

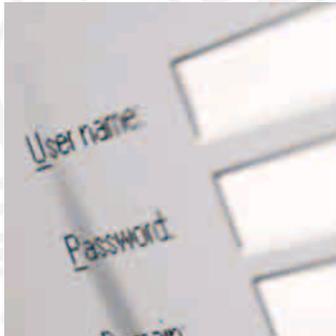


The Law Society
of British Columbia



Benchers' Bulletin

A publication of the Law Society of British Columbia
2005: No. 5 November-December



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President's View

Benchers' Bulletin

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

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

Additional subscriptions to Law Society newsletters may be ordered at a cost of \$50.00 (plus GST) per year by contacting the subscriptions assistant. To review current and archived issues of the *Bulletin* online, please see "Publications & Forms / Newsletters" at www.lawsociety.bc.ca.

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A few things I've been meaning to tell you

by Ralston S. Alexander, QC

By the time this gets to your desk, my term as your President will be done. The year has passed with incredible speed and, in many ways, it seems like a year is not a long enough term in which to get it all done. It has been a terrific year for me, and many of the goals and objectives that I set for myself at the beginning of the year have in fact been accomplished.

I particularly enjoyed the times I spent in meetings with county bar associations. The frank and free exchange of views and information allowed me to develop a greater understanding of the membership's take on the issues and initiatives of concern. I see it as an important component of the work of the President to get out and to meet the members on their home turf. I encourage my successors to make every effort to attend county bars when asked — the paybacks are significant.

I must express my considerable appreciation for the amazing help and support that I have received from both the Benchers and the staff of the Law Society. The Benchers have worked tirelessly in pursuing the objectives I wished them to adopt. As I indicated in my initial column in February, the Benchers are the most dedicated, hard-working group of volunteers with whom I have ever had the pleasure to work. During this year, the Law Society staff, with strong leadership from our new CEO, Tim McGee, have moved mountains to deliver on projects and promises that were identified by the Benchers for their attention.

A new trust assurance program has been planned, to bring a fresh and significantly superior approach to the fulfilment of our fiduciary duties in management of trust funds. Watch for details on this program in early 2006 and a full roll-out in 2007. Under that trust assurance regime, we will be

doing things differently — and more efficiently and effectively. I am proud to have played a small part in setting that new direction and in finding an appropriate and equitable method for financing the new initiatives.

There are some tasks undone. I will highlight a few here, with the hope that my successors will make some room on their agenda for these important concerns.

The decision by the Benchers of the day (circa 1992) to reduce the term limits for Benchers from the traditional six terms (12 years) to four terms (eight years) went too far. It is probable that 12 years was too long for all but the most dedicated, and there were strong pressures at the time both to reduce the time necessary to qualify as a Life Bencher and to ensure turnover at the Benchers table. However, some unintended consequences of the eight-year solution have emerged. The group of Benchers sitting in January of 2006 will have, on average, slightly more than two years experience in the job. With respect, that is not nearly enough. A broad consensus exists among Benchers that, to be most effective in their role, there is generally a learning curve and settling-in period of a couple of years. As a result, I am of the view that we will greatly enhance our effectiveness as Benchers if we extend the permitted number of terms of office to take better advantage of the clear benefits that experience brings.

Another unintended outcome is that, because Benchers now typically move onto the President's ladder earlier, some Presidents are only serving a total of seven years before their mandatory retirement as provided in the Law Society Rules. This has the effect of removing from the table some of the most senior Benchers earlier than is thought to be appropriate — at least in some cases. Allowing longer terms



would allow those Benchers seeking the “ladder” some additional time at the Benchers table before making that commitment.

In 2003 the Benchers sought, by referendum, the approval of the membership to expand the maximum service to 10 years (five terms of two years each). For reasons that are not at all clear, that initiative was approved by only a narrow majority of lawyers and failed to achieve the necessary two-thirds approval for a rule change. I encourage the Benchers to consider the issue anew and, if it becomes the subject of a new referendum vote, I urge the entire membership to be supportive of the proposed expansion. We have discussed three x three-year terms (nine years total) or alternatively a reconsideration of an additional two-year term for a total of five terms (10 years total).

Another issue that requires some work is the matter of “best practices” in the real estate work that lawyers do. The Conveyancing Practices Task Force, under the leadership of Bencher David Zacks, QC, will shortly be soliciting your feedback on this important subject.

I’ll say upfront that lawyers could risk losing, out of sheer neglect, the

privilege of looking after our clients in their real property transactions. This is because of the growing and dangerous trend to minimize the work that is done on their behalf. The reasons are complex, but include cost (profitability) considerations, large volume practices, fixed fees that include all disbursements and taxes and other competitive marketplace considerations.

There is now almost irresistible pressure to cut corners in real estate practice today. Like all such things, this is not a problem — until it’s a problem. But if a client loses an interest in property or the intended use of property, it can become a very big problem, very quickly. The public interest in low-cost conveyancing fees must be balanced against quality of outcome.

A lawyer who fails to allocate time for actual legal work becomes little more than a witness to the execution of documents. Yet our responsibility as lawyers is to consider the legal consequences for our clients of each contemplated transaction, including a proper review of the state of title and the existing encumbrances. If you are not charging enough to spend the time to handle the transaction carefully and properly, you are doing a disservice to your clients.

I am most disturbed to hear of lawyers who apparently think it is appropriate to give a client the opportunity to purchase a property without an examination of the charges registered on title. My understanding is that such lawyers actually tell a client in support of this approach that it “usually doesn’t matter.” No client could come to an informed decision this way, and this is not reflective of the professional approach demanded of our members.

Some Benchers are of the view that lawyers ought not to be doing real estate work at all if we are not able to do it properly and professionally. It is an easy argument to develop and to sell. Unless lawyers in real estate practice respond quickly and appropriately, we will lose that argument and, by default, risk our entitlement to continued participation in the field.

In closing this (my last) column, I’ll repeat what I have said elsewhere — that the presidency of the Law Society is the best volunteer job in the province. I mean that sincerely and I have been honoured to serve you in that role. I now wish all the best to your new President, Rob McDiarmid, QC, and his Vice-Presidents Anna Fung, QC and John Hunter, QC as they take up their responsibilities in 2006. ✧

CBC reporters honoured for legal journalism



CBC News reporters Scott Moore and Ian Hanomansing (left and left centre) proudly accept the 2005 Jack Webster Award for Excellence in Legal Journalism — a top honour in the media — for their news series “Crime on the Street” at the Jack Webster Awards Dinner held in Vancouver in November. The Law Society sponsors this award, which each year honours a journalist or team of journalists for a story about legal issues, the administration of justice or the legal profession in BC.

Marvin Storrow, QC and Tom Woods (also pictured) served as the independent judging panel.



2005 Bencher election results

BC lawyers have elected eight new Benchers for 2006-2007 and re-elected 14 Benchers (one by acclamation), following the November 15 province-wide Bencher elections.

New at the Benchers table

Joining the Law Society as Benchers in 2006 are **Rita C. Andreone**, **Leon Getz**,

QC and **Thelma O'Grady** (Vancouver), **Kathryn Berge**, QC and **Richard N. Stewart** (Victoria), **David M. Renwick** (Westminster), **Ronald Tindale** (Cariboo) and **Robert D. Punnett** (Prince Rupert).

Rita Andreone is a solicitor with Lawson Lundell LLP in Vancouver, whose practice focus is on corporate

reorganization and restructuring, project development, financings, mergers and acquisitions and government regulation. A member of the Law Society Discipline Committee since 2003, she has also served as a conduct review panellist and a PLTC contributor. Her community service includes time as a past director of the Italian

Your new Benchers



Rita C. Andreone

Lawson Lundell LLP
Vancouver

*Newly elected in Vancouver
County*



Robert D. Punnett

Punnett & Johnston
Prince Rupert

*Newly elected in Prince Rupert
County*



Kathryn Berge, QC

Berge, Hart & Cassels
Victoria

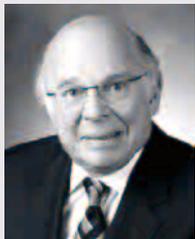
*Newly elected in Victoria
County*



David M. Renwick

Baker Newby LLP
Abbotsford

*Newly elected in Westminster
County*



Leon Getz, QC

Getz Prince Wells LLP
Vancouver

*Newly elected in Vancouver
County*



Richard N. Stewart

Cook Roberts LLP
Victoria

Newly elected in Victoria County



Thelma O'Grady

Bull, Houser & Tupper LLP
Vancouver

*Newly elected in Vancouver
County*



Ronald Tindale

Dick Byl Law Corporation
Prince George

Newly elected in Cariboo County



Chamber of Commerce in BC and Alberta.

Leon Getz, QC, of Getz Prince Wells LLP in Vancouver, is a corporate and securities lawyer and an arbitrator in labour-management and commercial disputes. He has served as a volunteer practice reviewer, a member of the Law Society Planning Committee, a CLE speaker and a member of the advisory committee to the BC Securities Commission. He has served on the board of the Vancouver Symphony Society, the Western Canada Society to Access Justice, the Blackbird Theatrical Society, Canadian Friends of the Hebrew University and the Canadian Jewish Congress (Pacific Region).

Also in Vancouver, with Bull, Housser & Tupper LLP, Thelma O'Grady is the firm's Manager of Professional Development. Complementing her years of practice and work experience in continuing legal education, she has also been a volunteer on the Education Committee of the CBABC Women Lawyers Forum, on the CBA Equality Committee and on the Law Society Lawyer Education Task Force. She is a founder of Vancouver's Professional Development Network, a member of the Professional Development consortium and an active volunteer for local school and community programs.

One of the two new Benchers in Victoria, Kathryn Berge, QC of Berge, Hart & Cassels, practises collaborative family law and acts as mediator and an advocate in the fields of family law, wills and estates and general civil litigation. Her extensive professional commitments include service as a director of the Legal Services Society, an elected member of the CBA Provincial Council and a member of many CBA committees and sections, several of which she has chaired. She has been a member of the ADR Task Force consultation, the CBA Liaison to the Law Society Equity and Diversity Committee, a member of practice advisory panels, a PLTC and CBA section

speaker and an active community volunteer.

Richard Stewart, also of Victoria, practises family law with Cook Roberts LLP in Victoria. A member of the Law Society Credentials Committee in 2005, he has also served on the Audit Committee. He is a former President of the Victoria Family Law Subsection and of the Victoria Bar Association, and he has also been a moot advisor for the University of Victoria law school, a speaker and author for the CLE Society and a member of the originating group of the Victoria Collaborative Law Program.

New as a Bencher for Westminster County is David Renwick, a criminal and civil litigator with Baker Newby LLP in Abbotsford. Mr. Renwick has served as a member of the Law Society Special Compensation Fund Committee and as President of both the Chilliwack and District Bar Association and the Fraser Valley Bar Association. He has also been director of the Chilliwack Chamber of Commerce, Chilliwack Arts Council, Chilliwack YMCA/YWCA and Abbotsford Chamber of Commerce.

Ronald Tindale, whose practice focuses on criminal defence and civil litigation, will join re-elected Bencher Bill

Jackson in representing Cariboo. A barrister with Dick Byl Law Corporation in Prince George, Mr. Tindale is a past Vice-President of the Prince George Bar Association, a lecturer for Provincial Court judges in the area and a speaker for the Prince George Young Lawyers. He is a past board member of the Phoenix Transition Society.

The new Bencher for Prince Rupert, Robert Punnett, practises with Punnett & Johnston. He has been on the CBABC Provincial Council and the board of the Trial Lawyers Association of BC. He has also been a director and President of the Museum of Northern British Columbia, secretary of the Prince Rupert Band Parents Association and a coach of youth soccer in his community.

President Ralston Alexander, QC has offered his congratulations to those elected and re-elected as Benchers and to all those who stood for election. "It takes very committed people to offer up their time in any form of public service," he said. "I'm happy to see that so many lawyers were willing to come forward as candidates for

continued on page 6

Westminster by-election underway

Following the appointment of Gregory Rideout as a judge of the Provincial Court, there is now a vacancy for Bencher in the County of Westminster (District No. 4). A by-election has been called in that district for January 24, 2006.

Members eligible to vote in Westminster County can expect to receive ballot packages in early January. In addition to a basic listing of each candidate in the ballot package, lawyers will be invited to visit the Law Society website to read full biographies.

The newly elected Bencher will join Carol Hickman and David Renwick in representing Westminster and will begin serving immediately on election through to December 31, 2007.

Bencher election ... from page 5

Bencher and to demonstrate the importance they place in the work of this profession."

Benchers who continue in service

Under the Law Society Rules, the Benchers who were previously elected by the members to serve as President, First Vice-President and Second

Vice-President continue as Benchers for their respective districts by virtue of their office. In 2006 those Benchers are:

- Robert W. McDiarmid, QC (President and Bencher for Kamloops)
- Anna K. Fung, QC (First Vice-President and Bencher for Vancouver)
- John J.L. Hunter, QC (Second Vice-President and Bencher for Vancouver).

Life Benchers

With the completion of their terms as Bencher at the end of the year, Ralston Alexander, QC, Patricia Schmit, QC and Ross Tunnicliffe become Life Benchers of the Law Society.

For the record

Benchers elected for the 2006-2007 term are listed below. For full election results in each district, please visit the Law Society website at www.lawsociety.bc.ca. ♦

Benchers elected for 2006-2007

District No. 1 Vancouver

Rita C. Andreone
Lawson Lundell LLP
Elected

Joost Blom, QC
UBC Faculty of Law
Re-elected

Ian Donaldson, QC
Donaldson Jetté
Re-elected

Leon Getz, QC
Getz Prince Wells LLP
Elected

Gavin Hume, QC
Fasken Martineau DuMoulin LLP
Re-elected

Terence E. La Liberté, QC
La Liberté & Company
Re-elected

Thelma O'Grady
Bull, Housser & Tupper LLP
Elected

Gordon Turriff, QC
Stikeman Elliott LLP
Re-elected

Art Vertlieb, QC
Vertlieb Dosanjh
Re-elected

James D. Vilvang, QC
Richards Buell Sutton LLP
Re-elected

David A. Zacks, QC
Blake, Cassels & Graydon LLP
Re-elected

District No. 2 Victoria

Kathryn Berge, QC
Berge, Hart & Cassels
Elected

Richard N. Stewart
Cook Roberts LLP
Elected

District No. 3 Nanaimo

G. Glen Ridgway, QC
Ridgway & Company, Duncan
Re-elected by acclamation

District No. 4 Westminister

Carol W. Hickman
Quay Law Centre, New Westminster
Re-elected

David M. Renwick
Baker Newby LLP, Abbotsford
Elected

Greg Rideout
Rideout Riddell, Coquitlam
Re-elected*

District No. 5 Kootenay

Bruce A. LeRose
Thompson LeRose & Brown, Trail
Re-elected

District No. 6 Okanagan

Dirk J. Sigalet, QC
Sigalet & Co., Vernon
Re-elected

District No. 7 Cariboo

William F.M. Jackson
Crown Counsel, Dawson Creek
Re-elected

Ronald Stephen Tindale
Dick Byl Law Corporation, Prince George
Elected

District No. 8 Prince Rupert

Robert D. Punnett
Punnett & Johnston, Prince Rupert
Elected

* Following his re-election as a Bencher for Westminister District, Mr. Rideout was appointed a judge of the Provincial Court. Accordingly, he will not serve as a Bencher in 2006. A by-election will be held in Westminister to fill the vacancy.



Lay Benchers reappointed



The Lieutenant Governor in Council has announced that all five Lay Benchers of the Law Society — (pictured left to right) Patrick Nagle, Dr. Maelor Vallance, Patrick Kelly, Michael Falkins and June Preston — have been reappointed for the 2006-2007 Bencher term. There is one vacancy for Lay Bencher that remains to be filled.

Like elected lawyer Benchers, Lay Benchers are Law Society volunteers. They bring a public viewpoint to all work of the Society, in policy discussions before committees and task forces and at the Benchers table.

The President and the other Benchers extend their congratulations and best wishes to the Lay Benchers on their reappointment. ♦

LLP provisions revised

Limited liability partnership provisions of the *Partnership Act* and the *Legal Profession Act* have been changed, retroactive to January 17, 2005, by Bill 16, the *Miscellaneous Statutes Amendment Act* (No. 2) SBC 2005, c. 35.

First, the *Act* has clarified that a limited liability partnership is not exempt from the liability provisions of section 12 of the *Partnership Act* — that is, the LLP is liable for the actions of the firm's partners.

For law firm LLPs, there is a further

change. Section 84(1) of the *Legal Profession Act* has been amended to reflect that a lawyer's liability for his or her own professional negligence is not affected by the fact that the lawyer practises through a law corporation or a limited liability partnership. Prior to the amendment, the section failed to recognize any limitation on the liability of a lawyer who practises in an LLP, which was not the intent of the legislation.

Section 84(1), amendment italicized,

reads:

84 (1) The liability of a lawyer, carrying on the practice of law, for his or her own professional negligence is not affected by the fact that the lawyer is carrying on that practice

(a) as an employee, shareholder, officer, director or contractor of a law corporation or on its behalf, or

(b) through a limited liability partnership. ♦

Tell us what you'd like to see on our website

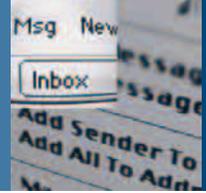


If you can find a few minutes for a survey, the Law Society would like your views on the Society's website.

The Law Society website was launched afresh in early 2005, with a new design and navigation and more extensive content, particularly in the areas of licensing, membership, regulation and insurance. A website is

always a work-in-progress, so we would like to know more about the information and features lawyers and members of the public would like to see on the site.

Please drop by, and drop us a line. To take the survey, visit www.lawsociety.bc.ca. ♦



Bench & Bar Dinner honours



OVER 300 JUDGES AND LAWYERS turned out to the November 17 Bench & Bar Dinner in Vancouver to pay tribute to three well-known BC lawyers. The BC Branch of the CBA presented the 2005 Georges A. Goyer, QC Memorial Award for Distinguished Service to **Darrell Roberts, QC** (left) for his many contributions to the profession, as counsel, author and

teacher. The same evening the CLE Society of BC presented its inaugural Leaders in Learning Award to **James P. Taylor, QC** (middle) and **John O.E. Lundell, QC** (right) for their outstanding contributions to continuing legal education.

Jim Taylor has made a great impact on the profession through his teaching,

his research and his writing. A respected member of the UBC Faculty of Law, he has played a pivotal role in the preparatory education of thousands of lawyers and also in their continuing legal education over the years. He is immediately recognized as founding co-author of *British Columbia Practice*, among his many writing credits.

John Lundell has been a volunteer for CLE since 1973, actively promoting a better understanding of company law in the profession. A longtime course speaker, author and editorial board member for business law publications, his contributions to the work of the CLE Society are unsurpassed. ♦

New pro bono opportunities for BC lawyers

Pro Bono Law of BC (PBLBC) has broadened the range of its services and developed flexible pro bono opportunities for BC lawyers through three new roster programs:

- **Family Law Program** — volunteer lawyers assist low-income individuals with family law issues involving divorce, separation, mediation, custody, access, guardianship and child support. John-Paul Boyd of Aaron Gordon & Daykin is the Program Coordinator.
- **Federal Court of Appeal Program** — volunteer lawyers assist low-income individuals appearing before the Federal Court of Appeal when it sits in Vancouver.
- **Judicial Review Program** — volunteer lawyers assist low-income people who seek judicial review of tribunal decisions by the BC

Supreme Court.

Angus M. Gunn, Jr. of Borden Ladner Gervais is the Program Coordinator for both the Federal Court of Appeal Program and the Judicial Review Program.

PBLBC's work on the Judicial Review Program is possible thanks to a two-year grant from the Law Foundation of BC to cover disbursements.

In each of these programs, PBLBC will accept screened client referrals from front-line pro bono organizations, such as the Western Canada Society to Access Justice and the Salvation Army BC Pro Bono Program. These client referrals will then be offered to volunteer lawyers on its roster according to their location, stated interest and capacity.

Volunteer lawyers can choose how and when they are able to provide pro bono assistance — from basic help on

single, discrete issues to full-service representation of a client. Program information sheets and referral forms are available on the PBLBC website at www.probononet.bc.ca.

PBLBC is planning other roster programs in early 2006 — including a Solicitors' Program for those willing to assist community organizations with discrete tasks, such as board governance, drafting of bylaws and policies or advising on particular employment and human rights matters. PBLBC invites senior practitioners to offer to serve as the volunteer Program Coordinator for the Solicitors' Program.

If you would like to volunteer for a roster program or would like more information about other pro bono opportunities, please contact Jamie Maclaren, PBLBC Executive Director, at 604 893-8932 or by email at jmaclaren@probononet.bc.ca. ♦



Practice Tips, by David J. Bilinsky, Practice Management Advisor

Fighting back against fraud — a dark and shifting landscape

If there is a dark underside to technology, it is that it provides new opportunities for fraudsters to ply their craft.

Everyone now hears more about online fraud, but consider the wide range of fraudulent schemes, some old and some new, that are perpetrated in Canada today. The few minutes you invest reading this overview could help save you or your firm from falling victim.

The April-May “Practice Tips” introduced the most common mortgage and real estate frauds, and a recent *Insurance Issues* further probed these issues. This column looks at more general types of fraud that can be directed at law firms and lawyers. For the purpose of simplicity, each type of fraud has been stripped down to its basic elements. Keep in mind that the perpetrators often embellish their schemes with realistic documentation, polished scripts and impressive presentations — and these are not always as easy to spot as you might think.

Some schemes take advantage of new technologies and the internet, and all take advantage of human decency. Fraudsters rely on the fact that most people treat other people as honest and trustworthy. They also rely on the fact that we all lead busy lives and may not report losses to the police (and that the police may not have the resources to investigate each report).

♪ *Dream lands of danger.*

Darkside pleasures

Bad behavior.

Dream lands of danger.

Darkside pleasures

At their best ... ♪

— Words and music by Seth Binzer, Bret Mazur,
recorded by Crazy Town

Phishing, pharming and spoofing fraud

Phishing and pharming are attempts to have you release account information to apparently legitimate account representatives via email and internet websites. Spoofing is much the same, but takes place via the telephone. There are various explanations put

forward to encourage you or your staff to cooperate. These fraud artists are seeking account numbers, PINs and passwords that allow them access to your financial accounts. Quite often the email and websites they use are very sophisticated and mimic the look and feel of your bank or other financial institution. The fraudsters rely on both psychology and technology to wrongfully obtain your account numbers, PINs and passwords.

Tips to avoid this fraud are as follows:

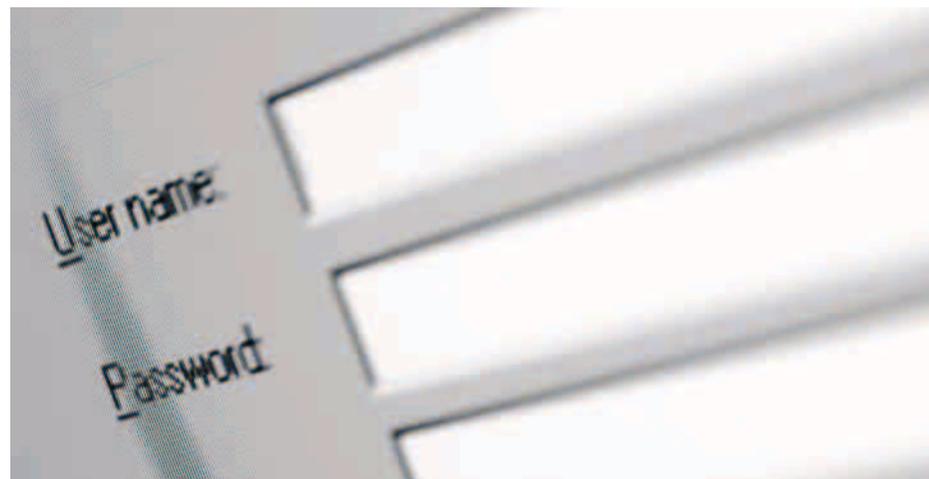
- Do not respond to email that appears to be from your bank or other entity with which you have an account. Legitimate businesses would not use email as a form of

communication regarding your account, PIN, password or other confidential information. If in doubt, call the entity involved (but don't use the telephone number or contact info in the email or website to which you have been directed). If you are responding to a telephone call, ask for the person's name, hang up and then call back at the number that you have in your system for this entity (not the one that the caller may have given you).

- Banks and other entities rarely, if ever, need to call you to verify your account information, PIN or password. In virtually all cases, it is customers who call their banks if they have forgotten passwords. Accordingly, treat all of these calls and emails with a very high degree of scepticism.

Advance fee fraud

Otherwise known as the Nigerian business scam, this particular fraud has been around for a long while and has attracted a fair bit of media focus. Nevertheless, the RCMP estimates that Canadians have lost \$30 million to this scam over the last 10 years.



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Fighting fraud ... from page 9

Typically this fraud contains the following elements:

- You receive an email purportedly from a Nigerian civil servant or businessman.
- The sender says he has access to a large amount of currency in Nigeria (various explanations are put forward as to how the funds came into his hands).
- The sender seeks your cooperation in using your law firm bank account (often your trust account) as the vehicle to receive the money in order to transfer it out of Nigeria.
- For your part, it is stated that you will receive a large percentage of the funds (often 15-30%).
- The sender requests information on your bank and bank account

and asks for you to forward an amount in order to meet expenses involved in transferring the money "out of Nigeria" and into your bank account.

- After sending the information and advance fee to the bank, you are either requested to send in further fees or you never hear from the sender again.
- These scams do not necessarily target lawyers but, when they do, there is often little legal service to be performed other than the stated requirement for your trust account to be the recipient of the funds.

Employee fraud

Employee fraud is estimated to account for 60-70% of business losses due to fraud. Technology may or may not be involved. When it is, it can be used to either implement the fraud or to conceal it. Unfortunately, this fraud

is carried out by those that you trust most. Types of fraud that fall into this area are:

- Embezzlement, where funds are stolen from the law firm and accounting entries are created in the financial system to cover up the theft
- Expense report fraud
- Ghost employees, where payments are made or continued to people who are not on the firm's payroll
- Kickbacks, where gifts or payments are made to employees in return for directing the firm's purchasing to a particular vendor or supplier
- Pilfering or stealing the firm's property.

Since there are so many different types of employee fraud, here is a list of

Services to members

Practice and ethics advice

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

Contact **Barbara Buchanan**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. All communications are strictly confidential, except in cases of trust fund shortages. **Tel:** 604 697-5816 or 1-800-903-5300 **Email:** advisor@lsbc.org.

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

Interlock Member Assistance Program – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society, and provided at no cost to individual BC lawyers and 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 cost to individual lawyers: **Tel:** 604 685-2171 or 1-888-685-2171.

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



warning signs:

- **Anonymous letters:** In many cases, letters advising you of fraud inside your organization may be simply unwarranted and prompted by motives that have nothing to do with an actual fraud; however, a law firm ignores these letters at its peril.
- **Lifestyle:** A discrepancy between an employee's lifestyle and his or her apparent income is cause for concern, particularly where a change has occurred suddenly without any obvious reason.
- **Absenteeism:** Paradoxically, the employee who never takes time off may not be a model employee at all, but may instead have a full-time job covering up an ongoing fraud and not wish to risk its discovery by someone else.
- **Low morale:** Unhappy staff are less likely to maintain your anti-fraud systems and procedures. Low morale may also lead to fraudsters rationalizing their activities and justifying in their own minds their fraud against you.
- **High staff turnover:** This could be a sign of low staff morale (see above) or could be a sign that honest employees do not agree with what they see happening in your organization and leave.

Systems that can be put in place to prevent employee fraud are:

- **Control systems:** Ensure that you have put into place systems that separate three key functions:
 - authorizing transactions
 - collecting or paying money
 - maintaining the financial records of the firm.
- **Separation of duties:** One employee should not have responsibility for both sides of an office function, such as preparing

cheques for payment and reconciliation of that bank account, or preparing payroll cheques and maintaining the payroll/employee record system.

- **Original documents:** Insist on having the original invoice available to the cheque signor at the same time he or she signs the cheque to pay that invoice. Have the cheque signor note in ink on the invoice his or her name and the date/time/cheque number used to pay that invoice or group of invoices. You can use a rubber stamp for this purpose that requires the signor to complete the information stamped on the original invoice before signing the payment cheque.
- **Budgeting:** If you prepare a detailed budget that forecasts both income and expenses, you can periodically compare your actual expenses to your budgeted items line by line and investigate any discrepancies.
- **Cash deposits:** Deposit all cash into the firm's bank accounts promptly and enter all cash transactions into a cash receipt book forthwith (note all requirements of the Law Society Rules).
- **Outside accounting:** Consider using a payroll service to look after your payroll accounting.
- **Outside reconciliations:** Periodically have someone different reconcile your bank statements (such as someone sent over by your accountants). Have a partner periodically pick up cancelled cheques from your bank and review them before handing them to your bookkeeper.
- **Outside reviews:** Consider having an annual "spot audit" by your accountants that occurs without any notice to the firm.
- **Supplies control:** Keep tabs on

your office stock, such as photocopy paper.

Prime bank fraud

This fraud goes by many names, such as prime rate guarantees, prime world bank debentures, prime bank letters of credit, secured trading programs or loan roll programs, but the central theme is the purchase of investment paper issued by prime banks that offer both low-risk and high rates of return to the purchaser. The investments can take the form of debentures, promissory notes, letters of credit, certificates or guarantees. The RCMP estimate that this type of fraud takes in tens of millions of dollars each year.

A fraudster may approach a lawyer, not necessarily to invest, but to accept funds for deposit from investors and to add an air of legitimacy to the transaction.

Typically, these frauds have these characteristics:

- There is an air of secrecy surrounding the transaction, combined with the threat of an investor being expelled or excluded from the transaction if he or she takes steps that would threaten this secrecy — such as independently investigating the bona fides of the deal. Confidentiality agreements may be requested.
- The documents themselves appear to be official and have wording typically found in legitimate financial instruments, which may or may not be consistent with the type of financial instrument being promoted. However, the vendors state that the documents are very complex and perhaps too technical for many investors to understand.
- There is often very little detail provided about the person(s) involved or the purposes for which the

continued on page 12

Fighting fraud ... from page 11

money is being raised, other than it is to be used for beneficial purposes.

- Relative to the risk, often stated to be near zero, excessive rates of return are offered (150% is not uncommon).
- There are typically no up-front fees to these transactions.
- The fraudsters target unsophisticated individuals seeking investments with above-average returns.

For more on prime bank schemes, see "When scamsters target lawyers" in the May-June 2003 *Benchers' Bulletin*.

Pyramid or ponzi schemes

A ponzi scheme is an investment that offers two things to an investor. The first is the promise of a high-rate of return in a short time period and the second is the opportunity to bring others into the scheme. In effect, investors build a pyramid where the new investors start at the bottom and receive returns after moving upwards.

An unsophisticated example of a ponzi scheme is email or chain letters involving the payment of money to the names at the top of the list in the communication, plus the requirement to add your name to the bottom of the list and then send the letter to X number of new people. Ponzi schemes eventually collapse as the recruitment of new investors diminishes.

A sophisticated ponzi scheme can be hidden behind an investment that is meant to disguise the pyramid nature of the investment.

Tips to avoid these schemes:

- Ponzi schemes may be dressed up within a product or service sales concept. Be sceptical if you are asked to purchase products or services at prices that do not reflect the value of the product or service

in the marketplace, on the expectation of a financial return down the line for participating and recruiting new members and thereby moving up the pyramid. (To be fair, there are legitimate product marketing businesses that resemble pyramid schemes.)

- These schemes are characterized by the fact that the majority of income generated by the scheme arises from the recruitment of people into the scheme and not from the sale of products or services.

Charity scams

Be cautious of calls requesting donations to charities and social organizations. Ways to prevent being taken in by frauds (and to ensure that your donations only go to legitimate organizations) are:

- Request information from the person making the pitch and state that you will call back after verifying the information.
- Be wary of those who appear in person at your organization seeking donations. Take down relevant details and state that you will call them back if you are inclined to make a donation.
- Verify the charity's tax exempt status and business licence.
- Call the stated charity directly and inquire if it has a promotion underway and, if so, obtain the details.
- Be suspicious of any stated urgency for the donation — legitimate organizations do not engage in pressure tactics.
- If possible, decide on your firm's charity program and contact your target charities directly and inquire how best to support their activities.

Telephone charge fraud

This fraud involves having to accept a collect call, which is typically (but not

exclusively) stated to be an emergency or police emergency. This is not a collect call at all, but rather triggers a large charge to your phone bill, such as being billed for a call that takes place from a pay phone to another country.

The police do not ask you to accept collect calls for emergencies. A way to prevent this is to ask the operator to provide the name of the caller and the caller's number, stating that you will call back instead. Often that will cause the caller to simply hang up.

Other telephone frauds involve a fraudster (usually through an email or website) having someone in your firm call or fax an off-shore number, typically in the Caribbean. In this way a large per-minute charge is levied against your telephone account. These numbers can be (but may not be restricted to) 809 or 900 telephone numbers. It is difficult to have these charges reversed once they are on your telephone bill.

Tips to avoid this fraud:

- Enticements to call the 809 or 900 numbers include having won a prize, product promotions, litigation, a death or injury or a vacation offer. If you do not recognize the company or the person(s) involved, check it out (with the Better Business Bureau, for example) prior to making the call. Simpler still, don't call back.
- The longer you are on the call, the higher the charges to your phone bill. If you find yourself on one of these calls, hang up once you realize the nature of the scheme to limit your exposure.
- Have an office policy not to place any 809 or 900 calls.
- Check out the area code on any unfamiliar number prior to placing the call. If it is to the Caribbean (and there are many new area codes for this area), do some further due diligence before returning the call. Area codes for North



America can be found at: www.bennetyee.org/ucsd-pages/area.html.

ATM loop

If you make any bank deposits or withdrawals at ATM machines, you could fall victim to this fraud. At its simplest, the perpetrator inserts a loop of VCR (magnetic) tape into the card slot on an ATM machine. When someone seeking to use the ATM inserts a bank card, the loop of magnetic tape prevents the machine from reading the bank card and it simply remains in the slot. At this point, the fraudster comes up and states that he or she has seen this before and you simply have to key in your PIN three times to get the machine to react. The fraudster then memorizes your PIN by watching over your shoulder.

When your bank card is not returned by the ATM, you eventually leave, and the fraudster pulls out the loop of tape and obtains your bank card. The

fraudster then takes the bank card to another ATM location that does not have security cameras, inserts the bank card, enters the PIN and withdraws money from your account.

Variations on this scenario now involve loop devices that are installed by the fraudster at the ATM locations that can read the magnetic strip and PIN, allowing the fraudster to duplicate your bank card and make a withdrawal from your bank account without your knowledge.

Ways to prevent this fraud:

- Exercise caution when using your bank card, particularly when there are strangers in close proximity.
- Talk to your bank about allowing only deposits by ATM to your firm general account (of course, your trust account must never be authorized for ATM withdrawals).
- Before using an ATM, look for signs of tampering. In particular,

do not use ATMs that do not have security camera surveillance.

- Hide your PIN from view by covering the keyboard with your other hand when you are keying in your PIN.

Telemarketing fraud

“Telemarketing fraud” can equally take place via the web, email or fax. The common element is to entice you to pay for goods and/or services that will never materialize. Examples are offers to receive photocopy or other office supplies on the cheap, services (such as to continue your domain name registration with a new registration service for an extended period) and the like.

Ways to prevent this fraud:

- Establish business relationships with proven business suppliers and resist unsolicited offers of cheap supplies from unknown companies.
- Ask for documentation from unknown vendors as well as references.
- Do not hesitate to call references prior to using a new supplier. Legitimate suppliers will not hesitate to provide valid references.
- Check with the BBB prior to using any new supplier.
- Resist any time pressure tactics in order to receive a discount.
- Recall that sophisticated fraudsters will have brochures and other documentation printed for distribution. Ensure that the business entity on the printed copy can be found listed with legitimate organizations (such as the Chamber of Commerce or City Hall business licence department).

By taking steps to protect ourselves against fraud, we can escape the bad behaviour of those who exist for darkside pleasures. ✧

Assurance Fund now offers greater protection to BC home buyers



Recent amendments to the *Land Title Act* provide greater certainty to BC home buyers who, through no fault of their own, become entangled in a fraudulent transfer. Although fraudulent land transactions are rare, section 25.1 of the *Land Title Act* now creates immediate certainty of land title for a person who has acquired a fee simple interest in a property in good faith and for valuable consideration although, unknown to that person, the transaction involved a forged transfer.

Lawyers will wish to be aware of this protection on behalf of their clients.

Prior to the amendment, if A forged a transfer of B's title to C and C was a completely innocent purchaser with no knowledge of the fraud, B would have been restored on title and C would be left with no remedy except against A.

After the amendment, which seeks to uphold the principle of immediate infeasibility of title and ensure public protection, C would keep the title acquired and B would be compensated by the Assurance Fund.

As lawyers know, the Assurance Fund has long provided compensation to individuals who are deprived of title to real property due to an error in the operation of the *Land Title Act* or the administration of the land title system under the Registrar's direction. With the most recent round of legislative amendments, this basic protection has been extended.

Previously it was necessary for a claimant to show that an administrative error had been caused solely by an

act of the Registrar, but now the concept of contributory negligence is recognized. If a claimant contributes to a loss caused by the Registrar, the liability is shared. The claimant accordingly bears his or her portion of the loss, but can claim against the Assurance Fund for the amount of the loss caused by the Registrar.

The *Land Title Act* changes came into effect as part of Bill 16, the *Miscellaneous Statutes Amendment Act (No. 2)*, SBC 2005, c.35, on November 24. On behalf of the Law Society, Su Forbes, QC, Director of the Lawyers Insurance Fund and Ron Usher, Policy Staff Lawyer, Practice Opportunities served on the task force behind these reforms. The Law Society has endorsed the reforms as a means of better protecting the public and enhancing public confidence in BC's respected land title system.

For more information, contact the Land Title and Survey Authority or visit online at www.ltsa.ca. ✧

Consumer protection now expected July 1, 2006

Mortgage discharges: within 30 days, for no more than \$75

A consumer protection reform that was expected on January 1 has been delayed until July 1, 2006.

Section 72(2) and (3) of the new *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 (Bill 2) will require financial institutions to make mortgage discharges within 30 days of repayment of a mortgage loan and for a maximum discharge fee of \$75, as prescribed by regulation.

Section 72(2) and (3) of the *Act* reads:

(2) The credit grantor must give to the borrower a discharge of the

mortgage loan, registrable under the *Land Title Act*, within 30 days after

(a) the whole amount of principal and interest owing under the mortgage loan has been repaid to the credit grantor, and

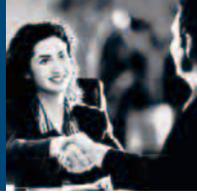
(b) if the mortgage loan is a revolving mortgage loan, the borrower has requested a registrable discharge of the mortgage loan from the credit grantor.

(3) A credit grantor must not

charge or accept any amount for or in relation to the provision to the borrower of a discharge of mortgage under subsection (2) that exceeds the maximum amount prescribed.

The Law Society supports the reform, having urged financial institutions previously to provide prompt and reliable discharge details and to deliver up discharges expeditiously.

For more on consumer protections under the legislation, see: www.qp.gov.bc.ca/statreg/stat/B/04003_01.htm. ✧



From the BC Supreme Court

Notices to the Profession: December 12, 2005, from Chief Justice Donald I. Brenner

Requests to appear back before a specific judge or master

Commencing January 1, 2006, the court will adopt a new procedure to deal with requests from counsel and self-represented litigants to appear back before a specific judge or master. This new procedure is being implemented to facilitate and standardize the process for the receipt of such requests.

After January 1, 2006, counsel or self-represented litigants making a request to appear back before a specific judge or master will be able to complete the form described in the following link: www.courts.gov.bc.ca/sc/requesttoappear.asp.

All parts of the form must be completed including the nature of the application, the reason why the

application must be heard by the specific judge or master, the position of the opposing counsel or self-represented litigants to the application, the last hearing date before the specific judge or master, and the mutually available dates for the appearance back before the specific judge or master.

The applicant is obliged to send a copy of the request by fax or ordinary mail to such counsel or self-represented litigants who do not have access to email.

To assist in the transition, this new practice will be optional until February 28, 2006. After that date it will become mandatory.

This notice to the profession replaces the notice to the profession issued by Chief Justice McEachern on June 27, 1988, which is hereby cancelled.

Matters within the scope of the commercial chambers mini-pilot project

The commercial chambers mini-pilot project includes within its scope matters involving:

1. the *Bankruptcy and Insolvency Act*;
2. the *Companies' Creditors Arrangement Act*;
3. the *Business Corporations Act* and the *Canada Business Corporations Act*;
4. the *Personal Property Security Act*;
5. the *Securities Act*;
6. the *Partnership Act*;
7. applications for injunctions in commercial matters; and

such other commercial matters as the Chief Justice may direct be heard in commercial chambers.

* * *

Lawyers can access BC Supreme Court notices to the profession online at www.courts.gov.bc.ca/sc. ♦

BC courts seek comments from the profession

Should court documents be searchable online?

For the past year, lawyers and members of the public have been able to search certain information on civil cases in BC Provincial Court and Supreme Court registry files and in BC Court of Appeal registry files. A search via Court Services Online will disclose a list of parties, filed documents and applications relating to a court file. As yet, there is no online access to the documents themselves. The question is: Should there be?

The BC Court of Appeal, BC Supreme Court and BC Provincial Court are seeking comments from the profession and the public on this issue through a consultation paper entitled *Electronic Access to Court Documents*, which is

available under "what's new" on the BC Courts website at www.courts.gov.bc.ca/ca.

The consultation paper provides an overview of these issues and links to a 2003 Canadian Judicial Council study. The Council identified as a major risk of electronic access to court documents "the relationship between two fundamental values: the right of the public to transparency in the administration of justice and the right of an individual to privacy."

The documents currently under consideration for access in BC through Court Services Online are listed in the consultation paper. These are initiating documents, pleadings, notices of

motion and orders—since these documents generally contain little personal information but provide information about the nature of a case, its progress and its disposition.

To review the current services offered by Court Services Online, visit <https://webapps.ag.gov.bc.ca/cso>.

Please send comments on the consultation paper by January 31, 2006 to:

Jennifer Jordan, Registrar
BC Court of Appeal
The Law Courts
800 Smithe Street
Vancouver, BC V6Z 2E1
Email: e-access.comments@courts.gov.bc.ca ♦

BC Court of Appeal practice directives

Citation of authorities, e-filing factums on appeal

The BC Court of Appeal has issued two new practice directives and a revised practice note:

- **Citation of authorities:** The Court has issued a practice directive for counsel who prepare factums respecting the citation of authorities in their materials;
- **Filing of electronic factums:**

Another directive requests that electronic versions of all factums be filed in both civil and criminal appeals and statements on sentencing, and sets out the procedures to be followed. An exception is made for unrepresented parties if the creation of an electronic version of a factum would be a hardship.

- **Leave to appeal:** A new practice note from the Court replaces an earlier notice of June 15, 2005 respecting procedures for filing a notice of appeal and application for leave to appeal.

These documents are available on the BC Courts website at www.courts.gov.bc.ca/ca. ✧

Threatening criminal proceedings or complaints

Lawyers should never threaten to make a criminal or regulatory complaint against another person as a way of obtaining an advantage for a client.

It is a breach of Chapter 4, Rule 2 of the *Professional Conduct Handbook* to threaten or advise another person to threaten to lay a criminal or quasi-criminal charge, or to make a complaint to a regulatory authority, for the collateral purpose of enforcing the payment of a civil claim or securing any other civil advantage for a client. It also is a breach of Chapter 11, Rule 15 to threaten to report another lawyer's past illegal or unprofessional conduct to the Law Society.

The Discipline Committee treats these breaches seriously. Over the past few years, lawyers who have made threats not only failed to secure an advantage for their clients, but in some cases found themselves the subject of a Law Society complaint, even leading to a conduct review or a citation. A few examples of threatening include:

- A lawyer saying he would report opposing counsel to the Law Society for breach of undertaking "if I do not receive the application and draft order for my approval, which we discussed";

- A lawyer threatening to report an opposing party to immigration authorities as a means of gaining a civil advantage for the lawyer's client;
- A lawyer advising a notary who had breached an undertaking to pay property taxes to provide proof of payment by a particular date or face a complaint to the notary's governing body.

It is not improper for a lawyer to simply inform another lawyer that certain conduct, or the conduct of the other lawyer's client, may amount to a breach of the *Handbook* or a criminal offence.

Moreover, the footnote to Chapter 11, Rule 15 says that a lawyer can forewarn another lawyer, when an illegality or a violation of a standard of professional responsibility contained in the *Handbook* has not yet occurred, that the other lawyer will be reported to the Law Society if he or she engages in that illegal or unprofessional conduct. But Rule 15 specifically prohibits a threat to report another lawyer for the latter's past conduct. This is because there is a risk that the threatening lawyer will use the threat, or the

other lawyer will perceive the threat being made, for the purpose of gaining an advantage for a client. The overriding concern is clearly stated in the footnote: "A lawyer must not use the Law Society's disciplinary machinery to coerce another lawyer into a course of conduct."

Often lawyers who breach these *Handbook* provisions may be unfamiliar with the scope of the rules, or do not consider how the language used in a letter or telephone conversation could reasonably be construed as a threat. This is especially true if threatening words were not used. But a lawyer needs to think carefully about whether any communication of an intent to make a complaint would pressure someone into some action. If it appears appropriate to report another person for an illegal act or a regulatory breach, the lawyer should simply make the report, not threaten to do so and not tie the report to any other issue.

If you have any questions about the rules, or about handling a particular situation, please contact Jack Olsen, Staff Lawyer – Ethics at the Law Society at tel. 604 443-5711 or by email to jjolsen@lsbc.org. ✧



Undertakings — accept with care, fulfil without exception

A number of lawyers have recently come before the Discipline Committee for failing to respect the sanctity of their undertakings — such as by trying to avoid responsibility for certain elements of those undertakings or failing to fulfil the undertakings promptly.

In one case, Lawyer 1 gave an undertaking to Lawyer 2 to pay out a financial charge and to provide Lawyer 2 with evidence of the payout within five business days of the completion date. Although Lawyer 2 pressed Lawyer 1 for evidence of the payout for three months, Lawyer 1 failed to provide evidence of compliance until the Law Society began an investigation. At that point, it was determined that Lawyer 1 had handled the payout in a timely manner, but failed to fulfil his reporting obligations to Lawyer 2. The Discipline Committee directed that Lawyer 1 attend a meeting with a Conduct Review Subcommittee to discuss this conduct.

This investigation is one of a number in which lawyers accepted the standard Canadian Bar Association real estate undertakings without properly considering and diarizing the obligations arising from those undertakings.

In another case, a citation was issued against a lawyer on the basis that unreasonable delay in performance of the undertaking amounted to a breach of the undertaking. The lawyer argued that delay was not a relevant factor in assessing the conduct since timely performance was not a specific term of the

undertaking and since the undertaking was ultimately fulfilled. The case came before the BC Court of Appeal: *The Law Society of British Columbia v. Heringa* 2004 BCCA 97. In reasons for judgment, Mr. Justice Hollinrake quoted with approval from the Law Society hearing panel decision concluding that Mr. Heringa's delay in that case amounted to a breach of undertaking:

The heart of the panel's reasoning is, in my opinion, found in these words:

[37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.

[38] The trust and confidence vested in lawyers' undertakings will be eroded in circumstances where a cavalier approach to the fulfilment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in

lawyers.

After a lawyer accepts an undertaking, it is not open to the lawyer to pick and choose which elements of the undertaking will be performed or to improperly delay the performance of the undertaking.

The Discipline Committee emphasizes that undertakings are critical to the proper conduct of legal work and to public confidence in the profession. As expressed on many occasions over the past few years, the events surrounding the Martin Wirick matter should not leave anyone in doubt about the need to perform an undertaking completely and in a timely manner.

The Discipline Committee also reminds the profession that the Law Society Rules now place greater accountability on all lawyers involved in real estate transactions to monitor and report instances where parties to a closing have not fulfilled their obligations in a timely manner. Rules 3-88 and 3-89 require a BC lawyer to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of any real property transaction. The rules also oblige a lawyer to report to the Law Society the failure of another lawyer or a notary to provide satisfactory evidence that he or she has filed a registrable discharge of mortgage as a pending application at the Land Title Office within that 60-day period. A lawyer has five business days to report. ♦

Family decisions come back online

Beginning January 1, 2006 family law decisions of the BC Supreme Court will once again be published on the BC Courts website at www.courts.gov.bc.ca.

Chief Justice Donald Brenner issued a notice to the profession on November

28.

The court had ceased internet publication of family decisions in September 2002, in an effort to protect the privacy of the parties in family law matters, unless the master or judge rendering the decision felt that it had value as a

precedent.

The court has decided to resume posting the judgments, effective January 1, as a result of concerns that lawyers and members of the public were having trouble accessing the law. ♦



New court protocol helps counter unauthorized practice

The Law Society and the Provincial Court have agreed on a protocol whereby judges can confirm that a person appearing as counsel is a practising member of the Law Society of BC or a member of another law society who is permitted to practise in BC. The protocol places the Provincial Court in a better position to verify the identity of those appearing as counsel, when that appears necessary, and to bring unauthorized practice to the attention of the Law Society.

The protocol, as adopted by the Benchers and the Court in October, reads:

Unauthorized Practice

When a Judge or JJP becomes aware of a person who is not a lawyer holding him or herself out to be a member of the Law Society of British Columbia or engaging in the unauthorized practice of law contrary to the *Legal Profession Act*, this may be the subject of an immediate complaint, either directly to the Law Society Unauthorized Practice Committee, or through the Administrative or Chief Judge if preferred. These complaints allow the Law Society to take action to protect the public from untrained, unregulated, and uninsured legal service providers.

Under s. 15(1)(e) of the *Legal Profession Act* and Rules 2-10.1 to 2-17.1 of the Law Society Rules and the National Mobility Protocol,

members of the law society of another Canadian jurisdiction may be entitled to provide legal services in British Columbia on a limited basis if they are practising members in good standing of that other law society. There is no requirement for such lawyers to confirm their attendance in British Columbia with the Law Society of British Columbia. However, the Law Society of British Columbia can confirm whether the lawyer is entitled to practise law as a visiting lawyer in British Columbia pursuant to the Rules.

Confirmation of whether a person is a practising member of the Law Society of British Columbia may be obtained by checking the Lawyer Look-up on the Law Society's website at www.lawsociety.bc.ca or by telephone at 604 669-2533. Confirmation of whether a person is a lawyer in another jurisdiction in Canada and entitled to practise law in British Columbia on a limited basis may be obtained by contacting the Unauthorized Practice Department of the Law Society of British Columbia by telephone at 604 669-2533 or by sending an email to: uap@lsbc.org.

[The protocol sets out the section 1 definition of "practice of law" of the Legal Profession Act as well as sections 15 and 85 of the Act.]

In referring a matter of

unauthorized practice or falsely holding out as a lawyer to the Law Society, the Judge or JJP may include with the complaint information regarding, or a copy of the transcript of, evidence given by the party, or the representative, as to the nature of their relationship and the amount of fees charged or paid, if any. They may also include copies of court documents prepared by the representative, together with any documents relevant to the representative holding out as a lawyer or engaging in the unauthorized practice of law. If there is a tape of any of the representations made, or of the evidence given, a copy may be provided to the Law Society with the complaint. This evidence is important for the Law Society to establish the breach of the *Legal Profession Act*.

This text is an addendum to a 2004 protocol respecting complaints by lawyers against judges or by judges against lawyers. The protocol is not intended to discourage complaints or to replace existing complaints processes — rather it recognizes that a judge, a JJP or a lawyer may benefit from advice or assistance in making a complaint, or in deciding whether it is appropriate to make a complaint.

The updated Provincial Court protocol is available in the Practice Support section of the Law Society website at www.lawsociety.bc.ca. ♦

Law Foundation secures new rate with CIBC

Law Foundation Chair Heather Raven has commended the Canadian Imperial Bank of Commerce for its commitment to pay a competitive rate of return on lawyers' pooled trust accounts.

As of October 1, 2005, under a new tiered rate agreement, CIBC will pay a net rate of return in the range of prime

less 2.7% on the current global balances in BC lawyers' pooled trust accounts.

Increased revenues enable the Law Foundation to fund programs that make the justice system accessible to British Columbians, particularly those people who have the greatest access problems as a result of their economic,

social, physical or mental special needs.

The Law Society, the Law Foundation, and the Canadian Bar Association (BC Branch) encourage lawyers to consider which financial institutions provide the best support to the Law Foundation when deciding where to hold their trust accounts. ♦



From the Special Compensation Fund Committee

The Wirick claims – an update

Over the past three years, BC lawyers have been asked to shoulder a heavy financial burden in the wake of misappropriations by former Vancouver lawyer Martin Wirick. Thanks to their professionalism and support, the Law Society has been able to pay valid claims against the Special Compensation Fund and fulfil its responsibilities in protecting the public.

All lawyers have a clear interest in knowing the status of the claims, how much they will cost and what potential there is for recoveries.

The Special Compensation Fund Committee has now reviewed and decided the majority of the Wirick claims and is working through the balance. Throughout the Law Society's investigations, the Benchers have made it a priority to identify and secure any possible sources of recovery for the Special Compensation Fund. The Society has successfully recovered on its commercial insurance bond. While other sources have been vigorously pursued, a recent report (referred to below) has narrowed the parameters of what is feasible to recover.

In September, the Benchers received the report of Russell Law, a chartered accountant and president of MacKay & Company Ltd. (MacKayCo) who had performed a review of the available books and records of Mr. Wirick's client Tarsem Singh Gill and Mr. Gill's companies (the Vanview group of companies). The Law Society had commissioned this review to help complete its investigation and to trace the disposition of the funds that Mr. Wirick paid to Mr. Gill's companies, in case there was the possibility of off-shore bank accounts or any other identifiable sources of recovery. MacKayCo found that this was not the case. Accordingly, the majority of recoveries will be limited to the funds

that have been or will be recovered by the Gill estate in bankruptcy on assets that are primarily in BC.

This article addresses the most common questions and concerns relating to the Wirick claims. Both lawyers and members of the public can check on the status of these claims at any time in the "what's new" section of the Law Society website at www.lawsociety.bc.ca.

The Wirick misappropriations

As most BC lawyers know, the story of Martin Wirick came to light in May 2002. At that time the Vancouver lawyer resigned from the Law Society and ceased practising law. Mr. Wirick had acted for a Vancouver real estate developer, Tarsem Gill, for the Vanview group of companies and for certain nominees in the sale of various properties. At the time of his resignation, Mr. Wirick admitted to the Law Society that he had misappropriated trust funds in real estate transactions by failing to pay out and discharge mortgages, and had instead applied the funds to other purposes, in breach of his undertakings.

The Law Society immediately took steps to protect Mr. Wirick's clients and other affected parties, by conducting an audit and investigation, seeking the appointment of a custodian for his practice and ensuring that the claims of innocent homeowners were given priority consideration by the Special Compensation Fund Committee. The Committee has since been working through the claims and has nearly completed those of innocent homeowners.

A discipline hearing panel found Martin Wirick guilty of professional misconduct and ordered that he be disbarred on December 16, 2002.

To finance the Wirick claims and other

claims against the Fund, the Benchers increased the annual Special Compensation Fund assessment from \$250 to \$600, beginning in 2003. All approved claims relating to Martin Wirick will be paid from this Fund.

Beginning May 1, 2004, new claims for compensation resulting from a lawyer's misappropriation (none of which relate to Mr. Wirick) are covered by the new trust protection coverage of the Lawyers Insurance Fund.

What claims have been decided so far? How many are outstanding?

As of December 13, 2005, the Special Compensation Fund Committee has considered 495 claims of the 555 total claims made in relation to Martin Wirick. Of these, 347 have been decided and \$32.5 million has been approved for payment. 51 claims have been withdrawn.

Another 150 claims have been adjourned for further information or investigation prior to decision and seven claims are still to be considered by the Committee.

Most of the claims denied to date have related to duplicate or overlapping claims. Most of the claims made by nominees of Mr. Gill have not yet been considered.

What were the duplicate claims for compensation?

Although the total dollar amount originally claimed against Martin Wirick for his misappropriations is close to \$80 million, the actual value of the claims is much less. The Law Society had asked that all potential claimants make claims early in the process,

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regardless of potential overlaps, to ensure the most complete information was available for review. There were in fact many duplicate claims because more than one party to the same transaction (such as an innocent purchaser and his or her private or institutional lender) each made individual claims for one loss arising from Mr. Wirick's failure to discharge a mortgage from title.

Over 40% of the Wirick-related claims assessed in 2004 did not require payment because of claims duplication.

For an example of a duplicate claim, see the report on the Special Compensation Fund in the *Law Society 2004 Annual Report*.

How much was covered by insurance?

The Special Compensation Fund was insured for \$15 million of the Wirick losses under a commercial insurance bond. Through the work of the Special Compensation Fund Committee and Law Society staff, the Fund recovered the full amount of insurance under this bond. At the time the Wirick claims were discovered, there was also approximately \$7 million in the Fund itself.

What happened to the money misappropriated by Wirick?

Ever since the Wirick misappropriations came to light in 2002, a key question for the Benchers — and one on the minds of many BC lawyers — is: "What happened to the money?" The natural follow-up question is: "Will there be recoveries?"

The Law Society's Special Compensation Fund Committee pursued these issues throughout its investigation and audit of the Martin Wirick practice and, most recently, MacKayCo's review of the available books and records of Mr. Gill and the Vanview

group of companies.

The audit of Martin Wirick's practice

The Law Society's audit of Mr. Wirick's books and records began in 2002. That audit revealed that approximately \$52 million passed through Mr. Wirick's pooled trust accounts to Mr. Gill and the Vanview group of companies during the period 1998 to 2002.

During this period, Mr. Gill and the Vanview group of companies were purchasing and developing various properties in Vancouver and surrounding area. It is clear that, in many of the subsequent property sales, Martin Wirick, while acting for Mr. Gill or one of his nominees as vendor, received the money in trust and paid out that money as his client directed, in breach of his undertaking to discharge mortgages. In some other cases, he prepared and registered fraudulent discharges.

From the Law Society's investigation, it became clear that, when the Vanview group developed and sold a property, a nominee purchaser often encumbered the property prior to reselling it to an innocent purchaser. In such a transaction, Mr. Wirick received money into trust from the innocent purchaser or the purchaser's lender. He typically gave his undertaking to the purchaser's lawyer to pay out and discharge an existing mortgage on title from the sale proceeds. But instead of doing so, he paid out funds to the Vanview group of companies. The Vanview group was then able to use the funds for other purposes. As a result of Wirick's breach of undertaking, the purchaser owned a property that was encumbered by a mortgage that should have been discharged. The purchaser's lender had only a second mortgage security, instead of a first mortgage.

The review of Tarsem Singh Gill and his companies' records

The Law Society's audit of Mr.

Wirick's accounts revealed one piece of the picture. To determine the ultimate disposition of the money that Martin Wirick paid to the Vanview group of companies, to verify the *bona fides* of certain Special Compensation Fund claimants and to secure any available recoveries for the Special Compensation Fund, the Law Society also sought to review the available financial records of the Vanview group of companies.

On July 15, 2003 the Law Society obtained a Supreme Court order that the trustee of Mr. Gill's estate produce to the Law Society the financial and business records of Mr. Gill, his nominees and his companies. A further court order on February 23, 2004 allowed the Law Society to seek production of banking documents from several financial institutions.

The Law Society retained MacKayCo to review the available books and records of Mr. Gill, Vanview Construction Ltd. and the other companies in the Vanview group.

Under the court orders, the Law Society could use the Gill estate documents only for the purposes of administering Special Compensation Fund claims and in its capacity as a creditor or trust claimant of the Gill estate.

The Law Society was constrained from making voluntary disclosure to the police or to other third parties — including the profession — without a further court order. To report out on MacKayCo's conclusions in this *Benchers' Bulletin*, the Society sought permission of the BC Supreme Court. On November 15, 2005 the Court authorized the publication.

MacKayCo concentrated its review on the banking documents and financial records from January 1, 1998 through May 2002. The task was challenging because of missing financial information and the need to obtain documentation from the banks. As a result of the sheer volume of missing



support for banking entries, in particular cleared cheques, MacKayCo limited its requests for copies of support to cleared items equal to or more than \$10,000. In addition, MacKayCo reviewed support for any items less than \$10,000 included in the available books and records.

MacKayCo confirmed that, over the four-year period, Martin Wirick paid approximately \$52 million from trust to the Vanview group of companies and other related parties, primarily the operating company, Vanview Construction Ltd. MacKayCo found that \$32 million of the \$52 million was deposited to Vanview Construction Ltd.'s primary operating account. The remaining funds were deposited into other Vanview group accounts, and a significant proportion, discussed below, was in fact transferred back to Vanview Construction Ltd.'s operating account.

Funds distributed through this Vanview Construction Ltd. account during the period totalled approximately \$52.7 million. There were no funds on hand when Vanview closed. The \$20.7 million of deposits to the account in addition to the \$32 million advanced by Mr. Wirick were composed of \$11 million of transfers from other members of the Vanview group of companies, approximately \$9 million from apparently independent parties, and \$700,000 of unidentified deposits.

The \$52.7 million distributed was disbursed as follows:

- \$32.6 million – business expenses (development and construction costs)
- \$12.5 million – payments to lenders
- \$3.2 million – payments to Vanview group, Gill and related individuals
- \$2.5 million – payments to unrelated businesses
- \$.6 million – payments to Wirick

- \$1.3 million – unidentified payments

Based on the records examined, MacKayCo believes that most of the \$32.6 million in business expenses related to Gill's development of properties in the Lower Mainland. In reporting to the Benchers in September 2005, MacKayCo said that it appeared Tarsem Gill engaged in poor business practices. In particular, his Vanview group of companies exercised little control over expenses and frequently paid its suppliers round amounts. Moreover, the Law Society audit of Martin Wirick's records revealed that Mr. Gill and his companies frequently sold or resold properties for less than it cost to develop them, resulting in significant losses.

As indicated above, the Vanview group also made \$12.5 million in payments to lenders or nominees to keep up mortgage payments on various properties, including mortgages that should have been discharged but remained on title. What the Special Compensation Fund Committee discovered in numerous transactions is that the mortgage payments fraudulently concealed the true state of title from lenders and innocent purchasers so that Vanview could use the sale proceeds of a property to pay other expenses, rather than to discharge a mortgage from title.

MacKayCo's conclusion was that most of the money flowing from Martin Wirick to the Vanview group of companies was subsequently used to pay Vanview's property development expenses and business losses and to maintain payments on undischarged mortgages. The Law Society has been advised that these payments in all probability will not be recoverable.

Instead, the Law Society's recoveries appear primarily limited to the funds that are recovered by and form part of the Gill estate in bankruptcy, which is being administered by Deloitte & Touche, Inc. as Trustee. The Law Society is

a major creditor of the estate by virtue of holding assignments from those persons receiving compensation from the Special Compensation Fund and may also have trust claims. The Society expects to be able to report further on these recoveries by next spring.

Are the police investigating?

The Vancouver Police and the RCMP, through the joint Lower Mainland White Collar Crime Unit, announced in early 2005 that they are conducting a criminal investigation of Mr. Wirick and Mr. Gill.

The Law Society is cooperating with the police investigation to the full extent permitted by law.

What are future plans for the prevention and payment of claims?

In the wake of Mr. Wirick's actions, the Law Society embarked on a number of reforms to prevent future catastrophic claims and to rework the system for providing compensation to the public.

The reforms to increase public protection in real estate and trust transactions, include:

- recommending changes to real estate practice, the use of the CBA standard undertakings and early confirmation by lawyers of the steps taken to pay out mortgages and other charges;
- adopting rules that require a lawyer to report the failure (by another lawyer or by a financial institution) to provide or file a registrable discharge of mortgage in a timely manner; and
- encouraging government to fast-track consumer protection legislation to require financial institutions to provide registrable mortgage discharges in a timely manner.

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Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, is available to compensate persons who suffer loss through the misappropriation or wrongful conversion of money or property by a lawyer acting in that capacity. The Special Compensation Fund Committee makes decisions on claims for payment from the Fund in accordance with section 31 of the *Legal Profession Act* and Law Society Rules 3-28 to 3-42.

(After May 1, 2004 compensation is provided by trust protection coverage under Part B of the Compulsory Professional Liability Insurance Policy.)

Rule 3-39 provides that, unless the Special Compensation Fund Committee directs otherwise, the Executive Director may publish and circulate to the profession a summary of the Committee's written reasons on claims. In any publication, the claimant may not be identified by name, or otherwise, unless the claimant consents and a lawyer may not be identified unless the Committee finds that the lawyer has misappropriated or wrongfully converted funds.



Re: A Lawyer *

* *The lawyer is not identified as this claim was denied.*

Special Compensation Fund Committee decision involving claim 20035013

Decision date: March 2, 2005
Report issued: April 27, 2005

Claimant A
Claim of \$582,315.26 denied

In 1993 the lawyer was retained by A, the plaintiff in a motor vehicle action and in a related civil action. At trial the client was awarded damages of \$33,838.51 relating to the motor vehicle action. The other action was dismissed.

In his reasons for judgment, the judge

stated that A was a difficult witness who often gave non-responsive, argumentative or inconsistent answers, all of which made it difficult to give weight to his evidence unless it was independently corroborated. The Special Compensation Fund Committee found this characterization of A's credibility consistent with what he presented to the Committee.

The Committee noted that it appeared ICBC, as insurer for the defendant, delayed in paying out A's judgment. Client A's union then garnished some of the proceeds to recover payments for wage loss that it had previously made to A. In March 2000 A signed a document releasing and discharging his lawyer on consideration of a \$2,600 payment.

A's claim to the Fund derived from a misunderstanding of a decision made *in camera* wherein a judge, faced with an application by A to issue a privately laid information against his lawyer, found that there was tangible evidence on which a trial judge *might* conclude that the lawyer of client A had committed the offences charged.

The private information against A's lawyer was stayed by Crown Counsel without ever contacting the lawyer.

The Special Compensation Fund Committee found that there was no evidence at all to corroborate client A's assertion of wrongdoing against his lawyer. After reviewing all of the criteria for payment from the Fund, the Committee found there was no evidence to show the lawyer had acted dishonestly or fraudulently. Any money the lawyer received was pursuant to a retainer agreement between the lawyer and A or pursuant to accounts rendered, which were in fact settled by way of the lawyer making payment and receiving a full release from A. The Committee denied the claim.

Re: A Lawyer *

* *The lawyer is not identified as this claim was denied.*

Special Compensation Fund Committee decisions involving claim 20010170

Decision date: March 2, 2005
Report issued: May 13, 2005

Claimants A and B
Claim of \$11,380 denied

Client A was introduced to the lawyer by way of a pre-paid legal plan under which the lawyer provided legal services. After an initial meeting, for which the lawyer billed and was paid, A and her husband B continued to use the lawyer's services in respect of a custody matter. In 2001 client A and B made several more cash payments to the lawyer after each meeting. In early March 2001, A and B provided \$1,000 in cash, which they considered a retainer, although no written retainer agreement was ever presented or signed. The lawyer did not provide a receipt for this \$1,000 and did not deposit the funds to his trust account. A and B provided a further \$4,000 to the lawyer in late March and \$6,000 in June. The lawyer did not provide a receipt or place the money in trust in either case.

Over this same period, the lawyer continued to do work for A and B in respect of the custody matter. In her claim to the Special Compensation Fund Committee, A stated that, after requesting a copy of her file from the lawyer in August, she learned that a consent order had already been granted in June in respect of the custody matter. A said that she had not agreed to a consent order, but when she questioned the lawyer, she was told it was "an agreement between lawyers" and that she should accept what had been done. A and B then retained a new lawyer.

The new lawyer encouraged A to ask for an accounting from the lawyer.



Only when A pressed the first lawyer for an accounting did he provide a statement of account that indicated A owed him a further \$6,000.

The Special Compensation Fund Committee noted that it appeared that the lawyer did not put any retainer money

or payments in trust and had no records verifying receipt, which the lawyer acknowledged. A and B's claim, however, was with regard to the quality and quantity of work the lawyer had performed and, as such, the claim appeared to be a fee dispute. The

claimants had not availed themselves of their right to take the lawyer's account to a fee review, but the lawyer expressed his intention to consent to an extension of time for this purpose. The claim was denied. ✧

Unauthorized practice undertakings

The Law Society has obtained the following undertakings from non-lawyers not to engage in the unauthorized practice of law.

[Redacted text block]

[Redacted text block]

[Redacted text block]

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The Benchers also approved a new form of defalcation coverage to provide greater certainty for the public and the profession. Since May 1, 2004 new claims for compensation fall under trust protection coverage, which is part of the insurance coverage carried by BC lawyers. Claimants now apply under that coverage, which is subject

to a global limit, rather than applying for discretionary payments from the Special Compensation Fund. The Benchers have just recently clarified the future role of the Special Compensation Fund and in what circumstances it will be available to claimants.

In the months ahead, the Benchers expect to report on upcoming changes to the Law Society's trust reporting and audit programs that will help ensure

compliance with trust standards across the profession.

* * *

If you have questions or comments on the Wirick claims, or on any aspect of the Special Compensation Fund, please contact the Chair of the Special Compensation Fund Committee or Mary Ann Cummings, Manager, Special Compensation Fund and Custodianships, at mcummings@lsbc.org. ✧

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