The Law Society of British Columbia

Benchers' Bulletin

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Highlights

President's View

The justice system may change, but must remain independent

by Robert W. McDiarmid, QC

To prepare for this, my last President's View column, I looked back at the events of the past year.

Personally, the year was immensely rewarding. I was privileged to be your representative at many local, county, national and international events, and I came away with a strong sense of pride in our profession. Here in BC, lawyers are well aware of our responsibilities to ensure high standards of ethical practice, and the public is well served in this province.

The most important issues for BC lawyers in 2006, however, arose not in this province, but in Ottawa where the Minister of Justice, The Honourable Vic Toews, QC, is making changes to our criminal justice system and to the way in which judges are appointed. These are issues that should merit a lot of thought and discussion by lawyers, and indeed, by all citizens.

Early in the year, Minister Toews announced that Members of Parliament would have an opportunity to question the proposed new selection for the Supreme Court of Canada, Mr. Justice Marshall Rothstein. Shortly thereafter, new mandatory minimum sentences were proposed for a variety of offences, ostensibly to deter the commission of crime. Then, this Fall, the Justice Minister announced new initiatives to make it easier to arrest and convict drivers impaired by drugs.

These proposals were followed by unilateral changes to the committees that advise the Minister on federal judicial appointments. One of the proposed changes is to include representation from the law enforcement community on the various judicial advisory committees.

Taken individually, these proposals all have some points worthy of debate. Mr. Justice Rothstein showed the country that the then-existing appointment process worked well by displaying an intelligence and character that has been the hallmark of Supreme Court of Canada appointments for at least as long as the 30-plus years I have been practising. So on balance, I think the experience, with the safeguards put in place to avoid US-style partisan muckraking, worked well.

Conventional wisdom suggests that the two "anti-crime" proposals resonate with a public that is increasingly tired of petty property crimes, havoc caused by impaired drivers, harassment by street people and well-publicized incidents of violent crime. However, the debate of these problems and proposed solutions must acknowledge that crime appeared to have been declining before these initiatives were announced. More importantly, close analysis also shows that harsh punishment does not work as a deterrent. Our provincial Attorney General, The Honourable Wally Oppal, QC, knows this and has publicly pointed out the abject failure of such measures to act as deterrents.

And is driving while impaired by drugs really a huge problem? Certainly, impairment by alcohol is, but I do not recall hearing of a fatal accident where impairment by drugs was felt to be a cause. So why put in place *Criminal Code* sanctions that require the imposition of highly intrusive procedures that, at first blush, appear to be contrary to the *Charter*?

The most recent initiative is the idea of increasing the number of people on the judicial advisory committees in order to include a law enforcement representative. The committees now have seven members. Three are appointed by the Justice Minister and one each by

Benchers' Bulletin

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

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the judiciary, the Law Society, the Canadian Bar Association and the provincial Attorney General. The addition of a law enforcement representative will make eight.

This new change prompted an unprecedented comment by Chief Justice Beverley McLachlan, who decried both the lack of consultation as well as a threat to the independence of our courts. But perhaps Minister Toews has a point. Perhaps having a police presence will enhance, not diminish, judicial credibility, and thus judicial independence. Maybe a representative of the media could also be added, to enhance the perception of public input. However, traditionally none of the other seven appointees must come from a particular walk of life but each appointing body could recommend a candidate with a particular set of skills and experience at any time. One wonders, therefore, why the Justice Minister could not simply have named a police representative as one of the three Ministry appointees. And never mind the fact that the vast majority of criminal cases are heard by provincial courts.

So are all these issues connected? Many predict the likely outcome is that the government will see these popular anti-crime laws struck down as unconstitutional. Will the government use that as an excuse to act on so-called judicial activism by radically altering the way our judges are chosen, perhaps going to elections for trial level s. 96 judges, and US style confirmation hearings for appellate judges? Or are these legitimate and constitutionally sound measures to fight crime that will actually enhance the already good reputation of our courts?

One thing is for sure — our independent judiciary, backstopped by an independent legal profession, is a critical component of the makeup of this country. And the people who will keep it that way are the lawyers. It was thus when Shakespeare had Dick the Butcher suggest killing all the lawyers as Jack Cade's first step in imposing a tyranny, and it remains so today.

Thank you for giving me the privilege of serving you this year. In return, please keep your collective guards up, so that we can continue to be leaders in serving the public interest in the administration of justice.✧

Public forum: citizenship, multiculturalism and the law

Dual citizenship helps make Canada a richer and more diverse society and must be preserved, said Senator Mobina Jaffer, QC at a Law Society forum on Citizenship and the Law on October 19.

"My Canadian citizenship means a lot to me because I earned it, and it's made all the more special to me by the fact that I was never asked to give up who I was to be a Canadian," said the Senator, who was born in Uganda and also holds British citizenship.

Speaking to the more than 140 people who attended the forum — an initiative by the Equity and Diversity Committee, chaired by Art Vertlieb, QC — Senator Jaffer rejected the suggestion from an audience member that Canada has a right to tell dual citizens to choose where their loyalties lie.

"The world is opening up so that people can have more identities," said Senator Jaffer, "most countries in the world do have dual citizenship — the United States, most European countries. Part of my job as a Senator is to work with developing countries to encourage them to have dual citizenship."

The forum — moderated by CBC Radio host Mark Forsythe — was approved by the Benchers to promote the legal profession and the rule of law among the community at large.

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Public forum *… from page 3*

President Rob McDiarmid, QC used his opening remarks to reflect on the role of the Law Society and the importance of an independent legal profession to ensure the rule of law is upheld.

Panellist and Provincial Court Judge Justine Saunders, who was born and trained as a lawyer in South Africa, recounted her experiences defending black men accused of murder during the apartheid years. Judge Saunders described her first client to receive the death sentence — a 16-year-old with the IQ of a nine-year-old. She spoke passionately about her visit to see him on death row. "The first thing he said to me was, 'why have they weighed and measured me?'" She "didn't have the heart to tell him that they had to find out his weight so when the rope was put around his neck and the trap door fell they would know it was going to make a clean break and kill him."

Despite having psychological reports done at her own expense, her appeals were rejected at every level, and a few months later she received the phone call she'd dreaded "at dawn, because they hang them at dawn, and I was told by the prison officials 'we've just hanged your little man.'" In Judge Saunders' opinion, the rule of law "never really worked in South Africa," and she concluded her presentation by stressing the value Canadians should put on the rule of law, because it "is what protects citizens from arbitrary government."

Panellist and former BC Supreme Court Justice Thomas Berger, QC took an occasionally humorous look at the meaning of citizenship and reflected on the experiences of his own family. In the 1920s, Mr. Berger's father came to Canada from Sweden. Mr. Berger told the audience, "when my father died, my mother said to me, 'I'd like to go to Sweden and visit your father's relatives.' I said, 'it's a great idea, you'll have to apply for a passport.'" When his mother did that, she discovered something the BC-born woman would never have guessed — she wasn't a Canadian.

Participating in the forum were (left to right): panellist Najeeb Hassan; Law Society CEO Tim McGee; Art Vertlieb, QC, Chair of the Equity and Diversity Committee; Attorney General Wally Oppal, QC; moderator Mark Forsythe; panellist Judge Justine Saunders; Law Society President Rob McDiarmid, QC; Senator Mobina Jaffer, QC; panellist Thomas Berger, QC.

Mr. Berger said ironically, when his mother married his father, she had unknowingly become a Swede, and to further the irony, "when my father gave up his Swedish citizenship to become a Canadian, my mother remained a Swede." She then had to apply for Canadian citizenship in her 60s, and Mr. Berger said, despite the fact "she had raised a family and grandchildren who were populating the province, she got a letter from the Governor General welcoming her to Canada." Mr. Berger concluded by telling the audience how amused his family was when the Government of Sweden wrote to tell his elderly mother, "they regretted her giving up her Swedish citizenship and warned her that if she ever came to Sweden she was liable to be conscripted into the Swedish army."

Panellist Najeeb Hassan, who is a lawyer and President of the North Shore Multicultural Society, spoke about the pro bono and volunteer work lawyers do in the community and concluded by saying, "because of that special place that lawyers hold in society, I believe that lawyers have a special commitment to do more than the law and going to work."

In closing, Attorney General Wally Oppal, QC added that citizenship in Canada is made all the more rich by multiculturalism. "Multiculturalism means that we are diverse and should be proud of our diversity, but we are Canadians," he concluded.

The forum was presented in association with CBC's *Think Vancouver* series and in partnership with the North Shore Multicultural Society and MOSAIC.

The Benchers have approved a second public forum, the details of which will be provided to the profession in early 2007.✧

Benchers approve Lawyer Education Task Force's preliminary report

Toward mandatory continuing professional development

The Benchers approved the Lawyer Education Task Force's preliminary report at their December meeting, taking a first step toward making continuing professional development mandatory for BC's practising lawyers.

"We are planning a novel approach to mandatory continuing professional development, unlike anything seen in North America to date," said Task Force Chair Gordon Turriff, QC as he briefed the Benchers on the report's background and its recommendations.

Stressing the significance and time-sensitivity of the issue, he said, "For 25 to 30 years the debate has waxed and waned in BC, without action. In the meantime, jurisdictions in other parts of the world have marched ahead. This is an opportunity for the Benchers to do something both important and overdue."

The Task Force's preliminary report sets out four broad options and recommends them for further consideration: 1) a program requiring a certain number of hours of study, of which a portion requires the study of certain subjects; 2) a program of required courses for all lawyers, with the remainder of hours to be made up of activities chosen by lawyers; 3) a program of required courses for certain areas of practice; and 4) a program requiring a certain number of hours of study through approved activities. The report emphasizes that credit for professional development activity should not be limited to course study, but should be extended to a broad range of activities, including:

- accredited and non-accredited courses (whether preparing, delivering or attending);
- coaching and mentoring programs;
- in-house programs;
- professional group attendance;
- study groups;
- writing; and
- teaching PLTC.

In March 2004, the Benchers approved Task Force recommendations calling for mandatory reporting of BC lawyers' post-call continuing education activity, and setting annual minimum expectations of 12 hours for course study and 50 hours for self-study. The Task Force reviewed mandatory reporting results for 2005 and found that just over one-third of respondents reported *no* hours of "formal" course study. Also noted was that the number of lawyers reporting no formal education activity in 2005 increased with seniority: 19% of lawyers with less than five years call reported no formal study, compared to 54% of those with 30 years or more at the bar.

Mandatory continuing professional development would serve the Law Society's statutory requirement to uphold and protect the public interest in the administration of justice by, among other things, establishing standards for the education, professional responsibility and competence of its members, the Task Force reported. Also noted was that making participation in a program of continuing professional development a condition of practice would demonstrate to the public the Law Society's commitment to ensuring that BC lawyers maintain a continued level of competence after their call to the bar.

The Lawyer Education Task Force will review the four noted options and will present a recommended program to the Benchers by the end of 2007. Implementation of the new program is anticipated in early 2009.

For more information, please contact Alan Treleaven, Director of Education and Practice, at 604 605-5354 or atreleaven@lsbc.org.✧

Benchers approve updated workplace guidelines and model policy

The Benchers have approved new best practice guidelines for hiring and recruiting by BC law firms. Prepared by the Equity and Diversity Committee, *Guidelines – Recruiting, Interviewing and Hiring Practices*, contains extensive revisions to the original *Hiring Guidelines* developed in 1999.

The Benchers have also recently approved the new *Model Policy on Pregnancy and Parental Leave*, to replace the *Maternity and Parental Leave* model policy, which was drafted in 1992. The new model policy incorporates substantial revisions, largely reflecting amendments to the provincial *Employment Standards Act* and the federal *Employment Insurance Act* made since 1992.

The new guidelines and model policy are both best practices resources for BC's legal profession, and will be posted in the Practice Support / Articles/Papers/Precedents section of the Law Society's website early in 2007. ✧

Small Firm Practice Course begins in January

The Law Society's new, on-line Small Firm Practice Course will be in place on January 1, 2007 to help sole practitioners and lawyers practising in small firms to better manage their practices.

The course will be mandatory for some lawyers, but will also serve as a useful tool for those practising in any size law firm who would like to take the course on a voluntary basis.

The Law Society developed the course on the recommendation of the Lawyer Education Task Force to provide greater assistance to sole practitioners and small-firm lawyers. Outside the major urban centres, sole and small firm practitioners provide the vast majority of legal services in the province and face unique challenges. The Task Force recognizes the importance of those lawyers and believes the course will help ensure the success of their practices.

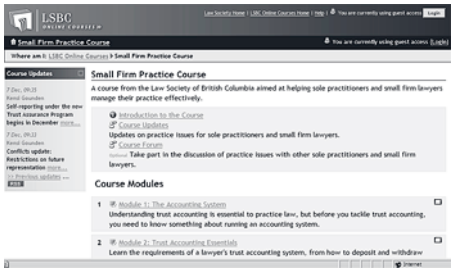
The Small Firm Practice Course is free, self-paced and accessible on-line at all times, regardless of location. It is designed with self-testing components that allow lawyers to measure their own progress and understanding of key practice issues, such as management, trust accounting and various pitfalls of practice.

Each course module provides additional resources and further reading that lawyers can use to assist them in their practices and to improve their understanding of course content, including links to practice management resources, forms, precedents and contacts for practice advice. There is also an optional course forum where members can discuss practice issues with other sole practitioners and small firm lawyers.

Who must take the course?

Rules 3-18.1 and 3-18.2 govern the Small Firm Practice Course. A firm of four lawyers or fewer constitutes a small firm for the purposes of this course. As of January 1, 2007, the following lawyers must take the course:

- anyone moving into small firm practice after January 1, 2007;
- anyone who begins or returns to practising in a small firm after not having done so in BC for the previous three years;
- anyone who is already practising in a small firm and becomes a signatory on a trust account after not having been a signatory on a trust account in BC for the previous three years;



- independent contractors, even if such lawyers are space-sharing with a firm of lawyers (see the exception for independent contractors below); and
- anyone directed by the Practice Standards, Credentials or Discipline Committees to take the course.

Who doesn't have to take the course?

The following lawyers do not have to take the course:

- anyone who is practising law as an independent contractor or lawyers in similar situations who are associated with a firm of more than four lawyers and the firm maintains trust accounting and other financial records on that lawyer's behalf; and
- a lawyer who, as a member of a governing body in another Canadian jurisdiction, has practised in a small firm and been a signatory on a trust account during the previous three years, and who has not been asked to take the course by the Practice Standards Committee.

What about lawyers who have been practising solo or in a small firm prior to January 1, 2007?

Those lawyers are exempt from taking the course if they are already practising in a small firm as of January 1, 2007, unless they have a break in practising solo or with a small firm in BC that lasts longer than three years after January 1, 2007, or unless after January 1, 2007 they become a signatory on a trust account after not having been one in BC for the previous three years.

Does the course include an exam?

Members who are required to take the course must complete the self-testing components for each of the course modules. Examinees will have unlimited attempts to complete the testing components. If a question is answered incorrectly lawyers will be presented with another opportunity through a differently worded question to demonstrate their understanding of the content. All of the testing components must be successfully completed in order to fulfil the requirement of taking the course.

Within what time frame must the course be completed?

The course takes approximately six to eight hours to complete. Lawyers who must take it have six months to complete it from the time they became a sole practitioner or join a small firm. Lawyers already practising at small

firms who become signatories on trust accounts — after not having done so in BC for the previous three years — will have six months to complete the course from the time they become signatories on trust accounts.

What if the course is not completed within the six-month time limit?

The Rules prescribe that anyone who is required to take the course and does not complete it within six months has failed to meet a minimum standard of practice and may be referred to the Discipline Committee.

What about lawyers who do not have to take the course but decide to do so on a voluntary basis?

They will not be required to complete it once they begin. They can simply use the course as a resource to help strengthen their own law practices. The Task Force believes all lawyers and articled students can benefit from taking the course regardless of the size of the firm where they practice.

How do lawyers register to take the course?

The course is available on the Law Society's website at www.lawsociety.bc.ca. You must log in through the member log in link on the right-hand side of the website using your surname and Law Society member number in order to get credit for any courses you complete.

Who can be contacted for more information?

If you are unsure about whether you must complete the Small Firm Practice Course, contact the Law Society's Member Services Department at memberinfo@lsbc.org or 604 605 5311.

For information on course content, contact Kensi Gounden, Practice Standards Counsel, at kgounden@lsbc.org or 604 605-5321 or Debra DeGaust, Legal Assistant, Practice Standards, at ddegaust@lsbc.org or 604 443-5718. ✧

Small Firm Practice Course modules

1. The accounting system
Understanding trust accounting is essential to practise law, but before you tackle trust accounting, you need to know something about running an accounting system.

2. Trust accounting essentials
Learn the requirements of a lawyer's trust accounting system, from how to deposit and withdraw trust funds to what to do if you discover a trust shortfall.

3. Trust filing and trust applications
Learn the requirements of filing Trust Reports and Trust Administration Fees with the Law Society.

4. Taxation and employee deductions
Among the taxation and business issues related to the practice of law are federal employee payroll deductions for income tax, CPP and EI, as well as WCB requirements.

5. Goods and Services Tax
Familiarize yourself with some of the important taxation and business issues related to the practice of law and the Goods and Services Tax.

6. Social Service Tax
Become familiar with some of the important taxation and business issues related to the practice of law and the Social Service Tax.

7. Retainers
Identify the types of retainers and what they should include, as well as the requirements of contingent fee agreements.

8. File retention and disposal
Why you need to keep your closed files and for how long, and how to close and destroy files.

9. Coverage during absence
Learn the importance of arranging for coverage during absences from work, as well as establishing a system to ensure continuity in the event of catastrophic risk.

10. Withdrawal of services
Recognize the circumstances in which a lawyer must withdraw services and those in which a lawyer may withdraw services, and learn the procedure for withdrawing services.

11. Conflicts
Learn how to recognize conflicts of interest, how to prevent them from occurring, and what might happen if they do occur.

12. Client screening
Client screening is a process that can help ensure you are not taking on the wrong clients for your practice, and that clients are not taking on the wrong lawyer for their cause.

13. Dealing with difficult clients
Learn how to identify various types of difficult clients and principles for dealing with them.

14. File management and diary systems
Learn the importance of setting up a file management system, managing your time and having proper limitation/bring forward systems in place.

15. Delegation of tasks and supervision
Recognize what tasks may and may not be delegated to legal assistants and understand the supervision responsibilities you have over your non-lawyer staff.

16. Avoiding fraud
Learn to recognize the types of frauds and scams that can involve lawyers and how to manage the risks of fraud.

Pickton trial security and access advisory

Sheriff Services recently announced security measures for the New Westminster Law Courts during the trial of Robert William Pickton, scheduled to commence January 8, 2007 and expected to run approximately 12 months: see advisory at www.lawsociety.bc.ca/publications_forms/bulletin/2006/06-12_advisory.pdf.

Access to the Law Courts building will be restricted to the Begbie Street main entrance, where search gates will be used during the trial. Counsel displaying their *current* Law Society membership card and *current* photo identification will be exempt from search, and a "Fast Lane" checkpoint will be established to expedite entry for counsel and pass-holders during peak times. Note that after-hours access to the law library may be restricted, and that counsel intending to enter the Pickton trial courtroom as spectators may expect to be searched.

Please call the Ministry of Attorney General's Integrated Threat Assessment Unit at 604 661-1661 with any questions or concerns.✧

Procedure for interim suspensions simplified

At their October 2006 meeting, the Benchers approved several changes to the Law Society Rules governing interim suspensions and practice conditions. The changes are designed both to simplify and clarify current procedure and practice under Rules 4-17 and 4-19.

Rule 4-17 provides a summary procedure whereby any three Benchers may suspend or impose practice conditions on a lawyer, with or without notice and pending a hearing, where a direction to issue a citation has been given under Rule 4-13(1), and where the Benchers consider that the lawyer's continued practice will be a danger to clients or to the public. Rule 4-19 sets out a formal hearing protocol, available to a lawyer or student seeking rescission or variation of an order made under Rule 4-17.

While a Rule 4-17 proceeding is often conducted in a hearing-like manner, it is not a hearing and is not subject to the procedural and process requirements of a hearing. Rule 4-17's flexibility is important to the Law Society's ability to move expeditiously to protect the public interest.

The first change codifies the current minimum requirements for taking any action under Rule 4-17's summary procedure: a proceeding attended by discipline counsel and at least three Benchers, recorded by a court reporter, at which the respondent and his or her counsel may be present.

Next, Rule 4-17 has been revised to confirm the authority of the Benchers to adjourn a referral brought before them, both before and after commencement of the proceeding. Previously, when discipline counsel and respondents were unable to agree on scheduling or adjournment, a formal application had to be made to the presiding Benchers at the date and time set for the referral. Significant expense and inefficiency often followed as the three Benchers, counsel and witnesses were assembled for a referral that might not proceed. Now, a request to adjourn a Rule 4-17 proceeding and supporting reasons must be set out in writing to the Executive Director. The request is then referred to the President or his or her designate, and notice is given to the other party, the complainant and anyone else specified by the Executive Director.

Occasionally, problems with the terms or implementation of a Rule 4-17 practice condition may lead discipline counsel or the respondent to request the presiding Benchers to vary the order (often by consent). However, nothing in the old rule actually permitted such an application or variance. Rule 4-17 has now been revised to provide for summary reconsideration of a condition by the three Benchers who originally imposed it.

Rule 4-19 previously allowed a respondent to apply for such a variation to the three Benchers who imposed the original condition. The Benchers have determined that any application made under Rule 4-19 for variation of a suspension or condition is a review, and as such, should be heard in a formal hearing by a panel of different Benchers than those who imposed the original order. Rule 4-19 has been amended accordingly.

Finally, a rarely used element of Rule 4-17 before it was amended authorized the Benchers to have the respondent examined by a medical practitioner named in the order. In the few cases that arise, the Benchers generally order that the examination be conducted by a qualified medical practitioner, to be approved by a representative of the Law Society (upon confirmation of suitability and availability). The rule has been amended to confirm this established practice. As Rule 4-17 already requires the resulting medical report to be forwarded to the Discipline Committee, the amended Rule requires the Chair or Vice-Chair of that committee to approve the examining practitioner.✧

Lawyers' Compulsory Professional Liability Insurance

Benchers clarify Trust Protection Coverage

At their October 2006 meeting, the Benchers approved two changes to Trust Protection Coverage (Part B of the BC Lawyers' Compulsory Professional Liability Insurance Policy). Effective January 1, 2007, Part B coverage will exclude claims arising from investment schemes where BC lawyers do not misappropriate funds directly and will limit recoveries to $300,000 per claim. The changes are designed to clarify and enhance the Part B trust protection coverage provided to innocent victims of theft of money or property by BC lawyers.

Introduced on May 1, 2004 to complement Part A's compulsory negligence coverage, Part B's insurance-based approach to compensating victims of defalcation by BC lawyers was the first of its kind to be offered by any law society or bar association in the world. Part B creates a contractual obligation between the Lawyers Insurance Fund (LIF) and the insured lawyer to honour verified claims, providing an important response to public concerns about the discretionary nature of the Special Compensation Fund regime. At the same time, Part B limits total compensation available annually to $17.5 million, signalling that there is a practical limit to the ability of all BC lawyers to guarantee one lawyer's conduct.

The Benchers intend these changes to address two emerging threats to the intention and effectiveness of Part B coverage.

First, arguments have been raised suggesting that some claimants will look to Part B to respond to losses arising from a fraudulent investment scheme involving a BC lawyer. Part B's coverage was conceived to fulfil by non-discretionary means the Special Compensation Fund's statutory mandate to pay compensation where:

- money or other property was entrusted to or was otherwise received by a lawyer in the lawyer's capacity as a barrister and solicitor;
- the lawyer misappropriated or wrongfully converted the money or other property; and
- a person sustained a pecuniary loss as a result of that misappropriation or wrongful conversion.

The Special Compensation Fund Committee has stated, "The intention of the Special Compensation Fund is to assist innocent victims of dishonest lawyers, not to act as an insurer respecting highly speculative and questionable investment schemes."

Second, Part B's annual aggregate limit may be threatened or even exhausted by a single catastrophic claim. Prompt intervention by LIF recently foiled a US $8.5 million solicitation of a single US investor, who was assured that investment funds placed in a BC lawyer's trust account would be protected by Part B coverage. The Benchers are concerned that the non-discretionary nature of Part B's trust protection coverage may attract the attention of some fraudulent rogues, who promote "get rich quick" investment schemes by touting that funds paid to a lawyer's trust account are "guaranteed" by an insurance policy of $17.5 million.

The Benchers also noted that a $300,000 per claim limit would ensure the continued financial viability of the Part B insurance program without diminishing the protection provided to the public. Historical analysis of Special Compensation Fund claims demonstrates that 98% of all payments made since 1986 have been for amounts less than $300,000 (excluding claims arising from the Martin Wirick case). Even in the Wirick claims, 76% of all claimants were fully compensated by payments under $300,000 (87% of all individuals and 71% of all financial institutions). Under modelling analysis that applies a $300,000 per claim limit to a catastrophic loss scenario with a claims distribution similar to Wirick, in which Part B's annual aggregate limit of $17.5 million has been exceeded, individual claimants with claimed amounts up to $300,000 would still receive pro rata compensation for 98.2% of the value of their claims.

The Benchers observed that the average per claim limit in the rest of Canada (eight participating provinces) is only $184,000, and that BC is the only jurisdiction not to make payments subject to case-by-case discretion.

Finally, the Benchers considered the American experience, noting that 45 of the 48 American states with lawyer theft compensation funds have individual limits. Seventy-eight per cent of those funds have per claim limits of $75,000 or less, and the average per claim limit is $37,000. Only two states (Idaho and Alabama) follow BC's approach of creating a right to compensation, as opposed to a discretionary entitlement, and they impose far more stringent limits. Idaho has a per claim limit of $15,000, and Alabama's limit is even lower — $10,000 per claim (all US dollars).

The Benchers concluded that a per claim limit of $300,000 for Part B coverage, supported by exclusion of claims arising from investment schemes where BC lawyers do not misappropriate funds directly, will provide the greatest benefit to the most vulnerable claimants, and will support the long-term interest of the public and the profession in a stable and sustainable compensation system.✧

Kenneth Walker acclaimed a Bencher for Kamloops

President Robert McDiarmid, QC has announced that **Kenneth Mitchell Walker** is elected a Bencher in District No. 9 (Kamloops) by acclamation. Mr. Walker will replace Mr. McDiarmid, who completes his term of office as President and becomes a Life Bencher at year-end. Mr. Walker's term as a Bencher starts on January 1 and runs to December 31, 2007.

Mr. Walker was called in 1974 and has practised in Kamloops for 32 years, currently with Wozniak & Walker. His practice includes criminal defence, civil litigation and a component of solicitor's practice. He is a member of the Kamloops Bar Association and has served that organization in various capacities, including as organizer of their golf tournament.✧

Federal Court upholds sanctity of solicitor-client privilege

Lawyers should take note of a recent Federal Court of Appeal decision upholding the sanctity of solicitor-client privilege.

In *Blood Tribe Department of Health* v. *Canada (Privacy Commissioner)* 2006 FCA 334, a three-judge panel concluded unanimously that solicitor-client privilege is presumptively inviolate, and that the *Personal Information Protection and Electronic Documents Act* does not permit the Federal Privacy Commissioner to compel the production of documents where an assertion of solicitor-client privilege over the documents has been made.

The decision addresses those difficult situations where, pursuant to a statute, a requirement is made on a lawyer to produce documents that are subject to a client's claim of privilege.

A lawyer's professional obligations in such circumstances are set out in Chapter 5, Rule 14 of the *Professional Conduct Handbook*:

> A lawyer who is required, under the *Criminal Code*, the *Income Tax Act* or any other federal or provincial legislation, to produce or surrender a document or provide information which is or may be privileged shall, unless the client waives the privilege, claim a solicitor-client privilege in respect of the document.

The facts of the case are relatively simple. The Blood Tribe Department of Health dismissed an employee. That employee applied to the Privacy Commissioner for access to her personal employment information. The Blood Tribe produced all records sought, except records over which a claim of solicitor-client privilege was made. The Commissioner, however, ordered production of the documents pursuant to s. 12(1)(a) and (c) of *PIPEDA*. The Federal Court (Trial Division) upheld the Commissioner's order but the Court of Appeal overturned the decision.

The Commissioner argued that she needed access to the records in order to test the claims of privilege rather than accepting them at face value or having a judge decide the issue.

The Court of Appeal, however, held that solicitor-client privilege is presumptively inviolate and that express language would be needed in order to abrogate privilege.

It is also worth noting that in *Canada (Attorney General)* v. *Canada (Information Commissioner)* [2004] 4 F.C.R. 181, the Federal Court of Appeal considered a provision in the *Access to Information Act* purporting to permit the Federal Information Commissioner to examine any record "notwithstanding any privilege under the law." Despite this express language, the Court held that the section:

> … must be interpreted restrictively in order to allow access to privileged information *only where absolutely necessary to the statutory power being exercised.* (emphasis added)

In *Blood Tribe,* the court said the Commissioner's ability to conduct an investigation is not fettered by a rule that protects privileged information. The court also noted that the Supreme Court of Canada, *R.* v. *McClure* [2001] SCR 14, had developed useful principles for reviewing solicitor-client privilege claims.

The Federal Court of Appeal also noted that in *Goodis* v. *Ontario (Ministry of Correctional Services)* 2006 SCC 31, the Supreme Court of Canada held that records subject to a claim of solicitor-client privilege may be ordered disclosed only where absolutely necessary — a test that falls just short of absolute prohibition.

Lawyers who receive a requirement pursuant to a statute to produce or surrender a document or provide information that is or may be privileged in circumstances where the client does not waive any claim of privilege, or where a client cannot be located and therefore no instructions can be obtained, are encouraged to call Law Society staff lawyers Michael Lucas, Policy and Legal Services Administrator, at 604 443-5777 or Kensi Gounden, Practice Standards Counsel, at 604 605-5321 for guidance with respect to the professional obligations that the lawyer must discharge.

Application for leave to appeal has been filed.✧

Disclosure and Privacy Task Force winds up after five years and more than 100 recommendations

The Disclosure and Privacy Task Force has now completed its five-year long review of the Law Society's operations and the Benchers have approved more than 100 recommendations designed to ensure openness and transparency in the Society's regulatory programs.

Established in 2001, the Task Force's work will ensure that the Law Society remains at the forefront of disclosure and privacy policy among self-regulating professions.

Recommendations adopted over the past five years include rule changes allowing disclosure of discipline decision on the Society's website, guidelines governing the naming of witnesses in hearing reports, and new rules requiring publication of hearing decisions and restricting anonymous publication. Additional changes allow the Law Society to disclose more information about complaints and conduct reviews and to post information about restrictions on a lawyer's practice on the website.

At one time the Law Society of BC, like most self-regulating professions, conducted most of its regulatory activities behind closed doors. Beginning in the 1970s, however, governments and the public began to take greater interest in the affairs of self-regulating professions and began demanding more transparency from these organizations.

As a result of these societal pressures, many changes occurred over the next two decades. For example, the Law Society opened its discipline hearings to the public in 1981 and its credentials hearings in 1999. The provincial government also passed freedom of information legislation, which requires the Law Society to protect personal privacy, while at the same time giving the public access to previously confidential Law Society records. Another significant legislative change gave the Ombudsman authority to review the Law Society's disciplinary and other procedures.

As these changes were forcing the once private world of the Law Society into the open, a new means of communicating with the public was growing and by the late 1990s the internet was, perhaps, our most important method of disseminating information.

Law Society rules, regulations and policies, however, did not keep pace with these changes, and there were many anomalies. For example, the Law Society disclosed the dates of discipline hearings on its website, but not the reasons for the hearings. The public knew a lawyer was in trouble but didn't know how serious the charges were. Another anomaly involved Law Society Rules that made discipline hearings open to the public and required summaries of disciplinary decisions to be distributed to the membership, but remained largely silent about distribution to the media or the public.

... the Task Force's work will ensure that the Law Society remains at the forefront of disclosure and privacy policy among self-regulating professions.

These anomalies, along with the growth in electronic communications and public demand for information, meant that the Law Society found itself regularly faced with questions of disclosure and privacy. There was, however, no centralized means of dealing with these questions and most issues were resolved on an ad hoc basis by the department in which the issues arose.

To deal with these problems, the Law Society, in January 2001, established a cross-departmental staff group to review existing disclosure rules and policies and to make recommendations for necessary changes. As the staff group worked through various issues, it quickly became apparent that Bencher input was required. Consequently, in July 2001, the Benchers created the Task Force on Disclosure and Privacy giving it a broad mandate to make recommendations for balancing the Law Society's obligation to be open and transparent against the requirements of the law, considerations of privacy and the efficacy of the Society's duties under the *Legal Profession Act*.

The Task Force and staff group included Benchers, Lay Benchers, lawyers and staff members with expertise in public policy, communications, media relations, professional regulation and corporate governance.

Members of the Task Force have included: Peter Keighley, QC (Chair July 2001 to February 2004), John Hunter, QC (Chair February 2004 to conclusion of the Task Force), June Preston (Lay Bencher), Maureen Baird and Jean Whittow, QC.

Over the past five years, the Task Force made 115 recommendations to the Benchers. These recommendations were all designed to ensure the Law Society operates with the level of openness and transparency necessary to maintain public confidence in our regulatory system. The Task Force based its recommendations on an analysis of five factors: the public interest, the profession's interest, the impact of the recommendations on Law Society operations, the interests of individual lawyers involved in the regulatory process and the interests of any third parties who might be affected by the recommendations.

Rule amendments have previously been distributed to the profession.✧

Law societies sign mobility agreement at Vancouver meeting

The Federation of Law Societies of Canada met in Vancouver in November, at which time the law societies signed the new Territorial Mobility Agreement.

Under the Territorial Mobility Agreement, the Yukon, Nunavut and Northwest Territories law societies agree to join the common law provincial law societies 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. BC lawyers practising temporarily in the territories, however, will still have to obtain a permit from the appropriate territorial law society.

The Territorial Mobility Agreement will become operational as each territory enacts the rules necessary to implement the program. The Law Society of BC's Benchers adopted rules at their November meeting to implement the agreement.

The Territorial Mobility Agreement will last for 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. At the expiration of the five years, each territory will have the option of signing on to full mobility (both permanent and temporary) or withdrawing from the agreement.

The Law Society of Prince Edward Island also signed the National Mobility Agreement so that all common law provinces are part of both the temporary and permanent mobility programs.

The signing was part of the Federation's annual conference, which took place in Vancouver November 2 to 4 and was attended by delegates from all Canadian law societies, including Quebec's Chambre des Notaires.

Founded in 1926 and incorporated in 1972, the Federation provides a unified voice for provincial and territorial law societies on matters of national and international importance.

Ongoing Federation initiatives include:

- preparation of a National Model Code of Conduct;
- discussions with the federal Department of Justice concerning a protocol for law office searches;
- monitoring World Trade Organization negotiations on the General Agreement on Trade in Services;
- refining provisions relating to interprovinical and territorial lawyer mobility;
- discussions with the Canadian Payments Association on a protocol for cheque imaging and

Alma Wiebe, QC (Sask.), J. Michel Doyon (Barreau, PQ), Robert Basque, QC (NB), Mona Duckett, QC (Alta.), Jon van der Krabben (Man.), Gavin MacKenzie (Ont.), Tracy-Anne McPhee (Yukon), M. Lynn Murray, QC (PEI), Sarah Kay (NWT), Susanne M. Boucher (Nunavut), Robert McDiarmid, QC (BC), Paul McDonald (NL), Philip J. Star, QC (NS).

retention;

- working with the Canadian Bankers' Association on issues relating to timely provision of mortgage discharges by financial institutions;
- ongoing discussions with federal government officials on anti-money laundering programs;
- interventions in litigation where issues relating to the governance and independence of the legal profession are at stake;
- CanLII, the national virtual law library;
- the National Committee on Accreditation, which assesses and accredits foreign law degrees for purposes of applying for admission to Canadian law societies.

The conference included a presentation by the Barreau du Quebec and the Chambre des Notaires on practice inspection programs in their jurisdictions and how similar comprehensive practice inspection programs might be developed and introduced in other jurisdictions.

Delegates also heard from Nunavut Premier and lawyer Paul Okalik, who spoke about the evolving role of the Northern bar.✧

Federation elects new President

William H. Goodridge, QC, of St. John's, Newfoundland was elected President of the Federation of Law Societies of Canada at the Federation's Council meeting in Vancouver.

Mr. Goodridge is a partner at Stewart McKelvey Stirling Scales in St. John's. He was President of the Law Society of Newfoundland and Labrador in 2001 – 2002 and was appointed to the Federation's Council in 2003. He has served as Chair of the Litigation Committee and as a member of the Committee on Continuing Legal Education Programs. He was elected Vice-President of the Federation in 2005.

He practises in the areas of insurance, professional negligence, government regulated industries and municipal law.

Charles Locke receives Law Society Award

Charles C. Locke, QC was presented with the Law Society Award in recognition of his truly exceptional service to the profession and the justice system over more than 60 years.

The Law Society Award is given every two years to honour exemplary lifetime contributions within the profession and the legal community, based on integrity, professional achievements, service and law reform.

The presentation was made by Law Society President Rob McDiarmid, QC at the Bench & Bar Dinner on November 23.

Mr. Locke graduated from the University of BC with a Bachelor of Arts degree in 1938 and articled with his father's firm in Vancouver. He was called to the Bar in 1942.

His legal career, however, was soon interrupted by the war and from 1941 to 1946 he saw active duty with the Royal Canadian Artillery. He participated in the 1944 Battle of Normandy and was part of the Rhine Crossing into Germany in 1945. He rose to the rank of Captain and was mentioned in despatches for his service in France and Germany.

In 1946, Mr. Locke returned to Vancouver and rejoined his father's firm, Locke Lane Guild and Sheppard, where he remained until 1955 when he joined Ladner Downs. He was appointed Queen's Counsel in 1960.

In 1978, he was appointed to the BC Supreme Court and in 1988 he joined the Court of Appeal where he served until his retirement from the Bench in 1992 when he returned to Ladner Downs. He retired from active practice in 2003.

In addition to his work as a lawyer and a judge, Mr. Locke served as Vice-President of the Canadian Bar Association, as a Bencher and Treasurer of the Law Society, and as President of the Federation of Law Societies of Canada.

During his retirement, Mr. Locke devoted considerable time to writing a history of the governance of the legal profession in BC, which was published over the course of three editions of *The Advocate* in 2002 and 2003.

The Law Society Award is a bronze statue of Sir Matthew Baillie Begbie, cast by the late Pender Island sculptor Ralph Sketch.

Past recipients of the award are: Dean Emeritus George F. Curtis, QC (1986), Oscar F. Orr MBE, OBC, QC (1988), Chief Justice J.O. Wilson (posthumously in 1992), Mr. Justice Peter Seaton (posthumously in 1994), Alfred Watts, QC (1996), Martin Taylor, QC (1998), E.N. (Ted) Hughes, QC, (2000), Mr. Justice Ken Meredith (2002) and Rick Sugden, QC (2004).✧

Roxane Vachon: an advocate for criminal justice in Afghanistan

Roxane Vachon had been practising criminal law in Vancouver for six years when, one March afternoon in 2005, a small newspaper ad changed her life. The next day, Ms. Vachon accepted a fellowship with Legal Aid Afghanistan (LAA), a criminal defence development project sponsored jointly by the Montreal-based International Criminal Defence Attorneys Association and the International Legal Foundation, headquartered in New York. Within two weeks of accepting that offer, Roxane Vachon packed up her life, said good-bye to her partner and two sons (then 9 and 10), and travelled to Kabul, Afghanistan. Working out of LAA's clinic in a small house, Ms. Vachon spent the next two months helping local people — many of them children — with their legal problems. LAA trains and mentors local defence lawyers, focusing on developing their practical skills and experience in case management, pleading techniques and effective interaction with authorities. The hope is that practical education and positive experience will both inspire and enable local lawyers' support for an individual rights-based criminal defence culture in Afghanistan.

In September 2006, Ms. Vachon returned to Vancouver from her second two-month LAA fellowship in Kabul. She recently spoke about her experiences in Afghanistan with Mark Forsythe, on CBC Radio One's BC Almanac program.

MARK FORSYTHE: Why were you drawn to do this kind of work?

ROXANE VACHON: I have always been interested in opportunities to help people in less fortunate parts of the world. I think destiny took me to Afghanistan the first time around, because one afternoon my partner happened to show me a newspaper ad that was closing that day. So, I just sent an email asking, "Is there still time to send my resume?" One thing led to another, and the following day they offered me a job. Ten days later I was in Afghanistan.

FORSYTHE: Why is it necessary for Canadian lawyers to go to Afghanistan and help this way?

VACHON: We have such a privileged justice system here. It's certainly not perfect, but Afghanistan has absolute chaos and arbitrariness for a justice system. If we can go out and train local lawyers to become advocates in their own system, I think we ought to do that.

FORSYTHE: Could you give us some examples of the circumstances of people that you defended?

VACHON: Well, we would defend anybody who is indigent. In Afghanistan, that means everybody who's in jail. If you have money, you're going to pay your way out of trouble when the police arrest you. So, if you're in jail, you're poor. There's no such thing as bail. You have to just wait and wait until your matter is heard. Prisoners range from suspected opium smugglers, to women alleged to have stolen a chicken, to children charged with stealing an egg. And they are held in custody in overcrowded, abject conditions for any amount of time.

FORSYTHE: What kind of sentences do they face for what we might consider to be minor criminal acts?

VACHON: Huge sentences. Their jeopardy is huge. Execution is the high water level. A mother can serve a life sentence for a crime committed by a male relative.

FORSYTHE: Can you tell us about a memorable person you defended?

VACHON: I went to a prison in Kunduz, a city in the north of the country. Lawyers hadn't visited the women there in a very long time. I met a mother in custody with her daughter and several grandchildren. In Afghanistan, a woman's arrest dishonours her whole family. Nobody wants her in the village, nor her children or grandchildren. This woman was in jail because her husband had disappeared. The authorities assumed that she must have killed him, refusing to believe that he might have run off with another woman to Iran. That simply could never happen; she must have killed him. So there she was, serving a life sentence with her daughter and grandchildren.

FORSYTHE: What happened after your visit?

VACHON: Unfortunately she had already exhausted her levels of appeal. But we were able to apply to have her daughter transferred out of the adult criminal justice system and into the juvenile system. She was seventeen and just made the cut, receiving a small sentence. When I returned during my second fellowship, she and her children were already out of custody. If we hadn't intervened, they would have spent their lives in prison.

FORSYTHE: I believe you also warded off a death sentence for another person you represented?

VACHON: Yes, his name was Bashir. His case had to do a lot with corruption: somebody highly placed in the government had it in for him. Although he had been acquitted at the first level, he was charged again, convicted and sentenced to death. I am sure that someone paid someone to get the verdict they wanted.

When we arrived at the courthouse at noon for the 1:00 pm sentencing hearing, we were told that the hearing had gone ahead in the morning and that Bashir had been sentenced to death. After I flew into an apoplectic rage, they agreed to hear my sentencing submissions at the scheduled time. We persuaded the United Nations to send two observers in a UN truck — basically applying maximum pressure to prevent Bashir's execution. His sentence was commuted to 16 years, but I know that the authorities haven't

Roxane Vachon wearing a burkha and visiting with an Afghan colleague's child. "Although very hot and inconvenient, wearing the burkha allows me to go incognito in communities where western women are quite a novelty, such as Kunduz."

given up on the death penalty. I heard recently that they have filed an appeal of the commuted sentence.

FORSYTHE: We hear about suicide bombers in Afghanistan. Was that a reality you experienced?

VACHON: One day I received an email from the Canadian Embassy that said, "We have intelligence that there's a suicide bomber out and about in Kabul. He's going to strike in the next couple of days. We can't tell you where. Stay home." So that's exactly what I tried to do. I went to work and came home at 6:00 o'clock.

At 6:30, my home blew up. Three people died in that blast. I was lucky — I wasn't hurt, but it was terrifying. Being a Canadian, you can't even imagine that you've just been bombed. So I was running around thinking a propane tank had just blown up and I wouldn't be having dinner that night. I thought that until I walked into the dining room, where it was pretty clear that something very, very bad had just happened.

FORSYTHE: And why do you think your home was a target?

VACHON: It was a guest house where foreigners typically live, so they were targeting foreigners. Also, there was an Internet café, which was pretty new in Afghanistan and was seen as a symbol of western communication. The bomber was planning to blow up the dining room at dinner in order to have the maximum amount of casualties. But he accidentally blew himself up in the bathroom, which was merciful.

FORSYTHE: That was the first trip. What about the second time around, what did you experience?

VACHON: I felt so much more comfortable. I would shop for bread, fruit and vegetables by myself. I would take a cab. In Kabul there were shopping malls, hotels, banks and bank machines being built. Kabul's infrastructure was so much better than the first time I was there, but the security had clearly deteriorated. Every week a couple of bombs would go off, and where was anybody's guess.

FORSYTHE: How did you stay focused on what you had to do when this was going on around you?

VACHON: It's amazing what the human mind can do. If a bomb went off in downtown Vancouver today, we would all be really frightened. Everything would stop for several days. In Kabul, a bomb detonated outside the courthouse about an hour after I had left the building. I thought, "Oh that's good, I wasn't there. And at least it's not on my street. At least it wasn't my house. At least it's two blocks away." You just adapt and keep functioning. If you can't adapt, I guess you don't go there and do that kind of work.

FORSYTHE: How have the Afghan people adapted?

VACHON: Oh goodness. They've adapted through 30 years of conflict, from the Russians to the Mujahedeen to the civil war. They're resilient people who like to laugh, are spirited and light hearted. And of course, they're profoundly religious. Violence is so much a part of their lives that they've learned to function and be happy in spite of it.

FORSYTHE: How much success have you and your International Criminal Defence Attorneys Association colleagues had in training Afghan lawyers? And do you have much faith that the Afghan people can receive equity and fair treatment in their justice system?

VACHON: For the success part, we represented 1,500 people who otherwise would be in jail, serving 25-year sentences or awaiting execution. As for training lawyers, they're bright, capable individuals who want to get their country on track. They have progressed enormously in the short time we've worked and done trials with them. The first lawyers I trained have become trainers, and now are considered to be senior lawyers.

Here, a defence counsel's work is a matter of always reminding the police

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Civil Justice Reform Working Group calls for fundamental changes

The Civil Justice Reform Working Group (CJRWG) has issued a report calling for fundamental changes to litigation in BC's courts.

"We envision a civil justice system that assists citizens in obtaining just solutions to legal problems quickly and affordably," the CJRWG said in a 142-page report released in November. "This vision involves providing everyone, regardless of their means, with access to civil justice."

The 12-member CJRWG — co-chaired by BC Supreme Court Chief Justice Donald Brenner and Deputy Attorney General Allan Seckel, QC — was established in November 2004 by the BC Justice Review Task Force (JRTF) to explore fundamental change to the civil, non-family process.

The working group's report, *Effective and Affordable Civil Justice*, is the result of two years' work, including consultation with the legal profession, review of 35 written submissions, a conference on restructuring justice, a Supreme Court file review and extensive analysis of research in Canada, the United Kingdom, the United States and Australia.

The report outlines two broad strategies:

- providing integrated information and services to support those who want to resolve their legal problems on their own before entering the court system; and
- providing a streamlined, accessible Supreme Court system where matters that can be settled are settled quickly and affordably and matters that need a trial get to trial quickly and affordably.

The report also provides three recommendations for implementing these strategies.

The first recommendation involves the introduction of a single place (referred to as a "hub") where people can go to get the information and services they require to solve legal problems on their own. The hub will coordinate existing law-related services, provide legal information and provide access to legal advice through a clinic model.

The CJRWG notes that the legal clinics proposed for the hubs "may depend in part upon the keen involvement of lawyers and law students on a largely pro bono basis." The report supports the work of the Law Society's Unbundling Legal Services Task Force, noting that the ability to hire a lawyer for a discrete task is "an essential ingredient of a hub clinic model." The report also calls on the Law Society to ensure conflict of interest rules do not prevent lawyers from volunteering at pro bono clinics.

The second recommendation is that parties to Supreme Court actions personally attend a Case Planning Conference (CPC) with a judge before they engage the system beyond initiating and responding to a claim.

The proposed CPC builds on two existing initiatives: the Rule 68 Expedited Litigation Project Rule and the Rule 60E Family Law Judicial Case Conference Pilot Project.

With the assistance of a judge, Case Planning Conferences will try to determine the most appropriate method for resolving the dispute. CPC judges will have extensive powers to limit discovery, to order the number of experts a party may call, to order mediation or other dispute resolution process, to limit trial length or to make any other orders necessary to produce an efficient resolution of the case.

The third recommendation involves a complete rewriting of the Supreme Court Rules based on the principle of proportionality so that the amount and type of process is directly linked to the amount and type of claim.

Additional recommendations for Rule changes include:

- abolish the current pleading process and instead adopt a new case initiation and defence process that requires the parties to accurately and succinctly state the facts and the issues in dispute and to provide a plan for conducting the case and achieving a resolution;
- limit discovery, while requiring early disclosure of key information;
- limit the parameters of expert evidence;
- streamline motion practice;
- provide the judiciary with power to make orders to streamline the trial process;
- consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules; and
- provide opportunities for litigants to quickly resolve issues that create an impasse.

For background information and a copy of the report, see www.bcjusticereview.org. The working group includes representatives from the Law Society of BC, the Canadian Bar Association, the BC Supreme Court, the BC Provincial Court, the Legal Services Society, Court Services and members of the Bar.

The Deputy Attorney General and Chief Justice Brenner will be touring communities throughout the province in 2007 to obtain input on the report's recommendations.

The working group believes that the "front-end loading" of processes and resources will encourage "early, affordable and just solutions." The report also predicts a reduction in the number of motions, documents exchanged, examinations for discovery and experts.

In addition, the working group believes its recommendations will:

- reduce the labour-intensiveness of the litigation process, thereby reducing the cost for the parties;
- reduce the number of hours spent by counsel relearning the case after prolonged bouts of inactivity;
- reduce the time spent on pleadings and amendments to pleadings;
- identify key issues earlier, thereby saving time and money spent on extraneous issues; and
- provide more opportunities to resolve disputes earlier, regardless of the dispute resolution process employed.

The Justice Review Task Force was established on the initiative of the Law Society of BC in March 2002 to identify a wide range of potential reform initiatives that could make BC's justice system more responsive, accessible and efficient.

Prior to creating the Civil Justice Reform Working Group, the JRTF formed three other working groups. The Family Justice Reform Working Group released its final report, *A New System for Families and Children*, in June 2005 and the Street Crime Working Group issued its report, *Beyond the Revolving Door: A New Response to Chronic Offenders*, in October 2005. The Mega-Trials Working Group is expected to release its recommendations in the near future.✧

Law Foundation update

Warren Wilson, QC provided a broad review of the Law Foundation of BC's history, mandate, priorities and operations to the Benchers at their November meeting. The Chair of the Foundation's Board of Governors reported that a three-year funding strategies review has recently been completed, assessing the alignment of the Foundation's funding with its mission and evaluating the effectiveness of its grant-making.

"The review confirms that the right groups are being funded the right amounts to do the right work," Mr. Wilson informed the Benchers. He added, "the Law Foundation plans to continue to use its limited resources to maximize benefits to the public and the legal profession in its five mandated areas of legal education, legal research, legal aid, law reform and law libraries."

The former President of the Law Society noted that the Law Foundation has approved grants totalling more than $298 million from its inception through 2005, fulfilling the Foundation's mission to support organizations and programs that advance the rule of law and a just society. Mr. Wilson reminded the Benchers that by persuading the BC government to enact enabling legislation for the creation of North America's first law foundation in 1969, BC lawyers pioneered the harnessing of interest earned on pooled trust accounts for the benefit of the public.

2005 saw the Law Foundation distribute $16.9 million in grants, $13.6 million of which provided core funding for 51 continuing programs, including the BC Courthouse Library Society, Legal Services Society and Pro Bono Law of BC. Seven child welfare grants totalling $500,000 were issued from the Foundation's Child Welfare Fund. Thirty-nine new project grants accounted for another $2.3 million, supporting various one-time initiatives in the areas of public and professional legal education and legal aid, including:

- $600,000 for new awards to UBC and UVic law students who demonstrate both academic merit and need;
- $300,000 for Public Interest Articling Fellowships, providing articling opportunities for six deserving students; and
- $100,000 to each of the Community Legal Assistance Society, the BC Public Interest Advocacy Centre, the Legal Services Society and Pro Bono Law of BC.

On the financial front, Mr. Wilson advised that because increased trust balances and improved interest rate agreements combined to offset generally low interest rates, "the Foundation was able to increase funding as well as add to its grant stabilization reserve in 2005."

He concluded by noting that with sound finances, strong governance and "invaluable" staff, the Foundation's outlook is bright for continuing its work to enhance public access to justice.✧

Financial institutions raise rates

Over the past two years, the Law Foundation has negotiated an improvement of .5% on its benchmark rate of interest earned on pooled trust deposits (from prime minus 3.25% to prime minus 2.75%). The Foundation is pleased to recognize the following financial institutions for honouring and in some cases exceeding the new benchmark rate: Royal Bank of Canada, Vancouver City Savings Credit Union, Canadian Imperial Bank of Commerce, TD Canada Trust, Bank of Montreal, Bank of Nova Scotia, HSBC and Canadian Western Bank.

Unbundling legal services: alternatives to full service representation

Representatives of the Law Society's Unbundling Legal Services Task Force met recently with members of the Cariboo Bar to share information and views regarding the provision of discrete or "unbundled" legal services under limited retainers.

Task Force Chair Carol Hickman told the Benchers that the September 22nd consultation in 108 Mile House was "an important component of our work toward generating a final report on the topic of unbundled legal services."

Ms. Hickman also said that any recommendations from the Task Force would be suggestive, not prescriptive. "We are very aware that considerable 'unbundled' legal work is already being done in BC, and done well. While it's important to examine how a more formalized approach to unbundling might contribute to greater access to justice in this province, it is also important not to disrupt what's already working well."

Ms. Hickman advised the Benchers that the Task Force representatives found their meeting with members of the Cariboo Bar both informative and enjoyable. "The session was well attended and a great success," she said. "The tone was informal and open, with many practical questions and issues raised in the discussion."

Those issues ranged from the strength of client demand for discrete services such as ghostwriting documents and pleadings, and making limited appearances before the courts, to the challenges of managing actual and potential conflicts of interest, and to the complexities of communications between parties where one or more is partially represented by a lawyer. "Perhaps as important as the information exchanged was the quality of the dialogue itself," Ms. Hickman said. "The local bar really appreciated the fact that our Task Force members visited their community and came prepared to listen to their concerns."

The Benchers established the Task Force in 2004 on the recommendation of the Access to Justice Committee. In early 2005, the Task Force began to examine the issues raised when lawyers offer their clients the option of discrete or limited scope legal assistance, instead of full legal representation on all aspects of a transaction, dispute or process. The major public interest implication of unbundling or limiting the scope of legal services lies in the potential to increase access to justice for members of the public who otherwise might not be willing or able to obtain legal representation.

Consultation has been an ongoing element of the Task Force's work. In May 2005, a facilitated consultation was held in Vancouver, including lawyers, judges, government and community organizations. That session sought to determine which services BC lawyers currently unbundle, how and to whom those discrete services are offered, and which unbundled services are seen by community leaders as being most helpful to the public. Participants were also asked to identify risks, issues or challenges associated with unbundling, to consider whether there should be a broader unbundling of legal services and, if so, to suggest how that broader unbundling might look.

The Task Force is exploring how unbundled legal services can enhance access to justice, and is reviewing possible regulatory and procedural changes to facilitate unbundling. Specific regulatory issues being canvassed include:

- liability and insurance implications;
- possible revisions to practice materials and rules;
- relations with the courts; and
- ethical issues, such as conflict of interest, informed consent and duty of disclosure.

While the American Bar Association's Model Rules for limiting the scope of legal representation have been in place for several years, a 2004 survey of Canada's law societies revealed that only BC and Alberta had rules specifically addressing limited scope services. Chapter 10, Rule 10 of the *Professional Conduct Handbook* requires any lawyer who acts for a client only in a limited capacity to disclose the limited retainer promptly, both to the court and to any interested party in the proceeding, if the court or such party would otherwise be misled.

The Task Force anticipates that most, if not all, rules that apply to full legal representation also apply to limited scope services. Lawyers must address a number of considerations in setting up a limited scope retainer and obtaining informed consent, such as identifying potential conflicts and risks, settling the terms of the retainer, alerting clients to issues that fall outside the scope of the retainer, establishing ground rules for communications with opposing counsel and defining how the retainer will end.

Potential difficulty lies in the distinction between "legal information" on the one hand, and "legal advice" or "legal assistance" on the other. The distinction is important because, if lawyers provide legal advice and assistance, they cannot avoid the ensuing duties of the solicitor-client relationship. That is to say, they owe the same duties of loyalty, confidentiality, diligence and competence to limited service clients as to other clients.

The Unbundling Legal Services Task Force is now finalizing the results of its research and consultation work. Input will be sought from the Ethics Committee before the Task Force's final report is released in the new year.✧

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

Integrated accounting and case management systems

♪ *I'm here to win your heart and soul, that's my goal …* ♪

Words and music by Shayne Ward

I am often asked to recommend a "good, simple and cheap accounting system." I tell people there are lots of programs that fit this description. But why go with a simple accounting system when, for a few dollars more, you can get an integrated accounting and case management system that will do so much more than just balance your books.

The difference can be compared to acquiring an "econo-box" car that simply gets you to and fro and a vehicle with a built-in GPS that allows you to select your destination, gives you real-time information and then tells you how to get there.

A typical "good, simple and cheap accounting system" costs about $400. But it does not provide you with trust accounting or any specific legal practice management features.

Contrast this with an integrated accounting and case management program and you will quickly see the difference. In addition to "good, simple and cheap" accounting, these types of programs include calendering, contact management, document management, conflict searches and a host of other utilities that provide significant added value.

Many equally good integrated accounting and practice management software packages are available: PCLaw, LawStream, SmartWeal, Tabs III + PracticeMaster, ProLaw and Brief Accounting are among the most popular. They cost a bit more than a simple accounting system — PCLaw is about $750 and the cost increases as you add users — but for a solo or small firm practitioner the cost is quickly recovered through added management applications.

An integrated accounting and case management package will perform all the traditional functions of a typical accounting program, such as preparing reports and balance sheets. But it can also help you monitor and achieve your financial goals the same way a GPS guides you to your desired destination.

For example, if you set an annual billable hour goal, your system can determine the weekly and daily billable time required to attain that goal then calculate your actual time logged and provide you with feedback so you know if you are on track.

Furthermore, an integrated system will allow you to create a budget and then track your actual expenses and income against the budget. This allows you to see if you are running your practice within the financial constraints you set for yourself.

You can also monitor work in progress on an individual file to ensure you don't exceed any billing limits you and your client have agreed on. This allows you to take early action before a file becomes a problem.

Another feature is that you can set an annual net income target and use the program's financial reporting features to give yourself real-time feedback on how close you are to attaining your goal.

If you have set a goal to open a certain number of files in a specific practice area, a case management package can also be used to track your progress and to provide feedback. In addition, you can set quality of service standards, such as responding to all telephone calls within 24 hours, and use the program to ensure you meet your targets.

These days, the additional features and capabilities of true integrated legal financial and case management systems outweigh the small cost differential as compared to basic accounting systems. Once you have tried them they will win over your heart and soul by helping you attain your goals.✧

Ministries issue caution about water licences

The Ministry of Environment and Ministry of Agriculture and Land remind lawyers that the *Water Act* of BC requires anyone conveying or disposing of land to report the change of ownership to the Comptroller of Water Rights if there are one or more water licences appurtenant to the land. All water licences are appurtenant to land and must be transferred to the new owner, complete with consideration of prepayments or arrears. Water licences are not recorded in the Land Title Office.

When conveying or disposing of land, lawyers are required to report, in writing, the transfer of ownership with water licences (s. 16(1) of the *Water Act*).

Water licence information is available at www.env.gov.bc.ca/wsd/water_rights/water_rights.html.

The status of a client's account for water licences is available from any of the Integrated Land Management Bureau's offices or, in Kamloops, Front Counter BC.

Call 1-800-361-8866 or fax 250 356-0605 prior to the land sale for a current balance on the licences and to communicate the transfer of ownership.✧

Ethics Committee seeks input on conflicts rules

The Ethics Committee invites the profession to suggest improvements to the *Martin* v. *Gray* rules governing conflicts that arise when a lawyer changes firms.

In 1995, the Law Society adopted Chapter 6, Rules 7.1 to 7.9 of the *Professional Conduct Handbook* to permit law firms, in some circumstances, to continue to act for existing clients when a lawyer who previously worked for opposing counsel joins the firm.

The rules permit firms to design screening mechanisms to ensure no confidential information of any party is improperly disclosed to the transferring lawyer's old or new firm. A checklist of factors to be considered when setting up a screen is set out in Appendix 5 of the *Handbook*. The rules were drafted from model rules prepared by the Federation of Law Societies following the decision of the Supreme Court of Canada in *MacDonald Estate* v. *Martin* (*Martin* v. *Gray*) (1990) 77 DLR (4th) 249.

During the past 11 years, the Ethics Committee has given a number of opinions to lawyers concerning their compliance with the rules, including whether screening measures are sufficient to permit the firm to continue to act when a lawyer transfers from an opposing party's law firm. Based on this experience, the Ethics Committee is now considering whether the rules can be improved and invites the profession's suggestions.

Some changes that have already been suggested:

1. Eliminate the requirements of Rule 7.4(b)(i)(D) and 7.4(b)(i)(E). Typically, suitable alternative counsel will be available and their availability or lack of availability is unlikely to be determinative of the issues raised. Issues affecting the national or public interest will almost never arise and it is better not to refer to them.

2. Modify guideline 5 of Appendix 5 to eliminate the requirement that the files be physically segregated from the files of the new firm's regular filing system. The incoming lawyer has a duty of confidentiality to both the former client and the current client of the new firm and the requirements of the rule ought to take account of those obligations. While steps need to be taken to ensure that the incoming lawyer does not access any files improperly, those steps may not require that the files be physically segregated.

3. Eliminate the need to physically segregate computer files in guideline 5, and substitute a requirement to segregate them electronically instead.

4. Eliminate the Rule 7.4 requirement that the new law firm must "establish" that it has taken reasonable measures to protect the former client's confidential information. While it would be reasonable to continue to require a firm to justify the measures it has taken to protect the former client's information if called upon to do so, it is not necessary that the new firm establish that it has taken reasonable measures unless the adequacy of those measures is challenged.

5. Eliminate the requirement in Rule 7.4(b)(i) that the new law firm establish that it is in the interests of justice that its representation of its client continue. Where a client would have to forgo its counsel of choice because of a conflict caused when an incoming lawyer to the firm has confidential information of a party adverse in interest to the new firm's client, it should be presumed that it is in the interests of justice to permit that client to continue to retain its counsel of choice.

6. Clarify the use of the words "should" and "must" in Rules 7.5(a) and 7.5(b). Rule 7.5(a) states that where a lawyer possesses relevant information that is not also confidential the lawyer "should" execute an affidavit to that effect. Rule 7.5(b) states that the law firm "must" deliver a copy of the affidavit to affected persons. It might be preferable to state that a lawyer covered by (a) must execute an affidavit. Alternatively, it may be that a lawyer who has relevant information that is not confidential ought not to be required to take any steps at all in relation to that information.

Lawyers are invited to suggest any improvements in these rules or comment on suggestions already made by contacting Jack Olsen, Staff Lawyer – Ethics, at Tel. 604 443-5711, Fax 604 646-5902 or email: jolsen@lsbc.org.✧

Courts and LTSA issue practice directives

The Supreme Court of Canada has enacted amendments to its Rules of Practice, which include changes to filing deadlines and adjustments to fees and costs. A guide to the principal changes is available on the court's website at www.scc-csc.gc.ca or by calling any Registry officer at 613 996-8666.

The Chief Justice of the BC Supreme Court has issued two directives: 1) on initial orders made pursuant to the *Companies' Creditors Arrangement Act*; and 2) concerning the *Class Proceeding Act* and the National Class Action Database. The directives are available in the Supreme Court section of the BC courts website at www.courts.gov.bc.ca.

The Land Title and Survey Authority has issued Practice Bulletin #0306 concerning production of evidence: see EFS Practice Bulletins at www.ltsa.ca/ltd_efs_news.htm.✧

New rule prohibits restrictions on future representation

The Benchers have added new Rule 7 of Chapter 4 of the *Professional Conduct Handbook* in order to prohibit a lawyer from agreeing to restrictions on future representation as part of a civil settlement for a client or other controversy. The new rule also prohibits a lawyer from participating in an offer or making an agreement that would restrict another lawyer's right to practise. The rule states:

> A lawyer must not participate in offering or making an agreement in which a restriction on any lawyer's right to practise is part of the settlement of a client lawsuit or other controversy.

The Ethics Committee has been asked on a number of occasions to provide opinions on the propriety of lawyers making or accepting such offers. The issue has arisen in the past when a litigant, typically a defendant, makes an offer for settlement that contains a term that the opposing party's lawyer must agree to refuse representation of future clients in separate similar actions against the litigant. Typically, the lawyer is asked to agree to a restriction in exchange for receiving a direct payment to the lawyer, which is in addition to settlement funds offered to the lawyer's client. This scenario sometimes occurs when a defendant is willing to settle a single case and hopes to avoid the possibility of a large number of future claims arising out of the same circumstances.

The majority of Benchers approved the new rule because they were concerned that any restriction on a lawyer's future representation created a conflict between the interests of client and lawyer — with the client's interest lying in a swift and favourable settlement, and the lawyer's interest in being free to earn future fees from prospective clients in the same area. Some Benchers were also concerned a restriction on future representation could create a conflict between the interests of present clients and those of potential future clients.

The Benchers were further of the view that the absence of a rule would permit wealthy clients to buy off lawyers who have represented similar clients in the past and may therefore be the most knowledgeable and effective advocates for any potential new client's cause. This could have the effect of restricting public access to, potentially, the best available talent and might permit defendants to avoid fully compensating those they injure and thus undercut the deterrent value of the law.

The profession was invited to comment on the issue last year in the *Benchers' Bulletin*. The Law Society received an overwhelming number of responses in favour of the creation of a rule prohibiting the offer or acceptance of such agreements.✧

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 **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.

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.

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 articled 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 articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no cost to individual lawyers: **Tel**: 604 685-2171 or 1-888-685-2171.

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled 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.

Practice Watch, by Barbara Buchanan, Practice Advisor

E-filing and retention of documents — What to do?

Some lawyers have asked what to do with the paper version of real estate documents now that the electronic versions are deemed by statute to be the originals once they are filed in the land title office.

Section 168.6(1) of the *Land Title Act* provides that an electronic instrument that has been received by the registrar under s. 153 is conclusively deemed to be the original of the instrument. For example, an electronically filed Form A received by the registrar is conclusively deemed to be the original, rather than the paper Form A with the actual signatures.

In most cases, you can return the paper originals to the client by enclosing them with the final reporting letter before closing out the client's file. You should also keep a copy in the client's file for the normal file retention period.

Lawyers who are concerned about retaining paper versions in the event of a requirement by the registrar to produce documents for inspection before registration pursuant to s. 168.51 of the *Land Title and Survey Authority Act* should note the LTSA's practice bulletin of November 8, 2006 (www.ltsa.ca/documents/ltd/bulletin%200306.pdf). According to that bulletin, the LTSA may require an applicant to produce for inspection either the paper form with the original signatures (referred to in the legislation as an "executed true copy of the electronic instrument") or a "copy of that true copy."

The LTSA has advised that the pending application stage of the registration process is currently about six days from the time the documents are transmitted electronically to the land title office to the time of registration. Therefore, lawyers should be in a position to comply with inspection requests from the registrar before final registration of the electronic instrument.

A suggested minimum retention and disposition schedule for real estate files is set out below. Keep in mind that these are guidelines and that you must apply your own judgement as well.

For general information about client documents and retention guidelines, see *Whose File is it Anyway? Who Owns Client File Documents When the Retainer Ends?* and *Closed Files – Retention and Disposition*, both of which are in the Practice Support/Articles section of the Law Society's website.✧

Suggested minimum retention and disposition schedule for real property files	
Residential conveyance	10 years after State of Title Certificate is received
Commercial conveyance	10 years after closing (there may be transactions of such complexity that a longer retention period is advisable)
Lease/Sub-Lease/Licence to Occupy	Six years after lease has expired, including any renewal
Foreclosure	Six years after Order Absolute, property sold, judgment satisfied or instruction received from client to stop proceedings
Receivership	Six years after receiver is discharged or payment unless receiver has entered into another agreement
Option to Purchase/Right of First Refusal	Six years after the options expire or are exercised
Easement/Right-of-Way/Restrictive Covenant	10 years after registration
Review of title and opinion	Six years from giving an opinion, unless opinion leads to an action
Mortgage/Debenture	Six years after expiry of mortgage term
Subdivision/Single plan strata development	Six years after completion of the sale of all the property
Phased strata development	Six years after completion of the sale of all of the property in the final phase
Real estate prospectus	Six years after sale of all property covered by prospectus
Building contract	Six years after substantial completion
Encroachment settlement	Six years after settlement

Unauthorized practice investigations

As part of its statutory mandate to uphold and protect the public interest in the administration of justice, the Law Society routinely investigates allegations of unauthorized legal practice.

The *Legal Profession Act* restricts the practice of law to qualified lawyers in order to protect consumers from unqualified and unregulated legal service providers. A legal decision, whether it involves the purchase of a house, the start of a business or the drafting of a will, is often one of the most important decisions a person makes in his or her life. It is therefore fundamentally important that he or she receives advice from someone properly qualified.

In addition, non-lawyers are not subject to any regulation. They have no educational standards, no errors and omissions insurance, no ethical standards, no defalcation coverage and no governing body to complain to should something go wrong.

Section 1 of the *Legal Profession Act* defines the practice of law while s. 15 states that only a practising lawyer is entitled to practise law. Section 85 makes it an offence to practise law if you are not a lawyer. It is important to note that the practice of law is defined as carrying out any of the activities listed in s. 1 "for a fee, gain or reward, direct or indirect." A non-lawyer who provides or offers to provide legal advice but is not seeking a fee is not violating the statute.

There are, of course, exceptions. Notaries public in BC are entitled to provide a limited range of legal services — primarily real estate conveyancing, certain types of wills and affidavits. Immigration consultants are regulated by federal legislation and advocates appearing before workers' compensation board tribunals are not regulated.

Information about unauthorized practice comes to the Law Society's attention from a variety of sources. Occasionally, the Law Society receives calls from consumers who think the person they are dealing with is a lawyer and who want to file a complaint. Sometimes we hear from lawyers who have been retained to redo legal work that has been performed incorrectly by a non-lawyer. A surprising number of complaints arrive in the form of anonymous letters enclosing newspaper advertisements (usually for discount divorce services).

Examples of unauthorized practice range from the ridiculous (a man who claimed he could handle divorce cases because he'd been divorced two or three times and knew all about the law) to the profoundly serious (a man who was posing as a lawyer and visiting battered women's shelters with offers of discount legal services). In the latter case, the police stepped in before the Law Society obtained its order and charged him with fraud. He was ultimately sentenced to 24 months in jail (he represented himself at trial).

In an unauthorized practice case, unless a client who is willing to swear an affidavit complains or the person providing the advice is publicly advertising his or her services such that it is apparent the person is providing legal services for a fee, the Law Society will retain a private investigator. The investigator will usually attend at the person's office as a prospective client. It is necessary to do this so the Law Society can determine whether the person is engaging in unauthorized practice or if it was an isolated incident. In addition, if it is necessary to take the matter to court, the Law Society needs evidence of unauthorized practice.

If there is evidence that the person is offering legal services for a fee, the Law Society will write to the person asking him or her to stop and to sign an undertaking promising to refrain from doing so in the future. Often it's a case of simple ignorance — the person does not realize his or her activities are prohibited by law — and he or she signs the undertaking. If a person refuses to sign an undertaking, the Law Society can take the matter to court pursuant to s. 85 of the *Legal Profession Act* and ask for a formal injunction. In rare cases, where a person breaches an injunction, the Society will bring a contempt application against the person. In some contempt applications, the courts have gone so far as to fine or even order jail time for repeat offenders (see for example *The Law Society of BC* v. *McLeod* (unreported, BC Supreme Court December 17, 1998, Vancouver Registry No. A952288)).

In the first 10 months of 2006, the Law Society investigated 71 allegations of unauthorized practice. These resulted in 26 undertakings, two BC Supreme Court consent orders and five injunctions.✧

Special Compensation Fund claims

Martin Jones

Formerly of Vancouver, BC
Called to the Bar: November 15, 1996
Ceased membership for non-payment of fees: January 1, 2003

Special Compensation Fund Committee decision involving claim 20020589

Decision date: December 1, 2004
Report issued: April 12, 2005

Claimant: Mr. A
Payment approved: **$1,500**

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Special Compensation Fund *… from page 23*

Mr. A and his wife paid Mr. Jones a retainer of $1, 500 when they hired him to help with Mr. A's application for permanent resident status.

Mr. Jones acknowledged receipt of the $1,500, but he did not appear to have recorded receipt of the funds nor placed them in his trust account. Further, Mr. Jones never completed the service he was retained for, issued any bill to Mr. A, returned the money or accounted for any of it. Thus, the Committee found Mr. Jones had misappropriated $1,500 of Mr. A's money.

The Committee noted that it has the discretion to require claimants to exhaust their civil remedies before making a payment out of the Fund. In exercising this discretion, the Committee may consider, among other factors, likelihood of recovery, clear evidence of defalcation and hardship to the claimant. The Committee noted in this case that Mr. Jones was no longer practising law, had moved to Toronto and had indicated to the Law Society his intention to move to Washington, DC. Therefore, rather than requiring Mr. A to pursue the claim in Small Claims Court, the Committee decided Mr. A must assign to the Law Society any claim or cause of action he had in relation to Mr. Jones.

The Committee found that the claimant had suffered a loss in the amount of the $1,500 and approved a payment in that amount from the Fund to Mr. A, subject to certain assignments and conditions.

Special Compensation Fund Committee decision involving claim 20020140

Decision date: December 1, 2004
Report issued: April 12, 2005

Claimant: Doctor B
Payment approved: **$1,500**

Mr. Jones requested that Doctor B prepare two medical-legal reports regarding clients of Mr. Jones. Doctor B made a claim to the Special Compensation Fund Committee because he believed Mr. Jones had received funds from the Legal Services Society for payment of those reports, but had failed to reimburse Doctor B for his invoices. The Legal Services Society advised the Law Society on September 9, 2002 that it had reimbursed Mr. Jones $1500 for two of Doctor B's invoices.

Even though the funds were not paid by Doctor B, himself, to Mr. Jones, but instead came from the Legal Services Society on the premise that Mr. Jones would pay them to Doctor B, the Committee determined they were clearly owed to Doctor B by Mr. Jones. Thus, the Committee found Mr. Jones had misappropriated $1,500 of Doctor B's money.

As with the previous claim, the Committee decided that rather than requiring Doctor B to pursue the claim in Small Claims Court, Doctor B must assign the Law Society any claim or cause of action he had in relation to Mr. Jones as a condition of receiving compensation from the Fund.

The Committee found the claimant had suffered a loss in the amount of $1,500, which had been paid to Mr. Jones to pay Doctor B's invoices and was not. The Committee therefore approved a payment of $1,500 from the Fund to Doctor B, subject to certain assignments and conditions.

Special Compensation Fund Committee decision involving claim 20020636

Decision date: December 1, 2004
Report issued: April 12, 2005

Claimant: Ms. P
Payment approved: **$4,000**

Ms. P and her husband paid Mr. Jones $4,000 to assist with her husband's application to Citizenship and Immigration Canada.

Mr. Jones issued Ms. P receipts for her funds but did not appear to have recorded receipt of the funds nor placed them in his trust account. While Mr. Jones acknowledged receiving the funds, he never issued any bill to Ms. P, did not return the money or account for any of it. Thus, the Committee found Mr. Jones had misappropriated $4,000 of Ms. P's money.

As with the previous claims, the Committee decided that rather than requiring Ms. P to pursue the claim in Small Claims Court, Ms. P must assign the Law Society any claim or cause of action she had in relation to Mr. Jones as a condition of receiving compensation from the Fund.

The Committee found that the claimant had suffered a loss in the amount of the $4,000 she paid to Mr. Jones and thus approved a payment in that amount from the Fund to Ms. P, subject to certain assignments and conditions.

Special Compensation Fund Committee decision involving claim 20020041

Decision date: December 1, 2004
Report issued: April 12, 2005

Claimant: Doctor W
Payment approved: **$2,525**

Mr. Jones requested that Doctor W prepare medical-legal reports regarding various clients of Mr. Jones. Doctor W made a claim to the Special Compensation Fund Committee for $3,450 because she believed Mr. Jones had received funds from the Legal Services Society for payment of at least 11 of the 14 reports she had prepared regarding Mr. Jones' clients. She also asserted that, although Mr. Jones had received payment, he had failed to reimburse her for her invoices. The Legal Services Society advised the Law Society on August 30, 2002 that it had reimbursed Mr. Jones $2,525 for Doctor W's invoices. The Committee noted that this amount covered 10 of Doctor W's invoices.

Even though the funds were not paid by Doctor W, herself, to Mr. Jones, but instead came from the Legal Services

Society on the premise that Mr. Jones would pay them to Doctor W, the Committee determined the funds were clearly owed to Doctor W by Mr. Jones. Thus, the Committee found Mr. Jones had misappropriated $2,525 of Doctor W's money. The Committee determined that the balance of Doctor W's claim, the amount of $925 was for outstanding invoices, which were not paid by the Legal Services Society to Mr. Jones. Payment of the unpaid invoices was a debt owed to Doctor W by Mr. Jones and did not constitute misappropriation or wrongful conversion.

As with the previous claims, the Committee decided that rather than requiring Doctor W to pursue the claim in Small Claims Court, Doctor W must assign the Law Society any claim or cause of action she had in relation to Mr. Jones as a condition of receiving compensation from the Fund.

The Committee found the claimant had suffered a loss in the amount of $2,525, which had been paid to Mr. Jones to pay Doctor W's invoices and was not. The Committee thus approved a payment of $2,525 from the Fund to Doctor W, subject to certain assignments and conditions.

◆

Re: A Lawyer*

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

Special Compensation Fund Committee decision involving claim 20020650

Decision date: September 7, 2005
Report issued: October 31, 2005

Claimant A
Claim of **$150,000** plus interest denied

Claimant A loaned a company $150,000, which was secured by an *inter alia* mortgage on properties in Surrey. Correspondence connected to the mortgage suggested the same notary public represented both A and the mortgagor. There was no mention of the lawyer in the original file received by the Special Compensation Fund Committee from the notary public who acted for A.

A letter to the claimant from the notary indicated A's mortgage would be registered and the previous financial charges would be discharged. The letter did not expand on who would file the discharge. The previous financial charge was not discharged, and eventually the mortgagee foreclosed on the properties. The result was that A's interest was lost.

The claimant's sworn application to the fund stated the money she loaned for the mortgage was to a client of the lawyer and that it was the lawyer who gave the undertaking to discharge the previous financial charge. The Committee found no evidence the lawyer was ever involved.

The Special Compensation Fund concluded that while A may have sustained a loss, there was no evidence it was the result of misappropriation or wrongful conversion by a member of the Law Society. Accordingly, the claim was denied.

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Re: A Lawyer*

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

Special Compensation Fund Committee decision involving claim 20030008

Decision date: December 7, 2005
Report issued: January 27, 2006

Claimants A & B
Claim of "an amount to be determined" denied

The lawyer in this case acted for A & B. They knew they were mortgagors with respect to two mortgages on a property in Vancouver; however, the claimants believed the mortgages had been discharged.

In June of 2002, A & B discovered that was not the case, and the mortgages were still on title. As a consequence, the claimants lost their good credit rating, and in September of 2002 the bank refused to renew the mortgage on their own property. The bank initiated foreclosure proceedings and A & B retained the lawyer to assist them.

The lawyer received payments, in trust, from the claimants totaling $15,241.50. He forwarded the money to another lawyer, who acted for the bank. However, the matter was not resolved and the bank foreclosed and sold the property.

In August of 2003, the lawyer prepared an account in the amount of $5,623.05 for services rendered with respect to the claimants' property. The Committee found that while work was done on the file and all funds received by the lawyer with respect to the claim were accounted for, it was impossible to determine whether the amounts charged to A & B for legal work were appropriate. The Committee determined that all funds the claimants gave to the lawyer were either returned to them or applied to the lawyer's bills for service. Further, the Committee found no evidence of misappropriation. Therefore, while A & B may believe they suffered a loss, the Committee concluded they had not met the requirements for their claim to be paid by the Special Compensation Fund, and the claim was denied.

◆

Arthur Skagen

Surrey, BC
Called to the Bar: May 18, 1989
Gave an undertaking not to practice: September 8, 2003
Custodian appointed: September 11, 2003
Ceased membership for non-payment of fees: January 1, 2004

Special Compensation Fund Committee decision involving claim

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Special Compensation Fund *… from page 25*

20035015

Decision date: October 12, 2005
Reports issued: November 29, 2005

Claimant: Mr. V
Payment approved: **$50,000**

Mr. Skagen was Mr. V's corporate lawyer for approximately 10 years. In July 2002, Mr. V asked Mr. Skagen to send an offer to purchase a property.

The letter of intent to purchase the property set out that a $50,000 deposit was required and was to be made payable to Mr. V's solicitors in trust. In September 2002, Mr. V provided Mr. Skagen with a bank draft for the deposit amount of $50,000. An audit report later revealed that the draft was deposited into Mr. Skagen's trust account, but was not credited to Mr. V. Instead, the funds were credited to another client and used for another purpose. Mr. Skagen did not respond or offer any explanation for this.

The Special Compensation Fund Committee found Mr. Skagen misappropriated or wrongfully converted the funds he received from Mr. V. Accordingly, the Committee approved a payment of $50,000 from the Fund to Mr. V, subject to certain assignments and conditions.

◆

Martin Wirick

Vancouver, BC
Called to the Bar: May 14, 1979
Resigned from membership: May 23, 2002
Custodian appointed: May 24, 2002
Disbarred: December 16, 2002 (see *Discipline Case Digest* 03/05)

In all of the cases summarized below, Mr. Wirick acted for the vendor, Mr. G, a developer client, one of Mr. G's nominees, or one of Mr. G's companies in respect of conveyances and mortgages of real property. In each instance, there were one or more existing mortgages and in some cases there were also assignments of rents on the properties at the time of the purchases. Mr. Wirick accepted the funds of the purchaser(s) on his undertaking(s) to pay out and legally discharge the existing mortgage(s). Mr. Wirick did not fulfil his undertaking(s).

The Special Compensation Fund Committee found that, while not every breach of undertaking is dishonest, the circumstances of these claims suggested, not negligence or error by Mr. Wirick, but an intention to deceive. He breached his undertaking(s) to apply the proceeds of sale to the discharge of registered mortgage(s) and he instead misappropriated or wrongfully converted the funds.

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

Subject to various conditions and assignments, the Special Compensation Fund Committee has approved the following claims involving situations such as those described above:

1. Special Compensation Fund Committee decision involving claims 20020220 and 20020100

Decision date: March 5, 2003
Report issued: April 15, 2003

Claimants: P & P and C Bank
Payment for C Bank approved: **$145,623.96** ($140,393.27 and $5,230.69 interest)

The claim of P & P was denied as the allowed claim of C Bank restored P&P to their bargained position, which they would have maintained had Mr. Wirick fulfilled his undertakings.

2. Special Compensation Fund Committee decision involving claims 20020531, 20020117 and 20020436

Decision dates: October 27, 2004 and February 2, 2005
Reports issued: September 26, 2005

Claimants: T & Y, D & D and C Bank
Payment for D & D approved: **$233,782.29** ($200,000 and $33,782.29 interest)

The claims of T & Y and C Bank were denied because the allowed claim of D & D restored the other claimants to their bargained positions, which they would have maintained had Mr. Wirick fulfilled his undertakings.

3. Special Compensation Fund Committee decision involving claims 20020156, 20020549, 20020374, 20020097, 20020489, 20020297, 20020298 and 20020299

Decision dates: February 2, March 16 and May 4, 2005
Reports issued: June 1, 2005 for T & W; April 26, 2005 for Credit Union A; and May 26, 2005 for Ms. P, H & H, C Bank and D Bank

Claimants: T & W, D Bank, Credit Union A, Ms. P, H & H and C Bank
Payment for Credit Union A approved: **$841,576.70** ($724,930.86 and $116,645.84 interest)

The claims of T & W, D Bank, Ms. P, H & H and C Bank were denied because the allowed claims of Credit Union A restored the other claimants to their bargained positions, which they would have maintained had Mr. Wirick fulfilled his undertakings.

4. Special Compensation Fund Committee decision involving claims 20020285/39, 20020490/39 and 20020495/39

Decision date: July 6, 2005
Report issued: September 12, 2005

Claimants: Credit Union A, C Bank and S & K
Payment for Credit Union A approved: **$280,644.58** ($240,816.64 and $39,827.94 interest)

The claims of C Bank and S & K were denied because the allowed claim of Credit Union A restored the other claimants to their bargained positions, which they would have maintained had Mr. Wirick fulfilled his undertakings.

5. Special Compensation Fund Committee decision involving claims 20020488, 20020666, 20020281, 20020155, 20020547 and 20020280

Decision date: July 6, 2005
Report issued: September 12, 2005

Claimants: Credit Union A, L & L, B Bank, W & L and C Bank
Payment for Credit Union A approved: **$397,710.85** ($343,121.10 and $54,589.75 interest)

The claims of L & L, B Bank, W & L and C Bank were denied because the allowed claims of Credit Union A restored the other claimants to their bargained positions, which they would have maintained had Mr. Wirick fulfilled his undertakings.

6. Special Compensation Fund Committee decision involving claims 20020537/264, 20020128/264 and 20020665/264

Decision date: September 7, 2005
Report issued: January 9, 2006
Supplementary decision date: October 12, 2005
Report issued: January 9, 2006

Claimants: L/L & L, D & M and B Bank
Payment for D & M approved: **$241,457.53** ($200,000 and $41,457.53 interest)

The claims of L/L &L and B Bank were denied because the allowed claim of D & M restored the other claimants to their bargained positions, which they would have maintained had Mr. Wirick fulfilled his undertakings.

7. Special Compensation Fund Committee decision involving claims 20020439/23 and 20020271/23

Decision date: November 9, 2005
Report issued: January 9, 2006

Claimants: W & H and Credit Union A
Payment for Credit Union A approved: **$193,802.68** ($162,748.87 and $31,053.81 interest)

The claim of W & H was denied because the allowed claim of Credit Union A restored W & H to their bargained position, which they would have maintained had Mr. Wirick fulfilled his undertakings.

8. Special Compensation Fund Committee decision involving claims 20320, 20164, 20356, 20319, 20037, 20577, 20309, 20162, 20578, 20310, 20161, 20357, 20252, 20163, 20358, 20302, 20160, 20359, 20292, 20159, 20579, 20250, 20165 and 20619

Decision date: February 1, 2006
Report issued: August 3, 2006

Claimants: R & J, A & S, F Bank, S Corporation and Credit Union A
Payment for R & J approved: **$337,501.66** ($335,020.28 and $2,481.38 interest)
Payment for A & S approved: **$341,416.26** ($332,072.91 and $9,343.35 interest)

The claims of F Bank, S Corporation and Credit Union A were denied as their claims would be satisfied because payment of the claims to R & J and A & S were directed to be made to F Bank, S Corporation and Credit Union A as mortgagees of the claimants.✧

Roxane Vachon *… from page 15*

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that they can't step over that due process boundary. There, criminal lawyers are doing the same thing, but at a much more basic level. They're fighting their own corrupt system. They challenge and denounce corruption day after day, until little by little, there are small changes.

FORSYTHE: What's it been like to make the transition of coming home?

VACHON: People say, oh you must be so happy to be home. Of course I'm happy to be home. I'm happy to see my kids, my friends and my family. But it's not that easy. Making the transition from a place like that is difficult. I feel like I'm living in a bubble or a fog. But every day the fog is a little bit thinner and I can feel closer to my normal activities. In fact, I have to get on with it, because I have to live and work. But, it's not that simple. Many of our daily concerns seem so trivial when I think about the struggle for survival that is unfolding in Afghanistan....

Ms. Vachon is encouraging other lawyers to get involved. Through the International Criminal Defence Attorneys Association and the International Legal Foundation, LAA is committed to establishing a network of legal aid clinics throughout Afghanistan's urban centres. Experienced Canadian criminal lawyers are urgently needed to train and mentor local Afghan lawyers. She urges interested Law Society members to contact the International Criminal Defence Attorneys Association.

Ms. Vachon has a a second suggestion — a vision, really. That would be to see some of Canada's leading law firms offer internship opportunities to young Afghan lawyers. She believes it would be a perspective-altering experience for them to spend two months here, seeing how we live and work, and seeing how effectively good lawyers can protect their clients' rights and freedoms when working in a justice system that is not corrupt.

Much needs to be done, and Canadians have much to offer.

For more information about the work done by the International Criminal Defence Attorneys Association, see: www.aiad-icdaa.org or call 514 285-1055. For discussion of Roxane's vision for Canadian-Afghan legal internships, call her at 604 696-0299.✧

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