



# Benchers' Bulletin

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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 articled students on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities.

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

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## Dugald Christie: One lawyer's legacy

by Robert W. McDiarmid, QC

The untimely death of Dugald Christie has generated an outpouring of praise for his dedication to the promotion of pro bono work amongst our profession. Regrettably, there hasn't been a corresponding increase in the profession's participation in pro bono programs.

Until relatively recently, there were very few pro bono clinics in our province. The two law schools have well-run and well-attended programs, but they are limited by geography. Various community organizations have also operated legal clinics on a sporadic basis throughout BC. In Kamloops, where I live and work, the local cable TV outlet once had a live program providing free legal advice on the air.

In 1985, the Salvation Army added to its lengthy history of assisting the indigent with legal matters by making space available for Dugald Christie to do pro bono work in their community and family service department. Three years later, with Dugald's assistance, they began an expansion of their free legal advice program and now operate more than 20 clinics around the province ([www.probono.ca](http://www.probono.ca)). Dugald worked there for 13 years.

In the summer of 1998, Dugald — on the first of his great bicycle missions — rode to Ottawa and burned his robes on the steps of the Supreme Court of Canada to protest the costs and delays that impede access to justice for many of our citizens. When he got back to Vancouver, he then convinced the profession to endorse a resolution at our Annual General Meeting encouraging every lawyer to participate in a pro bono program and asking the Benchers to further the development of pro bono services throughout the province.

In 1999, Dugald added to his pro bono legacy by becoming involved in a

significant way with the Western Canada Society to Access Justice ([www.accessjustice.ca](http://www.accessjustice.ca)). He helped that organization establish more than 60 new legal clinics, including programs in northern and central BC — areas where the need for legal help was critical.

Meanwhile, the Benchers made the 1998 AGM resolution a priority and established a joint Law Society / Canadian Bar Association (BC Branch) pro bono committee which, in turn, led to the creation of Pro Bono Law of BC ([www.probononet.bc.ca](http://www.probononet.bc.ca)), a registered charity whose role is to facilitate opportunities for the effective provision of pro bono services throughout the province. The Law Society also augmented its insurance program so that uninsured lawyers, such as in-house counsel and government employees, have professional liability insurance coverage when they volunteer for programs approved by Pro Bono Law of BC.

In addition, Pro Bono Law of BC has set up a fund that will pay for disbursements in some pro bono cases and there are now conflict-checking systems in place to ensure pro bono volunteers are not involved in matters that conflict with their law firms or employers.

In short, Dugald Christie's goal is now possible. All lawyers in this province — whether insured or not, whether in private practice or working for government — now have the ability to volunteer for a pro bono program in their community.

Sadly, there hasn't been enough uptake. There are still a large number of people who need legal help but cannot afford the services of a lawyer. To make matters worse, there are some areas of law — notably those involving regulatory agencies such as residential tenancies and environmental matters



— where the demand is even greater. While I firmly believe there is no substitute for a properly funded legal aid program and while I know that more lawyers have volunteered because of the legal aid budget cuts, I also believe that lawyers, as members of an ancient, honourable and learned profession, have a duty to support those who need help.

As we ponder Dugald's untimely

death, I ask all of my colleagues throughout this province to find ways to volunteer their skills and expertise. Opportunities can be found anywhere there is a need. They range from walk-in clinics, such as those run by the Salvation Army or Access Justice, to Pro Bono Law of BC's roster programs, to volunteering for an advocacy group. Some law firms even run their own pro bono programs. Pro

Bono Law of BC and the Attorney General's Ministry have also drafted a model policy to encourage more pro bono participation by public sector lawyers and I will be making my best efforts to get that policy finalized.

Dugald Christie's commitment to pro bono must not die with him. His cause must become our profession's cause. Volunteer! ✧

## Public forum on citizenship coming this Fall

The Law Society of BC, in partnership with the North Shore Multicultural Society and MOSAIC, is presenting a free public forum on **October 19** as part of Canadian Citizenship week that will examine citizenship and access to justice. The forum will be presented in association with CBC Radio and Television's *Think Vancouver* series and will be moderated by Mark Forsythe, host of CBC Radio One's *BC Almanac* program.

The public forum is part of a new initiative by the Law Society's Equity and

Diversity Committee, chaired by Art Vertlieb, QC, aimed at promoting the legal profession and the rule of law among the community at large.

Panellists for the forum will be Provincial Court Judge Justine Saunders, Senator Mobina Jaffer, QC, Vancouver lawyer and former BC Supreme Court Justice Thomas Berger, QC and Najeeb Hassan, President of the North Shore Multicultural Society.

Forum topics include the meaning of citizenship, the importance of the rule

of law and the responsibilities of dual citizenship. The Forum will take place at the Law Society building, 845 Cambie Street, on October 19 from 5:00 pm to 6:30 pm. Participants are invited to attend a reception at the Law Society afterwards.

If you plan to attend, please RSVP by October 16 by emailing [forum2006@lsbc.org](mailto:forum2006@lsbc.org). For more information, please contact Kuan Foo, Staff Lawyer – Policy and Legal Services, at 604 443-5727 or [kfoo@lsbc.org](mailto:kfoo@lsbc.org). ✧



### Law Society Fall calendar

**September 29** – Annual General Meeting (see the Law Society website for the outcome of the resolutions)

**October 12** – 50-Year Certificate Luncheon (by invitation)

**October 13** – Pacific Legal Technology Conference ([pacificlegaltech.com](http://pacificlegaltech.com))

**October 19** – Public forum on citizenship

**November 23** – Bench & Bar Dinner

**December 8** – Life Benchers Dinner (by invitation)

For more information, or to download programs and registration forms for the Pacific Legal Technology Conference and the Bench & Bar Dinner, go to [www.lawsociety.bc.ca/about/calendar/events.html](http://www.lawsociety.bc.ca/about/calendar/events.html).



## *Credentials rules amended*

### Refresher course to assist lawyers returning to practice

The Benchers have approved development of a refresher course for non-practising and former lawyers who wish to return to active practice.

The course was part of a package of recommendations and rule changes proposed by the Law Society's Credentials Committee to ensure all lawyers returning to practice are competent and to assist them to refresh their skills and knowledge.

Return to practice applications will now focus on what a person has done to keep current with the law in addition to considering whether he or she has been engaged in work that is equivalent to the practice of law. This should make it easier for former and non-practising lawyers who have not been doing legal work (for example, due to family commitments) to satisfy the requirements necessary to return to practice.

Under the former rules, a lawyer who had been away from active practice for more than three of the previous five years typically must write a requalification exam unless the Credentials Committee concludes the lawyer's activities amounted to "equivalent practice" or the committee concludes the public interest does not require the lawyer to write the exam.

The new rules, as adopted by the Benchers at their June meeting, direct the Committee to consider whether "the lawyer was engaged in activities that have kept the lawyer current with substantive law and practice skills."

The Credentials Committee believes that focusing on what a person has done to keep current with law and practice is relevant as is the consideration of whether the person has engaged in equivalent practice.

The Benchers also amended the rules to plug a gap that could be used by a

small number of lawyers to avoid the requalification requirements.

At present, a lawyer who wishes to leave active practice and to return several years later can avoid triggering the requalification provisions by maintaining full-time practising status while not practising, which requires paying full-time membership, insurance and Special Compensation Fund fees. Conceivably, a lawyer



could be away from active practice for several years and return to the profession without first having to demonstrate his or her competence. The Credentials Committee was concerned that this gap in the rules prevented the Law Society from properly discharging its mandate to protect the public interest.

There were also concerns that the gap prevented the Law Society from meeting its obligations under the National Mobility Agreement. This is because there could be BC lawyers who appear to be practising full time with insurance — and therefore qualified for practising membership in other law

societies — when, in fact, they haven't been practising at all.

The new rules require all current and former lawyers to meet the requirements for returning to practice when they move to active practice after more than three years of not practising law regardless of their membership status. To determine whether a lawyer has or has not been practising law, regardless of his or her membership status, all members will be asked to indicate on their Annual Practice Declaration whether they have, in fact, been practising law during the previous year. For this purpose a person is considered to be practising law if he or she was engaged in the practice of BC law for an average of one day per week.

The Equity and Diversity Committee has observed that any rule changes ought not to prejudice women who may have maintained practising status so they could more easily return to practice after raising a family. It is, however, likely that the number of lawyers taking advantage of the gap is very small because the member would have had to be willing to pay almost \$10,000 over three years in order to qualify. The Equity and Diversity Committee also noted that any negative impact on women would be reduced by the development of a refresher course to assist those returning to active practice.

While the new rules go into effect immediately, they ensure procedural fairness by allowing lawyers who have not been practising but who have been maintaining practising status to return to active practice without further requirements provided they do so before January 1, 2009.

The refresher course will be available no later than 2008 to assist those returning to active practice. ♦



## Law Society of BC teaches PLTC in Nunavut

*“Not only had they died, they had perished and they had not just perished they had perished miserably.”*

– Margaret Atwood’s introduction to *Frozen in Time*, Beattie & Geiger, 2004, Douglas and McIntyre

Ms. Atwood was referring to the ill-fated Franklin expedition of 1845. Captain Franklin and his company died while trying to navigate part of what is now Nunavut Territory. Nunavut was established on April 1, 1999 and about 30,000 people call it home. It makes up approximately one fifth of Canada’s landmass and, if it were a country, it would be the 14th largest and most sparsely populated in the world. The Law Society of BC sent PLTC Instructor Ian Guthrie to Nunavut’s capital, Iqaluit, in January 2006 to teach the first-ever Professional Legal Training Course offered in the territory.

For four months, Ian lived in Iqaluit, which to the “southern eye” is treeless, featureless and frigid. He taught nine articulated students. For them, it was the culmination of a journey that began in 2001 when the Akitsiraq Law School was created by the Nunavut Arctic College, the University of Victoria Law School and the Akitsiraq Law School Society. It was supported by the Law Society of Nunavut and the Governments of Nunavut and Canada.

The name of the law school, “Akitsiraq,” means “to strike out disharmony or wrongdoing” in Inuktitut. It was a one-time program designed to produce more Inuit lawyers in the Territory. When it was established, there was only one lawyer of Inuit origin in Nunavut. In 2005, 11 Inuit students who enrolled for the courses in the Nunavut-based school graduated with their LL.B. from the University of Victoria. The nine that Ian taught in the PLTC program all had articles in Iqaluit. Another articulated in the



*Law Society of BC PLTC instructor, Ian Guthrie, in Nunavut.*

Northwest Territories, and one was chosen to clerk for the Supreme Court of Canada.

Ian said that soon after he arrived he adapted to the glacial environment, with temperatures of minus 25 to minus 50 degrees Celsius that were often accompanied by wind speeds of 20 to 100 kilometres per hour. The lowest temperatures and highest wind speeds resulted in “blizzard days,” and all activity in Iqaluit stopped—the schools, the courts, the stores and even the legislature closed. Unless there was a medical emergency, there were no pedestrians, taxis, cars or snowmobiles on the road. If it wasn’t overcast or a blizzard day, there was daylight from about 9:00 am to 2:30 pm.

Ian said he walked everywhere and just bundled up. He described the sunshine as prairie-like, intense and penetrating against the whiteness of the land. He said when the sun rose, it arced only a few degrees in a parabola over the southern horizon, and at first reminded him of a large forest fire on the cusp of the earth: orange and

yellow.

It was common, Ian said, to see Inuit hunters of seal, polar bear, caribou and arctic wolves heading out to the land or the sea ice on snowmobiles towing a kamik (sled), with their rifles slung across their backs. If successful, the hunters would take the hides and begin the tanning process by nailing them to sheds next to their homes. About a month after Ian arrived, a polar bear was spotted near the hospital. At about the same time, wildlife officers in Apex, a suburb of Iqaluit, were forced to shoot two arctic wolves.

The Akitsiraq students and members of the Nunavut bar greeted Ian warmly. The PLTC course he taught was essentially the same as the one he has taught BC students for years, but this time, the students were Inuit and derived their ancestry from those who thrived and lived in that inhospitable land for some thousands of years. Ian observed that the students made

*continued on page 6*

## *Nunavut ... from page 5*

significant progress, particularly in the core skills of writing, drafting, advocacy and interviewing.

The classroom he used was at the Old Residence annex of the Arctic College where other students were studying Inuit history, computer science, hair dressing, art and Inuit culture and skills. Ian arrived one day and saw that in the classroom next to his, there were two frozen seals. Once thawed, they were skinned and the edible parts were eaten. The Akitsiraq students told him this was (along with arctic char, caribou, ptarmigan and walrus) "country food," and that it was still savoured by the Inuit and often eaten uncooked. Ian tried it, but generally cooked for himself, or went for soup and sandwiches at the Fantasy Palace Coffee Shop and Tanning Salon where, presumably, before the "Tanning" part closed, a patron could sip a cappuccino while bronzing.

The Law Society of BC played an important role in an historical event — the education of nine new lawyers in Canada's newest territory. The Law Society is obliged to the many people



*A playful moment in Nunavut, captured by amateur photographer and Deputy Director of PLTC, Lynn Burns.*

in Iqaluit who assisted with administrative support, classrooms, office space and accommodations. Principal amongst them is Susan Hardy, Legislative Counsel, Department of Justice, Government of Nunavut. The Law Society is also obliged to: Ian Guthrie, who taught the PLTC course and, as a

result, moved his life to Iqaluit for months; Lynn Burns, Deputy Director of PLTC; Katherine Potter, Registrar; and Alex Crabtree, who provided technical support and did all the heavy lifting in Vancouver to ensure the success of the endeavour. ✧

## Bright future for Nunavut PLTC student

After finishing the Professional Legal Training Course, Sandra Omik, one of 11 graduates from Nunavut's Akitsiraq Law School, is now looking forward to reaching the end of her long journey to become a lawyer. It officially began when she left her home in the small Inuit community of Pond Inlet (on the north end of Baffin Island), stepped onto a plane and embarked on a three-hour flight to her territory's capital, Iqaluit (on the southern end of Baffin Island). Now, after studying law in Iqaluit for four years, completing her degree and

having taken PLTC, Sandra is articling with Justice Canada and training to become a prosecutor. She said she feels like she's on the cusp of "a new beginning" and she's excited about having the tools she needs to initiate new ideas in Nunavut's legal community.

Prior to starting law school, the 33-year-old mother of two was a court worker in Pond Inlet for several years. She was often frustrated by the limitations of the legal system and said, "when you have someone right in front of you and you have to tell them,

'I'm sorry, legal aid can't help you with your complaint,' it's hard." Sandra said they thought legal aid was there to help with everything, and "it was very hard for me as an Inuit person to tell them in Inuktitut something they couldn't understand. But I was only an interpreter for the lawyer, I was only the messenger, but seeing their disappointed faces I felt angry that I couldn't help them." One of the reasons Sandra decided to attend law school was to help people who needed legal assistance, but weren't getting any under the current system.



PLTC, taught in Iqaluit by Law Society of BC instructor Ian Guthrie, was a crucial step in preparing Sandra for becoming a lawyer. Of her experience, Sandra said, "I expected to just read material and do a big exam at the end like what you see on TV, but it was very different." Among other things, Sandra credits Ian with teaching her how to handle a civil lawsuit. "There are hardly ever any civil suits here," said Sandra, "so you never really see them, and Ian really helped us to understand the process from the beginning to the end."

The students conducted a mock civil trial involving a dispute between two neighbours over a sequoia tree. Sandra praised Ian's patience with the class as they struggled to suppress their laughter, because there aren't any trees in the territory, and the students didn't even know what a sequoia tree looked like. Sandra soon confirmed for herself that the tree was no laughing matter. "Right after PLTC I had to do a chambers application while on my articles, and I ended up saying to myself, 'thank God I argued for that tree, because I now know how to do a chambers application.' The whole experience of PLTC was very useful."

Until the Akitsiraq program, there was only one Inuk lawyer in Nunavut — Premier Paul Okalik — and the others came from "the south," which is what local people call the rest of Canada outside of the territories. As someone who understands both Canada's legal system and Inuit ways of handling conflict, Sandra is now acting as a bridge between those "southern lawyers" and the community. While articling, she recently sent all the lawyers in town a letter explaining a misunderstanding in court.

The Inuit elders were recommending through an interpreter that an offender be sent to live "out on the land" in a hunting camp. The prosecutor and judge interpreted that as a lenient punishment and dismissed the idea.

Sandra sent a letter explaining the elders' recommendation was not "like getting a trip to Hawaii," and that while living "out on the land" the offender must embrace traditional Inuit values of harmony and peace and learn to live within the camp or face the possibility of perishing in the elements. Sandra told the lawyers that when you're living in a harsh climate and hunting for food there can't be conflict because it undermines everyone's goal of survival. If the offender were to start misbehaving, he or she would be cast out of the camp which, according to Sandra, is a "far harsher punishment than jail," because without the support of the group there is a real risk outcasts will die in the cold or starve to death.

Sandra's long-term dream is to build a cabin with gas generators powerful enough to run a fax machine and computer and then to set herself up as a sole practitioner in Pond Inlet. But she doubts that will ever happen because, for one thing, she would have trouble earning enough money to cover her expenses. One of the difficulties of practising in a small community, according to Sandra, is that "everyone knows everyone, and most people think I should help them because they're my relative, or my friend. They don't understand the concept that I would need to charge them by the hour." Still, Sandra is not tempted by stories of lawyers earning big money "in the south," and has no plans to leave her home territory of Nunavut.

One of the goals of the Akitsiraq program was to create not just lawyers, but community leaders.

Sandra has already done a lot of work in Pond Inlet; she was appointed the Chief Commissioner of the Nunavut Law Review Commission in 1999 and was selected in 2002 by *Maclean's* magazine as a leader of tomorrow. She has signed a two-year contract with Justice Canada that will start after she completes her articles. Unlike some of her fellow graduates who have ambitions of becoming community leaders outside the field of law, she has no desire to get into politics.

Sandra said she is happy using the skills she gained at law school and PLTC to try and make a difference for Inuit people from within the legal system, and she's proud of being so near to accomplishing her goal of being an Inuk lawyer practising in Nunavut. ✧



*Sandra Omik accepts her University of Victoria law degree at a special convocation in Iqaluit, Nunavut on June 21, 2005. (Photo: Greg Younger-Lewis)*

## Small Firm Task Force consultation

### Law Society looks at several initiatives to help small firm lawyers

The Law Society's Small Firm Task Force, chaired by Kootenay Benchers Bruce LeRose, is working on measures to help sole and small firm practitioners and invites your input.

The Law Society recognizes that while sole and small firm practitioners form the backbone of the legal profession throughout the province, they also face unique challenges making this type of practice increasingly less

attractive to lawyers.

Nearly 35% of the private bar work as sole practitioners and another 23% are in firms of two to five lawyers. Outside the major urban centres, solo and small-firm lawyers provide the vast majority of legal services in the province.

In addition, younger lawyers are more likely to choose large firm practice,

meaning that older lawyers are over-represented among small firms. This raises concerns about whether the solo and small-firm bar is renewing itself, particularly in the less-populated areas of the province. Today, 31% of sole practitioners are between 55 and 65 years old compared with 18% in firms of five or more lawyers.

The Law Society wants to support small firm practice and through the Small Firm Task Force is looking at several initiatives to assist solo and small firm lawyers and to alleviate the many pressures they face. The Task Force plans to submit formal recommendations to the Benchers by year end. The six initiatives are:

#### Law Society resources for sole and small firm practitioners

The Law Society has many resources to assist all members of the profession. Some may be of particular interest to sole and small-firm practitioners.

**Small Firm Practice Course:** The Benchers have approved a Small Firm Practice Course to be developed and implemented by January 1, 2007. It will be a free, on-line course for lawyers, students and law firm staff. It will provide information on setting up and operating a practice, avoiding pitfalls and developing a business plan. The core modules of the course will be mandatory for lawyers establishing solo practices or starting in small firms on or after January 1, 2007. Lawyers already in sole or small firm practice as of that date will be exempt, but are welcome to use the resource. The course will involve self-paced learning on the lawyer's own time and will have no pass-fail or grading components.

**Practice advice:** Free telephone and email advice on ethics, practice questions and technology.

**Web resources:** The Practice Support section of the Law Society's website contains a wide variety of precedents and articles ranging from standard form letters to information on solicitors' liens.

**Benchers' Bulletin:** The *Benchers' Bulletin* regularly contains helpful tips from the Law Society's practice advice team.

**Practice Checklists Manual:** Checklists, divided into eight practice areas, offer valuable assistance to lawyers and are available in the Practice Support section of the Law Society's website.

**PLTC materials:** The course materials, which are on the Law Society's website in Licensing & Membership / PLTC, provide a comprehensive summary of law and procedure in the most common practice areas.

**CanLII:** The Law Society of BC, along with all Canadian law societies, supports the national online law library CanLII ([www.canlii.org](http://www.canlii.org)), which provides free access to legislation and case law.

Additional resources are available through other organizations, including the BC Courthouse Library Society, the Canadian Bar Association, the Continuing Legal Education Society, the Trial Lawyers Association of BC and local and county bar associations.

**Technology support initiative:** The Task Force is reviewing two possible ways in which the Law Society can provide lawyers with assistance in the acquisition and efficient use of appropriate computer technology. One approach would make Law Society staff available to visit law firms and provide advice on technology. The other approach would involve the Law Society identifying consultants to provide those services. Either would have budget implications that the Task Force and Law Society would have to consider.

**Bookkeeper support initiative:** During earlier consultations, the Task Force identified the importance of an effective bookkeeper in successful law firms. Many lawyers, however, reported that it is often difficult to identify competent bookkeepers and to work with them effectively. The Task Force developed and published a comprehensive guide to recruiting and working with a bookkeeper: see the Practice Support/Articles section of the Law Society website.

**Shared articles initiative:** The Task Force endorses continued support of



the online shared articles registry that was developed by the BC Branch of the Canadian Bar Association with support and advice from Law Society staff and the two BC-based law schools: see [www.cba.org/BC/Initiatives/articles/default.aspx](http://www.cba.org/BC/Initiatives/articles/default.aspx). The Task Force also proposes working with the Credentials Committee, which has jurisdiction over articling, to develop a program to encourage students to article throughout the province in order to facilitate shared articles.

**Practice locums initiative:** Many lawyers working on their own report difficulties taking time off, even for brief vacations, because there is no one to provide essential services to their clients. This initiative would provide effective backup for small firm practitioners as well as opportunities for lawyers who want to work on a

part-time or occasional basis as locums. The proposed program would likely include a mechanism for avoiding conflicts and an on-line registry of lawyers in need of locums and those wanting to provide the service.

**Succession and emergency planning initiative:** The Task Force proposes a comprehensive guide to succession and emergency planning be published by the Law Society. This would include effective succession planning and planning for other emergencies, such as medical, natural disasters, theft or death.

**Certified cheque initiative:** During consultations, the Task Force heard from many lawyers who objected, on both professional and work-related grounds, to having to provide a

certified cheque to another lawyer. The Task Force noted that under Chapter 11, Rule 8 of the *Professional Conduct Handbook*, a lawyer's trust cheque constitutes an undertaking to pay and ought to be accepted as such by other lawyers. The Task Force proposes working with the Ethics Committee on a potential amendment to the *Professional Conduct Handbook* to clarify when it is not appropriate to demand a certified cheque from another lawyer.

The Small Firm Task Force welcomes comments from the profession. If you have suggestions or want further information about the initiatives proposed by the Task Force, please contact Alan Treleaven, Director of Education and Practice, at [atreleaven@lsbc.org](mailto:atreleaven@lsbc.org) or Bruce LeRose at [brucel@tlb.bc.ca](mailto:brucel@tlb.bc.ca). ✧

## Begg granted Law Society scholarship



*President Robert McDiarmid, QC offers his congratulations to Michael Begg.*

The Benchers have awarded the \$12,000 Law Society scholarship for graduate legal studies to **Michael James Begg**. Mr Begg said many things were going through his mind

when he received the telephone call notifying him of his successful application. "One doesn't generally like to get calls from the Law Society, but I was delighted to get this one. This

award allows me to focus more continuous time on my thesis, rather than working on it in between pursuing other sources of income."

Mr. Begg is currently studying for his LL.M. at the University of British Columbia, and his thesis focuses on the challenge of achieving sustainable land management while reconciling the interests of both non-aboriginal and aboriginal peoples. This is an issue he wanted to pursue after working with both the BC government and First Nations groups.

Mr. Begg graduated from law school at the University of Victoria in 1994. Two years after his call to the bar in 1996, he began working as a lawyer with the provincial government. In 2000, he became manager of aboriginal programs for BC Lands. During his two years in that department, he developed an innovative program enabling First Nations to develop business and cultural projects on off-reserve lands while negotiating treaty settlements. ✧



## Howard Kushner new Chief Legal Officer



The Law Society is pleased to welcome Howard Kushner as its new Chief Legal Officer.

Howard is an experienced lawyer and legal executive

who served as Ombudsman for the Province of BC for the past seven years.

As Chief Legal Officer — a newly created role at the Law Society — Howard will oversee all the Law Society's regulatory programs, including complaint resolution, investigations, discipline, custodianships and the Special Compensation Fund, as well as the Society's Policy and Legal Services division.

"I am responsible for ensuring the complaints process is dealing with complainants and members in a fair fashion," Howard explained, "and that's partly what I've been doing for the past seven years in the Ombudsman's office."

BC's new Ombudsman, Kim S. Carter, has high praise for Howard's work. In the Ombudsman's 2005 annual report, she recognized Howard's leadership and creative management in guiding the Ombudsman's office through a time of budgetary constraints. She also noted Howard convinced the government to increase the Ombudsman's budget so the office could investigate more complaints.

"Howard has left an organization that is in remarkable shape given the nature and speed of the changes it has undergone," Ombudsman Carter wrote in the annual report. "It is clear that his focus on recruitment, training, performance standards and service to individual complainants provides a solid base from which to move forward."

Innovations Howard introduced to

ensure the Ombudsman was able to meet the needs of British Columbians included a mobile intake office that could be set up anywhere to process complaints and an annual Ombudsman's "road show." Those innovations saw Howard and his staff visit communities outside the major urban centres, such as Terrace, Dawson Creek and Hudson's Hope.

"It was an opportunity for me to get out into the smaller centres and to make sure people were aware of the Ombudsman's office and of the services we offered."

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*"I'm proud to be a lawyer, and I think the Law Society plays an important role in ensuring that lawyers are acting in an appropriate fashion and that the public is being well served."*

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In 2005, Howard's last full year as Ombudsman, his staff of 31 handled more than 7,600 intakes — 5,500 complaints and 2,100 requests for information. Although the vast majority of complaints involved the provincial government and Crown corporations, Howard says the government never once refused his recommendations during his seven years in office.

"The effectiveness of the Ombudsman's office was demonstrated by the very fact that we had positive outcomes to our investigations and

positive responses from authorities," he said.

Born and raised in Edmonton, Howard graduated from the University of Alberta in 1972 with a Bachelor of Science (Honours) degree in mathematics, then attended the University of Toronto law school. After articles and a year practising with the Alberta Justice Department, he took a leave of absence to obtain an LL.M. from the London School of Economics, University of London.

Following another year at Alberta Justice, he joined the law faculty at UBC teaching constitutional law, administrative law, municipal law and corporate law. Anyone who attended UBC during Howard's era will remember the red, white and blue plaid sports jacket he traditionally wore on the last day of school (and which he still owns and has worn to Ombudsman Office Christmas parties).

In 1986, Howard returned to the Alberta Justice Department where he held a number of senior legal and management positions, including acting as special adviser to the Premier in the historic Meech Lake negotiations at Ottawa in June 1990.

Howard also served from 1996 to 1999 as Director of Legal Services for the Yukon government.

Joining the Law Society is an opportunity to serve both the profession and public and the "culmination of my career," says Howard. "I'm proud to be a lawyer, and I think the Law Society plays an important role in ensuring that lawyers are acting in an appropriate fashion and that the public is being well served."

And while he's only been on the job a short time, Howard says he's already encouraged by the "overwhelmingly positive attitude" of Law Society staff and their commitment to "ensuring the public interest is protected." ♦



## Benchers approve new Territorial Mobility Agreement

The Benchers have approved a new protocol to assist lawyers who wish to become members of Canada's three territorial law societies.

The new protocol, called the Territorial Mobility Agreement, is the work of a Federation of Law Societies of Canada task force and is designed to supplement the existing National Mobility Agreement.

Under the Territorial Mobility Agreement, the Yukon, Nunavut and Northwest Territories law societies, along

with the common law provincial law societies, agree that the three territories will participate in the National Mobility Agreement with respect to permanent mobility (the transfer of lawyers from one jurisdiction to another).

The agreement means BC lawyers will be able to become members of any of the territorial law societies without having to complete course work or exams. Transferring lawyers will be required to certify that they have completed a reading requirement set

by the territorial law society. Lawyers practising temporarily in the territories will still have to obtain a permit from the appropriate territorial law society.

The Territorial Mobility Agreement will take effect in 2007 and is designed to last for up to five years, during which time the territorial law societies can evaluate their ability to become full participants in the National Mobility Agreement, including the temporary mobility provisions. ♦

## 2007 Law Society fees due November 30

Watch for your fee invoice, as the Law Society annual practice fee and Special Compensation Fund assessment are due November 30, 2006 for the 2007 practice year. The Lawyers Insurance Fund assessment is payable in two equal instalments, half the fee is due November 30, 2006 and the remaining half is due June 30, 2007.

**Practice fee:** The members set the practice fee for 2007 at the Annual General Meeting of the Law Society on

September 29. See the Law Society's website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca) for results of the AGM vote.

**Lawyers Insurance Fund fee:** At their September meeting, the Benchers reduced the full-time practising member insurance assessment by \$100 from last year's fee of \$1,500, for a total of \$1,400 for 2007. This decision was based on the operational performance and financial strength of the Lawyers Insurance Fund.

**Special Compensation Fund fee:** The Benchers have also determined it is appropriate to reduce the assessment for the Special Compensation Fund by \$100 from last year's fee of \$600, for a total of \$500 for 2007.

**Trust administration fees:** These fees are due 30 days after the end of each calendar quarter ending on the last day of March, June, September or December. ♦

### *From Court Services Online*

## E-filing pilot now in full swing

On June 26, e-filing began at the Vancouver Law Courts registry, the last of seven registries chosen for the Ministry of Attorney General's Court Services Online (CSO) e-file pilot project.

The pilot began October 2005 in the Kelowna and Vernon court registries, and later moved on to Abbotsford, Chilliwack, Victoria and Prince Rupert. A small group of participants was chosen from each pilot registry location. Currently, there are 38 law firms, registry agents and bankruptcy

trustees participating in the pilot and more than 2,000 court documents have been e-filed.

The e-file application is simple and easy to use. Participants convert their documents to Adobe Portable Document Format (PDF), log on to the CSO website, provide some basic information and submit the electronic document for filing. Statutory filing fees are currently paid by credit card, but an option to use a BC Online deposit account is being developed and will be

available soon.

After submitting their documents, participants can check the status at any time by logging into their CSO account. After a document has been accepted by the registry, it is electronically stamped and participants can then download the stamped version of the document for their files.

With the e-file pilot, British Columbia

*continued on page 23*



## Trust Assurance Program

### Rule changes enhance trust security

The Benchers have approved several changes to the Law Society Rules to implement the new Trust Assurance Program.

Announced in January 2006, the new Trust Assurance Program is designed to be a more effective method by which the Law Society can fulfil its duty to ensure lawyers handle trust funds appropriately (see “A new trust assurance program — more effective, and less costly for firms,” *Benchers’ Bulletin* 2006 No. 1 January-February).

The program is also designed to reduce costs for most law firms by eliminating the need to retain an outside accountant to prepare the annual trust report.

In addition, the Law Society’s trust assurance team will be available to answer any questions lawyers and their staff may have about trust accounting and to assist lawyers — particularly those who are setting up new practices or working in smaller firms — to develop proper accounting systems.

Through the Trust Assurance Program, the Law Society will also conduct rotational “compliance audits” of all law firms. The compliance audit will review the books, records and accounts of lawyers to ensure they meet the relevant Law Society Rules and provisions of the *Legal Profession Act*. The goal is to audit each law firm at least once every six years. The Law Society is also developing a detailed risk analysis system to identify firms whose accounting practices and handling of trust property may pose concerns and who should, therefore, be audited more frequently.

By introducing a risk analysis system as a basis for deciding priority audits, the Law Society will be better prepared to detect serious trust breaches in the few firms where these exist and

to do so earlier. Taking proactive steps is intended to prevent thefts and subsequent claims against the Law Society’s Part B insurance coverage.

The new Trust Assurance Program will enhance public confidence in the legal profession and will assist the Law Society in detecting and preventing improper or substandard trust accounting by a few lawyers who may tarnish the reputation of many.

The rule changes build on existing provisions in Division 7 of the Law Society Rules that permit the Society to order an examination of a lawyer’s books, records and accounts to determine if the lawyer is maintaining appropriate financial records.

Amendments to Rule 3-79(1) authorize the Law Society to conduct a “compliance audit” to determine whether a lawyer meets appropriate “standards of financial responsibility.”

“Compliance audit” is defined in Rule 3-47 as “an examination of a lawyer’s books, records and accounts and the answering of questions by lawyers.”

The “standards of financial responsibility” — previously listed in several different rules — is now combined in Rule 3-43.1. Instances in which a lawyer has failed to meet a minimum standard of financial responsibility include, but are not limited to, failing to satisfy a monetary judgment within seven days, insolvency, failing to comply with a compliance audit, failing to deliver a trust report as required by the rules and failing to report and pay the Trust Administration Fee.

Law firms selected for a compliance audit will be notified approximately six weeks in advance of the audit by letter and telephone. In addition, there will be material on the Law Society’s website explaining the compliance

audit process and what a firm is required to do.

Rule 3-79(2) retains the provision that existed under the former audit program requiring a lawyer to immediately produce and permit the copying of all documents needed for the audit and to answer any necessary questions.

The Law Society believes the new Trust Assurance Program fulfils an important component of our mandate to regulate the legal profession in the public interest. As a measure of how seriously the Society takes its role, the Benchers have adopted a new rule (3-79.1), which provides for an administrative suspension if a lawyer does not produce the records required for a compliance audit. The lawyer will be given at least seven days notice of the suspension and the Discipline Committee will retain the discretion to order that the lawyer not be suspended or that the suspension be delayed.

The new rules will continue to require all lawyers to file a trust report. The form of trust report will, however, be replaced by a report to be completed by the lawyer and will not require completion by an accountant. Amendments to Rule 3-75 will give the Executive Director discretion to require a lawyer to file a report completed by an accountant in addition to filing a trust report. This will permit the Law Society to continue to require an external review of the accounts of any lawyer it considers warrants such a review.

For more information on the new Trust Assurance Program, contact Don Terrillon, Manager, Trust Assurance Program, at 604 443-5798, [dterillon@lsbc.org](mailto:dterillon@lsbc.org) or Dominique Fry, Senior Trust Assurance Coordinator, at 604 605-5359, [dfry@lsbc.org](mailto:dfry@lsbc.org). ♦



## Ministry of Attorney General identifies challenges ahead

According to Allan Seckel, QC, Deputy Attorney General for BC, there are three major challenges the Ministry is addressing: public confidence in the justice system; scarcity of time for legislative proposals; and scarcity of government financial resources. Mr. Seckel expanded on how the Ministry is dealing with those challenges when he made a presentation to the Benchers at their September meeting.

### Public confidence in the justice system

Public confidence in the justice system is one of the Attorney General's main concerns, said Mr. Seckel. "Unfortunately the perception we face is that the system is slow, unresponsive, self-interested and process bound. And the worst part is the public doesn't think we're doing anything about it." Mr. Seckel told the Benchers that perception has a direct impact on government funding flowing to the justice system. "There is no desire to throw money after something that's

perceived to be mediocre, so we have some real challenges. We either have to convince people that it's not a mediocre system, or we have to actually do something about the problems."

Mr. Seckel said one area the Ministry is focusing on to try to improve the system is law reform and innovation, including greater integration with social services. "We've got a large population in BC of people who are in the criminal justice system because they're either sick or have another social issue. And they don't necessarily belong in the justice system because it may not actually be well suited to their needs. So we need to find better ways to engage the social systems with that clientele." Mr. Seckel said it has not been an easy task, because facilities accommodating social and health needs aren't necessarily equipped to deal with people found in the criminal justice system.

The province is also working on a pilot project that will further integrate health and social services in the justice

system. The Ministry of Attorney General hopes to open a community court in Vancouver within 18 months. The Ministry wants the community court to bring a different way of thinking about the court and the parties involved with it.

### Legislative time

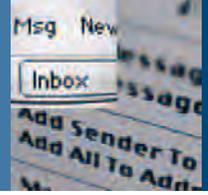
Mr. Seckel told the Benchers that another challenge the Ministry faces is that legislative time is scarce. About one third of the legislative proposals come from the Ministry of Attorney General. It isn't possible to get them all on the agenda because, said Mr. Seckel, "there's only so much time for the legislature and Cabinet to consider all of the things that have to happen." The best way to get justice issues on the agenda is to make sure they fit within established political priorities and to "recognize that there is a political cycle and there are times when things can get done and times when things can't."

### Financial resources

If current trends in provincial spending on health and education continue, government research shows that within the next 15 years, those areas will take all available provincial funding and other areas, including the justice system, will run out of money. Mr. Seckel told the Benchers this is not an issue unique to BC, as the rest of Canada's provinces are watching similar trends. In addition, he said, "we can all probably agree that governments are not going to be able to turn off the tap for police and the courts. But what it really shows is the intense competition that's going on internally for funding. There are no entitlements." Mr. Seckel said the Ministry of Attorney General is dealing with that by trying to work within the system to make sure justice issues have importance within the overall government structure. ♦



*Salmon Arm Courthouse opening: (left to right) Shuswap MLA George Abbott, Salmon Arm Mayor Marty Bootsma and Attorney General Wally Oppal, QC.*



## Model policies updated

The Law Society's Women in the Legal Profession Task Force, chaired by Vancouver Bencher Gavin Hume, QC, has completed updates to existing Law Society model policies on flexible work arrangements and workplace harassment. The policies are intended to assist firms in developing their own documents by either choosing to adopt them in their entirety or using them as models to create their own policies.

The members approved creating the original model policies at a Special General Meeting in 1992, following recommendations by two Law Society studies — *Women in the Legal Profession* (1991) and *Gender Equality in the Justice System* (1992) — that examined why women were leaving the profession.

The Task Force updated the two model policies to ensure they incorporated best practices in use throughout North America. The Workplace Harassment Policy was

revised to have more inclusive language, while changes to the Flexible Work Arrangement Policy were partly prompted by advances in technology that make it easier for people to work effectively and efficiently away from the office.

The updated Flexible Work Arrangements Model Policy recognizes that individuals may, for reasons such as work-life balance or family responsibilities, prefer flexible work arrangements, which can take many forms and have the effect of restructuring or reducing time devoted to work. The policy is intended to encourage and support lawyers in BC, with a view to increasing productivity and enhancing a law firm's ability to recruit and retain lawyers with diverse perspectives. In drafting the policy, the Task Force recognized that some firms may choose to implement a detailed policy, while others may want to adopt broad statements of commitment and deal with requests

on a case-by-case basis.

The updated Workplace Harassment Model Policy is intended to assist law firms to provide a healthy and respectful workplace free of harassment and discrimination. It serves as an example of steps to maintain a work environment where all firm members treat each other with mutual respect. The policy recognizes that what works for larger law firms may not work for all firms; accordingly, it includes a section to specifically assist sole practitioners and small firms in adapting the policy to suit their unique needs.

The revised policies can be found in the Practice Support/Articles section of the Law Society website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca).

In addition, the Task Force plans to bring forward for Bencher approval new policies and update other existing Law Society model policies before its mandate expires in December 2006. ↵

## Queen's Counsel: 2006 call for nominations

BC lawyers interested in making a 2006 Queen's Counsel nomination are reminded that an application package, including forms and instructions, is available from the website of the Ministry of Attorney General at [www.ag.gov.bc.ca/queens-counsel/index.htm](http://www.ag.gov.bc.ca/queens-counsel/index.htm). The deadline for nominations is **November 1, 2006**. Appointments will be announced by the end of the year.

Anyone, outside of the immediate family of nominees or nominees themselves, can submit a nomination by completing an application form. It must be accompanied by a statement of support from two nominators and a nominee's curriculum vitae or brief biography and may also include no more than five letters of support.

A candidate for Queen's Counsel must:

- belong to the BC bar and have been a member for at least five years; and
- demonstrate professional integrity, good character and excellence in the practice of law. Such excellence could be determined by any of the following:
  - being acknowledged by his or her peers as a leading counsel or exceptionally gifted practitioner;
  - having demonstrated exceptional qualities of leadership in the profession, including in the conduct of the affairs of the

Canadian Bar Association, the Law Society and other legal organizations;

- having done outstanding work in the fields of legal education or legal scholarship.

All submissions will be reviewed by an advisory committee, which will also recommend deserving candidates to the Attorney General. The committee is comprised of the Chief Justice of British Columbia, the Chief Justice of the Supreme Court of British Columbia, the Chief Judge of the Provincial Court, two members of the Law Society appointed by the Benchers

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*continued on page 23*

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

## Voice recognition: transformational technology

♪ *Puff, the magic dragon,  
lived by the sea ...* ♪

Words and music by Peter Yarrow

There have only been a handful of technologies that have had a profound effect on the practice of law. The typewriter, telephone, dictation machine, computers and email are five that immediately come to mind. However, I believe we are on the verge of another. Voice recognition has held promise for some time, but has suffered from slow recognition engines, substantially less than perfect recognition rates, laborious training periods and other problems endemic to an emerging technology. No longer. The latest version of Dragon's Naturally Speaking (version 9) has reached the "tipping point." The deficiencies of earlier versions have largely been addressed.

This latest version is fast, accurate and much easier to use compared to prior versions. Moreover, it isn't limited to just dictating directly into Word or WordPerfect — you can use it with email or issue voice commands that work directly inside applications. I use Dragon inside of Amicus Attorney — not only to dictate telephone call notes but to open and close dialogue boxes, search and save contact information and the like.

Voice recognition is often seen as the "holy grail" of technologies — allowing lawyers to speak to their computers and see their words appear as if by magic on the monitor. It increases work flow by eliminating the triple bottleneck of dictation, transcription and revision and it enhances profitability by reducing or eliminating transcription time and allowing law firm staff to concentrate on higher value services for clients.

Despite the promise of voice recognition, there are limitations to the

technology. For one, notwithstanding the power of a computer and voice recognition, it is still a non-thinking machine. It cannot fold a letter, answer a telephone or respond to a client's inquiry. To a certain degree, using voice recognition means taking on some of the tasks normally assigned to an assistant in exchange for the quick turnaround of document production. This trade-off may, however, be more illusory than real since firms have been reducing staff levels for some time now and lawyers are doing a great deal of drafting by keyboard these days. If you are already a fast typist, you may, in fact, just be replacing your keyboard with a headset.

Okay, so what do you need to start using voice recognition? An Intel or AMD powered PC (Dragon doesn't work on Macs — only Via Voice does). My basic recommendation is for a Pentium 4 or Pentium M at 1 gigahertz and 512 RAM. However, for any decent performance I would increase these substantially to, for example, a Pentium 4 at 2.4 gigahertz. Personally I use a Pentium M at 1600 MHz, and 2 gigs of RAM. You also need at least 1 gig of free hard drive space.

Your operating system needs to be Windows 2000 (SP4) or Windows XP (SP1). You will need a compatible sound card, a headset microphone and speakers for playback. I use a USB Andrea headset and PCTI switchbox that allows me to use the same headset for both telephone answering and voice recognition, but there are many other options here. Some users opt for a Bluetooth-enabled headset that allows them to be wireless and not tethered to the desk.

You should have a grounded power supply (a three pronged plug) to eliminate any "noise" generated by the power supply. This is essential for

laptops that don't typically come with a grounded power supply. Instead use a Targus generic laptop power supply.

There are several versions of Dragon's Naturally Speaking v.9 suitable for lawyers (Professional, Legal, Preferred and Standard). While the Professional and Legal versions offer greater vocabularies and other features (Legal is tweaked for legal citations, for example and Professional offers network and Citrix support), I recommend using the Preferred version and then acquiring the upgrades if you feel you need them.

Training is something I always recommend for any new technology. There are providers who will supply the software and train lawyers on Dragon (contact me for details). The time and money is well spent — training can get you up to speed very quickly and allow you to gain back the time spent training many times over.

Voice recognition is indeed a magic dragon whose power can be harnessed for all lawyers, whether or not they choose to live close to the sea. ✧

### Pacific Legal Technology Conference

The theme for this year's conference is "*... Come Together: Technology Face to Face.*"

Join us at the Westin Bayshore in Vancouver on **October 13** where you can choose from 21 educational sessions in six themed tracks. Learn from over 40 experts and distinguished speakers. Explore BC's largest legal technology exhibit floor.

It's the best of the ABA Techshow and the Pacific Legal Technology Conference.

Visit [pacificlegaltech.com](http://pacificlegaltech.com) for all the details.

## Practice Watch, by Barbara Buchanan, Practice Advisor

### E-mail notices to the profession

Ever since the BC Court of Appeal released its first decision in *Christie v. British Columbia*, I have answered many telephone and email questions about the application of PST to legal services. From these inquiries, it became apparent to me that many members had not received (or read) the Law Society's numerous email notices on PST and had not checked the website for updates ([www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)). If there is important information for the profession, it will be posted on the Society's website and, in some cases, distributed to members by email. If you are not receiving email notices, I strongly recommend that you make sure the Society has your current email address. To update your email address or provide other contact information, please contact the Law Society at 604-669-2533 and ask to speak with a Member Services Representative, or you can email [memberinfo@lsbc.org](mailto:memberinfo@lsbc.org) or fax 604-687-0135. I also strongly recommend that you regularly check the Law Society's website.

### Implied undertakings of confidentiality in civil cases

Parties obtaining production of documents or transcripts of oral examinations for discovery are on an implied undertaking, in most situations, to keep the documents confidential. In a recent BC Court of Appeal decision, *Doucette v. Wee Watch Day Care Systems Inc.*, 2006 BCCA 262, the court commented on the scope of implied undertakings. Below is an extract from the Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

It is easy to imagine a situation in which criminal conduct is disclosed in the discovery process, but no one apprehends that immediate harm is likely to result. Nevertheless, if an application to court is

required before a party may disclose the alleged conduct, the perpetrator of the crime may be notified of the disclosure and afforded the opportunity to destroy or hide evidence or otherwise conceal his or her involvement in the alleged crime.

... I conclude that the implied undertaking of confidentiality rule is as stated in *Hunt* [*Hunt v. T & N plc* (1995), 4 BCLR (3d) 110]: a party obtaining production of documents or transcriptions of oral examination of discovery is under a general obligation, in most cases, to keep such documents confidential. A party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court. However, the obligation of confidentiality does not extend to bona fide disclosure of criminal conduct. On the other hand, non-bona fide disclosure of alleged criminal conduct would attract serious civil sanctions for contempt.

The focus of the inquiry is on the use to which the evidence is to be made. A party is limited in the manner in which it can use the discovery evidence as I have indicated above. A non-party, such as the police, who obtains the discovery evidence by lawful means (such as by search warrant) is not prevented from using the evidence to further an investigation. Whether the evidence can be used in a subsequent criminal proceeding is a matter to be considered by the criminal court.

The court also considered a s. 7 *Charter* issue and found that the rules of civil procedure embodied in the implied undertaking of confidentiality cannot be elevated to a principal of fundamental justice.

### Hidden data in electronic documents

When you send someone an electronic document you may be inadvertently also sending prior drafts of the document. Imagine emailing an opposing party an offer to settle for \$5 million that includes a prior draft offer of only \$1 million. Unintended release of sensitive confidential information can have serious repercussions and lawyers should take special precautions with electronic documents.

If the word "metadata" is not in your vocabulary, it's time to learn it. Metadata means data about data.



When you create an electronic document you are also creating metadata, some of which you may not see on your computer screen. That metadata can include previous versions of a document. When you send someone an electronic document you are also sending its metadata and, if the recipient knows how to access the metadata, he or she may have access to your earlier drafts. The simplest example is the "track changes" function in Microsoft Word that can be used to reveal prior drafts. Other popular software such as Adobe Acrobat and Corel WordPerfect also produce metadata.

For more information on metadata and how to remove it from documents, check the software manufacturer's website.



## Withdrawal for non-payment of fee

It has come to the Law Society's attention that some judges are concerned that some counsel are withdrawing too close to the trial date. While the reasons for these withdrawals remain confidential, some judges have formed the impression that non-payment of fees is at issue. Lawyers are reminded that Rules 6 and 7 of Chapter 10 of the *Professional Conduct Handbook* state that, if a lawyer's retainer requires payment in advance, the lawyer must confirm this in a written agreement with the client, which specifies the payment date. In addition, the lawyer must not withdraw for non-payment of fees unless there is sufficient time for the client to obtain

other counsel and for that other lawyer to adequately prepare for trial.

## Speaking to one's own affidavit

It has also come to the Law Society's attention that some members are inappropriately speaking to their own affidavits. This practice should be avoided. Rule 9 of Chapter 8 of the *Professional Conduct Handbook* provides that unless the evidence relates to a purely formal or uncontroverted matter, a lawyer who gives viva voce or affidavit evidence in a proceeding shall not thereafter act as counsel in that proceeding unless it is necessary in the interests of justice. The lawyer may also be prevented from acting as counsel on an appeal from the proceeding (Rule 10).

Many decisions have referred to the undesirable practice of counsel giving evidence. See for example *National Financial Services Corporation v. Wolverton Securities Ltd.* (1998) 52 BCLR (3rd) 302 (SC); *Pioneer Lumber Company v. Alberta Lumber Company* (1923) BCR 321 (CA); Cartwright, J. in *Stanley v. Douglas* (1952), 1 SCR 260 at 274, 4 DLR 689 where he quotes Ritchie C.J. in *Bank of British North America v. McElroy* (1875), 15 NBR 462 (SC).

For more information on this subject, see "Chambers Practice" under Civil Litigation in the Professional Legal Training Course/Practice Material section of the Law Society website ([www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)).✧

## Services for members

### Practice and ethics advisors

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

**Practice and ethics advice** – 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. **Tel:** 604 697-5816 or 1-800-903-5300 **Email:** [advisor@lsbc.org](mailto:advisor@lsbc.org).

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

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

**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 other legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra:** **Tel:** 604 687-2344 **Email:** [achopra1@novuscom.net](mailto:achopra1@novuscom.net).

## Interlock

### Have you experienced an anxiety or panic disorder?



Have you experienced an anxiety or panic disorder? If so, you are not alone, as 12.6% or 2,910,888 Canadians suffer from these conditions annually.

We all experience some anxiety in our lives, however, the following may be symptoms of an anxiety disorder:

- excessive anxiety and worry uncontrollably about the future and daily life events
- sudden rushes of intense anxiety and panic — out of the blue
- fear or avoidance of certain situations, experiences or things
- problems with anxiety due to a past trauma

- unwanted thoughts and compulsive coping responses

These symptoms can cause significant distress and impairment in social, professional and other areas of life. They become a problem when they occur without any recognizable cause or when the situation does not warrant such a reaction. In other words, inappropriate anxiety is when a person's heart races, breathing increases and muscles tense without any reason for them to do so.

Once a medical cause is ruled out, an anxiety disorder may be the culprit.

A panic attack — a physical manifestation of an anxiety disorder — usually

includes several of the following symptoms:

- heart palpitations
- sweating, trembling, shaking
- shortness of breath or a smothering sensation
- chest pain/discomfort
- nausea and abdominal discomfort
- dizziness, light-headedness or feeling faint
- feelings of unreality or detachment
- tingling, numbness
- fear of losing control or going crazy
- fear of dying

Sufferers may think they are having a heart attack and cases sometimes are diagnosed in hospital emergency rooms.

Once medical causes have been ruled out by a physician, the key to treatment is accepting the panic attacks as psychological rather than physical. Although medication can be useful, counselling has proven quite successful, especially cognitive/behavioural approaches. Treatment may include practising relaxation exercises and working through the underlying issues.

For professional and confidential assistance, call Interlock at **604 431-8200** (Lower Mainland) or **1-800-663-9099**. ✧

### Supreme Court issues direction on filing orders for enforcement

Master William McCallum of the BC Supreme Court has issued a practice direction that, effective October 1, 2006, applicants wishing to file an order or decision to be enforced as a judgment of the Supreme Court of BC

must file a requisition in Form 2 accompanied by a certified copy of the decision or order. The requisition must refer to the legislation or rule authorizing enforcement of the decision or order and provide an address for

delivery of the applicant.

Practice directions are available on the BC Courts website at [www.courts.gov.bc.ca](http://www.courts.gov.bc.ca). ✧



## Unauthorized practice

Pursuant to its statutory duty to protect the public from unqualified, unregulated legal service providers, the Law Society has obtained undertakings or court orders prohibiting the following individuals and businesses from engaging in the unauthorized practice of law.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Penny Perpeluk**, doing business as **Effective Collections**, of Nanaimo, BC was offering to prepare small claims court documents and to act in small claims court matters for a fee. Ms. Perpeluk, who had previously signed an undertaking in June 1999,

consented to a BC Supreme Court order prohibiting her from doing so.

[REDACTED]

[REDACTED]

**Aaron Leung** and **AA Property Management Ltd.** of Richmond, BC were preparing documents for and appearing as counsel in small claims court matters for a fee. Mr. Leung and AA Property Management Ltd. have consented to a BC Supreme Court order prohibiting them from doing so. ♦

## Conduct review

Following consideration of a complaint, the Law Society's Discipline Committee may order that a lawyer appear before the Conduct Review Subcommittee.

Rule 4-11 permits the Law Society to publish and circulate to the profession a summary of the circumstances of a matter that has been the subject of a conduct review. A summary published under this rule must not identify the lawyer or the complainant.

The Discipline Committee has identified the following conduct review as one that would provide guidance to the profession.

### Re: A Lawyer

Lawyer D felt personally offended by the actions of a union. While the union's actions did not affect him personally, he felt the organization

was acting unlawfully and decided to launch a class action lawsuit against the union.

Lawyer D acknowledged that in addition to his concerns about the legality of the union's actions, he was also motivated to file the lawsuit by the publicity he felt it would generate for him.

The lawyer told the Conduct Review Subcommittee that he did not want to launch the class action in his own name because he did not want to risk being exposed to a judgment for costs. Consequently, he contacted a former client and asked her if she wished to be the nominal plaintiff in the class action. The former client agreed to meet the lawyer the following day to discuss the matter, but did not attend the appointment. Lawyer D filed the class action in her name without further discussion with his former client

because he believed media coverage was important at an early stage to attract potential members for the class action.

The former client learned she had been named as the plaintiff in the class action when contacted by the media two days later. She stated publicly that she had not instructed the lawyer to file the lawsuit. Lawyer D filed a notice of discontinuance as soon as he learned that his former client did not wish to be the nominal plaintiff in the action.

The Conduct Review Subcommittee emphasized to the lawyer the critical importance of obtaining clear instructions before filing a lawsuit. The Subcommittee also noted that a lawyer should not commence litigation for personal reasons or to generate publicity for himself or herself. ♦

## Credentials hearing

Law Society Rule 2-69.1 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement. If a panel rejects an application, the published summary does not identify the applicant without his or her consent.

For the full text of hearing panel decisions, see the Regulation & Insurance section of the Law Society's website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca).

### Paul Christian Nigol

Vancouver, BC

Called to the Bar: July 1, 2006

**Hearing** (application for call and admission by transfer): June 7, 2006

**Panel:** William F.M. Jackson, Chair, June Preston, Dirk J. Sigalet, QC

**Report issued:** June 14, 2006 (indexed as 2006 LSBC 24).

Mr. Nigol was a member in good standing of the Law Society of Alberta. In August 2005, he applied for call and admission in BC. His application for admission disclosed that he had been convicted of driving with a blood

alcohol level over .08 in 1999. It also disclosed he had been charged with a similar offence in July 2005. This second charge was subsequently resolved when Mr. Nigol pleaded guilty to careless driving and speeding.

The Credentials Committee referred Mr. Nigol's application to a hearing. Pursuant to s. 19(1) of the *Legal Profession Act*, to be called to the bar of BC, an applicant must satisfy the Law Society that he or she is a person of good character and repute and is fit to be a barrister and a solicitor of the Supreme Court.

Counsel for both the Law Society and Mr. Nigol submitted, and the panel accepted, that the applicant's circumstances did not give rise to issues of character or reputation. The only issue was whether Mr. Nigol's use of alcohol affected his fitness to practise law.

After hearing evidence from two addiction specialists and from Mr. Nigol, the panel concluded the applicant was not addicted to alcohol. The panel said that while Mr. Nigol's alcohol use had, on at least two occasions, been irresponsible and shown impaired judgement, it had not escalated to alcohol

dependency and had no effect on his ability to practise law.

The panel also noted Mr. Nigol's "effective and successful use of counselling services, his own rigorous self-examination and his favourable work record as a lawyer in Calgary."

The panel approved his application for call and admission and ordered that he pay \$500 as costs of the hearing.

A majority of the panel — Benchers William Jackson and June Preston — also ordered that Mr. Nigol be subject to two conditions for one year:

- that he obtain counselling from the Lawyers Assistance Program or Interlock; and
- that he obtain counselling from a psychologist every three months and that the psychologist provide the Law Society with reports at six-month intervals.

In dissenting reasons, Bencher Dirk Sigalet, QC disagreed with the imposition of conditions. He said Mr. Nigol had already recognized the need for counselling and that ordering him to seek counselling was unnecessary. ♦

## Special Compensation Fund claims

### Edward Kenny

Formerly of Vernon, BC

Called to the Bar: May 15, 1972

Ceased membership for non-payment of fees: January 1, 1999

Custodian appointed: January 15, 1999

Admitted professional misconduct: October 1999 (see December 1999 *Discipline Digest*)

Special Compensation Fund Committee decision involving claim 1999011

**Decision dates:** February 4, 2004, July

7, 2004, March 3, 2004, June 9, 2004, September 29, 2004

**Reports issued:** October 5, 2004

Claimant: Company J  
Payment approved: **\$399,900.00**

Mr. Kenny acted as a fiduciary and lawyer for an American company, Company J, in relation to its funds in an investment program by another client of Mr. Kenny, Company M. In 1997, Mr. Kenny entered into an agreement with Company M, an Ontario company registered extra-provincially in BC, to act as trustee for

investor funds and to hold bonds as security for investor capital and profits in relation to an investment program by Company M.

The sole director of Company M was Mr. P. The shareholders of Company J wanted to invest in Company M's program. Mr. P introduced them to Mr. Kenny as a possible lawyer to act as a fiduciary for Company J in its investments with Company M. Company J entered into an agreement with Mr. Kenny and claimed it entered into the investment structure because it was secured through the professional legal



services of Mr. Kenny, its fiduciary, who was fully covered for any insurance claims with respect to errors and omissions on his part.

In 1997, the shareholders of Company J made an initial investment of \$1,500,000 USD by placing the funds in Mr. Kenny's trust account. As part of the agreement between Mr. Kenny and Company J, the capital of Company J's investment was to remain under Mr. Kenny's direct control in his trust accounts, regardless of whether the funds were involved in the project. The money for the initial investment came from the three shareholders of Company J through funds they'd obtained outside of the activities of the company. One of the shareholders, Mr. D, later pleaded guilty to income tax evasion in the United States in 1999. In his plea agreement, Mr. D acknowledged that much of the money he had earned through brokerage fees was funds that should never have been transferred to him because the money was obtained after the principals of another company defrauded victims. The evidence did not suggest that Mr. D knew of or participated in the fraud. Of the money initially invested in Company M's project, a portion originally came from Mr. D's brokerage fees obtained from defrauded victims.

Company J invested more funds in the project via Mr. Kenny over the course of approximately one year, which was the time it was actively involved in Company M's investment project. During that time, Mr. Kenny made profit payments to Company J and from time-to-time Company J would instruct Mr. Kenny through amended letters of agreement or new letters outlining how Mr. Kenny was to handle its funds.

In May 1998, Company J made several unsuccessful attempts to contact Mr. Kenny. Mr. Kenny responded to Company J the following month with a faxed message. In July 1998, Company J wrote to Mr. Kenny and said it was

increasingly alarmed because it felt he and Mr. P were no longer returning phone calls. By October 1998, Company J filed a statement of claim in Vancouver against Mr. Kenny.

The Special Compensation Fund Committee has the discretion to require the claimant to obtain a judgment, but can exercise its discretion with special regard to the likelihood of recovery. The Committee noted that on January 29, 1999 Mr. Kenny filed an assignment in bankruptcy. The Committee therefore determined it was not necessary to require the claimant to exhaust its civil remedies.

The Committee considered in detail whether Mr. Kenny received the funds in his capacity as a lawyer. The Committee noted that in several pieces of correspondence and other documents Company J referred to Mr. Kenny as a "contracted fiduciary" rather than a lawyer. Mr. Kenny represented to the claimant that he would hold its funds in trust. The Committee concluded that had he not been a lawyer, Mr. Kenny would not have been in a position to represent that the monies in his trust account were protected by the rules of the Law Society. Therefore, the Committee determined Mr. Kenny did receive the claimant's funds in his capacity as a lawyer.

The Committee also found that Mr. Kenny sent Company J's money to financial institutions without Company J's consent. Further, despite a provision in the agreements between Company J and Mr. Kenny that said the funds could only be released to specifically rated banks and then only in exchange for security of a certain kind, Mr. Kenny went ahead and sent the money to non-approved banks without receiving any form of security. The Committee concluded that even after he knew the money was no longer in his control, Mr. Kenny continued to mislead Company J, and in the circumstances the Committee found that Mr. Kenny had misappropriated or wrongfully converted the

funds.

The Committee observed that notwithstanding the fact that a claim may be eligible for payment from the Special Compensation Fund, s. 31 of the *Legal Profession Act* provides the Committee with a broad discretion to make full compensation, partial compensation or no payment at all. In exercising its discretion, the Committee observed it must keep in mind the fundamental purpose of the Fund, which is to assist innocent victims where there has been theft by dishonest lawyers. Its purpose is not to act as an insurer for highly speculative or questionable investment schemes.

The Committee concluded the shareholders of Company J were sophisticated business people who freely participated after having accepted representations from Company M and Mr. P about returns of more than 500%. The Committee determined the proposed return from the investment was so unrealistic that any prudent investor would have recognized it was a somewhat risky endeavour. It noted that, even knowing that Mr. Kenny was Company M's lawyer, the main concern of the shareholders seemed to have been whether Mr. Kenny was entitled to practise and whether he had errors and omissions insurance. Therefore, the Committee deduced the claimant was well aware of the questionable nature of the investment scheme and was looking for an indemnity to cover its risk in the form of Mr. Kenny's professional liability insurance and/or the Special Compensation Fund.

Further, in exercising its discretion, the Committee noted that \$1,400,000 USD of the amount claimed came from fees received by one of the shareholders, Mr. D, which were monies obtained from defrauded investors in the United States. After taking into account all of these factors, the

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*continued on page 22*

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## Special Compensation Fund claims ... from page 21

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Committee exercised its discretion to pay the claim in part, and it approved a payment of \$399,900 from the Fund to Company J.



### Re: A Lawyer\*

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

Special Compensation Fund Committee decision involving claim 20020001

**Decision date:** October 12, 2005

**Report issued:** October 28, 2005

Claimant A

Claim of \$435,000 denied

Claimant A owned a property in Surrey, which he rented to two tenants. According to A, the tenants failed to make required payments. The claimant issued an eviction notice in April 1999, and that same month the matter went before an arbitrator at the Residential Tenancy Branch. The tenants applied to have the eviction notice set aside, but their application was dismissed.

The claimant initiated a BC Supreme Court action against the tenants for debt and breach of contract, and A obtained a default judgment. The tenants then retained the lawyer. The lawyer's firm had A's default judgment set aside on the grounds the matter fell within the exclusive jurisdiction of the *Residential Tenancy Act*.

The lawyer maintained a trust containing the funds the tenants were obligated to pay to A. In April 2000, a judge dismissed A's BC Supreme Court action and ordered that the \$5,525 being held in trust by the lawyer's firm be paid to A and his wife. The judge also ruled the tenants were entitled to their costs of the action, which could be deducted from the money held in trust by the lawyer's

firm.

The tenants' costs exceeded the amount held in trust, and consequently there was no money left to pay A. The claimant then failed to make mortgage payments on the property. He claimed it was because of the tenants' failure to pay and the lawyer's failure to provide him with the funds from the trust. The mortgagee foreclosed on A's property and it was ultimately sold.

The claimant then launched another action in BC Supreme Court against the lawyer and the lawyer's firm for fraudulent misrepresentation, breach of trust, breach of fiduciary duty, negligence, interference with contractual relations, conversion and misappropriation of funds. The claimant launched a second action against the tenants, their sons, the lawyer, the lawyer's firm and others for damages arising from an alleged fraudulent conveyance. A also filed a third action against the tenants and their sons for unlawful "detainer" of A's property. All were dismissed as mere reiterations of the original action dismissed by the court in April 2000. The court further declared the claimant a vexatious litigant.

The Special Compensation Fund Committee noted the lawyer administered the trust funds according to the terms of the court order. Therefore, while A may believe he sustained a loss, it was not the result of misappropriation or wrongful conversion by a member of the Law Society. Accordingly, A's claim was denied.



### Re: A Lawyer\*

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

Special Compensation Fund Committee decision involving claim 1999004

**Decision date:** July 6, 2005

**Report issued:** October 31, 2005

Claimant A

Claim of \$50,000 USD plus interest denied

The claimant entered into a Commitment Letter in December 1997, which was addressed to the lawyer. The lawyer was identified as the project lawyer in an investment opportunity related to the purchase and sale of banking instruments. Pursuant to the Commitment Letter, the lawyer was named as the person to pay funds to and A forwarded \$100,000 USD to the lawyer. Shortly thereafter, the lawyer returned \$50,000 USD to A, but the balance was never returned.

Section 31(5)(b) of the *Legal Profession Act* states the Benchers must not make payment out of the Special Compensation Fund where "the claim for payment was made more than 2 years after the facts that gave rise to the claim were known to the person making it."

The claimant's application for payment from the Fund was received on April 5, 2005. In it, he stated he discovered his loss upon receipt of a letter dated January 7, 1999 from the custodian of the lawyer's practice.

The Special Compensation Fund Committee noted the importance of avoiding an unduly narrow and technical view of the statutory requirements. Such an approach is contrary to the spirit and purpose of the Fund, which is to reimburse persons adversely affected by the dishonesty of individual members and to promote the public's perception of the honor and integrity of the legal profession. After considering the explanation provided by A, the Committee found there was an excessive and unjustifiable delay in A's application to the Fund, which was made six years after he discovered his loss. The Committee concluded that because the application was made more than two years after the facts that gave rise to the claim were known to A, it was outside the statutory limitation set out in section 31(5)(b), and was



therefore not compensable from the Fund. Accordingly, A's claim was denied.



## Re: Two Lawyers\*

\* *The lawyers are not identified as this claim was denied.*

Special Compensation Fund Committee decision involving claims 1999051 and 1999071

**Decision date:** December 7, 2005

**Report issued:** February 8, 2006

Claimant A

Claim of \$40,500 plus interest denied

Claimant A advanced \$70,000 to Construction Company H. The funds were secured by a second mortgage over certain property. The mortgage documents were prepared by A's lawyers. Either A or his lawyers prepared an additional document for signature by the principal of Company H, Mr. B. It declared there were no outstanding or unsatisfied judgments, proceedings or other claims pending

against Company H.

Mr. B attended the firm of the two lawyers named in the claim, and one of the lawyers, who did not work in the conveyancing department, was asked to witness Mr. B's signature on the mortgage documents. Although Mr. B's signature on the declaration did not need to be witnessed, the lawyer signed as a witness on that document and the other mortgage documents as well, where necessary. The lawyer did not, however, review the declaration Mr. B signed. All the documents were then sent to the firm's conveyancing department. The second of the two lawyers named in the claim worked in that department.

After the funds were advanced, A became aware that an action had been commenced against Company H just weeks before he provided the funds. Subsequently, the first mortgagee foreclosed on the property on which A held the second mortgage. There being insufficient equity in the property, A suffered a loss of approximately \$41,000. The claimant then filed an

application with the Special Compensation Fund alleging the two lawyers misappropriated his money. He alleged the declaration signed by Mr. B was false, and that the lawyers were aware of the action having been filed and ought to have told him. The claimant said, had he known, he would not have advanced the funds.

There was no evidence provided to the Special Compensation Fund Committee regarding whether or not the lawyers' firm received A's funds. However, because A's mortgage was registered in second position, as it ought to have been, the Committee noted that it appeared the firm had received them and paid them out to the appropriate party.

The Committee found no evidence of misappropriation or wrongful conversion of A's funds by the two lawyers or any member of the Law Society. Therefore, while A may have suffered a loss, the Committee found he had not met the requirements to be compensated by the Fund, and the claim was denied. ◆

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## *E-file pilot project ... from page 11*

has become the first province in Canada to introduce a comprehensive court e-filing system that incorporates the use of electronic documents within an electronic court record. Although the pilot has faced the kind of challenges that come with such a groundbreaking project, feedback from pilot participants has been very positive.

The limited pilot is expected to continue for several more months. During this time, the focus will be on further developing the "e-registry" capabilities to maximize the benefits of e-filing in the registry. A separate component focusing on the use of electronic court documents by the judiciary will also be introduced. This component will provide the judiciary with the ability to access electronic documents from

the bench and beyond, and even allow judges to digitally sign documents requiring their signature. Once this work is complete, look for e-filing to become more widely available across the province.

For more information on the e-filing pilot project, contact the CSO project liaison Thomas Broeren at 250 472-8949 or by e-mail at [thomas.broeren@gordium.ca](mailto:thomas.broeren@gordium.ca). ◆

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## *Queen's Counsel ... from page 14*

(President and First Vice-President) and the Deputy Attorney General.

The Attorney General retains authority to directly appoint lawyers who

meet the eligibility criteria. It is expected this power will only be exercised in exceptional circumstances.

For more information, contact:

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11th Floor, 1001 Douglas Street  
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Tel: 250 356-0149  
[www.ag.gov.bc.ca/queens-counsel/index.htm](http://www.ag.gov.bc.ca/queens-counsel/index.htm). ◆

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