The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Rule of law can never be taken for granted

by Miriam Kresivo, QC

ONE ONLY HAS to turn on the evening news to discover how central the rule of law is for many of the important issues in our lives. What we are witnessing in the news and social media underscores how central the rule of law is to our freedoms. In Canada, laws apply equally to all, no matter how wealthy or powerful: to private citizens, to big corporations and particularly to government. Those who make the laws should not interpret their application; that is the role of a judiciary whose independence from the executive and legislative branches of government is assured.

Our system allows Canadians to enjoy their freedoms within a stable society that the law provides and the justice system upholds. Lawyers have a special responsibility with respect to the rule of law. Each of us, when called to the bar, took an oath to uphold the rule of law and the rights and freedoms of all persons according to our laws. The Law Society also has a responsibility to support and promote the rule of law in BC. Our Rule of Law and Lawyer Independence Advisory Committee helps us to fulfil these aims by assisting the Benchers to monitor issues that affect the rule of law and to develop responses to them.

The Law Society also sponsors a number of initiatives to engage the legal profession and the public about the rule of law.

One such initiative is an annual Secondary School Essay Contest. The winner and runner-up of the third annual contest were recognized at the July Benchers' meeting, where Michelle Rodrigues, a recent graduate of Little Flower Academy in Vancouver, was presented with the first-prize cheque of $1,000, and Katy Berglund, of Reynolds Secondary School in Victoria, was awarded the runner-up prize of $500.

The competition was initially intended to foster understanding of the rule of law among young people, but it may be that we could all learn something from these students. In her winning essay, Michelle Rodrigues reminds us that the rule of law is a dynamic concept whose relevance to our daily lives is constantly evolving. She notes in particular that "social media is influencing all aspects of the rule of law, including accountability under the law, open government and the independence of the judiciary." I was impressed by the scope of Michelle's research and the depth of thought that went into her essay. Her work, as well as that of all the contest entrants, bodes well for the future of the profession and the public we serve.

Another initiative of the Law Society is an annual lecture that explores current issues in relation to the rule of law. The goal of the lecture is to engage the public beyond the legal profession. For this year's lecture, we assembled a panel that included former Supreme Court of Canada Justice the Honourable Ian Binnie, Dean Catherine Dauvergne of the Peter A. Allard School of Law at UBC, and lawyer and *National Post* columnist Jonathan Kay. Together, they explored issues related to social justice and the rule of law. It was a lively, engaging and informative evening — and the Law Society will continue to host similar events in the future.

We were reminded earlier this year of the important role of the Law Society, with the Supreme Court of Canada's decision confirming the Law Society's responsibility to uphold the rights of all persons, including ensuring equal access to the legal profession. Equally important is the Law Society's role in ensuring that a self-governing profession of independent lawyers preserves the rule of law. But the Law Society does not act in isolation. It is only by collaborating closely with our partners, including the judiciary, the law schools and the many agencies that play a part in the administration of justice, that we can ensure that BC, and Canada, continue to serve as a model of equality under the rule of law.❖

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled 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 for 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.

Issues of the *Bulletin* are published online at www.lawsociety.bc.ca (see About Us > News and Publications).

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Law Society scholarships awarded for 2018

Photo submitted (left); Brian Dennehy Photography (right)

The Law Society has awarded two scholarships aimed at helping outstanding law students pursue their university studies.

The Law Society Indigenous Scholarship was awarded to **Christina Gray** (left photo), a member of the Tsimshian Band of Lax Kw'alaams Dene from Lutel'ke and Metis. She obtained her undergraduate law degree from the Peter A. Allard School of Law at the University of British Columbia in 2013 and is currently working as a senior research associate at the Centre for International Governance Innovation in Waterloo, Ontario. She will be attending the University of Victoria's Faculty of Law LLM program, where she plans to study the overlapping and distinct legal characteristics of Indigenous legal orders within existing cases at federal and provincial human rights tribunals.

The Law Society Scholarship for Graduate Legal Studies was awarded to **Gabriella Jamieson** (right photo, with President Miriam Kresivo, QC), who graduated from the Faculty of Law at the University of Victoria in 2016 and is currently a judicial law clerk for the Supreme Court of BC in Vancouver. Jamieson will be attending McGill University's Faculty of Law in September to pursue an LLM in comparative law. Her research will focus on reconciliation through the reinterpretation of s. 35 of the *Constitution Act*, which recognizes and affirms the Aboriginal and treaty rights of Aboriginal Peoples in Canada.

Further details of the Law Society Indigenous Scholarship and the Law Society Scholarship for Graduate Legal Studies are available on the Law Society website.

Supreme Court of Canada rules on proposed TWU law school

ON JUNE 15, 2018, the Supreme Court of Canada confirmed the Law Society of BC's decision not to approve a proposed law school at Trinity Western University in *Law Society of British Columbia v. Trinity Western University*.

The Law Society's position is that everyone should have equal access to law school, which is the entry point for the legal profession and the judiciary. A covenant that students of Trinity Western University must sign infringes on the access of those in the LGBTQ community and those in committed common-law relationships.

"At the heart of the Supreme Court's decision is a recognition of the responsibility of the Law Society to uphold the rights of all persons and to protect the public interest," said President Miriam Kresivo, QC. "The court recognized that the Law Society has an overarching interest in protecting equality and human rights, as well as to removing inequitable barriers to the legal profession, in carrying out our duties and ensuring public confidence."

Read the court's decision here.❖

The vision for legal aid and access to justice: What's to come

by Don Avison

THE LAW SOCIETY'S involvement with legal aid has a long history. The Law Society coordinated volunteers to provide legal aid services in the 1950s. It helped the provincial government establish the Legal Services Society. In the years that followed, the Law Society worked with government, the legal profession and other partners in the justice sector to monitor the state of legal aid services for the poor, working poor and often Indigenous persons who need them.

In 2016, the Benchers of the Law Society approved *A Vision for Publicly Funded Legal Aid in British Columbia*, a principled statement on what legal aid means and what it should achieve. In developing the vision, the Law Society held a colloquium that brought together over 40 stakeholders from across the justice sector. The consensus formed during this forum was that a fairer, healthier and just society includes better access to legal advice and representation, that legal aid is an essential public service and that governments bear the responsibility to fund legal aid to the degree necessary to achieve its purposes. The full vision is available online, here.

Given the need to continue to bring focus to the importance of addressing the continuing gaps, the Law Society's Legal Aid Advisory Committee, chaired by First Vice-President Nancy G. Merrill, QC, is planning a second legal aid colloquium to be held this November. Our first colloquium solely engaged the legal profession. This second colloquium is aimed at hearing from Indigenous leaders, community advocates, mental health workers, police, social workers, unrepresented litigants, trade unions, social agencies and others who are often approached for help by those in need of legal representation. Our goal will be to learn from their perspectives and have them shape the future of our involvement.

Also this fall, the Law Society will be taking the next steps to advance the vision through engagement with the provincial government. The additional resources for legal aid that were announced in this February's provincial budget are encouraging signs of the success of the vision — but the allocations continue to fall short of the actual need. We will be presenting a pre-budget consultation submission to the Select Standing Committee on Finance and Government Services of the Legislative Assembly that outlines the need to revisit areas of coverage and the legal aid tariff.

Legal aid is a crucial part of the proper administration of justice, and our work continues to move forward to ensure that every British Columbian has equal access to justice in BC.❖

In brief

LAW SOCIETY FALL CALENDAR

October 30	**Annual general meeting** – see the Notice to the Profession
November 7	**Law Society Award** – to be presented at the Bench & Bar Dinner
November 15	**Vancouver Bencher by-election**

JUDICIAL APPOINTMENTS

Justice **Heather J. Holmes** was appointed Associate Chief Justice of the Supreme Court of BC. She replaces the Honourable A.F. Cullen, who elected to become a supernumerary judge effective January 1, 2018.

Geoffrey B. Gomery, QC, a partner at Nathanson Schachter & Thompson, was appointed a judge of the Supreme Court of BC in Vancouver. He replaces Mr. Justice B.M. Greyell, who retired effective November 24, 2017.

Susan Wong, regional director and general counsel at the Department of Justice Canada in Vancouver, was appointed a judge of the Tax Court of Canada. She replaces Madam Justice V.A. Miller, who resigned effective June 1, 2017.

Associate Chief Judge **Melissa Gillespie** was appointed Acting Chief Judge of the Provincial Court.

Anja Brown was appointed a judge of the Provincial Court in the Fraser Region with chambers in Port Coquitlam.

Trudy Macdonald was appointed a judge of the Provincial Court in the Fraser Region with chambers in Surrey.

Linda Thomas was appointed a judge of the Provincial Court in the Northern Region with chambers in Fort St. John.❖

Moving forward with addressing mental health in the legal profession

IN OUR CURRENT strategic plan, the Law Society has committed to look for ways to reduce stigma surrounding mental health issues that affect many members of the legal profession. At the beginning of the year, a Mental Health Task Force was established to review the Law Society's regulatory processes, particularly in regard to discipline and admission to the legal profession, explore ways to de-stigmatize mental health issues, and promote good mental health for lawyers.

At the July 2018 Benchers meeting, the task force issued its mid-year report. The report summarizes the work that has been done over the past six months. Over this period, the task force collected and reviewed facts and research, in order to increase its understanding of mental health and substance issues that the legal profession is facing. The task force also began engaging experts in several meetings dedicated to internal and external consultation.

Among the organizations and individuals sharing their expertise and advice with the task force were BC's law schools; Margaret Ostrowski, QC, former president of the Canadian Bar Association, BC Branch and former chair of the Mental Health Review Board; and Orlando Da Silva, who raised the profile of mental health issues during his tenure as president of the Ontario Bar Association. The task force also heard from experts in mental health and substance use issues, with presentations from medical and policy experts at the BC Centre on Substance Use, from the Canadian Mental Health Association, and from Drs. Ray Baker and Paul Sobey, physicians specializing in occupational addiction medicine.

These consultations were instrumental in helping the task force formulate its first set of recommendations, which will be presented to the Benchers later this fall. The initial recommendations focus primarily on educational initiatives that are designed to enable the Law Society to better support lawyers facing mental health issues through improved awareness, better knowledge and a robust range of resources. Recommendations with respect to the Law Society's regulatory processes are under discussion within the task force and will be delivered to the Benchers early next year.❖

Brian Dennehy Photography (left); Tyler Meade Photography (centre); photo submitted by UVic (right)

Gold medal presentations

Each year the Law Society awards gold medals to the graduating law students from the University of British Columbia, the University of Victoria and Thompson Rivers University faculties of law who have achieved the highest cumulative grade point average over their respective three-year programs.

In 2018, gold medals were presented to Alexander Kirby of UBC (left photo, with Dean Catherine Dauvergne and President Miriam Kresivo, QC), Danielle Ching and Brandon Harrison, in a tie for TRU's top spot (centre photo, with President Miriam Kresivo, QC) and Raya MacKenzie of UVic (right photo, with Bencher Dean P.J. Lawton, QC).

Second annual Rule of Law Lecture: The rule of law and social justice

ON THURSDAY, JUNE 7, 2018, nearly 200 people attended the Law Society's second annual Rule of Law Lecture. They were treated to a lively dialogue on the intersection and interaction of the rule of law and social justice. Speakers Ian Binnie, CC, QC, former Supreme Court of Canada Justice, Catherine Dauvergne, dean of the Peter A. Allard School of Law and Jonathan Kay, *National Post* columnist, shared their views on the topic. The discussion was moderated by Jennifer Chow, QC, Bencher and member of the Rule of Law and Lawyer Independence Advisory Committee.

Dean Dauvergne launched the event by taking a closer look at the meaning of the "rule of law" and "social justice," as the terms are frequently used but rarely defined in public discourse. She described the rule of law as having a thin and a thick version. The thin version of the rule of law is our traditional understanding that everyone in society is governed by the law and the law is not dictated by a monarch or any individual. The thicker, richer understanding of the rule of law includes values such as democracy, equality and access to justice, and it is with this more complex and evolving view of the rule of law where people often disagree. Dean Dauvergne said while she prefers the fuller definition, the rule of law as "a thin and unbreakable rail" should not be taken for granted. While the rule of law is a necessary condition in the pursuit for social justice, it alone is often not sufficient to ensure equality outcomes.

Following Dean Dauvergne, Jonathan Kay framed his presentation with an anecdote that demonstrated where social justice and the rule of law walk hand in hand. He spoke of Dovey Johnson Roundtree, an African-American lawyer who in 1965 successfully defended a black labourer falsely accused of killing a white woman in Washington, DC. Kay went on to contrast this against notable, recent cases where there has been a cleavage between social justice and the rule of law, including the recent acquittal of Saskatchewan farmer Gerald Stanley in the shooting of Colten Boushie, which conflicted with many people's sense of social justice. Drawing from Dean Dauverge's remarks, Kay took the view that due process and the thin, unbreakable rail safeguards exist in our system to protect every citizen from mob justice. While he said social justice is a wonderful thing, he also noted that different people have very different versions of what social justice looks like, and the pursuit of social justice can sometimes lead to damage of the due process necessary for the rule of law.

The Honourable Ian Binnie rounded out the discussion by exploring threats to the rule of law. He raised the recent examples of politicians who have defied court decisions or orders in the Trans Mountain Pipeline case. He said that display of contempt for court orders — particularly by politicians — can undermine the foundation of the rule of law, without which we could not enjoy our robust democracy. In saying this, Binnie also recognized that when the legal order is unduly oppressive and contravenes international standards, social justice may require challenges to that legal order. In general, however, citizens submit to the rule of law because we want to live in an ordered society. He emphasized the importance of not conflating social justice and the rule of law. Because we live in a diverse society with varying ideas of social justice, attaching subjective opinions or personal views to the rule of law makes the very system controversial, which can ultimately spell trouble.

Left to right: Jonathan Kay, Catherine Dauvergne and the Honourable Ian Binnie, CC, QC.

The Law Society launched the annual Rule of Law Lecture series in 2017 to increase public awareness of and build confidence in the rule of law. The 2018 lecture was captured on video and is available online on the Law Society's website.❖

Law firm regulation update

THE NEXT PHASE of law firm regulation is under way. Firm registration was completed in early July. The next phase, a pilot project involving a cross-section of law firms, will evaluate the self-assessment tool that the Law Society developed. Approximately 10 per cent of registered firms were randomly selected and have already been contacted. Pilot participants will test an online self-assessment tool, help the Law Society evaluate whether the self-assessment process may help firms enhance their practice management systems and gather feedback on whether firms feel they need additional practice management resources.

The pilot runs until October 19, 2018. Lawyers who complete and submit the self-assessment report to the Law Society for their law firms are eligible for up to two hours of CPD credits for the time that they spend on the pilot. Following the deadline, the Law Firm Regulation Task Force will report on the outcomes of the pilot project and provide recommendations to the Benchers by year-end. The Benchers will then consider the recommendations to determine the future course of law firm regulation.❖

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 omissions in the legal work or for 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.

* * *

During the period of May 15 to September 6, 2018, the Law Society obtained nine written commitments from individuals and businesses not to engage in the practice of law.

In addition, the Law Society has obtained orders prohibiting the following individuals and business from engaging in the unauthorized practice of law:

On July 31, 2018, Mr. Justice Michael Tammen ordered that **Joseph Alain Theriault**, of Vancouver, and his company **Trojan Roofing and Exteriors Inc.**, be permanently prohibited from engaging in the practice of law for a fee. The order also prohibits Theriault and his company from referring to themselves as lawyers or in any other way that connotes that they are entitled or qualified to practise law. Further, Theriault and Trojan Roofing and Exteriors Inc. are prohibited from commencing, prosecuting or defending proceedings in any court on behalf of others. The Law Society alleged that Theriault and his business brought two actions in Small Claims Court on behalf of their customers, gave legal advice, and attempted to negotiate the settlement of the claims for damages, for or in the expectation of a fee, gain or reward. The court awarded the Law Society costs fixed at $3,409.

On August 15, 2018, Madam Justice Emily M. Burke granted an order prohibiting former lawyer **Susan Margaret Ben-Oliel**, of Vancouver, from engaging in the practice of law, falsely representing herself as a lawyer and commencing, prosecuting or defending proceedings in court on behalf of others. As long as she remains a registered patent agent, she is permitted to offer patent services to the extent permitted by the *Patent Act*. As a term of the order, Ben-Oliel must inform potential clients that she is not a lawyer and that her business, IP Law Complete, is not a law firm. The court awarded the Law Society costs fixed at $2,500.

To read the orders, search by name in the Law Society's database of unauthorized practitioners.❖

FROM THE LAW FOUNDATION OF BC

Appointments to Law Foundation board

THE LAW FOUNDATION of BC is pleased to announce three new appointments by the Attorney General of BC to its board of governors.

Maureen Buchan is an Anishinaabe from Bearskin Lake First Nation in Northern Ontario and has over 17 years of experience working for First Nations political organizations. She is a senior policy advisor at the BC Assembly of First Nations, where she advocates for and works on behalf of the 203 First Nations in British Columbia. Maureen has an MA in Indigenous governance from the University of Victoria as well as an advanced BA in political science and government from the University of Manitoba. Maureen was formerly an associate faculty member at the University of Victoria and has worked as a policy analyst and land claims researcher for the Union of BC Indian Chiefs. Other experience includes research and policy-related work for various organizations, including the Assembly of Manitoba Chiefs, the Nicola Valley Institute of Technology and a number of Coast Salish and Sto:lo First Nations. As co-founder of Sparrow-Grant Consulting, Maureen has provided policy, political and strategic advice for BC First Nations. A proud mother of two, Maureen currently resides on Musqueam territory.

Felicia Ciolfitto is director of internal audit at the Vancouver Fraser Port Authority, responsible for carrying out the annual internal audit plan and being a primary contact for the port authority's ethics line. Felicia serves on several port authority committees, including the Enterprise Risk Management Committee, the Harassment Committee and the Employment Equity Committee. Felicia is a chartered professional accountant with an MBA from Queen's University. She is also a certified internal auditor, a certified fraud examiner and certified in financial forensics. Felicia has experience in public practice, industry and regulatory environments and is currently finishing her master of forensic accounting degree at the University of Toronto. Before joining the port authority, Felicia was manager of trust regulation at the Law Society of BC, where she helped develop the compliance audit program and oversaw a staff of auditors and forensic accountants.

John Greschner worked with the BC Representative for Children and Youth from 2007 until 2016, when he retired. He was deputy representative for several years and also served as chief investigator and executive lead, external relations and strategic direction. John was previously the deputy health and social services minister for Yukon, deputy child and youth officer for BC, deputy commissioner and chair of the tribunal division of the Children's Commission and an executive in several BC government ministries. He recently took on a temporary appointment as deputy ombudsperson for BC. John has an MA in psychology and a certificate in health services management.❖

Rule of law essay contest

Brian Dennehy Photography

Law Society President Miriam Kresivo, QC congratulates essay contest winner Michelle Rodrigues (left), a grade 12 student from Little Flower Academy in Vancouver, and runner-up Katy Berglund (right), a grade 12 student from Reynolds Secondary School in Victoria, for their exceptional essays on the rule of law and social media.

The Law Society is pleased to publish their essays in this issue of the Benchers' Bulletin.

Social Media and the Rule of Law

by Michelle Rodrigues, grade 12 student, Little Flower Academy, Vancouver
Winner of the 2017-2018 rule of law essay contest

In today's fast-paced and constantly changing modern society, the rule of law continues to be the backbone of our Canadian democracy. This fundamental principle of justice conveys the idea that everyone is equal under the law, a right guaranteed in section 15(1) of the *Canadian Charter of Rights and Freedoms*. Established laws serve to protect our rights and ensure that we are treated fairly. The idea that no one is above the law confirms that laws apply to everyone equally, from ordinary citizens to government officials. In order to have a well-functioning civil society, all people must abide by the rule of law. It is the role of the courts to assure that this is being done, and the responsibility of judges and lawyers to protect citizens from any and all infringements of their rights and freedoms ("Legal Independence and the Rule of Law"). As society progresses, the public's growing usage of social media is influencing all aspects of the rule of law, including accountability under the law, open government, and the independence of the judiciary.

Historically, the rule of law is vital in protecting social structure and ensuring that arbitrary uses of power are not tolerated. Dating back to c. 350 BC, this rule has origins in the words of the great philosopher Aristotle, who wrote, "It is more proper that law should govern than any one of the citizens" (Aristotle). Laws create a stable society and safeguard citizens from being punished by the acts of others. Much later, in 1689, John Locke stressed the importance of having "established standing laws, promulgated and known to the people" ("The Rule of Law"). Clearly publicized laws protect our rights from being infringed, while at the same time guaranteeing our freedom. Even in a technologically advanced society, the rule of law remains highly relevant in maintaining equity and addressing the issues that arise from a society becoming more reliant on social media.

The increasing presence of social media sites, and their growing number of users, is evidence of a shift in the way people interact. A shocking 91 per cent of Canadians who are online access at least one social media platform (MacKinnon). Social media's growing popularity stems from the fact that it is fast-paced, easily accessible and within itself contains no filters. Essentially, it is "largely devoid of rules — the antithesis of the deliberate, often snail-like pace of the judicial process" (Cohen). It is important to note that the rule of law is an ideal, something that our society strives to live up to (Waldron). Social media can pose a threat to that because the way it operates is a direct opposite from the peace and order which the rule of law tries to achieve. The power of social media is completely arbitrary and is susceptible to abuse because there are no rules controlling what

one can post online. Therefore, it is often the source of false information and propaganda to countless numbers of people who rely on it as their main news outlet.

Social media platforms function as online courts of public opinion (Cohen). The "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" (*Canadian Charter*, 1982, s. 2(b)) is protected in Canada and, undoubtedly, is the basis of our democracy. Social media is powerful, but its power is escalated when in the hands of influential public figures. Simply take a look at the aftermath of the Colten Boushie trial. The prime minister, minister of justice and minister of Indigenous services used Twitter to respond to the outcome of the trial, following the jury's verdict which found Gerald Stanley not guilty of second-degree murder in the death of Colten Boushie, a 22-year-old Indigenous man (The Canadian Press). A key principle of the rule of law is that "under the Constitution, the judiciary is separate from and independent of the other two branches of government, the executive and legislature" ("The Judiciary"). Consequently, it is reasonable that many saw these politicians' tweets as undermining the jury's verdict, and in turn the judicial process that occurred. Most importantly, this "political interference" (The Canadian Press) raised concern over people's confidence in our justice system, especially in its ability to act free from government influence.

This past year, the #MeToo movement has publicized the idea that everyone is accountable under the law and that social standing does not influence whether a person's wrongful actions are acceptable or not. This movement has catalyzed a "mass mobilization against sexual abuse, through an unprecedented wave of speaking out in conventional and social media" (MacKinnon). While having allegations made against someone online is not the same as being charged with a criminal offence, social media has provided a platform for victims to speak out. Critics argue that because allegations are made in this way, due process is not given to the accused as courts of public opinion automatically assume their guilt (Hayes). It is true that the fast-paced nature of social media is a contrast to the slow-paced judicial process, if a sexual assault trial were to occur in court. Simply, just the awareness this movement has raised is enough to elicit change. For example, employers can use it to update workplace policies denouncing sexual harassment (Bird). Without a doubt, taking steps like these further demonstrates how everyone is responsible for their actions under the law.

The usage of social media as a form of communication between citizens and the government is making democracy more transparent. In this case, its main function is "to connect with the public, influence decision-makers and hold legislatures and governments to account" (Clarke). Social media is breaking barriers between the government and the public, as it gives people a platform to directly interact with the lawmakers of our country. For instance, following the introduction of Bill C-61 in 2007, a law professor at the University of Ottawa, Michael Geist, started a Facebook group in opposition to *An Act to Amend the Copyright Act*. This bill was later tabled, and Professor Geist believes that "the online campaign contributed to the government's decision to conduct public consultations on copyright legislation in 2009" (Clarke). Evidently, the feedback citizens give is taken into account by governments and has the potential to produce substantive change. Previously, politicians would have had to travel to communicate with the public, but online platforms now enable them to hear the voices of Canadians across the country. Clearly, social media has strengthened the relationship between people and lawmakers and has made the entire process of how laws are enacted seem more accessible to the public.

As society moves towards being more dependent on technology, social media's impact on the rule of law will only increase. The democracy we enjoy in Canada is a result of this ideal, and therefore any threat to the rule of law is a threat to our freedom. Social media's influence on the various principles of this rule exhibit its power within a modern society. In making democracy more transparent, it allows people to be better involved in the law-making process. Social media demonstrates how our society does not tolerate arbitrary abuses of power, based on the belief that everyone is accountable under the law. While highlighting the importance of judicial independence, it recognizes how vital this principle is in the functioning of a fair and just society. The rule of law is a cornerstone of Canada's democracy, and despite challenges natural to occur in a progressing society, it is continuing to shape our world.

To read the list of works cited, download the PDF.

How Does Social Media Interact with the Rule of Law?

by Katy Berglund, grade 12 student, Reynolds Secondary School, Victoria
Runner-up of the 2017-2018 rule of law essay contest

With over 2.2 billion people using Facebook worldwide as of February 1, 2018, the world is more online and connected than ever. Initially created as a mass data collection interface, Facebook and social media platforms have departed from whatever baseline was originally intended. These ever-changing media entities have become even more complex when interacting with the rule of law. Under the World Justice Project, the first principle of the rule of law, accountability, is defined as "the government as well as private actors are accountable under the law." Unfortunately, with the rise of the Internet and social

media, governments, CEOs and other users alike have been able to evade and skew accountability to the law. Social media can serve as a catalyst to cry out for injustices, promoting opinions that lead to real-life consequences. It ultimately has the ability to sway juries and puts pressure on lawmakers and governments alike.

Social media isn't always used for the common good. Hate groups such as white supremacists, Islamophobics and anti-Semites are commonplace on social media. If a prejudice exists towards someone, most likely there is a forum online. Widespread access to extreme viewpoints calls into question the line between free speech and hate speech. Does being subjected to extremists' views impede upon our security and safety? Many of these groups have used platforms such as Facebook to organize and coordinate protests worldwide, specifically the neo-Nazi group that led protests down in Charlottesville, Virginia, in 2017. This rally, documented by pictures of mass proportions, shows the power of social media in bringing people with extreme ideals together in real life. The ability to post the pictures of rage and violence online is a 21st-century phenomenon, as people began naming and identifying those involved in the rally. This brings up an even more convoluted question: Do those participants deserve to be exposed and face the consequences of their peers, sometimes even resulting in people taking justice into their own hands? The answer is a complicated one and, in some cases, the misidentification of people in pictures is harmful and detrimental to the victim. What is even more worrying is the idea that violence will ensue towards these individuals because of a picture. Posts revealing one's identity often contain home and work addresses and other personal information. It is a double-edged sword. On one hand, social media serves as a way to identify those responsible. But on the other hand, it can promote violence and prejudice towards people who haven't been convicted formally of any crime. In the end, Facebook removed the group. A victory, but many of these groups pop up on social media so quickly and stay under the radar, making them practically untraceable.

The idea of fighting for justice isn't a new one. Throughout history people have taken justice into their own hands when they felt the system failed to do so. In the new age of social media, this becomes easier. The concept of a court of public opinion comes to light in these situations. In the story mentioned below about Colten Boushie, many government officials weighed in on the situation. Current Prime Minister Justin Trudeau commented, "We have come to this point as a country far too many times,"[1] stating that things needed to change. Having the prime minister effectively discredit the judicial system has caused a ripple effect throughout the country. This is possibly a wake-up call to the Supreme Court of Canada to reconsider policies around jury selection. Trial by social media has become increasingly concerning for those working in the criminal justice system. Within democracy, the process for justice is slow and takes time to have criminal proceedings. This court of public opinion is another example of social media being a medium to put pressure on the justice system, as in the recent case of Michael Bennett. He was wrongfully accused at gunpoint and detained in Las Vegas, which has caused public outcry on social media. Racial profiling seems to be at play here, with Bennett stating that he was "a black man in the wrong place at the wrong time." This outcry is putting pressure on the police to investigate. Online platforms provide an instant ability to learn news and react in real time. Additionally, the concept of the public holding the police (in this case) accountable for their actions is a relatively new phenomenon. The ability to band together online and pressure and push for equality adds a whole other level to this already complex system of justice and equality.

With the murder of the Aboriginal young man Colten Boushie, public opinion has been widespread over media and social media alike. He was fatally shot by a white farmer while on the farmer's property, and the jury chose acquittal. Public perception is that racial prejudices played into their decision, affecting the verdict. As *The Star* reported, "the system is set up to exclude Indigenous jurors, a fact Stanley's legal team exploited."[2] This is where social media comes into play. Public outcry that has ensued, both in protests and online, is calling on politicians and lawmakers to change the way juries are selected. Protesters can now be seen holding signs with the words "Justice for Colten," which shows that people are no longer accepting the decisions of the courts.

Many believe that Stanley's motivation and that of the jury were racially biased, which is in direct contradiction to the *Canadian Charter of Rights and Freedoms*, s.15(1), which states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[3] The makeup of the jury was even more shocking. When juries are chosen, they are intended to be of the defendant's peers. Despite this fact, Boushie's jury was entirely white, even though he himself was Aboriginal. Aboriginal discrimination in Canada is more deeply rooted than the general population would like to think. This case is so important because it brings to light the possible flaws in jury selection, which ultimately determines one's guilt or innocence. Social media provides the opportunity to influence those who have the power and ability to change it. Without the influence of social media, this case may have been forgotten. In this situation, the Internet is a powerful tool, providing a voice for Boushie's family, friends and supporters to challenge the government.

In the same vein of Aboriginal injustice in Canada, BC's own "highway of tears" has gained traction on social media, not just across Canada, but worldwide. The popular hashtag #MMIW, which stands for missing and murdered Indigenous women, has surfaced over social media, causing newspapers and television alike to report such matters. These serious crimes have been highlighted by social media coverage, which has ultimately put pressure on those with the power to make positive change.

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Milestones in the profession

EACH YEAR THE Law Society honours long-standing members of the profession through the presentation of 50-, 60- and 70-year certificates, in tribute to their cumulative years in the profession.

For those lawyers who have previously served as a judge, all years of service on the Bench are acknowledged as forming part of that service record.

The Benchers hosted a luncheon in Vancouver on June 13 to honour lawyers who are celebrating milestone anniversaries in the profession in 2018.

Brian Dennehy Photography

Receiving 50-year certificates unless otherwise noted, were, seated left to right: Michael D. Akerly, Gerald J. Lecovin, QC (60 years), Volmar Nordman (60 years), Warren T. Wilson, QC, John J. Michalski, Hon. Jack Austin, PC, QC (60 years), W. Richard D. Underhill (60 years), Bryan F. Ralph, QC and Duncan W. Shaw, QC (60 years).

Standing left to right: Ronald A. Wattie, J.F. Chester Bridal, Gavin H.G. Hume, QC, James A.W. Schuman, QC, Bryan K. Davis, Romano F. Giusti, QC, Dennis P. Coates, QC, Ronald George Fabbro, David F. McEwen, QC, David E.M. Jenkins, QC, John C. Fiddes, John W. Elwick, Yale M. Chernoff, Frank M. Baily, Alan E. Vanderburgh, QC (60 years), F. Stuart Lang, David L. Winkler, QC, Gordon M. Clark, George P.B. Reilly (60 years) and S. Russel Chamberlain, QC.

Also honoured this year, but not pictured: Ken Burnett, Michael B.M. Ellis, Richard P. Gibbons, Jack J. Huberman, QC, Robert W. Johnson, L. Neil Matheson, QC, Brian E. McCrea, David R. Mossman, William G. Nelson, W. Maxwell R. Newby, A. Barry Oland, John H. Outhet, Donald H.C. Paterson (60 years), Ian H. Pitfield, Alfred H.E. Popp, Barry J. Promislow (60 years), Raymond A. Rodger, Leon F. Thomas and Ivan G. Whitehall, QC.

Taking action toward reconciliation

THIS SUMMER, THE Law Society took a significant step forward in its response to the Truth and Reconciliation Commission's calls to action when the Benchers approved a Truth and Reconciliation Action Plan at their July meeting. The plan was developed by the Truth and Reconciliation Advisory Committee, co-chaired by Grand Chief Edward John of the First Nations Summit and Law Society First Vice-President Nancy G. Merrill, QC.

The action plan is in two parts, the first setting out the Law Society's commitments and the second listing broad areas of action, including making the Law Society more inclusive, increasing involvement of Indigenous people in Law Society governance, improving intercultural competence of all lawyers and Law Society Benchers and staff, supporting Indigenous law students and lawyers and regularly reviewing and reporting on its progress in fulfilling these commitments.

After the commission's final report was released in 2015, the Law Society was swift to endorse its findings and calls to action. In early consultations with Indigenous leaders, the Benchers were reminded of the saying "Nothing about us without us," and they understood from the outset that responding to the calls to action would be a long journey that could be undertaken only in consultation with Indigenous leaders at every step of the way. For that reason, the action plan is intentionally flexible and has no fixed end date for full implementation.

At the meeting at which the action plan was presented to the Benchers for approval, Truth and Reconciliation Advisory Committee member Michael McDonald, QC explained that the plan is a road map pointing the way ahead. "The action plan is principle-based and is a living breathing document intended to guide us," McDonald said.

A key part of the action plan is ensuring Indigenous representation among the Benchers. The Law Society currently includes two First Nations individuals among its Benchers. In May this year, Karen Snowshoe (from the Tetlit Gwich'in Nation) became the first Indigenous woman to be elected as a Bencher for the Law Society of

BC. Earlier this year, Claire Marshall (from the Mi'kmaq community of Millbrook First Nation) was among the appointed Benchers added by the province.

The action plan also calls for ensuring intercultural competence of all lawyers, and the Law Society has taken significant steps toward that goal. Indigenous intercultural competence training was recently approved for continuing professional development credit, and the Law Society has added Indigenous intercultural competence, Indigenous child welfare and Indigenous sentencing sessions to its Professional Legal Training Course.

The Law Society has taken steps to ensure that the organization itself is more inclusive and welcoming to all First Nations, Metis and Inuit people. Measures implemented to date include acknowledging traditional Indigenous territories at the beginning of all Law Society functions, observing Indigenous protocols at Law Society events and inviting Indigenous leaders to Law Society meetings and events. The Law Society also helped make the profession itself more welcoming to new lawyers by formalizing a process to facilitate the use of Indigenous regalia at call ceremonies.

A key commitment set out in the action plan is to improve the profession's understanding of the detrimental impact of colonial laws on Indigenous peoples. Benchers at the annual retreat in Osoyoos this year were given an enlightening perspective on that topic by Jeannette Armstrong, a prominent leader in the Syilx First Nation who also holds the Canada Research Chair in Okanagan Indigenous Knowledge and Philosophy at UBC Okanagan. The Law Society and the Continuing Legal Education Society of BC also co-hosted a 2017 Truth and Reconciliation Symposium, seeking ideas on how the legal profession can address systemic biases against Indigenous people. That event was recognized by the international Association for Continuing Legal Education, which awarded the Law Society and CLEBC its 2018 Award for Outstanding Achievement in the area of public interest.

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Reconciliation is an ongoing process, and the Law Society has a role to play, in collaboration with its partners in the justice system. As the commission made clear with recommendations 27 and 28, law societies and law schools share a particularly close relationship with regard to educating current and future lawyers. The Law Society has been in close contact with the province's law schools, which have taken significant strides in incorporating Indigenous content into their curricula. The University of Victoria recently became the first in the world to offer a joint degree program combining the study of both Indigenous and non-Indigenous law.

Val Napoleon, Law Foundation research chair of Aboriginal justice and governance and a co-founder of the University of Victoria's joint degree program, notes that the Law Society's commitment to ensuring Indigenous intercultural competence education for all lawyers is "profound."

"My experience working with judges and lawyers is that once they learn the 'how' of working across different legal orders, then you see the excitement. You can see people thinking about how to manage things differently," she said.

The Truth and Reconciliation Action Plan lays the groundwork for a process that promises to unfold over the years to come. Reconciliation requires all of us in the legal profession to become engaged in changing how Indigenous communities and individuals interact with and experience the justice system. The Law Society encourages all members to review the plan, discuss it with their colleagues and share feedback with their Benchers. At its core, reconciliation is a process of relationship-building, and that can only be done with the full engagement of the profession. ❖

Rule of law essay contest ... from page 10

Activity on Facebook and Twitter can pose a threat to prosecutions and the right to a fair trial through practices such as sharing photos of the accused before an indictment, creation of hate groups or jurors sharing their thoughts about a case online. This creates an instant, powerful, quickly scalable and often biased court of public opinion. Social media has become a people's court, shaping public opinion by providing a snapshot rather than a montage of human interaction and lacking truth filters. It is a new frontier in establishing appropriate boundaries for free speech, holding people accountable, whomever they may be, as well as ensuring that the court of public opinion does not eclipse the judicial process as the arbiter of the social contract.

Endnotes:

1. www.cbc.ca/news/politics/colten-boushie-trudeau-analysis-wherry-1.4530721
2. www.thestar.com/opinion/editorials/2018/02/12/anger-over-colten-boushie-holds-important-lessons-for-canada.html
3. *Canadian Charter of Rights and Freedoms*, 1982, section 15(1)

To read the bibliography, download the PDF.

Practice advice

by Barbara Buchanan, QC, Practice Advisor

PREPARING FOR A DISASTER

THE SUMMER 2017 wildfires in BC presented challenges to those lawyers who were forced to temporarily evacuate not only their law office premises, but also their homes and communities. The fire situation led to the creation of three new resources intended to assist lawyers during subsequent fire seasons or other potential disasters:

- What to Do Before and After a Disaster Strikes;
- Disaster Preparation Checklist; and
- After a Disaster Strikes Checklist.

The resources include five simple steps to reduce lawyers' exposure before disaster strikes, plus more detailed planning information.

Williams Lake lawyer John Russell is one of the lawyers who was affected in 2017. He had this to say about his experience:

> You do not really know the impact an evacuation will have until it is upon you. I was out for three and a half weeks in total, and we managed to set up a satellite office for some of that time. Thankfully, we had electronic backup of everything in place already and had some remote access to our server, as presently we have three staff who work from their homes. In the end, the downtown core of the city of Williams Lake was preserved in spite of the wildfires. Being prepared ahead of time was a huge factor in closing some transactions from the temporary office and restarting and getting back to normal after the evacuation order was lifted. It could have been much worse. Having digital copies and remote access ability as a pre-step we feel gave us a jump on an otherwise extremely difficult and

stressful situation. Thankfully there was no personal harm and relatively little building loss to our beautiful city.

If you had to evacuate your law office or if it was destroyed by a fire, flood or earthquake, how long would it take you to become operational again? How long would it take for you to contact your clients, insurers and opposing counsel, retrieve records and take the required steps on your clients' files? Please review the above resources to assist you with disaster preparedness. If you have questions, feel welcome to contact a practice advisor: practiceadvice@lsbc.org or 604.443.5797.

CONFIDENTIALITY OF COMPLAINTS

The Law Society receives complaints about lawyers from a number of sources, including current or former clients, other lawyers, a client's opposing party, debtors, the courts and members of the public generally. In certain circumstances, lawyers are required to "self-report." Every complaint is considered; however, a complaint may not be investigated if it is outside the Law Society's jurisdiction, is frivolous, vexatious or an abuse of process or does not allege facts that, if proven, would constitute a disciplinary violation (Rule 3-5(3)).

So are complaints to the Law Society confidential? If a complaint is made against you, can you discuss it with your client? Is it admissible in court? Can the Law Society tell your law firm that there is a complaint against you? What happens if a complaint becomes public? Read section 87 of the *Legal Profession Act* and Law Society Rule 3-3 for help with these questions and for more information.[1]

Here are some key points about the confidentiality of complaints:

- If a person has made a complaint to the Law Society with respect to a lawyer or law firm, the complaint is not admissible in any proceeding (as defined in s. 87(1) of the Act[2]), except with the written consent of the complainant (s. 87(2)). However, Rule 3-3(1) states that no one is permitted to disclose any information or records that form part of a complaint except for the purpose of complying with the objectives of the Act or the Rules.
- A lawyer or law firm's response to a complaint or investigation (or a copy or summary of it) is not admissible in any proceeding, except with the written consent of the lawyer or law firm about whom the complaint was made (s. 87(3)). This is the case even if the Society has provided a copy or a summary of the response to the complainant. However, no one, including the respondent to the complaint, is permitted to disclose any information or records that form part of the complaint except for the purpose of complying with the objectives of the Act or the Rules.
- A "report" (as defined in s. 87(1) of the Act) or a record concerning an investigation, an audit, an inquiry, a hearing or a review is not admissible in any proceeding except with the written consent of the Law Society's executive director. Accordingly, a lawyer or complainant cannot seek to admit into evidence the Society's correspondence on a complaint without the executive director's written consent.
- If a complaint has become known to the public, the executive director may disclose the existence of the complaint, its subject matter, its status and any additional information to correct inaccurate information. The status of a complaint is its state of progress through the complaints handling process, including, but not limited to, open, under investigation, referred to a committee, closed.
- If, in the course of an investigation of a complaint, a lawyer has given an

1. See also ss. 85-88 of the *Legal Profession Act* and Law Society Rules 2-53, 3-3, 3-5, 3-23, 4-8, 4-14 to 4-15, 4-20, 4-25, 4-29, 4-47 to 4-50, 5-10 and 5-27.

2. See also s. 39 of the *Interpretation Act*, which states: "The definitions section of the *Supreme Court Act*, so far as the terms defined can be applied, extends to all enactments relating to legal proceedings" and s. 1 of the *Supreme Court Act*, which states, in part, that a "proceeding" includes "an action, suit, cause, matter, appeal, petition proceeding or requisition proceeding."

Services for lawyers

Law Society Practice Advisors

Barbara Buchanan, QC
Brian Evans
Claire Marchant
Warren Wilson, QC

Practice advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

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

◆

LifeWorks – 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: 1.888.307.0590.

◆

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, law student and support staff of legal employers.
Contact Equity Ombudsperson **Claire Marchant** at tel: 604.605.5303 or email: equity@lsbc.org.

undertaking to the Society that restricts, limits or prohibits the lawyer's practice of law, the executive director may disclose the fact that the undertaking was given and its effect on the lawyer's practice. This information may be displayed on a lawyer's profile in the Lawyer Directory.

- The executive director may disclose any information concerning a complaint to a designated representative of a law firm in which the lawyer who is the subject of the complaint engages in the practice of law.
- The executive director with the consent of the Discipline Committee (or the Credentials Committee or Practice Standards Committee, as applicable), may deliver to a law enforcement agency any information or documents that the committee reasonably believes may be evidence of an offence.

A serious complaint may result in a citation being authorized by the Discipline Committee. Once the lawyer has been notified of the citation, the executive director may disclose the citation and its status to the public (Rule 4-20). Pending citations and hearing panel decisions are publicized on the Law Society's website and may be displayed on a lawyer's profile in the Lawyer Directory. Protections for solicitor-client privilege are in the *Legal Profession Act* and in the Law Society Rules.

Conduct reviews for breaches of confidentiality

The Law Society has ordered lawyers to attend conduct reviews when they were found to have improperly disclosed the Society's correspondence related to a complaint. The conduct reviews were previously summarized in the *Benchers' Bulletin* and are republished below:

- When a lawyer filed a complaint with the Office of the Chief Judge of the Provincial Court, he disclosed materials that formed part of a Law Society complaint investigation, though he knew, or ought to have known, that the materials could not be used without first obtaining consent from the executive director and the Law Society complainant, contrary to section 87 of the *Legal Profession Act* and Law Society Rule 3-3. A conduct review subcommittee reminded the lawyer of the central importance of the confidentiality provisions to the Law Society complaint process. The provisions ensure that there are no impediments to the free flow of information during the investigation by ensuring that the information will be kept confidential and not used in collateral proceedings. The lawyer understands that his conduct fell below the standard expected of lawyers; however, his actions appear to have been the product of poor judgment rather than malice, no harm resulted and he has apologized. In the future, the lawyer will read communications from the Law Society and will be diligent as to how he conducts himself. (CR 2017-26)
- A lawyer submitted confidential correspondence from the Law Society at a fee review, contrary to section 87 of the *Legal Profession Act*, which provides that Law Society correspondence is not admissible as evidence in any proceeding without the consent of the executive director, and Law Society Rule 3-3, which provides that no one is permitted to disclose any records that form part of the complaint (the "confidentiality provisions"). The lawyer advised that he had never dealt with the confidentiality provisions before in his legal career but has now read them and understands what he did wrong. He has extended his apologies to the complainant and advises he would not take the same action in future. (CR 2017-18)
- A lawyer represented a client in a matter involving the preparation and execution of a power of attorney that was used by the client in an ICBC matter and disclosed privileged client information to an ICBC adjuster after the adjuster raised concerns about the power of attorney, contrary to rule 3.3-1 of the *Code of Professional Conduct for British Columbia*. When the ICBC adjuster received the power of attorney, he questioned the lawyer because the two parties to the power of attorney signed the document on two different dates and it was unclear to the adjuster whether the lawyer had witnessed one or both signatures. The lawyer clarified that he only witnessed his client's signature, disclosed privileged client information without instructions from his client to do so and expressed his views as to the validity of the power of attorney. He advised the adjuster that he did not recommend its use. The client filed a complaint with the Law Society, but despite the existence of the complaint, the client requested the lawyer's assistance in an urgent conveyancing matter. The lawyer required the client to execute a document containing the client's agreement to withdraw the complaint to the Law Society, in exchange for his agreement to represent the client in the conveyance. In doing so, the lawyer acted contrary to rule 3.2-6 of the *BC Code*. The lawyer also directed an articled student to provide the client independent legal advice with respect to the document, contrary to Law Society Rule 2-60 and rule 6.2-2 of the *BC Code*. The client refused to sign the document at first but did so as the client felt pressured. The lawyer asked the articled student to write a letter to the Law Society stating that the client had signed the document of her own free will. After the conveyance completed, the client complained about the lawyer's conduct related to the document. In the course of the investigation of the complaints, it was also discovered that the lawyer represented both the buyer and seller in the conveyance transaction without obtaining written consent from the parties, contrary to rule 3.4-1 and Appendix C of the *BC Code*. The lawyer said he was aware of the conflict of interest provisions, but

So are complaints to the Law Society confidential? If a complaint is made against you, can you discuss it with your client? Is it admissible in court? Can the Law Society tell your law firm that there is a complaint against you? What happens if a complaint becomes public?

failed to ensure he advised the clients in writing of their entitlement to seek independent legal advice, and he did not provide a written joint retainer.

A conduct review subcommittee stated that the protection of client confidentiality is a cornerstone of solicitor-client privilege and that the lawyer's breach of this confidentiality was a significant departure from what the Law Society expects of lawyers. In discussions with the lawyer, he continued to demonstrate a lack of clear understanding of his overriding duty of loyalty to his client. He appeared to show a pattern of preferring his own self-interest over his duty to his client.

The lawyer acknowledged that he was familiar with rule 3.2-6 that prohibited him from inducing someone to withdraw a complaint. However, he did not think that his conduct violated that rule. The subcommittee observed that his explanations were not credible in the face of the contemporaneous documents. The subcommittee discussed with the lawyer that an attempt to obstruct a Law Society investigation by negotiating the withdrawal of a complaint has been found to constitute professional misconduct. Directing his articled student to provide independent legal advice to his own client with respect to a Law Society complaint related specifically to him was self-serving and contrary to rule 6.2-2 of the *BC Code* and Law Society Rule 2-60. The subcommittee emphasized to the lawyer that his direction to his articled student reflected both a lack of judgment and poor understanding of his role as a principal. It was also an inappropriate use of his position of authority in pressuring her to do something that she was reluctant to do.

The subcommittee expressed concern about the lawyer's lack of candour and acknowledgement and appreciation of his conduct. The subcommittee encouraged the lawyer to undertake a course of self-study to re-familiarize himself with the Rules and the *BC Code* and to take a general ethics course. (CR 2016-28)

- A lawyer attached confidential correspondence regarding a Law Society complaint investigation to an affidavit, contrary to Law Society Rule 3-3(1) and section 87 of the *Legal Profession Act*. The improper use by the other party of the confidential documents did not absolve the lawyer of his own obligation to seek the consent of the executive director. (CR 2014-12)

Further questions

If, after reading the relevant provisions of the *Legal Profession Act* and the Law Society Rules, you still have a question about what information you may disclose in relation to a particular complaint, consider contacting either the Manager, Investigations, Monitoring and Enforcement or the Manager, Intake & Early Resolution, in the Law Society's Professional Conduct group at professionalconduct@lsbc.org or 604.605.5388.

CONTINGENT FEE AGREEMENTS IN FAMILY LAW

A contingent fee agreement (CFA) can provide clients with access to a lawyer when they might otherwise be unable to afford one. Sections 64-68 of the *Legal Profession Act* and Part 8 of the Law Society Rules govern such agreements. CFAs must be in writing and are subject to a number of restrictions, and certain content is mandatory.

Section 3.6 of the *Code of Professional Conduct for British Columbia* provides ethical guidance regarding fees and disbursements generally and CFAs specifically. Rule 3.6-1, which includes four paragraphs of commentary, states that a lawyer "must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion." Rule 3.6-2 provides that a lawyer may enter into a CFA in accordance with the legislation and in the commentary that follows sets out factors for determining the appropriate percentage and restrictions on withdrawal. Commentary [1] states:

> In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The test is whether the fee, in all of the circumstances, is fair and reasonable.

While a CFA is used frequently in personal injury claims, it is uncommon in family law matters. In fact, in some jurisdictions CFAs are not permitted for services related to matrimonial disputes for public policy reasons.

In BC, a CFA "for services relating to a child guardianship or custody matter, or a matter respect parenting time of, contact with or access to a child, is void" (s. 67(3) of the Act). A CFA for services relating to a matrimonial dispute is void unless it is approved by the court (s. 67(4) and (5)). Section 66(7) to (9) deals with the court application itself, including rules to preserve solicitor-client privilege:

- The court may approve an application if the lawyer and the client agree on the amount of the lawyer's proposed fee and the court is satisfied that the proposed fee is reasonable.
- The hearing must be held in private.
- The style of proceeding must not disclose the identity of the lawyer or the client.
- If the lawyer or the client requests that the court records relating to the application be kept confidential, the records must be kept confidential and no person other than the lawyer or the client or a person authorized by either of them may search the records unless the court otherwise orders.

Two family law CFA decisions stand out in 2018: *Quaggin v. Berg Hart Cassels LLP*, 2018 BCSC 1130 (CanLII) and *Jackson v. Stephen Durbin and Associates*, 2018 ONCA 424 (CanLII). In *Quaggin*, although the CFA was initially approved by the chambers judge, when subsequently examining it under section 68 of the Act, Registrar Cameron concluded that the CFA was neither fair nor reasonable when it was made, noting the requirement of utmost good faith and full and complete disclosure of all material facts in order for the court to make a proper assessment. Prior to obtaining court approval for the CFA, the client's solicitors

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Conduct reviews

PUBLICATION OF CONDUCT review summaries is intended to assist lawyers by providing information about ethical and conduct issues that may result in complaints and discipline.

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee composed of at least one Bencher and one other senior lawyer. Conduct reviews are ordered by the Discipline Committee to address conduct that led to the complaint with a focus on professional education and competence. After the conduct review, the subcommittee provides a written report to the Discipline Committee, which may then direct that no further action be taken, that a citation be issued, that the conduct review be rescinded in favour of a different alternative disciplinary outcome or that the lawyer be referred to the Practice Standards Committee.

ELECTRONIC FILING REQUIREMENTS

A Law Society compliance audit revealed that a lawyer's assistant was filing documents electronically with the Land Title Office and affixing the lawyer's Juricert digital signature after the lawyer had reviewed and approved hard copies of the documents. By allowing his assistant to use his digital signature, the lawyer breached rule 6.1-5 of the *Code of Professional Conduct for British Columbia* and then Law Society Rule 3-64(8) (now Rule 3-96.1). As soon as the auditor brought the error to his attention, the lawyer made the appropriate changes to his practice so that his password was restricted to his use only. He met with a conduct review subcommittee, which reviewed the importance of maintaining the integrity of the electronic filing system. (CR 2018-27)

BREACHES OF E-FILING AND TRUST ACCOUNTING RULES

A compliance audit of a lawyer's practice revealed numerous breaches of Law Society Rules and the *Code of Professional Conduct for British Columbia*. The lawyer was a sole practitioner, with inadequate office systems and limited experience with trust accounting. The lawyer disclosed his Juricert password to his assistant and allowed the assistant to affix his signature on electronic documents filed in the Land Title Office, contrary to rule 6.1-5 of the Code and then Rule 3-64(8) (now Rule 3-96.1). He failed to report two trust shortages greater than $2,500 to the executive director, contrary to Rule 3-74(2). He had rectified the trust shortages, but explained that he overlooked the obligation to report because he was handling a large volume of real estate transactions. The lawyer filed an inaccurate trust report, contrary to section 2.2 of the Code. He relied on his bookkeeper to file his trust report and did not appreciate the gravity of certifying the trust report to be true. The lawyer used pre-signed trust cheques when he was not in the office, contrary to Rule 3-64(5).

After meeting with a conduct review subcommittee, the lawyer made several significant changes to address the breaches. He has changed his Juricert password and now personally affixes his digital signature in electronic filings. He has reported trust shortages to the Law Society. He has hired a more experienced bookkeeper, though it also was impressed upon him that he needs to carefully review his records himself. He has made arrangements for other lawyers to have signing authority when he is unavailable. The lawyer has also taken several remedial steps to prevent future problems, including hiring more staff, implementing better office systems and reading the rules applicable to his practice. (CR 2018-37)

DIRECT CONTACT WITH REPRESENTED OPPOSING PARTY

After receiving a frantic call from her client, a lawyer called opposing counsel's office on the client's behalf, but there was no answer. Believing the circumstances warranted immediate attention, the lawyer then attempted to call the opposing party directly, leaving two voice messages. The following morning, opposing counsel asked the lawyer about the calls, to which she offered an explanation by email. By directly communicating with the client of an opposing counsel, the lawyer exercised poor judgment and failed to comply with rule 7.2-6 of the Code. A conduct review subcommittee found that the lawyer did not consider all other options to address the situation that could have avoided calling the opposing party. She agreed to avail herself of counselling assistance to better manage emotional clients. (CR 2018-28)

BREACH OF TRUST ACCOUNTING RULES

A lawyer who had acted on contingency in a personal injury matter in which a settlement was reached for an amount excluding taxable costs and disbursements properly rendered an account for this initial amount, then entered into negotiations for taxable fees and disbursements. As part of the settlement, the lawyer claimed $16,000 in disbursements for a jury focus group; however, the client had understood this cost would be borne entirely by the lawyer. The lawyer prepared, but did not deliver, an invoice for $5,000 in disbursements attributed to the focus group and then withdrew the amount from trust. By withdrawing funds from trust without delivering an account and failing to properly account for a settlement received on behalf of his client, the lawyer breached Rules 3-54(1) and 3-64(1). A conduct review subcommittee impressed upon the lawyer that proper handling of trust funds is crucial to maintaining the public's confidence in the legal profession. He has since rendered a complete accounting of the settlement to his client and repaid the $5,000. He also has taken seminars to better understand trust accounting rules, improved his file management systems and properly records client instructions. (CR 2018-29)

BREACH OF NO-CASH RULE

While acting for a client in a debt recovery action, a lawyer's practice accepted cash in the aggregate amount of $10,000 from a debtor, in

multiple instalments of $500 to $1,000, over a period of 17 months. The cash was deposited into trust, and payments were made to the client periodically by trust cheque. The lawyer was unaware that the total amount of cash accepted had surpassed the allowable limit of $7,500 and agreed to accept cash payments, at least in part, to accommodate the payer, who was disabled and claimed he had no cheques. After receiving a summary compliance audit report and the results letter from the Law Society auditor, the lawyer issued a trust cheque to his client for $3,320.80 instead of returning the remaining funds to the payer in cash. The lawyer's conduct breached Rule 3-59(3) and (6) (the "no-cash rule"). He acknowledged to a conduct review subcommittee that, though he had previously reviewed the no-cash rule with his staff, the responsibility for the breach is his and his alone. He has since reviewed the rule with his staff and made changes to his practice so that he is notified whenever cash is delivered to his office. (CR 2018-30)

THREATENING CRIMINAL PROCEEDINGS

A lawyer wrote an email to opposing counsel in which he stated that his client would pursue criminal proceedings against the other party if that party did not agree to binding arbitration. The lawyer initially denied to the Law Society that he had issued a threat, explaining that he was operating on the concern that opposing counsel was attempting to foreclose his client's option to pursue criminal proceedings by securing his commitment to binding arbitration. The lawyer ultimately accepted responsibility for contravening rule 3.2-5 of the Code, which states that a lawyer is not to threaten to initiate or proceed with a criminal or quasi-criminal charge in an attempt to gain a benefit for a client. (CR 2018-31)

INDUCEMENT FOR WITHDRAWAL OF CRIMINAL PROCEEDINGS

A lawyer acting for a husband in a family law proceeding drafted a proposed settlement that included a term stating that the wife would advise Crown counsel that she consented to the resolution of a criminal proceeding against the husband. The lawyer had not discussed the matter with Crown counsel beforehand. By not having Crown counsel's consent to engage in such discussions with the parties in the family law proceedings, the lawyer contravened rule 3.2-6 of the Code. After being contacted by Law Society staff investigating the matter, the lawyer consulted with a Bencher and withdrew from both the family and criminal law proceedings. He mistakenly believed he was not violating the Code because the wife had initiated the proposal and the settlement specified that the parties' agreement did not bind the Crown. He has acknowledged that he should have considered the nature and scope of his ethical obligations and has taken remedial steps, which include restricting his practice to family law, reducing his workload and seeking guidance from senior lawyers. A conduct review subcommittee commended him for also making significant efforts to address the depression and substance use issues present at the time of the misconduct. (CR 2018-36)

In the same family law proceedings, another lawyer drafted a settlement agreement that could have influenced the Crown's conduct of a criminal proceeding without obtaining Crown counsel's consent. A term of the settlement stated that the lawyer's client would remove her objection to her husband's guilty plea following the resolution of the family law proceedings. The lawyer acknowledges that he drafted the settlement and that it was contrary to rule 3.2-6 of the Code. He incorrectly believed he acted properly because he did not initiate the discussions or attempt to influence his client to accept the settlement. A conduct review subcommittee reviewed the lawyer's obligations under the Code and the potential impact his actions may have had on his client. (CR 2018-38)

CONFLICTS OF INTEREST

A lawyer appeared in court as counsel for his mother in a family law matter involving his father, and in which the lawyer was also a potential witness. He had also attended a settlement meeting and obtained confidential information from his father. At various times, the lawyer's mother was represented by counsel; at other times she was self-represented. On two occasions, the lawyer appeared in court as counsel for his mother. At the second attendance, counsel for the father objected on the basis of a conflict of interest. The court declined to hear the lawyer as counsel for the mother. By acting for his mother in litigation involving his father, the lawyer was in a clear conflict of interest under rules 3.4-1 and 3.4-26.1 of the Code. A conduct review subcommittee explained that there was a substantial risk that his representation of his mother would be affected by his financial interest in the proceedings and his relationships with the parties to the litigation. The lawyer offered an explanation that the situation between his parents was stressful to the family and he acted for his mother because he was very concerned her interests could not be fully put before the court if she represented herself. The subcommittee pointed out that the strain on the family was exactly why he should never have agreed to act for one parent against the other. The lawyer agreed he would never place himself in such a conflict again. (CR 2018-32)

In another case, a lawyer acted in a real estate transaction resulting from an ongoing matrimonial action. The transaction involved parties with opposing interests who were all former clients of the lawyer's firm. The lawyer met with his clients to execute documents in the sale of the property without taking the necessary steps to satisfy himself that he was not in a conflict of interest. He did not review the client file and did not thoroughly question his clients before proceeding. He relied on his law partner, who was acting for the opposing party, to identify potential conflicts. By acting in a conflict of interest, the lawyer breached rules 3.4-1 to 3.4-3, 3.4-5 to 3.4-9 and 7.2-9 and Appendix C of the Code. As a result of his conduct, the lawyer's clients were in breach of a court order related to the sale of the property, and the opposing party suffered financial losses. A conduct review subcommittee discussed the importance of avoiding conflicts of interests in all files, not only in real estate matters. It highlighted, in particular, the no-cash rule and rules governing trust monies. The lawyer has taken several remedial measures, including implementing office

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Discipline digest

BELOW ARE SUMMARIES with respect to:

- Martin Drew Johnson
- Angiola-Patrizia Paola De Stefanis
- Patricia Evelyn Lebedovich
- Pir Indar Paul Singh Sahota
- Ian David Reith

For the full text of discipline decisions, visit Hearing Schedules and Decisions on the Law Society website.

MARTIN DREW JOHNSON

Kelowna, BC

Called to the bar: May 10, 1977

Court of Appeal: January 29, 2018 (Frankel, Savage and Hunter, JJA)

Written reasons: January 29, 2018 (2018 BCCA 40)

Counsel: G.B. Gomery, QC for the Law Society; T.C. Paisana for Martin Drew Johnson

BACKGROUND

Martin Drew Johnson was involved in an altercation outside a courtroom with a police officer. The exchange became heated and volatile, and Johnson used profanity. A hearing panel determined that Johnson's behaviour was a marked departure from the standard of conduct that the Law Society expects of lawyers and constituted professional misconduct. Johnson was suspended for 30 days and ordered to pay costs of $10,503.05 (facts and determination: 2014 LSBC 08; disciplinary action: 2014 LSBC 50; Winter 2014 discipline digest).

Johnson sought a review of the hearing panel's decisions, arguing that the panel erred in concluding that provocation is "irrelevant" and should not be a defence to professional misconduct, in concluding that his actions constituted professional misconduct and in overemphasizing his previous disciplinary record and giving little weight to letters of reference.

The defence of provocation is not recognized in the *Legal Profession Act* or Law Society Rules; it is a partial defence in criminal law. The review board declined to apply it in this case, and the majority of Benchers upheld the finding of professional misconduct by the hearing panel. One Bencher disagreed, finding that, while the conduct was wrongful, it was not a marked departure from the standards set by the Law Society.

The Benchers further determined that it was within the panel's discretion, with respect to disciplinary action, to give more weight to Johnson's past conduct and disciplinary record as opposed to positive letters of reference. Putting too much weight on letters from colleagues and friends would detract from the Law Society's duty to protect the public interest. The Benchers upheld the penalty imposed by the hearing panel (2016 LSBC 20; Fall 2016 discipline digest).

COURT OF APPEAL DECISION

Johnson appealed the decision of the Bencher review to the Court of Appeal. He contended that the review board did not properly apply its internal correctness standard of review to the facts found by the panel and that, in any event, the board's decision was unreasonable.

The Court of Appeal dismissed the appeal. The court found that the review board reviewed the facts found by the panel and independently determined Johnson's conduct was a marked departure from the conduct the Law Society expects of its members. That determination was a reasonable one.

ANGIOLA-PATRIZIA PAOLA DE STEFANIS

Vancouver, BC

Called to the bar: August 28, 1992

Written materials submitted: April 17, 2018

Panel: Tony Wilson, QC, Chair, Dan Goodleaf and Shona Moore, QC

Decision issued: June 19, 2018 (2018 LSBC 16)

Counsel: Alison Kirby for the Law Society; Jean Whittow, QC for Angiola-Patrizia Paola De Stefanis

FACTS AND DETERMINATION

Angiola-Patrizia Paola De Stefanis practised primarily in family law and wills and estates. In 2009, she was retained by a client to address potential elder fraud by an attorney appointed under a power of attorney. De Stefanis prepared a new will, which appointed herself and a friend of the client as co-executors of the will.

When the client passed away, the friend renounced her appointment as co-executor and left De Stefanis as the sole executor. The sole beneficiary was the deceased's brother living in Italy whose daughter communicated with De Stefanis on his behalf.

De Stefanis issued two trust cheques to herself, one for $100,000 and another for $10,000, from estate funds she held in trust, for payment of executor fees for her role in administering the estate. The $110,000 remuneration was approximately 12 per cent of the gross aggregate value of the estate, which was not in compliance with section 88(3) of the *Trustee Act*. That Act permits executor fees of up to five per cent of the gross aggregate value of the estate.

De Stefanis sent an email to the beneficiary's daughter with a document titled "interim summary of estate account transactions," which stated the executor fees charged were $50,000, as well as a consent and release form for the beneficiary to sign and approve of the accounting.

De Stefanis sent another email to the beneficiary's daughter to finalize the administration of the estate. She attached a document titled "final summary of estate account transactions," which stated the total executor fees charged were $60,000, as well as another consent and release form for the beneficiary to sign and approve of the accounting.

De Stefanis's practice was subject to a compliance audit by the Trust

Assurance department. The Law Society requested an explanation for charging the estate a greater percentage than the *Trustee Act* allows. De Stefanis stated that the family was extremely appreciative of the assistance she offered and the $100,000 she received was a gift to demonstrate their gratitude.

During the Law Society's investigation, the beneficiary's daughter confirmed in an interview that the fees set out in the summaries were requested by De Stefanis. The beneficiary said she had no idea whether the executor fees De Stefanis requested were excessive, too low or fair.

De Stefanis consented to the agreed statement of facts, the Law Society's written submissions and the proposed order that she be disbarred. De Stefanis admitted that she misappropriated the sum of $50,000 when she was not entitled to those funds and the family was unaware she had taken the funds. She admitted to altering the figures and delivering false accountings in the interim summary and final summary of estate account transactions. She also admitted she made false representations to the Law Society during a compliance audit and professional conduct investigation. She did not offer an explanation of why she took the funds.

De Stefanis eliminated the trust shortage by paying $50,000 to trust. She wound up her practice and ceased membership in 2017.

The hearing panel accepted her admission of professional misconduct and approved the proposed disciplinary action of disbarment.

DISCIPLINARY ACTION

The panel ordered that De Stefanis:

1. be disbarred; and
2. pay costs of $1,000 to the Law Society.

PATRICIA EVELYN LEBEDOVICH

Nanoose Bay, BC
Called to the bar: May 11, 1982
Written materials submitted: May 7, 2018
Panel: Craig Ferris, QC, Chair, Nan Bennett and Gavin Hume, QC
Decision issued: June 25, 2018 (2018 LSBC 17)
Counsel: Alison Kirby for the Law Society; Patrick F. Lewis for Patricia Evelyn Lebedovich

AGREED FACTS

A woman was named the executor of her mother's will, and Patricia Evelyn Lebedovich was named as an alternate executor. Following her mother's death, the daughter did not probate her mother's will or fully administer her estate, and when the daughter died, it was discovered that her mother's house was still registered in the mother's name.

The executor of the daughter's will retained Lebedovich to probate the mother's will so the house could be sold. The house was sold, and the net sale proceeds were received and deposited in Lebedovich's trust account.

Between March 2012 and September 2013, Lebedovich prepared 30 invoices relating to the mother's estate and withdrew $68,805.86 from her trust account in purported payment of the invoices. The funds were deposited in her personal account. Only three of the 30 invoices were legitimate accounts for services rendered and were delivered to the client. The balance of the invoices, totalling $50,516.80, were false invoices prepared by Lebedovich and given to her bookkeeper so that her trust account would reconcile.

Between December 2013 and June 2014, Lebedovich prepared five invoices with respect to the estate of the daughter and withdrew $13,567.50 from her trust account, depositing the funds in her general account. None of the invoices were delivered to the client. Lebedovich was not entitled to at least $4,312.91 of the funds she withdrew in purported payment of the five invoices. During the Law Society's investigation, Lebedovich prepared amended versions of the five invoices to reflect the work she stated she actually did. She subsequently admitted that she misrepresented that work in order to falsely inflate the amount of the invoices and that she intentionally misappropriated $4,312.91 in trust funds from the client's estate.

ADMISSIONS AND DETERMINATION

Lebedovich admitted that she committed professional misconduct by:

- misappropriating $50,516.80 received on behalf of the mother's estate by withdrawing the funds from trust when she was not entitled to do so;
- creating 27 false invoices for the estate in order to reconcile her trust account and conceal a trust shortage totalling $50,516.80; and
- misappropriating $4,312.91 and improperly withdrawing the balance of the $13,567.50 from trust and depositing the money in her general account when she was not entitled to the funds, preparing invoices that were false and in which she overcharged for the services rendered by $4,312.91 and withdrawing funds from trust in payment of her fees and disbursements prior to delivering a bill.

The hearing panel accepted Lebedovich's admission of professional misconduct and approved the proposed disciplinary action of disbarment.

DISCIPLINARY ACTION

The panel ordered that Lebedovich be disbarred.

TRUST PROTECTION COVERAGE PAYMENT

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 to reimburse the claimant, on the lawyer's behalf, for the amount of the loss.

Based on the circumstances described in relation to the allegations of misappropriation in *Law Society of BC v. Lebedovich*, 2018 LSBC 17, two TPC claims were made against Patricia Evelyn Lebedovich and the amounts of $50,517 and $4,313 paid, respectively. Lebedovich is obliged to reimburse the Law Society in full for amounts paid under TPC. For more information on TPC, including what losses are eligible for payment, go to Compensation: Claims for lawyer theft.

PIR INDAR PAUL SINGH SAHOTA

Surrey, BC

Called to the bar: August 11, 2006

Review date: February 27, 2018

Review board: Elizabeth Rowbotham, Chair, Pinder Cheema, QC, Gillian Dougan, John Lane, Robert Smith, Michelle Stanford and William Sundhu

Decision issued: July 17, 2018 (2018 LSBC 20)

Counsel: Alison Kirby for the Law Society; Robin McFee, QC for Pir Indar Paul Singh Sahota

BACKGROUND

A hearing panel concluded that Pir Indar Paul Singh Sahota's accounting practices amounted to misappropriation of client funds and that his conduct constituted professional misconduct. The panel suspended Sahota from practice for one month and prohibited him from engaging in any capacity with files involving the purchase, sale or financing of real estate (facts and determination: 2016 LSBC 29; disciplinary action: 2017 LSBC 18; Fall 2017 discipline digest).

The Law Society sought a review of the panel's decision on disciplinary action. The Law Society sought to have the review board set aside the decision of the hearing panel, suspend Sahota for six to 12 months and impose conditions on his practice.

DECISION OF THE REVIEW BOARD

The review board determined that the standard for review is correctness but a review board should not disturb a sanction that is within an appropriate or reasonable range of penalties. The review board concluded that the minimum appropriate range of suspension is between three and six months. The review board also reviewed the relevant factors considered by the hearing panel.

The review board ordered that Sahota:

1. be suspended for 90 days, with credit given for the 30 days already served;
2. not engage in any capacity with files involving the purchase, sale or financing of real estate; and
3. have a second signatory on this trust account who is subject to the approval of the executive director.

IAN DAVID REITH

Whistler, BC

Called to the bar: May 19, 1989

Hearing date: May 1, 2018

Panel: Jamie Maclaren, QC, Chair, Paula Cayley and John Waddell, QC

Decision issued: July 31, 2018 (2018 LSBC 23)

Counsel: Patrick M. McGowan for the Law Society; Ian David Reith on his own behalf

AGREED FACTS

Between February 2010 and May 2014, Ian David Reith contravened six trust accounting rules by failing to maintain trust account records, failing to record each trust transaction promptly, failing to prepare monthly trust reconciliations, failing to withdraw his funds from a trust account as soon as practicable, maintaining more than $300 of his own funds in a trust account and making payments from trust funds when his trust accounting records were not current.

ADMISSION AND DETERMINATION

The panel accepted Reith's admission that he breached six trust accounting rules and that his conduct amounted to professional misconduct.

DISCIPLINARY ACTION

The panel considered the gravity and consequences of Reith's misconduct. It concluded that each of the six breaches of accounting rules is serious and, "taken together as a pattern of prolonged misconduct, they are inexcusable."

The panel also considered Reith's conduct history. In 2014 and again for a separate matter in 2016, Reith was cited for misconduct relating to his actions while acting for multiple parties in a real estate conveyance. In each case, Reith was required to pay a fine and costs.

The panel noted that Reith had not acknowledged his misconduct until just before the hearing and, as of the date of the hearing, had not produced a trust reconciliation or assisted Law Society staff in producing one.

The panel also considered the need to preserve the public confidence in lawyers' handling of trust funds, the concept of progressive discipline and sanctions imposed in prior cases of multiple breaches of trust accounting rules.

The panel ordered that Reith:

1. be suspended for 30 days;
2. pay costs of $7,472.50; and
3. be prohibited from operating the trust account in question until the Law Society has determined the rightful owners of all funds held in it.❖

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procedures to avoid conflicts in the future and regular discussions with his law partner to review files prior to meeting with clients. (CR 2018-35)

BREACHES OF ACCOUNTING RULES / FAILURE TO SUPERVISE STAFF

A Law Society compliance audit of a law firm discovered 17 instances of funds withdrawn from trust without bills being delivered to the clients, in circumstances where the withdrawals cleared small residual trust balances. None of the client files were those of the lawyer, although, as the managing partner, he was responsible for the administration of the practice. The lawyer's assistant prepared the majority of the bills on one day without the lawyer's knowledge or instruction; however, the lawyer signed the trust cheques authorizing the trust withdrawals without questioning them. The lawyer's conduct was contrary to section 69 of the *Legal Profession Act,* Law Society Rule 3-64 and rule 6.1-1 of the Code. A conduct review subcommittee stressed to the lawyer that funds held in trust belong to the client and can only be withdrawn as authorized by Rule 3-64(1). It further reminded him that it is a lawyer's duty to properly train and supervise staff. The lawyer has rectified all matters discovered during the audit, updated office procedures and implemented systems that ensure the proper supervision of staff and billing procedures. (CR 2018-33)

POTENTIAL INTERFERENCE WITH AN INVESTIGATION

A lawyer engaged in several text messages with a potential witness in an investigation. The communications appeared to suggest that the witness lose documents by being really disorganized. The lawyer's conduct contravened section 5.3 of the Code, which governs communications with witnesses. The lawyer said that he had no intention of interfering with the investigation but wanted to ensure that the investigators only obtained information to which they were entitled. He sent the messages hastily and without considering that a third party could interpret them as a deliberate attempt to suppress evidence. He assured a conduct review subcommittee that he will take greater care with his communications in future. (CR 2018-34)

INCIVILITY

While acting in a family law matter, a lawyer behaved in an uncivil and discourteous manner toward opposing counsel. He was sarcastic and condescending and criticized opposing counsel to third parties and to the Law Society. His behaviour was contrary to rules 2.1-4, 7.2-1 and 7.2-4 of the Code. The lawyer's explanation that his forthright and confrontational approach had been successful and well-received in the past was not accepted by a conduct review subcommittee as an excuse. It challenged him on his belief that it was his role to instruct or correct opposing counsel. He has now completed the Communications Toolkit and, as family practice is not amenable to his personality or expertise, he no longer practices in that area of law. (CR 2018-39)❖

Practice advice ... from page 17

did not meet with her face to face to explain it or provide advice in writing; they did have a telephone conversation. Circumstances that were not disclosed to the chambers judge but that became apparent in the section 68 hearing had bearing on the registrar's decision. He concluded that "if the solicitors had carried out their clear instructions to apply in a timely way for interim spousal support the likely outcome would have been an award to the client sufficient to allow her to fund the litigation on the existing retainer arrangement," at that time an hourly rate. The delay "needlessly exacerbated her financial strain and worry." Further, given the client's "continuing mental health struggle and impecuniosity, and the very significant change to the existing retainer arrangements," he concluded that it was essential that she be advised to seek independent legal advice. The registrar provided guidance on meaningful independent legal advice in the circumstances. As to the reasonableness of the CFA, "the litigation did not carry with it any measurable risk to the client not making a substantial recovery in the range of $3 to $6 million, and, as such, cannot be viewed objectively as being reasonable from her perspective."

In *Jackson*, the retainer agreement provided that, in addition to hourly rates and daily counsel fees, the client would be charged an increase in fees in the event of a positive result (the "results achieved fee"). The Ontario Court of Appeal concluded that the results achieved fee was a CFA, prohibited in family law. This case is a good reminder that an agreement may be a CFA even if it is not called that and, accordingly, the Act, Law Society Rules and the *BC Code* may apply. In BC, section 64(1) of the Act defines a CFA:

> **"contingent fee agreement"** means an agreement that provides that payment to the lawyer for services provided depends, at least in part, on the happening of an event.

Other CFA decisions in the family law context include *Darren Hart Law Corporation v. Jiang*, 2016 BCSC 808; *Law Society of Saskatchewan v. Siwak*, 2017 SKLSS 6 (CanLII); *Thompson v. Merchant Law Group,* 2008 SKQB 395 (CanLII); *Thompson v. Thompson*, 2007 SKCA 142 (CanLII); and *Zloty v. Malamud* [1990] MJ No 210 (Quicklaw).❖

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