



BENCHERS' BULLETIN

Keeping BC lawyers informed

PRESIDENT'S VIEW

Only with you / 2

CEO'S PERSPECTIVE

The need for cultural competence / 4

NEWS

Vancouver county by-election / 3

Constance D. Isherwood, QC receives
Law Society Award / 5

Herman Van Ommen, QC,
2017 president / 6

Recent developments in the UK
threaten rule of law / 7

PRACTICE

Equity Ombudsperson: Free online
course on respectful workplace
behaviour / 12

REGULATION of the PROFESSION

Conduct reviews / 13

Discipline digest / 16



FEATURE

Working in a diverse society: The need for cultural competency / 9



Only with you

by David Crossin, QC

A FEW YEARS ago His Excellency the Right Honourable David Johnston, Governor General of Canada, suggested lawyers have a social contract with society. He remarked, "We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal."

The work of the Law Society, on your behalf, is to pursue our part of that bargain. In that regard, I would like to encourage my profession to continue to engage with, and assist, the Law Society in that pursuit. Whether as a volunteer, committee member or Benchers, you will find it rewarding, both professionally and personally, and you will meet men and women of good will at the Law Society committed to that public good.

I think one of the great challenges our justice system faces, and consequently our profession must confront, is finding its place and its voice in understanding and addressing the deep cultural scars left on our Indigenous communities in the wake of residential schools.

The Law Society has struck the Truth and Reconciliation Advisory Committee. It is co-chaired by Grand Chief Ed John and incoming president Herman Van Ommen, QC. It has a profoundly important mandate to provide guidance and advice to the Law Society on justice issues affecting Indigenous people in British Columbia, including those issues highlighted in the Truth and Reconciliation Commission's report and recommendations. This work, both provincially and nationally, cannot be accomplished without the hearts and minds of the legal profession. Consider adding your voice to this effort.

You might consider volunteering in some fashion relating to the Lawyers Assistance Program. The Law Society funds and unconditionally supports the good work of LAP. The leadership of Derek LaCroix,

QC has inspired many in our profession to reach out their hands to help our brothers and sisters at the bar who find themselves in difficulty. Consider calling Derek. Give him your name as someone to call. You will find you can change a life.

The Honourable Robert Bauman, Chief Justice of British Columbia, chairs Access to Justice BC. It is an action group consisting of a network of organizations and individuals committed to justice-system improvement. The committee decided this year to place its initial focus on family law and drafted guidelines aimed at promoting specific actions that will bring measurable outcomes. The Law Society is an important participant in this collaborative effort. Again, the profession must play an important role if it is to succeed. The Law Society and the Chief Justice welcome the participation of lawyers in this important work. Make some inquiries.

Legal aid and the discussion about legal aid in this province have, for many years, been frustrating and disappointing. Legal aid is in crisis. Funding is inadequate. The legal aid bar is shrinking. Tens of thousands of our citizens are unable to afford any kind of legal service. The Benchers unanimously decided to create a Legal Aid Task Force to add its voice in grappling with this crisis. It is a task force chaired by incoming second vice-president Nancy Merrill, QC. It will bring a mandate to the Benchers that will serve as a specific basis for our strategic plan going forward. The voice of the Law Society is only as loud as the engagement of the profession. Legal aid, to be sure, is a long-standing frustration, but that frustration cannot, and must not, defeat the commitment of the Law Society to press these important issues.

The Rule of Law and Lawyer Independence Advisory Committee, through the leadership of Craig Ferris, QC, has determined it is our obligation as a profession to speak to issues that are assaultive

BENCHERS' BULLETIN

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

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

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

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of our justice system. It is important that we engage the public and the profession on matters that potentially threaten the rule of law. In September, the Law Society welcomed the federal government's public consultation on national security by reiterating our concern that several aspects of the new security legislation do not appropriately balance protection of public safety with the rights and freedoms guaranteed to all Canadians. Consider engaging with the Rule of Law and Lawyer Independence Advisory Committee, through email or its [Twitter account](#). It is important the public understand why we have the rule of law and the consequences of unwarranted intrusion upon it. The profession must take on that responsibility, and we seek your participation.

Children in our justice system remain in purgatory in this province. To the credit of our Attorney General, the Honourable

Suzanne Anton, QC, alleviating the crisis of children in care is a robust priority. We applaud and support these efforts. Children are by far the most vulnerable in our society, and for far too long their interests have gone unrepresented in family law and child protection matters. The Law Society is supporting the efforts of Wayne Robertson, QC and the Law Foundation to create a Children's Lawyer Office for British Columbia. It will provide direct legal services to children and youth in the province. Children in crisis will also be the concern of initiatives in our Access to Legal Services Committee and our Truth and Reconciliation Advisory Committee. We invite lawyers, particularly those practising family law, to work with us in this important area.

Earlier this year our Law Firm Regulation Task Force, led by chair and incoming president Herman Van Ommen, QC, toured

the province and met with our members concerning a new, early intervention approach to lawyer regulation. It has been described as demonstrating, once again, BC as a leader in innovative proactive approaches to regulation. The participation of lawyers has provided invaluable input, and we invite your continued participation and insight.

Beginning in January 2017, Herman Van Ommen, QC will lead the Benchers as president concerning these important initiatives. He will be ably supported by Miriam Kresivo, QC as first vice-president, Nancy Merrill, QC as second vice-president, Chief Executive Officer Tim McGee, QC and the incredibly gifted and committed staff at the Law Society. The Law Society can make a difference in our justice system, but only with you, the bar of this province. My time is up. It has been a pleasure and an honour to serve you. ❖

Vancouver county by-election

Jeevyn Dhaliwal and Jasmin Z. Ahmad have been elected Benchers for Vancouver county in the November 15, 2016 by-election. Their one-year terms begin on January 1, 2017.

Jeevyn Dhaliwal was called to the bar in 1998 and practises workplace immigration law as a solicitor with Larlee Rosenberg. As an elected Bencher in 2014-2015, she served on the Rule of Law and Lawyer Independence Advisory Committee, the Legal Services Regulatory Framework Task Force, the Act and Rules Committee and the Discipline Committee. She is currently a non-Bencher member of the Discipline Committee and a subcommittee member on conduct reviews. Dhaliwal is also current executive and past president of the South Asian Bar Association of BC.

In her election statement, Dhaliwal expressed, in part, "The Law Society faces many diverse and important issues, from the expanded scope of legal services provided by non-lawyers, to law firm

regulation and opportunity within the profession, to the omnipresent issue of access to justice, and to the Truth and Reconciliation Commission's compelling calls to action.

"Diversity at the Bencher table can only assist the Law Society to address these issues, while governing in the public interest. As a woman of South Asian heritage, I possess diverse experience gained in various law firm settings."

Called to the BC Bar in 1995, Jasmin Ahmad practises as a commercial litigator at Koffman Kalef LLP. For the past five years, she has been actively involved as a mentor with the Women Lawyers Forum Mentoring Program of the Canadian Bar Association, BC Branch. She has served on the executive of the Vancouver Bar Association and has been a member of the Equality and Diversity Committee at CBABC. Since 2011, she has served as a member of Law Society hearing panels for discipline and credentials hearings.



Jeevyn Dhaliwal



Jasmin Z. Ahmad

In her election statement, Ahmad said, in part, "My background provides me with a perspective and awareness that is wide-ranging and allows me to empathize and understand many of the issues that face both our profession and the public we serve. As a Bencher, I would try to tackle those issues with the practical approach that I have learned as a lawyer at a business law firm."

See the Law Society website for voting results (About Us > Governance > Benchers > [Bencher Elections](#)). ❖



The need for cultural competence

by Timothy E. McGee, QC

THE BUSINESS WORLD has long recognized the importance of cultural competency. Cross-cultural interactions are an everyday reality for businesses with global offices, a diverse staff and an international client base.

The feature article in this issue of the *Benchers' Bulletin* explores what it means to be culturally competent and what this may look like in the legal profession. The topic is particularly timely in light of the

Truth and Reconciliation Commission's call to action for lawyers to receive appropriate cultural competency training.

At the heart of any cultural competency training is an understanding and appreciation of the cultural norms and traditions of those with whom we work and interact. This is especially important for lawyers and their clients. For our part, the Law Society is embarking on cultural competency training for our staff to achieve a

better understanding of these issues and to foster a stronger workplace.

We hope this edition of the *Benchers' Bulletin* will help raise awareness of the benefits of cultivating strong cultural competency as a hallmark of the legal profession in BC.

I welcome your comments and feedback. Please feel free to contact us at communications@lsbc.org. ❖

Unauthorized practice of law

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

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

* * *

During the period of August 5 to November 30, 2016, the Law Society obtained three undertakings and covenants from individuals not to engage in the practice of law.

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

Nguyen Phuong Nguyen

On September 16, 2016, Madam Justice Brown granted an injunction prohibiting **Nguyen Phuong Nguyen**, a.k.a. **Win Wen**

Nguyen and **Nguyen Phuong Nguyen**, d.b.a. **Utopia Enterprises International Law Group, Utopia Enterprises, LLC, Mystific Global Incorporate** and "www.utopia-enterprise.com" of Burnaby and Seattle, Washington, from engaging in the practice of law, from commencing, prosecuting or defending proceedings on behalf of others and from representing himself as a lawyer or attorney or in any other manner that connotes that he is capable or entitled to practise law. Claiming to be a lawyer, Nguyen purported to defend one "client" in a criminal matter and offered to provide immigration advice and services to other clients for fees. In the end, Nguyen's legal services appear to have been illusory. The court ordered Nguyen to pay \$8,135 in restitution to his victims and \$3,922.70 in costs to the Law Society.

Charles David Parent

On November 17, 2016, Madam Justice Russell granted an injunction prohibiting **Charles David Parent**, a.k.a. **Charles Parent-Quinn** and **Chase Parent-Quinn**, of Surrey, from engaging in the practice of law, from representing himself as a lawyer and from commencing, prosecuting and defending proceedings in any court. In

2001, Parent had falsely represented himself as a lawyer and had performed various legal services with respect to a family law matter for a fee. After the Law Society's involvement, Parent signed an undertaking whereby he agreed to abide by the provisions of the *Legal Profession Act*. In 2016, he breached his undertaking when he offered to appear as an advocate and to draft and file documents for a party before the Residential Tenancy Branch for a fee. In addition to the injunction, the court awarded the Law Society \$3,500 in costs.

Kent Stewart Webb

On September 23, 2016, Madam Justice Bruce granted an injunction prohibiting **Kent Stewart Webb**, of Penticton, from engaging in the practice of law, from commencing, prosecuting or defending proceedings on behalf of others and from representing himself as a lawyer or counsel or in any other manner that connotes that he is capable or entitled to practise law. Webb drafted and filed letters, pleadings, an affidavit and an order stating that he was "counsel" and "lawyer" for parties to a criminal and a family proceeding. The court awarded the Law Society costs of \$3,793.36. ❖

Constance D. Isherwood, QC receives Law Society Award

THE BENCHERS HONoured Constance D. Isherwood, QC with the Law Society Award for 2016. The award was presented to Mrs. Isherwood at the Bench & Bar Dinner on November 17, 2016.

In 1951, Mrs. Isherwood was one of six women in her graduating class at the University of British Columbia law school. She became the first woman to receive the Law Society's gold medal, awarded to the graduating law student with the highest cumulative grade point average.

After her call to the bar, Mrs. Isherwood practised under the guidance of her mentor Ernest Tait. When Mr. Tait passed away just two years later, Mrs. Isherwood took over the practice as sole practitioner. This was a remarkable move, as it was at a time when there were few women lawyers, let alone female sole practitioners. In 1964, she combined her practice with her husband's (the late Foster Isherwood) and became a partner in Holmes and Isherwood, the firm with which she still practises today.

Throughout her long and impressive career, Mrs. Isherwood served as a role model and mentor for many young women lawyers. In 1973, she organized a series of "lady lawyers' lunches" in Victoria to encourage networking among women lawyers and to foster a sense of belonging to the profession. Her guidance and support for women lawyers, especially during that time, have been central to advancing equity and diversity in the legal profession.

Her accolades include receiving the Queen's Counsel designation in 1998, the University of Victoria's Lifetime Achievement Legacy Award in 2006, the Victoria



Photo: Mits Naga / Brian Dennehy Photography

David Crossin, QC, Constance D. Isherwood, QC and Attorney General and Minister of Justice Suzanne Anton, QC.

Women's Pioneer Award from the CBA Victoria Women's Forum in 2012 and an honorary doctor of laws degree from UBC in 2015. Most recently, she was awarded the 2016 Alumni Lifetime Achievement Award from UBC's Peter A. Allard School of Law.

In addition to her law practice, Mrs. Isherwood has been active in her community throughout her life. She has served as chancellor of the diocese of British Columbia for the past 30 years. She also contributes her time to groups such as the

Art Gallery of Greater Victoria, the Sooke Philharmonic, the Victoria Symphony and the Victoria Board of Regimental Trustees of the Canadian Scottish Regiment. She has received the Canada 125th anniversary medal for community service and the Queen's Diamond Jubilee Medal.

Mrs. Isherwood is known for her diligence, fairness, integrity and professionalism. After 65 years in the profession, Mrs. Isherwood continues to show immense dedication to her clients and to the administration of justice. ❖

2016 annual general meeting

THE ANNUAL GENERAL meeting of the Law Society was held on Friday, October 14, 2016, in Vancouver, linked by audio-conference to 13 other locations around the province. One hundred seventeen members attended the meeting; for the second year, those unable to be there in person could watch the meeting via live webcast.

- Nancy Merrill, QC was acclaimed as the Law Society's second vice-president for the year commencing January 1, 2017.
- PricewaterhouseCoopers was appointed as the Law Society's auditors for the year ending December 31, 2016.
- The Benchers were authorized to amend

the Rules respecting general meetings to provide for voting at a general meeting either partly or fully by electronic means. This resolution required the approval of two-thirds of members voting in a general meeting, and passed with 81 per cent voting in favour. ❖

Herman Van Ommen, QC, 2017 president

IT'S OCTOBER 14, the morning of the Law Society annual general meeting, and incoming president Herman Van Ommen, QC is the man of the hour. He exits the elevator atop the Hotel Vancouver a half-hour early. As he makes his way toward the coffee table, his progress is slowed by fellow Benchers, staff and event organizers, each wanting a piece of his time. Van Ommen pauses to chat easily with each, a smile always at the ready.

Finally reaching the coffee station, he serves himself, and after being ushered to

a chair in a quiet corner, he proceeds to outline his focus for the year ahead, and to describe the circuitous route that led him to the presidency of the Law Society.

One of his goals in the coming year, Van Ommen explains, will be to connect with lawyers outside of the Lower Mainland. "I just think it's something we don't do well," he says. "Every time I go outside Vancouver and meet with lawyers, they are so happy to see that the Law Society cares about them. We have to make sure that our members know that we're not just the organization that slaps them when something goes wrong, but that we're actually there to help." He plans to attend as many bar association meetings around the province as he can and encourages other Benchers to do the same.

One policy initiative Van Ommen will advance in the coming year is law firm regulation. "It will be a significant innovation for a number of reasons, but perhaps, most importantly, because firms will be encouraged or, in some cases required, to ensure that lawyers in their firms practise competently and ethically. Firms are generally in a better position to identify and help lawyers who are struggling. Currently, we're missing one of the best levers to helping lawyers practise as they should."

As chair of the Law Firm Regulation Task Force, Van Ommen has been working to advance the initiative for nearly two years. He presented the task force's interim report at the November Benchers meeting, and hopes to move the process forward so that the Law Society might be in a position to implement law firm regulation shortly after he leaves the president's office.

Responding to the recommendations of the Truth and Reconciliation Commission will continue to be a top priority under Van Ommen's leadership. With an advisory committee now in place, he says his role will be to maintain the momentum. "We have gotten off to a good start this year, and I have to continue that. It will be a matter of engaging with the committee and seeing where it takes us, but it does require that I make this an important part of my presidency."

Improving access to justice is another issue that is close to Van Ommen's heart,

and he sees important roles to be played by both the Law Society and individual members of the profession. "From the Law Society's more macro perspective, I think we have to focus on how we can change our rules to facilitate better access. An example is unbundling, where the Law Society changed rules to better enable lawyers to provide services on a limited retainer basis. Now what is needed is for the Law Society to assure lawyers that, if things go wrong, the context in which the services were provided will be considered."

Van Ommen suggests that individual lawyers might have a role to play in facilitating better access to justice by asking how they can provide services to the middle class at a price the middle class is able to pay. Providing unbundled services is just one example. "Serving the needs of the middle class is one area where I don't think the profession has done that good a job, and it's because it's a complex problem. It's hard to do."

It's probably safe to say that Van Ommen is the only Bencher whose first career was logging. Born in Taber, Alberta, he spent grades 1 to 5 in Sumas Prairie in the Fraser Valley. He moved with his family to Salmon Arm at age 11. Wanting to help support the family, he left school at 15 to become a logger and spent five years working around the province as a faller and buckler. Seeing little future in logging, he went back to school. After completing his grade 12 equivalency at Okanagan College, he spent time at Simon Fraser University and McGill before enrolling in the University of Victoria law school, where he completed his LLB in 1984. He articulated in Vancouver and practised for a year in Salmon Arm before returning to Vancouver to practise commercial law with Shrum, Liddle & Heberton, a predecessor firm to McCarthy Tétraut.

Van Ommen's work with the Law Society began more than 20 years ago, when he frequently acted as counsel representing the Law Society in discipline and credentials hearings, and also acted for many lawyers. He was first elected a Bencher in late 2008 and has served in the role since 2009. He currently serves on nine committees, subcommittees, advisory committees



Photo: Ron Sangha Productions Ltd.

and task forces, three of which he chairs. As if all that weren't enough, as of November this year, Van Ommen is the Law Society's new representative to the Federation of Law Societies of Canada, taking over from Gavin Hume, QC.

Meanwhile, he continues in his role as senior partner in the Vancouver litigation group at McCarthy Tétrault, although he has stepped back from his former role

as regional managing partner for British Columbia.

Van Ommen and his wife, Barbara Norell, live in Ladner. Their daughter Clara is in medical school, and son Dirk is studying business at SFU. When not reading briefs or committee reports, Van Ommen enjoys cycling and gardening. He hopes to someday get back to an early passion for woodworking, if he can find space in his

garage to set up his shop. "It's all packed up in the corner because the kids occupy the rest of the garage," he says with a laugh.

Woodworking, however, will most likely have to wait. As he schedules visits to bar associations in between committee meetings and a full Bencher agenda, it will probably be at least another year before Van Ommen finds the time to unpack his tools. ❖

FROM THE RULE OF LAW AND LAWYER INDEPENDENCE ADVISORY COMMITTEE

Recent developments in the UK threaten rule of law

IN FEBRUARY 2016, the Rule of Law and Lawyer Independence Advisory Committee commented on attacks on lawyers by using examples from two very different societies: China and England (see "our initiatives" on the Law Society home page, and then go to [The Rule of Law, Lawyer Independence and the Self-Governance of Lawyers](#)). Given that the rule of law tends to be so closely associated with England, it was particularly striking that such fundamental principles were subsumed — or ignored — in that country's public debate.

It is equally discomfoting to note that public discourse in England is not yet retreating from the path of diminishment of the rule of law and the role lawyers play in the justice system.

The committee's February comments focused on the aftermath of the inquiry held concerning actions of British forces in Iraq. Allegations were made about mistreatment of Iraqi nationals by British forces, and lawyers were retained to act for the Iraqi nationals. Not all the claims brought were successful; some were withdrawn. Some, however, were proven. The British government appears to have focused only on the claims that were not established, citing them as examples of "spurious claims lodged against brave servicemen and women in Iraq." As noted in the February article, the government publicly criticized lawyers who advanced the claims. The government also vowed to end the "industry of claims against the armed forces," and to "strengthen investigative powers and penalties against law firms abusing the system."

Since these statements were made, a

new prime minister, Theresa May, has taken office, but that does not seem to have changed the direction of the government on this issue. Prime Minister May recently was quoted as saying, "we will never again — in any future conflict — let those activist, left-wing human rights lawyers harangue and harass the bravest of the brave — the men and women of Britain's armed forces." Does this mean that individuals who claim to have been mistreated by British forces or, perhaps, by any state agency, will be unable to retain representation to challenge the activities of the armed forces or other state agencies?

If so, it is a stark rebuttal of the principle of the rule of law. Are lawyers to be harassed by government in the United Kingdom, publicly criticized and chastised for having the effrontery to represent clients who challenge state actions? That, too, seems contrary to the principle of the rule of law and sounds more like how lawyers are treated in countries that do not have respect for traditions and legal principles that England has recognized for centuries. This type of reaction also seems to contravene the United Nations "Basic Principles on the Role of Lawyers," in which clause 16(a) states: "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference." Clause 18 states: "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

Perhaps the government's reaction to the claims against the military was simply an unfortunate political reaction

and not one that, had more thought been given, was intended to challenge the role of lawyers and the rule of law. However, that may be open to debate on the basis of another proposition that the British government has recently put forward. In October, the government proposed to impose penalties on solicitors who advise on tax evasion schemes that are later disallowed by the tax authorities in England. Obviously, there is a distinction between *tax evasion* and *tax planning*, and a person who knowingly tries to avoid paying taxes illegally should expect to be punished. A solicitor who advises a client to do so might also expect to be sanctioned by the tax authority and perhaps the Law Society as well. That advice given by the solicitor, if viewed as counselling an offence, would not be privileged. But the way the proposal was presented, it appears that, if a solicitor gives advice on a method that is not accepted, the solicitor will be exposed to sanction.

It seems odd to create a regime to impose a penalty if a solicitor only provides advice on a tax planning method where there may be some doubt as to its legality, simply because such method was later disallowed by the tax authority, presumably after representations were made by the solicitor, or other counsel, to the authority about why it was permissible. This approach could well dissuade solicitors from advising on tax matters and thereby deny clients the ability to obtain advice on how to structure their affairs. On its face, it too seems to violate the UN Principles.

continued on page 11

In brief

2017 FEES

The Benchers approved the 2017 practice fee and insurance fee, as recommended by the Finance and Audit Committee. The committee based its recommendation on a thorough review of the Law Society's financial position and the operational requirements for 2017.

The total annual mandatory fee for practising, insured lawyers for 2017 will be \$3,875.57. The practice fee will increase by \$68.48 to \$2,125.57 and the insurance assessment will remain the same at \$1,750.

A detailed breakdown and explanation of the 2017 fees is available on the website (Publications > Notices to the Profession).

TWU APPEAL PROCEEDINGS

On November 1, 2016, the BC Court of Appeal released its decision in *Trinity Western University v. Law Society of BC*. The appeal was dismissed.

On November 8, the Law Society determined that it will seek leave to appeal the decision to the Supreme Court of Canada.

JUDICIAL APPOINTMENTS

Heather MacNaughton, a master of the Supreme Court of BC, was appointed a judge of the Supreme Court of BC in Vancouver to replace **Madam Justice G.M. Dickson**, who was elevated to the Court of

Appeal in July 2015.

Catherine Murray, QC, a Crown counsel with prosecution service in Victoria, was appointed a judge of the Supreme Court of BC in Vancouver to replace **Mr. Justice G.J. Fitch**, who was elevated to the Court of Appeal effective September 2015.

Joyce M. DeWitt-Van Oosten, QC, an assistant deputy attorney general with the Ministry of Justice in Victoria, was appointed a judge of the Supreme Court of BC in Vancouver to replace **Madam Justice B.J. Brown**, who was transferred by the Chief Justice effective September 2015. ♦



FROM THE LAW FOUNDATION OF BC

New programs at Thompson Rivers University Faculty of Law

AT ITS NOVEMBER board meeting, the Law Foundation approved grants to the Thompson Rivers University Faculty of Law for a clinical program, public interest work placements and public interest awards. Pro Bono Students Canada also received funding to work with TRU to place students in pro bono projects with public interest organizations in Kamloops and the surrounding region.

The Clinical Legal Education Program will receive a grant of \$225,000 to operate a full-time community legal clinic in 2017. In February 2016, the TRU community legal clinic opened its doors at the Centre for Seniors Information at the Brock Centre on a part-time basis. This grant from the Law Foundation will allow TRU to expand the clinic to operate as a full-time general service clinic.

The university also received \$33,000 toward the Public Interest Work Placement

program. This grant will fund three summer work placements for law students who will work for one semester at a community-based public interest group that provides law-related services. The overall objectives of the program are to provide students with an opportunity to advance their legal knowledge and skills while expanding their understanding of public interest legal work and to provide legal assistance to public interest groups and the clients they serve.

A third grant to TRU of \$20,000 for public interest awards was also approved by the board of governors. The awards are intended as scholarship funding for second and third-year students who demonstrate commitment to the public interest, combined with academic achievement. This will be the second year the Law Foundation has funded these awards at TRU.

Finally, the board approved funds for Pro Bono Students Canada to set up a chapter at the TRU Faculty of Law. By building partnerships between law students, community organizations and practising lawyers, Pro Bono Students Canada's goal is to foster a pro bono ethic among law students while advancing access to justice by placing students at community-based organizations in need of legal assistance. The work performed by the students will be supervised by volunteer lawyers from the community.

Together, these grants establish a robust set of opportunities for students at BC's newest law school to increase access to justice within their community while pursuing their law degree. We are looking forward to the benefits these initiatives will bring to law students, community-based organizations and the citizens of the BC Interior. ♦

Working in a diverse society: The need for cultural competency

LAWYERS ARE OBLIGATED to represent their clients' interests resolutely and to serve them competently, honourably and with integrity. In our diverse society, cultural competency is increasingly a critical part of fulfilling that obligation.

"The question is not 'Do I need this or not?' The question is 'Can you achieve what you are mandated to do without it?'" said Alden Habacon, senior advisor of intercultural understanding at the University of British Columbia. "I think the answer is obvious. No, you can't. Your client will almost always be different from you professionally, culturally, or otherwise."

Habacon has worked as a diversity and inclusion strategist for more than 11 years. He currently provides training and workshops to faculty, staff and students on campuses across BC and in the United States, including graduate students at the UBC Peter A. Allard School of Law.

"The end goal is to represent your client fairly and to the fullest of your abilities, in your client's best interest," Habacon emphasized. "This is the means to achieving that goal."

As director of intercultural understanding at UBC from 2010 to 2015, Habacon developed and implemented an intercultural understanding framework as part of the university's strategic plan. What he found is that diversity on campus did not equate to cultural competency.

"To be able to work effectively and appropriately across differences, you need certain attitudes, skills, knowledge and relationships," he said. "That takes intentionality and effort."

According to Habacon, cultural competency is communicating and interacting effectively and appropriately with people who are culturally different. This includes people with different ethnic backgrounds, as well as different genders, sexual orientations, religious beliefs, ages,

physical and mental abilities, and socioeconomic backgrounds.

The Truth and Reconciliation Commission's report and calls to action highlighted the need for cultural competency. The report details the legacy of residential schools and the many ways that the Canadian legal system and lawyers harmed and continue to harm Indigenous peoples and communities. The report calls for lawyers to receive appropriate cultural competency training.



"Reconciliation is a lengthy process. We have to start from engaging with history and legacy and educating ourselves and one another about who we are," said Patricia Barkaskas, academic director of the Indigenous Community Legal Clinic in Vancouver.

"Nobody expects this process is going to be easy, including for Indigenous peoples," she said. "It's not easy for anyone, but it's fundamentally necessary for us as a society. It means restoring the dignity of a group of people who have been systemically subjugated."

CULTURAL COMPETENCY IN PRACTICE

The Indigenous Community Legal Clinic in

the Downtown Eastside provides advice and representation from UBC law students to clients who cannot afford a lawyer and who self-identify as Indigenous persons.

As academic director, Barkaskas teaches the course that students take in tandem with their clinical experience. She has practised in child protection, civil litigation, criminal law, family law and prison law and has a wealth of experience working with Indigenous people, including residential school survivors, in their encounters with the justice system.

Barkaskas explains that, when lawyers start to work with a client, their first inclination is to dive immediately into the legal issue, asking specific and detailed questions about the legal matter. But that line of questioning is not always effective or informative, particularly for clients who come from oral traditions. Their culture, history and knowledge is passed on through the telling of stories from generation to generation. Being asked question after question by a lawyer can feel like an interrogation or an assault.

Open-ended questions and discussions, on the other hand, help lawyers learn the necessary context and background, which then helps them find out what their clients desire in a legal outcome.

A client coming in to discuss a protection order might start out by saying they want their family back together. Barkaskas recommends asking for more information. "We might say, 'Tell me more about that. How does that look?'"

"That client might tell you that they weren't raised in a family together and how important it is for their family to stay together, that their partner is more than just a parent. They might tell you that their separation has ripple effects on the whole community."

While the immediate and obvious answer may be a protection order, a culturally competent approach takes into account the client's perspective. It will often

take more work on the lawyer's part to find a legal remedy that addresses the client's needs holistically.

"For example, that might include explaining to the client that a temporary protection order is possible, which can outline specific terms that balance the client's safety, and the safety of any children, against their instructions about wanting the family to remain intact."

She stressed that building a strong solicitor-client relationship is fundamental and it starts with establishing rapport and trust with the client, hearing their story and listening to what they really need.

"Know the whole story first. You'll never be able to build the relationship with that client otherwise. Start listening to the client and your legal advice may change depending on what that person is telling you."

ADOPTING A DIFFERENT LENS

Barkaskas has ongoing discussions at the legal clinic with articulated students about what it means to serve the public as a lawyer and how they could change their approach when working with Indigenous communities. She emphasizes the importance of self-reflection and developing an awareness of how one's background and privileges affect their viewpoint.

"Ask yourself, 'What does my position offer me? What does this mean for the person sitting across from me? What position are they in?'"

Adopting two perspectives, of the client and of the lawyer's role as representative of the client, is an approach recommended by the late law professor Rose Voyvodic. In her 2006 paper titled "Lawyers Meet the Social Context: Understanding Cultural Competence," Voyvodic outlined the values that a culturally competent Canadian lawyer needs to adopt.

Voyvodic stated that, because stereotypes and assumptions are ingrained in our consciousness, lawyers self-monitor and identify how these assumptions could influence their own thinking and behaviour. Examples of these assumptions might include believing that welfare recipients are undeserving or that immigrants are too passive or too aggressive.

The demographic reality suggests that most lawyers do not represent the larger Canadian society because they are mainly

white, male, able-bodied and middle class. Voyvodic indicated that, because of their backgrounds, lawyers might not understand what it is like to experience discrimination and are less likely to believe it is detrimental than their clients.

According to Voyvodic, a culturally competent lawyer will acknowledge the harmful effects of discrimination, power and privilege. For many lawyers, this requires an attitudinal shift in how they view their clients and how they view themselves.

This shift in attitudes is a key component of the framework for intercultural understanding that Habacon developed for UBC's strategic plan. "That's often seen as the hardest piece," said Habacon. "People are expected have an attitude where they aspire for empathy. They expect, appreciate and value diversity. They should have some conscientiousness about one's own culture, unconscious biases and a sense of their own privilege."

Habacon compares it to someone seeing the world as blue, recognizing that someone else sees it as red, and acknowledging that seeing the world through a red lens does not make it wrong. It requires a respect for someone else's perspective and the ability to suspend judgment.

Although one may imagine what it is like to walk in someone else's shoes, Habacon said, a common misstep is to assume you can achieve total empathy and know precisely what that person is going through.

"In not recognizing that empathy has a limit, it could come across to clients as arrogance and, actually, ignorance. I have never lived in an Aboriginal person's body, so I am not going to try to pretend that I really know what it is like. So rather than say I'm trying to represent you as authentically as I can, I need to acknowledge that I have a limit."

BUILDING RELATIONSHIPS ACROSS DIFFERENCES

The first framework that Habacon developed for UBC involved cultivating three areas needed to work effectively with people of different cultures: attitudes, skills and knowledge. However, when he presented this to Indigenous colleagues and scholars, their feedback was that the model was Eurocentric.

"It assumes that all you need is to have a positive attitude, that you have knowledge on how to communicate and that you have a bit of understanding of their history, culture and language," he said. "Their response was none of those things are worth anything if you don't first have a relationship with their community."

With their input, the relationship component, which speaks to establishing meaningful social connections with people from other cultures, was built into the university's framework.

Building strong relationships is particularly important for the legal profession. Barkaskas believes that the solicitor-client relationship is the most important part of their work at the Indigenous Community Legal Clinic. While this applies to lawyers and clients from all cultures and backgrounds, the relationship between Indigenous people and the legal profession is especially critical.

"When we are talking about the legal profession, we are talking about people who have had power over Indigenous peoples for much of history," Barkaskas stated. "The client might see you as a representative of those systems."

"It is not just between one lawyer and one client. It is the relationship between Indigenous peoples and the legal profession. It is about making that relationship better and changing the nature of that relationship."

DEVELOPING THE NECESSARY KNOWLEDGE AND SKILLS

In addition to having the appropriate attitudes and positive relationships with clients, lawyers need to learn the knowledge and skills to work effectively across cultures.

Barkaskas recommends that lawyers read about Indigenous relations in Canada, colonization and Indigenous laws. Having that historical knowledge and recognizing the Indigenous laws that apply in certain communities will help lawyers understand what the world is like from an Indigenous perspective.

Social worker and consultant Robert S. Wright agrees that understanding how other cultures view the world is essential to cultural competence. Based in Nova Scotia, Wright has studied and taught cultural competency for 28 years, providing



Alden Habacon



Patricia Barkaskas



Robert S. Wright

lawyer needs to use the appropriate language to talk about same-sex relationships.

“Lawyers need to develop the language and capacity to talk about differences, ask questions about these differences and understand how they may

influence the cases in front of them.”

MAKING A LASTING COMMITMENT

Developing and practising cultural competency requires ongoing awareness and engagement. Every encounter with a new client presents another opportunity to learn about a different perspective.

“This isn’t what you learn in a workshop. This is a lifestyle change,” said Habacon.

Habacon encourages those who wish to become more culturally competent to begin in the area they are most interested in, whether it is examining their own attitudes, learning more about a culture, developing the necessary communication

skills or building relationships with diverse groups of people. Feeding one’s interest, Habacon said, is the key to driving the momentum to achieving overall cultural competency.

Although Barkaskas acknowledges that cultural competency is a part of the reconciliation with Indigenous peoples, she recommends a holistic approach to responding to the Truth and Reconciliation Commission’s calls to action.

She emphasizes that it is important not to separate cultural competency from the rest of the recommendation, which also calls for lawyers to learn about the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law and Aboriginal-Crown relations, as well as to receive training in conflict resolution, human rights and anti-racism.

“It is not just lawyers who need to respond. This includes judges, paralegals, court services staff and many others. It is everyone who works in the legal profession,” said Barkaskas. ❖

training to law firms and the Nova Scotia Barristers’ Society.

A significant part of Wright’s work is based on Edwin Nichols’s framework for understanding cultural differences, which examines the various values, logic, ways of knowing and processes of reasoning in other cultures. With knowledge on alternate world views, lawyers can better recognize how their client sees their legal issue as well as identify the ways their own perspectives differ from their client.

Wright stresses the importance of acquiring the ability and the language to talk about cultural differences. When a same-sex couple comes to a lawyer to work on a cohabitation agreement, for instance, the

Rule of law ... from page 7

Clause 16(c) states: “Governments shall ensure that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties standards and ethics.” What is next? Will barristers who represent clients who plead not guilty to a crime but are later convicted themselves face penalties or imprisonment?

A further concern arises in the wake of the recent decision of the High Court on whether the government could unilaterally invoke the article commencing its departure from the European Union or whether it must first debate the matter in Parliament. The court ruled that the matter had to go to Parliament, despite the results of a referendum in which a majority of voters chose to leave the Union. Some politicians and media pounced on the court’s decision, calling the three judges who made it “enemies of the people.” At least one newspaper called for judges to be subject to public oversight. The tenor

of the response seems to be based on a conclusion that the court has thwarted the will of the people. The principle of judicial independence — crucial to the rule of law — was getting lost amid the anger fomented over a decision that is contrary to the agenda of certain groups. Thankfully, the lord chancellor (although criticized for the time it took her to do so) has commented that “the independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality.”

All this raises more than only the importance of being vigilant with respect to the protection of the rule of law. It shows that reactionary elements who may choose to focus their attention on lawyers do not necessarily pick and choose their target. They are equally happy to throw human rights lawyers, business lawyers and even judges into the fire based on misguided principles and lack of comprehension of the fundamentals of the rule of law and its place in society that gives them their freedom of speech. England

is not, of course, the only country where these sorts of occurrences take place. They happen in many countries. That they *do* happen in England, where the rule of law is considered to be firmly ingrained in the political structure of the country, is cause for concern.

Lawyers who represent clients in unpopular cases can trigger criticism from the public, but government should not pile on to the public sentiment. Judges must be free to make decisions based on their expert interpretation of the law, not based on what the government or a majority of the electorate want to do. Government needs to protect the role of lawyers and the rule of law by ensuring that actions *can* be brought against public institutions to hold them to account, and that lawyers will be free to represent clients on such matters, rather than creating a sense of distrust of lawyers and the judicial system. If the cases cannot be proved, they will be dismissed. That is why we judge legal matters in a court of law rather than in a court of public opinion. ❖

FROM THE EQUITY OMBUDSPERSON

Free online course on respectful workplace behaviour



Anne Chopra

THE EQUITY OMBUDSPERSON has partnered with the Continuing Legal Education Society of BC to offer a self-paced learning course on respectful workplace behaviour (go to www.cle.bc.ca, and then click on Courses > eLearning &

Toolkits). This complimentary online course uses video scenarios and asks you to consider the appropriateness of various behaviours. Viewing the scenarios and answering the questions should help:

- spark discussion of appropriate behaviour in the workplace;
- identify factors that contribute to behaviour being inappropriate; and
- refine views of what makes a

particular behaviour appropriate or inappropriate.

The course will take approximately 30 minutes to complete. There is also an option for group work, and an included discussion guide is available to help facilitate a deeper examination of the issues. The group discussion will add an additional 30 to 60 minutes. Participants can obtain a half-hour CPD credit if they watch the course on their own, but a group may be able to claim up to an hour and a half if they have arranged for structured discussion and registered as a study group.

If you have any questions with regard to this course or any issue of discrimination, bullying or harassment, contact our Equity Ombudsperson by email at achopra1@novuscom.net or phone 604.687.2344. Questions about the administration of the course can be directed to CLE. ❖

Practice advisors – frequently asked questions

LAWYERS ARE REMINDED to refer to the practice advisors' frequently asked questions web page (go to Lawyers > [Practice Support and Resources](#)), for discussion about the questions:

1. When do I have a duty of confidentiality?
2. Am I in a conflict of interest on this file?
3. Can I withdraw from this file?
4. Does my client have capacity?
5. Where can I find information on client identification and verification?
6. How do I deal with the tax components of my bill?
7. I am considering a space-share arrangement – what issues should I bear in mind?
8. Where can I find information on dealing with client files?
9. I am a sole practitioner and I am considering retirement – what do I need to think about?
10. When do I have to report myself or another lawyer to the Law Society? ❖

Services for lawyers

Law Society Practice Advisors

Dave Bilinsky
Barbara Buchanan, QC
Lenore Rowntree
Warren Wilson, QC

Practice advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

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



Optum Health Services (Canada) Ltd. – 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 articulated students and their immediate families.
Tel: 604.431.8200 or 1.800.663.9099.



Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articulated students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers.
Tel: 604.685.2171 or 1.888.685.2171.



Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articulated students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson Anne Bhanu Chopra at tel: 604.687.2344 or email: achopra1@novuscom.net.

Conduct reviews

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

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

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

CRIMINAL CODE DRIVING OFFENCES

A lawyer pleaded guilty to and was convicted of dangerous driving under the *Criminal Code* and was sentenced to a fine of \$2,000 and a one-year driving prohibition. The lawyer drove at a speed in excess of twice the posted speed limit, passed two vehicles on double solid lines, sideswiped one of the vehicles he was passing and crashed his vehicle. A conduct review subcommittee advised the lawyer that his conduct was inappropriate because of the nature of his driving and the risk that he presented, not only to himself, but to others using the roadway, including his passenger. The lawyer acknowledged that his conduct was not acceptable, but had not told his firm of the incident. The lawyer stated that he had changed his driving behaviour. Notwithstanding that the lawyer outwardly acknowledged that his conduct was unbecoming as defined in rule 2.2-2 of the *Code of Professional Conduct for British Columbia*, the subcommittee was concerned that the lawyer lacked insight as to how the incident occurred, and what caused him to drive in the manner that he did. (CR 2016-23)

JURICERT AND LAND TITLE ACT ELECTRONIC FILING REQUIREMENTS

During a compliance audit of a lawyer's practice, it was discovered that the lawyer improperly allowed his paralegal to use his Juricert password and to affix his Juricert personal digital signature to documents filed in the Land Title Office using the electronic filing system (EFS). Until the compliance audit, he was unaware that he was acting in violation of the rules governing the use of his Juricert password. A conduct review subcommittee advised the lawyer that his conduct was inappropriate because the foundation of the EFS is dependent upon lawyers using their passwords themselves and not sharing their

passwords with others. The lawyer agreed his conduct was inappropriate and was in breach of his Juricert agreement and Part 10.1 of the *Land Title Act*, and in breach of Law Society Rule 3-64(8)(b) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*. He understood his mistake and took full responsibility. The lawyer confirmed that now he is the only person who knows the password. The subcommittee recommended that the lawyer cease providing conveyance services since he does only a few conveyances per year and was not current with conveyancing laws, rules, practices and customs. The subcommittee further recommended the lawyer consider taking the online Small Firm Practice Course offered by the Law Society. (CR 2016-24)

During a compliance audit of another lawyer's practice, it was discovered that this lawyer also provided his Juricert password to his assistant to affix the lawyer's digital signature on electronic documents filed in the Land Title Office, contrary to the lawyer's Juricert agreement and Part 10.1 of the *Land Title Act*. The lawyer was also in breach of rule 6.1-5 of the *Code of Professional Conduct for British Columbia* and Law Society Rule 3-64(8) by permitting his assistant to file property transfer tax returns through the electronic filing system, thereby allowing a non-lawyer to withdraw funds from trust. A conduct review subcommittee stated that the lawyer's conduct was serious, given the potential for fraud or misuse of digital signatures, and the need for lawyers to specifically authorize or withdraw funds from trust. As a certification authority for the Juricert program, the Law Society's responsibility is to safeguard the integrity of the EFS. In this case there were 32 instances over a four-year period, and in nine of those cases, funds were improperly removed from trust to pay property transfer tax. The lawyer had applied for, and received, three digital certificates during the period in question. On each application, he acknowledged that he read and agreed to comply with the terms and conditions regarding the use of the digital certificates, including the condition that he keep his password confidential. At one point during the conduct review, the lawyer suggested that the Juricert program was a money-generating enterprise for the Law Society and this was the reason for enforcement. The subcommittee explained that this was an incorrect assumption and the Law Society was protecting the public interest by acting to protect the security of the EFS. The lawyer acknowledged these concerns and insisted that he was now going to be compliant. He explained steps he had taken to ensure compliance. The lawyer generally reviewed Law Society publications, but he could not specifically recall reading any bulletins relating to Juricert issues. The subcommittee suggested the lawyer set up a system or practice for reviewing Law Society publications and bulletins on a monthly basis to ensure that he is familiar with any changes or requirements. It was also suggested that the lawyer make it a practice to review the Law Society Rules and the *BC Code* on at least an annual basis to ensure that he is familiar with them and any changes to them. The lawyer agreed to take these steps to keep current. (CR 2016-25)

CONFLICTS OF INTEREST

A lawyer acted in a conflict of interest by representing an individual in a rectification claim under the *Land Title Act* in which the individual was seeking a greater interest in real property that was an asset of an estate for which that individual was the executor. At the same time, he was representing the sole beneficiary of that estate in a *Wills Variation Act* claim. The lawyer also failed to advise the executor that he was not protecting his interests as executor.

Although the rectification conflict over the real property was not known to the lawyer at the time of the retainer, there was at least a potential conflict given the disparate interests between the executor and the beneficiary, and the executor in his personal capacity and in his capacity as executor. A conduct review subcommittee stated that the lawyer did not handle this difficult situation firmly or clearly enough. His retainer letters failed to address the potential for conflict squarely, failed to require independent legal advice for the beneficiary, and failed to set out a process for if a conflict did arise. Once the lawyer was alive to the conflict, he did not ensure that the beneficiary received independent legal advice, including on whether the lawyer could continue to act for the executor. The lawyer raised with the executor the issue of renouncing his executorship, but did not insist on it. The lawyer also sent the executor bills for matters that were for the accounts of the estate intermingled with bills for matters that the executor, personally, was responsible to pay. The lack of clarity on this subject caused the executor to believe that the lawyer was also acting for the estate.

The subcommittee accepted that the lawyer had fully acknowledged the missteps in this case and had put in place practices that will avoid such problems in the future. (CR 2016-26)

DISHONOURABLE OR QUESTIONABLE CONDUCT

A lawyer presented, without discussion, a release to a non-client who was not proficient in English and was unrepresented and opposed in interest, in a manner that was inconsistent with her duty to conduct herself honourably and with integrity, contrary to section 2.2 of the *Code of Professional Conduct for British Columbia*.

The non-client assisted the lawyer with clients in some business dealings and was paid a commission by the lawyer. The individual claimed that he had not been paid all commissions owed to him. In response to persistent demands for payment, the lawyer agreed to give him a loan. The lawyer had her assistant prepare a promissory note. A release provision had not been discussed between the parties, but the assistant included a release of all claims against the lawyer and her clients if the individual defaulted on repayment of the loan. The promissory note was drafted in English, even though Mandarin was the individual's first language and both parties spoke that language during their interactions. The lawyer failed to read the document before presenting it to the individual. The lawyer advised a conduct review subcommittee that the document was for discussion purposes only and the lawyer did not know the release terms had been included. The individual reviewed the promissory note and understood

it. The lawyer described his reaction upon reading the document as being agitated, yelling and stating that he would not leave the lawyer's office until he got his money. The document was redrafted into an agreement and it was executed by both parties.

The lawyer's interests and those of her clients were adverse to the individual, and the release contained in the document drafted by the assistant created an advantage for the lawyer and her clients. The lawyer did not agree with the issues and concerns raised by the conduct review subcommittee until her counsel reminded her that it was her obligation and responsibility to review all documents prepared under her direction. The lawyer explained steps she would take if she encountered a similar situation again. (CR 2016-27)

BREACH OF CONFIDENTIALITY

A lawyer represented a client in a matter involving the preparation and execution of a power of attorney that was used by the client in an ICBC matter, and disclosed privileged client information to an ICBC adjuster after the adjuster raised concerns about the power of attorney, contrary to rule 3.3-1 of the *Code of Professional Conduct for British Columbia*. When the ICBC adjuster received the power of attorney, he questioned the lawyer because the two parties to the power of attorney signed the document on different dates and it was unclear to the adjuster whether the lawyer had witnessed one or both signatures. The lawyer clarified that he only witnessed his client's signature, disclosed privileged client information without instructions from his client to do so, and expressed his views as to the validity of the power of attorney. He advised the adjuster that he did not recommend its use. The client filed a complaint with the Law Society, but despite the existence of the complaint, the client requested the lawyer's assistance in an urgent conveyancing matter. The lawyer required the client to execute a document containing the client's agreement to withdraw the complaint to the Law Society, in exchange for his agreement to represent the client in the conveyance. In doing so, the lawyer acted contrary to rule 3.2-6 of the *BC Code*. The lawyer also directed an articled student to provide the client independent legal advice with respect to the document, contrary to Law Society Rule 2-60 and rule 6.2-2 of the *BC Code*. The client refused to sign the document at first but did so as the client felt pressured. The lawyer asked the articled student to write a letter to the Law Society stating that the client had signed the document of her own free will. After the conveyance completed, the client complained about the lawyer's conduct related to the document. In the course of the investigation of the complaints, it was also discovered that the lawyer represented both the buyer and seller in the conveyance transaction without obtaining written consent from the parties, contrary to rule 3.4-1 and Appendix C of the *BC Code*. The lawyer said he was aware of the conflict of interest provisions, but failed to ensure he advised the clients in writing of their entitlement to seek independent legal advice, and he did not provide a written joint retainer.

A conduct review subcommittee stated that the protection of client confidentiality is a cornerstone of solicitor-client privilege and that the lawyer's breach of this confidentiality was a significant departure from what the Law Society expects of lawyers. In discussions with the

lawyer, he continued to demonstrate a lack of clear understanding of his overriding duty of loyalty to his client. He appeared to show a pattern of preferring his own self-interest over his duty to his client.

The lawyer acknowledged that he was familiar with rule 3.2-6 that prohibited him from inducing someone to withdraw a complaint. However, he did not think that his conduct violated that rule. The subcommittee observed that his explanations were not credible in the face of the contemporaneous documents. The subcommittee discussed with the lawyer that an attempt to obstruct a Law Society investigation by negotiating the withdrawal of a complaint has been found to constitute professional misconduct. Directing his articled student to provide independent legal advice to his own client with respect to a Law Society complaint related specifically to him was self-serving and contrary to rule 6.2-2 of the *BC Code* and Law Society Rule 2-60. The subcommittee emphasized to the lawyer that his direction to his articled student reflected both a lack of judgment and poor understanding of his role as a principal. It was also an inappropriate use of his position of authority in pressuring her to do something that she was reluctant to do.

The subcommittee expressed concern about the lawyer's lack of candour and acknowledgement and appreciation of his conduct. The subcommittee encouraged the lawyer to undertake a course of self-study to re-familiarize himself with the Rules and the *BC Code*, and take a general ethics course. (CR 2016-28)

FAILURE TO REMIT GST AND PST AND FAILURE TO REPORT UNSATISFIED JUDGMENTS

Over a lengthy period of time, a lawyer collected but failed to remit GST, PST and statutory withholdings, contrary to rule 7.1-2 of the *Code of Professional Conduct for British Columbia*. The lawyer also failed to report to the executive director a Canada Revenue Agency requirement to pay for unpaid GST, contrary to Law Society Rule 3-50, and incorrectly certified in annual trust reports that her GST, PST and other statutory withholdings were paid in full and on time.

A conduct review subcommittee advised the lawyer that her conduct was inappropriate because lawyers are required and expected to fulfill their financial obligations. Lawyers are often entrusted with trust monies and other important fiduciary duties, and the failure to meet financial obligations raises concerns about the lawyer's ability to handle funds generally. The subcommittee discussed that the taking of monies that were collected for a specific purpose and using those monies for personal purposes is a serious breach of a lawyer's duties. Pursuant to rule 7.1-2 of the *BC Code*, a lawyer must promptly meet financial obligations in relation to their practice. A lawyer against whom a monetary judgment is entered is required to notify the executive director of the Law Society pursuant to Law Society Rule 3-50, and this rule applies to any requirement to pay pursuant to statute. The subcommittee also noted that the lawyer's misstatements on her trust reports were concerning, as it is critical that lawyers be honest and forthright in dealing with the Law Society. The Law Society's ability to govern the profession relies on lawyers being candid, honest and diligent in responding to Law Society inquiries.

The lawyer accepted responsibility for the conduct. She explained that her computers were stolen in 2014, which caused problems in managing her business affairs. She also explained that her family had gone through financial difficulties and acknowledged using GST monies to pay personal household expenses. The lawyer was a sole practitioner for the relevant time period. She had difficulties managing the business aspects of her practice and has taken steps to deal with her personal and professional debts, including entering into a garnishing agreement with the government, no longer operating a trust account, and taking a position with a firm that will manage all her billings and assist her with GST and PST remittances. (CR 2016-29)

FACILITATING BREACH OF COURT ORDER

A lawyer facilitated her client acting contrary to a court order made in family law proceedings by registering a law firm mortgage encumbering title to the matrimonial home, contrary to rules 2.13, 2.2 and 5.1-2 of the *Code of Professional Conduct for British Columbia*. The court order prohibited the parties from disposing of or encumbering family assets without the written consent of the parties or a further court order. The lawyer admitted to a conduct review subcommittee that her understanding of the definition of "encumbrance" was incorrect. She originally understood that a law firm mortgage preserved a potential future right and, as such, was not an encumbrance. She now understands that this was an incorrect interpretation.

The subcommittee advised the lawyer that her conduct was inappropriate because she is an officer of the court and, as such, owes a duty to maintain the integrity of the legal system. Her conduct fell below that which is expected of lawyers. The lawyer acknowledged her mistake and explained the steps she had taken to ensure it will not occur again. While it is unlikely that she will avail herself of a law firm mortgage in the future to secure her fees, if she does, she will first ascertain whether a court order prohibiting such a mortgage exists, and then take steps to either obtain the written consent of the opposing party or their counsel or apply to the court for an order allowing the law firm mortgage to proceed. The lawyer told the subcommittee that she regularly seeks advice from more senior family practitioners and the Law Society. She also calls upon lawyers experienced in other areas of law for assistance when needed. If she has any doubt whatsoever about her conduct, she will report herself to the Law Society. (CR 2016-30)

BREACH OF TRUST ACCOUNTING RULES AND FILE SECURITY

A compliance audit of a lawyer's practice revealed the lawyer had:

1. authorized the transfer of three small trust balances to his firm's general account without taking proper steps to ensure that he was entitled to the funds and without delivering bills to the clients, in breach of Law Society Rules 3-64 and 3-65 and s. 69 of the *Legal Profession Act*; and
2. failed to properly account to clients for trust funds and failed to

continued on page 19

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Susan Margaret Ben-Oliel
- Kevin Alexander McLean
- Ian David Reith
- Charles Louis Albas
- Peter Krogh Jensen

For the full text of discipline decisions, visit the [Hearing decisions](#) section of the Law Society website.

SUSAN MARGARET BEN-OLIEL

Vancouver, BC

Called to the Bar: September 2, 1994

Citation issued: January 19, 2016

Discipline hearing and order: June 9, 2016

Panel: Lynal Doerksen, Chair, Dennis Day and Carol Hickman, QC

Written decision issued: September 2, 2016 ([2016 LSBC 31](#))

Counsel: Carolyn S. Gulabsingh for the Law Society; Robert Cooper, QC for Susan Margaret Ben-Oliel

FACTS

On October 30, 2015, the Law Society received a complaint from a client of Susan Margaret Ben-Oliel. The Law Society advised Ben-Oliel of the complaint and asked her to reply with any information or explanation pertinent to the complaint. After several attempts over several weeks by the Law Society investigator to contact her, Ben-Oliel contacted the Law Society and requested more time to respond to the complaint. She was granted more time but did not provide a response by the extended deadline and had not responded by the time of the hearing.

DETERMINATION

The hearing panel was satisfied that there had been a persistent failure by Ben-Oliel to respond to Law Society communications and therefore found that Ben-Oliel has committed professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Ben-Oliel:

1. pay a fine of \$3,500;
2. pay costs of \$1,272.93; and
3. provide a complete and substantive response to the Law Society's inquiries in this case by June 30, 2016.

Citation issued: July 20, 2016

Discipline hearing: September 23, 2016

Panel: Phil Riddell, Chair,Carolynn Ryan and Peter Warner, QC

Decision issued: October 4, 2016 ([2016 LSBC 35](#))

Counsel: Carolyn Gulabsingh for the Law Society; no one appearing on behalf of Susan Margaret Ben-Oliel

FACTS

On June 9, 2016, a different hearing panel determined that Susan Margaret Ben-Oliel had persistently failed to respond to Law Society communications and had committed professional misconduct. The panel ordered that Ben-Oliel "provide a complete and substantive response to" the Law Society's inquiries by June 30, 2016 ([2016 LSBC 31](#)).

Ben-Oliel failed to comply with the order and provided no explanation for the failure to comply.

DETERMINATION

Ben-Oliel's conduct in failing to comply with the panel's order constitutes professional misconduct.

DISCIPLINARY ACTION

The hearing panel ordered that Ben-Oliel:

1. be suspended for two months, consecutive to any suspension she has already been ordered to serve. If, at that time, she has not complied with the order of June 9, 2016, she will remain suspended until she does comply; and
2. pay costs in the amount of \$1,258.09.

Citation issued: August 18, 2016

Discipline hearing: October 21, 2016

Panel: Thomas Fellhauer, Chair, Paula Cayley and David Layton

Decision issued: November 23, 2016 ([2016 LSBC 40](#))

Counsel: Carolyn Gulabsingh for the Law Society; no one appearing on behalf of Susan Margaret Ben-Oliel

FACTS

The Law Society received a complaint from one of Susan Margaret Ben-Oliel's clients on April 12, 2016 regarding her repeated failure to respond to the client's inquiries.

The Law Society sent letters and emails to Ben-Oliel to request more information. She did not respond to the request by the deadlines, and a citation was issued on August 18, 2016.

On September 8, 2016, Ben-Oliel sent an email to the Law Society, in which she apologized for not addressing outstanding matters with

the Law Society and stated she was dealing with a number of personal challenges. At the time of the hearing, she had still not responded to the Law Society's requests for information.

DETERMINATION

Ben-Oliel did not attend the hearing, and the hearing proceeded in her absence. The panel found that the unexplained failure of Ben-Oliel to reply to the Law Society's letters and the lack of a satisfactory excuse for not responding constitutes a marked departure from the standard expected of lawyers and amounts to professional misconduct.

DISCIPLINARY ACTION

The hearing panel ordered that Ben-Oliel:

1. be suspended for four months, consecutive to any suspension she has already been ordered to serve. If she continues to fail to respond, the suspension will endure until she provides a complete and substantive response to the Law Society's requests; and
2. pay costs of \$2,494.34.

KEVIN ALEXANDER MCLEAN

Vancouver, BC

Called to the bar: August 27, 2010

Not in good standing: January 1, 2015

Ceased membership: April 10, 2015

Disbarred: June 29, 2015

Application to dismiss the review: July 15, 2016

President's designate: Dean Lawton

Decision issued: September 27, 2016 ([2016 LSBC 33](#))

Counsel: Geoffrey Gomery, QC for the Law Society; no one appearing on behalf of Kevin Alexander McLean

BACKGROUND

A hearing panel determined that Kevin Alexander McLean had committed professional misconduct in respect of several allegations arising from his failure to cooperate with the Law Society on investigations into his conduct ([2015 LSBC 09](#)).

At a hearing into disciplinary action at which the Law Society sought a finding of ungovernability, the panel considered McLean's extensive and serious professional conduct record, which consisted of numerous citations and a suspension. McLean demonstrated a persistent and wanton disregard for the Law Society's regulatory process. The panel determined that McLean was ungovernable by the Law Society and ordered that he be disbarred ([2015 LSBC 30](#); [Fall 2015 discipline digest](#)).

Following the decision on disciplinary action, on July 27, 2015, McLean delivered a notice of review. He subsequently took no steps to

advance the review proceeding.

A pre-review conference was conducted. McLean did not attend and no one appeared on his behalf.

Counsel for the Law Society addressed a letter dated July 15, 2016 to the president of the Law Society and to McLean applying for an order dismissing the review. The president named a designate to make a determination on the dismissal application.

DECISION ON APPLICATION TO DISMISS THE REVIEW

The president's designate found that McLean's failure to take any steps in 14 months amounted to inordinate delay given other facts in the case, including his failure to attend both the hearing of the citation and the hearing on disciplinary action following the findings of professional misconduct against him, and his failure to attend the pre-review conference.

The president's designate granted the dismissal application, and the review was dismissed.

IAN DAVID REITH

Whistler, BC

Called to the bar: May 19, 1989

Application for a stay of an order to pay a fine: August 30 and September 23, 2016 submissions

Decision issued: September 30, 2016 ([2016 LSBC 34](#))

President's designate: Herman Van Ommen, QC

Counsel: Mark Bussanich for the Law Society; Ian David Reith on his own behalf

BACKGROUND

Ian David Reith admitted, and a hearing panel accepted, that he had committed professional misconduct by failing to provide a quality of service that would be expected of a competent lawyer. The panel ordered Reith to pay a fine of \$7,500 by November 30, 2016 and costs of \$5,636.25 ([2016 LSBC 19](#); [Fall 2016 discipline digest](#)).

Reith filed a notice of review and applied for a stay of the payment of the fine.

DECISION ON APPLICATION FOR STAY

A three-part test as set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, had to be satisfied, namely:

- the review must not be frivolous or vexatious;
- the applicant must show that she will suffer irreparable harm if the stay is not granted; and
- the granting of the stay must not put the public at risk.

The Law Society conceded that the review sought was neither vexatious nor frivolous, but there was no evidence that not granting

the stay would cause irreparable harm. Although it was not strictly necessary to consider the balance of convenience, the president's designate noted that, in the absence of irreparable harm, there is a public interest in not deferring discipline.

The application for a stay was refused.

Reith has withdrawn his application for a review of the hearing panel's decision.

CHARLES LOUIS ALBAS

Penticton, BC

Called to the bar: May 14, 1976

Ceased membership for non-payment of fees: January 1, 2016

Discipline hearing: February 17 and October 4, 2016

Panel: Martin Finch, QC, Chair, Dan Goodleaf and Bruce LeRose, QC

Decisions issued: May 30 (2016 LSBC 18) and October 31, 2016 (2016 LSBC 36)

Counsel: Kieron Grady for the Law Society; no one appearing for Charles Louis Albas (facts and determination); Mark Bussanich for the Law Society; Albas appearing on his own behalf (disciplinary action)

FACTS

In October 2005 Charles Louis Albas arranged with T Ltd. to borrow \$485,000 through a numbered company owned by Albas, to finance the subdivision of a property in Langley. At the time, the principal of T Ltd. believed Albas had already bought the property through his numbered company and needed the money to finance the subdivision.

In 2006 Albas needed more money to complete the subdivision, and he obtained a loan, through his numbered company, in the amount of \$300,000 from AV and JV.

In 2008 T Ltd. filed a petition in foreclosure against Albas, his numbered company, AV and JV and two other respondents. An order of foreclosure was granted, including a judgment in favour of T Ltd. against Albas and his numbered company for \$506,373.93.

In March 2009 AV and JV were granted conduct of sale as second mortgagee, and through their counsel, JJ, they filed an application for an order approving a sale of the property at a price of \$495,000.

Albas contacted NA, who had been involved in earlier attempts to sell the property, saying unless NA brought forward a buyer at a better price, the property was likely to be sold at a loss.

NA faxed Albas an offer from RS dated August 20, 2009, at a price of \$950,000. Albas noted that the offer was not in a form that could be approved by the court, so he made some notations and faxed it back to NA.

On August 21, 2009, Albas filed a response opposing AV and JV's application for an order approving the sale. Early in the morning of August 27, the date set for the hearing of the application, Albas

received an offer for the sale of the property for \$950,000 to RS, through RS's nominee corporation, a division of M Ltd. Albas filed an application for an order approving the RS offer, and the court approved the offer.

That same day, Albas ordered a company search on M Ltd. because he had been unable to reach RS and he wanted to make sure the offer was real. He found that M Ltd. had been dissolved on April 9, 2007 for failure to make required filings. Albas did not disclose the result of the M Ltd. corporate search to any other parties in the T Ltd. foreclosure and took no steps to return the matter to court or to advise the court of the result of the company search.

The RS offer that had been approved by the court required a deposit of \$20,000 within 72 hours of acceptance, and although that deposit was never paid, Albas continued to maintain that the sale to RS would close.

On December 18, 2009, AV and JV initiated foreclosure proceedings against Albas and his numbered company, and on January 28, 2010 an order was pronounced, including judgment against Albas and his numbered company in the amount of \$402,698.92.

On January 28, 2010, conduct of sale was granted to T Ltd. in the T Ltd. foreclosure, and on April 19, 2012, on the application of T Ltd., the court approved the sale of the property at a price of \$585,000. The sale completed, leaving a shortfall of over \$100,000 on the T Ltd. debt.

On November 15, 2012, a certificate of costs was entered in the T Ltd. foreclosure against Albas and his numbered company for \$16,739.15.

Albas failed to satisfy the judgments ordered against him pursuant to the August 28, 2008 and January 28, 2010 foreclosure orders and failed to tell the Law Society how he proposed to satisfy such judgments.

Albas further failed to satisfy the certificate of costs and failed to notify the Law Society of the circumstances of the unsatisfied monetary judgments against him and his proposal for satisfying them.

DETERMINATION

The panel found Albas guilty of professional misconduct with respect to all eight allegations in the citation, including:

- two counts of borrowing money from clients;
- two counts of providing legal services to clients when he had a direct or indirect financial interest in the subject matter of the legal services;
- failing to disclose material facts in a notice of motion and supporting affidavit;
- failing to disclose material facts and correct the record concerning an application in foreclosure proceedings;
- misleading opposing counsel; and
- failing to notify the Law Society of three unsatisfied judgments.

DISCIPLINARY ACTION

In reaching its decision, the panel considered that lawyers must know that borrowing money from a client fundamentally alters the solicitor-client relationship. In this case, Albas took advantage of his special relationship with these clients as their lawyer. Trust is the very foundation of a solicitor-client relationship and Albas's professional misconduct in this case breached that trust.

The hearing panel ordered that Albas:

1. be suspended for four months; and
2. pay costs of \$5,706.10.

PETER KROGH JENSEN

Vancouver, BC

Called to the Bar: July 10, 1981

Bencher review: March 31, 2016

Benchers: Gregory Petrisor, Chair, Lynal Doerksen, J.S. (Woody) Hayes, Jamie Maclaren, Lee Ongman, Elizabeth Rowbotham and Sarah Westwood

Decision issued: November 4, 2016 (2016 LSBC 37)

Counsel: Craig Dennis, QC for the Law Society; H.C. Ritchie Clark, QC for Peter Krogh Jensen

BACKGROUND

In its decision of March 14, 2014, a hearing panel concluded that Peter Krogh Jensen had committed professional misconduct by failing to state that he did not represent the interests of two individuals when one of those individuals tendered to Jensen's firm a US\$200,000 bank draft to purchase shares of a company from another individual or a related company, when that other individual was Jensen's client. On

April 24, 2015, the panel reprimanded Jensen and ordered him to pay a fine of \$2,000 and costs of \$30,000 (facts and determination: [2014 LSBC 14](#); disciplinary action: [2015 LSBC 10](#); discipline digest: [Summer 2015](#)).

Jensen sought a review of the hearing panel's decisions.

DECISION OF THE BENCHER REVIEW PANEL

The review panel considered whether the hearing panel erred by interpreting the Rules (as they were at the relevant time) to impose a duty on Jensen to advise an unrepresented party to obtain independent legal advice, and whether the panel erred in finding that credibility was not an issue.

Jensen submitted that credibility was an issue and that the testimony considered by the panel supports a scenario in which two sophisticated business people saw an opportunity for a quick profit by investing in a share deal. They were fully aware that Jensen was the lawyer for the person who had introduced the complainants to the deal and was not protecting their interest.

The Law Society submitted that the panel found one of the complainants to be an unsophisticated and inexperienced business person who, with her somewhat inexperienced husband, attended at a seasoned lawyer's office to purchase shares in a company owned by one of the lawyer's clients. To complete this transaction, the wife tried to provide the lawyer with \$200,000 to hold and protect in his trust account until such time as she received the shares they were anxious to purchase.

The Bencher review panel found that, although it would have been better if Jensen had advised the complainants to obtain independent legal advice, the evidence is insufficient to make a finding of professional misconduct.

The review panel ordered that the decisions of the hearing panel be overturned and the citation issued August 25, 2011 be dismissed. ❖

Conduct reviews ... from page 15

review supporting documents before he signed trust cheques to remove funds from trust, in breach of Law Society Rule 3-54.

The matter was referred to the Professional Conduct department for investigation, which further revealed that the lawyer failed to properly secure his records and failed to report to the executive director a loss of custody and control of his records, in breach of Law Society Rule 10-4.

The lawyer transferred the residual balance of trust funds to his general account after writing to the clients seeking instructions and

receiving no response. He did not send bills to the impacted clients nor properly account to the three clients for the trust funds. He failed to adequately review supporting documents before authorizing the transfers from trust. The lawyer stored closed client files in a locked equipment storage shed located in a public park. The lawyer's explanation for the lack of security for file storage was that, initially, he had the only key. The lawyer admitted to a conduct review subcommittee that he acted improperly and explained steps he had taken to properly secure his files and to alter his accounting systems to avoid similar errors in future. The subcommittee explained to the lawyer the importance of trust rules and the need to attend to accounting details. (CR 2016-31) ❖

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The Law Society
of British Columbia



845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9

Telephone 604.669.2533 | Facsimile 604.669.5232

Toll-free 1.800.903.5300 | TTY 604.443.5700

lawsociety.bc.ca

Lawyers Insurance Fund

Telephone 604.682.8911 | Facsimile 604.682.5842

