



BENCHERS' BULLETIN

Keeping BC lawyers informed

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Admission standards and the national landscape

by Kenneth M. Walker, QC

BENCHERS' BULLETIN

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

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

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

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PHOTOGRAPHY

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WELL, 2015 LOOKS to be an interesting year. Perhaps not as interesting as last year, but still ... interesting. The Law Society has just approved an ambitious strategic plan for the next three years, through which we hope to improve access to justice and assist the public with a better understanding of the importance of the rule of law and the administration of justice. But the strategic initiative I would like to talk about here is our intent to improve the Admission Program, including the education and continuing competence of students.

The program we have had in place for over 30 years now has three major elements: find an articling position; successfully complete the 10-week in-house PLTC program; and successfully complete nine months of articling with a principal.

Since its inception, our program has served us well. We have a right to be proud of the hard work of our PLTC instructors and the many, many volunteers who have devoted their time over the years to help educate future lawyers. And like each of the law societies across the country, we believe our program is the "best." However, the programs vary dramatically from law society to law society. So much so that the Competition Bureau was moved to write in a 2007 report that the "... variations in the length of the professional legal training course and articling suggest that the entry requirements may have been set, in some instances, at a higher than necessary level, thereby increasing the requirements prospective lawyers have to meet to enter into the profession."

With that in mind, I'd like to talk about two other Canadian bar admission programs.

Alberta, Saskatchewan and Manitoba require that new entrants attend and successfully complete the program offered by the Canadian Centre for Professional Legal Education (CPLED). The CPLED program is

offered once a year and consists of three one-week modules delivered face-to-face in the classroom, six modules delivered online and completion of an Ethics & Professionalism Competency Evaluation. This means that these western provinces (we refer to them as "east of us") have standardized a bar admission program that is mainly online and only requires students to meet in person for skills training for three weeks in total.

Ontario has gone a different route. Law school graduates seeking admission to the bar in Ontario now have two ways to gain admission to the profession:

1. The traditional articling program, which requires students to work for 10 consecutive months with an approved articling principal.

The public expects that new lawyers will be competent. We must continue to meet that expectation. It is time to evaluate, improve and modernize our program with a view to national standards.

2. The Law Practice Program, which consists of a four-month training course and a four-month work placement.

In addition, students from both streams must pass the self-study open-book Barrister Examination and a self-study open-book Solicitor Examination.

In November 2013, Ontario approved yet another option for fulfilling the experiential training component of its licensing requirements. Graduates of the Integrated Practice Curriculum offered by Lakehead University will only need to pass the licensing examinations and satisfy the good character requirement to complete the Lawyer Licensing Process and be called to the Bar in Ontario.



The existence of different bar admission programs across the country and the differences among those programs is highlighted now that we have mobility across the country. Under the National Mobility Agreement, lawyers may practise for up to 100 days a year in any other province and can transfer between jurisdictions with ease. I am very proud of the work done by Gavin Hume, QC and others in standardizing a code of conduct across the country, resulting in the adoption of the *Code of Professional Conduct* here. The Federation of Law Societies of Canada is currently working on developing national standards for admission to the legal profession. That work is ongoing. All of which shows that we must think nationally and move towards some standard admission requirements.

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will be competent. We must continue to meet that expectation. It is time to evaluate, improve and modernize our program with a view to national standards.

Some things we might do:

1. I have heard from first-time principals that they could use some help with how to be a principal. More information about the role and responsibilities for first time principals might assist.
2. In 2013, we have increased the types of work articulated students could do. We can do more. Students are a great resource to help those with limited resources.
3. I was reading today it will not be long before a robot will be the driver of the car. I am sure that the legal profession needs to utilize technology better.

Students are a great resource here, and we could make the use of technology a greater part of our education program.

I'm sure there are many more ideas we could bring to bear on improving our bar admission program, and I'd be happy to hear any you may have.

I have been talking regularly to students in Kamloops during the eight years I have been a Benchers. I have found all of them to be smart, interested and enthusiastic. During 2015, I plan to visit as many county bar association meetings as I can, and I hope to talk to the students around the province. They are the future of our profession, and we owe it to them to provide the best possible preparation for practice that we can.

We will talk again.❖

Supreme Court decisions regarding TWU's proposed law school

ON MARCH 18, the Supreme Court of BC released decisions in two interlocutory proceedings regarding the proposed law school at Trinity Western University. *Loke v. British Columbia (Minister of Advanced Education)*

was dismissed as moot, as the Minister's decision challenged by the petitioner has been changed. As a result, the Law Society's applications, to be added as a party or intervenor in the *Loke* proceeding and to have *TWU*

v. The Law Society of BC heard at the same time as *Loke*, were dismissed.

More information on matters related to TWU's proposed law school can be found on the [Law Society's website](#).❖

SCC decision on the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

ON FEBRUARY 13, the Supreme Court of Canada released its decision in *Attorney General of Canada v. Federation of Law Societies of Canada* on the applicability of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and its regulations to members of the legal profession. The court held that the regulation of the legal profession by Canada's law societies provided an effective and constitutional anti-money laundering and terrorist financing regime. This decision protects the public against government interference in the confidential relationship between a lawyer and a client.

The Court recognized that, as a principle of fundamental justice, the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Moreover, the maintenance of solicitor-client privilege is integral to the public's confidence in the administration of justice. The Law Society has rules requiring legal professionals to identify their clients, as well as cash transaction rules. These rules ensure lawyers have clear obligations that protect against money laundering and terrorist financing.

In making this decision, the court accepted that adequate client identification

and record-keeping practices were already in place by virtue of the law societies' regulation of their members, and held that all legal professionals are exempt from the legislation.

The Law Society of BC is pleased with this decision. This lengthy debate began in British Columbia 15 years ago, and throughout the process the Law Society worked with the Federation, the Canadian Bar Association, the Barreau Du Quebec, and the Chambre des notaires du Quebec to bring this important matter to a successful and just conclusion.❖



Proposed changes will improve access to legal services

by Timothy E. McGee, QC

THE YEAR IS well underway, and much is happening at the Law Society.

First, we have a new President, Ken Walker, QC. He and I meet regularly, and we have been busy on a number of Law Society initiatives. Ken has been a Bencher for eight years, and his experience and depth of knowledge on a wide range of issues is serving us well.

Our new President was officially sworn in at the first Bencher meeting of 2015, which took place in January, and it was there that the Benchers also reinforced their commitment to serving the public by adopting the new Strategic Plan for the next three years. In it, there are three main goals: the public will have better access to legal services; the public will be well served by an innovative and effective Law Society; and the public will have greater confidence in the rule of law and the administration of justice.

In keeping with the goals set out in the Strategic Plan, the Law Society is currently

laying the groundwork for legislative amendments to the *Legal Profession Act* that would permit us to establish new classes of legal service providers to engage in providing legal services, set the credentialing requirements for such individuals,

Our goal is to begin developing the regulatory and credentialing framework that will ultimately broaden the field of legal providers, ensuring more alternatives for accessing legal services in British Columbia.

and regulate their legal practice. The amendment was recommended by the Legal Services Regulatory Framework Task Force and adopted by the Benchers last December. This followed Bencher approval in 2013 of the recommendations of a previous task force – the Legal Service

Providers Task Force – that the Law Society develop a regulatory framework by which other existing providers of legal services, or new stand-alone groups who are neither lawyers nor notaries, could provide credentialed and regulated legal services in the public interest.

For much of 2014, the members of the Legal Services Regulatory Framework Task Force were busy – conducting consultations, and engaging in extensive research in order to produce its report outlining its recommendations. The feature story on page 10 explains the task force's work, and gives further insight into why the Law Society is seeking these legislative amendments.

Our goal is to begin developing the regulatory and credentialing framework that will ultimately broaden the field of legal providers, ensuring more alternatives for accessing legal services in British Columbia. ♦



Media and the Law Workshop

More than 50 members of the media attended the annual Law and the Media Workshop on February 11. Co-sponsored by the Jack Webster Foundation, this workshop helps educate the media on potential legal issues in reporting stories and builds relationships between the Law Society and journalists. Feedback was extremely positive, and journalists left better prepared to face the legal challenges that may lie ahead.



Hearing panel pool members attend refresher course

IN 2011, THE Law Society expanded the list of individuals eligible to sit as hearing panel members to include members of the public and non-Bencher lawyers. This allows broader input and creates greater public confidence in the hearing process.

The Law Society received applications from many qualified people, and those selected for the hearing panel pools took training courses. A refresher course and dinner was held on March 4, 2015.

Attending the course were, seated from left to right: Peter Lloyd, Anna Fung, QC, Clayton Shultz, Paula Cayley, Jasmin

Ahmad, Donald Silversides, QC, June Preston, Glenys Blackadder, Dr. Gail Bellward, Graeme Roberts, David Mossop, QC and Gavin Hume, QC.

Standing, left to right: John Waddell, QC, Jamie Maclaren, Jennifer Chow, Carol Gibson, Thelma Siglos, James Dorsey, QC, Sharon Matthews, QC, Lance Ollenberger, William Everett, QC, David Layton, Dan Goodleaf, John Lane, Donald Amos, Joost Blom, QC, J. S. (Woody) Hayes, Robert Smith, Bruce LeRose, QC, Claude Richmond, Jory Faibish, Tom Fellhauer, Carol Hickman, QC, Peter Warner, QC, Sandra

Weafer, Lynal Doerksen, Elizabeth Rowbotham, President Ken Walker, QC, Hadyn Acheson, Gregory Petrisor and Tribunal and Legislative Counsel Jeffrey Hoskins, QC.

Hearing panel pool members not pictured: Ralston Alexander, QC, Adam Eneas, John Ferguson, John Hogg, QC, Patrick Kelly, Richard Lindsay, QC, Linda Michaluk, Shona Moore, QC, Laura Nashman, Karen Nordlinger, QC, Jennifer Reid, Dale Sander-son, QC, Lois Serwa, William Sundhu and Brian J. Wallace, QC. ❖

Revision and consolidation of Law Society Rules

AT THEIR NEXT meeting on April 10, it is expected that the Benchers will adopt revised and consolidated Law Society Rules, to come into effect July 1, 2015.

The primary objectives of the revision and consolidation are to:

- re-number all rules and subrules in consecutive whole number order to eliminate decimal numbering;

- add headings to cross-references to aid recognition;
- consider the logical placement of provisions and relocate as necessary;
- ensure consistency and economy of language;
- identify substantive issues for consideration outside of the consolidation

project.

The draft Law Society Rules 2015 can be downloaded from the website; see the [highlight](#). A historical table showing the new and old numbers assigned to each rule with the dates of past changes since the 1998 Rules is included. ❖

Fiduciary property rules adopted

THE BENCHERS HAVE adopted new rules that permit lawyers acting in a fiduciary capacity, such as an executorship, arising from a solicitor-client relationship to deal with assets under their control in less prescriptive ways, while still requiring lawyers

to account for the assets and to allow the Law Society to review the accounts, when necessary.

In addition to this rule change, the Benchers have also adopted changes to the rule regarding payment of fees from trust,

where now a client must agree in writing to receiving a bill by any means other than that specifically addressed under that rule.

The rule amendments can be found on the [Law Society website](#). ❖

In Brief



ABORIGINAL LAWYERS MENTORSHIP PROGRAM MEET-AND-GREET

More than a dozen lawyers, recent calls, and law students attended the Aboriginal

Lawyers Mentorship Program meet-and-greet, which was held in January at the University of Victoria Faculty of Law. The program is intended to enhance the retention and advancement of Aboriginal lawyers, who are currently underrepresented in the legal profession in BC.

Currently in its second cycle, the program has already surpassed its goal of matching 20 mentor-mentee pairs.

JUDICIAL APPOINTMENTS

Martha Devlin, a lawyer with the Public Prosecution Service of Canada (Vancouver),

was appointed a judge of the Supreme Court of BC, replacing Justice **John Savage**. Justice Savage was appointed a judge of the Court of Appeal, replacing Madam Justice **K.E. Neilson**, who elected to become a supernumerary judge.

Richard Browning was appointed a judge of the BC Provincial Court (Fraser Region).

Barbara Flewelling was appointed a judge of the BC Provincial Court (Vancouver Island Region). ❖

Unauthorized practice of law

UNDER THE LEGAL Profession Act, only trained, qualified lawyers (or articled students or paralegals under a lawyer's supervision) may provide legal services and advice to the public, as others are not regulated, nor are they required to carry insurance to compensate clients for errors and 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 purporting to provide legal services, the Society will investigate and take appropriate action if there is a potential for harm to the public.

From November 25, 2014 to February 18, 2015, the Law Society obtained undertakings from seven individuals not to engage in the practice of law.

The Law Society has obtained orders against the following individuals and business related to the unauthorized practice of law:

- On the court's own motion, Associate Chief Justice Cullen dismissed an action that **R. Charles Bryfogle**, of Kamloops, had commenced against the Law Society. Bryfogle commenced the action

without first obtaining leave, as was required by virtue of a previous court order declaring Bryfogle a vexatious litigant. The Associate Chief Justice ordered that Bryfogle must not, except with prior leave of the Court, initiate any legal proceedings in any court. The court ordered that any document or process filed contrary to the order is a nullity, even if a registry inadvertently files the document or process. Further, the court declared that no person is obliged to respond to any process filed contrary to the order. (March 9, 2015)

- Madam Justice Dorgan found **Robert G.D. Gallard** and **Gallard's Collection Service Ltd.**, of Victoria, in contempt of an order pronounced in 2007 that prohibited Gallard and his company from engaging in the practice of law. Gallard and his company and its employees had performed various legal services for clients in small claims court in the expectation of a fee, contrary to the court order. The court fined Gallard and his company \$7,500 and awarded the Law Society its special costs. The court also expanded the previous injunction to prohibit Gallard and his company from

commencing, prosecuting or defending a proceeding on behalf of others regardless of whether a fee is charged. (February 18, 2015)

- **Kevin James Anderson**, of Kelowna, consented to an injunction prohibiting him from representing himself as a lawyer, counsel or any other manner that connotes that he is qualified or entitled to engage in the practice of law in BC. Anderson is also prohibited from engaging in the practice of law, including the drawing, settling or revising of corporate documents and giving legal advice for or in the expectation of a fee, gain or reward. The injunction will remain in force unless and until the Law Society permits him to practise law in BC. (February 13, 2015)
- **Boguslaw Bejm**, of Coquitlam, consented to an injunction prohibiting him from engaging in the practice of law for or in the expectation of a fee. In 2013 and 2014, Bejm had offered legal services on the Craigslist website, including advice on family law and litigation matters, for or in the expectation of a fee. (January 23, 2015) ❖

Essay contest invites high school students to consider the relevance of the Magna Carta

CONSISTENT WITH OUR strategic goal of raising public awareness of the importance of the rule of law and the proper administration of justice, the Law Society is hosting an essay writing contest in honour of the 800th anniversary of the Magna Carta. The essay topic is "Magna Carta and its relevance to Canada in the 21st Century."

The competition is open to students in a BC public high school in the 2014/15 academic year who are currently enrolled in, or have taken, Law 12 and/or Civic Studies 11 courses. Students are asked

to submit an essay that demonstrates an understanding of the significance of the Magna Carta to the rule of law, human rights and democratic principles. The first prize winner will receive an award of \$1,000 and will be invited to a special awards presentation event in Vancouver; the runner up will receive \$500. Deadline for submissions is June 1, 2015.

For more on the contest or how to submit an essay, see the [highlight](#) on the website to download the information form. ❖



King John signing the Magna Carta, England, 1215



News from the Law Foundation

INTRODUCING THE NEW CHAIR OF THE LAW FOUNDATION BOARD



As of January 1, 2015, Warren Milman is the chair of the board of the Law Foundation of BC. Milman joined the Law Foundation board in 2011. Over the past three years, he has

served on the Finance, Fellowships and Research, and Policy and Planning Committees. He has chaired the Class Actions Committee for the past two years.

Milman was called to the bar in 1993 and is a partner at McCarthy Tétrault in Vancouver, practising in the area of commercial litigation, with a focus on insolvency. He is a member of his firm's Pro Bono Committee and was formerly the chair of Pro Bono Law of BC.

Milman succeeds Tamara Hunter of Davis LLP, who completed her two-year term as chair at the end of 2014.

VALUABLE WORK OF THE INNOCENCE PROJECT AT UBC'S ALLARD SCHOOL OF LAW

The Innocence Project is a clinical program at the University of British Columbia's Allard School of Law, in which students work on files under the supervision of a lawyer for individuals who have been convicted of a serious offence and are asserting their factual innocence. It has two components: one academic and one clinical. The seminar "Preventing Wrongful Convictions" makes up the academic component of the program. It is designed to provide students with an understanding of both the causes of wrongful conviction and the proper role of the various players in the criminal justice system, including the police, Crown, judges, experts and defence counsel. The clinical component includes casework; weekly meetings to discuss new and ongoing cases; presentations from guest speakers, mostly forensic experts and lawyers; and regular meetings with supervising lawyers, investigators and experts involved with the case.

Since the project began accepting applications in September 2007, it has received at least 700 inquiries. Students are currently working on 18 cases. (Many applications are denied as they do not fit within the program's narrow eligibility guidelines.) Cases have a lifespan of several years, with the volunteer supervising lawyers (many of whom are senior criminal lawyers) staying with a case and new students being incorporated into the case each year.

The overall objectives of the Innocence Project are to educate law students about the practice of criminal law and the frailties of the criminal justice system; to provide those students with an inspirational and practical education experience; to deliver a legal service not otherwise provided in BC; to engage the legal community in the provision of a valuable, pro bono legal service; and to create networking opportunities for students interested in criminal law. An additional long-term objective is to identify and educate the public about important issues related to wrongful convictions in Canada. ❖

Thanks to our 2014 volunteers

THE BENCHERS THANK and congratulate all those in the profession and the legal community who volunteered their time and energy to the Law Society in 2014. Whether serving as members of committees, task forces or working groups, as Professional Legal Training Course guest instructors or authors, as fee mediators, event panellists or advisors on special projects, volunteers are critical to the success of the Law Society and its work.

Over the past year, the Society has enjoyed the support and contributions of over 300 volunteers, all of whom deserve acknowledgement.

Alisia Adams	David Brown	William Everett, QC	Roger E. Holland	Nathan C. Lampard
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 Joel Whysall
 Loreen Williams
 Gary J. Wilson
 Louisa M. Winn
 So Yin Woo
 David K. Wotherspoon
 Darcy Wray
 Don Yule, QC ❖

In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2014:

Manfred G.L. Angene
 Don P. Baron
 A.B.B. Carrothers, QC
 Kenneth C.K. Chen
 Clinton W. Foote
 H. Patrick Glenn
 H. Bjorn Hareid
 G. Jack Harris, QC
 Frederick H. Herbert, QC
 J. David Houston
 Beverley D. Hoy
 Dick Lester
 Kelly MacDonald
 Brian W.F. McLoughlin, QC
 James H. Noble
 Julie L. Owen
 George W. Owen, QC
 Andrew Pavey
 Gilbert R. Schmitt, QC
 Henry A. Smith
 Mark J. Steinberg
 Kelvin R. Stephens
 James G. Stewart
 Jacob J. Talstra
 Benjamin B. Trevino, QC
 Ross D. Tunnicliffe ❖

Taking steps to make justice more accessible

CONSISTENT WITH OUR goal of ensuring the public has better access to legal services, the Law Society is taking steps to expand how legal services are provided in this province. This proposed change in the structure of British Columbia's legal profession will create an opportunity for certain legal service providers to deliver additional types of legal services. Areas of legal need that are currently not served, or are only partially served by lawyers, will be met by other legal service providers, enhancing access to justice for all British Columbians.

Other Canadian provinces have already taken steps in this direction. In Ontario, the Law Society of Upper Canada regulates both lawyers and independent paralegals, ensuring that they meet appropriate standards of learning, and professional competence and conduct. Under that system, lawyers are licensed to provide any legal advice or service, while paralegals are licensed to provide legal advice in limited areas of legal services.

Changes of this nature are taking place outside of Canada as well. South of the BC border, Washington State has a new class of legal professionals called "limited

Other Canadian provinces have already taken steps in this direction. In Ontario, the Law Society of Upper Canada regulates both lawyers and independent paralegals, ensuring that they meet appropriate standards of learning, and professional competence and conduct.

license legal technicians." The Washington State Bar has authorized this new category of legal professional to advise and assist clients on specific areas of law once they have met certain educational requirements.

This spring, the Law Society of BC will begin the groundwork for seeking legislative amendments to the *Legal Profession Act* to permit the Law Society to establish, credential and regulate categories of legal service providers to provide certain legal services. This step follows a recommendation in the report from the Legal Services Regulatory Framework Task Force, chaired by former President Art Vertlieb, QC. The report was adopted by the Benchers in December 2014.

"Access to justice is a big issue, obviously, and I want to see the Law Society

This spring, the Law Society of BC will begin the groundwork for seeking legislative amendments to the Legal Profession Act to permit the Law Society to establish, credential and regulate categories of legal service providers to provide certain legal services.

continue the important work that has been done to increase the availability of affordable legal services," says Vertlieb. "The increased scope of practice for designated paralegals in BC is one of the most significant achievements by the Benchers in the past few years, and now it is time for the next step in the process." Vertlieb played a pivotal role in championing the expanded scope of duties that can be performed by paralegals and articulated students.

"Taking the step of establishing different categories of legal service providers is the way forward," agrees Michael Lucas, Manager of Policy and Legal Services. "This will provide greater alternatives in the provision of legal advice and services in BC."

Lucas has worked for the Law Society for 20 years and has seen discussions

around the expansion of the Law Society's regulatory oversight ebb and flow, but he says the conversation has now moved to the forefront due to a changing regulatory environment.

"Over the last five or six years, there's been greater recognition within the profession that there are problems with access to justice that simply can't be solved without changing the rubric under which legal services are provided," Lucas said.

As the Canadian Bar Association noted in its recent report on trends and issues in the future of legal services, "To the extent that legal services are only allowed to be provided by lawyers, regulation of lawyers is effective regulation of legal services. But it is increasingly clear that some legal services are not necessarily best delivered by lawyers or law firms... This evolution in the marketplace suggests that consideration must be given to whether the nature of legal regulation must change to ensure client protection and protection of the administration of justice and rule of law. The regulation of paralegals in Ontario is one example."¹

"The increased scope of practice for designated paralegals in BC is one of the most significant achievements by the Benchers in the past few years, and now it is time for the next step in the process."

– Art Vertlieb, QC

"We have a clearly articulated mandate to protect the public interest in the administration of justice – and at this

¹ *The Future of Legal Services in Canada: Trends and Issues*, June 2013 © Canadian Bar Association, page 37.



point all evidence points to the fact that for many people, the system is not working the way it needs to work," says Vertlieb. "As the Law Society, we have a duty to improve access to justice, to help ensure everyone in BC is able to access the legal services they require."

An earlier Law Society of BC report, *The Final Report of the Legal Service*

Providers Task Force, adopted by the Benchers in 2013, identified the need to adjust the scope of regulation to include categories of legal service providers, and to credential and regulate those providers. The report concluded that all legal service providers, not just lawyers and notaries, should be regulated and that a single regulator is the preferred model. It also

concluded that, if there is to be one regulator of legal services, then the Law Society is the logical regulatory body. The third recommendation was that the Law Society develop a regulatory framework under which existing providers of legal services, and new stand-alone groups, could provide credentialed and regulated legal services in the public interest.

The Benchers established the Legal Services Regulatory Framework Task Force in April 2014 to follow up on the third recommendation. After it was struck, the

"We have a clearly articulated mandate to protect the public interest in the administration of justice – and at this point all evidence points to the fact that for many people, the system is not working the way it needs to work. As the Law Society, we have a duty to improve access to justice, to help ensure everyone in BC is able to access the legal services they require."

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task force engaged in even more extensive research, undertaking a series of in-person consultations as well as consultations with the courts, administrative tribunals, other regulatory bodies, and groups that are already utilizing some non-lawyer assistance, such as the Legal Services Society.

The report analyzes legal needs, identifies categories of legal professionals who might be able to meet needs in specific areas, and suggests what sort of services might be provided. The task force also recommended that the new classes of legal service providers should only be able to provide legal services within a limited scope, concluding that they should be

The report notes that the full scope of permitted advocacy services will need to be decided through further consultations with the courts and administrative tribunals, lawyers, notaries and law schools.

permitted to provide legal information and advice, assist in drafting, filling out forms, coaching, and interpreting substantive and procedural law, and with some limitations, be permitted to provide advocacy services.

The report notes that the full scope of

permitted advocacy services will need to be decided through further consultations with the courts and administrative tribunals, lawyers, notaries and law schools. Those discussions will play a significant role in deciding what type of appearances, if any, ought to be permitted. With that in mind, the task force suggests, as a starting point for discussion, that properly credentialed and regulated professionals in any new class of legal service provider be permitted to offer advocacy services before administrative tribunals, in small claims court, and before mediators and arbitrators, in areas of law covered by their licence and within the jurisdiction of the dispute resolution forum to hear.

However, the task force recognized the importance of ensuring that legal advice is given by individuals who have studied the law and are trained in its application. The public interest in the administration of justice would not be well served if these new categories of legal service providers were not educated and credentialed to provide those legal services: "There is no

... the task force recognized the importance of ensuring that legal advice is given by individuals who have studied the law and are trained in its application.

point in creating a system that enables people to retain uninformed legal advice," the report states, "as that advice will in most cases exacerbate already existing legal problems."

Vertlieb points out the complexity of the task. "We've got to decide, how much education do you need?" he said. "That's not going to be simple. We would have to develop the framework for credentials, which would cover what training you would need to provide the services we've identified you can do." Professional standards would also need to be developed and implemented, together with a regime for regulation.

Before the framework can be established, the *Legal Profession Act* must be amended. Currently, discussions are underway with staff in the Ministry of Justice



Art Vertlieb, QC



Michael Lucas

in connection with the materials necessary for government consideration of the request for a legislative amendment, and it is hoped the amendments will be on the legislative agenda in 2016.

"I'm very pleased with this approach," Vertlieb said. "When we started this project,

"Throughout the process, we have demonstrated our commitment to act in the public interest, and to ensuring that the public is well served in the governance of the legal profession."

– Art Vertlieb, QC

it was clear a change in the regulation of the profession was necessary to address access to justice issues. These measures set a direction that will begin to address this problem. Throughout the process, we have demonstrated our commitment to act in the public interest, and to ensuring that the public is well served in the governance of the legal profession." ❖



PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Acting for a client with dementia

AT SOME POINT in time, you may have a client, or a prospective client, who has a form of dementia. The person may be anxious to get his or her affairs in order by making a representation agreement, an enduring power of attorney, a new will, and taking other steps. How would you handle this? While every situation depends on the facts and this is not a comprehensive answer, here are some points to keep in mind.

BC CODE RULE 3.2-9 – CLIENT WITH DIMINISHED CAPACITY

Generally speaking, a person with dementia faces a decrease in capability over time, and the rate of progression can be uncertain. Read *BC Code rule 3.2-9* and commentary [1] to [5] regarding your ethical responsibilities when assisting a person

with diminished capacity. The starting point is that a lawyer must, as far as reasonably possible, maintain a normal lawyer-client relationship if a client's ability to make decisions is impaired because of a mental disability. A medical diagnosis of dementia – Alzheimer's being the most common form – does not always mean that a person does not have capacity to provide instructions to a lawyer for all legal services at all times. Further, in some cases, a person's symptoms may be found not to be attributable to dementia at all, but instead the result of another, treatable medical cause.

A person with dementia may be mentally capable of making some decisions about his or her legal affairs, but not others. Accordingly, capacity should

be assessed in the context of a particular decision to be made. While a letter from the person's doctor and the insight of family members or close friends may be of assistance, it is up to the lawyer to assess if the impairment prevents the person from giving instructions for a particular matter or entering into binding legal relationships.

A lawyer who believes a person to be incapable of giving instructions should decline to act, but it may be appropriate to take some protective steps (see commentary [2] to [5] of rule 3.2-9 where a failure to act could result in imminent and irreparable harm; where a lawyer has an ethical obligation to ensure that a client's interests are not abandoned; where the assistance of the Public Guardian and Trustee might be obtained; and where the

authority to disclose necessary confidential information in some circumstances may be implied).

To explore whether it is appropriate to provide the legal services requested, some questions to consider include:

- Does the person appear to have the ability to understand information relative to the decision that has to be made?
- Does the person appear able to appreciate the reasonably foreseeable consequences of the decision or lack of decision?
- Does the person appear to be acting of his or her own free will, or do you suspect undue influence?
- What common law tests, statutory tests and rules of court may be applicable?

Commentary [1] to rule 3.2-9 provides:

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs

A medical diagnosis of dementia – Alzheimer’s being the most common form – does not always mean that a person does not have capacity to provide instructions to a lawyer for all legal services at all times.

and to give the lawyer instructions. A client’s ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice,

guidance and support of others. A client’s ability to make decisions may change, for better or worse, over time. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.

A client who has capacity issues may be vulnerable to undue influence by a third party putting pressure on the client to make decisions that may not be in the client’s best interests. A lawyer has a responsibility to satisfy him or herself that the client’s instructions reflect the client’s true intent. The BC Law Institute (BCLI) published a guide in 2011, Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, which is available on the Law Society website (see Practice Support and Resources). The guide includes a checklist of recommended practices for screening potential undue influence that is useful, not only for will instructions, but for other personal planning documents and transactions as well.

COMMON LAW TESTS AND STATUTORY TESTS OF INCAPACITY

There is no one perfect, single test to determine capacity. Capacity should be assessed in the context of the decision to be made. For example, more capacity is required for a complex commercial transaction than for making decisions about clothing and food. There are common law tests of capacity for some matters (e.g. capacity to make a will, nominate a committee) and there are statutory tests that have been developed for some purposes (e.g. a representation agreement under the *Representation Agreement Act*, RSBC 1996, c 405; an enduring power of attorney under the *Power of Attorney Act*, RSBC 1996, c 370; or an advance directive to give or refuse consent to health care under the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 18).

The BCLI published a Report on Common-Law Tests of Capacity (BCLI Report no. 73, September 2013) in which several common law tests of capacity are described: the capacity to make a will, to make a gift, to designate a beneficiary, to nominate a committee, to enter into a contract, to

FOLLOW THE CLIENT IDENTIFICATION RULES TO HELP THWART SCAM ATTEMPTS

Scammers continue to pretend to be BC lawyers’ legitimate new clients, either using the phony debt collection scam or other ruses. Whatever their stratagem, their end goal is usually to coerce a lawyer to deposit a fraudulent financial instrument (often a bank draft or certified cheque) into a trust account, and then to trick the lawyer into transferring funds electronically to the scamster before the lawyer finds out the instrument is no good. The scams range from the obvious to the very sophisticated and everywhere in between.

Protect yourself. Verify the client’s identity as required by Law Society Rules 3-91 to 3-102. Use a checklist and read the answers to the frequently asked questions on our website to assist you with compliance.

Get familiar with the common characteristics of these scams and the risk management tips on our website (go to Fraud: Alerts and Risk Management). Review the bad cheque scam names and documents web page as part of your firm’s intake process.

Appoint someone in your firm to keep lawyers and relevant staff up to date with new information from the Law Society. Since scammers may impersonate you, regularly perform internet searches of your own name and firm, to see what turns up. Margrett George and Surindar Nijjar from the Lawyers Insurance Fund, Practice Advisor Barbara Buchanan and the Continuing Legal Education Society of BC presented a free webinar for lawyers: *The bad cheque scam – don’t get caught*. Videos from the webinar are available on CLE’s website. Check out the archive of the client identification and verification rules online course (Roy Millen and Barbara Buchanan), originally webcast by CLE, and available in the practice resource section of our website.

Report potential new scams to bbuchanan@lsbc.org. Reporting allows us to notify the profession, as appropriate, and update the list of names and documents on our website.

retain legal counsel, to marry, to form the intention to live separate and apart from a spouse, and to enter into an unmarried spousal relationship.

For statutory tests of capability, look for the relevant statute and how the statute may have been interpreted by the court. The client may, for example, have the capacity to appoint a representative to help with decisions or to make decisions about personal care, health care, the routine management of financial affairs, and obtaining legal services and instructing counsel under section 7 (standard provisions) of the *Representation Agreement Act (RAA)* and to appoint a monitor. If the client is higher functioning, the client may be able to make a section 9 non-standard representation agreement for health care decisions under the *RAA* and an enduring power of attorney in relation to financial affairs pursuant to the *Power of Attorney Act*. There is a statutory presumption of capability in section 3 of the *RAA* that includes a provision about a person's way of communicating:

A client who has capacity issues may be vulnerable to undue influence by a third party putting pressure on the client to make decisions that may not be in the client's best interests.

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of

- (a) making, changing or revoking a representation agreement, and
- (b) making decisions about personal care, health care and legal matters and about the routine management of the adult's financial affairs.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

Section 8 provides a statutory test of incapability for the standard section 7 agreement:

8 (1) An adult may make a representation agreement consisting

of one or more of the standard provisions authorized by section 7 even though the adult is incapable of

- (a) making a contract,
- (b) managing his or her health care, personal care or legal matters, or
- (c) the routine management of his or her financial affairs.

(2) In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any of those provisions, all relevant factors must be considered, for example:

- (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
- (d) whether the adult has a relationship with the representative that is characterized by trust.

In order for a person to make a section 7 representation agreement, the section 8 statutory test seems to require a fairly low level of capacity in light of the many powers granted to a representative in the "routine management of financial affairs" (see section 7(b) and *Representation Agreement Regulation*, BC Reg 199/20001, s. 2). Section 8 provides that an adult may make a section 7 agreement even if the adult is incapable of making a contract (the legislation does not distinguish between contracts generally or contracts for necessities). However, a lawyer should typically not act for a person who is otherwise incapable of entering into a retainer agreement with the lawyer. The Ethics Committee has not, as yet, given an opinion on whether it would recommend a change to *BC Code* rule 3.2-9 to clarify whether a lawyer may

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** 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, Lenore Rowntree** or **Warren Wilson, QC** to discuss ethical issues, interpretation of the *Code of Professional Conduct for British Columbia* or matters for referral to the Ethics Committee.

Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships. Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org. Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org. Contact Warren at: tel: 604.697.5857 or 1.800.903.5300 email: wwilson@lsbc.org.

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

◆
Optum Health Services (Canada) Ltd. – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and 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 additional cost to lawyers. tel: 604.685.2171 or 1.888.685.2171.

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

act for a client for a section 7 representation agreement in a situation where the client may be otherwise incapable of making a contract. One of the recommendations in the BCLI *Report on Common-Law Tests of Capacity* (page 172) was that the government should amend the RAA to provide that a person with the mental capacity to make a section 7 representation agreement also has the mental capacity to retain and instruct legal counsel for the purpose of advising on and drafting the representation agreement.

In balancing a client's access to legal counsel with the capacity required in context of the decision to be made, a lawyer must keep in mind the ethical guidance set out in *BC Code* rule 3.2-9 and commentary [1] to [5]. As stated previously, the key is whether a lawyer is satisfied that a person has the ability to understand the information relative to the decision that has to be made, and whether that person is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. If the lawyer believes the person to be incapable of giving instructions, the lawyer should not act. It may be appropriate for the lawyer to take some protective steps, as described in the commentary to the rule.

COMMUNICATION ENHANCEMENT STRATEGIES

How a lawyer communicates with a client with diminished capacity contributes to a successful outcome. In addition to having dementia, the client may also be affected by poor hearing, failing eyesight, medications, mobility issues, other health problems, undue influence and family issues.

- Consider meeting the client on his or her home turf. Some individuals function better in a familiar environment and may have mobility and transportation issues. Meeting the client at home can reduce stress and make for a more productive meeting, as well as providing insight about the client's daily living.
- Meet the client alone in a quiet, comfortable location with good lighting. Background noise not only is distracting but can cause problems for individuals with hearing loss.

- Treat the client with respect. Do not refer to the client as "dear" or "honey." Explain confidentiality.
- Speak slowly and clearly. Repeat and summarize information. A person may be nodding their head in affirmation to questions or comments, but in reality has not understood. Check in. Ask open-ended questions to confirm the client's understanding and feelings (e.g. questions beginning with what, how, why, tell me) rather than closed questions only requiring a yes/no or one-word answer. Take notes of any responses that may be relevant to capacity and undue influence.
- A number of short visits may work better than long appointments.
- Take time to listen. Do not respond to text messages, emails and telephone

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calls during the client's visits. Put your phone on call forward or shut off the ringer.

- Be patient. Give the client time to respond to questions or make comments. Even without dementia, older clients may have problems with word retrieval and need more time to process information.
- Provide drafts of documents prior to your meeting so the client can read the documents beforehand. Consider using a large font (e.g. 14 to 16 point) and double-spacing.
- Ask what time of day the client is generally at his or her best and schedule the meeting accordingly. Remind the client about the meeting.
- Ask about family and friends. The client may want a support person present for the meetings. That is okay, as

long as there is time alone with the client to assess capacity, to screen for undue influence, and to take instructions.

- If the client's financial information is inaccurate or incomplete, obtain consent to contact the client's financial institution, accountant or other relevant contact. Consider meeting together with that professional and the client. During the meeting, focus on the client, not on the other person.
- Consider whether medications may affect the client's responsiveness. Ask the client for consent to contact his or her physician for a medical opinion, if appropriate, regarding the client's memory, cognitive ability and medications. In order to obtain useful information, provide the physician with the legal context of the capability required.

The Alzheimer's Society of BC is a resource for people with dementia, and for those who support them. It has developed two publications, *Freda's Story, Living Alone and Finding Help on the Dementia Journey* and *Cam and Sally's Story, Legal Planning and the Dementia Journey*, and is preparing a third, *Making Your Workplace Friendly, Information for Legal Professionals*. Check the [society's website](#) for the availability of the upcoming publication, or contact the Alzheimer Society at dementiafriendlybc@alzheimerbc.org or 604.742.4939.

The Public Guardian and Trustee also has resources on its website with respect to support for vulnerable adults. For some risk management tips, on the Law Society website see *Witnessing a signature? Stop. Read this First* (go to Lawyers Insurance Fund, Preventing Claims). *Continuing Legal Education of BC* is planning a June 2015 CLE-TV program about acting for clients with dementia. Check their website for details.

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. ❖

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Dealing with Cryptowall ransomware

♪ *Tired, frustrated ...
I think I'm hitting the wall ...* ♪

Music and lyrics by Adrenaline Mob

THE LAW SOCIETY issued a [Fraud Alert](#) on December 31, 2014 concerning the Cryptowall virus ransomware. This article expands on the information in that notice.

WHAT IS IT?

According to Wikipedia:

Ransomware is a type of malware which restricts access to the computer system that it infects, and demands a ransom paid to the creator(s) of the malware in order for the restriction to be removed. Some forms of ransomware encrypt files on the system's hard drive (cryptoviral extortion, a threat originally envisioned by Adam Young and Moti Yung), while some may simply lock the system and display messages intended to coax the user into paying.

While initially popular in Russia, the use of ransomware scams has grown internationally; in June 2013, security software vendor McAfee released data showing that it had collected over 250,000 unique samples of ransomware in the first quarter of 2013 – more than double the number it had obtained in the first quarter of 2012. CryptoLocker, a ransomware worm that surfaced in late-2013, had procured an estimated US\$3 million before it was taken down by authorities.

There are at least three different types of ransomware. The first is software that appears to have detected something nasty on your computer and demands that you buy a clean-up tool to “remove” it. This is

really bogus ransomware and typically can be removed from a computer without too much effort.

The second type of ransomware displays what appears to be a notice from the police or other authorities and demands payment of a fine since you have “illegal” content on your computer (typically copyrighted materials or porn). Again, this type

encrypting the files of infected computers in an effort to extract money for the decryption key.

A Trojan horse is, as the name suggests, a malicious application wrapped up in sheep's clothing. It works by tricking you into clicking on what you think is an innocent attachment from a trusted source. The exact opposite is true.



of ransomware should not be too difficult to remove by someone with an IT background.

The third type of ransomware, most commonly known as Cryptowall or Cryptolocker, is much more dangerous and malicious, and is the focus of this article. It has infected at least seven BC lawyers' systems over the last while.

WHAT IS CRYPTOWALL?

According to [Techrepublic](#):

CryptoWall is classified as a Trojan horse, which is known for masking its viral payload through the guise of a seemingly non-threatening application or file. Its payload involves

WHERE DOES IT COME FROM AND HOW IS IT SPREAD?

Techrepublic continues:

Geographically speaking, that is unknown as of this writing. What is known regarding origins of infection is that CryptoWall is most typically spread through email as an attachment and from infected websites that pass on the virus – also known as a drive-by download.

Additionally, CryptoWall has been linked to some ad sites that serve up advertising for many common websites users visit on a daily basis, further spreading its distribution.

HOW PREVALENT IS IT?

According to [Secureworks.com](#), the top 10 countries infected with CryptoWall are:

Country	Infected systems
United States	253,521
Vietnam	66,590
United Kingdom	40,258
Canada	32,579
India	22,582
Australia	19,562
Thailand	13,718
France	13,005
Germany	12,826
Turkey	9,488

As you can see, it is not a trivial threat.

WHAT DOES IT DO?

Once it is on a computer, it searches for and encrypts files located within shared network drives, USB drives, external hard drives, network file shares and even some cloud storage drives (there are reports of Dropbox files being encrypted by the malware).

The malware uses a very strong public/private encryption key and uploads the private encryption key to a “command and control” server, placing the private key required to unencrypt the files out of the victim’s reach.

It starts out demanding a ransom (typically around \$500 USD or 1 Bitcoin) and may increase the amount as the deadline for payment nears. It may also offer de-encryption after the deadline for yet a higher ransom.

HOW DO YOU PREVENT IT?

The important things to realize about this malware are:

- Once it encrypts your files, there is no way to “unencrypt” them without paying the ransom and receiving the private key. The length of the encryption key (reported to be a 2048-bit RSA key pair) is such that a “brute force” attack will not succeed to break the encryption in the time allotted to pay the ransom.
- While it is reasonably easy to remove the malware from your system using known tools, this does not affect the encrypted files. Removal of the malware still leaves your files encrypted

and unavailable to you.

- In talking with the firms that have been hit, even the best internet security and anti-virus software suites have not stopped this malware from infecting their computers and systems. In spite of what these security suites may state on their websites, the malware has succeeded in attacking systems that were protected by Kaspersky, Microsoft Security Essentials, McAfee and others. Many security suites claim that they can remove the malware and, doubtless, many of them do. However, what they do not say is that removal of the malware does not de-encrypt the infected files.
- After having done an exhaustive search of the internet, I could not find anyone who reported a reputable tool to break the encryption on the infected files. You are left with a Hobson’s choice: either pay the ransom (which may or may not result in your encrypted files being unencrypted), or not. If you do not pay the ransom, you will be left to recover or recreate the files that are now lost to you.
- The best way to deal with this malware is by taking preventive measures. Once your system is hit, it is really a matter of damage control.
- Keep your operating system current and fully up to date. One firm that was infected was still using Microsoft XP well after April 8, 2014, which was the date that Microsoft stopped supporting this operating system. As Microsoft states:

If you continue to use Windows XP now that support has ended, your computer will still work but it might become more vulnerable to security risks and viruses. Internet Explorer 8 is also no longer supported, so if your Windows XP PC is connected to the internet and you use Internet Explorer 8 to surf the web, you might be exposing your PC to additional threats.
- Do not allow peer-to-peer file sharing applications on your network.
- Disable autorun on your Windows computers on network drives and USB ports. This will prevent malware from

being introduced using this function.

- Be very careful about opening attachments to emails or other messages (including instant messaging). In some of these cases, the malware appears to have been an executable file masquerading as a PDF attachment to an email. Once opened, the executable file installed the ransomware on the firm’s system.

If you have what appears to be a questionable email, do not click on it. Forward it to your IT support and ask that they open it in a “sandboxed” computer, which has special protection that can allow the email and attachment to be safely examined without infecting your system.

Note that email addresses can be “spoofed,” and an email may appear to be from someone you trust. If the email appears to be at all questionable, or not in keeping with what you

It starts out demanding a ransom (typically around \$500 USD or 1 Bitcoin) and may increase the amount as the deadline for payment nears.

would expect receive from that address, treat it as suspicious and send it to your IT department without opening any attachments.

- Educate the people you work with about the risks of:
 - attachments to email and other messages;
 - downloading applications from the web that have not been approved by IT;
 - visiting websites of questionable content, as they may contain malware.
- Maintain up-to-date browsers and set security settings high to help prevent phishing and other malware attacks.
- Have an internet and authorized use policy in place in the office (a precedent can be found on the [Law Society website](#)), and educate your staff and lawyers on the risks outlined in that policy.

- Consider restricting software and installing blocking applications. Techrepublic states: “Lastly, consider enabling software restriction policies if you’re a system administrator on an enterprise network or using a freely available application such as CryptoPrevent to block many of the avenues to which Cryptowall uses to gain a foothold on your computer.” Note that blocking applications may or may not work against future versions of Cryptowall or similar viruses as they evolve.

IS IT POSSIBLE TO RECOVER ENCRYPTED FILES IF YOU DO NOT PAY THE RANSOM?

The short answer is, there is no known way to unencrypt affected files without paying the ransom. However, several different approaches have allowed lawyers to restore some or all of their lost files from earlier versions and/or backups that were not themselves encrypted by the virus.

Here is a selection of ways that *may* work if you have been hit by the virus:

- If you have enabled a cloud backup that maintains versions of documents, you may be able to go back to a version that has not been encrypted. [Microsoft OneDrive](#) states that you may be able to restore files from earlier versions in OneDrive.

However, this virus is known to disable the versioning aspect of Windows. Again, according to Techrepublic:

Finally, once the encryption process has completed, Cryptowall will execute some commands locally to stop the Volume Shadow Copy Service (VSS) that runs on all modern versions of Windows. VSS is the service that controls the backup and restoration of data on a host computer. It also controls file versioning, a feature introduced in Windows 7 that keeps histories of changes made to files. The file may be rolled back or restored to a previous version in the event of an unintended change or catastrophic event that causes the integrity of the file to have been modified. The command run by the virus stops the service altogether and also

adds the command argument to clear/delete the existing cache, making it even more difficult to recover files through versioning or system restore.

- You may be able to retrieve your files if you use [SpiderOak](#) or similar zero knowledge systems. These online backup services encrypt files uploaded to their cloud storage via a key that is only known to you. The cloud provider has no way of knowing either your password or your de-encryption key. (Of course, you are well advised to store that key in a very safe place, as it is the only way to access your files.) The files are potentially unreachable and therefore safe from the ransomware.

SpiderOak’s website states:

Ransomware attacks are on the rise these days. In order to ensure protection against attacks like Cryptowall, it is extremely important to back up your files and folders in a trusted cloud storage system. SpiderOak is one of the few cloud storage systems that uses “zero knowledge” privacy and uses strong security controls to protect customer data. SpiderOak encrypts the files in your computer before uploading them to the server. As a result, only you, have access to your unencrypted data. Even SpiderOak cannot read your data because the keys used for encryption only belong to you. SpiderOak offers amazing products like SpiderOak Hive and SpiderOak Blue to secure consumer and enterprise data. SpiderOak Blue provides enterprises with a fully private cloud service featuring all of the benefits of cloud storage along with total data privacy.

- Have a backup of your files that is disconnected from the network and thereby isolated from the propagation of the virus. This will work only if the virus does not have the opportunity to find this backup and encrypt it or disable the versioning.
- If you are fortunate enough to have an uninfected backup, do not attempt to

restore your data until you are absolutely certain that your network has been fully sanitized of the malware. You wouldn’t want to find that your only backup has now become infected courtesy of a vestige of the malware left on the system.

Here is what has not worked for firms that have been hit:

- At least one firm was unable to restore its files in [Dropbox](#). The virus also found the firm’s Dropbox files and encrypted them as well – notwithstanding that Dropbox maintains versions of files.

It is an open question as to whether files that are themselves placed within an encrypted volume in Dropbox using a third-party encryption application (such as Boxcrypt or Viivo) might survive an attack.

- Restoring files stored on an USB drive or NAS (networked attached storage) device, unless the USB or NAS was disconnected from the network when it was infected. If the USB drive or NAS was connected to the network at the time of the infestation, the virus can find and encrypt these devices.

CONCLUSION

Everyone should see ransomware as a serious threat and take steps to minimize their risk. According to [Secureworks.com](#):

In mid-March 2014, Cryptowall emerged as the leading file-encrypting ransomware threat. The threat actors behind this malware have several years of successful cybercrime experience and have demonstrated a diversity of distribution methods. As a result, CTU researchers expect this threat will continue to grow.

This is clearly one case where a gram of prevention is worth a kilogram of cure. Lawyers are urged to harden their systems, to take action to prevent viruses from infecting their systems, to maintain backups that are out of reach of ransomware and to educate their users on the role that they play in preventing infections.

After all, once you are infected the effort to try to recover and restore encrypted files can cause you to be tired, frustrated and eventually, hit the wall. ❖

Conduct reviews

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

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee, which may also be attended by the complainant at the discretion of the subcommittee. The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, including:

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

RESTRICTIONS ON CONTINGENT FEE AGREEMENTS

A lawyer breached section 67(2) of the *Legal Profession Act* when he billed clients on a contingent fee agreement that purported to permit him to take a percentage of the settlement proceeds and a percentage of the taxable costs recovered. The lawyer knew or ought to have known that he was not entitled to a portion of the amount recovered for costs. He used an out-of-date precedent agreement and was unaware of the *Act* provisions at the time of billing. The lawyer promptly repaid the excess fees billed to the clients. A conduct review subcommittee stated that the lawyer's conduct was inappropriate and that ignorance of the law was no excuse. He was clearly in violation of the *Act*, which was designed to protect clients from potential abuse. The lawyer has changed his precedent agreement and incorporated the proper wording, which prohibits taking of a percentage of costs. The lawyer has no professional conduct record, and the subcommittee accepted that his conduct was the result of oversight and not any dishonest intent. (CR 2014-21)

OBLIGATIONS TO CLIENTS AND UNREPRESENTED PERSONS IN LOAN TRANSACTION

A lawyer breached a number of professional obligations owed to a client and unrepresented party in a loan transaction. She failed to advise the lender, who was self-represented, that she was acting for the borrower in a loan transaction and not protecting the lender's interest, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook* then in force. The lawyer also failed to ensure the accuracy of the lending documents prepared by her staff, and subsequently disclosed

to the lender confidential information regarding her instructions from the borrower, contrary to Chapter 5, Rules 1 and 4 of the *Handbook*. A conduct review subcommittee recommended various strategies to ensure that the lawyer does not find herself in this position again, including (1) confirming in writing who she is acting for and who she is not acting for; (2) making clear notes about who attends a meeting; (3) providing clear instructions to her paralegal, preferably in writing, so that documents are not drafted incorrectly; (4) taking continuing legal education courses in conveyancing, secured transactions and real estate; and (5) reviewing a file and obtaining instructions from her client before responding to inquiries about the file or transaction. The lawyer acknowledged her misconduct and has taken steps to prevent reoccurrence. (CR 2014-22)

DISHONOURABLE CONDUCT

A lawyer failed to faithfully discharge the ethical obligations of his employment, contrary to Rule 2.2-1 of the *Code of Professional Conduct for British Columbia*. Due to a deteriorating relationship between the lawyer and his law firm, he gave notice that he would be resigning from the firm. He set up a personal law corporation, with its own bank and trust accounts, then diverted fees he earned on a client file that were due to the law firm. He stated that leaving the firm was emotional and it was always his intention to pay the firm the portion of the fee owing to it. A conduct review subcommittee advised the lawyer that his actions were inappropriate and, but for the lack of a professional conduct record, may have resulted in a citation. One way to characterize his conduct was misappropriation of funds, and that, seen from this perspective, fell far below acceptable standards. The lawyer acknowledged his misconduct and expressed remorse. He now practises in an office-sharing arrangement with other lawyers whom he can rely upon for counsel. (CR 2015-01)

BREACH OF UNDERTAKING OR TRUST CONDITIONS

A lawyer breached an undertaking in a real estate transaction by failing to concurrently register a release of a Certificate of Pending Litigation (CPL) with his client's new mortgage and by subsequently failing to make an application to the Land Title Office to withdraw the release of the CPL, contrary to Rule 7.2-11 of the *Code of Professional Conduct for British Columbia*. The release of CPL and first mortgage were registered, but there were two outstanding conditions that had not been met by the client with respect to the second mortgage. As the lawyer did not have sufficient funds to pay out the amount owing to the credit union, the transaction did not complete on time. The lawyer ignored demands from the credit union's counsel to withdraw the release of the CPL, in breach of his written undertakings. The second mortgage was later registered, and the lawyer forwarded the required

continued on page 27

Credentials hearing

Law Society Rule 2-69.1 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement.

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

DONALD DUKE MAINLAND

Vancouver, BC

Called to the bar: September 10, 1980

Ceased membership: June 18, 1986

Hearing (application for reinstatement): June 11, 2014

Panel: Maria Morellato, QC, Chair, Carol Gibson and Richard Lindsay, QC

Decision issued: November 18, 2014 ([2014 LSBC 56](#))

Counsel: Gerald Cuttler for the Law Society; Henry Wood, QC for Donald Duke Mainland

BACKGROUND

This application is Donald Duke Mainland's third attempt to be reinstated as a lawyer in BC in the past 24 years. His first application for reinstatement was filed with the Law Society in 1990 and his second in 1994.

On June 18, 1986, after misappropriating legal fees and disbursements, Mainland relinquished his membership in the Law Society and undertook not to practise law again unless authorized to do so.

The circumstances leading up to Mainland's resignation from membership involved 14 occasions between October 1985 and May 1986 in which Mainland took a total of \$8,950 in payments that had been made by clients of his law firm for fees and disbursements; he wrongfully retained these monies for his own use. Mainland's law firm discovered his theft, reported the matter to the Law Society, and sued Mainland. Mainland made full restitution for the money he took and the lawsuit was settled.

During the period leading up to and surrounding the thefts, Mainland was under considerable stress in his personal life and had assumed financial obligations in excess of his means.

Since 1989, Mainland has been employed as a paralegal with the same law firm.

On July 24, 1990, Mainland applied for reinstatement and disclosed that, due to financial difficulties, he had failed to obey a court order regarding maintenance payments that were due to his ex-wife and daughter. He had subsequently paid the money owed and was in

compliance with the court order. His application for reinstatement was unsuccessful.

On February 3, 1994, Mainland made a second application for reinstatement and this application was also rejected.

On April 22, 1999, Mainland made a Consumer Proposal under the *Bankruptcy and Insolvency Act*. He fully satisfied the provisions of his Consumer Proposal in September 2002.

On August 15, 2013, Mainland made a third application to the Law Society for reinstatement. That application was the subject of this hearing.

DECISION

Clearly, Mainland did not have the prerequisite character in 1985 and 1986 – by his own admission – nor during his attempts at reinstatement in 1990 and 1994, as determined by the previous panels that dismissed his applications.

Mainland made extremely serious mistakes in stealing funds almost 30 years ago. However, it was obvious to the panel that he had accepted full responsibility for those mistakes, made full restitution, and worked extremely hard to rehabilitate and redeem himself. He has been a responsible husband, father, employee and professional for well over two decades.

Mainland has been financially sound and responsible for over a decade, and the panel was satisfied that he had fulfilled his legal obligations to pay his debts.

Mainland's application was strongly supported by three lawyers in the law firm where he has been employed for 25 years. They were unequivocally supportive of his reinstatement, and each was also aware of his prior wrongdoings that led to his departure from the profession.

Based upon the evidence, the panel was of the view that Mainland is extremely unlikely to misconduct himself in the future. His employer is, in large measure, responsible for his rehabilitation, and it appears certain that the employment relationship will continue.

The panel determined that Mainland met the evidentiary burden of proving, on a balance of probabilities, that he is a person of good character. The panel decided that Mainland should be reinstated and permitted to practise law when he meets all conditions imposed by the Credentials Committee.

The panel ordered that Mainland pay \$2,500 in costs. ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Sebastian Nejat
- Bradley Darryl Tak
- Georgiale Alida Lang
- Donald Roy McLeod
- Andrew Christopher Lee
- Douglas Edward Dent

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

SEBASTIAN NEJAT

Vancouver, BC

Called to the bar: June 1, 2010

Discipline hearing: August 26, 2014

Panel: A. Cameron Ward, Chair, Patrick Kelly and David Layton

Decision issued: November 3, 2014 ([2014 LSBC 51](#))

Counsel: Carolyn Gulabsingh for the Law Society; Sebastian Nejat on his own behalf

FACTS

On March 16, 2011, Sebastian Nejat was retained by a client to act for him in a matrimonial matter. Another lawyer acted for him and his wife on the sale of their home, and \$175,000 of the sale proceeds had already been paid out to the spouse by court order dated March 4, 2011. The balance of proceeds of sale were being held in trust by the other lawyer.

On March 17, Nejat brought an application without notice seeking an order restraining the spouse from disposing of the funds that were paid out to her pursuant to the March 4 order.

On March 23, Nejat received a cheque from the other lawyer in the amount of \$80,952.70, being the balance of the net sale proceeds, and deposited it into his trust account.

On March 29, Nejat brought an application without notice before the court seeking an order compelling the spouse to pay \$175,000 into court. Nejat advised the court that he had not been able to serve the spouse with the March 17 order and had been unable to contact her. The court granted the requested order.

On May 5, at the request of his client, Nejat provided him with a trust cheque for \$78,952.70, which was the balance of the net sale proceeds he held in trust, less legal fees. He also included a cover letter advising his client of the potential ramifications of requesting this sum and disposing of it.

On June 28, the spouse's lawyer appeared in court to set aside the orders made on March 17 and 29. The court attempted to clarify the status of the net sale proceeds from the family residence. An order was made that the funds held in Nejat's trust account be frozen pending final determination of the issues between the parties. Nejat did not disclose that he no longer held any funds in trust on behalf of his client.

Subsequently, Nejat failed to correct the record and continued to leave the impression that he held the funds in trust when he wrote opposing counsel and the spouse on three occasions.

At a trial management conference on April 12, 2012, the court ordered Nejat to advise the spouse's lawyer of the amount he held in trust on behalf of the parties. Nejat wrote to the spouse's lawyer and advised that he no longer held any funds in trust on behalf of the parties, as \$78,952.70 had been released to his client on May 5, 2011. Nejat also stated in this letter that he was going to withdraw as his client's lawyer.

On August 24, Nejat obtained a court order removing him from the record as his client's lawyer. The spouse's lawyer did not appear on the application.

On September 28, Nejat appeared in court and was questioned about the trust funds and how he had obtained an order removing himself from the record without proper notice to the spouse's lawyer. The judge was highly critical of Nejat's lack of candour in his earlier dealings with the court, opposing counsel and his client's spouse, and directed that his reasons for judgment be transcribed and forwarded to the Law Society.

ADMISSION AND DISCIPLINARY ACTION

Nejat's uncertainty regarding the status of the trust monies at certain points was partly the result of his inexperience, combined with the fact that he had no control over his law firm's trust account. While he did not intend to mislead the court or opposing counsel, the panel found that his failure to disclose constituted gross culpable neglect.

There were five occasions, over a span of ten months, on which Nejat failed to disclose material information or failed to correct the record. The benefit accruing to Nejat was not significant, but he was able to pay his modest account sooner than if he had kept the funds in his trust account as required. These were aggravating factors.

The panel also considered a number of mitigating factors. Nejat had no relevant professional conduct record, he did not intend to mislead the court or opposing counsel, and he was a fairly new call to the bar at that time. He admitted his misconduct to the Law Society from the outset of disciplinary proceedings. He has deep contrition

and indicated that he had taken steps to ensure that he would never commit such errors again.

The panel accepted Nejat's admission of professional misconduct and ordered that he pay:

1. a \$5,000 fine; and
2. \$1,000.00 in costs.

BRADLEY DARRYL TAK

Port Moody, BC

Called to the bar: February 15, 1991

Ceased membership: January 1, 2011

Discipline hearing: March 12 and September 11, 2014

Panel: Lee Ongman, Chair, Anna Fung, QC and John Lane

Decisions issued: June 16 ([2014 LSBC 27](#)) and November 27, 2014 ([2014 LSBC 57](#))

Counsel: Carolyn Gulabsingh for the Law Society; no one on behalf of Bradley Darryl Tak

FACTS

Bradley Darryl Tak was suspended from practice from July 16 to August 30, 2010 as ordered by a discipline hearing panel. He was suspended from December 7, 2010 to January 1, 2011 for failing to file a trust report. His membership ceased from January 1 to February 17, 2011 for non-payment of fees, and he was suspended from February 17 to June 16, 2011. Tak's membership was not reinstated after January 1, 2011 and he became a former member.

Misappropriation of client funds

Tak received retainer funds from nine clients and did not deposit the funds in his firm's trust account, as required. He misappropriated these funds by making personal use of them when he was not entitled to do so.

Misleading and/or attempting to mislead the Law Society

In a Law Society investigation of a complaint, Tak represented that he deposited the retainer funds to his general account when he knew, or ought to have known, that he did not deposit the funds to his general account.

Tak made a statement to the Law Society that his practice had paid all GST remittances to the government when this was not true.

Failure to respond to the Law Society

Tak did not provide a substantive response to the Law Society's inquiries on eight different issues, including his obligations to file GST returns, the handling of retainer funds provided to him by clients, and the investigation of a complaint from the Ministry of the Attorney General that he was practising law while suspended.

Failure to respond to another lawyer

Tak failed to respond to letters and telephone messages from two other lawyers.

Failure to report charges under a federal statute to the Law Society

Tak was charged under the *Income Tax Act* and the *Excise Tax Act* with failing to file income tax returns for three years and for failing to file a completed GST return for certain quarterly periods. He did not report these charges to the Law Society.

Failure to report a certificate of judgment to the Law Society

The Canada Revenue Agency filed a certificate against Tak for unpaid GST in the amount of \$49,181.97. Tak did not notify the Law Society of the certificate or of its filing in the Land Title Office.

Failure to remit GST collected

Auditors found that the GST collected was not maintained as a form of trust, but was used by Tak for drawings and to pay expenses.

Failure to follow trust accounting rules

Tak failed to keep accounting records in compliance with the rules between September 2008 and March 2010.

DETERMINATION

Tak did not appear at the hearings or send anyone on his behalf. The panel exercised its discretion to proceed in his absence.

The panel found that Tak had committed professional misconduct in respect of 26 allegations.

Tak's misappropriation had an obvious impact on his client victims, who were facing criminal court proceedings. He took retainers from clients and their families and then misappropriated the funds for his own personal use. He failed to communicate with clients on many occasions and did not attend fixed court dates that he contracted to attend, leaving his clients to suffer the consequences.

Tak made little effort to compensate his clients for his misconduct. His failure to provide any assistance when transferring client files to other counsel made the transition more difficult.

In addition to misappropriating client funds, Tak was found to have committed multiple other types of professional misconduct, including misleading the Law Society. The panel's finding that his misrepresentations were intentional elevated the seriousness of this element of his misconduct.

The Law Society's ability to carry out its regulatory responsibilities is significantly compromised if lawyers are permitted to ignore accounting rules and requirements of communicating with clients, colleagues and the Law Society, and the requirement to report judgments and charges to the Law Society. The Law Society would have been in a better position to seek immediate measures to protect the

public and may have been able to detect and prevent some of the misappropriation if Tak had been forthright with the Law Society.

DISCIPLINARY ACTION

The panel ordered that Tak:

1. be disbarred; and
2. pay \$10,350 in costs.

At the conclusion of the hearing, counsel for the Law Society made an oral application for a non-disclosure and sealing order for the purpose of preventing third-party access to solicitor-client confidential information. Certain exhibits must be redacted or anonymized prior to disclosure to the public.

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 paragraphs [47], [77], [90] and [109] of *Law Society of BC v. Tak*, 2014 LSBC 27, four TPC claims were made against Bradley Darryl Tak and the amounts of \$2,700, \$3,500, \$7,200 and \$1,750 paid respectively. Tak is obliged to reimburse the Law Society in full for the amounts paid under TPC. For more information on TPC, including what losses are eligible for payment, see [Trust Protection Coverage on the Law Society's website](#).

GEORGIALEE ALIDA LANG

Vancouver, BC

Called to the bar: November 17, 1989

Discipline hearing: June 25 and November 20, 2014

Panel: Ken Walker, QC, Chair, Dr. Gail Bellward and Peter Warner, QC

Oral reasons: November 20, 2014

Decisions issued: August 25 ([2014 LSBC 35](#)) and December 10, 2014 ([2014 LSBC 60](#))

Counsel: Carolyn Gulabsingh for the Law Society; Geoffrey Cowper, QC for Georgialea Alida Lang

FACTS

Georgialea Alida Lang acted for her client, who was a long-time friend, in an estate litigation matter. Lang had no retainer agreement with the client, but during the solicitor-client relationship, two sizeable accounts were sent to her client. The first account was paid; the second was disputed.

The dispute resulted in a review of the accounts before a deputy registrar of the Supreme Court. Lang represented herself at this proceeding, and her client was represented by another lawyer. Lang spent two days on the witness stand in her capacity as a "party" to give evidence and be cross-examined.

On her way to court on the third day of the hearing, Lang commented to her assistant that she intended to discuss settlement with her former client and his lawyer when they arrived at the courthouse.

Lang saw the opposing lawyer in the courtroom and noted to him that his client had not yet arrived. Lang and her assistant left the courtroom and waited out in the hall, without speaking to the lawyer about a settlement.

When her former client arrived, Lang asked if she could speak to him. He agreed and they went into a private interview room. The opposing lawyer was not present and was unaware of this meeting.

Lang had a very brief conversation, including an exchange of comments on the relative merits of each side's case, and she offered to settle the accounts at a discount. Her former client said he needed to speak to his lawyer concerning the offer before he would agree to settle.

Lang responded that she believed the lawyer would not agree to the proposed settlement. Her former client repeated his desire to speak to his lawyer and, at this point, the conversation ended.

The former client and his lawyer spoke privately and then Lang met them both. The settlement offer was rejected.

Lang apologized for speaking to her former client about the settlement without his lawyer being present. She told them she would self-report her conduct to the Law Society. She wrote a letter that day to disclose and apologize for her error. Lang also disclosed and apologized to the Deputy Registrar who conducted the hearing. The matter was settled later that day.

DETERMINATION

The panel determined that Lang had committed professional misconduct when, in the course of representing herself in a review of her bill before a deputy registrar, she had settlement discussions with the opposing party in the absence of his nearby lawyer and without that lawyer's consent.

Lang's conduct was serious but did not arise from any overt intention to breach the rules. There was no adverse impact upon the other party and Lang gained nothing from the conduct.

The conduct happened only once during three to ten minutes of contact between Lang and her former client. Lang immediately apologized for her conduct and self-reported to the presiding registrar and to the Law Society.

The panel took into consideration that Lang has 25 years of experience as a lawyer and her professional conduct record is nearly without blemish.

DISCIPLINARY ACTION

The panel issued a reprimand and ordered that Lang pay \$5,820 in costs.

DONALD ROY MCLEOD

Victoria, BC

Called to the bar: July 10, 1981

Discipline hearings: February 18, 19 and December 15, 2014

Panel: Jan Lindsay, QC, Chair, Satwinder Bains and Peter Warner, QC

Decision issued: April 19, 2014 ([2014 LSBC 16](#)) and January 27, 2015 ([2015 LSBC 03](#))

Counsel: Susan Coristine for the Law Society; William G. MacLeod for Donald Roy McLeod

FACTS

Donald Roy McLeod was retained to act for the same two clients in two Supreme Court actions, one for personal injuries arising from a motor vehicle accident and the second for damages arising from an alleged misrepresentation concerning their purchase of a house. He had also acted for these clients in two earlier motor vehicle accident claims.

McLeod entered into written retainer agreements with the clients in the personal injury action but did not have a written retainer agreement with them in the misrepresentation action.

The clients ultimately retained new counsel on the personal injury action. McLeod concluded that the clients did not intend to compensate him in accordance with the retainer agreements in the personal injury action and that there would be a dispute over his fees. In addition, they had not paid two accounts that he had issued in the misrepresentation action.

McLeod determined that he could not continue to represent his clients in the misrepresentation action while involved in a dispute with them over compensation in another matter, as it would place him in a conflict of interest. When McLeod informed his clients that he wished to withdraw as counsel in the misrepresentation action, they indicated that they wished him to continue to represent them. He then brought an application to be removed from the record, which disclosed confidential information.

The clients filed a complaint with the Law Society alleging that McLeod had filed an affidavit that they claimed contained confidential and privileged material regarding the personal injury action.

At the hearing of McLeod's application to be removed as solicitor,

the clients consented to the relief sought, but complained about the alleged breach of confidentiality and opposed the claim for costs. McLeod told the judge that he had a "written consent to release any information that in my view is necessary for purposes such as this," and both parties submitted that further proceedings arising out of the complaint to the Law Society would take place. The judge granted McLeod his orders plus costs and said nothing about the alleged breach of confidentiality.

DETERMINATION

The panel found that McLeod was not legally entitled to disclose the confidential client information, and that this breach of the rules constituted professional misconduct.

McLeod submitted that he was authorized to disclose confidential information by way of a retainer agreement, although he did not actually have a retainer agreement on the misrepresentation action. He was relying on the retainer agreement executed by the clients in two earlier motor vehicle accident claims. He submitted that he was entitled to disclose the confidential information in support of his application to be removed from the record.

Although McLeod was awarded costs on the application to remove himself from the record, the panel did not agree that the hearing judge was specifically ruling on the propriety of McLeod's affidavit. It was more likely that the hearing judge knew that the Law Society was investigating the disclosures made by McLeod in the affidavit and on the application.

As a practising lawyer since 1981, McLeod should have known about, and used, well-established procedures for bringing applications to get off the record, and for serving applications on parties who are not entitled to disclosure of confidential client information. A lawyer's obligation to preserve client confidentiality is an integral and vital part of our justice system.

McLeod's prior disciplinary record was an aggravating factor. He was the subject of prior conduct reviews on issues including client confidentiality and, more specifically, inappropriately disclosing client information in pursuit of his own fees. He had been directed to take counselling and remedial courses, which should have clarified the importance of client confidentiality for him.

McLeod's clients were affected by his disclosure and they complained of it to the court. At the hearing to determine disciplinary action, McLeod finally apologized to his clients and the profession.

DISCIPLINARY ACTION

The panel ordered that McLeod:

1. be suspended for one week;
2. pay a \$2,500 fine; and
3. pay \$5,000 in costs.

ANDREW CHRISTOPHER LEE

Vancouver, BC

Called to the bar: January 14, 2011

Ceased membership: November 25, 2013

Counsel: Carolyn Gulabsingh for the Law Society and Ravi Hira, QC for the Respondent

FACTS

In 2011, after Andrew Christopher Lee started working for a law firm, he began submitting claims to the firm for reimbursement for out of pocket expenses that were fraudulent. Between November 2011 and September 2013, he was reimbursed by the firm for the fraudulent expenses totalling about \$15,000, including claims submitted for:

- expenses that were never incurred;
- taxi and meal expenses that were never incurred or that Lee was not entitled to claim reimbursement for because the expenses were personal in nature;
- expenses that he was also later reimbursed in whole or in part directly by the service provider;
- reimbursement for refreshments for the office, where he used duplicate receipts to be reimbursed twice for the same expense; and
- client disbursements, where the amount he was reimbursed exceeded the amount of the expense actually incurred.

ADMISSION

Lee admitted that his conduct constituted professional misconduct and gave an undertaking. His admission was made to the Discipline Committee under Law Society Rule 4-21. This rule provides for a process whereby a respondent can admit misconduct and the citation is resolved without a hearing.

The Discipline Committee accepted Lee's admission and his undertaking for a period of seven years, commencing on January 29, 2015, to:

1. not apply for reinstatement to the Law Society;
2. not apply for membership in any other law society (or like governing body regulating the practice of law) without first advising the Law Society; and
3. not permit his name to appear on the letterhead of, or otherwise work in any capacity whatsoever for, any lawyer or law firm in BC, without obtaining the prior written consent of the Law Society.

Lee was a former member and had no professional conduct record.

DOUGLAS EDWARD DENT

100 Mile House, BC

Called to the bar: September 14, 1976

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Review: October 16, 2014

Review board: Jan Lindsay, QC, Chair, Don Amos, Dennis Day, Dean Lawton, Elizabeth Rowbotham, Donald Silversides, QC and Sandra Weafer
Decision issued: February 5, 2015 ([2015 LSBC 04](#))

Counsel: Carolyn Gulabsingh for the Law Society; Ravi Hira, QC and Peter Waldkirch for Douglas Edward Dent

BACKGROUND

In 2011, Douglas Edward Dent was retained to act for the husband in a matrimonial dispute. He was given funds to be held in trust and to be released to the wife on certain conditions and at certain times. He was also given some funds to pay his accounts. Dent applied \$2,000 of the funds held for the wife, and not yet released to her, to pay outstanding accounts for his fees and disbursements. Dent said he did so acting on the mistaken but honest belief that he had obtained the express consent of the client.

Dent admitted that he improperly withdrew funds from trust to pay fees and disbursements, contrary to the rules, and that his conduct constituted professional misconduct.

The hearing panel suspended Dent from the practice of law for 45 days and ordered him to pay costs of \$4,720 ([2014 LSBC 04](#); [discipline digest: 2014 No. 1 Spring](#)).

Dent sought a review of the decision and obtained a stay of the suspension ([2015 LSBC 12](#)).

DECISION

There was no dispute that Dent's improper taking of monies from trust was professional misconduct. Professional misconduct can encompass a wide range of circumstances and penalties. The most egregious professional misconduct will attract the most significant disciplinary action.

The proper handling of trust funds is at the heart of the fiduciary duties that lawyers owe to their clients, but it does not follow that every case of improper handling of trust funds should result in a suspension.

The review board concluded that Dent's conduct in improperly taking funds from trust to pay fees and disbursements while acting on an honestly held but mistaken belief that he had secured his client's consent did not warrant a 45-day suspension.

Dent admitted that he did not have his client's clear consent to take the funds from trust. He should have recorded what he believed to be his client's consent and, if he had, the outcome may have been different. He should have been more careful in how he handled the funds held in trust. His conduct was a marked departure from the conduct the Law Society and the public expects of lawyers.

Dent said that he believed he was entitled to transfer funds from trust to pay his fees. There was no suggestion that he did not hold that belief. He was wrong, but he was not dishonest.

The hearing panel had expressed some concern about Dent's "honest belief." If the panel did not accept the fact of his honest belief, then they should have said so in clear terms, and should have given reasons. The only conclusion to be drawn is that the fact was accepted.

The panel made reference to Dent's professional conduct record and specifically to a citation resulting in an adverse finding and a one-month suspension in 2001. The panel discussed that earlier misconduct, but decided not to apply the concept of progressive discipline, determining a suspension to be the appropriate penalty in this case. There were many distinguishing circumstances between the earlier misconduct and the current matter. The review board agreed with the panel that the concept of progressive discipline should not be applied

in this case.

The review board found that the panel's decision was not correct, because the 45-day suspension was significantly outside the appropriate range of disciplinary action for conduct that, although wrong, was made based on a mistaken belief honestly held by the lawyer. His actions constituted professional misconduct but did not warrant a suspension.

The review board ordered that the suspension ordered by the panel be set aside and that Dent pay:

1. a \$5,000 fine; and
2. \$4,720 in costs. ❖

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payout to the credit union. It was clear to a conduct review subcommittee that the lawyer had improperly delegated to his legal assistant the task of dealing with his failure to comply with his undertakings. The lawyer recognized his mistakes, and the subcommittee was satisfied that he appreciated the gravity of his transgressions, not only to his reputation and to the credit union's counsel, but to the profession as a whole. The subcommittee was satisfied that the lawyer has taken steps to ensure that he will not repeat the same error and that he is aware of his responsibilities when giving a solicitor's undertaking. The lawyer has developed a network of solicitors locally that discuss such issues on a monthly basis and share their experiences. (CR 2015-02)

In another matter, a Law Society compliance audit revealed that a lawyer breached his undertakings on two personal injury files. He paid his fees out of settlement proceeds prior to returning executed releases to the insurer and, when the breaches were brought to his attention, he failed to act in a timely manner to remedy one of the breaches. The lawyer acknowledged that the firm's system for dealing with settlement funds and releases was not adequate, and he and his firm have changed their procedures. A conduct review subcommittee accepted that the breaches occurred as a result of a systemic problem and steps had been taken to minimize breaches in the future. The lawyer readily admitted his misconduct, accepted responsibility, and expressed remorse and an appreciation of the importance of undertakings. (CR 2015-03)

QUALITY OF SERVICE

A lawyer failed to provide the quality of service at least equal to

that expected of a competent lawyer in a similar situation, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*, then in force. His failure included an unreasonable amount of time from the date he was first retained to sending out an initial demand letter and then filing the lawsuit. He was also unprepared for two court applications, failed to respond to emails from his client, was often late and did not attend scheduled appointments. The lawyer agreed that he was dilatory in providing services to the client, there were frequent delays in pursuing the litigation, and his conduct resulted in the award by two separate judges of costs against his client. A conduct review subcommittee explained to the lawyer that his conduct in handling this file was unacceptable. The lawyer readily admitted and took responsibility for his conduct and has taken numerous steps to improve his practice, including limiting his areas of practice, consulting with senior practitioners and entering into a mentorship agreement. (CR 2015-04)

FAILURE TO MEET FINANCIAL OBLIGATIONS RELATED TO THE PRACTICE

A lawyer failed to meet two financial obligations in a timely manner, contrary to Rule 7.1-2 of the *Code of Professional Conduct for British Columbia*. For eight months, he failed to pay two invoices from a company for services related to title searches, despite the company's frequent requests for payment. A conduct review subcommittee advised the lawyer that his handling of this matter was unacceptable. The lawyer recognized that the systems he had in place did not identify smaller accounts payable and the accounts should have been paid in a timely manner. He has taken steps to correct the inadequacies in his practice. (CR 2015-05) ❖

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The Law Society
of British Columbia



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

Telephone 604.669.2533 | Facsimile 604.669.5232

Toll-free 1.800.903.5300 | TTY 604.443.5700

lawsociety.bc.ca

Lawyers Insurance Fund

Telephone 604.682.8911 | Facsimile 604.682.5842

