



# Benchers' Bulletin



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Inside



## President's View

# Women in the profession – time has passed, what has changed?

by William M. Everett, QC

Time can give us a clear and sometimes dramatic perspective on how far we have come. In 1908 the Law Society Secretary, Oscar Bass, penned these words to a colleague from Ontario: *"I beg to say that the fair sex have not yet threatened to invade the legal profession in British Columbia. The Benchers not yet having had to consider the application of a modern Blackstone in petticoats to enter the profession, it is difficult to say what their feelings would be or what decision they would reach ..."*

I suspect it was not a great surprise to Mr. Bass when, just a few years later, the Benchers of the day decided they had no power "to admit ladies to the practice of law." Despite firm resistance from the established order, Mabel Penery French broke new ground, pushing government to pass *An Act to remove the Disability of Women so far as relates to the Study and Practice of Law* and becoming the first woman to be called to the BC bar on April 1, 1912.

There have been many firsts for women lawyers in the 90 years that followed. A cause for celebration, but also reflection. The transitions have not been easy and there is undoubtedly some way to go.

It is now over a decade since the Law Society released two major studies on gender issues in the legal profession and justice system — one in 1991 by the Women in the Legal Profession Subcommittee, chaired by Kate Young, and the other in 1992 by the Gender Bias Committee, chaired by Ted Hughes, QC.

Those studies were the first to document the status of women lawyers in BC — describing in some detail the difficulties that many have faced in accommodating both the practice of law and family responsibilities, and the discrimination and sexual harassment

encountered by others.

To their credit, the Benchers of the early 1990s confronted many of the issues head-on, determined to show leadership by encouraging more equitable conditions for women in practice, including career breaks for family responsibilities, and by tackling discrimination. These were the key initiatives:

- a *Professional Conduct Handbook* rule that discrimination, including sex discrimination and sexual harassment, is professional misconduct, adopted in 1992;
- a non-practising membership category with a lower fee, beginning in 1994;
- a 50% reduction in liability insurance for members in part-time practice, beginning in 1993;
- active encouragement of women lawyers to stand for election as Benchers;
- reimbursement of reasonable child-care expenses incurred by Benchers and lawyers while on unpaid Law Society business;
- encouragement of law firms to adopt workplace policies on maternity and parental leave, alternative work arrangements, gender-neutral language, employment equity and workplace harassment;
- retaining an independent Discrimination Ombudsperson (now Equity Ombudsperson) to mediate allegations of discrimination in law firms, with the agreement of all parties.

The years have passed. The question remains: *How much has changed for women lawyers?*

Today's statistics offer a few

### Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articulated 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](http://www.lawsociety.bc.ca).

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encouraging facts about women lawyers in BC. Women are entering the profession in higher numbers than ever before. Looking back to the 15-year period between 1974 through 1988, men made up 73% of all newly called lawyers in BC, and women just 27%. More balanced law school enrolments have since made a difference. Over the last 15 years (1989 through 2003), women made up 45% of all newly called lawyers and men 55%.

Perhaps the best news is that the attrition rate for women, at least in the early years of practice, has dropped. The *Women in the Legal Profession* study found that the yearly average attrition rate for lawyers called during the 15-year period between 1974 and 1989 was 23% for women, compared to 13% for men. Looking back on the past 15 years, the attrition rate for women has dropped to 16% and for men risen just slightly to 14%. The overall average attrition rate was around 15% during both periods. And there has been some cumulative effect. At the time the *Women in the Legal Profession* study was released in 1991, just one in five lawyers was a woman. Today, that number is close to one in three.

While economic factors and the migration of lawyers from province to province can affect growth in the profession, one of the reasons for lower attrition rates among women is likely non-practising membership. This category of Law Society membership was introduced in 1994, and was intended to accommodate career breaks by women lawyers who needed to attend to family responsibilities.

There are still proportionally fewer women in practice than men. Of women lawyers called in the past 15 years, 78% are practising members and 22% non-practising. Among men called during the same period, 87% are practising members and 13% are non-practising. Across the entire profession, almost 80% of women are now practising members and 20%

non-practising; whereas 88% of men are practising members and 12% are non-practising. To focus more precisely on private practice, 67% of women lawyers in BC are in private practice, compared to 82% of men.

More details are needed to complete the picture, to tell the full story. Are women staying in the profession longer across all years of call, or not? Are they taking up non-practising membership to facilitate career breaks and then integrating back into practice? Or are they remaining non-practising members for longer periods? If so, why? We need to know if women are now finding their career opportunities and experiences more equitable, and to see if balance between work and family commitments is possible in our profession. Are women lawyers where they want to be in their careers, or are they settling for less?

When asked why they were leaving the profession more than a decade ago, women cited some reasons that were different from those of men — child care commitments being a prime example. Yet men and women also shared concerns about the general lack of flexibility in the practice of law, so some issues of dissatisfaction may affect both men and women.

The Women in the Legal Profession Subcommittee recommended that the Benchers re-examine the status of women by the year 2000, so a second look is well past due. This task falls to our Equity and Diversity Committee, chaired by Victoria Bencher Anne Wallace, QC and to the Women in the Legal Profession Working Group, chaired by Vancouver Bencher Margaret Ostrowski, QC.

I pause here to note that Ms. Ostrowski has already taken the initiative of organizing an annual lunch-time panel of senior women lawyers on campus at UBC and UVic to share with law students their experiences and the lessons they have learned in practice. The latest panel took place in mid-March at

UBC, drawing 75 students, including men. It was an opportunity for experienced women lawyers to encourage women who are aspiring to become lawyers — and to emphasize the importance of both women and men finding balance between work and life, without necessarily accepting the conventional career advice of the day. There is clearly a need for this type of mentorship, and I understand the panel ran out of time well before the students ran out of questions.

I expect the Working Group will gather the latest research from across Canada — including a recent study on gender issues out of the Law Society of Alberta — and will consider what research is needed in BC. Among the possibilities now being canvassed is a voluntary exit survey that would

*continued on page 4*

## Women Lawyers Forum & Leadership Institute

May 28, 2004

BC women lawyers are invited to attend the 2004 Women Lawyers Forum in Vancouver on May 28 to reflect on women and leadership in the practice of law. The Forum, sponsored by the BC Branch of the CBA and endorsed by the Law Society, will present a picture of practice today for Canadian women lawyers and provide practical training on the leadership issues they face.

If you would like to participate in the training program, or join the luncheon and reception with special guest speakers, please contact the Forum Chair, Cheryl Stephens at [email@cherylstephens.com](mailto:email@cherylstephens.com) for details. Register early, as enrolment in the training portion of the program is limited to 40 lawyers.



## Law Society Award: call for nominations



The Law Society Award, offered every two years, honours the truly exceptional within the profession, based on the criteria of integrity, professional achievement, service and law reform. The Award is made chiefly in recognition of contributions to the advancement of the profession or the law, but public service outside the legal profession will be considered.

Past recipients are Dean Emeritus George F. Curtis, QC (1986), Oscar F. Orr, MBE, OBC, QC (1988), Chief Justice J.O. Wilson (honoured posthumously, 1992), Mr. Justice Peter D. Seaton (honoured posthumously, 1994), Alfred Watts, QC (1996), The Hon. Martin R. Taylor, QC (1998), The Hon. E.N. (Ted) Hughes, QC (2000) and The Hon. Kenneth E. Meredith

(2002).

Lawyers are encouraged to nominate a candidate to receive the Law Society Award in 2004. Nominations must be received by **Friday, May 7, 2004**.

When submitting a nomination, please include the candidate's *curriculum vitae*, and your views on why he or she should receive the Award. *Please note that a nomination must be accompanied by this material for it to be considered by the Selection Committee.*

If given in 2004, the Award will be presented at the Bench & Bar Dinner this Fall. For full details, please see the circular enclosed in this mailing or visit the Law Society website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca). ✧

## Law Society supports government's look at a Land Title Authority

The Law Society of BC has asked the Ministry of Sustainable Resource Management to consider the concept of an independent provincial authority to administer the province's land title system.

The Law Society first raised the possibility of an independent authority with the Ministry late last Fall as a way of preserving the integrity of BC's Torrens system and improving service delivery to users around the province

as the demand for land title services grows.

The Ministry of Sustainable Resource Management, which is responsible for operation of the land title system, has now struck a committee to look at the implications and benefits of a land title authority. Law Society President William Everett, QC has appointed Victoria Bencher Ralston Alexander, QC, now First Vice-President, to that committee. Any decision as to whether an

independent provincial authority is the best way to deliver land title services rests entirely with the government, which has stated it plans consultations with key user groups from across the province.

The Law Society is pleased that the government is prepared to explore an alternative means of delivering land title services in BC. The Society will keep the profession updated on this issue. ✧

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### President's view ... from page 3

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allow all BC lawyers, both women and men, to say why they are withdrawing from practice and to flag any systemic issues that the Law Society needs to consider.

Taking the pulse of the profession, through surveys, research and discussions, is important. It keeps the Law

Society in touch with lawyers and their concerns. The results of that research can also help lawyers better understand the pressure points in their own firms, hopefully to avoid losing some of their brightest talent whom they have spent time recruiting and training. The latest issue of the *CBA National* magazine flagged a high attrition rate among associates generally in Canada, and pointed to the cost of losing associates just as they become valuable to the firm.

There is always a business cost, as well as a social cost, to losing good lawyers at the wrong time and for the wrong reasons. On the issues facing women lawyers in particular, I am pleased that our Equity and Diversity Committee and the Women in the Legal Profession Working Group will begin a fresh assessment of where we stand today — to see what has worked and what has not and what changes are still needed to bring women to a position of equality in the profession. ✧



## Land Title Office offers online filing beginning April 1

### The documents for e-filing

As of April 1, 2004 the Land Title Office will accept electronic filings from BC lawyers, notaries and land title agents of these key documents in land transfers:

- Form A (Freehold Transfer)
- Form B (Mortgage)
- Form C (Charge)
- Form C (Release)
- Declaration
- Property Transfer Tax Electronic Payment Authorization
- Property Transfer Tax Return

The electronic filing of documents is optional, not mandatory.

### Computer system requirements

The Land Title Office form templates are in portable document format (PDF), featuring data fields that can be completed electronically using Adobe Acrobat 6.0. For a test version of the forms, visit the electronic filing system project website at [srmwww.gov.bc.ca/landtitle/EFS\\_web\\_site/index.htm](http://srmwww.gov.bc.ca/landtitle/EFS_web_site/index.htm). The final version of the forms will be available for downloading from the BC Online website ([www.bc.online.com](http://www.bc.online.com)) beginning April 1.

Most lawyers will already be familiar with viewing PDF documents on the internet with Adobe Acrobat Reader (free software available for download from the Adobe website). Fewer may have used the full version of the Acrobat software, which allows for the creation and completion of PDF documents, including forms.

BC lawyers and their conveyancing staff will need to use version 6.0 of Adobe Acrobat (standard or professional) to complete the forms. The software is available for purchase from software retailers or can be ordered online from BC Online or Adobe ([www.adobe.com/acrofamily/main.html](http://www.adobe.com/acrofamily/main.html)).



*The moment of truth* — Conveyancer Rosalyn Gutierrez (left) and lawyer Peter DeMeo (centre) of the law firm Mullin DeMeo in Victoria complete the first-ever electronic filing in the Land Title Office by submitting a mortgage online on January 7. Darcy Hammett, Director of Operations and Systems for the Land Title Branch, and Denis Thomas, Technical Architect (right) savour this moment of success in the pilot phase of the e-filing project.

To begin e-filing, law firms should ensure their practices feature the following:

- Windows operating system, 98SE or higher or Mac OS
- Microsoft Internet Explorer 5.01 web browser
- An internet connection (minimum 56K dial-up; high-speed cable or ADSL is recommended)
- a BC OnLine account, with access to land title applications
- Adobe Acrobat 6.0
- a Juricert-authenticated Adobe Acrobat Signing Certificate
- a set of computer folders configured for LTO electronic filing system files
- electronic filing system templates (which can be downloaded to the

firm's computer system via BC Online beginning April 1)

- set-up for electronic funds transfer (for payment of the Property Transfer Tax)

### First steps

#### Register with Juricert to obtain digital certificate

A lawyer who wishes to make electronic filings in the Land Title Office must first register with, and obtain an Adobe Acrobat Signing Certificate from Juricert, a company owned by the Law Society. The Law Society is the certification authority for professionals for the purpose of e-filing under the *Land Title Act*: see page 7 for details on registering with Juricert.

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LTO online filing ... from page 5

## Authorize electronic funds transfer for payment of PTT

If a lawyer chooses to make an electronic filing of documents, any Property Transfer Tax payable in the transaction must be paid by electronic funds transfer. Law Society Rule 3-56 was recently revised to allow lawyers to authorize electronic withdrawals of funds from their trust accounts for this purpose.

If a law firm's trust account requires the signature of a non-lawyer financial officer on cheques, both the signatory lawyer and the financial officer must register with Juricert and obtain digital certificates. This is necessary to allow them to digitally sign and file a Property Transfer Tax Electronic Payment Authorization form. This form authorizes the Land Title Branch to draw payments for Property Transfer Tax from designated law firm banking accounts at the time the firm submits documents for e-filing: see page 7 for more on payment of the PTT.

## Basic components of a conveyance under e-filing

An underlying principle of the new e-filing system is that it will not mandate fundamental changes to conveyancing practice.

In accordance with practice in BC, it is therefore expected that the purchaser's lawyer, with the assistance of his or her staff, will continue to prepare the transfer package in residential conveyances under e-filing. Rather than creating the Form A Transfer (and other forms) in word processing software, however, the purchaser's lawyer and staff will do so using Adobe Acrobat forms, by filling out pre-determined fields.

Each person within a firm who drafts a land title form for electronic filing, and each lawyer who signs the form as officer, will need access to Adobe Acrobat software.

Assuming conveyancing staff have created a transfer form in Adobe Acrobat, the lawyer will review that form, along with all other documents in the package, with the client. The lawyer's staff will forward the transfer package, with statement of adjustments, to the vendor's lawyer by courier, by fax or by email (as scanned document attachments). The vendor's lawyer will witness execution of a paper copy of the transfer by the vendor and return the document to the purchaser's lawyer by courier, by fax or by email (as a scanned document attachment). In practice, the purchaser's lawyer will need a hard copy of this signed transfer for his or her files. No hard copies will be used in electronic submissions to the Land Title Office.

As is now the case, the purchaser's lawyer must review all documents prior to submission to the LTO. Under e-filing, the lawyer will digitally sign (using his or her digital certificate from Juricert) and lock each document prior to submission, typically the Form A transfer, Form B mortgage and Property Transfer Tax return.

The actual submission of the documents can be carried out by the lawyer's staff or third parties such as registration agents. They will log into BC Online and upload the signed documents for submission. The Land Title Office system is expected to feature built-in checks on the submission, to ensure that the correct form version is used and that documents are not missing and are in the right order.

The Land Title Branch will also check a lawyer's digital certificate to verify the practising status of that lawyer through current Law Society data provided to the Land Title Branch by Juricert.

## New practice resources

### Land Title Electronic Filing System Reference Manual

The Land Title Branch is releasing mid-March a comprehensive *Land Title Electronic Filing System Reference*

*Manual*, which provides step-by-step instruction on preparing forms and carrying out electronic filing. The *Manual* will be available at no cost on the Land Titles Branch electronic filing system project site at [srmwww.gov.bc.ca/landtitle/EFS\\_web\\_site/index.htm](http://srmwww.gov.bc.ca/landtitle/EFS_web_site/index.htm).

The *Manual* contains information on the following:

- **Getting started:** system requirements, installing Adobe Acrobat 6.0, obtaining a digital certificate, setting up computer folders for electronic filing, downloading form templates and authorizing PTT electronic payments;
- **Filling out forms:** opening and saving forms, entering data, locking forms, re-using data in forms and altering electronic filing system forms;
- **Using electronic filing:** navigating the electronic filing system, submitting document packages, submitting corrective declarations and managing the submission queue;
- **Digital signatures:** obtaining a digital signature, security issues and applying a digital signature;
- **Electronic funds transfer:** authorizing electronic payments for Property Transfer Tax and filing a PTT return.

## Land Title Transfer Forms Guidebook

The Continuing Legal Education Society of BC recently published the *Land Title Transfer Forms Guidebook*, second edition (2004), which includes select statutory provisions on e-filing, section-by-section instruction on completion of each electronic form and annotated commentary.

The *Forms Guidebook* is available for purchase from CLE: visit [www.cle.bc.ca](http://www.cle.bc.ca) or call customer service at 604 893-2121 or toll-free in Canada at 1-800-663-0437. ♦



## Visit Juricert site to register for digital credentials

On March 15, 2004 the Director of Land Titles formally recognized the Law Society as a certification authority under the *Land Title Act*. BC lawyers who wish to electronically file documents in the Land Title Office must first register with the Law Society's Juricert service at [www.juricert.com](http://www.juricert.com) to obtain the necessary digital certificate.

This is a two-step process. First, a lawyer must register with Juricert for authentication of his or her identity and Law Society membership status. Second, once registered with Juricert, the lawyer must apply for a digital certificate. The lawyer will use the certificate to digitally sign documents for electronic submission to the Land Title Office.

Here are the steps to follow:

1. **Register with Juricert** — A lawyer will visit the Juricert website ([www.juricert.com](http://www.juricert.com)) to complete an online registration form. The system will generate the lawyer's information in portable document format (PDF) for the lawyer to

review, print out, sign and submit to Juricert by fax or mail. Once this signed form is received, Juricert will check the lawyer's information and signature against Law Society records to confirm his or her identity and Law Society membership status. When that authentication is complete, the lawyer will be registered with Juricert and receive a Juricert identification number by email.

2. **Apply for an Adobe Acrobat Signing Certificate\*** — Once the lawyer receives a Juricert identification number, he or she can apply on the Juricert website for an Adobe Acrobat Signing Certificate. Juricert will advise the lawyer once the certificate is available to download. The lawyer will be able to use this certificate to digitally sign documents for electronic submission to the Land Title Office via BC Online.

If a law firm's trust account requires the signature of a non-lawyer financial officer on cheques, the financial officer also must register with Juricert and

obtain a certificate. This is necessary to allow the law firm's account signatories to digitally sign and file a *Property Transfer Tax Electronic Payment Authorization* form. For more on the electronic payment of the Property Transfer Tax, see the article below.

*Please note that, depending on volume, registration with Juricert may take up to two business days, and issuance of a certificate another two business days. Lawyers are encouraged to register early.*

For more information, visit [www.juricert.com](http://www.juricert.com).

**\* Note on certificates:** The Adobe Acrobat Signing Certificate supplied by Juricert is only for use in signing Acrobat files. Other "general purpose" certificates authenticated by Juricert are available from the commercial certificate companies listed on the Juricert website. Due to technical limitations in the Land Title Office e-filing system, these certificates are not currently usable on that system. It is anticipated that this limitation will be resolved in the near future, after the launch of e-filing. Certificates from IDScript, Commguard and Dye & Durham can be used to digitally sign and encrypt e-mail messages and PDF files. ✧

## Rule change facilitates e-filing at Land Title Office

### Law firms can pay PTT from trust through electronic funds transfer

Law Society Rule 3-56 "Withdrawal from trust" was amended on March 5, 2004 to allow BC lawyers to make Property Transfer Tax (PTT) payments from their trust accounts via electronic funds transfer, instead of by trust cheque, at the time they submit electronic filings to the Land Title Office. The LTO expects to have its e-filing service available beginning April 1, 2004.

A law firm must first arrange for electronic payment of PTT by authorizing

the Ministry of Provincial Revenue and the financial institution(s) at which the firm holds accounts to process debits against specified trust accounts in payment of the Property Transfer Tax.

To do so, the authorized signatory or signatories on the law firm's accounts must complete, digitally sign (with a Juricert-authenticated certificate) and electronically file via BC Online a *Property Transfer Tax Electronic Payment Authorization* form with the Land Title

Branch of the Ministry of Sustainable Resource Development.

Each time a law firm subsequently submits a *Property Transfer Tax Return* in the course of a Land Title Office electronic filing of documents, via BC Online, the firm will confirm the PTT payment amount on the *Return*. In accordance with the firm's *Electronic*

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## *Law Society and BC Real Estate Association reach common position*

### Lawyers should remain unrestricted in real estate sales, but new rules expected on delegation to staff

The Law Society and the BC Real Estate Association will put forward to the provincial government a common position that an exemption for lawyers from the licensing provisions of the *Real Estate Act* should remain, but that the licensing exemption should not extend to a lawyer's staff. In furtherance of this understanding, the Benchers have decided in principle to make rule changes to the *Professional Conduct Handbook* to restrict lawyers who sell real estate from delegating certain activities to their non-lawyer staff.

The Benchers made these decisions in February, at the recommendation of a Real Estate Act Review Task Force, chaired by Victoria Bencher (and now First Vice-President) Ralston Alexander, QC. That task force reviewed a proposal to change the *Real Estate Act* put forward by the provincial government a year ago. At that time, and at the urging of the BC Real Estate Association, the Ministry of Finance had proposed limiting the exemption for

lawyers from licensing requirements of the *Real Estate Act*. Under the proposal, lawyers would have been restricted to conducting only those real estate sales that are ancillary to settling an estate, administering a will or effecting a marriage settlement, but would not be entitled to list or sell a property outside these circumstances unless they were separately licensed under the *Real Estate Act*.

The Law Society strongly opposed the proposal and the prospect of dual licensing for lawyers, as reflected in its submissions to the Ministry of Finance: see the *Resource Library/Reports* section of the Law Society website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca). BC lawyers have had a longstanding exemption under the *Real Estate Act* that allows them to engage in real estate sales without any additional licensing requirements. The Society pointed out that the exemption had caused no public harm and there was no public policy rationale to restrict it.

"It is particularly difficult to reconcile the stated goals of *Real Estate Act* reforms — to enhance competition and promote ease of access to the marketplace — with new restrictions on lawyers in that marketplace," the Law Society had stated in its submission. "It will be impossible to restrict the involvement of lawyers in transacting real estate contracts without interfering with the public's entitlement to appropriate legal advice at each stage of the real estate sale process, including on such critical matters as best valuation information, exposing the property to the marketplace, examination and qualification of prospective purchasers, exploring the nature of the contract and participating in the closing of the transaction by registration at the Land Title Office."

A number of BC law firms also opposed restrictions on their activities and presented submissions of their own, as did the CBA (BC Branch).

The BC Real Estate Association has pinpointed as its primary concern that a lawyer's employees — without being licensed under the *Real Estate Act* — might engage in real estate sales activities that would not be permitted if they were employed by realtors.

With Ministry encouragement, the Law Society and BC Real Estate Association have discussed their respective concerns and come to a common understanding. As of early February, both organizations have agreed that the licensing exemption for lawyers in the *Real Estate Act* should not be changed or restricted and that lawyers should require no additional licensing to conduct real estate sales. A lawyer's secretaries, paralegals and other

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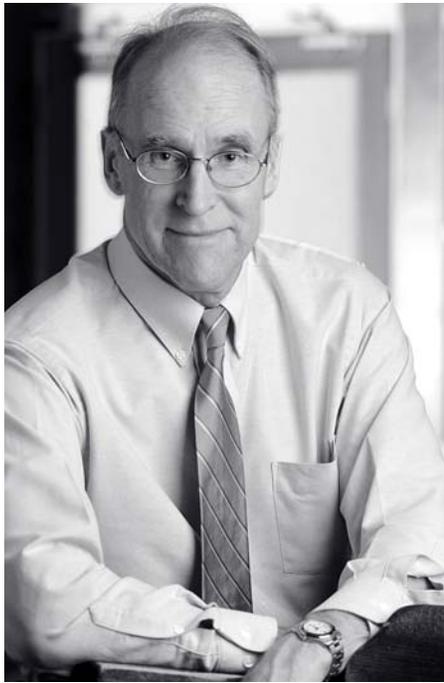
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## Keighley appointed a master



The Law Society's First Vice-President in 2004, Peter J. Keighley, QC, has been appointed a master of the BC Supreme Court in New Westminster. In accordance with his new role, he has resigned his position as Vice-President, having completed more than eight years of service as a Bencher for Westminister County.

President William Everett, QC described Mr. Keighley as a "full-service" Bencher. "He never said 'no' to assuming any Bencher task assigned to him and, as a result, carried a significant workload," Mr. Everett said. "Mr. Keighley brought quiet, thoughtful leadership, balance and commitment to the Benchers table and to all aspects of his service in the public interest. These qualities, along with his keen sense of humour, will be greatly missed by the Benchers and the Law Society staff, and will serve him and the public well as he takes up his new duties."

With a legal career spanning 30 years, Mr. Keighley has practised with Rosborough and Company in

Abbotsford since 1979, as a barrister in civil litigation, criminal law and family law.

A Bencher for Westminister County since 1996, Mr. Keighley has served on a wide range of Law Society committees, task forces and working groups, including as Chair of the Discipline, Futures, Audit and Special Compensation Fund Committees, as Chair of the Disclosure and Privacy Task Force and Conduct Review Task Force and as Co-Chair of the *Pro Bono* Initiative Task Force. He was also the Society's 2004 representative on the Council of the Federation of Law Societies of Canada. The Benchers' nominee for the presidential ladder, Mr. Keighley was acclaimed as Second Vice-President-elect by members at the 2002 AGM.

Mr. Keighley has been a member of the Westminister, Burnaby, Abbotsford and District, Chilliwack and Fraser Valley Bar Associations, has served on CBA National and Provincial Councils and has volunteered as a speaker for various legal and community groups. Among his other community commitments, Mr. Keighley has been secretary of the Clearbrook Kiwanis Club, a director and past President of the Abbotsford Football Club and a director of the Valley Home Support Society.

Following on Mr. Keighley's appointment as a master, Second Vice-President Ralston S. Alexander, QC of Victoria is now the First Vice-President for the balance of 2004, in accordance with Rule 1-3(5). Under Rule 1-3(6)(a), the Benchers may elect a Bencher to fill the vacancy for Second Vice-President on an interim basis: see *Nomination of Second Vice-President for 2004*.

A by-election has been called in District No. 4 (Westminister County) for May 4 to fill the vacancy for a Bencher in that district arising from Mr.

Keighley's departure. The successful candidate will be elected for the balance of the 2004-2005 Bencher term, which ends December 31, 2005. ♦

### Nomination of Second Vice-President for 2004

Following the appointment of First Vice-President Peter J. Keighley, QC as a BC Supreme Court master, Victoria Bencher Ralston S. Alexander, QC has become the Law Society's First Vice-President, leaving vacant the position of Second Vice-President. In accordance with Rule 1-3(6)(a), the Executive Committee has called on the Benchers to elect an interim Second Vice-President who will also stand as the Benchers' nominee for that position for the balance of the year.

The name of the interim Second Vice-President and Benchers' nominee will be published on the Law Society website ([www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)) on April 5. Please visit the site for details.

There will be an opportunity at that time for members to put forward the names of other Bencher candidates, although the written consent of any such Bencher is required. If there are no other nominations put forward between April 5 and 21, the Benchers' nominee will be acclaimed as Second Vice-President for 2004. If there is more than one nomination, the election of Second Vice-President will be put to the profession by mail ballot.

The Benchers' nominee for the 2005 Second Vice-President will come before members at the Annual General Meeting this Fall, in accordance with Rule 1-3(18). ♦



## Consultation by the Ethics Committee

### Acting for and against a sophisticated client in unrelated matters

At the request of the Benchers, the Ethics Committee is calling for comments from BC lawyers on whether the current rules in the *Professional Conduct Handbook* should be modified to permit lawyers to act against current, sophisticated clients in some circumstances. It is not intended to change the rules to apply to any clients that do not fit the definition of sophisticated client in proposed Rule 6.31(c), set out below.

#### Current rules

In 2001 the Benchers passed rules that permit lawyers to act for one client and against another in some limited circumstances. The scope of those circumstances is described in Chapter 6, Rules 6.3 and 6.4 of the *Handbook*, which state:

6.3 A lawyer must not represent a client for the purpose of acting against the interests of another client of the lawyer unless:

- (a) both clients are informed that the lawyer proposes to act for both clients and both consent, and
- (b) the matters are substantially unrelated and the lawyer does not possess confidential information arising from the representation of one client that might reasonably affect the other representation.

6.4 For the purposes of Rule 6.3, the consent of a client to the lawyer acting for another client adverse in interest may be inferred in the absence of

contrary instructions if, in the reasonable belief of the lawyer, the client would consent in the matter in question because the client has

- (a) previously consented to the lawyer, or another lawyer, acting for another client adverse in interest,
- (b) commonly permitted a lawyer to act against the client while retaining the same lawyer in other matters to act on the client's behalf, or
- (c) consented, generally, to the lawyer acting for another client adverse in interest.

#### Benchers' policy decision of October, 2002

The Benchers, on the recommendation of the Ethics Committee, agreed to further broaden the circumstances in which lawyers could act against current sophisticated clients. In October, 2002 they agreed in principle to permit lawyers to act against *sophisticated clients* in certain circumstances. The rationale for the decision was to provide sophisticated clients with greater choice of counsel and to reduce the possibility that firms acting for such clients would be removed as counsel when no legitimate interest of the client was at stake.

The circumstances under which a lawyer could act against sophisticated clients were to be restricted to when:

- 1) the matters are substantially

unrelated,

- 2) the lawyer has no confidential information arising from the representation of one client that might reasonably affect the other representation, and
- 3) the clients have been informed in advance by their lawyers that their lawyers may act against them in the circumstances set out in 1) and 2) above.

#### Proposed rule change

To give effect to the Benchers' decision of October, 2002, the Ethics Committee has proposed the addition of Rule 6.31 to Chapter 6 of the *Handbook*. Rule 6.31 would state:

##### Acting against a current client — exception for sophisticated clients

6.31 As an exception to rule 6.3(a), a lawyer may represent a client against the interests of another client who does not consent if:

- (a) the client, to the knowledge of the lawyer, regularly engages another lawyer,
- (b) the lawyer has notified the client in writing at the time the lawyer was engaged<sup>3.1</sup> that the lawyer may act against the interests of the client in circumstances permitted by this rule, and
- (c) any client involved that does not regularly engage another lawyer consents.



**Footnote:**

3.1 In the case of an engagement existing when this Rule comes into effect, the lawyer may notify the client in writing on or before [date] (three months after rule comes into effect).

**Developments in the case law since October, 2002**

Since the Benchers made the October, 2002 policy decision in regard to sophisticated clients, there have been two important court decisions that are directly relevant: *R. v. Neil* 2002 SCC 70 ([www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol3/html/2002scr3\\_0631.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol3/html/2002scr3_0631.html)) and *Ribeiro v. The City of Vancouver* 2002 BCCA 678 ([www.courts.gov.bc.ca/jdb-txt/ca/02/06/2002/BCCA0678.htm](http://www.courts.gov.bc.ca/jdb-txt/ca/02/06/2002/BCCA0678.htm)).

In *R. v. Neil* the Supreme Court of Canada, in *obiter dicta*, articulated a general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client. The rule applies even if the two matters are not related, unless both clients consent after full disclosure and the lawyer reasonably believes that it is possible to represent each client without adversely affecting the other. The court recognized that, in the case of entities that can be described as professional litigants such as governments and large corporations, such consent may be implied in some circumstances.

In *Ribeiro v. City of Vancouver*, however, the BC Court of Appeal distinguished *Neil* on its facts, and declined to accept that a lawyer's duty of loyalty prevented the lawyer from continuing to represent a client where the lawyer's

firm simultaneously represented the other side on other non-related matters. Leave to appeal the decision in *Ribeiro* to the Supreme Court of Canada was refused.

Some Benchers and other lawyers have expressed concern about implementing the Benchers' October, 2002 policy decision on the basis it is inconsistent with the principles in *R. v. Neil*. Others, who favour implementing the decision, argue that it is not inconsistent because it applies only to sophisticated clients who have had notice, and *Neil* contemplates that clients' consent to their lawyers acting against them may be implied. Moreover, proponents of a rule change note that a rule incorporating the October, 2002 decision would be clearly consistent with *Ribeiro*.

**Summary of arguments for and against the proposed change**

Those who favour this proposed change make some of the following arguments for it:

- It will provide sophisticated clients with greater choice of counsel. In particular, a sophisticated client will not necessarily be forced to relinquish a lawyer with whom the client has a longstanding relationship simply because, in an unrelated matter, that lawyer or the lawyer's firm acts for a client adverse in interest.
- Lawyers and law firms will not have to refuse to act for some sophisticated clients just because they act for a client adverse in interest on an unrelated matter.
- Since a rule change will affect only sophisticated clients

(those who regularly use other lawyers), such sophisticated clients that desire it can negotiate an agreement with their lawyers to require those lawyers to act only for them.

Those who oppose this proposed change make some of the following arguments against it:

- The Law Society would have a different standard for determining conflicts than the Supreme Court of Canada has defined in *Neil*. Since law societies have concurrent jurisdiction with the courts, this is permissible, but not desirable.
- Even sophisticated clients, in some circumstances, may feel a sense of betrayal if their lawyers act against them even if, before the disputed representation began, they received advance notice of the lawyers' right to do so.
- Even with all lawyers adhering to the existing rules, there is still a wide choice of lawyers for all clients.
- The definition of sophisticated client in the proposed Rule is too broad and includes potential clients who may not really be sophisticated.

\* \* \*

The Ethics Committee welcomes your comments on the proposed rule change. Please send comments to Jack Olsen, Staff Lawyer – Ethics, by April 29, 2004 at:

Law Society of British Columbia  
845 Cambie Street  
Vancouver, BC V6B 4Z9  
Tel.: 604 443-5711  
Fax: 604 646-5902  
Email: [jsolsen@lsbc.org](mailto:jsolsen@lsbc.org) ✧



*Vote will decide if CBA fee equivalent is a mandatory component of the practice fee*

## Law Society practice fee to be set by referendum

The Benchers will ask BC lawyers to set the 2005 practice fee in a referendum ballot, rather than at the Annual General Meeting in the Fall. This change will afford all lawyers a better opportunity to vote on whether a CBA fee equivalent should be a mandatory component of the practice fee.

Following consultations with the CBA, the Benchers are expected to set the wording of the referendum question at their meeting on April 2. The referendum is scheduled for June 23, with the deadline for the return of ballots on June 22. Formal notice of the referendum will be sent to the profession in April and the referendum ballot package will be mailed in May.

Mandatory payment of the CBA fee (or the fee equivalent) has sparked controversy for years and remained a focus of debate at almost every Law Society Annual Meeting since 1995. The issue has drawn away Benchers and staff time, as well as financial resources, to prepare for the debate and to face various legal challenges.

In the past 20 years there have been five lawsuits against the Law Society by lawyers who objected to a mandatory fee or fee equivalent. The most recent was a petition in BC Supreme

Court by former President Richard Gibbs, QC who disputed the legal authority of Law Society members to include "an amount equivalent to" the CBA fee as part of the practice fee on a mandatory basis and the authority of the Law Society to remit those funds to the CBA. In December, 2003 the Supreme Court found there was such authority and dismissed the Gibbs petition. Subject to an appeal of that decision, the remaining question is one for the profession — whether the CBA fee equivalent *should* be a mandatory component of the practice fee.

To date, a majority of members attending the Annual General Meeting have answered that affirmatively, by approving a mandatory CBA fee or fee equivalent as part of the practice fee. But while the Benchers have made the AGM more accessible through regional teleconference sites joined to the main site in Vancouver, lawyers in some regions still cannot attend the AGM without travelling, sometimes a considerable distance. The CBA fee component was voted on by 434 lawyers in 2003, less than 4% of the profession.

In canvassing options this year, the Benchers decided on a referendum

ballot to set the 2005 practice fee, to allow more BC lawyers the opportunity to vote and to settle the issue in a more conclusive fashion.

Section 23(1)(a) of the *Legal Profession Act* allows for the practice fee to be set by referendum:

### Annual fees and practising certificate

23(1) A practising lawyer must pay to the society an annual fee consisting of:

- (a) a practice fee in an amount set by a majority of the members voting on the resolution at a general meeting or in a referendum.

It is important to note that a referendum ballot conducted under section 23(1)(a) is not an opinion poll on the CBA fee issue. Instead, it is the means by which BC lawyers will set the 2005 practice fee and determine if an amount equivalent to the CBA fee should be a mandatory component of the practice fee. It will be a binding resolution in the same way as a practice fee resolution passed at an Annual General Meeting.

For more information, please watch for the notice of referendum and check the Law Society website at [www.law.society.bc.ca](http://www.law.society.bc.ca) for updates. ✧

## SCC finds no infringement of legal publishers' copyright

The Supreme Court of Canada has held that the Law Society of Upper Canada's Great Library did not infringe the copyright of law publishers by making single photocopies of legal material, including copies of case reports and excerpts from legal texts, for lawyers doing legal research or in

providing self-service photocopiers for use in the library.

Noting that section 29 of the *Copyright Act* allows for "fair dealing" in copyrighted material for the purpose of research or private study, the Court reviewed the factors in assessing fair

dealing and gave a liberal interpretation to "research." The Court found that research is not limited to non-commercial or private contexts but rather encompasses legal research by a lawyer in the practice of law: see *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13. ✧



## New Bill would oblige mortgagors to issue discharges within 30 days

Bill 2, the *Business Practices and Consumer Protection Act*, recently introduced in the provincial legislature, contains new consumer protections that have been much anticipated by the Law Society's Conveyancing Practices Task Force.

If it passes into law, Bill 2 would require a mortgage lender to provide a borrower with a registrable mortgage discharge within 30 days of the

borrower repaying the principal and interest owing under the loan. In the case of a revolving mortgage loan, the discharge would be required within 30 days of the borrower requesting a registrable discharge.

The Bill also provides for a prescribed maximum on the fee that a lender can charge for a discharge.

The Conveyancing Practices Task

Force, in considering reforms in conveyancing practices and in financial protections for the public in real estate transactions, urged financial institutions in 2002 to provide prompt and reliable discharge information and to expeditiously deliver discharges of repaid mortgages.

Bill 2 is available at [www.legis.gov.bc.ca/37th5th/1st\\_read/gov02-1-toc.htm](http://www.legis.gov.bc.ca/37th5th/1st_read/gov02-1-toc.htm). ♦

## Ceased members

A list of BC lawyers who ceased membership during 2003 is posted in the Resource Library/Notices to the Profession section of the Law Society website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca). The

notice lists those BC lawyers who have ceased Law Society membership by voluntarily electing not to renew for 2004, those who have been appointed to the Bench and those who have

passed away.

For up-to-date confirmation of the membership status of any BC lawyer, please check the online BC Lawyer Look-up at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca). ♦

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### *Property Transfer Tax ... from page 7*

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*Payment Authorization*, the Ministry of Provincial Revenue will call for the electronic transfer of those funds as a pre-authorized debit on the firm's trust account.

Rule 3-56(1.3), as amended, is set out below. Under the Rule, lawyers are required to maintain copies of all *Electronic Payment Authorization* forms they submit, all *Property Transfer Tax Returns* and all transaction receipts provided by the Land Title Office electronic filing system. Law firms will continue to pay land title fees through their BC Online deposit accounts.

#### **Withdrawal from trust**

**3-56 (1.3)** A lawyer must not make or authorize the withdrawal of funds from a pooled or separate trust account, except by

- (a) cheque as permitted by subrule (2) or (3),
- (b) electronic transfer as permitted

by subrule (3.1) or (3.2), or  
(c) instruction to a savings institution as permitted by subrule (4).

(2) A lawyer who makes or authorizes the withdrawal of funds from a pooled or separate trust account by cheque must

- (a) withdraw the funds with a cheque marked "Trust,"
- (b) not make the cheque payable to "Cash" or "Bearer," and
- (c) ensure that the cheque is signed by a practising lawyer.

(3.2) A lawyer may make or authorize the withdrawal of funds from a pooled or separate trust account by electronic transfer using the Electronic Filing System of the Land Title Branch for the purpose of the payment of Property Transfer Tax on behalf of a client, provided that the lawyer

- (a) retains in the lawyer's records a printed copy of
  - (i) all Electronic Payment Authorization forms submitted

to the Electronic Filing System,

- (ii) the Property Transfer Tax return, and
- (iii) the transaction receipt provided by the Electronic Filing System,

(b) digitally signs the Property Transfer Tax return in accordance with the requirements of the Electronic Filing System, and

(c) verifies that the money was drawn from the trust account as specified in the Property Transfer Tax return.

(4) A lawyer may instruct a savings institution to pay to the Foundation under Rule 3-52 the net interest earned on a pooled trust account.

For details on PTT online payment, see the Land Title Branch electronic filing system site at [srmwww.gov.bc.ca/landtitle/EFS\\_web\\_site/index.htm](http://srmwww.gov.bc.ca/landtitle/EFS_web_site/index.htm) and the *Land Title Electronic Filing System Reference Manual*, available on that site. ♦



## *First Canadian Title Company Limited v. The Law Society of British Columbia*

### Lawyers may not witness signatures via videoconference: BCSC

In February the BC Supreme Court dismissed the petition of First Canadian Title Company Ltd. and approved the opinion of the Law Society Ethics Committee that the requirements for a lawyer to witness a document as an officer under the *Land Title Act* cannot be met by interactive videoconferencing: see *First Van Title Co. v. Law Society of BC*, 2004 BCSC 197.

In 1999 First Canadian Title launched a program with certain mortgage lenders in BC that permitted borrowers to sign mortgage documents in the offices of those lenders. A lawyer retained by First Canadian Title witnessed and certified the mortgage instruments via a live interactive videoconferencing link, instead of being physically present in the offices of the lenders. On March 2, 2000, at the request of First Canadian Title, the Ethics Committee met to consider whether a lawyer in BC could properly witness a document via live interactive videoconferencing.

The Committee took note of the fact that, in 1996, it had identified the minimum obligations of a lawyer acting as

a witness under section 43 of the *Land Title Act* and under the *Professional Conduct Handbook* as being:

- to identify himself or herself as a lawyer;
- to verify the identity of the borrower in accordance with section 43 of the *Land Title Act*; and
- to advise the borrower that the lawyer is not protecting the borrower's interests.

In considering the issue of a lawyer witnessing a signature via live videoconferencing, the Ethics Committee issued an opinion that certain of the witnessing requirements could not be met:

- A lawyer cannot know what document the signer is signing and cannot know for certain that the paper the lawyer must sign was the paper signed by the person who executed the document;
- Off-screen influences and the lack of proximity may detract from the lawyer's ability to verify the

identity of the person who signed the document.

The Committee concluded that the words "appeared before" in section 43 of the *Land Title Act* require an actual physical appearance before the officer, and not an appearance by means of videoconferencing technology.

As a consequence, First Canadian Title voluntarily suspended the practice of witnessing documents via interactive videoconferencing in 2000 pending the outcome its petition.

In dismissing the petition, the court approved the opinion of the Ethics Committee. The court also agreed with the position of counsel for the Attorney General that permitting documents to be executed at one location and sent to another location for completion by a witness would provide increased opportunities for fraud and would therefore increase the exposure of the Land Title Assurance Fund to claims. It was the position of the Attorney General that such a change should only be adopted after full consultation with all affected parties. ♦



#### QC honours

R. Hector MacKay-Dunn, QC accepts a Queen's Counsel certificate from Attorney General Geoff Plant, QC at a reception for new Queen's Counsel, hosted by the Law Society on February 27. Sharing in the event are his proud family — his spouse Allyson (Timmy) and their sons, Reid and Robert (left) and daughter Marion (right). A partner with Farris, Vaughan, Wills & Murphy in Vancouver, Mr. MacKay-Dunn has over 25 years experience representing clients in the corporate-commercial technology and biotechnology fields.



*E-search service coming September, 2004 ♦ E-filing slated for March, 2006*

## Court Services Online: electronic search and filing of civil court records

Beginning this Fall, BC lawyers will be able to gain online access to information from the Court Services Branch on civil court proceedings filed in any registry of the BC Court of Appeal, BC Supreme Court and BC Provincial Court.

Court Services Online — an initiative of the Court Services Branch of the Ministry of Attorney General and the judiciary — was introduced and demonstrated for the Benchers in February by project liaison Thomas Broeren and project analyst Janice Vurdela.

The core services provided through Court Services Online will be electronic search and access to civil court file information (e-search), and the electronic filing of civil court documents (e-filing). Current project plans call for implementation of e-search in the Fall of 2004 and e-filing in the Spring of 2006.

### What court registry information will be searchable online?

E-search is the electronic search and access module of Court Services Online. E-Search will allow users to search for information on civil court files in the Provincial and Supreme Court and on civil and criminal appeal files in the Court of Appeal. Information from every court registry in the province will be accessible, allowing users to conduct province-wide searches at any time.

Files will be searchable by party name or file number. Some restrictions on access will apply, particularly to information on family matters. Subject to these restrictions, the following court registry information will be accessible:

- File number

- Type of file
- Date opened
- Registry location
- Party names/style of cause
- Counsel names
- Claim amount
- List of filed documents
- Appearance details
- Clerk's notes
- Caveat details

A transaction charge of \$6.00 per search will apply.

The e-search service heads into the pilot phase this April, with 55 participants drawn from law firms, registry agent companies and the media.

### How will law firms access the e-search service?

Once e-search services are launched this Fall, lawyers, their staff and any other person will be able to gain access directly via the Internet and pay for searches by credit card. Firms will also have the option of setting up an e-search account through registration with Court Services Online.

By opting for an account, a firm need not provide a credit card number each time it conducts searches. In managing the account, a firm can specify which people within the firm are permitted to conduct searches. The firm can also assign file numbers to searches and, for an additional fee, order monthly statements showing all e-search activity.

### What is ahead for e-filing?

The current plan is to allow for the

electronic submission of civil court documents at any court registry in the province by 2006. E-filing will be available in the Provincial Court, Supreme Court and Court of Appeal.

While the scope of e-filing has yet to be determined, Court Services Online expects to accommodate the e-filing of originating documents in all levels of court, a majority of documents in Provincial Court family and small claims matters and a majority of documents in BC Supreme Court civil matters. In general, to e-file a document in a court registry, a law firm will be expected to convert the document to portable document format (PDF) using Adobe Acrobat and to file via the Court Services Online site. Registration will be required for these filings and will allow law firms to check the status of their filings.

It remains to be seen how the online service would accommodate documents that require original signatures, such as affidavits, exhibits and consent orders, and with large filings, such as appeal books and factums in the BC Court of Appeal.

Users will have online access to the electronic documents they file, for on-screen viewing, downloading or printout. Whether the profession and the public will have general access to documents filed by others in the registry, however, is a policy decision to be considered by the judiciary.

### Questions or comments?

For more information, contact Project Liaison Thomas W. Broeren of Gordium Associates (Canada) Inc. at tel: 250 472-8949, fax: 250 472-8171 or email: Thomas.Broeren@gordium.ca. ♦



## Volunteers 2003

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 2003. Law Society volunteers embody the spirit of professionalism and service, as members of committees, task forces and working groups, as guest instructors, lecturers and authors at PLTC, as practice reviewers, practice supervisors and conduct reviewers and as event panelists and advisors on special projects.

Anne Adrian	Luciana Brasil	Paul Daykin	Justice Nicole Garson	Robert Jones
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Paul Beagan	Chilwin Cheng	Perry Ehrlich	Daniel Harlos	David Kozak
Paul Beckmann, QC	Yale Chernoff	John Ellan	Victor Harwardt	Darren Kozol
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Hugh Braker, QC	Azim Datoo, QC		Mark Jette	Rhona Lichtenwald
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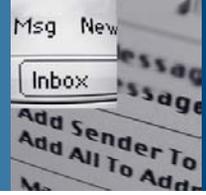
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Kenneth Madsen	Judge Anthony Palmer	Paul Scambler, QC	Peter Swanson	Peter Warner, QC
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	Peter Ramsay, QC	John Smith	Clara Tsang	Deborah Zutter ✧

## Survey report on continuing education in the legal profession:

An Ipsos-Reid survey, conducted for the Law Society's Lawyer Education Task Force, asked BC lawyers for their views on the quality and availability of legal publications, courses and other

educational resources. The preliminary survey findings were highlighted in the President's View column in the January-February, 2004 *Benchers' Bulletin*.

The full report is now available in the Resource Library/Reports section of the Law Society website at [www.law.society.bc.ca](http://www.law.society.bc.ca). ✧



*Acting for more than one party on a related matter may be possible in some circumstances with the use of screens*

## Benchers approve broader use of screens to overcome imputed conflicts

The Benchers have decided in principle to permit firms to use screens to overcome imputed conflicts in some circumstances. The Benchers will consider draft changes to the *Professional Conduct Handbook* to give effect to the decision later in the year.

The decision is to permit firms to act against current clients in related matters where confidential information is in issue, provided the information is screened and the affected clients consent. Firms will also be permitted to act against former clients on related matters without client consent if the firms can establish that they can meet criteria similar to those that govern the representation of clients when lawyers transfer from one firm to another. Those situations are currently addressed in Chapter 6, Rule 7.4 of the *Professional Conduct Handbook* and, among other requirements, stipulate that a firm must establish that the representation is in the interests of justice and that confidential information is

appropriately screened.

The changes will not, however, permit a client to consent to the use of screens to enable a law firm to act on both sides of the same matter or to consent to the same lawyer acting for and against the client in any matter.

The changes with respect to current clients will permit lawyers to meet the requirements of Chapter 6, Rule 6.3(b) of the *Handbook* through the use of screens. Clients will still be required to consent to the representation under Rule 6.3(a) and will also have to consent to the screening arrangements. The changes with respect to former clients will permit lawyers to fulfil the requirements of Rule 7(b) through the use of screens, if the lawyer can meet the same standard as exists when lawyers transfer from one firm to another, as currently set out in Rule 7.4.

These Rule changes will allow clients a wider choice of counsel by mitigating the general rule on imputed conflicts.

That rule, both from a professional responsibility and legal standpoint, is that the conflicts of one lawyer are to be treated as conflicts for every member of that lawyer's firm. As noted in *Lawyers and Ethics* by Gavin MacKenzie, "Lawyers who practise together are permitted to share confidential information, and may have ready access to one another's files. They are bound together also by the ties of finance, friendship and loyalty."

The imputation rule and the possibility that lawyers may, in some circumstances, be able to use screens to overcome it has been considered in a number of cases, most notably by the Supreme Court of Canada in *MacDonald Estate v. Martin* (1990) 3 SCR 1235 (*Martin v. Gray*). In that case the Court considered whether a disqualifying conflict existed when a lawyer changed firms and possessed

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### *Real estate sales ... from page 8*

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non-lawyer staff members, however, will be not be covered by the exemption, and the *Real Estate Act* should be amended accordingly.

Provided the provincial government makes changes to the *Real Estate Act* that reflect this understanding, the Benchers plan to revise the *Professional Conduct Handbook* to clarify the role of law firm staff in a real estate sale (in addition to the general provisions that apply to staff supervision). Any changes will likely be reflected in Chapter 12 of the *Handbook* on the

supervision of staff and Chapter 14 on marketing.

Accordingly, when a lawyer is engaged in the sale of real property, only the lawyer may take instructions from the client or provide advice to the client on buying and selling real estate, the listing agreement, a property management contract or the contract of purchase and sale. Only lawyers will be permitted to present, accept or negotiate offers or contracts of purchase and sale for clients. Any advertising with respect to real estate sales must be in the name of the lawyer or law firm.

Under the lawyer's supervision, employees will be entitled to draft

documents and correspondence for approval by the lawyer for presentation to the client (as in other areas of practice), arrange for maintenance and repairs of real property under the lawyer's care and control, attend at a property with a prospective purchaser to open the home (but not conduct an open house), act as security during the viewing of the home and provide prepared information packages.

Draft *Professional Conduct Handbook* rule changes are expected to come before the Benchers for consideration later this Spring, following the anticipated amendments to the *Real Estate Act*. ♦



*Practice Tips*, by Dave Bilinsky, Practice Management Advisor

## Time, technology and business

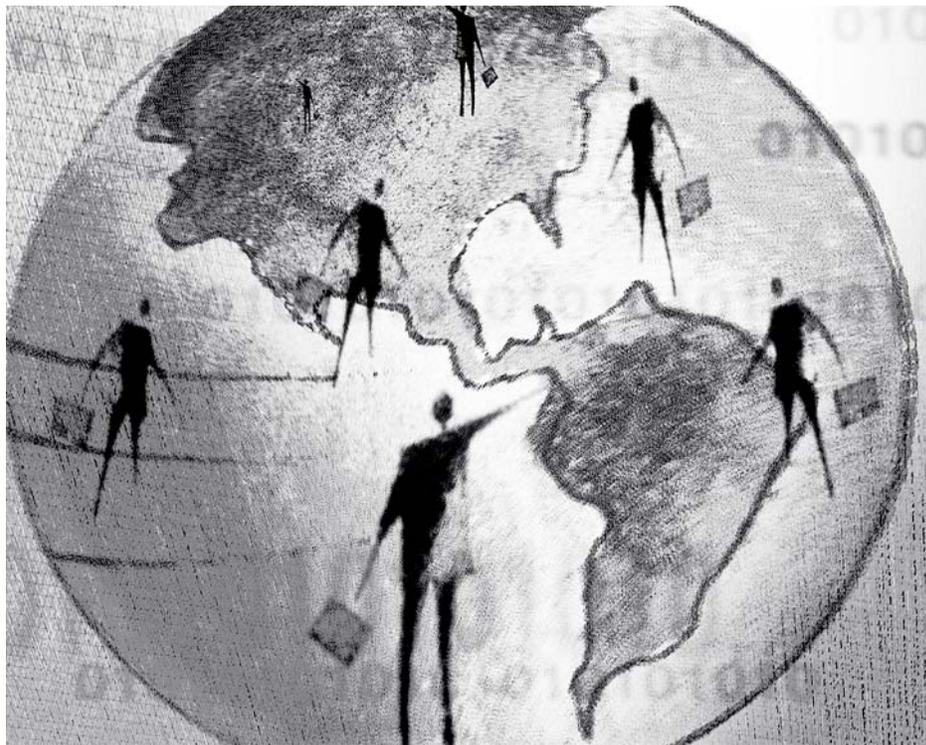
♪ *Time is on my side, yes it is.* ♪

Mick Jaggard

The *Vancouver Sun* recently headlined yet another study that found Vancouver one of the three most desirable places in the world to live. Whistler-Vancouver will host the Olympics in 2010. As the world turns its attention on BC, it is time for BC lawyers to focus outward on the world.

At the CBA mid-winter meeting in Banff last year, a panel of private practice and in-house lawyers emphasized that, when it comes to international legal work, Canadian lawyers are sought out and trusted. Furthermore, under the new National Practice Protocol (Rule 2-10.2), BC lawyers can practise in reciprocating Canadian jurisdictions for up to 100 business days in any calendar year without a permit, provided they meet the qualifications set forth in that rule.

Many practice areas already have an international focus: immigration and business law being two of the most obvious examples. And most areas of law have at least some international component: family law (where one spouse is from a different country or where children may have been taken from a different jurisdiction into BC or abducted from BC), internet law (where the buyers and sellers of products or services on the Net can be from two different corners of the globe), real estate (buying and selling of property in BC on behalf of non-residents), tax law, arbitrations, air law, banking law, class actions, corporate law, criminal law (money laundering, proceeds of crime, drugs), entertainment law (since actors and musicians are constantly on the move), elder law (as retirees may have property interests inside or outside of BC), environmental law (as pollution is no respecter of borders), health law (witness the



interest in Canadian pharmacies selling drugs to Americans), human rights law, insolvency law (since business failures are increasingly global), insurance law (people, goods and transportation facilities that are insured are constantly entering and leaving BC), labour law (employers and unions have become international in scope), maritime law, natural resources law (witness the debate over duties on softwood lumber or the US's attempt to regulate the Cominco smelter in Trail), securities law (the effect of Sarbanes-Oxley is an example) and wills and trusts (since property may be owned in many different jurisdictions). Indeed, it could be argued that practising in any of these areas requires you to be aware of the international aspects of your client's affairs to competently provide legal services.

All this adds up to the fact that a BC lawyer can develop a focus in a

practice area that extends well beyond one geographic location.

When you think of international work, two concepts come immediately to mind: *time* and *distance*. Developing an international practice means having to come to grips with the practical limitations of these two concepts. Fortunately, Internet technology has had its biggest successes in eliminating or reducing the effects of time and distance — and in some cases has allowed lawyers and law firms to bond with their clients in ways that were simply not possible a few short years ago. These lawyers focus on the type of legal services they are providing, combined with a vision of how technology can be applied for great strategic effect.

What are the technologies at play? Websites, email, extranets and virtual

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## Practice Tips ... from page 19

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meetings are all successfully used by lawyers in the international business area. Here are some examples:

**Websites and email:** A lawyer seeking an international practice must be able to establish credibility and reliability with a foreign client who may not be familiar with the lawyer's reputation. A well-planned website has a strategic focus on the needs of the international client. The site should, as its top-level message, identify, promote and clearly demonstrate the specialized knowledge, reputation, prior successes and reliability of the lawyer and law firm in meeting the needs of their international clients. Since an international client may not be fully comfortable conversing in English, having the website available in the languages that are supported by the firm would also be highly desirable.

Furthermore, there is no better way for a client and lawyer to communicate quickly, easily and at low cost than email. Siskind Susser has grown to be one of the largest immigration firms in North America, courtesy of Greg Siskind's vision of how the firm's website, combined with email, could be used to market and reach immigration clients worldwide ([www.visalaw.com](http://www.visalaw.com)). Greg's application of the Internet for client recruitment and client communication has shown that a law firm can have an international reach using the common tools available to all of us. In consequence, a law firm can truly tap into a worldwide market via the web.

**Extranets:** An extranet is a secure area of the law firm's website for access by select clients. Entry is secured by password and other authentication procedures. Security and confidentiality are an absolute necessity. A "traditional" extranet grants clients access to view the progress on their files on a 24/7 basis. In effect, the client is granted

limited access to the firms' file or practice management system as it applies to specific files or parts of a file.

Both lawyers and clients often face difficulty in establishing two-way communications. In an international practice, this usually means scheduling telephone calls at awkward times to provide client updates and instructions or sending and receiving faxes. The extranet is a dramatic improvement over these methods. By virtue of the tie-in between the extranet and the practice management system in the law office, the lawyer's progress on the client's file is updated continually to the extranet and the client can view that progress at times and locations that are convenient. The client and the

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*... a law firm can truly  
tap into a  
worldwide market  
via the web.*

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lawyer can then use the extranet to deliver reports and instructions in a seamless, interactive fashion.

The next level in the extranet is when lawyers use it, not just to document legal work, but to deliver legal services to clients online, in particular, complex legal advice "on demand." In this situation, the extranet becomes a subscription or paid service that grants clients access to legal research and advice on specific and well-defined legal issues. As a consequence, the extranet crafts an electronic bond that becomes a major strategic advantage to the law firm.

Linklaters – Blue Flag® and other e-business services are examples of how Linklaters has redefined the delivery of legal opinions and legal services online ([www.linklaters.com](http://www.linklaters.com)). Linklaters' website reflects how their

initial foray into providing online advice in the worldwide area of derivatives has expanded to include the following listed areas: Regulatory, Derivatives, Shareholding Disclosure, Funds, Pensions, Employee Share Plans, Confirms, World Bank, Netmark and FSMA Litigation. Furthermore, these websites are a sign that international firms view the world as their market and are prepared to spend time and resources to reach that market. No longer are borders any protection against legal competition.

The Blue Flag® online advice service in particular has been very successful in demonstrating that lawyers can provide legal advice 24/7 on issues that matter to clients. And they can do this in a form that is useful to clients and does not require the real-time intervention of a lawyer. The system requires considerable legal work, both at the initial launch and in maintaining the website, as it must always be up to date in the various areas of practice. Linklaters has succeeded in creating this new legal delivery model and is now reaping the benefits of its early and well-thought-out efforts.

**Internet meetings:** In those practice areas where it is necessary to provide expert and highly customized services to clients, Internet technology can assist in cutting the costs and inconvenience of face-to-face client meetings. Live Meeting is Microsoft's answer to working collaboratively with clients via the web. With this software, lawyers and clients can call a virtual meeting to order and use tools embedded in the software to share views or applications, to show web slides, to poll attendees and to collaborate via electronic white boards (being the Internet equivalent to an easel with large sheets of paper for brainstorming or collaboration).

To ensure that only those who are invited attend, lawyers can control access to meetings via meeting IDs and meeting keys, or through individual



authentication with access control lists. Lawyers can decide what type of access control is most appropriate to the meeting. This technology allows lawyers to explain legal concepts and work collaboratively with clients to craft solutions tailored to their specific needs, notwithstanding their different locations.

Last, Internet videoconferencing is a developing technology that allows a virtual meeting in which all parties can see images of each other. For more informal conferencing, law firms can

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*Internet technologies have clearly allowed law firms that understand the true strategic positioning of their legal services — expertise, experience or efficiency — to develop and deliver those legal services to the international market in ways that break down time and distance barriers.*

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turn to technologies such as CUSeeMe, which is a lower-end Internet videoconferencing service for consumers. This service is targeted at informal chatting, and requires all participants to install the proprietary CUSeeMe software and have an inexpensive web camera or “webcam.” It also needs fixed IP addresses or Microsoft Messenger accounts ([www.cuseeme.com](http://www.cuseeme.com)).

Moving towards more professional services, ViaVideo ([www.polycom.com/products/viavideo.html](http://www.polycom.com/products/viavideo.html)) delivers reasonable videoconferencing when used over high-speed Internet connections. Although ViaVideo

makes a big jump forward in quality, the Internet itself can unfortunately cause slowdowns. Lawyers may find that certain times, such as mid-mornings, are problematic. Videoconferences should be scheduled outside of peak Internet traffic times, but this should not be a problem for lawyers who are most likely dealing with clients who are in different time zones.

Internet technologies have clearly allowed law firms that understand the true strategic positioning of their legal services — expertise, experience or efficiency — to develop and deliver those legal services to the international market in ways that break down time and distance barriers. Furthermore, lawyers have found that creating electronic bonds with clients is a strategic tool in the battle with the competition. When it comes to an international law practice, having a strategic bond is a distinct advantage, considering the difficulty of building person-to-person bonds. In this way, overcoming the limitations placed on you by time and distance effectively puts time on your side.

## US anti-spam law

The *Can-Spam Act* of 2003 is now in effect in the US. It supercedes anti-spam laws that were passed in 36 states. If you conduct email marketing (including an email newsletter) that is sent to American email addresses, or if you act for clients that do so, you should be aware of this statute.

Unsolicited email must have a functioning return email address, identifier information, opt-out provisions and a physical address for the sender.

The email should incorporate a method for the receiver to affirmatively consent to the receipt of further emails. You should have in place a procedure to remove email addresses when you receive notice of opting out.

The *Act* makes it an offence to transmit email to addresses if you have actual knowledge, or knowledge fairly

implied on the basis of objective circumstances, that the email addresses may have been harvested off the web or generated by automatic means.

Unlike some of the now-superseded state statutes, private individuals are not able to launch civil suits based on a breach of the provisions. Only state and federal Attorneys General and Internet Service Providers (ISPs) may initiate suits based on this anti-spam legislation.

The American Bar Association has published the *Best Practice Guidelines for Legal Website Providers* ([www.elawyering.org/tools/practices.shtml](http://www.elawyering.org/tools/practices.shtml)), a great resource for any lawyer or law firm that has a website or is thinking of hosting one. Furthermore, the guidelines can be adapted for email.

Accordingly, lawyers should be aware of the *Can-Spam Act* when considering their marketing practices or when advising their clients, particularly if they or their clients are doing any work in the US. This law is just the first step in attempts to control spam email and further legislation is expected to appear in most jurisdictions.

## Canadian Bankers Association

In my Practice Tips column in the March-April, 2003 *Benchers' Bulletin*, page 9, I answered a question from a lawyer on whether or not it is okay to endorse over a trust cheque. Under Rule 3-54 it is permissible to do so, provided the lawyer keeps a written record of the transaction and retains a copy of the cheque. I also recommended endorsing the cheque with the words “without recourse” to avoid potential trust liability if the cheque should not be honoured.

I have subsequently received correspondence from the Canadian Bankers Association advising that their members may decline to

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negotiate cheques that have been endorsed over, due to fraud concerns. Accordingly, lawyers should consider the possibility that a party may not be able to negotiate such a cheque and what impact that would have on the matter.

### Q & A: Construction draw mortgages

**Q:** Does Appendix 3, section 5(g) of the *Professional Conduct Handbook* prohibit lawyers from acting for both the lenders and the borrowers on construction draw mortgages?

**A:** Appendix 3 deals with lawyers acting for multiple parties on simple conveyances:

#### Acting for parties with different interests

2. A lawyer must not act for more than one party with different interests in a real property transaction unless:

- (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,
- (b) the transaction between the parties is a simple conveyance, or
- (c) paragraph 10 of this Appendix applies.

Appendix 3, section 5 reads:

5. The following are examples of transactions that must not be treated as simple conveyances:

- (a) a transaction in which there is any commercial element, such as
  - (i) a conveyance included in a sale and purchase of a business,
  - (ii) a transaction involving a building containing more than three residential units, or

- (iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

- (b) a lease or transfer of a lease, other than as set out in paragraph 4(e),

- (c) a transaction in which there is a mortgage back from the purchaser to the vendor,

- (d) an agreement for sale,

- (e) a transaction in which the lawyer's client is a vendor who:

- (i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

- (ii) to the lawyer's knowledge, directly or indirectly leads purchasers to believe that it is unnecessary for them to be separately represented in the transaction, or

- (iii) is or was the developer of property being sold, unless paragraph 4(f) applies,

- (f) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage, or

- (g) a transaction involving a mortgage, the proceeds of which are to be, or may be, advanced in stages as construction progresses.

It is clear under section 5(g) that, if the mortgage is of the type where the proceeds are to be advanced in stages (as would occur in a construction draw

mortgage), this type of transaction is not a "simple conveyance," and the same lawyer should not be acting for both the lender and the borrower.

### New resources

Watch for a new publication coming soon to the Practice & Services/Practice Resources section of the Law Society website: *Managing the Finances of Your Practice*. For lawyers looking to open an office, there are other papers in this section of the site that will be useful for starting up a practice, or ask for a package of materials on starting a practice, available from the Law Society office. Contact me at [daveb@lsbc.org](mailto:daveb@lsbc.org).

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*Watch for a new publication coming soon to the Practice & Services/Practice Resources section of the Law Society website: **Managing the Finances of Your Practice.***

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### The Pacific Legal Technology Conference

Session papers for the 2003 Pacific Legal Technology Conference are now available for purchase on CD-Rom. Please see the order form on the Pacific Legal Technology Conference website, in Microsoft Word format ([www.pacificlegaltech.com/2003sessions/Materials\\_Order\\_PLTC\\_03.doc](http://www.pacificlegaltech.com/2003sessions/Materials_Order_PLTC_03.doc)) or in PDF ([www.pacificlegaltech.com/2003sessions/Materials\\_Order\\_PLTC\\_03.pdf](http://www.pacificlegaltech.com/2003sessions/Materials_Order_PLTC_03.pdf))

The CD-Rom is \$75 +GST. If you wish the materials in both CD-Rom and hard copy, they are available for \$150

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

### **New Business Corporations Act**

The *Business Corporations Act*, SBC 2002, c. 57 comes into force on March 29, 2004, introducing both substantive and procedural changes in the incorporation, organization and activities of all British Columbia companies and the registration and obligations of all extraprovincial companies (collectively "companies").

Lawyers must familiarize themselves with the requirements of the new *Act*. Here are some of the key changes.

#### **Incorporations and other filings move online**

The forms and process for corporate procedures will change. All companies will be incorporated online through an "Incorporation Application" web form on the Corporate

Registry's new *Corporate Online* service. Other documents that are slated for online filing as of March 29 are the BC Annual Report, Extraprovincial Annual Report, Continuation Application, Transition Application, Notice of Alteration, Notice of Change of Address, Notice of Change of Directors, Amalgamation Application and Post Restoration Transition Application.

To obtain the most up-to-date information on the process and the latest version of all forms, check the Corporate Registry website at [www.fin.gov.bc.ca/registries/colin](http://www.fin.gov.bc.ca/registries/colin).

#### **New requirements ahead for registered and records offices**

When the *Act* comes into force, all companies must have a "central securities register" that complies with the *Act*.

Generally the Registrar will play a reduced role in warehousing corporate documents and will no longer vet documents. For example, the Registrar will accept only a notice of articles (as prescribed), and not a full set of articles, from a newly formed company. This change means that law firms must be vigilant in ensuring that all corporate documentation is genuine, accurate and properly maintained.

A firm that intends to act as the registered and records office for a company must be accessible to the public during "statutory business hours" for the delivery of records. Companies' records may be inspected during statutory business hours and, although a company may by ordinary resolution restrict the times for access, the restriction must permit inspection during at least two consecutive hours a day.

#### **Directors issues**

A director's resignation now takes effect when it is provided "to the company or any lawyer for the company," unless a later date is specified in the resignation. All lawyers who act for a company must now be prepared to accept a resignation, note the time and date it is received and ensure that it is forwarded appropriately.

The articles of a company may transfer in whole or in part the powers of the directors to manage or supervise the business and the affairs of the company to one or more other persons (including shareholders). The persons to whom the powers have been transferred have all the rights, powers, duties and liabilities of the directors to the extent of the transfer. Lawyers who are dealing with companies with which they are not familiar should be watchful for the transfer of powers and liabilities.



*The new Business Corporations Act, 2002 and amending statutes and the Business Corporations Regulation come into force on March 29, 2004. As of that date, the Corporate Registry will no longer accept paper forms for those filings that are available through the Registry's new Internet filing service, Corporate Online. For more information, visit the newly revised Business Corporations project website at [www.fin.gov.bc.ca/registries/colin/default.htm](http://www.fin.gov.bc.ca/registries/colin/default.htm).*

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### Transition filing required within two years

Within two years of the *Act* coming into force, all companies must make a transition filing, or face dissolution by the Registrar.

There are many other aspects of the new *Act* that have not been explored here. The *British Columbia Company Law Practice Manual*, published by the CLE Society of BC, is a very useful resource. For more information, contact CLE at 604 669-3544 or 1-800-663-0437 or check the CLE website at [www.cle.bc.ca](http://www.cle.bc.ca).

*Thanks to Lenore Rowntree, Claims Counsel at the Lawyers Insurance Fund, for contributing this article to Practice Watch.*

### Refunds of PST for unpaid accounts

If you have claimed a refund for bad

debts under the *Social Service Tax Act*, you may have received a letter from the Consumer Taxation Branch requiring you to provide the name and address of the clients whose accounts have been written off.

Section 5.19 of the regulations to the *Act* specifies that, when claiming a bad debt refund, the claimant must indicate the name and address of the purchaser whose account has been written off. However, in response to an enquiry from the Law Society, the Consumer Taxation Branch has now advised that, because of the unique nature of solicitor-client privilege, the Branch will accept a tax refund claim that identifies bad debt accounts for legal services by the client's file number rather than by the client's name and address.

The claim must still include the other supporting information specified in *Consumer Taxation Branch Bulletin 010* — Refund of Tax Remitted on Sales

Written Off as "Bad Debts." This bulletin says, in part, that the refund must contain the following information on a form or letter signed by the lawyer:

- names and addresses of the purchasers (*which in this case is the file number*);
- full amount of each sale and tax involved;
- payment received from the client;
- date the sale took place; and
- a statement indicating the amount of payment received and the amount of tax claimed for reimbursement that has actually been written off as a bad debt and is not collectible.

If you have questions about PST, please contact Don Terrillon, Auditor, at the Law Society, at [dterrillon@lsbc.org](mailto:dterrillon@lsbc.org) or 604 443-5798. ✧

## Services to members

### Practice and ethics advice

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

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

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

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

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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 cost to individual lawyers: **Tel:** 604 685-2171 or 1-888-685-2171.

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



## 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 identifying the claimants.

### Martin Wirick

*Vancouver, BC*

*Called to the Bar: May 14, 1979*

*Resigned from membership: May 23, 2002*

*Custodian appointed: May 24, 2002*

*Disbarred: December 16, 2002 (see Discipline Case Digest 03/05)*

### **Special Compensation Fund Committee decision involving claims 20020033, 20020316, 20020406 and 20020399**

*Decision date: October 1, 2003*

*Report issued: December 15, 2003*

*Claimant: A Bank*

*Payment approved: \$157,424.16*  
*(\$146,685.08 and \$10,739.08 interest)*

*Claimant: B Mortgage Company*

*Payment approved: \$161,695.50*  
*(\$151,989.02 and \$9,706.48 interest)*

*Claimant: C Credit Union*

*Payment approved: \$179,843.43*

*(\$169,142.06 and \$10,701.37 interest)*

### The P Street property

In late 2000 Mr. Wirick represented Mr. C in the purchase of a property on P Street in Vancouver. Mr. C had been assigned the right to purchase the property by V Ltd., a construction company that belonged to Mr. G, another client of Mr. Wirick. Mr. C signed a declaration that he held the P Street property in trust for V Ltd.

While represented by Mr. Wirick, Mr. C obtained a mortgage for \$150,000 from A Bank. He then obtained a mortgage and assignment of rents for \$159,250 from B Mortgage Company, in which transaction Mr. Wirick represented B Mortgage Company only. Mr. Wirick gave B Mortgage Company his undertaking that he would pay out and discharge from title the A Bank mortgage, but he failed to do so and instead diverted the funds received from B Mortgage Company for other purposes.

Mr. C next obtained a mortgage for \$172,500 in favour of C Credit Union, registered February 1, 2001. Mr. Wirick represented both Mr. C and C Credit Union in the transaction. Mr. Wirick gave his undertaking to the credit union that he would pay out and discharge from title the A Bank mortgage and the B Mortgage Company mortgage and assignment of rents, but he failed to do so, instead diverting the funds received from the credit union for other purposes.

In September, 2001 V Ltd. contracted to sell the P Street property to Mr. M and Ms. K for \$420,000. Mr. Wirick received in trust from the purchasers' lawyer \$362,097.58, on his undertaking to pay out and discharge the A Bank mortgage, the B Mortgage Company mortgage and assignment of rents and the C Credit Union mortgage. In breach of that undertaking, Mr. Wirick instead transferred funds

received from the purchasers' lawyer to another property, paid his own account and forwarded the balance to V Ltd.

The Special Compensation Fund Committee found that, while not every breach of undertaking is dishonest, the circumstances of these claims suggested, not negligence or error by Mr. Wirick, but an intention to deceive. He breached his duty to comply with his undertakings to facilitate the misappropriation of mortgage proceeds.

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

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

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

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*Special Fund claims ... from page 25*

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## **Special Compensation Fund Committee decision involving claims 20020559, 20020393 and 20020425**

*Decision date: September 3, 2003*

*Report issued: January 5, 2004*

*Claimant: B Mortgage Company*

*Payment approved: \$198,003.10*

*(\$186,701.28 and \$11,301.82 interest)*

## **The L Street property**

In October, 2001 Mr. Wirick acted for PG in the purchase of a property on L Street in Vancouver for \$286,000. PG was a nominee of Mr. G, another client of Mr. Wirick. At the time of this purchase, PG arranged a mortgage for \$185,500 in favour of A Bank.

In January, 2002 PG further encumbered the property with a mortgage for \$188,500 in favour of B Mortgage Company, which was to be a first charge on title. Mr. Wirick acted for both PG and B Mortgage Company in this transaction.

In March, 2002 Mr. G (under a power of attorney from PG) sold the property for \$280,000 to Mr. M. Mr. Wirick represented the vendor in this transaction. In the contract of purchase and sale, Mr. M had agreed that Mr. G's

construction company, V Ltd., would build a house on the property for \$199,000. To help finance the purchase and construction, Mr. M arranged for mortgage financing from A Bank for \$350,000.

The purchaser's lawyer sent to Mr. Wirick in trust the mortgage proceeds on his undertaking to pay out the two prior mortgages of A Bank and B Mortgage Company. Mr. Wirick eventually used most of these funds to pay out the A Bank mortgage, but did not use any of the funds to pay out the B Mortgage Company mortgage. Instead he transferred the funds to another party and paid his own account.

The Special Compensation Fund Committee found that, while not every breach of undertaking is dishonest, the circumstances of these claims suggested, not negligence or error by Mr. Wirick, but an intention to deceive. He breached his undertaking to apply the proceeds to the B Mortgage Company mortgage. He later breached his undertaking to discharge mortgages in the sale of the property to Mr. M.

Although Mr. Wirick provided no explanation for his actions, he made a general statement in his bankruptcy documentation that he knowingly paid out money in breach of his undertakings. The Committee was satisfied

that he misappropriated or wrongfully converted funds.

The Committee decided that it would not require the claimant to exhaust its civil remedies in this case by obtaining a judgment against Mr. Wirick. As Mr. Wirick had made an assignment in bankruptcy claiming liabilities far in excess of assets, there was little hope of recovery from him.

As Mr. Wirick failed to pay out or discharge the mortgage of B Mortgage Company, the company suffered a loss. The B Mortgage Company's claim was allowed, subject to certain releases, assignments and conditions, including the requirement that A Bank and B Mortgage Company provide to the Law Society registrable discharges of their mortgages on the property. In the case of A Bank, it was required to discharge the mortgage relating to PG. The Committee also exercised its discretion to pay interest on these claims at the contract rate to May 24, 2002 and thereafter at the applicable rate to a maximum of 6% per annum.

Once the B Mortgage Company mortgage was discharged from title, Mr. M and A Bank (as his mortgage lender) would be restored to the positions they would have been in had Mr. Wirick fulfilled his undertakings. Their separate claims for compensation were accordingly denied. ✧

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*Practice Tips ... from page 22*

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+ GST. If you have questions, please contact [info@pacificallegaltech.com](mailto:info@pacificallegaltech.com) or call me at 604 605-5331.

## **Inherit the Wind: a Touchstone Theatre production**

On April 16 and 17 the Arts Club and Touchstone Theatre, in association with the Vancouver Bar Association, will present "The Lawyer Show 2004" at the Stanley Theatre. This year's production is *Inherit the Wind* by Jerome

Lawrence and Robert E. Lee. This is a dramatization of the infamous "Scopes Monkey Trial" that pitted William Jennings Bryant against Clarence Darrow over the issue of the teaching of evolution in the State of Tennessee in 1925.

The cast is composed entirely of lawyers, including Hamish Cameron as Brady (Bryant), Rob Ruttan as Drummond (Darrow), Gerry Lecovin as the judge, and a host of others. In addition to the talented cast, special guests will be in the jury. They include: Chief Justice Finch, Allan McEachern,

Madam Justice Newbury, Mr. Justice O'Neil, two Provincial Court judges, UBC Law Dean Mary Bobinski, Glen Orris QC, Rose Mary Basham QC, Gail Dickson QC and William Deverell.

All proceeds from this event go to charity.

Tickets are \$65 until April 1, then go up to \$75 (tickets include a wine reception after the show). Tickets: 604 687-1644. Tell them I sent you — there is a friendly competition to see who can sell more tickets! I hope to see you there. ✧



## Unauthorized practice actions

### Injunction

On application of the Law Society, the BC Supreme Court has ordered that **John Charles Schnurr** of Delta and his companies, doing business as **Legal Consulting Services**, be permanently enjoined from appearing as counsel or advocate, giving legal advice or drawing corporate documents, wills, trust deeds, powers of attorney or estate documents, documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute or documents relating to real or personal estate or offering or holding themselves out as qualified or entitled to provide

any of these services for a fee: September 26, 2003 (entered December 18, 2003).

### Undertakings

[REDACTED]

[REDACTED]

## Lawyers must report to Society when charged with an offence

The profession is reminded that Rule 3-90, in effect since July 1, 2003, requires a lawyer, articled student or applicant for enrolment, call and admission or reinstatement to report to the Law Society if he or she is charged with a federal or provincial offence, other than when served with a ticket under the federal *Contraventions Act* or provincial *Offence Act*.

Rule 3-90 provides:

### Reporting criminal charges

**3-90** (1) Subject to subrule (2), a lawyer, articled student or applicant who is charged with an offence under a federal or provincial statute must, as soon as practicable, give written notice to the Executive Director of

- (a) the particulars of the charge, and
  - (b) the disposition of the charge and any agreement arising out of the charge.
- (2) No notification is required under subrule (1) if a lawyer, articled student or applicant is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act*. ✧

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### *Imputed conflicts ... from page 18*

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confidential information that, if used by the new firm, could damage the interests of a client of the lawyer's former firm. It was held that a court should draw the inference that lawyers who work together share confidences, unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted lawyer" to the member or members for the firm who are engaged against the former client — such as through appropriate screening devices in the firm. Law societies across

Canada subsequently implemented rules designed to permit a law firm to continue to act for a client despite the fact that a lawyer joining the firm has confidential information about the client on the other side of the case — by taking steps to ensure the lawyer joining the firm does not disclose confidential information about the case. Those rules are set out as Chapter 6, Rules 7.1 to 7.9 and Appendix 5 of the *Professional Conduct Handbook*.

The question has since arisen: *should similar rules be adopted to cover situations other than those in which lawyers are transferring firms?* Several courts have recently considered the scope of

imputed conflicts. The law society in Ontario now allows law firms to act against former clients, if there is client consent or if the firm can meet certain standards (similar to those set out in Chapter 6, Rule 7.4 of BC's *Professional Conduct Handbook*).

Lawyers who would like further information on these changes should contact Jack Olsen, Staff Lawyer – Ethics, at:

Law Society of British Columbia  
845 Cambie Street  
Vancouver, BC V6B 4Z9  
Tel.: 604 443-5711  
Fax: 604 646-5902  
Email: jolsen@lsbc.org ✧

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