The Law Society of British Columbia

Benchers' Bulletin

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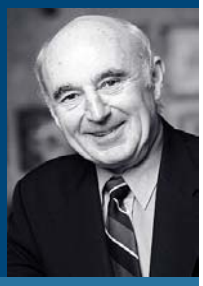

President's View

Championing the cause of access

By Howard R. Berge, QC

Lawyers have a historic and ongoing commitment to access to justice. We believe that all people deserve equal protection under the law and, to that end, deserve the benefit of legal advice and access to the courts. For poor people, it is access to legal aid that makes access to justice possible. That is why lawyers must champion the cause of a properly funded legal aid program.

The recent federal budget offered a ray of hope — a boost to criminal legal aid contributions in each of the next two fiscal years. The federal government is now committing $92 million annually to legal aid Canada-wide; this includes $21.5 million of temporary funding that has become permanent and $20 million in new money. As BC picks up its share, it's time to make sure the money is spent on legal aid as intended. This means not only the portion earmarked for criminal legal aid and immigration/refugee matters, but the portion intended for civil legal aid, which is now desperately underfunded.

It bears repeating that the BC government itself collects some $92 million in annual revenues from its provincial tax on legal services, yet legal aid, far from deriving a benefit, is undergoing annual budget cuts. Just $71.4 million is designated as the provincial contribution in 2003, which includes the federal funding, and less in 2004.

There are real-life consequences, and costs, of depriving our communities of legal aid. As documented in the Law Society's study *Where the Axe Falls – the real cost of government cutbacks to legal aid*, women and children suffer the greatest impact when their legal interests are not protected, often going without legal advice or representation in situations of domestic violence. And the growing burden of unrepresented litigants in the courts is simply not sustainable.

As the province takes in more federal money for legal aid, this is the golden opportunity to reinstate legal aid funding overall, fairly and properly. It's simply time.

Lawyers are doing their part. Those who offer legal aid services do so despite very restrictive tariff rates and holdbacks, which most health professions would likely view as intolerable. Lawyers are nevertheless committed to legal aid to ensure that poor people have access to professional legal advice and the courts.

With the same professionalism, more than three-quarters of BC lawyers donate time of their own to pro bono services to help people solve legal problems for which legal aid is not available, according to a recent pro bono survey.

This month, the CBA made news nationally by calling on Canadian lawyers to make pro bono commitments of 50 hours a year. What the headlines now need to reflect is that BC's legal profession is already ahead of the national curve by the launch of ProBonoNet BC, the first major project of Pro Bono Law BC. Unique in Canada, this web-based project matches community groups needing legal assistance with volunteer lawyers. If you are looking for your own opportunity to offer pro bono services in this way, you are urged to join ProBonoNet BC at **www.probononet.bc.ca**.

When I reflect on the events of the past year, I'm proud that the Law Society has shown national leadership on other access issues too — most notably, through our constitutional challenge of federal money laundering legislation. That legislation would have imposed requirements on

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Benchers' Bulletin

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

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

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

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Court of Appeal extends definition of "law office" to protect privilege in searches

On February 25, the BC Court of Appeal ruled that, for the purpose of searches of law offices authorized by a search warrant, a "law office" must be taken to mean "any place where privileged documents may reasonably be expected to be located:" *Festing* v. *Attorney General (Canada)* 2003 BCCA 112.

The Law Society of BC was an intervenor in *Festing* for the protection of solicitor-client privilege. The Supreme Court of Canada remanded the case to the Court of Appeal last year to reconsider its earlier orders in light of the Supreme Court's own decision in September in *Lavallee, Rackel & Heintz* v. *Canada (Attorney General)*; *White, Ottenheimer & Baker* v. *Canada (Attorney General); R.* v. *Fink* 2002 SCC 61.

In *Lavallee* the Supreme Court of Canada struck down section 488.1 of the *Criminal Code* — which set out a process for claiming privilege in law office searches — as unconstitutional. The section inadequately protected solicitor-client privilege in searches of law offices, resulting in an unreasonable search and seizure that infringed section 8 of the *Charter of Rights* and could not be justified under section 1 of the *Charter*. The Federation of Law Societies of Canada was an intervenor before the Supreme Court of Canada on behalf of Canadian law societies.

Following its reconsideration of *Festing*, the Court of Appeal has now set aside its previous order that s. 487 of the *Criminal Code* (the section authorizing the issuance of search warrants) is unconstitutional and its declaration that the words "other than a law office" must be read into the introductory words of the section.

As a result of *Festing*, police and other investigative authorities may again seek warrants to search law offices in BC. There are two critical points to note. First, the s. 488.1 *Criminal Code* process for claiming privilege over documents seized in law office searches is unconstitutional and, as a result, law office searches must be governed in accordance with the guidelines articulated by the Supreme Court of Canada in *Lavallee*. Second, within the Supreme Court of Canada's guidelines, a "law office" must be broadly defined as stipulated in *Festing*.

"The legal protection afforded solicitor-client privilege does not begin and end at the door of a law office," the Court of Appeal stated in its decision. Accordingly, the expanded definition of "law office" for the purpose of protecting privileged documents in searches would include, for example, a lawyer's home, a lawyer's office in a multi-disciplinary business premises, the office of in-house counsel for a business and facilities where lawyers store files. The Court noted that a "document" in this context is as defined by s. 321 of the *Criminal Code.*

The Supreme Court of Canada articulated 10 general principles that, as a matter of common law, now govern the searches of law offices unless and until Parliament re-enacts legislation on the issue. Those principles are:

1. No search warrant can be issued with regard to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so as to afford maximum protection of solicitor-client confidentiality.
4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a

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Lawyers can now make large trust withdrawals electronically

On February 7 the Benchers approved changes to Law Society Rule 3-56 to allow BC lawyers to make trust withdrawals of over $25 million electronically under specified conditions. Rule 3-56 had previously required that lawyers make all trust withdrawals by cheque.

As amended, Rule 3-56 effectively allows lawyers to make trust payments through the "Large Value Transfer System (LVTS)" of the Canadian Payments Association (CPA). The LVTS is the CPA's electronic same-day settlement system for wire payments. Since February 3, the CPA has required that all payments for sums in excess of $25 million CDN be made by electronic transfer through this system, rather than by cheque, bank draft or other traditional paper-based payment instrument. While the CPA has apparently extended a grace period (to August 3) for financial institutions to comply with the new requirement, lawyers should check with their own financial institutions to determine in what way this grace period is extended to customers.

Law Society Rule 3-56(3.1) now provides that a lawyer may make or authorize the withdrawal of funds from a pooled or separate trust account by electronic transfer, provided specified conditions are met.

The first condition is that the transfer must be for more than $25 million. [Note: Rule 3-56 continues to require that a lawyer's withdrawal from trust of an amount less that $25 million be by trust cheque.]

Second, the transfer system must be one that will produce, not later than the next banking day, a confirmation form from the financial institution. That form should confirm the details of the transfer, including:

1) date of the transfer;
2) source trust account information, including account name, financial institution and account number;
3) destination account information, including account name, financial institution, financial institution address and account number;
4) name of the person authorizing the transfer; and
5) amount of the transfer.

As a final condition, the lawyer must complete and personally sign a requisition for the transfer in a form approved by the Discipline Committee (a Large Value Transfer System (LVTS) Electronic Transfer Form), submit the original requisition to the appropriate financial institution, retain a copy of the requisition in the lawyer's records, obtain the confirmation from the financial institution, retain a hard copy of the confirmation in the lawyer's records and, immediately on receipt of the confirmation, verify that the money was drawn from the trust account as specified in the requisition.

BC lawyers who may be involved in trust transactions of over $25 million are urged to review the full text of Law Society Rule 3-56, as amended, and a copy of the LVTS Electronic Transfer Form: for details, see "What's New" or "Resource Library/Forms" on the Law Society website at www.lawsociety.bc.ca.

Questions can be directed to Don Terrillon, Auditor, (dterrillon@lsbc.org) at the Law Society office.✧

Rule changes on conditional discipline admissions

In February the Benchers amended Law Society Rules 4-16, 4-21 and 4-23 to provide that, when a lawyer makes a conditional admission of a discipline violation that is accepted by the Discipline Committee, that admission amounts to a disposition of the citation against the lawyer, rather than a rescission of the citation. A new subrule 4-21(5) also provides that such an admission, when accompanied by an undertaking to leave the profession, is to be treated as the equivalent of a disbarment or suspension under section 15(3) of the *Legal Profession Act* in that the person may not practise law, even if he or she does so without a fee.

These rule amendments are enclosed in this mailing as *Member's Manual* amendment pages and are posted in the Resource Library section of the Law Society website at www.lawsociety.bc.ca.✧

New rules will require lawyers to report delays in mortgage discharges

New rules will require a BC lawyer to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of the closing date of the transaction: see Part 3, Division 9, comprising new Rules 3-88 and 3-89.

The new rules will also require a lawyer to report to the Law Society the failure of another lawyer or a notary to provide satisfactory evidence that he or she has filed a registrable discharge of mortgage as a pending application at the Land Title Office within that 60-day period. A lawyer has five business days to report, in a form to be prescribed by the Law Society, under the new rules.

The new rules apply to transactions that close on March 1, 2003 or later. Accordingly, the earliest that a need to file a report would arise is April 30, 2003, with the report due five business days thereafter. A reporting form will be available on the Law Society website by the end of March, and it is intended that lawyers will submit the form electronically.

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

These new provisions have been collectively termed the "30-30 rule" by the Law Society's Conveyancing Practices Task Force. This reflects the expectation that a financial institution would typically have 30 days after a mortgage repayment in which to issue a discharge, and the lawyer responsible for the discharge (usually the vendor's lawyer) would have a further 30 days to register the discharge.

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

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

The Benchers passed Rules 3-88 and 3-89 on February 7, following the recommendations of the Conveyancing Practices Task Force. For background, see the November-December, 2002 *Benchers' Bulletin* and "What's New" on the Law Society website at www.lawsociety.bc.ca.

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

Executive Committee 2003

The Benchers have re-elected **Ralston Alexander**, QC and **Robert McDiarmid**, QC and elected **David Zacks**, QC to the Executive Committee in 2003, and the Lay Benchers have re-elected **June Preston.** These Benchers join President **Howard Berge**, QC, First Vice-President **William Everett**, QC and Second Vice-President **Peter Keighley**, QC on the Committee.

The Executive Committee assists the Benchers and the Executive Director in establishing relative priorities for the assignment of Society financial, staff and volunteer resources and planning Bencher meetings.

For more on the structure and role of the Executive Committee, see Law Society Rules 1-48 and 1-49.✧

Law office searches *… from page 3*

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judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

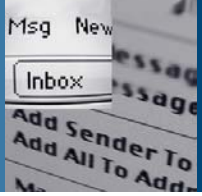
If you have questions on searches of law offices, please contact any of the following lawyers at the Law Society office:

Michael Lucas, Staff Lawyer, Policy & Planning (mlucas@lsbc.org)

Kensi Gounden, Staff Lawyer, Professional Conduct (kgounden@lsbc.org)

Tim Holmes, Manager of Professional Conduct (tholmes@lsbc.org)

Jean Whittow, QC, Deputy Executive Director (jwhittow@lsbc.org).✧



Volunteers 2002

The Benchers would like to thank and congratulate all those in the profession and the legal community who volunteered their time and energy to the Law Society in 2002. Whether serving as members of committees, task forces or working groups, as practice reviewers, practice supervisors, conduct reviewers, fee mediators, event panelists or advisors on special projects, these volunteers are critical to the success of the Law Society and its work. Over the past year, the Society has enjoyed the support and contributions of over 100 Life Bencher and non-Bencher volunteers, all of whom deserve acknowledgement.

Ian Aikenhead, QC
Sabrina Ali
Maureen Baird
Russell Balcome
Catherine Best
William Bice, QC
Halldor Bjarnason
Patricia Bond
Sheila Braaten
Hugh Braker, QC
Rees Brock, QC
Trudi Brown, QC
Alexander Cameron
Hamish Cameron, QC
Nancy Cameron
Kimberley Campbell
Neil Campbell
James Carfra, QC
Jo Ann Carmichael, QC
Mary Childs
Anne Chopra
Douglas Cochran
Brian Coleman
Azim Datoo, QC
Robert Debou
Adam de Turberville
Laura Donaldson
Cassandra Doulis
John Drayton
Robert E. Eades
William Ehrcke, QC
Gerry Ferguson
Lorraine Gerbig
Jack Giles, QC
Peter Gorgopa
Frederick Hansford, QC
Colleen Hendersen
Robert Herperger
Carol Hickman
Fiona Hunter
David Ibbetson
Keith Jones
Moses Kajoba
Peter Kelly
Judith Kennedy
Anthony Knight
Ken Kramer
Terence La Liberté, QC
Stan Lanyon, QC
Kenneth Learn
John Leathley
Gerald Lecovin, QC
Jason Lee
Morley Levitt
Jan Lindsay
Kathy Louis
Paul Love
Deborah Lovett, QC
Eugene Macchi
Karen MacMillan
Rosalyn Manthorpe
Richard Margetts, QC
Marjorie Martin
Dinyar Marzban
David Masuhara
Jerry McHale, QC
Todd McKendrick
Ross McLarty
Stephen Mulhall, QC
Beverly Nann
Barbara Nelson, QC
Karen Nordlinger, QC
Charlotte Olsen
Richard Peck, QC
Errin Poyner
William Prowse
Leo Raffin
Peter Ramsay, QC
Eugene Raponi
David Renwick
Stephen Richards
Terrence Robertson, QC
Michiko Sakamoto-Senge
Susan Sangha
Jane Shackell, QC
Dirk Sigalet, QC
Ronald Skolrood
Mark Skwarok
John Smith
Margot Spence
Georgina Spilos
Mark Stevenson
Anne Stewart, QC
Richard Stewart
Ted Strocel
Pat Sweeney
Alex Szibbo
Jacob Talstra
Sylvia Teasdale
Jeff Thorsteinsson
Tim Timberg
Vicki Trerise
William Trotter, QC
Nelson Tsui
Diane Turner
Henry Vlug
Peter Voith
John Waddell, QC
Brian Wallace, QC
Karl Warner, QC
Peter Warner, QC
Nancy Wiggs
Warren Wilson, QC
Opal Wong
Josiah Wood, QC
David Wotherspoon
Deborah Zutter

New course of study approved for family law mediators

On February 6, 2003 the Practice Standards Committee approved a new course of study in family law mediation under Law Society Rule 3-20 (1)(b) as an alternative to the 40-hour (5-day) Family Law Mediation Course offered by the Continuing Legal Education Society. Until now, the CLE course was the only one approved by the Law Society for the accreditation of family law mediators. This change offers lawyers additional flexibility.

Section 29 of the *Legal Profession Act* authorizes the Benchers to make rules establishing the qualifications for and conditions under which practising lawyers may practise as mediators. To date, the Law Society offers accreditation only in the field of family law mediation.

Rule 3-20(1) provides that a lawyer may act as a family law mediator only if the lawyer has engaged in the full-time practice of law for at least three years (or the equivalent in part-time practice) and has completed a course of study in family law mediation approved by the Practice Standards Committee. Under Rule 3-20(2) the Committee may allow a lawyer with special qualifications or experience to act as a family law mediator without the practice experience requirement.

The new alternative course of family law mediation study consists of the following, (or the equivalent*):

1. Mediation Skills Level I, offered by the Justice Institute;
2. any of the following Family Dynamics courses offered by the Justice Institute:
   a) CORR 605: Family Violence
   b) FAM 103: Effects of Separation and Divorce on Adults
   c) FAM 104: Effects of Separation and Divorce on Children; and
3. Day V of the Family Law Mediation Course offered by CLE.

**Note: A lawyer seeking to have other courses approved as equivalents must make application to the Practice Standards Committee.*

A lawyer who is accredited as a family law mediator may refer to the accreditation in any marketing activity: see Chapter 14, Rule 19 of the *Professional Conduct Handbook*.

Family law mediators must comply with Appendix 2 of the *Handbook* (which sets out the conduct expected of a mediator), as well the other *Handbook* rules to the extent those rules are not inconsistent with Appendix 2: see Chapter 6, Rule 9 of the *Handbook.*

Lawyers should also note that a Law Society Task Force has undertaken a broad-based review of alternative dispute resolution, including mediation. A report to the Benchers is expected this year.✧

President's view *… from page 2*

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lawyers to report information on their clients to the state, violating solicitor-client privilege. On another front, our Law Society did not shy away from countering the provincial government's unilateral decision to close courthouses across the province.

The government's civil liability review and administrative justice project have generated many weighty and controversial issues that call out for the expertise of the profession. The Justice Reform Task Force — a project in which the government, the profession and the judiciary have a voice — is developing proposals that also need an access to justice perspective on such topics as the proposal for a unified family court.

Already this year the Benchers have raised the priority of access to justice issues within the Law Society by transforming our Access to Justice Working Group into a permanent Access to Justice *Committee*. Bencher Patricia Schmit, QC chairs that new committee, and is joined by Benchers James D. Vilvang, QC, Anne K. Wallace, William Jackson and June Preston, Life Benchers Gerald Lecovin, QC and Marjorie Martin and lawyer Vicki Trerise.

The committee should now be able to focus on longer-term strategies, while being better able to bring pressing issues to the Benchers' table.

The Access to Justice Committee is mandated to identify and analyze access issues that fall within the Law Society's statutory mandate, to help the Benchers in prioritizing these issues and to do policy work for Bencher consideration. Without a doubt, they have their work cut out for them. In addition to reviewing government initiatives, the Committee will canvass a range of issues, from reform of the small claims court to legal expenses insurance products for the public, to municipal bylaw reform.

Consultations within the profession will be critical to the success of the work. If you have ideas, the Committee wants to hear from you.✧

Professional Legal Training Course moves in-house

On January 1, 2003 the Professional Legal Training Course became a department of the Law Society, allowing for closer integration of both PLTC and articling within the Law Society Admission Program. Prior to this change, the Continuing Legal Education Society of BC administered PLTC for the Law Society.

Bringing PLTC in-house is the first step toward implementing Recommendation #25 of the Admission Program Task Force Report, which called on the Law Society to "combine PLTC and articling into a single Admission Program." It is also a move toward achieving greater administrative and cost efficiencies within the Law Society and PLTC.

For more on the Task Force report and recommendations, approved by the Benchers last Fall, see the September-October, 2002 *Benchers' Bulletin* or the full report text, both available in the Resource Library section of the Law Society website.

The Law Society and the CLE continue to enjoy a cooperative relationship with respect to PLTC, continuing education for lawyers and other co-ventures.

For PLTC students, guest instructors and other volunteers, the transition should be smooth, with course schedules maintained and classes continuing as usual on the second floor of the Law Society building on Cambie Street in Vancouver. Please note the new office contact and access information.✧

How to reach PLTC

Office and contact information

Visitors to PLTC should take the elevator designated for PLTC at the north side of the atrium on the main floor of the Law Society building. The PLTC reception is on the third floor.

(Please note: there is no longer access to PLTC via CLE's reception on the 3rd floor.)

General enquiries to PLTC, and all deliveries and pick-ups, are now handled through the Law Society office at:

8th Floor – 845 Cambie Street
Vancouver, BC V6B 4Z9
Tel: (604) 669-2533
Fax: (604) 646-5907
pltc@lsbc.org

Full contact information for staff and faculty can be found in the PLTC section of the Law Society website.

Website

2003 PLTC program information is now available online on the Law Society website at www.lawsociety.bc.ca.

The PLTC section of the site is a resource for both students and volunteers, featuring admission information, schedules, information on course organization and program policies.✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

♪ *We like our fun and we never fight*
You can't dance and stay uptight
It's a supernatural delight
Everybody was dancin' in the moonlight ♪

Words and music by Sherman Kelly, recorded by King Harvest

Is there leadership in your law firm?

At the time of writing this column, one of the pre-eminent national US law firms, Brobeck, Phleger & Harrison, had just announced its demise. This firm was renowned as a legal adviser to the technology world (*ABA Journal e-Report*, February 7, 2003). At its height, Brobeck had over 1,000 lawyers and registered the highest per-partner profit for any corporate law firm outside New York: $1.17 million for some 200 partners (*San Francisco Business Times*, October 18, 2001).

The growth of Brobeck has been attributed to Board Chair Tower Snow's stated strategic vision of being the dominant law firm in the world representing high technology and new economy companies (*BizLaw Journal*, February 21, 2001).

What caused Brobeck to fail? Certainly too much debt is always a factor in a business failure; but what is interesting is the role that leadership, or perhaps the lack of it, played in the collapse.

Leadership is a difficult quality to define, as there are probably as many leadership personalities as there are leaders and their defining moments. Winston Churchill in the Battle of Britain was one type, Wayne Gretzky and the Canadian Men's Olympic Hockey Team another. Are there commonalities that we can draw on in leading our own firms?

Nancy R. Daly, in "Characteristics that Count," *Association Management*, January, 2003, p. 49, attempts to do just that. Here is her description of 10 leadership characteristics, applied to a law firm setting:

1. Trust

Leaders must be seen to possess integrity, and to be business-like, honest, and respectful. Moreover, the trust must be two-way — the leaders must be able to trust their staff and desire their feedback through active listening. Contrast this with many firms where the information flow resembles a one-way street.

2. Respect

This is a culture of collaboration that values the significance and contributions of all members of the staff. Contrast that with what is found in most law firms regarding "lawyers" versus "the rest of the staff" mentality.

3. Vision

This can be described as the trait of knowing the end destination while being flexible on the path. Leaders don't micro-manage — they keep their heads up to look for new opportunities. Contrast that with lawyers who "hover" when something needs doing rather than trusting that the work will be done and moving on to the next objective.

4. Self-confidence

This is not about appearing invulnerable or worse, arrogant. Rather this is the ability to listen to all options and, in the absence of consensus, to act decisively. Leadership is decisiveness in action. Self-confidence is the catalyst. However, compromise that is not in the true interests of the firm is not leadership, yet how many lawyers act or react from a position of self-interest?

5. Communication skills

A leader possesses above-average communication skills that can articulate a firm's objectives and make people feel like they are part of a motivated and excited team. This is equal parts sincerity, competence and understanding. One would hope that lawyers would possess above-average communication skills, and for the most part they do. However, lawyers also have a slight tendency towards advocacy — expounding a point of view, rather than listening to another point of view.

6. Enthusiasm

Passion. Energy. Commitment. An enthusiastic leader can motivate and energize people to excel — beyond what even they thought possible. Enthusiasm is not generated by fear of consequences, rather by embracing ideals.

7. Feedback

Daly speaks of leaders providing sincere praise and recognition to staff. In any business, there is a role for providing both positive feedback and negative feedback where performance may be less than stellar. Could lawyers learn to praise more and criticize less?

8. Ability to fulfil commitments

People look to a leader to walk the walk — and that means doing your homework, being as prepared, if not more so, than others around you, and in possessing one simple trait: doing what you said you would do. All the time. On time. Period.

9. A focus on growing more leaders

True leaders are not afraid to nurture, coach and grow more leaders. They challenge future leaders to take on commitments that lead to their own growth and personal development. Contrast that with many law firms where "mentoring" is handing off a file to an associate and saying when you want it done.

* * *

David Maister, the noted legal consultant, stated: "Without a loyal cadre of attorneys following a trusted leader, law firms are vulnerable to market downturns — particularly if

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

Mobility of non-lawyer staff

Lawyers must exercise due diligence to ensure compliance with Law Society conflicts rules, not only by all lawyers in a firm, but also every non-lawyer employee and any other person retained by the firm.

Legal assistants and other staff are, like lawyers, subject to the rules set out in Chapter 6, Rules 7.1 to 7.9 of the *Professional Conduct Handbook* concerning conflicts arising from a transfer between law firms. ***If a legal assistant takes employment in a law firm that has clients adverse in interest to those of the assistant's former firm, the screening devices described in Appendix 5 of the Handbook should be put in place.***

The confidential information acquired by the legal assistant at the previous firm must be protected. It may be professional misconduct on the part of a lawyer to fail to take reasonable measures to protect such confidential information.

What might reasonable measures be when a legal assistant, having worked on a client file in one firm, moves to another firm that represents clients on the opposite side of the file?

The legal assistant should have no involvement in any aspect of that file. No relevant file materials should be permitted in the assistant's work area, and she or he should not provide staff support on any of the files. The legal assistant should be reminded of the obligation to keep confidential any information obtained at the previous firm and not to divulge it to any member of the new firm. Other staff should also be directed not to discuss any aspect of the relevant matters with the new employee.

Issues arising as a result of a transfer between law firms should be dealt with promptly. If the firm in which the legal assistant takes employment cannot protect confidential, relevant information obtained at the former firm, the new employer should cease to act in the matter. Reasonable measures to protect confidential information should be in place before an employee who has such information begins to work at the new firm.

Contingent fee model agreement

Please note several additions to the practice resource materials on the Law Society website. In particular, for those lawyers who have a previous version of the model Personal Injury Contingent Fee Agreement, that agreement has been updated by a major change in the section on costs.

The agreement has been redrafted to include the option for lawyers to take court-ordered costs instead of a percentage of the award or settlement. Rule 8-2(2) of the Law Society Rules says that a contingent fee agreement may allow a lawyer to elect to forego any remuneration based on a proportion of the amount recovered and receive instead an amount equal to any costs awarded to the client by order of a court.

Key guard your cellphone

If you carry a cellphone, please make use of the key guard function to ensure that you don't accidentally push a redial or send key. Otherwise, it is possible that you will unknowingly transmit a conversation with or about a client to someone on the other end of the telephone. Without being aware of it, you may be reconnected to the last person you called, or that person's voicemail. If you carry your phone in a handbag or in your pocket and bump the phone, you could unknowingly breach client confidentiality.

Fortunately, most cellphones have a key guard capability. You can program your phone so that certain keys must be pressed in sequence before you can dial out. Use of that function will allow you to keep your phone turned on without the risk of inadvertently dialing out.

Know your client, confirm your advice

A recent Ontario Superior Court decision emphasizes the need to know your client and confirm your advice. In *Turi* v. *Swanick* [2002] OJ No. 3595,

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61 OR (3d) 368, the court awarded damages to a client who had incurred personal liability when he failed to use his corporation to contract with a supplier. The client sued the lawyer for the amount of the supplier's judgment against the client. The lawyer was held liable.

The lawyer had incorporated a company for the client's clothing store business. In this particular case, the client was unsophisticated and the lawyer knew the client could be sloppy in his record-keeping. The lawyer told the plaintiff to always use the corporate name. The lawyer did a memo to file confirming the advice but did not confirm the advice in writing to the client. The court found that the lawyer did not give advice about the possible consequences if the corporate name was not used. The lawyer testified that he had told the client that he could be personally liable if he did not use the company name. The judge's conclusion that the lawyer had not advised the client of the possibility of personal liability was based mostly on the fact that there was no confirming note in the file about that advice.

The judge ruled that, although it is not the usual practice to advise clients in writing of the possible consequences of not using a corporate name, on the specific facts of this case, the lawyer had a positive duty to warn his client in writing. The decision is under appeal.

Lawyers may not take affidavits in other provinces

Can a member of the Law Society of BC, while in Alberta on an Alberta matter, swear an affidavit for use in Alberta? The answer appears to be no.* Alberta's *Commissioner for Oaths Act*, s. 2(1), says that "a member of the Law Society of Alberta, other than an honorary member, is by virtue of the member's office a commissioner empowered to administer oaths and take and receive affidavits … in Alberta."

The *Notaries Public Act* of Alberta, s.3(1), says that "a member of The Law Society of Alberta, other than an honorary member, is by virtue of that membership a notary public for Alberta." Section 6(1) states that "a notary public may … administer oaths and take affidavits …"

Likewise, lawyers from other jurisdictions visiting BC may not take affidavits in BC for use in BC. The BC *Evidence Act*, s. 60, says "The following persons are, because of their office or employment, commissioners for taking affidavits for British Columbia …

(d) practising lawyers as defined in section 1(1) of the *Legal Profession Act*;

(e) notaries public."

Since s. 1(1) of the *Legal Profession Act* defines "practising lawyer" as "a member [of the Law Society of BC] in good standing who holds or is entitled to hold a practising certificate," and since only a "practising lawyer" may exercise the power of a notary public, it is apparent that visiting lawyers may not take oaths in BC.

*BC lawyers should contact the law society of another province or territory if they need to check whether they are entitled to swear an affidavit in that jurisdiction.✧

Practice Advice

Dave Bilinsky

Felicia S. Folk

Jack Olsen

Practice management advice

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

Practice advice

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

Ethical advice

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

BC Courthouse Library cards now available

In January the BC Courthouse Library Society introduced a new circulation system in the Vancouver Courthouse Library. Under that system, all members of the Law Society, as well as judges, articled students, law clerks and librarians, must obtain a BCCLS library card to borrow materials or to access certain databases that will be introduced on the BCCLS website at the end of April.

To receive a card, a lawyer should send a signed borrower card application form to the Vancouver Courthouse Library. Forms are available at courthouse libraries around the province or are downloadable from the BCCLS website at **www.bccls.bc.ca/borcard_form.htm**. Forms completed at the Vancouver Law Courts can be dropped off at the Circulation Desk; others can be returned by fax to (604) 660-2428.

For questions about library cards and the new circulation system at the Vancouver Courthouse Library, please contact the Circulation Desk at (604) 660-2838.

Please note that a Law Society membership card is still required for after-hours access to the courthouse library.

New BCCLS website ahead

BCCLS is updating its website to increase access to legal information resources. There will soon be free access via the website to various databases, including a local BC legal literature index, an index to BC unreported decisions and — for Law Society of BC members only — access to the family law judgments of the Supreme Court of BC. Launch date for the new website is planned for the week of April 28. Visit the site at **www.bccls.bc.ca**.

New hours in Kelowna and Nanaimo

BCCLS has extended regional library service hours in Kelowna and Nanaimo. The Kelowna library is now staffed on Fridays from 8:00 a.m. to 4:00 p.m., resulting in full-time staffing every weekday. In Nanaimo, staffing has been increased to include Friday mornings from 8:30 a.m. to 12:30 p.m. Staff is already available Monday to Thursday from 8:30 a.m. to 4:00 p.m.✧

Practice Tips *… from page 9*

they have borrowed extensively." While establishing cause-and-effect is always problematic, Brobeck's demise certainly coincided with the ouster of Tower Snow following partnership divisions, large debt accumulations and internal turmoil. The message from Brobeck's fall from grace? That vision, drive and enthusiasm is not enough — no matter what the size of a law firm, it must have a culture of cultivating well-rounded leaders to call the tune and keep the group dancing in the moonlight …

Practice Q & A

How do we pay GST/PST if the client will be late in paying our bill?

Question: We are about to render a large account to a client. We are concerned that it will be some time, if ever, before the account will be paid. However, we are concerned about having to pay the PST and GST without having any funds to the credit of the account. What can we do?

Answer: If you have reasonable grounds to conclude that payment of the account is questionable, you can render the account and immediately place it into the bad debt category. That will allow you to reverse the entries of the taxes payable on the account. When and if you receive payment or partial payment, you can remit the taxes on the amounts received. This avoids your being out of pocket for taxes on accounts that are yet to be paid.✧

Equity Ombudsperson

From the new Equity Ombudsperson

Why your staff should know about this service

by Anne Bhanu Chopra

As Ombudsperson, I receive telephone calls and emails from lawyers and staff, on a wide range of equity concerns, such as:

- How can our firm draft a proper harassment and discrimination policy?
- How should we deal with sexual harassment? What about personal harassment?
- How can we evaluate our mentoring and other in–house programs from an equity perspective?
- What options are available to me if I'm facing harassment or some other form of discrimination?

After holding the position of Ombudsperson for the last two years, it is quite apparent to me that callers benefit the most from the program by calling me on a proactive basis. For this reason, I encourage law firms to make all their lawyers and staff aware of their options. That means advertising a firm's own workplace policies, but also the services of the Equity Ombudsperson program.

Because the Equity Ombudsperson program is confidential and independent from both law firms and the Law Society, it offers a safe environment for someone to discuss discrimination issues and available options. The benefit of *early* contact for concerns of discrimination is critical. I can often help a staff person, a firm (or both) tackle a problem on a proactive basis before the problem worsens, or even results in litigation.

Many callers have told me that they found out about my services too late and, by then, felt their options were limited. While I promote the program to lawyers and to staff as much as possible, the law firm is best positioned to advise staff that an independent service is available, and to describe the service within its workplace policies.

A brief word about workplace policies. Many firms adopt them, then expect adherence without further work on their part. In fact, firms need to undertake consistent and ongoing education to show commitment to the policies and equity issues. This is clearly in management's interest, from both a legal and business perspective, as the case law shows.

Two other points are worth noting. Workplace policies must be updated and they must contain specific examples of both acceptable and unacceptable behaviour, so that lawyers and staff have more than a theoretical concept of what constitutes harassment and discrimination.

These are just a few steps that firms can take towards a more equitable workplace. Would you like to know more? Feel free to contact my office if you have any questions, comments or concerns, or would like me to visit your firm to hold an information session on the program.

I can be reached on my confidential, dedicated telephone line at (604) 687-2344 or by email at achopra@novus-tele.net.✧

* * *

Lawyers should verify electronic deposits to their trust accounts

BC lawyers who receive trust deposits by electronic transfer should exercise caution by confirming with their respective financial institutions that the deposits are valid and cannot be reversed before dealing with the funds.

The Benchers have become aware of instances in which lawyers received deposits in their trust accounts by electronic transfer (their financial institutions had reflected the funds as credited to their trust accounts). The deposits, however, were subsequently reversed. If a lawyer were to have paid out any of the funds by trust cheque prior to the funds being reversed, the trust cheque would have been dishonoured and the lawyer in breach of undertaking. The Law Society is looking further into this issue with the Canadian Payments Association to determine what problems may arise in wire transfers and what constitutes the best practice for lawyers to follow when receiving funds electronically.

Lawyers who have experienced any similar issues are invited to contact Don Terrillon, Auditor (dterrillon@lsbc.org), at the Law Society office.✧

The Interlock Member Assistance Program

Surviving a marriage break-up

*Having a place to turn for support and guidance during the rough spots can make all the difference in a lawyer's professional and personal life. Of the some 350 BC lawyers who contact Interlock each year, 40% are seeking help with a marriage or relationship problem. The following is the true story of one of those lawyers.**

I never expected my marriage of 18 years to break up. For three years there had been a few problems between my spouse and me. Nothing serious, I thought, but I knew the problems needed our attention. I spoke to one of my law partners, who had been through one divorce and one near miss, and asked her about how she had worked things out on the near miss. She said, "We went to Interlock. Why not talk to one of their counsellors? Maybe you can work it out."

Of course, despite the high recommendation from my own law partner, I still had concerns. How much would it cost, what kind of service would we get, what time would I miss away from the office? I found those things out fast — it turned out to be free for lawyers and their families, and everyone at Interlock were highly qualified professionals who were most accommodating to my schedule.

So off to the counsellor we went.

Unfortunately, and through no fault of the counsellor, we only went to three meetings. Despite my initial optimism after those first sessions, I came home from work one day to discover my spouse had left me. I was devastated. Emotionally I did not expect this to happen, so I crawled into bed and did nothing for three days. I experienced nausea, headaches and sleeplessness. At first I did not know where to turn. I knew I could not go on missing work and hiding from the world. Then it struck me to call the Interlock counsellor we had seen, since she at least knew something about my marriage from our earlier meetings.

Despite my good education, I always thought that people who saw a counsellor had a sort of stigma about them. But as I began seeing the counsellor on a regular basis, I realized that it is always best to seek professional help, no matter what your problems are. The Interlock counsellor was excellent and helped me to get over the marriage break-up much sooner than I expected.

We did this by taking things in small steps, starting by discussing my relationship with my wife and what we had gone through. We discussed how to resolve the financial side of the break-up and the extended family situation, since in most marriages families are involved to some degree or another with both spouses. As the counselling went on, I became more stable emotionally and was soon able to cope with work and daily life again. Eventually, I got tired of speaking just about my marriage breakdown and my former wife, and I spoke with my counsellor about working on making "me" a better person. We found strategies for me to recognize the problems I had on a personal level and to improve myself. I also learned to identify what qualities I should be looking for in a life partner in order to better address my needs and desires.

Through this experience, I realized that counselling had been an excellent step to take. It's really not surprising when you think about it. We lawyers encourage our clients to seek out professional help and often refer clients to professionals who specialize in one area or another. None of us would even think about going to see an unqualified friend for dental work, so why would we expect our friends to be equipped to help in times of personal problems? Sure, good friends make for a nice support system, but to solve a problem, you really need a professional.

So I encourage other lawyers to seek help from Interlock and let their professionals help you, no matter what type of counselling you need. I promise, it will be well worth it.

* * *

If you are a lawyer or articled student and you or a dependant would like assistance with personal, family or work-related concerns, please call Interlock for confidential, professional counselling. The Law Society of British Columbia funds this service.

Lower Mainland / Fraser Valley:
(604) 431-8200
National toll-free: 1-800-663-9099
Emergency after-hours:
1-800-324-9988

**Minor details have been changed to ensure the confidentiality of the author.*✧

Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, is available to compensate persons who suffer loss through the misappropriation or wrongful conversion of money or property by a BC lawyer acting in that capacity.

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

Rule 3-39 (1)(b) allows for publication to the profession of summaries of the written reasons of the Committee. These summaries are published with respect to paid claims, and without the identification of claimants.

Martin Wirick

Vancouver, BC

Called to the Bar: May 14, 1979

Resigned from membership: May 23, 2002

Custodian appointed: May 24, 2002

Disbarred: December 16, 2002*

**Mr. Wirick's disbarment was subsequent to the Special Compensation Fund Committee's determination of these claims. For the discipline summary, see DCD 03/05.*

Special Compensation Fund Committee decision involving claims 20020019, 20020446, 20020153, 20020190, 20020229, 20020265, 20020191, 20020227, 20020154, 20020226 and 20020267.

Decision date: November 25, 2002
Report issued: December 19, 2002

Claimant: AA Credit Union
Payment approved: ***$377,163.69*** *(****$207,667.40*** *and* ***$169,496.29****)*

Claimant: B Mortgage Company
Payment approved: ***$909,100.79***

Claimant: C Bank
Payment approved: ***$547,192.60*** *(****$273,596.30*** *and* ***$273,596.30****)*

Claimant: D Inc.
Payment approved: ***$155,498.63***

Claimant: E Bank
Payment approved: ***$892,386.81*** *(****$298,015.84, $296,355.13*** *and* ***$298,015.84****)*

Claimant: F Bank
Payment approved: ***$682,918.34*** *(****$341,459.17*** *and* ***$341,459.17****)*

The East Vancouver properties

The *inter alia* mortgages

Between 1999 and 2002, Mr. Wirick represented Mr. G (and subsequently his assignee S) in the mortgaging and remortgaging of three adjoining East Vancouver properties. In many instances, he represented both S as mortgagor and a financial institution as mortgagee.

Mr. G owned a numbered company that contracted to purchase an East Vancouver residential property (Property #1) for $336,000 in September, 1999. The purchase was scheduled to complete in mid-2000. Prior to completion, Mr. G's company assigned rights to the property to S who completed the purchase.

Mr. Wirick acted for S as borrower in the mortgage financing of the purchase and also for AA Credit Union as mortgage lender. He registered AA Credit Union's $170,000 mortgage as a first charge against the property.

In October, 1999 Mr. G contracted to purchase Property #2 for $275,000, with a completion date in March, 2000. As with Property #1, S completed the purchase of Property #2. Mr. Wirick again represented both S as mortgage borrower and AA Credit Union in the financing of this property. Mr. Wirick used the funds from the sales of other properties for the purchase of Property # 2 and used the funds from AA Credit Union for other purposes.

In December, 2000 S and his construction company applied to demolish the homes on Properties #1 and #2 and to build two-storey buildings on these properties and on a third property ("Property #3"). S obtained a number of construction mortgages. In September, 2000 the AA Credit Union mortgage on Property #1 was extended to Properties #2 and #3 as an *inter alia* mortgage. The AA Credit Union mortgage on Property #2 was likewise extended to Properties #1 and #3.

In June, 2001 an *inter alia* mortgage for $870,000 in favour of B Mortgage Company was placed on Properties #1, #2 and #3. Mr. Wirick represented S in the transaction, while another lawyer represented B Mortgage Company.

The lawyer for B Mortgage Company forwarded the mortgage funds to Mr. Wirick on his undertaking to pay out and discharge various charges on the property so that B Mortgage Company's mortgage would be a first charge on title. Mr. Wirick gave this undertaking, but did not in fact use any of the funds to pay out any of the previously registered mortgages.

In December, 2001 another *inter alia* mortgage for $350,000 in favour of D Inc. was placed on Properties #1, #2 and #3. The mortgage was to be a second mortgage. None of the designated mortgage funds were used to pay out any of the previously registered mortgages.

Additional mortgages on the properties

Property #1

By December 14, 2001 Property #1 was

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Special Fund claims *… from page 15*

subject to the *inter alia* mortgages as security for the obligations of S to AA Credit Union, B Mortgage Company and D Inc. Three additional mortgages were placed on Property #1, as follows:

- on December 4, 2001 a mortgage for $270,000 in favour of C Bank as the institutional mortgage lender;
- on January 8, 2002 a mortgage for $292,500 in favour of E Bank as the institutional mortgage lender; and
- on February 18, 2002 a mortgage for $337,500 in favour of F Bank as the institutional lender.

In each of these transactions, Mr. Wirick acted for both S as borrower and for the institutional lender. In each case, the lender provided the mortgage funding to Mr. Wirick in trust on the basis that it would receive a first charge against the property and Mr. Wirick advised both E Bank and F Bank that a first charge in their favour had been secured. In fact, Mr. Wirick used none of the funds he received in trust to pay out any of the previously registered mortgages.

In March, 2002 S contracted to sell Property #1 to new purchasers. The purchase completed in April and included registration of a new mortgage in favour of G Bank. Mr. Wirick acted for S and a notary public acted for the new purchasers. Mr. Wirick undertook to pay out and discharge all prior charges on title on receiving the purchase funds from the notary. In a letter he stated that he had already paid all the charges on title except that of F Bank and was only awaiting the return of releases from C Bank and E Bank. He received $377,578.61 in trust from the notary acting for the new purchaser, but discharged none of the prior mortgages.

Property #2

Property #2 was subject to the *inter alia* mortgages as security for the obligations of S to AA Credit Union, B Mortgage Company and D Inc. Two additional mortgages were placed on Property # 2, as follows:

- on December 4, 2001 a mortgage for $292,500 in favour of E Bank as the institutional mortgage lender; and
- on February 18, 2002 a mortgage for $337,500 in favour of F Bank as the institutional lender.

In each transaction, Mr. Wirick acted for both S as borrower and for the institutional lender. Each lender anticipated it would receive a first charge on title and Mr. Wirick specifically reported to E Bank that it held a valid first charge. Mr. Wirick received the mortgage proceeds in trust, but used none of the funds to pay out any of the previously registered mortgages.

S subsequently sold Property #2 to new purchasers for $423,000. The sale completed in March, 2002. Mr. Wirick represented S in the transaction. The purchasers' notary forwarded the purchase funds to Mr. Wirick on his undertaking to pay out and discharge all prior mortgages, but Mr. Wirick did not do so.

Property #3

Property #3 was subject to the *inter alia* mortgages as security for the obligations of S to AA Credit Union, B Mortgage Company and D Inc. Two additional mortgages were placed on Property # 3, as follows:

- on December 4, 2001 a mortgage for $270,000 in favour of C Bank as the institutional mortgage lender; and
- on January 8, 2002 a mortgage for $292,500 in favour of E Bank as the institutional lender.

In each transaction, Mr. Wirick acted for both S as borrower and for the institutional mortgage lender. Each lender anticipated it would have a first charge against the property. Mr. Wirick received the mortgage proceeds in trust and represented to each lender that he had secured a valid first charge. In fact he used none of the funds to pay out any of the previously registered mortgages.

In February, 2002 S sold Property #3 to new purchasers. A new mortgage of $265,200 in favour of G Bank was to be registered as a first charge against the property as part of the purchase financing. The notary for the new purchasers sent Mr. Wirick the purchase funds in trust on his undertaking to pay out the previous charges on title. Mr. Wirick did not in fact use the funds to pay out the previous mortgages, but used them for unrelated matters.

* * *

With the exception of D Inc., all mortgage lenders in these transactions anticipated that they would have a first charge on the properties with respect to which they advanced mortgage financing. AA Credit Union in fact held the first charge on Properties #1, #2 and #3.

* * *

The Special Compensation Fund Committee considered compensation claims made by the mortgage lenders and by the new purchasers of East Vancouver Properties #1, #2 and #3.

The Committee noted that, while applications to the Fund are ordinarily considered after the conclusion of discipline proceedings, these applications would proceed early. In the circumstances, one of the lenders had already commenced foreclosure proceedings and a master had granted a three-month redemption period and ordered that the properties be listed for sale at the end of the three-month period.

The Committee decided that it would not require the claimants to exhaust their civil remedies in this case by obtaining a judgment against Mr. Wirick, given that he had made an assignment into bankruptcy, that his debts greatly exceeded his assets and that there was

little hope of recovery from him.

In considering the eligibility of the claims for compensation, the Committee noted that Mr. Wirick had received trust funds in his capacity as a lawyer who acted for the vendor, purchasers or lenders in the conveyance or mortgage of real property. He had not provided an explanation of the various claims, but his bankruptcy documentation clearly showed that he breached his undertakings to pay trust funds to specific parties and to clear title. Given the pattern of deceit and dishonesty, the Committee came to the irrefutable conclusion that Mr. Wirick misappropriated and/or wrongfully converted the funds.

Noting its discretion to dispose of claims and make payment as it saw fit, the Committee determined to pay the claims of AA Credit Union, B Mortgage Company, C Bank, D Inc., E Bank and F Bank in the principal amount of the outstanding mortgages, plus interest.

Payment of approved claims from the Fund was subject to a number of conditions:

- all claimants must agree to the conditions and, if not, the claim must go back to the Committee;
- all financial institutions submitting claims must provide statutory declarations setting out:
  - whether they have any insurance available to pay these claims; and
  - whether they have instigated any disciplinary action against any employee or terminated the employment of any employee or if any employee has resigned as a result of any matter in connection with these mortgages;
- all claimants must provide an assignment of their claims against Mr. Wirick, Mr. G and any companies owned by Mr. G that were involved in this matter;
- all lenders must provide a discharge of their respective mortgages in registrable form;
- all claimants must provide releases to the Law Society and the Fund.

The Committee exercised its discretion to pay interest, based on the special circumstances of these claims. Accordingly, interest was to be paid at the applicable rate until May 24, 2002 and at the applicable rate (to a maximum of 6%) thereafter until November 25, 2002.

The Committee considered, but did not allow, claims made by G Bank and by the new purchasers of Properties #1, #2 and #3. The Committee noted that, once all charges and mortgages ahead of the G Bank mortgages were paid, these claimants would have suffered no direct loss as a result of Mr. Wirick's actions and would be in the same position as they would have been had he honoured his undertakings.

* * *

Special Compensation Fund Committee decisions involving claims 20020293, 20020018, 20020272 and 20020498.

Decision date: November 25, 2002
Report issued: December 20, 2002

Claimant: D Inc.
Payment approved: ***$207,578.08 ($103,789.04** and **$103,789.04)***

Claimant: AA Credit Union
Payment approved: ***$837,679.05 ($418,662.94** and **$419,016.11)***

The West Side Vancouver Properties

Mr. Wirick acted for Mr. G who was the sole director of V Ltd., a construction company. V Ltd. purchased a property on the west side of Vancouver, demolished the residence and divided the property into two strata lots (Properties #1 and #2).

To finance the purchase and new construction, V Ltd. obtained three mortgages to be registered against Properties #1 and #2:

- a $322,500 mortgage in favour of H Mortgage Group on December 29, 1999;
- a $100,000 mortgage in favour of D Inc. on December 30, 1999 (later discharged and replaced with a $200,000 mortgage on February 9, 2001); and
- a $294,000 mortgage in favour of I Mortgage Company on August 10, 2000.

In March, 2001 V Ltd. sold Property #1 to its nominee (S) and sold Property #2 to its nominee (SS). Each property sold for $605,000.

S and SS each obtained purchase financing of $417,450 from AA Credit Union.

AA Credit Union forwarded mortgage funds with respect to both purchases (a total of $834,900) to Mr. Wirick in trust. With respect to each property, Mr. Wirick confirmed registration of a first charge in favour of AA Credit Union, subject only to the mortgages of T Mortgage Group, D Inc. and I Mortgage Company, which were to be discharged. Mr. Wirick did not in fact use the mortgage proceeds to secure discharges of those mortgages. Rather, he directed the funds to be used in a manner not authorized by AA Credit Union and for the benefit, directly or indirectly, of himself and his client, Mr. G.

In August, 2001 S sold Property #1 to new purchasers for $529,000. The purchasers obtained new mortgage financing of $325,000 from C Bank. The lawyer representing the new purchasers forwarded $446,459.25 to Mr. Wirick in trust on his undertaking to pay out and discharge the H Mortgage Group, D Inc., I Mortgage Company and AA Credit Union mortgages (and

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Special Fund claims … *from page 17*

the attendant assignment of rents on the H Mortgage Group and I Mortgage Company mortgages). Mr. Wirick also received in trust $11,900 from the realtor, $34,607.48 from a builders' lien holdback and $128.19 as interest on the lien holdback.

In September, 2001 SS sold Property #2 to a new purchaser for $505,000. The purchaser obtained two new mortgages from C Bank totalling $355,000. The purchaser's lawyer forwarded $467,320.13 to Mr. Wirick in trust on his undertaking to pay out and discharge the H Mortgage Group, D Inc., I Mortgage Company and AA Credit Union mortgages (and the attendant assignment of rents on the H Mortgage Group and I Mortgage Company mortgages).

Mr. Wirick breached his undertakings respecting the trust funds he received in these two transactions. He failed to discharge the prior mortgages and related charges, but instead paid the funds to unauthorized payees for the benefit, direct or indirect, of himself and his client, Mr. G. At a later date he paid and obtained discharges of two of the mortgages on Properties #1 and #2 with funds from other properties. As of the date he ceased practice, however, Mr. Wirick had not filed those discharges.

Had the purchase and financing of Property #1 proceeded as the purchasers anticipated, they would have received their fee simple interest in the property, subject only to a first mortgage in favour of C Bank. Had the purchase and financing of Property #2 proceeded as that purchaser anticipated, he would have received his fee simple interest subject only to the two mortgages he had negotiated in favour of C Bank. Instead the titles of both properties were subject to prior mortgages in favour of AA Credit Union and D Inc., which should have been discharged.

* * *

The Special Compensation Fund Committee considered compensation claims made by the mortgage lenders and by the new purchasers of the West Side Vancouver Properties #1 and #2.

The Committee noted that, while applications to the Fund are ordinarily considered after the conclusion of discipline proceedings, these applications would proceed early. In the circumstances, the purchaser of Property #2 had moved to be near his sister who was ill. He had sold Property #2 but was unable to deliver up clear title and the prospective purchasers were living in the residence on the understanding that his claim would receive early consideration. Given that Property #1 was subject to one of the same mortgages as Property #2, it was prudent to consider claims involving both properties at the same time. The Committee decided that it would not require the claimants to exercise their civil remedies against Mr. Wirick, given there was little hope of recovery from him.

The Committee found that Mr. Wirick, having received trust funds in his capacity as a lawyer, misappropriated or wrongfully converted the funds in these two transactions. While it need not be established that he was guilty of a criminal act, the Committee noted it must be satisfied that a lawyer has acted dishonestly or fraudulently in appropriating or converting money or property. The BC Court of Appeal had defined the required objective standard of culpability as "conduct which ordinary, decent people would feel was discreditable as being at variance with straightforward or honourable dealings." The Court stated that intention becomes relevant only when an explanation is offered to excuse conduct objectively determined to be dishonest.

Although not every breach of undertaking is dishonest, the circumstances of these claims did not suggest negligence or error, but rather an intention to deceive. Mr. Wirick misled AA Credit Union as to the nature of its security in order to facilitate the misappropriation of trust funds. Similarly, he breached his undertaking to the lawyers acting for subsequent purchasers of the properties to facilitate the misappropriation and wrongful conversion of the purchase funds.

The Committee approved the claims of AA Credit Union and D Inc. with respect to Properties #1 and #2. It noted that, once the claims of those lenders were paid and their charges released, the subsequent purchasers and their institutional lenders would not suffer a loss. The Committee declined to pay amounts claimed by the purchaser of Property #2 to compensate him for bridge financing in the resale of the property, legal fees and an amount he paid to the subsequent purchasers by reason of his inability to complete the sale.

The Committee exercised its discretion to pay interest, based on the special circumstances of these claims. Accordingly, it ordered that interest be paid at the applicable rate until May 24, 2002 and at the applicable rate (to a maximum of 6%) thereafter until November 25, 2002.

Payment of approved claims from the Fund was subject to the following conditions:

- all claimants must agree to the conditions and, if not, all claims must go back to the Committee for reconsideration;
- each financial institution submitting a claim must provide a statutory declaration setting out:
  - details of any insurance that might be available to pay these claims or confirmation that it has no such insurance; and
  - whether it has initiated any disciplinary action against any employee or terminated the

employment of any employee, or if any employee has resigned as a result of any matter in connection with its claim;

- all claimants must provide an assignment of their claims against Mr. Wirick, Mr. G and any companies owned by Mr. G that were involved in this matter;
- AA Credit Union and D Inc. must provide registrable discharges of their respective mortgages;
- all claimants must provide releases to the Law Society and the Fund.✧

Unauthorized practice actions

[redacted]

Suspensions

J.A. Donald Bohun, of Victoria, has been suspended for one year, effective February 19, 2003, after a discipline hearing panel accepted his admission of professional misconduct and his proposed disciplinary action under Law Society Rule 4-22. A summary of this matter will be published in an upcoming *Discipline Case Digest*.

Lawrence E. Pierce, of Vancouver, is suspended from the practice of law for six months, from February 28 through August 31, 2003. The Benchers imposed this additional term of suspension on Mr. Pierce in 2002 following their review of a three-month suspension earlier imposed by a discipline hearing panel. The BC Court of Appeal, however, stayed the additional six-month suspension pending a decision of the Supreme Court of Canada on an application for leave to appeal a judicial review decision brought by Mr. Pierce: see *Discipline Case Digests* 02/15 and 00/12 for background.

As a result of the Supreme Court of Canada's dismissal of Mr. Pierce's leave application, the additional six-month suspension is now in effect.✧

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