The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Moving beyond words: Only action is acceptable in addressing access to justice

by Art Vertlieb, QC

DURING MY YEAR as president, we have seen increasing awareness of the need to address access to justice in Canada.

2013 saw the release of several key reports and papers, including the Action Committee on Access to Justice in Civil and Family Matters report *Access to Civil & Family Justice: A Roadmap for Change*; the Canadian Bar Association's *Reaching Equal Justice: An Invitation to Envision and Act*; the provincial government *White Paper on Justice Reform Part Two: A Timely, Balanced Justice System*; and Dr. Julie Macfarlane's report *Identifying and Meeting the Needs of SelfRepresented Litigants*, just to name a few.

Vancouver was also host to several summit meetings, including the CBA's Envisioning Equal Justice Summit, and two provincial Justice Summits, both of which were moderated by Law Society CEO Timothy McGee, QC.

As the Honourable Chief Justice of British Columbia, Robert Bauman, said recently at his welcoming ceremony, "These initiatives are to be applauded. They are producing the critical mass of knowledge and dialogue necessary to fuel real and meaningful change in accessibility to legal resources and in the way those resources are spent and deployed." He went on to note, however, that what is now required "is a coordinated, holistic approach to meeting the challenges. We need to manage the forest and not simply the trees."

The Action Committee report observed, "The ways of the past – often working in silos and reinventing wheels – are not sustainable. A coordinated, although not centralized, national reform effort is needed. Innovative thinking at all levels will be critical for success."

The legal profession, the courts and government all have a role to play in improving access to justice.

Lawyers in this province are the beneficiaries of a serious public trust. We have the exclusive privilege of providing legal services and advice to the public, and in return we have the responsibility of adding value for our clients and for maintaining the integrity of the law and the justice system.

While I strongly believe that the legal profession does and will continue to provide value to those clients who can afford a lawyer, too often those who find themselves facing legal problems find the value we bring is beyond their reach.

The recent approval by Benchers of the recommendations of the Legal Service Providers Task Force is a significant start. We must consider alternative ways to meet the legal needs of the public. We must get creative in packaging options for clients that allow them to obtain the value we offer. Fixed-fee, unbundled services and incorporating designated paralegals into our practices are just two of the available options. We may need to adopt different delivery models, such as the Ontario lawyer who is running several boutique firms, all of which use a centralized, outsourced service to manage the business functions, and the Kelowna lawyer who is setting up a website to offer specific services at set rates.

The courts also have a responsibility to ensure the court system is as efficient and effective as possible in resolving disputes.

Again at his welcoming ceremony, Chief Justice Bauman, to his great credit, called on all stakeholders, including the judiciary, to achieve three things:

- understand the many challenges we face;
- commit to do something meaningful and robust within a defined timeframe; and
- share a common vision for the future of the justice system.

The CBA's *Envisioning Justice* report observed: "Judges must be ready to integrate

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled students and the public on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities. BC lawyers are responsible for reading these publications to ensure they are aware of current standards, policies and guidelines.

Suggestions on improvements to the *Bulletin* are always welcome — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. Print subscriptions may be ordered for $70 per year ($30 for the newsletters only; $40 for the *Member's Manual* amendments only) by contacting the subscriptions assistant at communications@lsbc.org.

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new functions and approaches, potentially including active case management, judicial dispute resolution, specialization, court simplification and active adjudication models."

Judges are trained to be thoughtful, contemplative and conservative, leaving the pace of a trial largely up to the parties' lawyers. The notion of taking more control seems inconsistent with the perceived need to be appropriately neutral, but surely there is some middle ground that affords greater efficiency without compromise. It may well be time for judges to become more active in trial management.

Government has a role to play as well. Adequate funding for the Legal Services Society is a necessary component of ensuring access to justice, given the large number of British Columbians who require information, advice and representation services to resolve their legal problems. An adequately resourced legal aid program is as important to the administration of justice as an adequately resourced judiciary, prosecution or police service.

I'm hopeful that a coordinated overall approach to improving access to justice will bear fruit in the coming years and, although I feel I'm leaving just as the party is getting started, I take great comfort in knowing that Jan Lindsay, QC will continue to build on the momentum around improving our justice system. She is passionate about the need for better access for all and determined that the Law Society fulfill its commitment to serve in the public interest.

I want to thank Tim McGee and the rest of the outstanding Law Society senior management team and staff. Their absolute dedication to the work they do and the service they provide is remarkable, and they have been a tremendous support to me throughout my ten years as a Bencher.

Lastly, to my fellow Benchers – both past and present – it has been an honour to serve with you. I could not be more proud to have you as colleagues, and I have the utmost respect for your contribution to the profession and the public we all so faithfully serve.❖

New National Mobility Agreement bridges common and civil law traditions

This year's Annual Conference of the Federation of Law Societies of Canada, held in St. John's Newfoundland and Labrador this past October, provided the backdrop for the signing of the National Mobility Agreement, bridging common law and civil law traditions. The new agreement removes past restrictions that limited interprovincial practising rights and allows lawyers to practise across Canada in the areas of law in which they are competent, whether they are trained in the common law or civil law tradition.

President of the Federation, Gerald R. Tremblay, QC, was quoted: "There are more similarities in legal training and in daily practice in Canada's two legal traditions of common and civil law than there are differences. Especially with the globalization of markets, it was important for the law societies of Canada to allow lawyers to move freely and practise across Canada without any barriers."

The agreement was signed by all provincial law societies and will take effect once each province has adopted the terms and conditions in their by-laws and regulations. Implementing the new agreement nationally could take up to a year; nevertheless, the process will remain a priority for the Law Society of BC in 2014.❖

Law Society president, Art Vertlieb, QC, adds his signature to the National Mobility Agreement.

Today's regulation benefits from a world view

by Timothy E. McGee, QC

WE ARE ALL aware of how what goes on elsewhere in the world increasingly has an impact right here at home.

At the Law Society, keeping tabs on regulation and the legal profession around the globe has always been critical to our policy development, but never before have we been more attuned to the goings on in other countries as we are today.

Driving the interest is the speed with which the legal world is changing. Slower economies and more frugal governments have restricted funds for legal aid. Firms have closed down in large numbers in both the UK and the US. Others are finding new ways to market their services. The public is demanding better access to justice.

As regulators, it's critical that we stay ahead of the changes and that we ensure regulatory innovation addresses critical issues in a timely manner. It's also important that we develop new programs and policies that anticipate where the profession and the provision of legal services are headed.

As a member of the International Institute of Law Association Chief Executives, I regularly converse with legal regulators from over 20 countries. Our goal is to discuss important topics for the regulation and advocacy of the profession and to compare notes on operational and governance matters.

At a recent meeting, we addressed whether the traditional model of regulating lawyers could remain current, particularly if it is in any way restricting access to justice. With new participants in the profession, more professionally-led and bigger law firms and a variety of multidisciplinary partnerships, we questioned the future of legal regulation.

The Benchers have unanimously approved the work of the Legal Service Providers Task Force, and we will now move towards a model that will see the Law Society regulate non-lawyer legal service providers. We will soon be engaging the profession on the topic of law firm and entity regulation, an initiative that is very much of interest to regulators elsewhere. We are also giving renewed thought to alternative business structures, which are well established in the UK.

Also on the tops of the minds of my colleagues are international trends in lawyer training and admission standards. In some US states, the widespread view is that law graduates do not have sufficient practical skills competency. In response, changes have recently been made. For example, in California, law school students will soon be required by regulators to have 250 hours of experiential learning and to complete 50 hours of pro bono work. Nationally, Ontario has shortened its required period of articles, and the Federation of Law Societies of Canada is actively developing national admission and competency standards.

It is indeed a fascinating time to be a lawyer and be part of the discussion and debate as to how regulation can best serve the public interest issues of today. As always, I welcome your thoughts on the future we are collectively creating.❖

Meeting with Beijing Lawyers Association

On November 13, CEO Tim McGee, QC and other executive staff welcomed and spent the morning sharing information with delegates from the Beijing Lawyers Association. The Association is a self-disciplinary professional organization of Beijing lawyers and law firms.

Topics discussed included the relationship between the Society and law firms, disciplinary action for malpractice, continuing legal education and lawyers' rights.

Benchers approve task force recommendations

Work to begin on certifying paralegals and moving to a single regulator of legal service providers

ON DECEMBER 6, 2013, the Benchers unanimously approved recommendations of the Legal Service Providers Task Force that could, ultimately, transform the regulation of legal services in BC.

The task force recommended the recognition of non-lawyer legal service providers, the certification of paralegals and the amalgamation of the Law Society and Society of Notaries Public of British Columbia.

The approval means that work can now begin to assess how the recommendations might be implemented. Possible models of regulation and certification will be explored and the terms and conditions of any amalgamation of lawyers and notaries will be investigated.

This initiative will require a significant commitment on the part of the Law Society, paralegals and notaries to make changes that are in the interest of the public and have the potential to increase access to justice.

The cross-organizational task force, which included representation of the public, notaries and paralegals and was led by past president Bruce LeRose, QC, was formed after many years of discussion around whether such steps would be in the best interest of the public, particularly with respect to increasing access to justice.

Members of the task force studied a number of regulatory models from other jurisdictions world-wide and considered trends in the provision of legal services. They issued an interim report in June 2013 and then travelled the province to meet with interested groups as well as offered the opportunity for the public, lawyers, paralegals and notaries to weigh in online.

In attendance at the December Benchers meeting was Attorney General and Minister of Justice Suzanne Anton, QC, who said, "It is encouraging to see our justice partners work together to transform the regulation and delivery of legal services to the citizens of our province. The Law Society has shown tremendous leadership, and the recommendations made today signal that progress is being made to improving access to justice for British Columbians."

The recommendations will require further work, analysis, collaboration and consultation with other interested parties. In particular, further work will require a more detailed examination of the implications of any action to be undertaken on Law Society operations or on its mandate.

More details will be reported in the next issue of the Bulletin and the task force report is available on the Law Society website at Publications > Committee reports.❖

End of an era: the Special Compensation Fund

THE LAW SOCIETY of British Columbia has long been a leader among professional regulators when it comes to protecting the financial interests of the public. One of the clearest examples of this is the Special Compensation Fund, which has now been replaced by a more modern and streamlined alternative.

Established in 1949, the Special Compensation Fund was the first of its kind in North America. It was designed to compensate people who suffered a financial loss through the misappropriation or wrongful conversion of money or property by a BC lawyer. Funded by lawyers' annual contributions, the fund helped preserve and enhance the reputation of the legal profession in BC.

After more than five decades, the Special Compensation Fund heard its final applications in December 2012 and paid out the final claim in the fall of 2013.

This does not mean the public will go without protection, however. Since May 2004, compensation for new claims has been provided through trust protection coverage under Part B of the Compulsory Professional Liability Insurance Policy. The Special Compensation Fund was maintained to deal with claims prior to 2004.

Over the course of its existence, nothing tested the Special Compensation Fund quite like disbarred lawyer Martin Wirick. In 2002, the Law Society first learned of Wirick's multi-million dollar misappropriations. Acting for a Vancouver real estate developer, Wirick misappropriated funds during real estate transactions by failing to pay out and discharge mortgages. Wirick later admitted professional misconduct, resigned, and was ultimately disbarred.

In his wake, Wirick left a devastating trail of financial misery for hundreds of innocent homeowners. The Law Society reacted by immediately taking steps to protect affected parties. The Benchers removed the $17.5 million annual aggregate limit on the Special Compensation Fund and increased the annual assessment paid by lawyers to the fund from $250 to $600 beginning in 2003.

Over the next decade, BC lawyers, through the Special Compensation Fund, paid out nearly $40 million to those who lost money due to the actions of Martin Wirick. In the 15 years prior to the discovery of the Wirick misappropriations, the fund paid out an annual average of $348,000 for compensation claims.

"The Wirick misappropriations are a dark part of the history of the legal profession in British Columbia," said Law Society President Art Vertlieb, QC. "But lawyers in this province stepped up like never before and paid out of their own pockets to compensate all of those people who lost money. The entire legal profession can be proud of the way the Law Society handled this matter."❖

Law Society welcomes new president: Jan Lindsay, QC

THE LAW SOCIETY'S incoming president may have stumbled upon a career in law somewhat serendipitously, but since then it's been full steam ahead, one determined step after another.

Jan Lindsay, QC didn't plan on a career in law. She came from a family without a tradition of higher learning, but she had excellent marks in school, and she loved to learn. So after high school, she took a job as a file clerk with CIBC and saved enough money to go to university.

She enrolled in arts at Simon Fraser University, though she envisioned a possible career as a doctor. Those thoughts ended at the age of 19 after she spent much of the summer in hospital battling cancer. She decided she'd had enough of hospitals at that point and went back to Simon Fraser to study history and political science.

To support herself through school, Jan worked as a train order operator, first for Canadian Pacific Railway in Alberta and then eventually for several summers in Vancouver with Canadian National Railway. "I sat in that little green box on the railway bridge next to the Iron Workers Memorial Bridge and was part of the team that made sure trains travelled across safely," she explained. "It was a great job."

Jan worked hard and, when a relative gave her the idea to consider law, she took the LSAT in third year just to see how she would do.

She did well. She was accepted to UBC's law school after three years of university. "I keep meaning to finish that undergrad degree," she revealed. "Maybe some day."

Eventually, Jan settled into private practice with a focus on insurance and personal injury defence work. However, it wasn't necessarily easy. "I really enjoyed law school," said Jan, "but it took me a long time to find articles, probably because I didn't really have a sense of how the profession worked."

How the profession "works" is now what Jan enjoys most about the practice of law. "I love the collegiality of this profession and associating with good people looking to do good things. It's the best part of being a lawyer."

Jan's practice is a high-volume outfit with both straightforward and complex files, and well-informed clients. It's also a practice that allows her to balance her career with her other priority: her family. Jan is the first Law Society president who is a mother. She has four children: Steven (29) Christopher (27), Sean (25) and Kelly (23), and is married to fellow lawyer, Richard Lindsay, QC.

Clearly, Jan is a role model for other women lawyers and she speaks often about how she has made it work. "I made sure I had a great support system. I decided what I really needed to be there for – such as the kids' important activities – and I made sure that, as much as possible, my practice could accommodate that."

Though Jan makes it sound easy, one wonders how she did it, given her extensive volunteer work over the years with both the Canadian Bar Association and the Law Society. She ran for Bencher many times because she wanted to contribute in a way that was different from private practice, and she wanted to meet and work with other such dedicated, hard-working people. "The more I did, the more I wanted to do," she said.

Elected as a Bencher in 2006, Jan has participated in many ways. She is currently on the Appointments Subcommittee, the Credentials Committee, the Executive Committee, the Finance Committee (chair) and the Governance Committee (co-chair). Past commitments include the Discipline, Practice Standards and Rule of Law and Lawyer Independence committees as well as the Retention of Women in Law Task Force and the Reduced Fee Feasibility Working Group.

When asked what she plans to accomplish as president of the Law Society, Jan is very quick to answer. "It's got to be access, and it has to be action." She explains that her aim is to have a concrete proposal for action the Law Society can take to improve access to justice. "We must move beyond dialogue."

Jan also intends to focus on the legislative mandate to begin regulating law firms, a change that will make the Law Society a better regulator in the public interest, and she remains keenly intent on maintaining the proud tradition of independence and self-regulation of the profession.

"It's going to be an exciting year and a significant highlight of my career," shared Jan. "And best of all is that I get to do this alongside an incredible group of people who give so much back."❖

New Benchers in 2014

Joseph J.M. Arvay, QC

Pinder K. Cheema, QC

Jeevyn Dhaliwal

Craig A.B. Ferris

W. Martin Finch, QC

Dean P.J. Lawton

Jamie Maclaren

Sharon Matthews, QC

Elizabeth Rowbotham

A. Cameron Ward

Bencher election results

THE 2014-2015 BENCHER election results are in: 10 Benchers were elected for the first time and 12 were re-elected (four by acclamation).

Members had previously elected the following Benchers as president, first vice-president and second vice-president, respectively, for 2014:

- Jan Lindsay, QC (president and Bencher for Westminster)
- Kenneth Walker, QC (first vice-president and Bencher for Kamloops)
- David Crossin, QC (second vice-president and Bencher for Vancouver)

Lindsay, Walker and Crossin continue as Benchers for their respective districts by virtue of their executive office.

President Art Vertlieb, QC congratulates the elected and re-elected Benchers, and thanks all those who stood for election. Vertlieb also thanks those Benchers who were not re-elected for their service and acknowledges the years of dedicated service of Benchers Rita Andreone, QC, Kathryn Berge, QC, Leon Getz, QC, Thelma O'Grady, David Renwick, QC and Richard Stewart, QC, who will be stepping down and, along with the outgoing president, will become Life Benchers.❖

Here are the Benchers who were elected on November 15, 2013 for the 2013-2014 term:

District No. 1 Vancouver
Joseph J.M. Arvay, QC
Jeevyn Dhaliwal
Craig A.B. Ferris
Miriam Kresivo, QC
Jamie Maclaren
Sharon Matthews, QC
Maria Morellato, QC
David Mossop, QC
Herman Van Ommen, QC
Elizabeth Rowbotham
A. Cameron Ward
Tony Wilson

District No. 2 Victoria
Pinder K. Cheema, QC
Dean P.J. Lawton

District No. 3 Nanaimo
Nancy Merrill

District No. 4 Westminster
W. Martin Finch, QC
Philip A. Riddell

District No. 5 Kootenay
Lynal E. Doerksen

District No. 6 Okanagan
Thomas P. Fellhauer

District No. 7 Cariboo
Lee Ongman
Gregory Petrisor

District No. 8 Prince Rupert
Barry N. Zacharias

For full election results, see About Us > Governance > Benchers > Bencher elections.

Your fees at work: Counselling programs

THE LAW SOCIETY regularly highlights how annual practice fees are spent, so that lawyers are aware of services to which they are entitled as well as programs that benefit from Law Society funding.

In this issue, we feature Law Society-funded personal assistance programs.

Taking the necessary steps to foster a healthy, productive work environment should be a priority at every law firm. This includes providing lawyers with support services to maintain their mental, emotional and physical health, as stress levels associated with the profession can leave lawyers dealing with personal issues that could adversely impact work performance.

For this same reason, lawyers' annual fees include a small portion allotted to providing lawyers, immediate family members and articled students with counselling services. When personal issues start affecting work performance, counselling services are crucial in taking steps toward restoring one's health and returning as a contributing member of the workplace. In addition, access to counselling programs offer a variety of benefits to firms and small practices, such as lowered medical costs and reduced turnover and absenteeism.

Law Society fees fund services through Personal Performance Consultants (PPC) and the Lawyers Assistance Program of BC. Both programs operate independently of the Law Society and are completely confidential. These programs provide assessment, support (in both individual and workshop approaches) and referrals, when needed. Also, the Lawyers Assistance Program provides free initial assessments in person or online, a valuable resource for deciding if you or someone close to you requires help.

For further information on these resources, you can visit the Personal Assistance Program page on the Law Society's website, or contact PPC directly at 1.800.663.9099 or the Lawyers Assistance Program at 1.888.685.2171 or www.lapbc.com.❖

Updated guidelines for handling service charges on pooled trust accounts

This article updates a 1997 Benchers' Bulletin article.

THE LAW FOUNDATION of British Columbia has negotiated interest rate agreements on lawyers' pooled trust accounts with financial institutions since the Foundation's inception in 1969. From the interest earned on these accounts, the Foundation has been able to fund over $478 million to support important law-related programs in BC.

In negotiating these agreements, the Foundation also took into account the service fees that would otherwise be charged by financial institutions to maintain and service pooled trust accounts. The Foundation has been able to get service fees directly associated with day-to-day transactions in the pooled trust accounts waived, or netted, against the interest earned on the accounts. These service fees would have amounted to approximately $1.3 million annually paid by the profession throughout BC.

To ensure a more effective and consistent application of the service fees, the Foundation and the Law Society have developed the following guidelines.

To date, the Foundation has negotiated the waiver of service fees on pooled trust accounts with 39 of 53 financial institutions. As for the balance, two charge a flat monthly fee, nine charge fees by transaction and three charge fees by account.

The allowable routine transaction service fees on pooled trust accounts that have not been waived may be netted against (deducted from) the interest earned on the pooled trust accounts, but only to the limit of the interest earned on that account for the month. These include:

- deposits; and
- cheque clearing.

In addition, the following bank administrative fees may be deducted:

- a reasonable account fee; and
- a reasonable charge for the payment transmittal to the Foundation.

Service fees that may not be deducted from the interest earned on pooled trust accounts, because they are considered specific to the needs of the law firm or its clients, include, but are not limited to, the following:

- online banking fees;
- electronic funds transfers;
- returned deposits (including NSF);
- dormant account fees;
- manual intra-bank transfers;
- certified cheques;
- automatic debit transfers;
- cheque printing, cheque orders and cheque imaging;
- interim statements;
- accountant's bank confirmation fees; and
- service fees in excess of the monthly interest earned on the account.

The excess of the service fees not covered by the monthly interest on the pooled trust account, as well as the law firm/client specific service fees, will have to be handled as negotiated between the law firm and the financial institution.

The law firm has several options for handling the above:

- try to negotiate a waiver of these service fees with the financial institution;
- have service fees charged to the law firm's general operating account;
- if the pooled trust account and general operating account are at different financial institutions, have service fees charged up to a maximum of

$300 a month against the law firm's own funds, which may be held in the pooled trust account under Law Society Rule 3-52(4); or

- pay service fees by cash or cheque.

There may be some service fees associated with pooled trust accounts that can be avoided, as well as saving the law firm costs in other areas. A dormant or unused pooled trust account still generates service fees that are not offset by interest earned and are charged to the law firm. Law Society Rule 3-65(4) requires these pooled trust accounts be reconciled on a monthly basis. As well, they must be reported on the annual Trust Report and may be subject to a Law Society audit. These service fees and administrative costs could be avoided by closing these dormant or unused accounts, and the profession is encouraged to review its accounts accordingly.

If you have any questions, please contact Jo-Anne Kaulius, finance director, at the Law Foundation of BC at 604.688.2337 or Felicia Ciolfitto, manager, trust regulation, at the Law Society at 604.669.2533 or 1.800.903.5300.❖

Family law mediators, arbitrators and parenting coordinators: January 1, 2014 deadline quickly approaching for lawyers who were previously accredited

THE GOVERNMENT OF BC is emphasizing the use of alternative dispute resolution professionals to diffuse the adversarial nature of family law disputes and to see more family law disputes resolved outside of court.

Under the new *Family Law Act*, the Law Society has been given the authority to oversee the accreditation of lawyers who wish to act as family law mediators, family law arbitrators and parenting coordinators.

Lawyers who were previously accredited as a family law mediator by the Law Society or were acting as a family law arbitrator or parenting coordinator will have until January 1, 2014 to meet the new requirements and receive accreditation if they wish to continue to act or hold themselves out as a family law mediator, arbitrator or parenting coordinator.

Lawyers who wish to be accredited but are unable to fulfill the requirements prior to January 1, 2014 will be able to submit their previous courses and request accreditation at a later date; however, they will be unable to hold themselves out or act as a family law mediator, arbitrator or parenting coordinator until they have received accreditation from the Law Society under the new family law regulations.

Lawyers wishing to be accredited must complete the applicable hours of training in a course of study and record their training on the Law Society website by logging in through Lawyer Login and clicking on Family Law ADR Accreditation > Initial Request. Once logged in, lawyers can either choose from the list of more than 200 already approved courses or request approval of an unlisted course.

Please contact the Law Society at Memberinfo@lsbc.org for any assistance or questions in regards to the new requirements or accreditation process.❖

Aboriginal Lawyers Mentorship Program now underway

FIRST INTRODUCED IN June 2013, the Aboriginal Lawyers Mentorship Program has now successfully paired several junior Aboriginal lawyers with experienced practising lawyers who will meet at least once a month, in person or by phone. The selection process was largely driven by specific requests made by the mentees, but the Aboriginal Lawyers Mentorship Committee took geographic region and practice specialization into consideration as well.

The program, which is intended to enhance the retention and advancement of lawyers with Aboriginal ancestry, is a recent collaboration between the Law Society, the Canadian Bar Association, BC Branch's Aboriginal Lawyers Forum and the Indigenous Bar Association.

The committee prepared the participants for the program by providing them with mentorship best-practices information. The next step will be to check in with both parties part way through their first cycle, and facilitate networking opportunities in January 2014.

After receiving more applications from willing mentors than anticipated, organizers will continue to accept mentee applications.

The committee strove to create an accessible program that will continue to attract junior Aboriginal lawyers, breaking down the barriers that currently and historically have prevented them from entering and staying in the legal profession

To apply for the program, visit the Law Society website at Lawyers > Aboriginal Lawyers Mentorship Program.

For further information, please contact Andrea Hilland, staff lawyer, policy & legal services, 604.443.5727.❖

Trust Assurance Program begins second six-year cycle of compliance audits

AUDITORS WITH THE Law Society Trust Assurance Program, which ensures lawyers handle trust funds appropriately, have embarked on the second wave of compliance audits. The first full six-year cycle was completed in 2012 and resulted in the examination of the books of every law firm in BC that handled trust accounts and had been in operation when the program was launched six years earlier.

"Ensuring compliance with the trust accounting rules is a key part of the Law Society's mandate to protect the public," said Felicia Ciolfitto, Manager of Trust Regulation.

Prior to 2006, the process to ensure compliance with the Law Society's trust accounting rules was substantially different than the process that exists today.

The Law Society previously required all law firms maintaining trust accounts to hire an accountant and file an annual report to ensure bookkeeping and financial transactions were conducted in accordance with the rules and regulations. While audits could be ordered following complaints or evidence of accounting irregularities or fraud, there was no proactive audit program.

Questioning whether the annual accountant's report was the best or most cost-effective way to ensure compliance with the trust accounting standards, Law Society staff compared the then-current trust review program with programs in place in other Canadian jurisdictions, as well as New Zealand and Scotland. It soon became clear the Law Society could offer a more effective and efficient program and the Benchers approved a new approach in December 2005.

The new Trust Assurance Program, which began operations in late 2006, dropped the requirement for most law firms to file an annual accountant's report. Instead, firms are now able to self-file an annual trust report.

Complementing the annual trust report is the compliance audit program, where auditors examine the books, records and accounts of law firms to ensure they comply with certain Law Society Rules and provisions of the *Legal Profession Act*.

The Law Society also assesses each firm to reflect its past history of compliance with the rules, in addition to looking at other information, such as areas of practice and the volume and size of trust transactions. The goal is to identify firms with accounting and trust practices that may pose a concern, and audit them more frequently.

A MORE COST-EFFECTIVE PROGRAM

Law Society President Art Vertlieb, QC said it has been demonstrated that the Trust Assurance Program is good for the profession, as well as the general public.

"There is a real cost saving for law firms," said Vertlieb. "Previously, lawyers had to go to the trouble of hiring an external accountant, have them prepare a trust report, and then submit it every year to the Law Society. For about 90 per cent of firms, that significant expense is no longer there."

Providing the Law Society with an effective mechanism to protect the public is a key feature of the compliance audit program.

Today, the program is funded by the trust administration fee, which until recently was a $10 charge lawyers remit to the Law Society for most files that involve trust funds. Beginning January 1, 2014, the fee will increase to $15 per applicable transaction, the first increase since the program's inception.

Approximately 92 per cent of firms across BC self-file trust reports each year. Eight per cent of firms are required to file an accountant's report, because they are new firms in the first year of practice, old firms in their final year or firms that have a history of low compliance with trust accounting rules.

PROTECTING THE PUBLIC

Providing the Law Society with an effective mechanism to protect the public is a key feature of the compliance audit program. The old system of accountant's reports would occasionally reveal rule violations that could lead to an audit, but most investigations resulted from complaints.

The compliance audit model, on the other hand, is proactive and more effective at detecting and deterring potential mishandling of trust funds.

"Lawyers know that they are going to have their books and records examined," said Ciolfitto.

"We do have times when a compliance auditor is going to notice some red flags. When certain red flags are identified, investigating those further is beyond the scope of a compliance audit. In those particular situations, a referral is made to professional conduct."

Between 2008 and 2012, the percentage of compliance audits that resulted in a referral to the professional conduct department ranged from between five and eight per cent each year.

Ciolfitto says by providing an effective program, the audit model better protects the public and helps reduce the profession's exposure to insurance claims.

EDUCATION FOR LAWYERS

In addition to being more cost effective and better able to detect potential trust accounting issues, the program is also an educational opportunity for lawyers.

"In the past, there was a section of the trust report that only the external accountant would answer," said Ciolfitto. "Now, they have to answer similar questions about their trust account practices, and that helps them become more familiar with the rules."

The compliance audit program offers another educational opportunity. By visiting firms and examining their books, compliance auditors can suggest simple ways to make the accounting systems more efficient, in addition to complying with the Law Society's rules.

Tracey Crossen, a trust assurance auditor based on Vancouver Island, points

to cash receipts as an area where lawyers are frequently not in compliance with the rules. Crossen noted lawyers often fail to properly record cash transactions or forget to have the proper signatures on the receipt.

"A lot of members say they don't take cash very often and can't remember what information to get," said Crossen. "I tell members to take that rule, cut it out, and paste it on the front of the receipt book. It's right there in front of you. Something as simple as that can make their lives a lot easier."

"I think at the very beginning of the program, lawyers thought we were out to see them because we suspected they were fraudsters. But over the last six years, much of that apprehension has disappeared and they really see the benefits of the program."

– Felicia Ciolfitto

An auditor will also visit a new law firm upon request to ensure they are off to a good start with their trust accounting.

A SIX-YEAR CYCLE

In 2012, Law Society auditors performed 473 compliance audits, bringing the total number of audits to approximately 2,900 since the inception of the program. In addition, the Trust Assurance Department reviewed just over 3,400 annual trust reports in 2012, a similar number to previous years.

While the program is considered a success within the Law Society, it also appears to be resonating with the profession.

"We've been fortunate because our auditors have been well received," said Ciolfitto, pointing to post-audit survey results conducted by her department. Overwhelmingly, lawyers reported the compliance audit process was beneficial to their practice, the recommendations were constructive and the auditors themselves were positive and professional.

"I think at the very beginning of the program, lawyers thought we were out to see them because we suspected they were fraudsters. But over the last six years, much of that apprehension has disappeared and they really see the benefits of the program."

For more information, including Trust Assurance forms, checklists and templates, please see the website.❖

Trust Administration Fee to increase on January 1

The Trust Administration Fee (TAF) funds the Trust Assurance Program and has remained set at $10 since its introduction in 2005. However, revenue from TAF has been declining over the past seven years, largely due to fewer real estate unit sales. In order to offset the decrease in revenue and cover the costs of the program, TAF will be increased from $10 to $15 per applicable transaction, effective January 1, 2014. For more information, please contact trustaccounting@lsbc.org.

THE LAW FOUNDATION OF BRITISH COLUMBIA

NEWS FROM THE LAW FOUNDATION

Reductions in funding for 2014 and beyond

AT ITS NOVEMBER 2013 meeting, the Law Foundation Board of Directors decided to reduce the grants budget from $19.6 million (the 2013 amount) to $16 million for 2014 and years going forward. This was a difficult decision that was made after serious discussion and consideration of the principles developed by the board in 2012. Those principles are that the Foundation will:

- fulfill its statutory mandate;
- remain a stable and effective organization;
- produce the greatest value for the poor;
- recognize the importance of delivering services to disadvantaged people;
- give a direct benefit to the public of Foundation funding;
- provide maximum benefit to British Columbia;
- minimize harm to grantees as much as possible; and
- take into account alternate funding that may be available to grantees.

The Foundation also worked hard to be strategic in its approach and, accordingly, did not impose automatic, across-the-board cuts.

Board decisions were also informed by the reviews of work being done in the mandate areas of legal research, public legal education and information, public interest law and professional legal education. There was additionally some rationalization of funding amounts for some of the advocacy programs.

The Law Foundation, adhering to the 10 per cent administrative costs guideline that it applies to grantees, has reduced its own administration budget and cut two staff positions.

In keeping with the Foundation's mission statement "to advance and promote a just society governed by the rule of law through leadership, innovation and collaboration," both the Foundation's Strategic Initiatives Fund and a project fund were retained to ensure that important plans can move forward and that the best new, innovative project ideas can be advanced. These funds, however, have been significantly reduced from previous levels.

The $330,000 project fund will be used to allocate a maximum of $50,000 per project, rather than the large and small project funds of the past. The submission date for applications for 2014 projects is February 14, 2014. For more information about project funds, please refer to the Law Foundation website under the "Funding Available" tab.❖

Unauthorized practice of law

UNDER THE LEGAL Profession Act, only trained, qualified lawyers (or articled students or paralegals under a lawyer's supervision) may provide legal services and advice to the public, as others are not regulated, nor are they required to carry insurance to compensate clients for errors and omission in the legal work or claims of theft by unscrupulous individuals marketing legal services.

When the Law Society receives complaints about an unqualified or untrained person purporting to provide legal services, the Society will investigate and take appropriate action if there is a potential for harm to the public.

From August 16 to November 13, 2013, the Law Society obtained undertakings from 11 individuals and businesses not to engage in the practice of law.

The Law Society has obtained orders prohibiting the following individuals and businesses from engaging in the unauthorized practice of law:

- **Eduardo R. Pereira**, of Victoria, consented to an order prohibiting him from engaging in the practice of law unless under the direct supervision and employment of a practising lawyer; from falsely representing himself as a lawyer; and from commencing, prosecuting or defending a proceeding in any court on behalf of others. In its petition, the Law Society alleged that Pereira (a self-described paralegal) appeared in court, gave legal advice, negotiated the settlement of a claim, drafted and filed materials in the court for a variety of persons for or in the expectation of a fee and while not supervised and employed by a practising lawyer. The Law Society alleged that, in one particular instance, Pereira negotiated the settlement of a personal injury claim on behalf of another, accepted the settlement funds and did not forward the funds to the client or advise the client that the matter had settled. As a term of the injunction, Pereira is responsible for the Law Society's costs and a restitution payment to the injured party. (October 23, 2013)
- **Charles Daniel Sam**, a.k.a. **Klatle-Bhi** and **Lucius Tyler Lewis**, a.k.a. **Tah-Sun-Quay-ton**, of North Vancouver, consented to an order permanently prohibiting them from engaging in the practice of law for a fee and from commencing, prosecuting and defending proceedings in any court on behalf of others, regardless of whether a fee is charged. The order specifically prohibits Sam and Lewis from appearing as counsel, advocate, representative of any other title that connotes an ability on behalf of others, as well as drafting legal documents and giving legal advice for or in the expectation of a fee, gain or reward, direct or indirect from the persons for whom the acts are performed. The Law Society was awarded its costs. (October 22, 2013)
- Mr. Justice Silverman ordered an injunction against **Michael Helfrich**, a.k.a. **Marvin Helfrich**, of North Vancouver, prohibiting him from engaging in the practice of law; commencing, prosecuting or defending a proceeding in any court; and from falsely representing himself as a lawyer. As Helfrich previously resigned from the Oregon State Bar in the face of discipline proceedings, he is prohibited from engaging in the practice of law regardless of whether he charges a fee. In its petition, the Law Society claimed that, while falsely representing himself as a lawyer, he offered to provide a wide array of legal services to a number of persons for a fee. Helfrich represented himself as entitled and qualified to prepare business agreements, negotiate the settlement of claims, draft and file pleadings, appear as counsel in court, and give legal advice. In granting the order, the court also awarded the Law Society's costs. (October 18, 2013)
- **Major Singh Randhawa**, a.k.a. **Dr. Major S. Randhawa**, of Surrey, BC, consented to an order prohibiting him from engaging in the practice of law. The Law Society alleged that Randhawa offered to prepare incorporations and other corporate documents for a fee. Under the order, Randhawa is prohibited from preparing corporate documents, documents for use in a judicial or extra-judicial proceeding or a proceeding under statute and from giving legal advice for or in the expectation of a fee. The order also prohibits Randhawa from offering or representing that he is qualified or entitled to provide any of these services for a fee. (October 2, 2013)❖

In Brief

JUDICIAL APPOINTMENTS

Justice **Richard Goepel** of the Supreme Court of BC was appointed a judge of the Court of Appeal of BC, replacing Justice **Christopher Hinkson**. Justice Hinkson was appointed Chief Justice of the Supreme Court of BC, replacing Chief Justice Robert Bauman who was appointed Chief Justice of BC.

Leonard Marchand was appointed a judge of the BC Provincial Court (Kamloops).❖

Designated paralegals in the delivery of legal services

A year of change, at home and abroad

2013 HAS BEEN a year of change for the legal profession in jurisdictions around the world.

In the UK, the creation of alternative business structures (ABS), which allow non-lawyers to take an ownership role in law firms, is gaining momentum. The Solicitors Regulation Authority is reporting it is receiving approximately 50 applications for ABS licences every quarter in 2013, and has granted more than 200 licences since it began accepting applications in early 2012.

In the US, online legal service providers such as Rocket Lawyer, which specialize in providing legal documents for families and small to medium-sized businesses, are also trumpeting their own strong growth. Some say the growing "virtual" legal industry is now eating away at the profits of traditional bricks-and-mortar law practices.

2013 was a year of change in British Columbia as well. The Benchers recently approved the recommendations of a joint task force of the Law Society, which determined legal services providers should be brought under one regulatory umbrella, and the Law Society should be the single regulator. Representatives of the Law Society, the Society of Notaries Public of BC, the BC Paralegal Association and others went around the province seeking input from legal system stakeholders and the public.

Also in 2013, the Law Society, partnering with the BC Provincial Court and the BC Supreme Court, kicked off a two-year pilot project that allows supervised paralegals to appear in certain BC court registries on family law matters, a first in the province.

That pilot project was part of the Law Society's effort to ease the regulations governing lawyers' use of paralegals, thereby providing another affordable option for members of the public who need legal services. Months earlier, the Law Society implemented regulatory changes that allowed supervising lawyers to "designate" competent, qualified paralegals, allowing them to provide legal advice directly to clients.

With access to legal services out of reach for those in the middle-income class who earn too much money to qualify for legal aid, but too little to afford a lawyer's fees, the Benchers hope designated paralegals can play a role in making justice more affordable.

Looking back on their experiences in 2013, the paralegals and lawyers who have taken advantage of the new regulations say there is a clear benefit for their practices and, more importantly, for their clients.


Michele McMillan


Julie Fredette


Douglas Lester


Kevin Heinrichs

THE DESIGNATED PARALEGAL'S PERSPECTIVE

Michele McMillan, a designated paralegal specializing in family law at Quay Law Centre in New Westminster, was one of the first designated paralegals to appear in court this year on behalf of a client.

Under the pilot project that was launched in January, designated paralegals like McMillan are permitted to appear in certain family law proceedings to deal with uncontested procedural matters, such as seeking leave to amend pleadings or correction of an order, as well as a small number of contested matters.

McMillan, who has spent more than 20 years working in law, said she spent a considerable amount of time preparing for her first appearance, which was a consent order in chambers in New Westminster.

"I went to several court appearances with different lawyers in my office," said McMillan. "I attended a few chambers applications in New Westminster and Vancouver to observe so I would know the process, how to check in with the clerk, how to speak to the court. I wanted to be fully prepared."

McMillan believes there is a clear access to justice benefit for clients when a designated paralegal appears in court on their behalf.

"From the client's perspective, they can pay, for example, $100 or $150 an hour for a designated paralegal, or significantly more for a lawyer, even though they are doing the same work," said McMillan. "It's just one part of the puzzle, but if you add that up over time it is a significant cost savings for clients. And it is something a designated paralegal has the ability to do, providing they are properly supervised."

Julie Fredette is a designated paralegal at RDM Lawyers in Abbotsford and acts as the case manager for the firm's personal injury department. Because she is not working in family law, Fredette is not appearing in court under the pilot project.

But for her, the new Law Society regulations provide the freedom to give legal advice and to make hospital visits to clients on her own, without a lawyer present.

"That's really convenient for our clients," said Fredette. "It also leverages the lawyer's time so they can provide faster and more efficient service on other files, because they don't have to meet three personal injury clients in the day."

THE LAWYER'S PERSPECTIVE

Lawyers who supervise designated paralegals agree the changes are beneficial to their clients, and their practices.

Douglas Lester, managing partner at RDM Lawyers, said Fredette's expanded role provides him with more flexibility to run the firm.

"If there is no downside from a liability standpoint, or from an expertise standpoint, and I as the lawyer am standing behind this work, then the benefit is for the client in paying $100 dollars per hour in legal fees for the same work to be done."

– Kevin Heinrichs.

"I may spend 50 per cent of my day dealing with human resources issues, or accounts receivable from other departments, or approving budgets," said Lester.

Kevin Heinrichs, a family law lawyer with Henderson Heinrichs in Vancouver, supervises a designated paralegal in his practice. He said while the paralegal's role has not changed dramatically, she is now permitted, for example, to do initial consultations with clients to deal with uncontested divorces without a lawyer in the room. Previously, a lawyer would conduct all initial consultations.

Heinrichs believes that, while the initiative will benefit law firms in the long run, the biggest benefit is for clients.

"If there is no downside from a liability standpoint, or from an expertise standpoint, and I as the lawyer am standing behind this work, then the benefit is for the client in paying $100 dollars per hour in legal fees for the same work to be done," said Heinrichs.

THE LAW SOCIETY'S PERSPECTIVE

The first year of the two-year pilot project that allows designated paralegals to appear in court is almost over. When the pilot project ends, the Law Society and the courts will evaluate what worked, what did not work, and whether it should be expanded into other areas of law.

The regulatory changes that allow designated paralegals to give legal advice do not expire and will also be evaluated. The Law Society has added a question to the Annual Practice Declaration asking lawyers about their use of designated paralegals, and has created a voluntary survey for lawyers to report back their experiences.

Overall, the goal is to continue serving the needs of the public by improving access to justice, while always ensuring the high professional standards British Columbians expect.

Law Society President Art Vertlieb, QC, who also works with a designated paralegal, is optimistic about what the future holds for paralegals, and for the clients who use them.

Vertlieb travelled the province in 2013 speaking to bar associations and paralegals groups, drumming up support for the initiative. He said while the interest is there, uptake has nevertheless been slow.

"I believe that once more is known about the benefits of working with designated paralegals, more lawyers will take advantage of the designated paralegals option," said Vertlieb. "But change isn't easy, and it doesn't happen quickly."

Just how much things will change in the years ahead in BC, in other Canadian provinces and in other countries around the world, remains to be seen. But with shrinking legal aid budgets, growing numbers of people choosing to self represent and new business models taking root, change is clearly in the air.

"There is no doubt in my mind, paralegals will play an increasingly important role in the delivery of legal services in British Columbia," said Vertlieb.❖

Practice Watch

by Barbara Buchanan, Practice Advisor

PST AND LEGAL SERVICES

The provincial government has issued an updated provincial sales tax (PST) bulletin related to legal services. Among other updates (see adjustments to the section, Purchases of Legal Services by Providers of Legal Services), the bulletin is intended to clarify how PST applies to disbursements, fees and charges.

Disbursements, generally not subject to PST, are described as a request for the reimbursement of an out-of-pocket expense that was incurred on behalf of a client and owed to a third party. Other charges, which do not require the recovery of an expense as a result of a billing by a third party, are generally subject to PST, with limited exceptions. Accordingly, billing items that are in-house charges of the lawyer or law firm, including paralegal time, word processing, computer costs, online searches performed using resources acquired under a flat subscription fee, mileage, photocopying, printing, faxes and telephone calls (unless the charge is a precise recovery of an amount billed by a third party, such as a long distance call that appears on a telephone bill), are normally subject to PST, with limited exceptions.

For more information, see PST Bulletin 106 on the government website, or contact the province at 1.877.388.4440 or by email at CTBTaxQuestions@gov.bc.ca. You can also subscribe to the government's What's New page to receive email updates of new PST information as it becomes available.

HIGHLIGHTS OF THE 2013 PRACTICE CHECKLISTS MANUAL

Check out the Practice Checklists Manual, free on the Law Society website (go to Practice Support and Resources). The 2013 update reflects *Code of Professional Conduct for British Columbia* (*BC Code*) rule changes, statutory amendments, new cases and changes in practice (see Highlights of the 2013 Practice Checklists Manual). The highlights are not exhaustive, so refer to the checklists for more details. The manual consists of 41 checklists, for practice in core subject areas (corporate and commercial, criminal, family, litigation, real estate, wills and estates, human rights, immigration) and for client identification and verification.

If you have suggestions for improving the checklists, developed by the Law Society with the assistance of the Continuing Legal Education Society of BC, please send them to Barbara Buchanan at bbuchanan@lsbc.org.

ACTING JOINTLY FOR LENDER AND BORROWER IN COMMERCIAL TRANSACTION

The Law Society has been advised that some lawyers have acted jointly for lenders and commercial borrowers. This is not permitted under the *BC Code*. The requirement that a lawyer reasonably believe that he or she is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under the *BC Code* (rule 3.4-2, commentary [7]).

In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C (rule 3.4-1, commentary [0.1]). One of the permitted circumstances is if the transaction is a simple conveyance. A transaction with a commercial element is not a simple conveyance.

If a lawyer is permitted to act for more than one client in a matter or transaction, the lawyer must comply with the obligations for joint retainers set out in rules 3.4-5 to 3.4-9.

LIMITED SCOPE RETAINER RULES ADDED TO *BC CODE*

Rules regarding limited scope retainers were added to the *BC Code* in September 2013 to assist lawyers in the delivery of such services. BC's rules are based on the model code rules adopted by the Federation of Law Societies.

A "limited scope retainer" means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client (rule 1.1-1). When entering into a limited scope retainer, a lawyer should be aware of the obligations in rules 3.1-2, 3.2-1.1, 7.2-6 and 7.2-6.1 and, in particular, the writing requirement.

Suppose a new client asks you to draft a notice of civil claim that she will file. At this point, she doesn't want you to do anything other than draft the claim for her. As usual, assess whether you have the necessary legal knowledge and skill, as a lawyer must perform all legal services to the standard of a competent lawyer, including those provided under a limited scope retainer (rule 3.1-2, commentary [7.1]). Then, ensure that the client is fully informed of the nature of your engagement, clearly understands the scope and limitation of your services and any risks of the retainer.

Rule 3.2-1.1 contains a writing requirement: "Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and *must confirm in writing* to the client as soon as practicable what services will be provided." Be clear about what services you agreed to provide and what you did not, as you risk having any ambiguity resolved in favour of the client. Note that rule 3.2-1.1 does not apply to situations in which a lawyer is providing summary advice, for example, over a telephone hotline or as duty counsel or for an initial consultation that may result in the lawyer retaining the client (rule 3.2-1.1, commentary [5]).

Now suppose that some months after the client has filed the claim herself, you agree to represent her on a court application as part of a second limited scope retainer. You may have concerns about how you will represent yourself to the court and to opposing counsel. Regarding the court, rule 3.2-1.1, commentary [3] provides:

> [3] Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

How should counsel conduct themselves when one lawyer is acting under a limited scope retainer? According to rule 3.2-1.1, commentary [2] and [4] and rule 7.2-6.1:

- A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client and should consider how communications from opposing counsel in a matter should be managed.
- A lawyer may, without the consent of the lawyer providing limited scope legal services, approach, communicate or deal with the lawyer's client directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer. Where such written notice has been provided, the opposing lawyer is required to communicate with the client's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the client on matters outside of the limited scope retainer.

Note that the *BC Code* includes specific conflict rules for lawyers who provide "limited legal services," meaning advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter (rules 3.4-11.1 to 3.4-11.4).

For unique risks created by limited retainers and some tips to avoid them, see Managing the risk of a limited retainer (*Insurance Issues: Risk Management*, Summer 2010).

BAD CHEQUE SCAM ATTEMPTS USING LINKEDIN

Fraudsters are always looking for new ways to try to get access to a lawyer's trust account. Recently, a BC lawyer was approached via LinkedIn by someone impersonating a lawyer at a Japanese law firm attempting to refer a phony client to the BC lawyer regarding a divorce settlement. The phony client would then try to trick the BC lawyer into the bad cheque scam (wiring funds from trust to the "client" on the strength of depositing a bad cheque or phony bank draft).

What can you do to protect yourself? See Take steps to manage the risk and review the bad cheque scam names and documents list on our website as part of your firm's intake process. The list is regularly updated; in September, October and the first half of November alone, the following new names were added:

Lucy Wang, Mark Landers, Craig Williams of Williams Investment Ltd., Tony Yomex, Alfred Odwod, Kasuruo Makoto, Richard Alfred, Peter Cheng, Rina Walton, Saburo Daiichi Kosho Co., Ltd., Viktor Gustaff of Aptilo Networks AP, Akiyori Shibuya of Howa Textile Industry Co., Ltd., Toshiko Hamayotsu, Attorney-At-Law of Hamayotsu & Hamayotsu, Kenneth Dean, Robert Otermat, Miyahara Yu of Goertek Technology Co., Ltd., Seaside Computing Services, BEI Canadian Initiatives, Inc., Wessler Hillary, David Troyer, Maki Kennedy, Kim Crowford, Cheng Wu of Wu Ind'l Co. Ltd., Huan Song (aka Huan Shan), Shan Song, Derreck Terry, Irfan Dean, Lukas Horkavec, He Weijian and Matsui Tatsuyuki.

The phony client would then try to trick the BC lawyer into the bad cheque scam (wiring funds from trust to the "client" on the strength of depositing a bad cheque or phony bank draft).

The fraudsters' ruses included commercial and personal loans, overdue business accounts, matrimonial agreements, impersonating a lawyer, contempt petitions for failure to make court ordered payments, a phony real estate purchaser, incorporation of a company and a breach of licence agreement and copyright infringement.

Author's note: This fraud alert includes names used by fraudsters in BC. Real people with the same names may be the victims of a fraudster or of coincidence, but are not suspected of wrongdoing.

FRAUDSTERS MAY IMPERSONATE YOU – SEARCH YOUR NAME ON-LINE

It's sensible to regularly conduct an on-line search of your name and your firm's name to see what turns up. This isn't vanity; it's for your protection. You may find that someone has pretended to be you. Recently, a BC lawyer found that her name and her firm's name had been used in a prospectus filed with the Securities and Exchange Commission. The information she turned up also indicated that she had given an opinion. The lawyer doesn't practise securities law, didn't provide an opinion, had no connection with the matter and hadn't acted for the party. It would appear the lawyer's name was used in attempt to fool potential investors.

The Solicitors Regulation Authority in the UK has warned lawyers that a law firm's clients received phony letters, purportedly from a real partner of the firm. The letter said that the firm had changed its bank accounts and asked clients to use the new account information provided in the letter. So far this scam hasn't surfaced in BC.

Contact Barbara Buchanan, Practice Advisor at bbuchanan@lsbc.org for confidential advice if you believe someone is trying to scam you. Reporting allows us to notify the profession, as appropriate, and update the bad cheque scam list of names and documents.

AFFIDAVITS – DO YOU KNOW THE BASICS?

Someone contacted me recently, frustrated by problems with affidavits received from lawyers, especially as to the marking of exhibits. Supreme Court Civil Rule 22-2 and Supreme Court Family Rule 10-4 dictate the basic requirements for affidavits, including how to identify each exhibit attached by signing a certificate placed on the exhibit in the following form:

> This is Exhibit . . . . . referred to in the affidavit of . . . . . sworn (or affirmed) before me on . . . . [dd/mm/yyyy] . . . . .

Lawyers are also encouraged to read paragraph 1 and the commentary in Appendix A – Affidavits, Solemn Declarations and Officer Certifications of the BC Code.

Lawyers should scrupulously adhere to the requirements for affidavits. The Law Society has disciplined lawyers for professional misconduct related to the preparation and use of affidavits (e.g., improper alterations). There are lots of resources to help lawyers. Here are just a few:

- *Affidavit Secrets 2011*, Continuing Legal Education Society of BC (print material and webcast course archive);
- "Chapter 33 – Affidavits" in *The Conduct of Civil Litigation in British Columbia*, Second Edition, Volume 2, Fraser, Horn & Griffin, Lexus Nexus;
- *British Columbia Annual Practice*, 2014, Dillon & Turriff, Canada Law Book;
- Law Society of BC, PLTC Practice Material, Civil Litigation, Chapter 3 – Chambers Practice, [3.03] Affidavit Drafting;
- *Information and Instruction Guide for Commissioners for Taking Affidavits for British Columbia*, BC Ministry of Justice.

PROCEDURE WHEN GROUNDS FOR APPEAL ALLEGE INCOMPETENCE

On November 12, 2013 the BC Court of Appeal issued Criminal Practice Directive: Ineffective Assistance of Trial Counsel, which outlines the procedure to follow when a ground of appeal alleges the ineffective assistance or incompetence of trial counsel in the lower court. The directive covers counsel acting on the appeal, as well as trial counsel whose conduct has been impugned.

The directive was prepared with the input of the court, representatives of the defence bar, the Legal Services Society, and federal and provincial prosecutorial authorities and the Law Society.

Trial counsel are reminded of their duty to immediately report to their insurer any negligence claim or potential claim. For more information on the reporting obligation, see My Insurance Policy: Questions and Answers.

FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604.697.5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch.❖

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** 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.

Practice and ethics advice – Contact **Barbara Buchanan**, **Lenore Rowntree** or **Warren Wilson**, QC to discuss ethical issues, interpretation of the *Code of Professional Conduct for British Columbia* or matters for referral to the Ethics Committee.
Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships.
Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org.
Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org.
Contact Warren at: tel. 604.697.5857 or 1.800.903.5300 email: wwilson@lsbc.org.

All communications with Law Society practice and ethics advisors are strictly confidential, except in cases of trust fund shortages.

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PPC Canada EAP Services – 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.

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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 additional cost to 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 other legal workplaces.
Contact Equity Ombudsperson, **Anne Bhanu Chopra**: tel: 604.687.2344 email: achopra1@novuscom.net.

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Time for robust backups

> ♫ *Did you think I'd crumble?*
> *Did you think I'd lay down and die?*
> *Oh, no, not I, I will survive …* ♫
>
> Lyrics and music by Freddie Perren and Dino Fekaris, recorded by Gloria Gaynor

IN MID-OCTOBER, A fire in New Westminster destroyed several buildings, including a law firm's office. As reported in the *Vancouver Sun*:

> The law firm Edwards and Co., plans to reopen in new premises further down Columbia by next week. According to office manager Linda Deroche, clients' files and company records were intact as they were stored in a fireproof safe.

It is indeed good news that Edwards & Co. had a fireproof safe. But do you? And what would happen to your computer data in the event of a fire or other catastrophe? Rebuilding accounting data would be an onerous undertaking at best. The loss of unbilled disbursement records, trust accounting records and the like, not to mention client documents and communications, would be devastating to most law offices.

Reports about the percentage of businesses that fail following a disaster paint a grim picture – the numbers range from 40 per cent to as high as 80 per cent. Ultimately, though, there is only one statistic that counts … yours. Can *your* business recover from a disaster?

To start, you need a disaster recovery plan. Part of that plan includes a robust continual data backup and restoration system, since you don't know when or how a disaster could strike. It could be a fire like the one in New Westminster. It could be a flood (where the sprinklers are accidentally turned on by someone hitting the sprinkler head with a ladder, for example), a strong storm (like Katrina), an earthquake or even an epidemic that prevents lawyers and staff from getting to the office (SARS in Toronto). It could also be a power surge caused by a tree falling onto a power line. In any event, you are faced with a situation that is out of the ordinary and requires action to prevent further losses and to put the business back on track as quickly as possible.

Of course, it is crucial that your backup system is not also taken out by the disaster. This typically means having off-site storage of your data (not just a portable USB drive). It is also important to ensure that your backup service itself has a robust backup system in place … just in case you all fall victim to the same catastrophe!

Having a good backup system might actually prevent some kinds of disaster.

A law firm in BC was recently hit with "ransomware" – a malicious application that encrypted all their files and demanded a ransom be paid to unlock the data – failing which the application threatened to delete itself, taking the de-encryption key with it. In this case, the firm paid the ransom to have the data back.

The Cryptolocker malware had struck – successfully. Typically, these malware encrypt your data with a cryptography key that is too large to be broken within the time available to pay the ransom. Aside from good anti-malware software, one way to prevent this is to have a regular backup that (hopefully) predates the infection, so you can restore your data without paying the ransom.

Unfortunately, data protection and security may not be getting the attention it deserves. According to the Legal Technology Resource Center's 2013 annual survey of legal technology undertaken for the American Bar Association:

- 15 per cent of law firms have reported a security breach;
- 43 per cent reported being infected by a virus, spyware or malware;
- 53 per cent reported having a disaster recovery plan in place;
- 79 per cent use some sort of anti-virus software (query: *what does it take* to get law firms to 100 per cent???).

So how do you get started building a disaster recovery plan? There are a number of very good websites that can help:*

- www.americanbar.org/groups/committees/disaster.html – The ABA Committee on Disaster Response and Preparedness has published *Surviving a Disaster: A Lawyer's Guide to Disaster Planning*, along with many other resources for lawyers on disaster response and preparedness;
- www.publicsafety.gc.ca/cnt/mrgnc-mngmnt/mrgnc-prprdnss/mrgnc-mngmnt-plnnng-eng.aspx – Public Safety Canada has an excellent website devoted to disaster planning, including *A Guide to Business Continuity Planning*;

- npccny.org/info/disaster_plan.htm – The Nonprofit Coordinating Committee of New York has published *Disaster Planning, Emergency Preparedness & Business Continuity*. This publication was drawn from a series of disaster planning and recovery seminars, and is made available as a Word document that can be adapted and incorporated into your own plan;
- www.sba.gov/content/disaster-planning – The US Small Business Administration has a collection of resources on disaster planning for businesses;
- www.cga-canada.org/en-ca/AboutCGACanada/CGAMagazine/2004/Nov-Dec/Pages/ca_2004_11-12_ft1.aspx – The Certified General Accountants have put together an excellent step-by-step approach (as recommended by IBM) on how to conduct IT disaster planning.

In conjunction with a disaster recovery plan you will need a good data backup that will help you restore your business operations. Some providers of off-site backup focus specifically on the legal profession while others market to businesses generally. I would definitely focus on those providers who state that your data remains in Canada.

Here are a couple of Canadian online backup providers that focus on the legal market:*

- www.bmcnetworks.ca/?page_id=3 – BMC Networks provides backup and disaster solutions for BC lawyers;
- www.i-worx.ca – i-worx is a cloud solution for law firms, offering cloud storage and remote hosted desktop and applications.

These cloud storage companies state that they host data in Canada:*

- paper42.ca – Paper42;
- www.bell.ca/enterprise/EntPrd_Cloud-Computing_Landing.page – Bell Canada;
- boldbeaver.com/cloud-backup/ – Bold Beaver Communications;
- canadacloudstorage.ca – Canada Cloud Storage;
- www.cacloud.com – Canadian Web Hosting;
- cloudpath.pathcom.com – Pathway Communications;
- www.cloudpockets.com – Foreverwarm Consulting Inc;
- www.servercloudcanada.ca/company/why.html – Server Cloud Canada.

There is one final consideration in this context when establishing your online backup, and that is the speed of your internet connection – for both uploading and downloading.

Wikipedia lists the upload and download maximums for virtually every major ISP in Canada at en.wikipedia.org/wiki/Internet_in_Canada.

The fastest service listed is Novus, at 300 megabytes per second, both up and down, with no cap. Telus is stated to be 50 MB/s down and 10 up, with a cap of 400 gigabytes.

A download calculator can be found at www.numion.com/calculators/time.html.

Why does your connection speed matter? Let's assume you have 500 GB of data (half a terabyte). At a speed of 51 MB/s, uploading or downloading the data would take 21:47:11 (H:M:S), calculated with no overhead factor. With a 50 per cent overhead factor, the time jumps to over 32 hours.

So to determine how long it would take you to retrieve your data, you need to know your download speed, make an estimate of your overhead factor (50 per cent is normal) and the size of your backup. You can see that it can take a substantial amount of time to restore your data if you are on a slow internet connection (and slower yet if download caps slow your connection once you exceed the cap).

Instead of your business crumbling when disaster strikes, with proper preparation and a robust data backup, you can survive!❖

* Website links and resources are provided as a convenience only; neither the writer nor the Law Society are endorsing any particular service or company.

DISCIPLINE ADVISORY

Know your obligations before accepting cash

THE LAW SOCIETY has consistently recognized that the legal profession must take steps to prevent money laundering and, since 2004, has had a rule limiting the amount of cash that lawyers may accept.

Under Law Society Rule 3-51.1 (the "no-cash rule") lawyers are generally precluded from accepting an aggregate amount of $7,500 or more in cash with respect to any one client matter or transaction. There are, however, very limited circumstances under which a lawyer can accept cash in excess of that amount. These exceptions are set out in subrules (2) and (3.1) and include instances where a lawyer receives the cash from a law enforcement agency; pursuant to a court order; or for professional fees (including a retainer), disbursements, expenses or bail.

Some lawyers have expressed uncertainty about how the exceptions ought to be applied and what constitutes acceptance of $7,500 or more in cash with respect to any one client matter. Read the full advisory on the website, where we provide more information around the following questions:

- Was the cash tendered for a specific purpose?
- Was the cash tendered incrementally?
- If the cash was received pursuant to a court order, what does the order say in this regard?

Failing to know your obligations with respect to the receipt of cash, or not understanding them, is not a shield to disciplinary action. If you have questions, contact a practice advisor.❖

Conduct reviews

THE PUBLICATION OF conduct review summaries is intended to assist lawyers by providing information about ethical and conduct standards.

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee, which may also be attended by the complainant at the discretion of the subcommittee. The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, including:

- the lawyer's professional conduct record;
- the need for specific or general deterrence;
- the lawyer's acknowledgement of misconduct and any steps taken to remedy any loss or damage caused by his or her conduct; and
- the likelihood that a conduct review will provide an effective rehabilitation or remedial result.

BREACH OF TRUST ACCOUNTING RULES

A lawyer failed to take sufficient care to ensure that every trust cheque has a signature of a practising lawyer, contrary to Rule 3-56(2), and failed to adequately supervise staff to ensure proper practices were followed. The lawyer accepted responsibility for the error and has rectified the situation by removing staff as signing authorities from all trust accounts, circulating an email reminder to all lawyers and staff, establishing new procedures and hiring a bookkeeper who is familiar with the Law Society's trust accounting rules. (CR #2013-38)

A lawyer transferred several small trust balances to his firm's general account, without any inquiry as to the beneficial entitlement to the funds and without preparing or delivering a proper bill to the clients, contrary to Rule 3-56(1). The lawyer had taken a total of $48 over a period of 4½ years from 13 client files. There was no suggestion of personal gain, but rather an uninformed attempt to reduce the account balances to zero and close the files. The lawyer recognizes the seriousness of the conduct. Lawyers are reminded of the Part 3, Division 8 rules regarding unclaimed trust money. (CR #2013-41)

BREACH OF UNDERTAKING

A lawyer registered a transfer document before complying with all the conditions imposed by the vendor's counsel. The lawyer had assumed the conditions were the standard Canadian Bar Association undertakings imposed in real estate transactions. He acted expeditiously to correct the error but delayed in taking responsibility for it. (CR #2013-37)

A lawyer gave a solicitor's undertaking in his private life as a guarantee of a loan to a company in which he had an interest. When the loan become due, he failed to take steps to honour the undertaking, contrary to Chapter 11, Rule 7 of the *Professional Conduct Handbook* (now rule 7.2-11 of the *BC Code*). He is aware of the importance that undertakings serve in the practice of law and will only provide undertakings that he is in a position to personally perform. (CR #2013-44)

DISHONOURABLE OR QUESTIONABLE CONDUCT

While acting as counsel for an accused charged with sexual offences, a lawyer sought records of third-party communications from a social networking website directly from the ISP without following the procedure set out in the *Criminal Code*, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* (now section 2.2 of the *BC Code*). While the lawyer was dealing with a complicated and largely unchartered area of the law, he had been informed in court that the issue was one that would have to be litigated. The lawyer acknowledged he was wrong and apologized. (CR #2013-36)

A lawyer put his female legal assistant in a surprise chokehold at the office. He also fostered a physical roughhousing behaviour and the use of profane language in his office. He acknowledged he breached his duty to demonstrate integrity and respect in his dealings with staff. He indicated he would, amongst other things, contact the Law Society's counselling program (Personal Performance Consultants) to deal with his stress arising out of the practice of law, and the Equity Ombudsperson for guidance and information regarding the potential impact of his conduct upon vulnerable individuals at work. (CR 2013-42).

A lawyer assisted her client to breach a court order not to dispose, encumber or assign matrimonial assets when she had the client execute an assignment of her interest in the matrimonial property to secure legal fees. The lawyer also failed to recommend that the client obtain independent legal advice concerning the client's provision of security to the lawyer for the payment of fees. Lawyers should be aware that rule 3.4-28 of the *BC Code* now explicitly requires a lawyer to advise a client to obtain independent legal advice in these situations. (CR 2013-45).

FAILURE TO RESPOND

A lawyer failed to reply to communications from the Public Guardian and Trustee concerning a client settlement contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook* (now rule 7.2-5 of the *BC Code*). The lawyer was unable to provide a substantive response due to his inability to obtain instructions, but should have made it clear to the Public Guardian that he was unable to respond. (CR #2013-43)

FAILURE TO REPORT CRIMINAL CHARGE

A lawyer failed to report an impaired driving and refusal to provide breath sample charge to the Law Society. The lawyer has a history of alcohol dependency for which she is now seeking treatment. She currently attends Alcoholics Anonymous and Legal Assistance Program meetings. Lawyers are reminded of their obligation to report a criminal charge under Rule 3-90(1). (CR #2013-39)

FEES

A lawyer made payments to lawyers and non-lawyers for client referrals, contrary to Chapter 9, Rules 2 and 3 of the *Professional Conduct Handbook* (now rules 3.6-6 and 3.6-7 of the *BC Code*). The lawyer was reminded of the policy reason for the prohibition on referral fees, namely to prevent the unauthorized practice of law and to ensure that non-lawyers do not gain control over lawyer's practices, which could dilute the lawyer's loyalty and create conflicts of interest. (CR #2013-40)❖

Credentials hearings

Law Society Rule 2-69.1 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement.

For the full text of hearing panel decisions, visit the Hearing reports section of the Law Society website.

JAGDEEP SINGH MANGAT

Called to the bar (Ontario): September 21, 2011
Hearing (application for call and admission transfer): April 17 and 18, 2013
Panel: Kathryn Berge, QC, Chair, Dr. Gail Bellward and Peter Warner, QC
Decision issued: August 1, 2013 (2013 LSBC 20)
Counsel: Henry C. Wood, QC for the Law Society; George K. Macintosh, QC and Ryan Androsoff for Jagdeep Singh Mangat

Jagdeep Singh Mangat made a preliminary application to exclude the public from the hearing and for non-disclosure of all evidence and submissions made in the preliminary application. Mangat also applied for orders excluding the public from certain portions of the hearing dealing with specific issues, and excluding all transcripts taken and exhibits and other evidence tendered at the hearing on those same issues.

The panel determined that orders could be made without unreasonably denying the public access to and knowledge about this application for admission, while avoiding exposure of Mangat and his family members to risks. These orders implemented a system of public exclusion, transcript redaction, redaction of evidence and restricted disclosure of certain facts and documents.

Mangat grew up in a rough Vancouver neighbourhood. After suffering constant racial insults, bullying and beatings, he was drawn to and then protected by a youth gang. He eventually dropped out of school.

In 1991, at age 17, Mangat was charged with weapons-related charges and possession of cocaine. He operated the getaway car in two armed robberies of a grocery store. He pleaded guilty to both robbery counts and the weapons charge and was sentenced to one year of incarceration, two years probation and a ten-year weapons prohibition.

Between 1993 and 1997, Mangat was charged with 23 regulatory offences from 14 incidents. From 2000 to 2005, he was charged with 19 more offences, one Motor Vehicle Act offence and 18 failures to pay transit fares. In 2004, he was charged with obstructing and assaulting a police officer at a labour rally, but was later acquitted following trial.

On March 21, 2007 the National Parole Board granted Mangat a pardon in relation to three youth court and three adult court convictions.

Mangat traced his ascent from the most troubled period of his life to his decision in 1997 to complete his high school general equivalency diploma, followed by UBC studies to gain his real estate licence.

In 1998, at age 24, Mangat was accepted to Douglas College where he joined the United Nations Club and co-founded the Human Rights Club.

In 2001, Mangat transferred to Simon Fraser University and graduated with a degree in sociology. He was a member of many student volunteer groups involving social justice and human rights issues. He also became active in anti-gang youth education initiatives, accepting speaking engagements at schools and other community forums.

When Mangat began his UBC law school studies in September 2007, he continued to be an active volunteer and guest speaker on youth gang issues.

Mangat obtained his law degree in 2010, completed his articles in Ontario and was called to the Ontario bar in 2011. He returned to BC without practising in Ontario, primarily to care for his ailing mother. At the time of the hearing, Mangat was employed as a carpenter.

Mangat's goal is to practise law helping disadvantaged, low-paid workers, refugees and others who are marginalized in society. His interests include employment law, human rights and occupational safety. He has a strong belief in social justice and believes that his criminal past will help him better connect with and assist his target clientele.

The panel observed that rehabilitation from a criminal past is not only possible, but is to be encouraged. It is in the public interest to admit lawyers from diverse backgrounds with a view to meeting the legal needs of all sectors of society.

It was clear to the panel that Mangat had profoundly transformed his life, activities, associates and goals. He had established his present good character.

The panel gave significant weight to the substantive, positive letters of reference from those who received advance, detailed disclosure of Mangat's violent criminal activities and record. The letters demonstrated the degree to which he met the test of being highly regarded and of good repute.

Although not determinative in itself, the panel took into account the fact that Mangat was pardoned for his criminal convictions.

The panel found that Mangat was a person of good character and repute and was fit to become a barrister and a solicitor of the BC Supreme Court. The panel ordered that the application for call and admission be granted without conditions.

APPLICANT 4

Bencher review: September 25, 2013
Benchers: Art Vertlieb, QC, Chair, Rita Andreone, QC, Thomas Fellhauer, Leon Getz, QC, William Maclagan, Benjimen Meisner and Philip Riddell
Decision issued: November 8, 2013 (2013 LSBC 31)
Counsel: Henry Wood, QC for the Law Society; Applicant 4 on his own behalf

BACKGROUND

In November 2012, a hearing was held to consider Applicant 4's application for enrolment as an articled student in the Law Society Admission Program.

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Discipline Digest

BELOW ARE SUMMARIES with respect to:

- Laird Russell Cruickshank
- Sean Patrick O'Neill
- Mishal Abrahams
- Aaron Murray Lessing
- Vivian Chiang
- Leanne Frances Rutley

For the full text of discipline decisions, visit the Hearings reports section of the Law Society website.

LAIRD RUSSELL CRUICKSHANK

Vancouver, BC
Called to the bar: May 10, 1983
Discipline hearings: December 18, 2012 and July 17, 2013
Panel: Vincent Orchard, QC, Chair, Don Amos and Jennifer Chow
Decisions issued: February 13 (2013 LSBC 06) and August 14, 2013 (2013 LSBC 21)
Counsel: Alison Kirby for the Law Society; Gerald Cuttler for Laird Russell Cruickshank

FACTS

Motor vehicle accident claim

In 2000, Laird Russell Cruickshank was retained by a client on a contingency fee basis in regard to a motor vehicle accident claim. Cruickshank did not provide his client with a written contingency fee agreement.

When the client took over his father's business, Cruickshank also acted for the client's business matters.

In July 2004, ICBC paid $16,502.34 to Cruickshank to settle his client's motor vehicle accident claim. Cruickshank used these settlement funds to pay the legal bills incurred by two companies owned by his client. By February 28, 2005, a balance of $2,012.36 remained in trust from the settlement funds.

In March 2006, Cruickshank's client requested an accounting and payout of the settlement funds. In April 2006, Cruickshank ceased acting for the client and his companies.

Cruickshank's client kept his personal and business affairs separate and he denied giving Cruickshank instructions to pay any legal bills related to his business from the settlement funds. In April 2006, Cruickshank was to re-issue the legal bills to the client's companies so that the bulk of the settlement funds could be paid to the client personally.

Although Cruickshank was repeatedly contacted by the client, he did not re-issue his legal bills to the client's companies. In May 2011, Cruickshank paid the remainder of the settlement funds to his client and subsequently gave a full accounting.

Family law matters

In December 2008 Cruickshank was retained by a client with regards to an application to vary an order that gave unsupervised access to her child to her former partner.

In January 2009, a judge ordered production of documents and, as a specific term of the order, required a party to pay for copies after delivery.

In February and April 2009, opposing counsel delivered to Cruickshank copies of the documents along with photocopying invoices for $40.32 and $166.43. Cruickshank was contacted eight times by opposing counsel's office; however, he did not pay the invoices until January 2011.

In April 2010, Cruickshank was again retained by this client to proceed with an application by her current husband to adopt her child.

In September 2010, Cruickshank filed eight documents for a desk order adoption. Two key documents were missing and the adoption materials were rejected by the registry. Cruickshank re-submitted the adoption documents. The court accepted the adoption documents but rejected the desk order adoption.

In February 2011, Cruickshank contacted the client's former partner's counsel asking whether she could accept service of the adoption materials.

During this time, the client regularly contacted Cruickshank for updates on the adoption process. Cruickshank did not return her calls.

On March 3, 2011, the client picked up the adoption file from Cruickshank's office. That was the first time she learned that the desk order adoption had been rejected and that service on her former partner was not attempted until February 2011.

ADMISSIONS AND DISCIPLINARY ACTION

Cruickshank admitted that his conduct amounted to professional misconduct when he:

- failed to serve these clients in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation; and
- failed to pay disbursement accounts sent to him by opposing counsel and failed to respond promptly to opposing counsel.

Cruickshank admitted that he breached the rules when he:

- received remuneration on a contingency fee basis, without having entered into a written agreement;
- failed to account in writing for trust funds received; and
- withdrew trust funds without authorization to pay bills of other clients.

Cruickshank admitted that he had no notes or correspondence in his client files or any recollection of client instructions authorizing the use of the settlement funds to pay legal bills relating to his client's companies. Cruickshank said he mistakenly but honestly believed that either he or his assistant had verbal instructions to pay the legal bills from the settlement funds.

Cruickshank expressed remorse and gave his assurance that appropriate office safeguards had been put in place, including the hiring of a

bookkeeper.

Cruickshank's professional conduct record showed that this was not the first time he had failed to pay disbursements in a timely manner, engaged in conduct amounting to professional misconduct, and failed to put contingency fee agreements in writing. In 2012, Cruickshank was suspended from practice for one month.

The panel noted that none of the allegations in this case involved malice or deception. Given the circumstances of this case and Cruickshank's previous disciplinary record, the panel placed particular emphasis on ensuring that public confidence in the legal profession was maintained.

The panel accepted Cruickshank's admissions of professional misconduct and breaches of the rules and ordered that he:

1. be suspended from practice for 45 days; and
2. pay $6,948 in costs.

SEAN PATRICK O'NEILL

Vancouver, BC
Called to the bar: May 19, 2000
Discipline hearing: June 25, 2013
Panel: David Mossop, QC, Chair, Adam Eneas and Dale G. Sanderson, QC
Oral reasons (facts and determination): June 25, 2013
Decision issued: August 29, 2013 (2013 LSBC 23)
Counsel: Alison Kirby for the Law Society; Henry Wood, QC for Sean Patrick O'Neill

FACTS

In February 2010, Sean Patrick O'Neill's law firm was retained by an overseas company to assist it with becoming listed on a Canadian stock exchange.

O'Neill introduced the client to a third party who would provide the client with financial advice and assist in locating a suitable company that could be listed on a Canadian stock exchange. The third party then introduced the client to a capital pool company listed on the TSX Venture Exchange.

O'Neill prepared a tri-party finder's agreement between the client, the third party and the capital pool company that provided, in part, that the third party would be paid a finder's fee of $103,049.40, payable in shares in the new company.

In the fall of 2010 the third party told O'Neill he was contemplating giving some of the shares to O'Neill as compensation for his hard work. O'Neill did not inform his client that he might receive these shares.

O'Neill prepared a draft services agreement providing that 420,610 shares of the new company would be transferred to O'Neill's wife in exchange for her financial advice and services. This agreement was never executed or shown to anyone. O'Neill contemplated the shares being transferred into his wife's name for tax purposes.

In November 2011, the tri-party finder's agreement was amended. The third party was to receive a finder's fee of $206,098.80 payable in cash and shares.

In February 2012, the transaction closed and the third party transferred 273,382 shares of the new company to O'Neill's wife. O'Neill did not inform the client.

In March 2012, O'Neill's law firm made a complaint to the Law Society. O'Neill was later dismissed from his firm. Several months later, O'Neill's wife transferred the shares back to the third party.

ADMISSION AND DISCIPLINARY ACTION

In the course of representing his client, O'Neill acted in a conflict of interest by negotiating an amended agreement when he had a financial interest in the contract. He also took compensation without making full disclosure to his client. Although this amounts to two breaches of the rules, the panel concluded that there should be a finding of one act of professional misconduct, since they both arose out of O'Neill accepting shares without disclosure to his client.

O'Neill admitted that his conduct constituted professional misconduct. He assisted the Law Society with the investigation and apologized and expressed his sincere regret for what he had done.

The panel took into consideration that, at the time these breaches occurred, O'Neill had practised law for seven years, which was sufficient time for him to understand and recognize that his actions were wrong.

The panel found no evidence or suggestion of O'Neill being of bad character. There was one prior conduct review when O'Neill billed a client directly for travel disbursements, contrary to his law firm's policy, and deleted the evidence from his computer to avoid confrontation with the firm management.

O'Neill stood to gain by the transfer of the shares to his wife. The paper value of those shares was approximately $27,000. O'Neill testified that he thought the shares would be of little or no real value.

O'Neill expressed concern that he would suffer from adverse publicity about his disciplinary penalties. The panel did not believe that this was a significant factor. All lawyers will face this potential embarrassment if they are disciplined for misconduct. The panel believed that, to reduce an otherwise appropriate penalty because of potential public knowledge of it, would be wrong in principle.

The panel accepted O'Neill's admission that he had committed professional misconduct and ordered that he:

1. be reprimanded
2. pay a $5,000 fine; and
3. pay $4,124 in costs.

MISHAL ABRAHAMS

Surrey, BC
Called to bar: May 20, 1994
Ceased membership: September 26, 2013
Admission accepted: September 26, 2013
Counsel: Alison Kirby for the Law Society; Ravi Hira, QC for Mishal Abrahams

FACTS

Mishal Abrahams and his law firm partner shared profits equally and both had signing authority for the firm's trust and general bank accounts.

Between January 2008 and August 2010, Abrahams' law firm partner was absent from the office on several occasions for health reasons.

Misappropriation of trust funds

In June 2009, Abrahams started a pattern of improperly withdrawing client funds from his firm's trust account.

Over the next year, Abrahams withdrew a total of $137,100 by making online transfers. He used the funds improperly withdrawn from trust to pay draws to himself and to his law firm partner and to pay some of the firm's operating expenses, but he did not pay all of his staff the compensation that they were entitled to during this period.

Abrahams began repaying funds improperly taken from trust on February 26, 2010 and repaid all of the funds by July 2, 2010.

Loan from client

In October or November 2009, the bank would no longer permit the firm's line of credit on the general account to exceed its maximum of $150,000. The bank would "bounce" cheques written on the general account if there were insufficient funds.

In mid-December 2009, Abrahams' law firm partner arranged to borrow $20,000 on a short-term basis from a client. Abrahams was aware of and approved of the loan agreement.

The partner prepared a promissory note for the principal amount of $20,000 payable on February 28, 2010 and he and Abrahams signed the note. Abrahams and his partner agreed to pay 10 per cent interest per annum.

When Abrahams received the cheque for the loan, he realized that the client and the client's wife had borrowed the funds from a personal line of credit. Abrahams did not advise the client and his wife that he was not protecting their interests when they entered into the loan arrangement and he did not recommend that they obtain independent legal advice.

The loan proceeds were deposited to the firm's general account and used to pay operating expenses.

The firm had insufficient funds to repay the loan when it was due on February 28, 2010. Abrahams' law firm partner arranged for an extension to March 28, 2010. Abrahams was aware of and approved the extension.

On March 28, 2010, the firm again had insufficient funds to repay the loan. The client's wife called and emailed the firm numerous times about repayment of the loan, but her phone calls were not returned and the partner responded to only some of her emails.

On April 13, 2010, Abrahams' law firm partner provided the client with three cheques payable from the firm's general account. One of the cheques, in the amount of $5,000, was later returned due to insufficient funds.

On April 26, 2010, Abrahams deposited $35,000 to the firm's general account, then transferred the funds to the trust account as part of his repayment of trust funds he had wrongfully withdrawn. Abrahams' law firm partner understood from discussions with Abrahams that $5,000 of these funds were to be used to replace the $5,000 cheque to partially repay the loan.

On April 30, 2010, Abrahams' law firm partner purchased a $5,000 bank draft with funds from trust and delivered the bank draft to the client.

The client ultimately retained another lawyer to assist in obtaining repayment of the loan. Abrahams borrowed funds from his brother to repay the loan. The client received a bank draft on June 4, 2010 for the balance owing on the loan plus interest.

ADMISSIONS AND DISCIPLINARY ACTION

Abrahams admitted that, on 85 occasions from June 2009 to June 2010, he misappropriated $135,100 from the firm trust account by improperly withdrawing the funds and then using those trust funds to pay practice debts and for his own benefit, and that his conduct constituted professional misconduct.

Abrahams admitted that he borrowed $20,000 from a client and that his conduct constituted professional misconduct.

Abrahams admitted that, when he entered into the loan with a client, he failed to advise the client and his wife that he was not protecting their interests and that his conduct constituted professional misconduct.

Under Rule 4-21, the Discipline Committee accepted Abrahams' admissions on his undertakings:

1. to cease membership in the Law Society on September 26, 2013;
2. not to apply for reinstatement to the Law Society before September 26, 2025;
3. not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising the Law Society; and
4. not to permit his name to appear on the letterhead of any lawyer or law firm without the prior written consent of the Law Society.

AARON MURRAY LESSING

Bencher review: May 29, 2013

Benchers: Jan Lindsay, QC, Chair, Satwinder Bains, Lynal Doerksen, Benjimen Meisner, David Mossop, QC, Thelma O'Grady and Gregory Petrisor

Decision issued: October 16, 2013 (2013 LSBC 29)

Counsel: Geoffrey Gomery, QC for the Law Society; Henry Wood, QC for Aaron Murray Lessing

BACKGROUND

The Law Society issued two citations to Aaron Murray Lessing. The first citation set out that Lessing failed to notify the Law Society of the circumstances of eight unsatisfied monetary judgments against him. The second citation stated that, while representing himself in matrimonial proceedings in BC Supreme Court, Lessing failed to comply with three court orders, which resulted in a judge finding him in contempt of court.

The hearing panel found that Lessing breached the Law Society rules, and committed professional misconduct and conduct unbecoming a lawyer (facts and determination: 2012 LSBC 19 and disciplinary action: 2012 LSBC 29; discipline digest: 2012: No. 4 Winter).

The hearing panel imposed a significant fine and costs against Lessing, rather than the suspension sought by the Law Society. The Law Society requested a review of the panel's decision.

DECISION

The hearing panel had accepted the evidence about Lessing's mental state, and this was the major reason that a fine was ordered instead of a suspension. The review panel found that the hearing panel erred in not putting more weight or significance on Lessing's professional conduct

record when determining the quality and quantity of the disciplinary action.

The review panel determined that Lessing should face severe sanctions due to a number of aggravating factors, in particular that he had over 20 years' experience as a lawyer practising primarily in family law and his professional conduct record contained multiple warnings.

The number of times the offending conduct occurred was also an aggravating factor. Not reporting the first six judgments may be explained, in part, on Lessing being unaware of the reporting requirements. However, he knew he had to report the last two judgments.

The breach of three court orders took place over a long period of time. Of more importance to the panel, Lessing was found in contempt of court, which is a very serious matter. The review panel determined that it was not a mitigating factor that Lessing cured the contempt, as the Law Society would expect this of any lawyer subject to a contempt order.

Lessing did not acknowledge that his failure to report that the judgments was a breach of the rules until the morning of the first day of the hearing. The review panel found that the effect of this last-minute admission as a mitigating factor was very limited.

The two citations demonstrated to the review panel a tendency for Lessing to delay matters or fight them on technical or procedural grounds. These were not isolated incidents; they were part of a pattern.

A medical professional submitted that Lessing was unlikely to re-offend in regard to the breach of the three court orders and of the contempt. The panel was less certain, based on Lessing's past conduct record and his late admission on the failure to report judgments.

In the review panel's opinion, a lawyer who breaches three court orders and finds himself in contempt should face some form of suspension. While Lessing's mental health was a mitigating factor, the panel decided it did not go as far as diminishing the disciplinary action to a fine, only to the length of the suspension.

The review panel ordered that Lessing:

1. be suspended for one month in substitution for the fines imposed by the hearing panel;
2. pay costs as ordered by the hearing panel; and
3. not self-represent in any court or tribunal without the prior written consent of the Law Society.

VIVIAN CHIANG

Hearing on disciplinary action: August 29, 2013

Panel: Thelma O'Grady, Chair, Ralston Alexander, QC and Karl Warner, QC

Application for stay of proceedings: October 23, 2013

President's designate: Lynal Doerksen

Decisions issued: September 25 (2013 LSBC 28) and November 4, 2013 (2013 LSBC 30)

Counsel: Henry Wood, QC for the Law Society; Vivian Chiang on her own behalf

BACKGROUND

The Law Society issued a citation to Vivian Chiang alleging four counts of professional misconduct. One allegation was withdrawn, and the October 2008 hearing proceeded on three allegations of acting contrary to the duty of an officer of the court or misleading the court.

The hearing panel dismissed the remaining three allegations (facts and verdict: 2009 LSBC 19; discipline digest: 2009 No. 3 Fall). The Discipline Committee sought a review of the decision to determine if the panel was correct in dismissing the allegations and not finding that Chiang's conduct constituted professional misconduct.

The Bencher review panel found that one of the three allegations amounted to professional misconduct and referred the matter back to the hearing panel to consider appropriate sanctions (Bencher review: 2010 LSBC 29; discipline digest: 2013 No. 2 Summer).

Chiang appealed to the Court of Appeal, alleging that the review panel misapprehended the facts. The appeal was dismissed on January 15, 2013 (2013 BCCA 8).

Chiang applied to the Supreme Court of Canada for leave to appeal the decision of the Court of Appeal. The application was dismissed on June 13, 2013 (No. 35279).

In August 2013, the hearing panel issued a decision on disciplinary action which included a one-month suspension, commencing November 1, 2013.

Chiang sought a review of the decision on disciplinary action and, in October 2013, brought an application for a stay of proceedings pending the hearing of a review.

DECISION ON DISCIPLINARY ACTION

Chiang had failed to present an honest statement of the basis for her presence in court, and the court was misled in the result. This misconduct was at a very high level of significance, given the importance of integrity and honour required of lawyers, and particularly in the discharge of their duties to the court.

In the panel's view, the integrity issues raised by Chiang's behaviour were not dependent upon a lack of age or experience, but spoke instead to a more fundamental shortcoming.

Chiang sought to protect her financial stake in the outcome of the litigation and disregarded clear directions from the court about the limits of her ability to seek redress. It was Chiang's stated and repeated preoccupation with the financial consequences of the subject dispute that persuaded the various tribunals before which she appeared that she was acting wilfully and knowingly contrary to instructions provided and acknowledged.

Chiang argued repeatedly that no member of the public had a complaint against her and no one had been harmed by her behaviour. This is untrue. Though the initial complaint was advanced by two lawyers, their clients were, in fact, negatively impacted by the misleading behaviour. This distinction appeared to be one that Chiang did not understand.

Chiang's continued insistence that the impugned behaviour was merely a miscommunication suggested that she has still not acknowledged the seriousness of her misconduct, despite a strong message to that effect from the highest court in this province.

The panel ordered that Chiang:

1. be suspended from the practice of law for the month of November 2013; and
2. pay $10,000 in costs.

Chiang requested a "discontinuance of further prosecution of this complaint," a ban on publication of the result and removal of practice restrictions.

The request that all further prosecution of this complaint be discontinued was dismissed as being inconsistent with the panel's statutory duty under the *Legal Profession Act*. The application for a publication ban was also dismissed, given that a suspension was ordered. The restrictions imposed on Chiang's practice were removed as the condition terms were spent with the release of this decision.

DECISION ON STAY OF PROCEEDINGS

The onus was on Chiang to establish that she was entitled to a stay and, therefore, it was necessary for her to satisfy a three-part test.

First, the review must raise a serious issue. Chiang raised many facts and issues in her application materials, and some appeared to be irrelevant to the merits of the review. It was at first difficult to discern Chiang's basis for the application for review; however, she raised a sufficient number of factors that were best left to a review panel. Since it could not be concluded that the application was vexatious or frivolous, the first part of the test was met.

Second, Chiang must suffer irreparable harm if the stay is not granted. Chiang's application and affidavits did not clearly address this factor. Her submissions seemed to solely address the alleged harm already done by the prosecution and not the issue of irreparable harm of a suspension. She was fortunate to be assisted by the reasons of the hearing panel on disciplinary action, which held that Chiang's "consulting practice would likely be impaired in some ways by a suspension."

A suspension is a serious penalty and, unlike a fine, is not a penalty that can be returned to Chiang if she is successful at review. If the suspension is not stayed, the penalty would be served long before the review could be conducted. On that basis, and the findings of the hearing panel, part two of the test was met.

Third, the balance of convenience must favour the imposition of a stay. It must be considered whether the granting of the stay would put the public at risk again. It was noted that the facts concern conduct before the BC courts in 2005 and that there has been no allegation of a similar or continuing nature. The hearing panel on disciplinary action removed the practice restrictions that Chiang was under and did not make these practice restrictions part of the penalty. It was found that the public was not at further risk by a stay being directed.

The stay was granted on the condition that it terminates:

1. if the review is discontinued or abandoned by Chiang;
2. if the review is dismissed by the Benchers;
3. upon further order of the Benchers on review; or
4. on April 30, 2014;

whichever event occurs first.

LEANNE FRANCES RUTLEY

Vernon, BC
Called to the bar: February 16, 1990
Discipline hearings: March 11 and October 10, 2013
Panel: David Renwick, QC, Chair, Dan Goodleaf and Sandra Weafer
Decision issued: June 24 (2013 LSBC 16) and November 27, 2013 (2013 LSBC 32)
Counsel: Jaia Rai (facts and determination) and Alison Kirby (disciplinary action) for the Law Society; Henry Wood, QC for Leanne Frances Rutley

FACTS

In 2005, Leanne Frances Rutley was retained by a friend and her new husband to prepare wills and powers of attorney.

In 2006, the husband purchased 15,000 shares of a private company for $4,500. In 2007, the wife refinanced the home she owned prior to marriage and transferred title to herself and her husband as joint tenants. Rutley did not provide legal services in connection with either the share purchase or the transfer of the home.

In 2009, the husband declared bankruptcy and the couple later separated. The wife was represented by counsel (not Rutley) in connection with the matrimonial dispute and the husband was initially self-represented.

The wife tried to use a power of attorney to transfer her husband's shares into her name. The transfer agent told her that the power of attorney had to be "renotarized."

Rutley wrote a letter to the share transfer agent on behalf of the wife. Even though she knew that the couple was separated, she enclosed a notarized copy of the power of attorney, as well as an explanation that the power of attorney remained valid and in full force and effect. The transfer agent transferred the shares to the wife.

The husband had refused to transfer title of the matrimonial home to his wife; however, Rutley was not aware of this. Rutley prepared documentation to transfer the husband's interest in the matrimonial home to the wife, again, using the power of attorney. The wife then executed these transfer documents before another lawyer. The mortgage on the property, on which both the husband and wife were liable, remained on title.

Rutley did not notify the husband, her former client, of either the share or the property transfer.

ADMISSION AND DISCIPLINARY ACTION

These two separate but related incidents both arose out of the improper use of a power of attorney contrary to the interests of a former client. Rutley admitted that acting in a conflict of interest and facilitating the use of the power of attorney to transfer shares and property constituted professional misconduct

Rutley was influenced by her friendship with the wife and allowed her personal feelings to affect her professional judgment.

The wife had told Rutley that she was the actual purchaser and beneficial owner of the shares, but that they had been put into her husband's name for tax reasons. She disclosed that, after the separation, her husband had broken into their home and stolen items. She was concerned that he would sell or assign the shares. Further, she disclosed that her husband had been violent and that she was frightened of him and did not want to have any direct dealings with him.

Rutley was also influenced by the fact that the power of attorney contained a clause granting the specific power to use it to transfer the assets of the husband to the wife. She accepted that the wife's motivation was to prevent inappropriate disposition of the assets by her husband and

felt confident that what she was doing was actually assisting to preserve assets.

The panel considered a number of mitigating factors. Rutley did not act out of self-interest or profit from her use of the power of attorney. She did not have a previous discipline record and had cooperated with the Law Society investigation.

The mitigating factors, however, did not outweigh the need to maintain public confidence in the integrity of the legal profession by sending a message that these sorts of breaches will not be tolerated. Acting against a former client goes against the fundamental duty of loyalty that is at the core of trust in a solicitor-client relationship.

The panel accepted Rutley's admission of professional misconduct and ordered that she pay:

1. a $7,500 fine; and
2. $7,400 in costs.❖

Credentials hearings ... from page 21

Applicant 4 had previously been involved in a hit and run accident and given a violation ticket for failing to remain at the scene of the accident and was charged with impaired driving. He was not convicted of these offences. Applicant 4 admitted to the Law Society that he initially lied to the police, but his position was that he was not impaired and the other driver was at fault and left the scene of the accident. The panel had a number of concerns about Applicant 4's behaviour and evidence, and did not believe he was being truthful.

The hearing panel rejected Applicant 4's application (application for enrolment 2013 LSBC 03; *Benchers' Bulletin* summary, 2013 No. 1 Spring).

Subsequent to the hearing decision, Applicant 4 filed a notice of review.

DECISION

The circumstances surrounding the hit and run accident, Applicant 4's disclosure of these events to the Law Society, and his credibility before the hearing panel were the focus of the review hearing.

Applicant 4 applied to the review panel to admit 13 letters of reference that were not presented to the hearing panel. The review panel believed that the hearing was the proper forum for consideration of character references since the review panel had no opportunity to question the writers of the letters of reference or to hear what information the writers were aware of prior to writing their letters. In the absence of evidence of special circumstances, the application to have letters of reference admitted was dismissed.

The review panel considered the hearing panel's findings. The hearing panel was concerned about inconsistencies between Applicant 4's behaviour and his testimony that he was not impaired. It was inexplicable that Applicant 4 would have lied to the police about his involvement in a hit and run accident if he were indeed the victim of that accident. His actions, comments and general demeanour at the police station after the accident were not the actions of a person confident that they had done nothing wrong.

There were inconsistencies between Applicant 4's evidence before the hearing panel and his response to a letter from the Law Society as well as his response to the hearing panel with respect to those inconsistencies. The hearing panel found that his response to the Law Society constituted only a partial admission.

The review panel determined that the hearing panel was in the best position to assess Applicant 4's credibility. The hearing panel weighed and balanced consideration of Applicant 4's past behaviour against his efforts and achievements towards rehabilitation. When considered in light of the good character test, his failure to convince the hearing panel that he was telling the truth was fatal to his application.

The review panel agreed that the hearing panel's decision to reject Applicant 4's application for enrolment was correct.

ARUN MOHAN (formerly Applicant 5)

Court of Appeal hearing: November 1, 2013
Court of Appeal decision: November 18, 2013

BACKGROUND

In March 2012, a credentials hearing was held regarding the application of Arun Mohan for enrolment in the Law Society admission program. The hearing was ordered as a result of Mohan's history of cheating and plagiarism during undergraduate studies and law school. The decision of the majority of the hearing panel was to allow Mohan's enrolment; however, the chair of the hearing panel would have rejected the application (credentials hearing decision, 2012 LSBC 24; *Benchers' Bulletin summary,* 2012 No. 3 Fall).

The Law Society sought a review of the panel decision. The Benchers on review set aside the hearing panel's decision and rejected the application (Bencher review, 2013 LSBC 05 and 2013 LSBC 12; *Benchers' Bulletin* summary, 2013 No. 2 Summer).

Mohan appealed *the decision of the Benchers on Review* to the BC Court of Appeal.

COURT OF APPEAL DECISION

The issue before the Court of Appeal was whether the correct standard of review was applied by the Benchers on review.

The Court of Appeal found that, "The majority of the hearing panel made a finding of credibility in [Mohan's] favour, and did not do so by failing to consider what was offered as circumstantial evidence in making their finding. Their finding was entitled to deference which it did not receive from the Bencher review. In the result, the Bencher review erred as a matter of law in their treatment of the decision of the majority of the hearing panel."

The court held that the decision of the Benchers on Review be set aside and the decision of the hearing panel restored (*Mohan* v. *Law Society of British Columbia*, 2013 BCCA 489).❖

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