society and services are provided at no direct cost to BC lawyers, articling students or their immediate family members. A brochure describing Interlock is enclosed in this mailing. Interlock can be reached at: Lower Mainland: 604 431-8200; Toll-free: 1-800-663-9099; www.interlock-eap.com.

Please note that group services are normally provided at the worksite and funded by the law firm or organization requesting these services.

** These scenarios do not refer to specific situations but are based on typical requests.*✧

News from the Ministry of Provincial Revenue

Directors' liability for tax debts: new statutory provisions in BC

The *Provincial Revenue Statutes Amendment Act*, 2004, (Bill 34) will introduce directors' liability under the BC *Social Service Tax Act*, *Hotel Room Tax Act*, *Motor Fuel Tax Act* and *Tobacco Tax Act*. The government has announced that it will allow a six-month grace period for enforcement of the legislation, to run from the date Bill 34 received Royal Assent (May 13, 2004).

Under the legislation, directors and deemed directors may be held liable for a corporation's tax debts that were incurred during the period they served as directors or deemed directors if the corporation fails to collect or remit the tax or pay security. Directors who act appropriately, by exercising due diligence, will not be personally liable.

Deemed directors

A deemed director is a person who performs the function of a director, even though he or she is not a member of the board of directors. An individual cannot be deemed a director solely because he or she is: 1) acting under the direction of a shareholder, director or officer of the corporation; 2) a lawyer, accountant or other professional providing professional services; 3) a trustee in bankruptcy; or 4) a receiver or secured creditor controlling his or her interests in the property of the corporation.

Six-month grace period

The six-month grace period allows corporations and directors to voluntarily disclose existing tax debts and to review financial procedures to ensure that tax debts do not occur in the future.

Once the grace period has expired, directors may be held liable for a corporation's tax debt even though some or all of the debt was incurred before the expiration of the grace period.

For more information

For more information, please refer to Bulletin GEN 010 *Directors' Liability* on the Consumer Taxation Branch website (www.rev.gov.bc.ca/ctb) or contact the Consumer Taxation Branch at 604 660-4524 in Vancouver, or toll-free at 1-877-388-4440.✧

Bank of Montreal adopts mortgage protocol in Western Canada

On June 30, 2004, the Bank of Montreal will become the first national bank to accept opinions from lawyers in Manitoba, Saskatchewan, Alberta and British Columbia in the conveyance or refinancing of residential properties in accordance with the Western Law Societies Conveyancing Protocol.

A BC lawyer who acts for a financial institution in a mortgage transaction under the protocol is permitted to advise that institution (through a short, standard form opinion) that, if there are no known building location defects on a property, the institution need not obtain an up-to-date building location survey as a condition of funding a mortgage loan. If the financial institution relies on a protocol opinion to fund a mortgage and suffers an actual loss as a result of an unknown building location defect that would have been disclosed by an up-to-date survey, the Lawyers Insurance Fund will, on behalf of the lawyer, accept liability and, as appropriate, pay the cost of repair or any actual loss suffered.

In agreeing to accept opinions under the protocol, the Bank of Montreal joins ranks with national lenders such as the Investors Group, Canadian Western Bank and ING, and with many credit unions across the West that have done the same.

The BC version of the Western Law Societies Conveyancing Protocol and background information is available on the Law Society website at www.lawsociety.bc.ca (see Practice & Services / Practice Resources). For more information, contact Ron Usher, Staff Lawyer at rusher@lsbc.org.✧

CCH Canadian Ltd. v. *Law Society of Upper Canada*

A closer look at SCC decision on law publisher copyright

In 1993, three Canadian legal publishers initiated legal proceedings against the Law Society of Upper Canada asserting that the not-for-profit photocopy service of the Law Society's Great Library infringed their copyright. The case moved through the Federal Court to the Supreme Court of Canada, with the Federation of Law Societies intervening in support of the Law Society of Upper Canada.

On March 4, 2004 the Supreme Court of Canada delivered its reasons for judgment in CCH Canadian Ltd. v. *Law Society of Upper Canada 2004 SCC 13. The Law Society of Upper Canada was successful on its appeal, while the publishers were unsuccessful in their cross-appeal.*

The Supreme Court held that the Law Society of Upper Canada's Great Library did not infringe the copyright of the law publishers in making single photocopies of legal material, including copies of case reports and excerpts from legal texts, for lawyers doing legal research or in providing self-service photocopiers for use in the Great Library. Noting that s. 29 of the Copyright Act allows for "fair dealing" in copyrighted material for the purpose of research or private study, the Court reviewed the factors in assessing what constitutes fair dealing and gave a liberal interpretation to "research." Research is not limited to non-commercial or private contexts and encompasses legal research by a lawyer in the practice of law.

The Law Society of Upper Canada published the following notice to Ontario lawyers in the March 26, 2004 Ontario Reports and March-April Ontario Lawyers Gazette, also available on the Society's website at www.lsuc.on.ca. The article, which summarizes key points in the judgment and offers advice through a series of questions and answers, has been reprinted at the request of the Law Society of BC Libraries Task Force and with permission of the Law Society of Upper Canada. It has been modified only as necessary for clarity, in particular to flag references that are specific to Ontario.

The Supreme Court of Canada recently held the Law Society of Upper Canada (LSUC) does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its access policy.

The Supreme Court also found that research undertaken as part of the commercial practice of law is in fact "research," and is therefore able to be protected under the *Copyright Act*.

The decision ended a lawsuit originally launched in 1993 by three legal publishers — CCH Canadian, Carswell and Canada Law Book — against the Law Society of Upper Canada. The publishers unsuccessfully attempted to enjoin photocopying services the Great Library has offered since 1954. The Great Library provides single copies of extracts from its collection of legal resources to lawyers, students and judges for the purposes of research and submission to court.

The Supreme Court unanimously delivered a strong message regarding key arguments made by the Law Society in the case, holding that:

- reproduction by lawyers of single copies of case reports, including headnotes, along with other legal materials as part of their research during the commercial practice of law constitutes fair "research," which is protected by the provisions of the *Copyright Act*;
- even if copyright resides in the publishers' case headnotes appearing in published reported decisions, the publishers do not hold a copyright over the accompanying judge's decision itself. As a result, the publishers' copyright cannot be infringed when anyone photocopies the portion of a reported decision that is the judge's decision, even if done for a purpose other than research, so long as the headnote is not copied as well;
- LSUC's not-for-profit and request-based photocopy service is an example of "fair dealing" that is protected under the *Copyright Act*;
- LSUC is entitled to assume that free-standing photocopiers in the Great Library will be used in compliance with the *Copyright Act*, and is therefore entitled to maintain those copiers in the Library.

Among its far-reaching implications, the decision guarantees access to the law for local law libraries, lawyers and their clients. It means that the Great Library — and by extension, the profession — does not have to pay legal publishers a licensing fee for copying legal materials, provided the copying is limited and for legitimate

research purposes.

Law libraries

The decision means that the provision of self-service photocopiers on the Great Library's premises will not amount to an infringement of copyright by the library when patrons use the machines, even if an abuse by a library patron happens to occur.

The court found that the Law Society's photocopying guidelines and policies, when followed, constituted fair dealing. As a result, it is recommended that law libraries consider adopting adequate controls on photocopying to ensure that they comply with the guidance provided by the court in this decision.

Lawyers

The decision means counsel can continue to do most, if not all, of their day-to-day legal research activities, including the making of reproductions of materials needed for submission to court, without the need to obtain a reproduction license.

The Supreme Court of Canada agreed with the Federal Court of Appeal's statement that "research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research."

Lawyers can also continue to make fair use of the LSUC's photocopying services. To ensure their photocopying activities fit within the Supreme Court's "fair dealing" requirement, lawyers should:

- continue to reproduce only single copies of the legal resources they require;
- refrain from producing and distributing multiple copies of any work, as this might be considered unfair (this restriction may not apply to copies required for use in court);
- reproduce materials only to the extent required in order to finish the research they are undertaking;
- consult copyright counsel if a photocopy is required for a reason that does not fall squarely within the scope of research activities enunciated by the Supreme Court, or if it is to be copied in quantities or circumstances where the fairness of the dealing may be questioned.

For lawyers' clients, the decision means the cost of their counsel carrying out required research should be maintained at current levels. Lawyers and firms will not need to incur additional costs related to copyright licences, and that means no additional costs for photocopying materials associated with legal research will be passed on to clients.

For more information, please visit the Law Society of Upper Canada's web site at www.lsuc.on.ca.

Questions and Answers

Question: *What was the case about?*

The LSUC Great Library at Osgoode Hall has offered a request-based, not-for-profit photocopying service to members, students, the judiciary and other authorized researchers since 1954. The principles governing the operation of this service are contained in a policy statement known as the Law Society's *Access to the Law Policy*.

Generally speaking, LSUC will provide single copies of reported judicial decisions, articles, and statutory references — or up to five per cent of the volume from a secondary resource — to lawyers who request them. Those who request the service must confirm in advance that the copies are required for the purpose of research or use in court.

In addition, for about the same period of time, the Law Society of Upper Canada has provided patrons of its Great Library with access to self-service photocopiers on the library's premises. The photocopiers enable patrons to make copies for research purposes.

LSUC believes both of these services are essential to providing members throughout Ontario with equal access to the Great Library's extensive collection of legal materials. Copying services are essential because the library's collection of materials is non-circulating and many members do not practise in the vicinity of the Great Library.

In 1993, LSUC was sued for copyright infringement by CCH Canadian Limited, Thomson Canada Limited (Carswell) and Canada Law Book Inc. The Supreme Court of Canada ultimately determined the case in the Law Society's favour on March 4, 2004, following a four-week trial in the Federal Court of Canada in 1998-99 and a four-day appeal to the Federal Court of Appeal, which was decided in 2002.

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The BCCLS copyright policy

As part of its research and reference services, the BC Courthouse Library Society may provide users with single copies of legal information materials that are required for the purpose of research, review, private study or criticism, as well as for use in legal or governmental proceedings. Compliance with the *Copyright Act* is the responsibility of each user of the Society's libraries and services, including the use of self-service photocopiers and printers at courthouse libraries throughout BC.

The service is provided on a not-for-profit basis, and the fee charged is intended to recover some of the costs associated with the provision of the service. The copy service is provided primarily in Vancouver, and all service forms require that clients acknowledge the proper use of the materials requested for copying.

Copyright *… from page 23*

Question: *Why did the Law Society of Upper Canada decide to defend these cases?*

During the proceedings, it became apparent that the publishers were attempting to do more than enjoin LSUC's copying services. The publishers' ultimate goal was to require all lawyers and their firms to pay licence fees for copies of reported judicial decisions and limited extracts from texts and other materials, even when made for research purposes.

The Law Society of Upper Canada successfully argued that its photocopying services and the research activities of lawyers constitute fair dealing under the *Copyright Act* and do not infringe copyright.

Question: *What did the Supreme Court decide?*

The Court confirmed that the concept of "research" is not limited to non-commercial or private contexts. It affirmed that "*research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research ... Lawyers carrying on the business of law for profit are conducting research within the meaning of [fair dealing].*"

The Court held that LSUC's custom copying service is provided for the purpose of research. In light of the controls put in place by the Law Society of Upper Canada under its *Access to the Law Policy*, LSUC's dealings are also fair in the circumstances.

The Court rejected the publishers' suggestion that, by merely providing library patrons with access to self-service photocopiers, the Great Library could be deemed to be authorizing copyright infringement. A library is entitled to presume that patrons who are provided with access to such machines are going to use them lawfully.

Finally, the Supreme Court decided that, while the publishers may own copyright in a headnote they write and publish, this copyright does not extend to cover their publication of an edited version of reasons for decision written by a judge. Accordingly, the Court's decision stands for the proposition that copyright cannot be infringed by the reproduction, for any purpose, of the reasons for decision portion of a published case report, when the accompanying headnote is not copied with it.

Question: *What are the implications of this decision for law libraries?*

The decision makes clear that, absent special relationships of employer-employee or master-servant, a library's provision of self-service photocopiers on the library's premises will not amount to an infringement of copyright by the library when those machines are used by patrons — even if an abuse by a library patron happens to occur.

The decision also finds that the photocopying guidelines and policies followed by the Law Society of Upper Canada constitute fair dealing. It is recommended that law libraries consider adopting adequate controls on photocopying to ensure that the libraries comply with the guidance provided by the Court in this decision.

Question: *What are the implications for lawyers doing research?*

The Supreme Court has clarified that most of the day-to-day dealings by lawyers with photocopies fall within the concept of "research" under the *Copyright Act*. The decision means lawyers may continue with most (if not all) of their personal research activities without the need to obtain a licence. They can also continue to make fair use of the LSUC photocopying services.

However, the Court's decision is not a blanket authorization for lawyers to copy works in any manner and for any purposes. In order to qualify as a "fair dealing," a work may only be copied for the purpose of "research or private study" and only in circumstances that are objectively "fair."

The following guidelines are suggested to help lawyers ensure that their dealings with photocopied resources continue to meet this "fairness" requirement:

- Lawyers should continue to reproduce only single copies of the legal resources they require for research purposes. Lawyers should refrain from reproducing and distributing multiple copies of any work, as this might be considered unfair. This restriction may not apply to copies required for use in court.
- Lawyers should reproduce materials only to the extent required to complete the research they are undertaking. The Supreme Court recognized that, in many cases, proper legal research may require an entire case, article or statutory reference to be reproduced.
- If a photocopy is required for a reason that does not fall squarely within the scope of permitted research activities enunciated by the Supreme Court — or if copies are to be made in quantities or circumstances where the fairness of the dealing may be questioned — lawyers are advised to consult copyright counsel.

Question: *What does this decision mean for lawyers' clients?*

This decision should mean that counsel will still be able to undertake and perform all research necessary to guard and protect their clients' interests without fear of infringing copyright. Further, the cost for counsel to carry out these research activities should be maintained at current levels; lawyers and firms will not need to incur additional costs associated with copyright licences.✧

Consultation by the Ethics Committee

Lawyers acting in real property transactions

The Ethics Committee is concerned about reports it has received within the profession that some lawyers are failing to comply with the provisions of the *Professional Conduct* Handbook, including Appendix 3. According to those reports, there are specific concerns that:

- some lawyers are routinely acting for more than one party in real estate matters in circumstances that are contrary to the rules in Appendix 3,
- some financial institutions are pressuring lawyers to breach the rules by advising them that other lawyers are prepared to do so in order to act for the institutions, and
- it is not always clear whether a transaction contains a commercial element which, under paragraph 5 of the Appendix, would prevent a lawyer from acting for more than one party.

The Benchers last amended the real estate rules generally in 1999, following consultations by the Ethics Committee with the profession. In making those amendments, the Benchers sought to balance the desirability of independent representation for clients with the flexibility for lawyers to act for more than one client in circumstances in which it is economic and safe to do so.

Lawyers who become aware that other lawyers are acting contrary to the *Handbook* may wish to consider drawing the attention of those lawyers to the relevant rules. For its part, the Law Society will look at whether further amendments would clarify any ambiguity in the rules and will also consider how to educate financial institutions on lawyers' obligations under the *Handbook*.

If there continues to be non-compliance with the *Handbook*, lawyers who are aware of non-compliance may wish to consider reporting those lawyers to the Law Society so that the Society can consider whether disciplinary action is warranted.

The Ethics Committee invites lawyers to provide the Committee with any information they can about current practices that contravene the *Handbook*, as well as any suggestions they may have for improvements to the *Handbook*.

Please send comments to the attention of Jack Olsen, Staff Lawyer – Ethics, at:

Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

Telephone: 604 443-5711
Fax: 604 646-5902
Email: jolsen@lsbc.org.✧

Services to members

Practice and ethics advice

Contact **David J. (Dave) Bilinsky**, Practice Management Advisor, to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction. **Email**: daveb@lsbc.org **Tel**: 604 605-5331 or 1-800-903-5300.

Contact **Felicia S. Folk**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. All communications are strictly confidential, except in cases of trust fund shortages. **Tel**: 604 669-2533 or 1-800-903-5300 **Email**: advisor@lsbc.org.

Contact **Jack Olsen**, staff lawyer for the Ethics Committee, on ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Committee. **Tel**: 604 443-5711 or 1-800-903-5300 **Email**: jolsen@lsbc.org.

Interlock Member Assistance Program – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society, and provided at no cost to individual BC lawyers and articled students and their immediate families: **Tel**: 604 431-8200 or 1-800-663-9099.

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no cost to individual lawyers: **Tel**: 604 685-2171 or 1-888-685-2171.

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: **Tel**: 604 687-2344 **Email**: achopra@novus-tele.net.

Special Compensation Fund claims

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 Discipline Case Digest 03/05)

Special Compensation Fund Committee decision involving claims 20020209/1, 20020401/1, 20020304/1 and 20020193/1

Decision date: October 1, 2003
Report issued: November 10, 2003

Claimant: B Credit Union
Payment approved: ***$309,609.57***
($290,853.25 and $18,756.32 interest)

Claimant: C Bank
Payment approved: ***$162,932.29***
($151,795.07 and $11,137.22 interest)

The East 5th Avenue property

K was a nominee of Mr. G, a developer client of Mr. Wirick. In 2000 K purchased a property on East 5th Avenue in Vancouver and encumbered the property with a $156,000 mortgage in favour of C Bank. Acting under a power of attorney from K, Mr. G subsequently entered into an agreement for K to sell the property to Z and M.

Three days prior to the transfer, Mr. G (again acting under a power of attorney) further encumbered the property with a mortgage in favour of B Credit Union.

Mr. Wirick acted for K in the sale of the property to Z and M. In a letter to the purchasers' solicitor, Mr. Wirick undertook to obtain releases of the C Bank and B Credit Union mortgages.

On April 26, 2001, the property was transferred to Z and M who subsequently registered a mortgage in favour of another financial institution.

Mr. Wirick did not use the funds received from Z and M to pay out the C Bank and B Credit Union mortgages, but instead transferred the balance of the sale proceeds to unauthorized recipients.

The Special Compensation Fund Committee found that, while not every breach of undertaking is dishonest, the circumstances of these claims suggested, not negligence or error by Mr. Wirick, but an intention to deceive. He breached his undertaking to apply the proceeds of sale to the discharge of registered mortgages and he instead misappropriated or wrongfully converted the funds.

The Committee decided that it would not require the claimants to exhaust their civil remedies in this case by obtaining judgments against Mr. Wirick, noting that he had made an assignment in bankruptcy claiming liabilities far in excess of assets, and there was little hope of recovery from him.

The Committee found that C Bank and B Credit Union had suffered losses by not receiving the funds owed to them. Their claims were allowed, subject to certain releases, assignments and conditions, including the requirement of providing to the Law Society registrable discharges of their mortgages on title. The Committee also exercised its discretion to pay interest on these claims at the contract rate to May 24, 2002 and thereafter at the applicable rate to a maximum of 6% per annum.

As a result of the payment and discharge of the prior charges from title, the purchasers Z and M and their own mortgage lender would be placed in the positions they ought to have been in and would suffer no loss. Accordingly, their separate claims for compensation were denied.✧

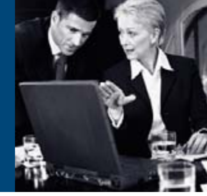
Unauthorized practice actions against non-lawyers

Injunction

The BC Supreme Court ordered that **Sarabjit Nagra** and **World Immigration and Citizenship Consultants Inc.**, of Victoria, be enjoined from appearing as counsel or advocate, drawing corporate documents, documents for use in a judicial or extra-judicial proceeding or a proceeding under statute, from giving legal advice or from offering or representing themselves as qualified or entitled to provide these services for fee: *January 14, 2004.*

Finding of contempt of court

The BC Supreme Court has held **Steven Serenas** and his company, **S. Serenas & Associates (1988) Inc.**, of White Rock, in contempt of court for giving or offering to give legal advice and for drawing documents relating to wills, codicils and incorporations for a fee, contrary to a 2002 BC Supreme Court order that they cease the unauthorized practice of law. The Court has ordered Mr. Serenas and his company to pay a $4,000 fine and $2,000 as special costs and disbursements. Mr. Serenas was also placed on probation for one year, on the condition that he keep the peace, report to a probation officer and complete 100 hours of



community work service: *March 3, 2004.*

Undertakings

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] ✧

***Practice Tips** … from page 19*

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action to prevent any court dates, appointments or limitation dates from being missed.

The firm's accounting system should be able to handle both trust and general accounting, since trust retainers figure so prominently in a criminal practice. As noted, it should also be compatible with the practice management system to maximize workflow and reduce duplicate keystrokes in collecting billable hour data. Both Amicus Attorney and Time Matters work with many legal accounting systems.

Another approach is to acquire an integrated practice management and accounting product, such as LawStream (formerly Integra Office System) or ProLaw. LawStream and some legal accounting systems now incorporate case management features. In some cases, a legal accounting system (such as PCLaw) may be sufficient for both practice management and accounting functions.

All legal case management systems allow for the set-up of document generation precedents — trial notification letters, retainer replenishment reminders and the like — which can pull data from the contact list and merge it into a Word (and in some cases, WordPerfect) document.

To be sure, there are additional applications that a criminal lawyer can add to this core system, such as high-powered evidence analysis and courtroom presentation tools. The beauty of having a well-functioning, simple core system is that you can concentrate on doing what you do best — acting to release those clients that find themselves close confined.✧

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