The Law Society of British Columbia

2010: No. 2 • SUMMER

BENCHERS' BULLETIN

Keeping BC lawyers and the public informed

FEATURE STORY

Commission to study legal aid

by G. Glen Ridgway, QC

IN MY EARLY years of practice in the Cowichan Valley, the lawyers in this community took turns administering legal aid services. One lawyer took on the task of handling assignments. The rest of the lawyers would take turns staffing a weekly "clinic" at the local courthouse. We met with people who had legal problems, and we provided advice. We also took applications for legal aid services. The plan at that time covered primarily criminal matters, with some subsequent expansion into family law issues. The tariff was as modest then as it is now.

That was "legal aid" in the smaller communities. My impression was that there was a general acceptance by members of the public of the need for legal aid/help for financially disadvantaged people. There was appreciation for the lawyers who participated. The system was far from perfect, and we all knew it.

That was a time before the *Charter of Rights*. Inherent in the *Charter* is a right to counsel and an emphasis on legal advice and assistance for the citizens of Canada. The *Charter* has great acceptance among Canadians, and yet I sense that there is less acceptance of the need to provide legal aid. My impression or sense is that there was greater acceptance of legal aid in the pre-*Charter* years.

The funding for legal aid activities goes up and goes down. Services are expanded, modified, reduced. This appears to attract no public attention or emotion, save and except from the groups in our society very directly affected or involved.

A modest shift in health funding or services attracts massive public emotion. The same applies to education, albeit somewhat calmer.

All aspects of legal aid or poverty law funding have been studied extensively in this province, in this country, in the United States, and in the United Kingdom. The results are all fairly similar. People see legal aid as important, and yet we all know that no one is going to win or lose an election on the politics of legal aid funding.

The Law Society views legal aid services in this province as needing significant improvement. The issue for us, and I think for others, is — how do we get there?

The Canadian Bar Association, BC Branch, has announced a plan to proceed with a commission to inquire into legal aid in this province. They have requested financial and other assistance from various law-related organizations. They are prepared to fully fund the commission, but have requested financial assistance from those organizations that can do so. The Law Society has decided to join them. The Victoria and Vancouver Bar Associations,

The Public Commission on Legal Aid

The purpose of the Public Commission on Legal Aid is to "engage the British Columbia public on Legal Aid in British Columbia and to determine what the priorities of British Columbians are in regards to Legal Aid."

The commission will be led by Leonard Doust, QC and will convene meetings across BC in September and October 2010. Submissions are invited from all interested parties, including residents, community organization representatives and justice system stakeholders. For further information, contact Michael Litchfield, Public Commission on Legal Aid at 250-862-5715 or visit publiccommission.org.

BENCHERS' BULLETIN

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

Suggestions on improvements to the *Bulletin* are always welcome — please contact the editor. Additional subscriptions to Law Society newsletters may be ordered at a cost of $50 (plus HST) per year by contacting the subscriptions assistant at communications@lsbc.org. To review current and archived issues of the *Bulletin* online, see "Publications & Forms/Newsletters" at lawsociety.bc.ca.

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the Law Foundation and the Crown Counsel Association are also joining and providing funding.

I can indicate to you that the Benchers thought long and hard about participation. We are all aware — and I have certainly been reminded by members since — that this has been the subject of much inquiry and study. Benchers were skeptical as to the approach to be taken by the commission and whether it would achieve any results. We have been assured by the originators of this concept, and it is something with which Benchers concur, that the commission is meant to be non-political, and its purpose is to achieve a long-term public acceptance of legal aid as a right of our citizens, accompanied by an appropriate funding model. The executive members of the Canadian Bar Association have told me that they feel a "solution" will likely not be effective or in place for a number of years. This is step one in a long-term process.

In selecting the commissioner and in developing the format, the focus will be on how to achieve public acceptance and involvement in legal aid, an appropriate delivery model, and a clear funding approach. While it will be difficult to control participation of those who wish to use this as a forum for a political agenda or to criticize the Legal Services Society, the focus will be on the more long-term and sustainable goals. The plan is to include participation by all community leaders and by local MPs and MLAs. The commission will be holding public meetings in our larger communities throughout the province.

It was on this basis that the Law Society has agreed to participate. We recognize that many will not agree with this approach and will wish to adopt other methods of attempting to improve the situation with respect to legal aid in our province. That is their right, and we anticipate that other avenues will be explored by various groups to advance the cause of legal aid.

We encourage BC lawyers and other interested British Columbians to participate in this exercise and attend the commission meetings. Information from the commission will be available in the near future as to dates, times and locations. Please play a part and do what you can to involve the public. Recognize that this is the start of a long process. We are all hopeful about its outcome.

Needless to say, you can contact me by email at the Law Society (gridgway@lsbc.org) or at my office (gridgway@ridgco.com). You can also phone me at 250-746-7121 or 250-715-8439.❖

Law Society Award winner – Honourable John Charles Bouck

THE BENCHERS HAVE selected the late Honourable John Charles Bouck as the recipient of the 2010 Law Society Award in recognition of his exemplary career and many achievements.

The Award is intended to honour the lifetime contributions of the truly exceptional in the legal profession whose accomplishments have inspired others to the pursuit of excellence.

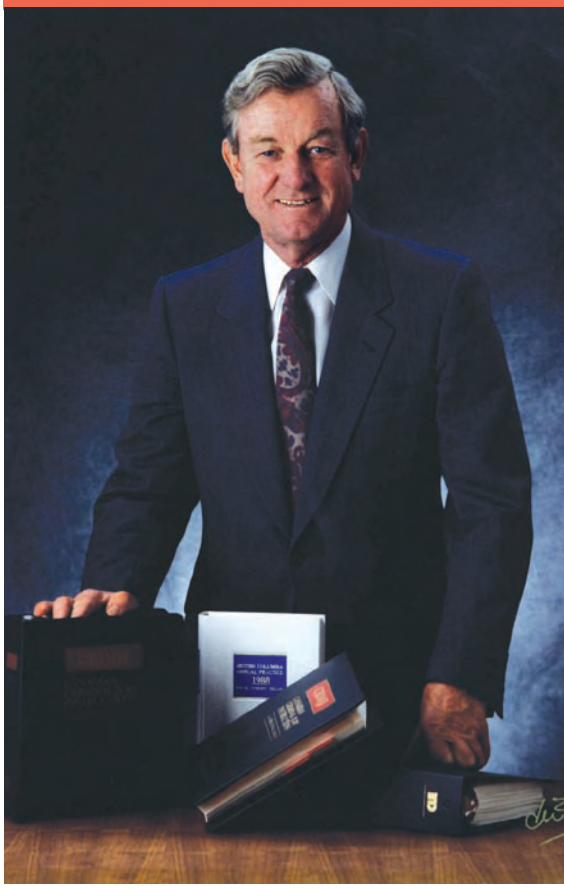
Mr. Justice Bouck, who passed away in January 2010 after a battle with cancer, was a strong voice for reform in our legal system. In addition to participating as a member of the Law Reform Commission of Canada, he wrote extensively on legal subjects and was a much sought-after lecturer across the country and in the US. His blog and published articles on Canada's criminal and civil justice system were based on his extensive research and he offered many suggestions for how the system could be improved. Many of his publications are now core texts for the profession.

Justice Bouck obtained his Bachelor of Arts and Bachelor of Laws from the University of British Columbia and was an extremely successful sole practitioner until 1965 when he and two partners formed what is now known as Edwards, Kenny & Bray. Among his many volunteer commitments, he served for three years as the Executive Secretary of the Vancouver Bar Association, was a five-year Bencher of the Law Society and was director of the Legal Services Society for four years.

In 1974, Justice Bouck was appointed to the BC Supreme Court, one of the youngest appointees at the age of 42. As a judge, he tackled many issues of law reform and judicial administration, pushing for modernization.

In addition to his many contributions to the justice system, Justice Bouck was a skilled military and civilian pilot, a Squadron Leader of the 442 Squadron of the Reserve in Vancouver, and an accomplished athlete.

Justice Bouck was a leader and a visionary. His work ethic was legendary and his integrity inspiring. In the words of his nominators, "There can be no doubt he made a very significant and outstanding contribution to the advancement of the law and the improvement of the justice system."❖



Getting to "I Do"

by Timothy E. McGee

THREE TIMES A year I recite the barristers and solicitors' oath to bar admission candidates in Vancouver and invite them to respond "I Do." With that affirmation, presentation to the court and the signing of the rolls of the Law Society the candidates complete a long and difficult haul to qualify as lawyers licensed to practise law in BC. In 2010 the Law Society will license over 400 lawyers, including both new calls and lawyers transferring to BC from other provinces under the national lawyer mobility rules.

The rigorous path to bar admission includes years of university, law school, articling and successful completion of the Law Society's professional legal training course, known as PLTC.

Whether or not this is the best model for preparing candidates for the practice of law is a critical question currently being investigated by the Federation of Law Societies of Canada. Over the next year, a task force of the Federation (on which I sit) will assess the present approach across Canada with a view to establishing a uniform national standard for admission.

When PLTC was introduced by the Law Society in 1984, it was a pioneer program because it focused on teaching and assessing practical lawyering skills as a requirement of bar admission. While the PLTC approach is no longer novel in Canada, it continues to be a foundation of establishing entry level competence for new lawyers. What has also emerged as an important feature of PLTC is what Lynn Burns, the Director of PLTC, calls a sense of the "community of the bar," which is fostered in the program.

The PLTC experience is designed to help students transition from the academic bent of law school to the world of the practising lawyer. This is achieved in part by simulating real-life situations and teaching skills such as negotiation and practice management. Volunteers and guests from all segments of the bar as well as PLTC faculty play a big part in making these simulations literally come to life. Perhaps most importantly, the students have a safe place to make mistakes and to receive constructive feedback. A sense of community emerges in which students, teachers, volunteers and guests all work together in helping to lay part of the foundation for practice.

The Law Society through its Key Performance Measures annually assesses the utility of the PLTC program, including through satisfaction surveys of students and principals. The results show the skills-based community learning approach is working.

Critics of skills-based training approaches to professional certification suggest that those efforts only scratch the surface of what must be learned experientially outside the classroom. Some even suggest that such approaches create a false sense of preparedness. The Law Society recognizes that PLTC is only one initial step in the journey of becoming a competent lawyer, but a foundational step nonetheless. Recognition of the value of practical training is also reflected in the growing popularity and importance of clinical law programs offered in law schools across the country. We also recognize the importance of post-call opportunities for new lawyers to learn from their peers and colleagues, to engage in continuous professional development, and to be mentored.

It is a daunting challenge for the Federation's task force on national admissions, but an exciting and important one. The task force will initially focus on two core areas; lawyering competencies and character and fitness. Because of the success which the skills-based approach has had in bar admission programs across the country such as in PLTC, I would be surprised if that approach did not form part of a future model for national standards.

I would welcome your views on this topic. Please feel free to contact me at ceo@lsbc.org.❖

INTERNATIONAL BAR ASSOCIATION CONFERENCE
VANCOUVER
3 – 8 OCTOBER 2010

International Bar Association annual conference 2010

The 2010 IBA annual conference, being held in Vancouver on October 3 to 8, is the largest gathering of the international legal community in the world, with more than 200 working sessions covering all areas of practice relevant to international legal practitioners. Journalist Bob Woodward will be the keynote speaker at the opening ceremony.

Attendance at this conference will qualify for up to 25 hours of CPD credit.

For more information, see the conference website.at www.int-bar.org/conferences/Vancouver2010.

New Benchers

MEET THE NEW APPOINTED BENCHERS

THE LAW SOCIETY is pleased to welcome three non-lawyer Benchers recently appointed by the provincial government. Satwinder Bains, Benjimen Meisner and Claude H. Richmond have been selected to represent the public on the Law Society's board of governors.

Together with Haydn Acheson, Stacy Kuiack and Peter B. Lloyd, these six appointed Benchers work with the elected lawyer Benchers to ensure the public is well served by a competent and honourable legal profession.

Satwinder Bains is the Director of the Centre for Indo-Canadian Studies at the University of the Fraser Valley and an instructor in the India-Canada Studies program. Bains has spent over 25 years working in community development, locally in the Fraser Valley, as well as provincially, nationally and internationally.

She has a Masters degree in Education, a Bachelor of Arts degree, and is a PhD candidate at Simon Fraser University in the Faculty of Education. Her research interest and expertise is in the field of cross-cultural education and community development.

Benjimen Meisner has over 50 years of experience in the media working as a news reporter, writer and, for much of his career, a talk show host. Every Canadian Prime Minister from Louis St. Laurent to Stephen Harper has been interviewed by Meisner.

His outstanding contribution to broadcast journalism was acknowledged with a Lifetime Achievement Award by the Radio and TV News Directors' Association of Canada. He was also a recipient of the Queen's Golden Jubilee Medal in recognition of his volunteer efforts to help people who live along the Nechako River.

Claude H. Richmond is the former Member of the Legislative Assembly for the Kamloops riding and Speaker of the Legislative Assembly. Richmond was also BC's Minister of Employment and Income Assistance, chaired the Cabinet Committee on Social Programs, served as a councillor with the Kamloops City Council and a director of the Kamloops Chamber of Commerce. He was formerly the managing director of the Kamloops Airport and co-created Total Entertainment.

Richmond received an Honourary Doctorate of Laws from Thompson Rivers University in recognition of his commitment to public service in the Kamloops region.

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The Law Society extends its appreciation to the three outgoing appointed Benchers — Patrick Kelly, Barbara Levesque and Dr. Maelor Vallance — for their dedicated and valued contribution.

President Glen Ridgway, QC (right) welcomed the new appointed Benchers to their first Benchers meeting on July 9. Pictured left to right, Benjimen Meisner, Claude Richmond and Satwinder Bains.

PETRISOR ELECTED IN CARIBOO

Gregory Petrisor is the new Bencher for Cariboo county for the remainder of the 2010-2011 term. Petrisor received a majority of votes cast by Cariboo county lawyers in the fifth round of a preferential ballot by-election. The by-election was required to replace Ronald Tindale, who was appointed a judge of the Provincial Court.

Petrisor was called to the bar in 1992 and is a sole practitioner in Prince George, practising primarily family law, including family law mediation, and civil litigation. He has served as president of the Prince George Bar Association and as a director of Prince George Crimestoppers.

In his election statement, he noted his pride in being a member of the Cariboo bar and the value he places on integrity and collegiality.

The Law Society congratulates Gregory Petrisor, and thanks all the candidates for their participation in this by-election.❖

Go Green – Sign up to receive all your Law Society materials electronically

WITH FEW EXCEPTIONS, all materials created by the Law Society and distributed to BC lawyers are available electronically and can be sent to you via email. That includes *Benchers' Bulletin*, changes to the Rules and much more.

At present, about 45% of lawyers have chosen to receive these materials electronically. If you haven't signed up, maybe now is the time.

Receiving materials electronically means you will have up-to-the minute information from the Law Society delivered directly to your email inbox. You will also help us save paper and reduce waste.

Worried you might miss something? Everything we send to you is also available on our website so you can be sure of finding something when you need it.

To sign up for electronic distribution, simply log in to your Law Society account and under "Member Options," choose the link "Email Address and Email Choices." Under "Law Society publications by email" select the option "I **DO** want to receive the *Benchers' Bulletin*, related newsletters and *Member's Manual* amendments in electronic form".

For more information, email communications@lsbc.org.❖

Canada Revenue Agency: requirements for information

THE *INCOME TAX Act* authorizes the Ministry of National Revenue to require a person to provide information or documents for any purpose related to the administration or enforcement of the *Income Tax Act*. These are usually referred to as requirements for information (RFI).

Lawyers occasionally receive an RFI from the Canada Revenue Agency (CRA) for documents in their possession relating to former or current clients. Lawyers are reminded that they owe a duty of loyalty to a client and a duty to protect the client's confidences and privilege, even when a transaction is complete and the file is closed (Chapter 5, Rule 14 of the *Professional Conduct Handbook*).

When issuing RFIs, the CRA often advises lawyers that the documents being sought (usually financial records, including trust cheques relating to the payout from the lawyers' trust account or the proceeds of sale of an item or real property) are not privileged, and that the lawyer must produce the information required, pursuant to the *Income Tax Act*.

The Ethics Committee has considered this issue and concluded that Chapter 5, Rule 14 requires a lawyer to make a claim of privilege in all circumstances if unable to obtain instructions otherwise from the client. While certain situations may make it unlikely that a claim of privilege would succeed, unique facts in some situations can cause documents to be privileged that may ordinarily not be privileged. Since privilege always belongs to the client, the committee was of the opinion that the decision whether to claim privilege must always be that of the client and not of the lawyer, regardless of the lawyer's view about the validity of the potential claim. The committee further concluded that, if a client cannot claim privilege because the client does not know of CRA's application to obtain the client's document from the lawyer, it is the role of the court to decide the issue of privilege, not the role of the lawyer who has custody of the document.

STEPS TO TAKE ON RECEIVING AN RFI

In light of the Ethics Committee's consideration of this matter, the Law Society advises a lawyer who receives an RFI to do the following:

1. Contact the client and seek instructions with respect to privilege. The Law Society suggests that the client should obtain independent legal advice on whether any privilege exists. The lawyer should fully and frankly advise a client on the likelihood of success of any privilege claim;
2. If the client waives privilege and instructs the lawyer to produce the documents in question, the lawyer may do so.
3. If the client claims privilege, or if the lawyer no longer knows the whereabouts of the client and cannot obtain instructions, the lawyer should make a claim of privilege if the document is or may be privileged.

If the client has instructed a lawyer to claim privilege, or if the lawyer is unable to obtain instructions from the client and has therefore claimed privilege on her or his behalf, the CRA will likely make an application for a compliance order against the lawyer pursuant to s. 231.7 of the *Income Tax Act*. The CRA often advises the lawyer that it will seek costs against the lawyer in the event that the application for a compliance order is necessary. The Law Society has discussed the issue of costs on such applications with the Department of Justice. While no consensus was reached, the Department of Justice has advised that, when a client expressly instructs a lawyer to claim privilege, the CRA will not generally seek costs against the lawyer, although there may be situations where this is not the case.

In situations where the lawyer does

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2010 gold medallists

Each year the Law Society awards Gold Medals to the top BC law school graduates in recognition of their academic achievement.

This year's recipient for UBC was Kaitlin Cooper (right).

Christina Drake received top honours at UVic (she is pictured here with Life Bencher Richard Margetts, QC and Dean Donna Greschner).

John Hunter, QC to represent Law Society on Federation council

THE LAW SOCIETY is pleased to announce that John J.L. Hunter, QC has been selected as its representative on the Federation of Law Societies' Council. He replaces Ian Donaldson, QC.

On November 15, 2010, Hunter becomes first vice-president/president-elect and then president for a one-year term on November 15, 2011.

Hunter received a Bachelor degree from Yale University, a Masters degree from the London School of Economics, and his law degree from the University of Toronto. He was called to the BC bar in 1977.

Hunter is a senior litigation counsel at Hunter Litigation Chambers in Vancouver with a broad civil and commercial litigation practice. He was appointed Queen's Counsel in 1994.

He was a Bencher of the Law Society from 2002 to 2008, was President in 2008, and is now a Life Bencher. He has served on many Law Society committees, including the Executive Committee, Credentials Committee, Discipline Committee, Ethics Committee, Disclosure and Privacy Task Force, Futures Committee, Lawyer Education Task Force, Regulatory Policy Committee and Technology Committee. He also chaired the Federation's Task Force on the Canadian Common Law Degree.

Hunter is a Fellow and former Provincial Chair of the American College of Trial Lawyers, and a Fellow of the International Society of Barristers. He has written and lectured extensively on both trial and appellate advocacy, is the author of *Conducting a Civil Appeal* (Carswell 1995) and was an Adjunct Professor of Law at UBC teaching appellate advocacy from 1988 to 2002.

The Federation of Law Societies of Canada is the national coordinating body of Canada's 14 law societies, which are mandated by provincial and territorial statutes to regulate the country's 95,000 lawyers and Quebec's 3,500 notaires in the public interest. The Federation's Council is its senior, decision-making body.❖

Media and Law Workshop

MORE THAN 65 journalists in two locations made this year's Media and Law Workshop the highest-attended yet. Organized by the Law Society in partnership with the Jack Webster Foundation, the event is held annually to contribute to the Benchers' strategic objective of effective public education. To that end, the workshop helps journalists educate the public about legal issues through knowledgeable and accurate reporting.

The workshop was held at the Law Courts Inn in Vancouver, with the Jack Webster Foundation providing, for the first time, a satellite link so that 15 reporters in Kamloops could also participate.

The panellists were (photo, L-R) reporter John Daly of Global BC TV, the Honourable Mr. Justice Geoffrey Gaul of the BC Supreme Court, reporter Louise Dickson of the Victoria *Times Colonist*, and media lawyers David Sutherland and Dan Burnett. Together they answered journalists' questions and made presentations on the following topics: publication bans, access to the courts and legal hot spots for journalists. One reporter called the discussions "entertaining and eye-opening."❖

Law Week 2010

THE LAW SOCIETY continued its annual sponsorship of Law Week, which ran from April 11 to 17, 2010. Law Week is a national event that has been held every April since the Canadian Bar Association started it in 1983 to commemorate the signing of Canada's *Charter of Rights and Freedoms*. Several lawyers throughout the province volunteer to make it a success.

The week involves a number of events, one of which is Law Day; it is designed to provide the public with an opportunity to learn about some of the legal institutions that form the cornerstones of Canadian democracy. As part of this year's Law Day, the Law Society and other legal organizations provided displays at an open house for the public at locations in Vancouver and Victoria. Law Society staff Stuart Cameron and Lesley Small *(right)*, Etienne van Eck and Alan Treleaven and Benchers Kathryn Berge, QC and Stacy Kuiack staffed the Law Society's tables and answered people's questions about how they benefit from the services and effective regulation of lawyers that the Society provides. This year's Law Day theme was *Access to Justice: Justice for All*.❖

Downtown Vancouver firms: articling offers stay open to August 13

LAW FIRMS WITH an office in the downtown core of Vancouver (west of Carrall Street and north of False Creek) must keep open all offers of articling positions they make this year until 8:00 am, Friday, August 13. This timeline is set by the Credentials Committee under Law Society Rule 2-31. It applies to offers firms make to second-year law students or first-year law students, but not offers to third-year law students or offers of summer positions (temporary articles).

A law firm may set a deadline of 8:00 am on August 13 for acceptance of an offer. If the offer is rejected, the firm can then make a new offer to another student the same day. Law firms may not ask students whether they would accept an offer if an offer were made, as this places students in the very position Rule 2-31 is intended to prevent.

If a lawyer in a downtown Vancouver firm makes an articling offer and later discovers circumstances that mean it must withdraw the offer prior to August 13, the lawyer must receive prior approval from the Credentials Committee. The committee may consider conflicts of interest or other factors that reflect on a student's suitability as an articled student in deciding whether to allow the lawyer to withdraw the offer.

If a law student advises a law firm that he or she has accepted another offer before August 13, the firm may consider its own offer rejected. However, if a lawyer learns third-hand that a student has accepted another offer, the lawyer should first confirm with the student that the offer is no longer open for this reason.

Contact the Member Services department at 604-605-5311 for further information.❖

In Brief

JUDICIAL APPOINTMENTS

Carolyn Bouck, formerly a district registrar of the Supreme Court of BC, was appointed a master of the Supreme Court of BC.

The Honourable **Dev Dley,** a judge of the BC Provincial Court in Kamloops, was appointed to the Supreme Court of BC. He replaces Mr. Justice D. Brine who passed away in November 2009.

David Harris, QC, formerly a lawyer with Hunter Litigation Chambers in Vancouver, was appointed to the Supreme Court of BC in Vancouver. He replaces Mr. Justice Christopher Hinkson who was appointed to the BC Court of Appeal.

The Honourable **Christopher Hinkson**, a judge of the Supreme Court of BC, was appointed to the BC Court of Appeal. He replaces Mr. Justice Robert Bauman, who was appointed Chief Justice of the Supreme Court of BC in September 2009.

Miriam Maisonville, QC, formerly a lawyer with the Ministry of Attorney General, was appointed to the Supreme Court of BC in Vancouver. She replaces Mr. Justice S.R. Romilly who elected to become a supernumerary judge in January 2010.

Robert Prior, formerly a lawyer with the Public Prosecution Service of Canada, was appointed to the Supreme Court of BC in Vancouver. He replaces Madam Justice D.J. Martinson who resigned in June 2009.

The Honourable **Anne MacKenzie**, a judge of the Supreme Court of BC, was appointed Associate Chief Justice of the Supreme Court of BC. She replaces the Honourable Justice Patrick Dohm who retired in April 2010.

William Sheard, formerly a lawyer with Miles, Daroux, Zimmer, was appointed to the BC Provincial Court in Cranbrook.

Shelley Fitzpatrick, formerly a lawyer with Davis LLP in Vancouver, was appointed a judge of the Supreme Court of BC. She replaces Madam Justice Anne MacKenzie who was appointed Associate Chief Justice of the Supreme Court of BC.

FROM THE LAW FOUNDATION OF BC

Graduate Fellowships 2011/2012

The Law Foundation is awarding up to five fellowships of $13,750 each (subject to change). The field of study is full-time graduate studies in law or a law-related area. Applicants must either be BC residents, graduates of a BC law school or BC lawyers. The closing date for applications is January 7, 2011.

For more information, see "Project Funding Available / Graduate Fellowships" on the Law Foundation's website at www.lawfoundationbc.org.

Legal Research Fund

The Law Foundation has established a fund of $100,000 per year to support legal research in BC. The maximum grant available for each project is $20,000. To be eligible for funding, a project must fall within the Foundation's legal research fund objectives of advancing the knowledge of law, social policy, and the administration of justice through the identification of areas and issues needing study, and the encouragement and support of projects to address those needs.

For more information, including eligibility and the application process, see "Project Funding Available / Legal Research Fund" on the Law Foundation's website at www.lawfoundationbc.org. Contact Michael Seaborn, Program Director, at 604-689-2048 prior to submitting a Letter of Intent.❖

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Not a holiday for fraudsters

SUMMER HOLIDAYS ARE here, and fraudsters like to prey on law firms when they think they may be short-staffed, rushed for time and not as careful. Be extra vigilant during the summer and at any time of the year when there are bank holidays.

THE "OKLAHOMA FLIP" — A CAUTIONARY TALE OF PROPERTY VALUE FRAUD

What is an Oklahoma flip? The Oklahoma flip (also known as "the bump") is an old scheme, but in today's real estate market it is worth remembering to be on guard against this type of property value fraud. Typically, two fraudsters work together to dupe lenders and lawyers. A fraudster purchases real property and resells it (the "flip") to a complicit purchaser at an artificially inflated price. This positions the new purchaser to deceive a lender as to the property's true value when obtaining a mortgage.

To illustrate the scheme, this reminder reflects on the misfortune of a BC lawyer who failed to make sufficient inquiry into the bona fides of clients who retained him for numerous related residential real estate transactions, and who agreed to act for multiple clients with conflicting interests. Following a discipline hearing, his poor judgment resulted in a six-month suspension, and an order that he pay costs and remain bound by a previous undertaking not to practise real estate law.

Over a period of months, the lawyer's corporate clients, I Ltd. and Q Ltd., bought 13 properties and assigned the 13 contracts of purchase and sale to nominee purchasers at significantly higher prices. The lawyer also acted for the purchasers and the banks that loaned money to the purchasers for mortgages based on inflated prices. The lawyer improperly acted for multiple parties, failed to disclose potential conflict issues to his clients and preferred the interests of some clients (corporate assignors) over others (lender banks and nominee purchasers).

The lawyer explained that the fraudsters told him the company's business was to help clients moving to Canada to obtain visas, and the properties were bought at favourable prices from clients and sold by the company to other clients to assist in the immigration process. The hearing panel found that, while the lawyer's actions were not consistent with knowing participation in a fraud, they were consistent with a lack of judgment, skill and diligence. If he had complied with the "formalities" of real estate practice and conflict of interest rules, it is doubtful he would have participated in this scheme. His conduct shows he was oblivious to these requirements, which are fundamental to the practice of law.

By making prudent inquires before accepting a retainer and by steering clear of improperly representing multiple parties in real estate transactions, you will stay on the right side of your professional obligations and avoid becoming a pawn in a real estate fraud.

When acting for multiple parties, carefully review Law Society Rules 3-91 to 3-102 (the client identification and verification rules), and the following rules in the *Professional Conduct Handbook*:

- Chapter 3, Rule 1 (Knowledge and skill)
- Chapter 4, Rule 6 (Dishonesty, crime or fraud of client)
- Chapter 6 (Conflicts of Interest Between Clients); and
- Appendix 3 (Real Property Transactions), especially the "simple conveyance" rules.

Consider contacting a Practice Advisor if you have doubts about whether you should be acting. For more information on the Oklahoma flip, see the following on the Law Society website at lawsociety.bc.ca:

- "Real estate fraud – a prevention primer," October 2005 *Insurance Issues: Risk Management* (Publications & Forms / Newsletters);
- Law Society alert on fraud schemes, August 10, 2005 Notice to the Profession (Publications & Forms/Notices);
- March 4, 2009 decision of the hearing panel in *Law Society of BC* v. *Nielsen*, 2009 LSBC 08 (discipline database at Regulation & Insurance / Regulatory Hearings / Hearing Reports).

PHONY DEBT COLLECTION SCAMS A PLAGUE – NEW TWISTS

Be on guard and look for new twists to the phony debt collection scam. This scam started out in the business context, then appeared in the matrimonial context, and both versions continue to plague lawyers. While the initial contact is often by email, it sometimes comes in the way of a phone call or even in person.

Fraudsters pretending to be lawyers are now making "referrals." A fake lawyer referred a phony foreign client (but using the name of a real company) to a BC lawyer to collect a debt. The supposed debtor sent the lawyer an authentic-looking, but phony bank draft in the name of a real BC company. The astute lawyer contacted the real company who told the lawyer that it had never done business with the foreign company, didn't owe it any money and hadn't sent a bank draft to the BC law firm. The phony foreign client wanted the lawyer to deposit the draft into his trust account and then wire the money to the fraudster's account in Japan (to a different name than the name of the real company). The law firm's bank confirmed the bank draft was fake and the scam came to a halt.

If you receive a referral from a lawyer whom you do not know, check to see that the person truly is a lawyer and actually made the referral to you. Also, always follow the client identification and verification rules (Rules 3-91 to 3-102).

For more information regarding phony debt collection scams and how to protect yourself, see Practice Watch in the Fall 2009, Winter 2009 and Spring 2010 *Benchers' Bulletins*.

GETTING RID OF YOUR PHOTOCOPIER? A POTENTIAL GOLD MINE FOR FRAUDSTERS

Today's lawyers not only have to be concerned about protecting the confidentiality of sensitive information in their laptops, desktop computers, PDAs, flash drives, etc., but must also be concerned about hard drives in photocopy machines. A photocopier's hard drive may automatically store copies of thousands of confidential documents that have been copied, scanned

or emailed. Media reports have cautioned the public that confidential information stored on hard drives is easily accessible. Speak with your service provider to find out what steps you can take to ensure that the information is not stored or is erased from the hard drive before you dispose of the machine. Lawyers must take all reasonable steps to ensure the privacy of a client's confidential information (Chapter 5, Rule 1, *Professional Conduct Handbook*). Failure to do so could result in an action for damages and disciplinary consequences.

BLACKLINED DOCUMENTS – UNDERTAKINGS AND REPRESENTATIONS OF ACCURACY

Lawyers commonly send documents to other lawyers indicating where changes have been made to a previous draft by "blacklining" (also called "redlining"). Are you giving an implied undertaking or representing that the blacklined version is an accurate blackline of the changes from the previous version when you do this? Here's a scenario considered by the Ethics Committee:

Lawyer A and Lawyer B represent clients opposed in interest. Lawyer A proposes changes to a document (version 1) (either one drafted by Lawyer B or already reviewed by Lawyer B) and sends version 2 to Lawyer B, in clean and with a blackline to version 1. In doing so, without expressly undertaking anything in relation to the document, does Lawyer A do either of the following?

- impliedly undertake that the blacklined version is an accurate blackline showing the changes between version 2 and version 1; or
- represent that the blacklined version is an accurate blackline showing the changes between version 2 and version 1.

The Ethics Committee's opinion was as follows:

> "A lawyer who sends a blacklined document to another lawyer in these circumstances, in the absence of language to the contrary, neither undertakes nor represents that the blacklined document accurately shows the changes made to it. A lawyer in such circumstances simply represents that he or she believes, in good faith, that the blacklined version correctly describes proposed changes to the document." (June 2009 Ethics Committee minutes)

AUTHENTICATION OF A CLIENT'S DOCUMENT FOR USE IN A FOREIGN COUNTRY

Sometimes foreign governments and organizations will only accept a document notarized by a BC lawyer if the lawyer's signature has been "authenticated." The Law Society provides an authentication service. For information about authenticating your signature, contact the Member Services Department at memberinfo@lsbc.org or 604-605-5311.

Additional authentication services may be obtained in BC through the Order in Council Administration Office, or federally through Foreign Affairs and International Trade Canada. The contact information for the government offices is as follows:

British Columbia government service
Order in Council Administration
Ministry of Attorney General
Attention: Authentication Clerk
Room 208, 553 Superior Street
Victoria, BC V8V 1X4
Phone: 250-387-4376

Federal government service
Authentication and Services of Documents Section (JLAC)
Foreign Affairs and International Trade Canada
125 Sussex Drive,
Ottawa, Ontario K1A 0G2
Phone: 1-800-267-8376
Website: international.gc.ca (search for "authentication")

FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604-697-5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch.❖

Services for lawyers

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, Conduct & Ethics, to discuss professional conduct issues in practice, including questions about client identification and verification, scams, 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 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.

Judge Scow's inspiring story

JOAN SCOW STANDS in the Vancouver condominium she shares with her husband, retired Provincial Court Judge Alfred Scow. She sweeps her arm — gesturing to the walls covered in symbols that mark a life of incredible achievement.

"This is Alf's Order of Canada," she said pointing to a framed certificate. "And below it is his Order of BC." She continues walking around the room describing each object representing another milestone in her husband's groundbreaking career. "We haven't even hung that one up yet," she said, pointing to the latest honour that sits perched on a plush easy chair — the certificate's frame leans comfortably against the tufted buttons. "And over here," she said, gently touching a meticulous and beautiful wooden mask, "was Alf's attempt at carving. He wanted to see if he could do it, so he carved this, realized he could and then never carved again."

As his wife of 46 years highlights just a few of his many achievements, Judge Scow sits quietly on the couch with his head bowed. "He's so modest," continues Joan. "If I'd done half the things he has I would shout it from the mountain tops, but not Alf."

Indeed Judge Scow has accomplished much. He has led a life of firsts: the first Aboriginal person to graduate from the University of British Columbia law school; the first to be called to the Bar in BC; and the first legally trained Aboriginal person to be appointed to the Bench.

On June 16 at an event entitled *Inspiring stories connecting future leaders*, the Law Society joined the ranks of many other organizations when it recognized the outstanding contributions of Judge Scow.

Tina Dion, a lawyer and President of the Scow Institute for Communicating Information on Aboriginal Issues — an organization that works toward greater understanding between Aboriginal and non-Aboriginal peoples — spoke to Judge Scow's achievements at the Law Society event.

"There is no question," said Dion, "that Alfred Scow, along with his lovely wife Joan, has contributed an enormous amount to Canadian society — he is a real hero for all Aboriginal peoples, as well as for all Canadians."

But Judge Scow, himself, doesn't see it that way. "I don't know who thinks of me that way," he said. "Do Indians think of me that way, do white people think of me that way or do I think of me that way? I have never really been consciously thinking of myself as a role model." But when the point is pressed that, like it or not, other people do see him that way, Judge Scow concedes that, while he didn't intend it, "I feel very good about that."

Retired Judge Alfred Scow was honoured at the June 16 Law Society event, "Inspiring stories connecting future leaders."

Born April 10, 1927 in Alert Bay, Scow was the eldest of 16 children. His father, Chief William Scow of the Kwicksutaineuk Nation, and mother Alice both valued formal education. Their son attended St. Michael's Indian Residential School as well as public schools in Richmond and Vancouver. It was during his senior year at Kitsilano High School that the yearbook editors became the first to learn of Scow's future career path.

"What really happened in my decision to become a lawyer," said Scow, "was one of the young ladies who was preparing the yearbook asked me, 'What are you going to do when you finish schooling?' I said 'I want to become a lawyer,' so," laughed Scow, "when I made that statement I had to do it."

Joan added, "He's a man of his word!"

But Scow said law school was not easy. "I've never been an academic. I had troubles with getting my degrees and so on because I never really developed good study habits. So when UBC accepted me I said to myself, 'OK smarty, now you're going to have to work!' And I had difficulties, but fortunately the Dean and some of the professors encouraged me."

He made friends quickly, though. "You see, I'd gone through the high schools in the Lower Mainland and I was the only Aboriginal in most of them and I participated in sports. Soccer was my game — softball, track and others, as well." Scow said it was the same in law school. "Sports provided instant acquaintance. I became friends with many of my teammates."

After graduating at the age of 34 he changed history. The head of the Indian Affairs Department for BC attended the ceremony at which Scow became the first Aboriginal person in the province to be called to the Bar.

It wasn't that no other First Nations person had wanted to. In 1919 the Benchers of the day passed a resolution that prevented First Nations and other specific ethnic minorities from being admitted to the legal profession, because they were barred from voting in government elections.

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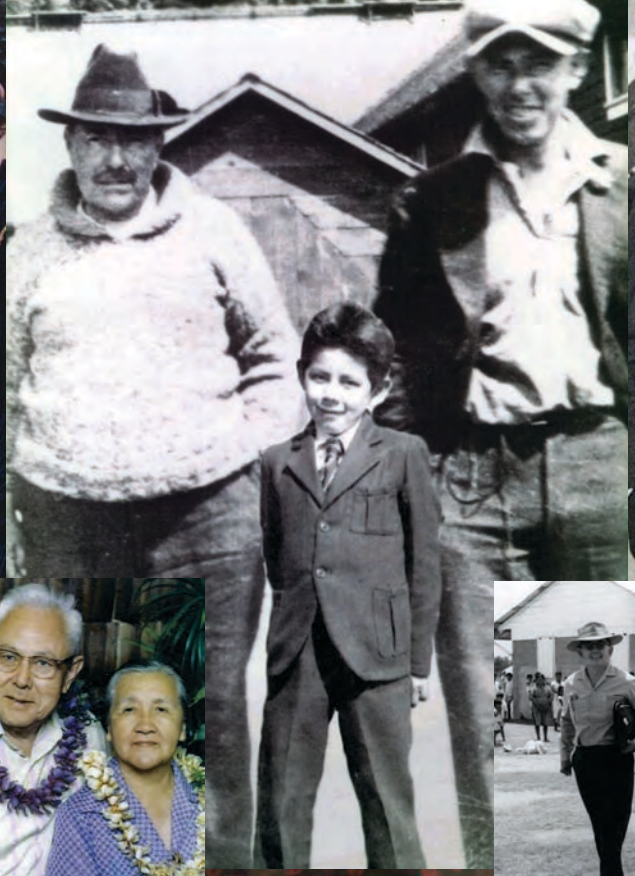


Top row (L-R): receiving the Order of Canada from Governor General Adrienne Clarkson; about six years of age with his grandfather and father; walking in New Westminster with wife Joan.

Second row: with his father Chief William Scow; parents William and Alice in Hawaii; working in Guyana; a more recent photo with Joan.

Third row: with family after his call ceremony; an illustration from Secret of the Dance.

Bottom: captured in oil wearing judge's robes; UBC law grad photos; the Order of BC.

Judge Scow ... from page 12

"If I had graduated before we were given the federal vote I would not have been eligible to enter the profession of law," said Scow.

After graduating, Scow recalls being offered his first murder case. "The parents of this future client came to see me. They said, 'We want you to defend our daughter who is charged with murder.' I said, 'Oh boy, I'm quite new in this field so I really think you should get somebody who's more experienced.' 'No,' they said, 'we want you.'"

Scow said he went to different lawyers to talk about the case. "Two of my lawyer friends said, 'you really should get a senior lawyer to run the case,' and I thought that was good advice. So I went to talk to one of the top criminal lawyers."

Unfortunately, he was tied up in another trial, so Scow said to him, "I have a question to ask you. Do you think I should take this case on my own?" Scow describes what happened next, "'Alfred,' he says, 'I just have a question to ask you. You're a lawyer aren't you?' I said 'yes.' He sat up in his chair and he looked at me and he says, 'Alfred the time has come and my advice to you is (Scow pauses for effect) take the &#*%! case.'" While Scow laughs about that moment now, he did go on to take the case and — despite his own concerns about being relatively new to the profession — he won.

After less than two years of practice, Scow took the job of city prosecutor for New Westminster. From there, he accepted an assignment from the federal government on the Amerindian Lands Commission, working in Guyana. After two years in South America he returned to BC and became chair of a board of review for the Workers' Compensation Board. A short time later he applied to the provincial government for a judicial appointment.

His wife, Joan enjoys telling what happened next. "He came home and I shouted, 'Hi, Judge!' He thought I was kidding, but I heard it on the radio." Scow served on the Bench for 23 years.

Among his other achievements are serving on the management council for UBC's First Nations House of Learning and acting as a lifetime member of the Vancouver Aboriginal Friendship Society; he was its founding president. He also published a children's book in 2006 with Andrea Spalding and Darlene Gault. *Secret of the Dance* tells the true story of then nine-year-old Scow who, unbeknownst to his parents, snuck in to watch his father dance at a potlatch, which at the time was prohibited by the *Indian Act*. The book was selected as one of the 2007 Best Books for Kids and Teens by the Canadian Children's Book Centre.

Over the course of his long distinguished career Scow has witnessed many changes for Aboriginal people and society. But, according to Scow, "What has not changed is the necessity to adapt and to take your studies seriously."

He and Joan have tried to help needy law students focus on their studies by raising funds to fully endow a bursary for them. It is still available for law students at UBC and the University of Victoria.

When asked what advice Scow has for First Nations students considering a legal career his reply is quick, "if I can do it, you can, too." And perhaps it's also true that *because* he did it, they will too.❖

We asked participants at Inspiring stories connecting future leaders, "What does Judge Scow mean to you?"

ROSALIE WILSON

"Walking as an Aboriginal person right now into the profession is challenging, so I can only imagine what he had to overcome in accomplishing it, and the way that he's done it with a very humble nature makes me proud…"

RHAEA BAILEY

He's always had such a great sense of humour about everything, and he takes all the trials and tribulations he's been through, and he uses those experiences to push him forward. He's a great inspiration to the Aboriginal community and to all young lawyers."

ELDER LARRY GRANT,

"Watching Alf's career, I could see younger people coming up, going into university, going to law school, moving into a sphere of law-making ... allowing us to defend ourselves, to get our story out."

ALDRED JOHN SCOW

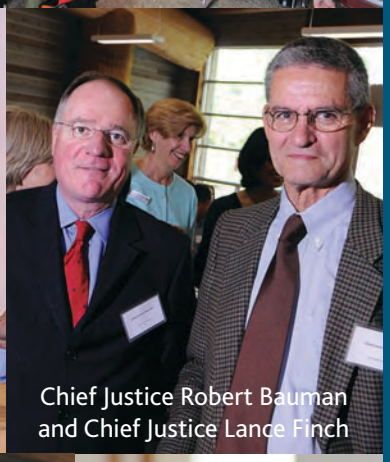
"I had the opportunity to live with him for a year, and he has been very inspirational in my life. He told me when you get a goal, don't stop until you get it."

JOEL CARDINAL

"I feel that he cleared a lot of barriers that I probably would have had if it wasn't for him. He made it easier for me to fulfill my goals."

Inspiring stories connecting future leaders

Duncan McCue



Chief Justice Robert Bauman and Chief Justice Lance Finch

Patrick Kelly

Tina Dion

Chief Edward John, Judge Scow and Elizabeth Hunt

One hundred lawyers, law students and other interested people attended the Law Society's *Inspiring stories connecting future leaders* event on June 16. Aboriginal leaders in the legal profession, including Grand Chief Edward John and Elizabeth Hunt, whose practice focuses on Aboriginal law, shared their own inspirational stories with the audience. Tina Dion, lawyer and President of the Scow Institute, told the audience about the groundbreaking career of now retired Judge Alfred Scow, the first Aboriginal person in BC to graduate from law school, to become a member of the Bar and to be appointed to the Bench.

Dion told the audience about Scow's advice to an Aboriginal lawyer considering the Bench. She said he advised, "don't stop until you get it, and do the best job that you can when you get there." Judge Scow's own remarks were met with a spontaneous standing ovation from those who attended.

Hunt talked to the audience about how over the course of her practice she has redefined what success means to her, "I feel that I may not have been a downtown [law firm] success," said Hunt, "but the bigger success for me lies in the fact that I have become the person that the creator is intending me to be and a parent that is involved in a meaningful way." She described balancing her part-time practice with two children and how her children think "anyone coming up the driveway is a client and they know to 'meet, greet and retreat.'"

Chief John told the audience about how, as a UBC law student, he got into a debate with his professor about hearsay evidence and how in his opinion Aboriginal stories should be an exception to the rule. His evidence professor was Beverley McLachlin, now Chief Justice of Canada, who later discussed that very issue in one of the court's rulings.

Law Society President Glen Ridgway, QC, told the audience about his own interaction as a young lawyer in the court room with Judge Scow, who Ridgway said was respected by the Bar as an outstanding judge. Ridgway reiterated to Judge Scow and the rest of the attendees that the Benchers "have identified retaining Aboriginal lawyers in the legal profession as one of the key objectives in the current strategic plan. This event is part of that," he said.

Patrick Kelly, who served as an appointed Bencher until late May, told the audience in his closing remarks, "this isn't the end of the Law Society's interest in this area. We are working on a number of initiatives and strategies to help retain Aboriginal lawyers."

The Law Society is undertaking a demographic project to better understand the participation of Aboriginal lawyers. And, as the Society did in 2009 with women in the legal profession, is going to develop a business case for diversity, including the retention and advancement of Aboriginal lawyers.

The event was moderated by the CBC's Duncan McCue, who was called to the BC Bar in 1998.

FROM THE ETHICS COMMITTEE

Withdrawal of counsel in criminal matters – implications of *R.* v. *Cunningham*

IN THE RECENT case from the Yukon, *R.* v. *Cunningham*, 2010 SCC 10, the Supreme Court of Canada determined that, in a criminal matter, a court has the authority to require counsel seeking to withdraw from a case to continue to represent an accused when the reason for withdrawal is non-payment of fees. With respect to this aspect of withdrawal, this is a reversal of the law in British Columbia stated in *Re Leask and Cronin* (1985), 66 BCLR 187 (SC), which determined that, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, subject to the court's authority to cite a lawyer for contempt if there is evidence the withdrawal was done for some improper purpose.

While the Supreme Court emphasized in *Cunningham* that refusing to allow counsel to withdraw in these circumstances should truly be a remedy of last resort to prevent serious harm to the administration of justice, it also opined:

> If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power. In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:
>
> - whether it is feasible for the accused to represent himself or herself;
> - other means of obtaining representation;
> - impact on the accused from delay in proceedings, particularly if the accused is in custody;
> - conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
> - impact on the Crown and any co-accused;
> - impact on complainants, witnesses and jurors;
> - fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
> - the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

The Ethics Committee expects Chapter 10, footnote 2 of the *Professional Conduct Handbook* to be amended to refer expressly to *R.* v. *Cunningham*. However, counsel have always been bound by Chapter 10, Rule 7 which states:

> A lawyer must not withdraw because the client has not paid the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

In the committee's opinion, counsel's obligation has not changed because of *Cunningham*; Rule 7 has always prevented counsel from withdrawing when it is unfair to a client to do so. What has changed is that it is now clear the court has the power, in certain circumstances, to refuse to permit counsel to withdraw from a criminal case. Such a refusal may occur if the proposed withdrawal results from the client's failure to comply with the financial terms of the retainer, and if the court is of the opinion that the withdrawal will leave the client with insufficient time to retain and instruct new counsel and the client's inability to do that will cause serious harm to the administration of justice. The Law Society continues to have power to discipline lawyers for breaches of Rule 7.

HOW CAN LAWYERS COMPLY WITH RULE 7?

A lawyer who proposes to withdraw because of a client's failure to comply with the financial terms of a retainer should take the following steps:

- Advise the client in writing the lawyer will withdraw from the case unless the client provides the necessary retainer by a certain date. The date must be one that leaves the client sufficient time to retain other counsel if the client is unable to come up with the necessary funds, or
- Act for the client in a limited capacity only, and do not go on the record for the client until the client has provided the necessary retainer for the trial or other matters requiring representation. When acting in a limited capacity for a client, a lawyer must comply with Chapter 10, Rule 10 of the *Professional Conduct Handbook*, which states:

> A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.

WHAT CAN LAWYERS SAY TO THE COURT?

In the Cunningham decision, it was determined that, if a lawyer's reason for withdrawal goes to the merits of the case or would cause prejudice to the client, solicitor-client privilege may attach to the information. In that circumstance, a lawyer may not disclose it to the court. If the reason for withdrawal does not involve these considerations, a lawyer may give the following explanations to the court:

If the lawyer's withdrawal is for ethical reasons

If a lawyer seeks to withdraw from a case because the lawyer is in a conflict, has received instructions from the client that require the lawyer to cease acting or for other reasons relating to the lawyer's ethical obligations, the lawyer may advise the court that he or she is withdrawing "for ethical reasons."

If the lawyer's withdrawal occurs under Chapter 10, Rules 2 or 3

In other circumstances, if the lawyer is permitted to withdraw under Chapter 10

of the *Professional Conduct Handbook*, but the circumstances do not engage the lawyer's ethical obligations, the lawyer may be permitted to advise the court that the lawyer's reasons for withdrawing do not involve the lawyer's financial arrangements with the client. Such circumstances could occur under Chapter 10, Rules 2 or 3, which permit a lawyer to withdraw when there has been a serious loss of confidence between lawyer and client and the withdrawal is not unfair to the client or done for an improper purpose.

A lawyer may amplify this explanation by providing other non-confidential information to the court in support of the withdrawal. For example, a lawyer may be compelled to withdraw because another trial might have lasted longer than anticipated or for other reasons related to the lawyer's workload.

If the lawyer's withdrawal is for non-payment of fees

If a lawyer seeks to withdraw because a client has failed to pay the lawyer's fees, the lawyer must disclose that information to the court when asked to explain the withdrawal.

WHAT IF A LAWYER CANNOT DISCLOSE THE REASON FOR WITHDRAWAL?

If a lawyer is unable to answer a court's request for the reason for withdrawal because the reason goes to the merits of the case or the client will be prejudiced by disclosing the information, the lawyer should simply advise the court of that fact. A lawyer who expects to be in such a position may want to consult a Bencher or Law Society practice advisor.

WHEN MUST COUNSEL APPEAR IN COURT TO WITHDRAW FROM A CRIMINAL MATTER?

If counsel's withdrawal raises no issue about adjournment of the case, counsel may withdraw from a criminal case by notifying the client, the Crown and the appropriate registry of the withdrawal. If the withdrawal may raise such an issue, however, counsel should attend at court to withdraw.

Further analysis of *R.* v. *Cunningham* can be found in the Case Comment by David Layton in the Spring 2010 issue of *The Verdict*, published by The Trial Lawyers Association of BC. The article may be obtained from the Trial Lawyers Association by contacting Moya Larkin at moya@tlabc.org.❖

Equity Ombudsperson tackles workplace discrimination with strategies and support

WHEN JASON* JOINED a law firm as an articled student, he expected a professional and positive work environment. What he got was entirely unexpected. His female principal made it clear that she was interested in more than just his work by asking him personal questions about his relationship with his girlfriend, flirting with him and often coming around to his side of the desk when meeting with him in his office.

It made him uncomfortable, to say the least, and he found it difficult to concentrate on his work. "Whenever she was around me, I was worried about what she might do. Other students noticed too, and I didn't want people thinking I was encouraging her. I felt trapped because I needed to be there, but I sure didn't want to be."

Across town, Margareta* was feeling much the same way. Of Latin American descent, she was a paralegal working in a small firm. The senior partner often made jokes about her dark skin and hair, usually saying it was nothing personal. "He would tell me that he was just having fun with me because everybody likes to have a few laughs in the day," Margareta explained, "but it was embarrassing and made me self-conscious. I had to get out of there."

Harassment in the workplace can take many forms, including unwanted sexual comments, name-calling, racial slurs and religious jokes, but the impact tends to be the same: humiliation and anxiety on the part of the victims. What's more, it can create tension that can permeate far beyond the parties involved, breaking down work relationships, hurting productivity, motivating valuable employees to leave and undermining the reputation of the law firm.

Discrimination and sexual harassment are illegal and lawyers or employees who harass others in the firm could face a human rights complaint or civil action that could result in a substantial award of damages. In addition, lawyers could face a complaint to the Law Society, which may put their reputations and careers on the line.

As the regulator of lawyers in BC, the society has a vested interest in ensuring law firms provide an equitable workplace. Lawyers and legal staff whose skills are compromised by a negative environment cannot work at their best and may even leave the profession. Either way, the public is not well-served.

To help stop workplace discrimination and encourage respectful workplace practices, the Law Society supports the services of an Equity Ombudsperson, who provides a safe haven, strategies and support for any caller who works in a law firm and has concerns about possible discrimination or harassment.

The Ombudsperson offers options to assist with the impact of discrimination and harassment. That includes helping victims as well as assisting management to develop strategies that maintain a productive and respectful workplace.

The Ombudsperson's services are free and completely confidential; only statistical data is relayed to the Law Society so that people feel they can talk freely about highly personal, sensitive and emotional circumstances.

**Names have been changed to protect privacy.*❖

You can contact the Equity Ombudsperson, Anne Chopra, on her confidential, dedicated line at 604-687-2344 or by email to achopra1@novuscom.net.

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Using social media to build your professional reputation

♫ It's a matter of trust
It's always been a matter of trust
It's a matter of trust...♫

Music, lyrics and recorded by Billy Joel

IF EVER THERE was a Pandora's Box that cannot be closed, it is the social networking box. Facebook, MySpace, LinkedIn and many others have literally exploded over the Internet. Facebook alone lists over 400 million active (i.e., returned to the site in the last 30 days) users. While many law firms have restricted access to such sites at the office, a LinkedIn search lists more than 410,000 attorneys on their site. Restricting social media at the office may address productivity issues, but it does nothing to address the fact that your lawyers and staff have complete access to these sites outside of office hours. Furthermore, younger (and some older as well) lawyers and marketing professionals are demanding access to such sites to promote the interests of the firm and the law practices.

Blogs, Twitter, LinkedIn, LegalOnRamp, JDSupra and a host of other sites are being used by lawyers to reach out to new clients, build new practice areas and develop professional relationships. Gartner Research has stated that, "By 2014, social networking services will replace email as the primary vehicle for interpersonal communications for 20 per cent of business users." (gartner.com/it/page.jsp?id=1293114). As a result, Gartner recommends:

> that organizations develop a long-term strategy for provisioning and consuming a rich set of collaboration and social software services, and develop policies governing the use of consumer services for business purposes. Companies should also solicit input from the business community on what collaboration tools would be most helpful.

All of this leads to the point that law firms can no longer afford to simply prohibit access to social media and collaboration services. Rather, it behooves law firms to take a proactive approach and set out reasonable policy guidelines for staff and lawyers to follow at all times when using these services. Along with the Law Society's Internet / Email Authorized Use Policy, we have now drafted a Social Media Policy for the guidance of lawyers and law firms (see Practice Support / Practice Resources on the Society's website for both documents).

Here are a few highlights of this draft policy:

- **Your identity:** Social media blurs the line between personal and professional lives. Furthermore, once posted to the web, information can be traced back and found virtually forever. Since your identity online is a trusted asset that you wish to build, be professional, courteous and respectful at all times. You are responsible for all of your online activity. Remember that referencing the firm's name or attaching your firm's email address to any post or communication implies that you are acting on the firm's behalf. Posting to personal online sites should never be done from the firm's equipment, should never be attributed to the firm and should never appear to be endorsed by the firm. If you list your work affiliation on a social network site, then you should regard all communications and postings on that network as being professional in nature and govern yourself accordingly.

- **Content:** Always follow the *Legal Profession Act*, Law Society Rules and *Professional Conduct Handbook*, other laws and regulations when dealing with social media. Never disclose a client's name or confidential information in a posting unless you have their written permission as this has legal, ethical and professional ramifications, even if it is unintentional. Never disclose any proprietary information. Be courteous at all times: Think twice before sharing a comment, post, picture or video about a client, lawyer or staff member on any sort of social media site or network, and certainly obtain their prior written approval before doing so. Give due credit to all authors and respect copyright on all materials. Correct all errors promptly, apologizing when appropriate. Avoid all personal attacks, hostile communications and online disputes. Follow the firm's policy guidelines.
- **Be selective:** There are many social networking sites out there. Be selective in the sites you visit and avoid those that do not provide you with adequate control over privacy settings, friends and followers and confidential information.
- **Seek approval:** If a blogger or online person posts an inaccurate, accusatory or negative comment about the firm, any staff member or client, do not engage in that conversation without the prior approval of the firm. Clear it with the firm before responding to a journalist.
- **Build your reputation:** Build a reputation of trust and transparency among your clients, media, firm members and the public. Use the power of social media to establish yourself as a credible, trusted and transparent legal professional. Guard your reputation and your integrity at all times while on the web.

Given the reach of the Internet and the ease by which information can be found on it, it is a matter of trust that each of us would use these new social networking services properly, ethically and in a manner that reflects positively on you and your firm.❖

Unauthorized practice of law

Under the *Legal Profession Act*, only trained, qualified lawyers may provide legal services and advice to the public. Further, non-lawyers are not regulated nor are they required to carry insurance to compensate clients for errors and omission in the legal work or claims of theft by unscrupulous individuals marketing legal services. When the Law Society receives complaints about an unqualified or untrained person providing legal assistance, the Society will investigate and take appropriate action if there is a potential for harm to the public.

From March 1 to June 30, 2010, the Society obtained undertakings from 14 individuals and businesses not to engage in the practice of law.

The Law Society has obtained court orders prohibiting the following individuals and business from engaging in the unauthorized practice of law:

- **Davood Ghavami** of Vancouver has consented to an order prohibiting him from holding himself out as a lawyer, appearing as counsel or advocate, preparing documents for use in a proceeding, giving legal advice, agreeing to place at the disposal of another the services of a lawyer, making an offer to provide any of these legal services, and holding himself out as being qualified or entitled to provide these legal services, except as allowed by the *Immigration and Refugee Protection Act*. Ghavami was further enjoined from identifying Leonard C. Hanson as a lawyer; Hanson is a former lawyer who was disbarred in 1983.
- **Blair Franko** and Franko d.b.a. **IPX Consulting**, of Kelowna, was found in contempt of Court for breach of a consent order prohibiting him from giving legal advice, preparing documents for use in a proceeding, preparing documents relating to a proceeding under a statute, and holding himself out as being qualified or entitled to provide these legal services. Franko was ordered to advise his clients that no such further legal services will be provided and to pay $1,000 to the Law Society as a fine for his contempt.❖

Discipline digest

Please find summaries with respect to:

- Kheng-Lee Ooi
- David William Blinkhorn
- Henry Alexander (Sandy) McCandless
- James Hu
- Robert John Cuddeford
- Bradley Darryl Tak
- Douglas Edward Arthur LeBeau
- Fiesal Ebrahim
- Marianne Walters

For the full text of discipline decisions, visit the Regulation & Insurance / Regulatory Hearings section of the Law Society website.

KHENG-LEE OOI

Called to the bar: February 15, 1991
Discipline hearing: March 23, 2010
Panel: Leon Getz, QC, Chair, Patricia Bond and Robert Brun, QC
Report issued: March 31, 2010 (2010 LSBC 06)
Counsel: Maureen Boyd for the Law Society and Richard Fernyhough for Kheng-Lee Ooi

FACTS

In September 1996, Kheng-Lee Ooi represented a client in the purchase of a property. In July 2007, the client was in arrears of $61,155 on mortgage payments, owed $16,668 in unpaid property taxes and $21,000 in credit card debt.

At her client's request, Ooi contacted the bank to obtain the amount required to reinstate her client's accounts in good standing and avoid foreclosure on the mortgages. As her client did not qualify for a loan from a trust company, a loan from a private investor was necessary to pay the bank.

In August 2007, Ooi advised her client about a company offering a $150,000 loan, with a $10,000 administration fee and 10% interest per annum. Ooi prepared the loan documents in English even though her client could only speak Mandarin. The client believed that the term of the loan was for one year.

Ooi did not disclose to her client that the principal of the company loaning the funds was Ooi's husband. She failed to explain the principle of undivided loyalty and the effect of joint representation. Ooi also failed to obtain the informed consent of each client for continued representation or recommend that her client obtain independent legal advice.

Through August and September 2007, the loan funds were used to pay the client's debts. On November 30, 2007, the full amount of the loan was due and payable, under the written terms of the promissory note. The client did not repay any part of the principal of the loan.

Ooi's husband commenced an action against her client in December 2007. She subsequently referred her husband to another lawyer and a Notice of Change of Solicitor was filed in the action. Ooi faxed documentation containing confidential information about her client to her husband's new lawyer.

On May 6, 2008, Ooi, her husband and a company employee went to her client's home to serve her with a Writ of Summons and other legal documents. When no one answered, they entered the home through the garage. A confrontation ensued with the client who then learned about the source of the loan.

On June 10, 2008, the client hired a lawyer who made a complaint about Ooi to the Law Society.

ADMISSION AND PENALTY

Ooi admitted that her clients' interests in the loan transaction were adverse to each other and her own interests and that her conduct in acting in a conflict of interest without the required disclosures and consents constituted professional misconduct. She also admitted that disclosing confidential information concerning the business affairs of her former client and entering the former client's residence without invitation constituted conduct unbecoming a lawyer.

The panel accepted her admissions and proposed penalty. The panel ordered that Ooi:

1. be suspended for six weeks; and
2. pay $2,500 in costs.

DAVID WILLIAM BLINKHORN

Richmond, BC
Called to the bar: May 19, 1989
Ceased membership: January 1, 2007
Disbarred: April 21, 2010
Hearing dates: May 12, 2009 and April 12, 2010
Panel: Leon Getz, QC, Chair, Haydn Acheson and Herman Van Ommen
Reports issued: August 12, 2009 (2009 LSBC 24) and April 21, 2010 (2010 LSBC 08)
Counsel: Jaia Rai for the Law Society; no one on behalf of David William Blinkhorn (facts and verdict) and David William Blinkhorn on his own behalf (penalty)

FACTS

In two agreed statements of fact, David William Blinkhorn admitted that he:

- misappropriated trust funds;
- breached undertakings to hold funds in trust;
- misled a client on the status of her case;
- misled the Law Society by stating that he had paid the account of another lawyer when he had not done so; and
- breached a variety of Law Society rules relating to trust accounting records.

Between 1999 and 2006, Blinkhorn stole and lied repeatedly and did not keep any records of any kind. In giving evidence at his penalty hearing, he said that he did not know whether the misappropriated sums in the agreed statements of fact were accurate because the only records he had were retrospective reconstructions.

At the hearing, Blinkhorn candidly said several times that he was not currently capable of practising law. The central theme of his representations, both as a witness and as counsel on his own behalf, was that his conduct was the product of acute depression and melancholy that had caused him to make "very bad decisions." His explanations, however, amounted largely to a self-diagnosis, and he did not provide an independent professional opinion as evidence to support that he was under treatment.

Blinkhorn has not practised as a lawyer since May 2006 when he was suspended for failure to file a completed Trust Report for the period ending November 30, 2005.

VERDICT

Blinkhorn admitted that his conduct constituted professional misconduct. The panel found that the conduct showed "a marked departure from the standard of conduct the Law Society expects of its members" and accepted the admission. The panel further found that he breached the Law Society Rules in failing to keep proper trust accounting records.

PENALTY

The panel determined that Blinkhorn's explanations for his conduct did not meet the test of being compelling evidence of extraordinary mitigating circumstances sufficient to satisfy the panel that the protection of the public interest and reputation of the profession do not require disbarment. He admitted that he knew what he was doing when he did it and that he knew that it was wrong. The panel concluded that, by any objective measure, his conduct was disgraceful and dishonourable.

The panel ordered that Blinkhorn:

1. be disbarred; and
2. pay $37,000 in costs.

TRUST PROTECTION COVERAGE

In every profession, there are occasionally members who are dishonest. Although not all professions or industries protect victims of their dishonest members, the legal profession in BC has, since 1949, provided financial protection to members of the public whose money has been stolen by their lawyer. If a claim is made against a lawyer relating to the theft of money or other property, Trust Protection Coverage (TPC) is available under Part B of the lawyer's insurance policy to reimburse the claimant, on the lawyer's behalf, for the amount of the loss.

Based on the circumstances described in paragraph [3] (13) of *Law Society of BC* v. *Blinkhorn*, 2009 LSBC 24, a TPC claim was made against David William Blinkhorn and the amount of $11,235 paid. Blinkhorn is obliged to reimburse the Law Society in full for the amount paid under TPC.

For more information on TPC, including what losses are eligible for payment, see Regulation & Insurance / Trust Protection Coverage on the Law Society's website at lawsociety.bc.ca.

HENRY ALEXANDER (SANDY) MCCANDLESS

Langley, BC
Called to the bar: May 17, 1971
Ceased membership: January 25, 2008
Disbarred: April 30, 2010
Discipline hearings: November 16 to 19, 2009 and January 14, 2010 (facts and verdict); April 21, 2010 (penalty)
Panel: Bruce LeRose, QC, Chair, Haydn Acheson and William Jackson, QC
Reports issued: February 1 (2010 LSBC 03) and April 30, 2010 (2010 LSBC 09)
Counsel: Jaia Rai for the Law Society; H.A. (Sandy) McCandless on his own behalf (facts and verdict) and no one on behalf of H.A. (Sandy) McCandless (penalty)

FACTS

From November 2005 to July 2007, Henry Alexander (Sandy) McCandless was involved in an investment scheme. He represented a client who participated in the scheme and engaged in conduct intended to give shareholders the impression that their investment was secure and continuing to generate earnings.

After being specifically advised that two government securities regulators were investigating the investment as a fraudulent scheme, McCandless failed to warn investors of the risk. He allowed his position as a lawyer to

give credibility to the suspect scheme.

He further facilitated the continuation of the scheme by investing his own money while in a clear conflict of interest. He also accepted funds into his trust account in circumstances that required him to decline to accept or return such funds.

McCandless, and the investors who relied on his status as a lawyer, lost thousands of dollars.

VERDICT

McCandless firmly held the position that the scheme was not fraudulent until well after being confronted with the investigation of the Law Society. He failed to adhere to warnings that the investment scheme may be fraudulent and continued to believe in the legitimacy of the scheme in circumstances that any prudent lawyer would not.

The panel found McCandless guilty of professional misconduct for engaging in conduct that gave shareholders the impression that their investments were secure, for placing himself in a conflict of interest, for acting in a manner that had the potential of perpetuating a fraud and for not giving full and proper legal advice.

PENALTY

McCandless did not appear at the scheduled penalty hearing; however, the panel decided to proceed in his absence.

The proven misconduct in this case was extremely serious, exposed the public to considerable harm, and tainted the reputation of the legal profession. In order to maintain the public's confidence in the legal profession, a significant disciplinary response was warranted.

The panel found that McCandless had an almost "blind faith" in the investment scheme and its principals at the expense of his client and members of the public without even an acknowledgment that he should have known better.

His professional conduct record revealed an inability to learn from Law Society intervention and prior discipline. There were five incidents of discipline from 1979 to 2005, which demonstrated a pattern of misconduct resulting from his lack of objectivity and professional judgment and his failure to recognize classic conflicts of interest.

In determining costs, the panel considered the seriousness of McCandless' misconduct, the indication that he was in dire financial straits, his ability to generate income and his right to have his case heard.

The panel ordered that McCandless:

1. be disbarred; and
2. pay costs of $47,000.

JAMES HU

Richmond, BC
Called to the bar: May 19, 2000
Discipline hearing: March 31, 2009
Panel: David Renwick, QC, Chair, Rita Andreone and Peter Lloyd
Report issued: May 6, 2010 (2010 LSBC 10)
Counsel: Maureen Boyd for the Law Society and James Hu on his own behalf

FACTS

In April 2008, a Law Society compliance audit revealed that James Hu, a sole practitioner, had not maintained books and records in compliance with the Rules. The auditor returned to Hu's practice on June 25 and 26, 2008 to further discuss the deficiencies and prepare a final report.

On June 28, 2008, two days after the auditor's visit, Hu completed his 2008 Trust Report. He certified that all of the information was true and accurate, when he knew that the answers to several questions were not true.

A follow-up compliance audit in October 2008 determined that Hu's books and records were still not being maintained in substantial compliance with the Rules. He was advised to expect a compliance audit in one year's time and that he was required to provide monthly summaries and trust reconciliations in the interim.

In December 2008, the Law Society asked Hu to explain why his 2008 Trust Report contained untrue answers. His reply letter acknowledged the inaccuracies and explained that he was trying to correct the deficiencies. In May 2009 the Law Society sought an explanation from him regarding untrue answers in his 2007 Trust Report. He replied that he had difficulties with his accounting software and it was his intention to bring himself into compliance with the requirements.

The panel found Hu's conduct to be serious as it involved "truthfulness." The panel also took into consideration that Hu's inaccurate answers did not provide him with any monetary benefit; he had no professional conduct record; he was cooperative and made progress in achieving compliance; and his conduct fell short of deliberate conduct intending to deceive.

ADMISSION AND PENALTY

Hu admitted that he gave untrue answers to several questions in his 2007 and 2008 Trust Reports and that his conduct constituted professional misconduct. The panel accepted his admission and ordered that he pay:

1. a $7,500 fine; and
2. $2,000 in costs.

ROBERT JOHN CUDDEFORD

Maple Ridge, BC
Called to the bar: May 4, 2001
Discipline hearing: May 5, 2010
Panel: Kenneth Walker (single Bencher panel)
Report issued: May 11, 2010 (2010 LSBC 11)
Counsel: Eric Wredenhagen for the Law Society and Robert Cuddeford on his own behalf

FACTS

In October, November and December 2009, Robert John Cuddeford received letters and telephone messages from the Law Society regarding a complaint about him. He chose not to reply because he was concerned his written response might be used by the complainant in an action in the courts.

Cuddeford was not aware that the *Legal Profession Act* makes communications with the Law Society concerning an investigation of a complaint inadmissible in court proceedings, except with the consent of the lawyer. The panel noted that his decision not to respond was misguided and that he ought to have retained counsel to assist him with this issue, as suggested in the Law Society's letters.

At the hearing, Cuddeford explained that the complainant was difficult and had a history of complaining about him. The panel found that an aggravating factor was that he had been slow to reply to communications from the Law Society in the past on a related complaint from this

complainant. His failure to provide a timely response interfered with the statutory obligation of the Law Society to investigate complaints.

The panel urged Cuddeford to take advantage of the Law Society's online Communications Toolkit training module.

ADMISSION AND PENALTY

Cuddeford admitted that his failure to respond to Law Society communications constitutes professional misconduct. The panel accepted his admission and ordered that he:

1. pay a $2,000 fine;
2. pay $1,000 in costs; and
3. respond to the Law Society's October 2009 letter.

BRADLEY DARRYL TAK

Port Moody, BC
Called to the bar: February 15, 1991
Discipline hearings: January 27 (facts and verdict) and April 8, 2010 (penalty)
Panel: David Renwick, QC, Chair, Leon Getz, QC and Thelma O'Grady
Reports issued: April 7 (2010 LSBC 07) and May 14, 2010 (2010 LSBC 13)
Counsel: Eric Wredenhagen for the Law Society and Bradley Darryl Tak on his own behalf

FACTS

In September 2008, Bradley Darryl Tak accepted a $2,000 cash retainer from a client. He subsequently failed to respond to his client's repeated telephone calls and messages. As a result, the client could not determine what, if any, steps Tak had taken on his behalf.

Upon receipt of the client's complaint, the Law Society was also unsuccessful in reaching Tak by phone and email. A personally delivered letter finally prompted a response that he would reply to the Law Society on or before November 13, 2009. The Law Society received a letter from him on December 14, 2009. He admitted that he had met with the client and received a retainer in cash; however, he failed to fully provide the information requested.

At the time of the hearing, the panel did not know if the retainer was used since no statement of account was provided, nor did they know if it was retained or forwarded to the new lawyer. Following the hearing, Tak did provide the Law Society with a copy of his trust ledgers and records relating to receipt and deposit of the client's cash retainer.

VERDICT

Tak did not present any evidence that would excuse his conduct. The panel found that his failure to substantively respond to repeated requests from the Law Society amounted to professional misconduct.

PENALTY

The panel stated that this type of misconduct goes to the heart of the Law Society's ability to govern the profession. Their concern was amplified by the fact that Tak had been found guilty of professional misconduct in July 2009, less than a year earlier, for similar conduct in another matter.

The panel ordered that Tak:

1. be suspended for 45 days; and
2. pay costs of $2,500.

DOUGLAS EDWARD ARTHUR LEBEAU

Burnaby, BC
Called to the bar: May 3, 2004
Discipline hearing: May 6, 2010
Panel: Gavin Hume, QC (single-Bencher panel)
Report issued: May 14, 2010 (2010 LSBC 12)
Counsel: Maureen Boyd for the Law Society and Michael A. LeBeau on behalf of Douglas Edward Arthur LeBeau

FACTS

In 2009, Douglas Edward Arthur LeBeau was retained by a bank to prepare and register mortgages on certain properties. The Law Society received complaints from two representatives of this bank alleging that, despite several attempts, they were unable to contact him to obtain final reports in these matters.

LeBeau also failed to respond to letters and telephone messages from the Law Society with regards to these complaints. He was personally served on March 24, 2010 with affidavits and a cover letter, advising that failure to respond to Law Society communications was a serious matter and could constitute professional misconduct.

Immediately before the discipline hearing, LeBeau resigned as a member of the Law Society and indicated that he had no intention of returning to the practice of law.

VERDICT

The panel determined that LeBeau's failure to respond to Law Society communications was professional misconduct

PENALTY

The panel decided that a fine was unnecessary given LeBeau's resignation. Counsel for LeBeau indicated that he had taken responsibility for LeBeau's files and was responding to the concerns of the complainants. The panel, therefore, found it unnecessary to order that LeBeau do so. The panel ordered that LeBeau:

1. be reprimanded; and
2. pay $1,500 in costs.

FIESAL EBRAHIM

Vancouver, BC
Called to the bar: May 21, 2003
Discipline hearing: March 25, 2010
Panel: Gavin Hume, QC, Chair, Bruce LeRose, QC and Thelma O'Grady
Report issued: May 18, 2010 (2010 LSBC 14)
Counsel: Eric Wredenhagen for the Law Society and Richard Fernyhough for Fiesal Ebrahim

FACTS

In April 2008, Fiesal Ebrahim, a sole practitioner, acted for two clients with respect to their purchase of three residential strata lots that were being developed. The clients purchased one of these lots as an investment property, which they were planning to "flip." When the developer went into receivership, the clients decided to assign their right to purchase this investment property lot to a third party, a person who was well known to them.

The third party was unrepresented and, between June and October 2008, paid deposits totalling $280,500 to Ebrahim's trust account. Two days

before the scheduled closing in November 2008, the receiver granted the clients an extension of the completion date for all three lots on the condition that the deposit on each lot would be increased.

The clients instructed Ebrahim to take the additional deposit for their two lots out of the funds in the trust account. At that time, his clients did not have funds in trust. On advice from one of his clients, he believed that the third party was agreeable to his funds being used in this manner. The third party, however, was unaware that his trust funds were being paid out to the receiver to the credit of Ebrahim's clients.

Ebrahim failed to advise the third party, an unrepresented person, that he was not protecting his interests in the transaction. He also committed a breach of trust by improperly applying trust funds provided to him by the third party for the benefit of his clients' purchase of the two lots in which the third party had no interest.

The panel found no evidence that Ebrahim acted with dishonest intent with respect to the trust funds, nor any suggestion that he benefited or stood to benefit personally from any of the breaches that occurred. The panel took into consideration that he had only practised law for five years and had no prior discipline record. When he realized his mistakes, he took immediate steps to rectify them and reported himself to the Law Society. He has since taken a conflicts course and the Sole Practitioner course, upgraded his software, and arranged for a senior practitioner to mentor him.

ADMISSION AND PENALTY

Ebrahim admitted that his conduct amounted to professional misconduct. The panel accepted his admission and ordered that he pay:

1. a $3,000 fine; and
2. $1,500 in costs.

MARIANNE WALTERS

Abbotsford, BC
Called to the bar: August 1, 1985
Discipline hearing: May 18, 2010
Panel: Bruce LeRose, QC, Chair, Joost Blom, QC and David Crossin, QC
Report issued: May 26, 2010 (2010 LSBC 15)
Counsel: Maureen Boyd for the Law Society and Marianne Walters on her own behalf

FACTS

In March 2008, Marianne Walters was retained to commence Supreme Court proceedings for divorce, division of assets and debts, child support, and primary or shared residence of a child on behalf of her client, the husband. The client's wife was the registered owner of real property, and Walters filed a certificate of pending litigation (CPL) against this property.

On April 23, 2009, the wife's lawyer requested a payout statement to discharge the CPL for the purpose of refinancing the property. Walters proposed to release the CPL on the conditions that the wife consent to reducing child support payments and sign a passport application for the child.

Following a conversation with opposing counsel, Walters believed it was agreed that she would not release the CPL until she received the completed passport application for the child and the Consent Order had been entered.

Walters received a Consent Order to reduce child support payments and a signed passport application for the child on May 7, 2009, subject to a trust condition. A covering letter from opposing counsel set out that the documents were forwarded on her undertaking that she would forthwith release the CPL that was registered by her client in the Land Title Office.

The refinancing of the property did not proceed, and the client's wife entered into a contract to sell the property, with a completion date of July 15, 2009. Although Walters knew that the refinancing was not proceeding, she was not aware of the pending sale prior to June 12, 2009, when she obtained a release of the CPL.

Walters breached the undertaking when she submitted the Consent Order for filing without having taken any steps to release the CPL. She did not submit for registration a discharge of the CPL until mid-June 2009.

The panel found that the breach of undertaking in this case was a clear, marked departure from conduct the Law Society expects of lawyers and that Walters was culpable. A breach of undertaking is a serious form of misconduct. In this case, there are some mitigating factors.

Walters had previously discussed the terms on which the documents would be sent, and had expected the terms would be different than the terms set out in the letter dated May 7, 2009. She did rectify the breach and comply with the terms of the undertaking when she submitted the discharge of the CPL for filing on June 12, 2009. No harm resulted from the breach.

An aggravating factor, however, is Walter's professional conduct record, which consists of two conduct reviews in 2002 and 2005, and one citation that resulted in a finding of professional misconduct.

ADMISSION AND PENALTY

Walters admitted that on May 7, 2009 she received an executed Consent Order and a passport application sent to her on an undertaking that she forthwith release a Certificate of Pending Litigation. She further admitted that she breached the undertaking when she used the Consent Order for the benefit of her client but did not take any steps to release the CPL until June 12, 2009.

The panel accepted Walters' admission that her conduct constituted professional misconduct and ordered that she pay:

1. a fine of $3,500; and
2. $1,500 in costs.❖

CRA requirements for information ... from page 6

not know the whereabouts of the client, and has claimed privilege on behalf of the client, we have been advised that the CRA will continue to deal with each situation on a case by case basis and may therefore seek costs against a lawyer if it concludes that it is necessary to do so.

The Ethics Committee recognizes that its view on a lawyer's obligations when faced with an RFI may expose the lawyer to a claim of costs for CRA's application for a compliance order. In this situation, the lawyer should notify the Law Society so the society can consider whether to seek leave to intervene or appoint counsel on behalf of the lawyer.❖

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