The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

FEATURE

Prioritizing access to justice and the challenge of Truth and Reconciliation

by David Crossin, QC

TO UPHOLD A justice system that serves all, the legal profession has a responsibility and obligation to listen to and address the needs of the public. It is simply too difficult for ordinary citizens to access legal services. We as lawyers have a duty to help ensure the services we provide are available to all citizens, not just those the profession wants to serve or those who can afford the fees.

On April 25 I attended Access Pro Bono's annual appreciation breakfast, which honours volunteer lawyers for their outstanding service to the public. I am inspired by the wonderful work that the organization and its volunteers have done and continue to do. In 2015 alone, Access Pro Bono provided legal services of $5 million in value, helping 14,599 clients in need.

A portion of Law Society members' fees currently goes to the Law Foundation of BC to fund pro bono work, but I want to further strengthen our partnership. I have asked the Access to Legal Services Advisory Committee to look for ways to collaborate with this great cause and to consider how to more effectively encourage the profession to dedicate time to pro bono work.

Another important component of improving access to justice is a strong and sustainable legal aid system. That goes beyond paying lawyers to go to court — it requires fundamental changes and reforms to the justice system. Our Legal Aid Task Force has been tasked with developing a principled vision concerning publicly funded legal aid in BC. Chaired by Nancy Merrill, QC, the task force will work to find ways to engage lawyers to be actively involved in legal aid programs. The task force has met with stakeholders and expects to hold a summit with them in the late fall.

I would like to take this opportunity to welcome Appointed Bencher Daniel Smith, a citizen of the Laich-Kwil-Tach First Nation, member of the Campbell River Indian Band on Vancouver Island and former Chief Negotiator for the Hamatla Treaty Society. Dan brings to the Bencher table a wealth of expertise in negotiations and experience in working with local First Nations communities, provincial, national and international Indigenous organizations and provincial and federal governments.

The Law Society continues to move forward with addressing the Truth and Reconciliation Commission's calls to action, which formed the focus of this year's annual Bencher retreat. Ardith Walkem, Indigenous lawyer and a member of the Nlaka'pamux Nation, co-chaired the retreat with First Vice-President Herman Van Ommen, QC. A list of presenters shared their insights at the retreat, providing for the Benchers a foundation of knowledge and understanding of the legacy of residential schools, ongoing harms to Indigenous peoples, as well as invaluable insights into how the Law Society can move forward.

We are honoured to have key leaders in the Indigenous legal community help guide our next steps. This highly esteemed group includes Judge Marion Buller, Judge Len Marchand, Judge Steven Point, Professor John Borrows, Canada Research chair in Indigenous law and Nexen chair in Indigenous leadership at the University of Victoria's Faculty of Law, Grand Chief Ed John of the First Nations Summit, Tina Dion of the Aboriginal Lawyers Forum, Michael McDonald of the Indigenous Bar Association, Appointed Bencher Dan Smith, and Indigenous lawyer Linda Thomas. These leaders will help guide the Law Society's engagement with the Indigenous legal community in the creation of a task force, whose mandate will be to effectively respond to the Truth and Reconciliation Commission's calls to action. I look forward to updating you on our progress in the near future.❖

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.

Current and archived issues of the *Bulletin* are published online at lawsociety.bc.ca (see Publications).

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Ardith Walkem (photo left) addresses the Benchers and guests at the 2016 Bencher retreat; First Vice-President Herman Van Ommen, QC (photo right) emceed the event.

Photos: Kevin Dunn

TRUTH AND RECONCILIATION

"Nothing about us without us"

THE BENCHERS HELD their annual retreat from June 2 to 4 at the Penticton Lakeside Resort and Convention Centre. Friday, June 3 was devoted to a forum at which the Benchers heard from Indigenous leaders and participated in discussions.

The all-day program marked an important step in the Law Society's ongoing development of an action plan in response to the findings of the Truth and Reconciliation Commission of Canada (TRC).

At their October 2015 meeting, the Benchers unanimously agreed that addressing the challenges arising from the TRC report is one of the most critical issues facing the country and the legal system today. The Benchers also recognized, however, that the desire for immediate action must be tempered by the need for consultation with the Indigenous legal community. That need was articulated by Indigenous lawyer Ardith Walkem when she referred to the saying, "Nothing about us without us" while addressing the Benchers at their May 2016 meeting. The Benchers subsequently recognized the phrase as a reminder of the need to be guided by Indigenous engagement.

Since their October 2015 meeting, the Benchers have identified key Indigenous leaders to help guide the Law Society's response to the TRC's calls to action. As a first step, the Society's annual retreat was used as a forum to build broad awareness of the issues underlying the calls to action.

Walkem was the co-chair of the June Bencher retreat and spoke at the June 3 forum. Walkem is a member of the Nlaka'pamux Nation and has practised in the area of Indigenous law since she was called to the bar in 1996.

At their Penticton retreat, the Benchers also heard from the Honourable Judge Marion Buller, who spoke about First Nations courts. A member of the Mistawasis First Nation in Saskatchewan, Judge Buller was the first Aboriginal woman judge in BC. Judge Buller established the First Nations Court in New Westminster, and in 2013 she expanded the First Nations Court to Duncan. Judge Buller is currently supporting the development of an Aboriginal family court. She has been a Provincial Court judge for just over 19 years.

Grand Chief Edward John spoke about the United Nations Declaration on the Rights of Indigenous Peoples as a foundational document necessary to understand the TRC's calls to action. A hereditary Chief of the Tl'azt'en Nation in Northern BC, John was a lawyer for more than 30 years and has served in many leadership roles at the local, provincial, national and international levels. He is a former co-chair of the North American Indigenous Peoples' caucus and participated in the development of the Declaration on the Rights of Indigenous Peoples that was adopted by the United Nations General Assembly in September 2007. He was recently reappointed for a second three-year term as a North American representative to the United Nations Permanent Forum on Indigenous Issues.

Michael McDonald, a member of the Peguis First Nation in Manitoba and the treasurer of the Indigenous Bar Association, provided an overview of the history of the constitutional protection of Aboriginal and treaty rights in Canada. McDonald has practised in the area of Aboriginal law for over 25 years.

Katrina Harry, a member of the Esk'etemc First Nation near Williams Lake, conveyed the need for improvements in the child welfare system to reduce the number of Indigenous children in foster care. Harry manages the Parents Legal Centre at the Robson Square courthouse in Vancouver, which focuses on helping parents reach collaborative solutions as early as possible in the child protection process. Called to the bar in 2006, Harry has been involved in child protection matters for several years.

Dan Smith, a citizen of the Laich-Kwil-Tach First Nation and a member of the Campbell River Indian Band who was recently appointed as a Bencher (see p. 4), presented an overview of Indigenous laws. A former chief negotiator for the Hamatla Treaty Society, Smith has considerable working experience with local First Nations communities, provincial, national and international Indigenous organizations and provincial and federal governments. He was elected by the Chiefs of the First Nations Summit as one of three members of its Political Executive and Leadership Council, and the Chiefs subsequently elected him to the BC Treaty Commission as a commissioner. ❖

Access to justice and the work of the Law Foundation of BC

by Timothy E. McGee, QC

THE THEME OF this issue of *Benchers' Bulletin* is access to justice, a subject that is central to the Law Society's strategic priorities. We have chosen to feature Jennifer Muller's arduous journey as a self-represented litigant in a family law proceeding for the custody of her daughter. Her story serves as a reminder that, for some, the challenge of accessing justice can seem insurmountable.

There are, however, many success stories in the area of enhancing access to justice, and I would like to highlight the work of the Law Foundation of BC as the driver of many of those. As you may know, the interest on funds held in lawyers' pooled trust accounts and a portion of lawyers' fees are directed toward the Law Foundation of BC, largely to support pro bono services and access to justice programs. I was reading the Foundation's most recent annual report and it really drove home for me the importance of its work and the difference it makes in communities across our province. Legal aid is the largest mandate area of the Foundation, with 68 per cent of the total grants falling under this category. In 2015 alone, 103,645 clients were helped by programs funded by the Foundation's legal aid grants.

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It is hard not to be impressed by the breadth of the programs the Foundation funds and the great care it takes to identify and assess programs and projects in legal aid, legal education, legal research, law reform and law libraries. Last year, the Foundation approved $16.3 million in funding for 73 continuing programs and 66 grants to many worthy causes and programs such as the Legal Services Society, the CBA, BC Branch's lawyer referral service, the People's Law School, the BC Law Institute, Courthouse Libraries BC, Access Pro Bono, and the Law Society's own Professional Legal Training Course.

The Foundation's success is made possible by the strong leadership of its board of directors and the tireless efforts of its Executive Director Wayne Robertson, QC and his dedicated staff and volunteers. It is often said that in addressing the challenge of improving access to justice there is no silver bullet and no simple solution in the hands of any one organization. But it is safe to say that the Law Foundation is a major player in improving access to justice and an organization that can inspire us all.

I welcome your comments or feedback on our efforts in improving access to justice. Please feel free to contact us at communications@lsbc.org.❖

New Appointed Bencher

THE LAW SOCIETY welcomes recently appointed Bencher **Daniel Smith**. Appointed Benchers are non-lawyers selected by the provincial cabinet to represent the public interest.

Dan is a citizen of the Laich-Kwil-Tach First Nation, a member of the Campbell River Indian Band on Vancouver Island and former Chief Negotiator for the Hamatla Treaty Society.

Dan began his career in the commercial fishing, logging and trucking industry, gaining experience in negotiations as an active member of the International Woodworkers of America and the Teamsters Union of Canada. He has extensive experience working with local First Nations communities, provincial, national and international Indigenous organizations and provincial and federal governments.

Dan has worked in senior positions with Canada Employment and Immigration, the Department of Fisheries and Oceans, Indigenous and Northern Affairs Canada and Canadian Heritage. He was elected by the Chiefs of the First Nations Summit as one of three members of its Political Executive and Leadership Council. After Dan served his term, the Chiefs elected him to the BC Treaty Commission as a commissioner. Dan is now retired.

Dan was raised by his grandparents in the Wuikinuxv Nation, Rivers Inlet and the Campbell River Indian Band and later moved to Vancouver to attend school.❖

Law and the Media Workshop

MORE THAN 50 members of the media attended the annual Law and the Media Workshop on April 28. The Law Society partners with the Jack Webster Foundation each year to put on the workshop to refresh and enhance reporters' knowledge of the law as it relates to journalism.

This year's workshop focused on an unfolding fictional scenario of reporting on a high-profile scientist suspected of misusing public funding and manipulating results of her scientific research. The workshop touched on topics related to FOI requests, the open-source whistleblower submission system SecureDrop and the "reportage" defence.

The audience heard from panellists David Beers, founding editor of the *Tyee*, leading media lawyers Dan Burnett, QC and David Sutherland, and Kathy Tomlinson, investigative journalist at the *Globe and Mail*. An impressive 100 per cent of attendees surveyed said the panellists were excellent or good and 97 per cent said they had improved their understanding of the legal issues around reporting and journalism.❖

Panellists (l-r): Dan Burnett, QC, Kathy Tomlinson, David Sutherland and David Beers.

FROM THE LAW FOUNDATION OF BC

Respected poverty law lawyer retires

DAVID MOSSOP, QC has retired. Over the course of a career that spanned more than 40 years, he contributed much to improving access to justice for all people in BC. His commitment to this issue served his clients well and has had a lasting impact on the law that affects low-income people in BC.

Since his call to the bar in 1971, David has worked on poverty law and social justice issues. Until recently, he was a staff lawyer at the Community Legal Assistance Society, a legal organization funded by the Law Foundation of BC, the Legal Services Society and the Ministry of Justice, that assists disadvantaged clients throughout the province. David practised in the areas of poverty, administrative, human rights and constitutional law. He represented public interest litigants in numerous tribunals, and in courts up to the Supreme Court of Canada. David also worked with many low-income groups, including the Federated Anti-Poverty Groups of BC and the Front Line Advocacy Workers. He was appointed Queen's Counsel in 1999.

David was an elected Bencher from 2008 through 2015. During this time, he served as chair of the Credentials Committee and the Access to Legal Services Advisory Committee. He was also a member of the Ethics Committee, the Task Force on Unbundling Legal Services, the Tribunal Program Review Task Force and the Delivery of Legal Services Task Force. In 2016, David became a Life Bencher.

David has also served as a member of the Canadian Bar Association's Provincial Council and National Legislative Review Committee. He chaired the CBA's Administrative Law Section and its Public Legal Education and Information Committee. He has presented at many continuing legal education programs, has been an adjunct professor at UBC law school, and has served as a member of the BC Marketing Board and the UBC Sexual Harassment Tribunal.

David was awarded the Social Justice Award in 1990, the Special Award of the Federated Anti-Poverty Groups of BC in 1996, and the Special Recognition Award of the Regional Immigrant and Visible Minority Women of BC in 1998.

We thank David for his untiring work over many years, and wish him the best in what we expect will be an active retirement.❖

The Law Society congratulates winner and runner-up of the secondary school Magna Carta essay contest

THE LAW SOCIETY congratulates essay contest winner Han Wei (Helen) Luo, Law 12 student from Hugh McRoberts Secondary School in Richmond, and runner-up Anushka Kurian, Law 12 student from Hugh Boyd Secondary School in Richmond, for their exemplary essays on the topic of "Magna Carta and its relevance to Canada in the 21st century." The Law Society is pleased to publish their essays in this issue of *Benchers' Bulletin*.

At the Bencher meeting on May 6, 2016, Luo and Kurian were introduced to the Benchers, and President David Crossin, QC presented them with their respective awards. The Law Society launched the essay contest in March 2015 to acknowledge the 800th anniversary of Magna Carta and to support the goal of raising public awareness of the importance of the rule of law and the proper administration of justice.

Photo: Alistair for Ron Sangha Productions Ltd.

Han Wei (Helen) Luo (left), President David Crossin, QC and Anushka Kurian

The Journey of the Magna Carta

by Han Wei (Helen) Luo, Law 12 student, Hugh McRoberts Secondary School in Richmond
Winner of the 2015 secondary school Magna Carta essay contest

When the indignant English barons met with King John in 1215, little did they know that the aftermath of their Runnymede gathering would carry overseas, inspiring countless other movements across the centuries. The Magna Carta has long since been an emblem of equality and unconditional justice, having sought to establish governance not by man and his folly but by an indiscriminate law. Fragments of its legacy still carry into Canada's legal system, and yet, how deserving is the archaic document of its symbolic value? Did its existence serve to further humanity's pursuit of impartial rights and freedoms, or is it merely an oversimplified historical happening? It seems only appropriate to discuss the Magna Carta within its proper historical context. By deciphering the motives and nuances in its creation and usage, we can begin to understand the prevalence of the Magna Carta in the contemporary world as well as its place in the bedrock of Canada's democratic principles.

King John was by no means a benign ruler, and after 16 years of his reign, his tyrannical grasp of England prompted the noblemen to rebel against his lawlessness. The sealing of the Magna Carta in the meadow of Runnymede signified a momentous reduction of the monarchy's power — or so the myth claims. What is little known of this historical moment is that within 10 weeks of its conception, the Magna Carta was declared "null and void of all validity forever" by Pope Innocent III at the request of the king, and only an altered version was reinstated by King John's successor, which was an ineffective political manoeuvre.

Contrary to common belief, the contents of the Magna Carta were not revolutionary. It did not forge the rule of law. It couldn't even uphold the rule of law. The concept that kings were not above the law was not a novelty — King Henry had sworn to observe the laws of England upon his coronation in 1100. The Magna Carta also has no claims in the origin of the Great Writ, or habeas corpus, which was first documented in 1119, making it a predecessor of the Magna Carta by 16 years. And yet, we remember the Magna Carta as a hallmark in the progress of equality and justice.

The original Magna Carta was short-lived and insignificant, and soon faded into obscurity. It makes no appearance in Shakespeare's *King John*, nor does it ever grace the pages of other notable writers

from the 15th and 16th centuries. Only by the 17th century did it experience an upsurge of popularity as Edward Coke, an English judge, distorted its earliest intent into a rallying cry against yet another disliked monarch. Coke transformed the Magna Carta, which was at its core a petition of England's upper class to free themselves of the reins of their ruler, into an anthem of freedom for all the people. Article 29, which granted that "no free man is to be arrested, or imprisoned ... save by the lawful judgment of his peers or by the law of the land," is perhaps wrongly praised. Arguably, *free men* in this context did not refer to all citizens, but rather, was analogous with *noblemen*.

Despite its ornate Latin name and its existence in history textbooks, the existing conception of the Magna Carta is nothing more than a myth, a small lie to simplify the past. Nevertheless, its legacy and symbol as an advocate for freedom persists. When the Universal Declaration of Human Rights was unveiled in 1948, it called from the Magna Carta as source of inspiration. Eleanor Roosevelt described it as "the international Magna Carta of all men everywhere." In 1957, the American Bar Association built a memorial at Runnymede to commemorate the sealing of the Magna Carta. English historian William Stubbs stated, "The whole constitutional history of England is little more than a commentary on the Magna Carta." The document remains a silent supporter of the rule of law, human rights, and a harmonious relationship between the government and the people throughout the ages.

In Canada, though it has done little to change our constitutional landscape, the Magna Carta has doubtlessly influenced the opinions of our lawmakers, politicians, judges and others that serve to uphold Canada's longstanding reputation as a nation of peace and equality. When considering a Canadian Bill of Rights, Prime Minister John Diefenbaker stated in the House of Commons, "I believe the time has come for a declaration of liberties to be made by this Parliament. Magna Carta is part of our birthright. Habeas corpus, the bill of rights, the petition of right, all are part of our traditions…freedom from capricious arrest and freedoms under the rule of law, should be made part and parcel of the law of the country." It is arguable that without Diefenbaker's lifelong dedication to human rights, the later and current Canadian Charter of Rights and Freedoms would have never been implemented.

The Magna Carta also furthered another decisive document and for this, the 1763 Royal Proclamation has come to be known as the "Indian Magna Carta." This document outlined and laid groundwork for future treaties between the Crown and the First Nations peoples in Canada. It also acknowledged "the great frauds and abuses that have been committed in the purchasing of the lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians." Although the results of this proclamation are contestable, the "Indian Magna Carta" has been a guide in all treaty-making since its creation. The Magna Carta was also referenced in 2000 during a case before the Supreme Court of Canada, whereupon Justice Louis LeBel cited clause 40, "To none will we sell, to none will we deny, or delay, right or justice."

Though not formally part of our constitution, the Magna Carta has had its role in the formation of Canada's image and legacy. It is entwined in our rights and freedoms, our courts, and our democracy. Though the rule of law today seems inseparable from the very definition of law itself, we must remember that history has no lack of rulers who deemed lawfulness a virtue for only his subjects, and not to himself.

The Magna Carta served to mandate the law not as the word of a capricious or cruel dictator, but as an established system that all Canadians must abide to and can therefore be trusting in its stability. Law, if not given the rule of law, is nothing more than impalpability and the fickle whims of the few. If justice, rights or freedoms are applied to a mere few, then they are merely luxuries in a society built on corruption. Law is the same. It must be applied to all and equally so, or else forfeit the people's trust and the nation's prosperity.

Of the original 63 clauses in the Magna Carta, most address the ailments of a feudal system and hence are not pertinent in the 21st century and certainly not to Canada. Even so, politicians today often refer to the Magna Carta as a beacon of light for the rights of the people, though this symbolism is not corroborated by the judgment of history. In its foremost and earnest intent, the sheepskin document was nothing more than a gathering of noblemen's interests and did little to support the freedom of the common people. Passion for the Magna Carta has faded and been rekindled whenever it was deemed beneficial for some cause or the other, and it cannot be truthfully stated that the Magna Carta has withstood the ravages of time. Rather, it has been transformed, altered to suit the current challenges to the rule of law, human rights, or democratic principles. Though the general perception of the Magna Carta is not accurate, the upkeep and remembrance of equality and the toils humanity has endured to achieve it is of paramount importance. In Canada, any electoral candidate who suggests contrary to key elements in the Magna Carta would be massacred on the poll — this would not be the case in other countries, in other centuries. Citizens of the world should pride themselves in the knowledge of the immense collective progress we have made since the Magna Carta.

And yet, the Magna Carta's journey does not end at present. Two thousand fifteen marks merely the 800th birthday, and still we have much to strive for in the upcoming centuries. Doubtlessly, it will continue to serve as a symbol of mankind's everlasting pursuit of justice and equality, and it will be many years before we look upon the wrongs that the Magna Carta sought to eradicate as pages uniquely of the past.

* * *

The Ripple Effect of the Magna Carta

by Anushka Kurian, Law 12 student from Hugh Boyd Secondary School in Richmond
Runner-up of the 2015 secondary school Magna Carta essay contest

Human history has a tendency to rely on itself in order to create itself. Thus it can easily be asserted that without its intricate and often trudging past, our modern Canadian legal system would be simply a shadow of what it has truly become. Although far from perfect, our law and government seek to value the lives of its citizens in upholding equality, justice and the protection of every Canadian. This is the product of centuries' worth of democratic evolution, war, inequality, bloodshed, and a thirst to right the many wrongs our race has done unto itself; it was birthed from a need for justice. Its genesis lies in what has grown to become an unassuming part of our high school curriculum: the Magna Carta of 1215. According to an article by United for Human Rights Foundation, "The Magna Carta … was arguably the most significant early influence on the extensive historical process that led to the rule of constitutional law today in the English-speaking world." This being said, one can discern: the signing of the Magna Carta signifies the very foundation on which our modern legal system not only is built, but actively thrives. This is because its fundamental framework laid out the rule of law, human rights and democratic principles that our free society revels in. In observing the rule of law the "Great Charter" enacted, the progression of human rights and its connection to the rule of law, and finally the democratic principles that govern our society as a result, one may discern that which essentially comprises our Canadian legal system in the 21st century.

The Magna Carta primarily established what we can recognize as the irrevocably pivotal rule of law. At the crux of an effective modern legal system is the universal accountability of all those who exist within it. As the "first document in English history to limit the powers of the monarch," the Magna Carta of King John's nobles proposed the virtuous and contextually daring idea of the law being the absolute ruler as opposed to the monarch. Acknowledging that this was simply a preliminary step, the nobles included the writ of habeas corpus, seeking to prevent unlawful detention. Eight hundred years of legal evolution later, section 10(c) of the Canadian *Charter of Rights and Freedoms* addresses the same writ. Our 21st-century legal system flourishes on the basis that no single person is above the law. This type of all-encompassing governing serves to eliminate the hierarchy of an absolute monarch and empower the people and, in doing so, concurrently empowers the nation itself. While classism is to a degree unavoidable, it is by all means preventable. In limiting the powers of those who hold power, power itself is not something one can obtain, and instead must be something a preconceived system enacts. A shift in the attitudes of how citizens are viewed is the root of shifting attitudes in the type of legislature that is written. Creating a certain element of equality in all who are accountable of the law was the beginning of this phenomenon, spurring a chain of events that sought to improve upon the Magna Carta's fundamental ideology: the rule of law.

Wars and revolutions have been waged and won to obtain even the most basic rights throughout human history. The ideology of every citizen deserving equal treatment in the eyes of the law and concurrently being protected by that law is a wholly new one. Our modern Canadian legal system and government includes measures that ensure such rights be upheld to the highest degree in recognizing their importance. These measures include the creation of statute law such as the Canadian Bill of Rights, and later, the *Charter of Rights and Freedoms*, both which sought to ensure fairness, protection, etc. to all Canadian citizens. Such statutes were an enormous evolution from unwritten common and case law that governed Britain before the Magna Carta. In King John's signing the "great charter," the legislature was able to extrapolate a sense of justice to include a sphere of human rights that was entirely non-existent before. It created a framework to address not only accountability in who is subject to the law, but how the law is equally enforced and upheld. The latter is fundamental. To whatever degree Canada's law may have been effective before 1982, human rights were not legitimately ensured in a definitive and lasting way until the Charter became constitutional. What is relevant to note is that this could never have occurred if not for a series of preceding events. The Charter would not have been implemented if not for Diefenbaker's 1960 Bill of Rights, which in turn would not have been significant if not for the UN Universal Declaration of Human Rights of 1948, following the Second World War. These events trace back through history, circulating a chronological increasing of political awareness regarding human rights, until eventually finding their origin in the Magna Carta's framework. The idea of all being accountable was fundamental in establishing the idea of all being equal. Today, the Canadian Charter of Rights and Freedoms governs a fair and equal sense of justice applicable to all of Canadian society that would have been entirely impossible without the groundwork set out by King John's nobles.

In a fair and equal society, democracy must follow clear principles in order to effectively function. The origin of such modern principles can be found in Runnymede, England in 1215. Beyond the concrete products that were the ripple effect of the Magna Carta (including but not limited to the Bill of Rights and the *Charter of Rights and Freedoms*), social and political ideologies that grew to encompass equality and justice in a far more intimate way were made possible in lieu of its signing. Democracy as a principle was created when a monarch signed away its right to be as such. Not immediately, but eventually, the end of absolute monarchy as an institution was promised. Despite our world struggling with obtaining democracy to a large degree (25 per cent of the world is classified as "partly free" and 35 per cent as "not free" according to 2014 findings from the organization Freedom House), Canadians

are both protected and empowered by our democratic legal system. Today, essential democratic elements include components such as the separation of three branches of power, the active participation of citizens, political tolerance and many others. The first references the necessity of disassociating the judicial, executive and legislative branches of government which play imperative roles in altering or interpreting the law. The second addresses the participation of citizens and their fueling of the democratic system in participating in voting, elections, volunteering, taxes, etc. Political tolerance, finally, inferences the vitality of protecting the minority. In a system which centralizes the majority opinion and decision, democracy is only upheld so long as the minority view is as well protected. These values serve as some examples of that which allows us to operate as a just society far more evolved than that of King John's — one which the nobles who pressed for the Magna Carta's triumph likely envisioned. The principles of our democratic system are debatably the most vital outcome of the Magna Carta's signing; it is comprised of both the aforementioned concepts of human rights and the rule of law and extends far beyond such in defining what our society needs to operate in order to maintain its freedom and justice.

Human history has a tendency to rely on itself in order to create itself. The Magna Carta has spurred innumerable evolutionary legislatures, actions, attitudes and ideologies that have cumulatively created the proud legal system our society upholds today. The legal system in effect in 21st-century Canada has developed to encompass five greater functions than it ever once did: establish rules of conduct, provide a system of enforcement, protect rights and freedoms, protect society, and resolve disputes. This type of punctiliousness in addressing the way Canadian citizens are governed is illustrious of the vibrant and progressive legal system we have cultivated. Beginning with the rule of law, growing to address human rights, and finally enacting crucial and underlying democratic freedoms, the evolution of Canadian law, government and our court system is dependent on one sagacious event: the Magna Carta of 1215, the foundation on which our modern legal system not only exists, but thrives. ❖

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.

* * *

Between February 12 and May 17, 2016, the Law Society obtained undertakings from 10 individuals and businesses not to engage in the practice of law.

The Law Society also obtained orders prohibiting the following individuals from engaging in the unauthorized practice of law:

Ralph Charles Goodwin

On December 11, 2015, Mr. Justice Macintosh found Ralph Charles Goodwin, of Duncan, BC, in contempt of the injunction order of Mr. Justice Greyell pronounced March 28, 2013. The court found that, on various websites, Goodwin had offered legal services to the public and represented himself as "Law Speaker," "Chancellor of Laws" and other titles connoting that he was entitled or qualified to engage in the practice of law contrary to the order of Mr. Justice Greyell. In addition, Goodwin failed to inform the Law Society of his involvement in the legal matters of others as the injunction required.

The court ordered Goodwin to remove various websites on or before December 25, 2015. After Goodwin failed to remove the various websites, on February 3, 2016, Mr. Justice Macintosh ordered Goodwin to be incarcerated for 30 days without remission. Mr. Justice Macintosh also ordered that Goodwin remove the offending websites within 30 days of his release. The court awarded the Law Society $5,519.87 in costs. (February 2, 2016)

Michael Helfrich, aka Marvin Helfrich

Madam Justice Gerow found Michael Helfrich, also known as Marvin Helfrich, of North Vancouver, in contempt for having engaged in the practice of law contrary to a 2013 injunction order. Helfrich, who is a former lawyer from Oregon, admitted to having appeared as an advocate in court, negotiated the settlement of a claim for damages, drafted pleadings and documents for a bankruptcy proceeding and given procedural and substantive legal advice to third parties contrary to the injunction. Pursuant to the order, Helfrich must pay a $5,000 fine and perform 100 hours of community work service in a field not related to law or accounting. Helfrich must also pay $5,500 in restitution to a person for whom he provided legal services and must pay the Law Society $6,500 in costs.

The court also expanded the 2013 injunction to prohibit Helfrich from performing any activities that constitute the practice of law regardless of whether he charges a fee, including assisting with corporate documents, and also from representing himself as a lawyer or in any other manner that connotes that he is qualified or entitled to practise law. Helfrich is also prohibited from commencing, prosecuting or defending a proceeding in any court, unless he is representing himself in the proceeding, acting without counsel solely on his own behalf. (May 9, 2016) ❖

Articling offers by downtown Vancouver firms to stay open to August 12

ALL OFFERS OF articling positions made this year by law firms with offices in downtown Vancouver must remain open until 8 am on Friday, August 12, 2016. Downtown Vancouver is defined as the area in the city of Vancouver west of Carrall Street and north of False Creek.

Set by the Credentials Committee under Rule 2-58, the deadline applies to offers made to both first- and second-year law students. The deadline does not affect offers made to third-year law students or offers of summer positions (temporary articles).

If the offer is not accepted, the firm can make a new offer to another student within the same day. Law firms cannot ask students whether they would accept an offer if an offer was made, as this places students in the very position Rule 2-58 is intended to prevent. If a law student advises that he or she has accepted another offer before August 12, the firm can consider its offer rejected.

If a third party advises a lawyer that a student has accepted another offer, the lawyer must confirm this information with the student. Should circumstances arise that require the withdrawal of an articling offer prior to August 12, the lawyer must receive prior approval from the Credentials Committee. The committee may consider conflicts of interest or other factors that reflect on a student's suitability as an articled student in deciding whether to allow the lawyer to withdraw the offer.

For further information, contact Member Services at 604.605.5311.❖

In brief

2015 REPORT ON PERFORMANCE AND FINANCIAL STATEMENTS

THE LAW SOCIETY'S 2015 Report on Performance and audited financial statements are available online. Our annual report provides a progress update on strategic initiatives in the first year of our 2015-2017 Strategic Plan.

For the ninth year, we also review key performance measures for our core regulatory functions to evaluate the overall effectiveness of Law Society programs. These performance measures form a critical part of our regulatory transparency, informing the public, government, the media and the legal community about how we are meeting our regulatory obligations.

TWU APPEAL PROCEEDINGS

THE LAW SOCIETY'S appeal of the decision in *TWU* v. *The Law Society of BC* was heard by a panel of five justices in the BC Court of Appeal from June 1 to 3, 2016. At the time of publication of the *Benchers' Bulletin*, the justices had not issued their decision.

Check the Law Society's website for more up-to-date information.

JUDICIAL APPOINTMENTS

Catherine Ann Crockett has been appointed a judge of the Provincial Court in Campbell River.

Brian Harvey has been appointed a judge of the Provincial Court in Nanaimo.

Judge Melissa Gillespie has been appointed an Associate Chief Judge of the Provincial Court, replacing **Associate Chief Judge Nancy Phillips**, who has completed her term and will return to sitting duties.

Judge Susan Wishart has been appointed an Associate Chief Judge of the Provincial Court.❖

Self-represented litigant Jennifer Muller at the Vancouver Law Courts

Photo: Ron Sangha Productions Ltd.

Overcoming resistance to limited representation

WHEN JENNIFER MULLER was served notice that her former partner had filed a civil claim in the Supreme Court of BC seeking 50 per cent custody of their two-year-old daughter, she was caught by surprise and was determined to contest the claim. She did what she assumed anyone would do in her situation: she hired a lawyer.

After interviewing three candidates, Muller settled on a lawyer who seemed concerned about her case and who affirmed Muller's belief that hiring a lawyer to see the case through to trial was the right decision. "I was feeling under threat, afraid of what the future might hold. When I hired the lawyer, I remember feeling an immense sense of relief," Muller recalls.

That relief, however, soon gave way to another source of anxiety. Within six weeks Muller received a bill for just over $20,000. Within four months, the total had climbed to more than $50,000. Muller could no longer afford her lawyer. Still nowhere near resolving the custody dispute, she was on her own.

Muller is hardly the exception. In the Provincial Court of BC last year, 41 per cent of appearances in family cases were self-represented (as were 18 per cent in the adult criminal division, and 65 per cent in small claims appearances). In the Supreme Court of BC last year, 36 per cent of appearances in family law proceedings involved self-represented litigants.

Like Muller, the majority of those litigants were not self-represented by choice, but by necessity. According to a 2013 research paper by University of Windsor law professor Julie Macfarlane, "By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel." Of the 259 self-represented litigants Macfarlane interviewed for her study, 53 per cent had been represented by counsel earlier in their action.

* * *

Left to navigate the court system on her own, Muller was distraught. "I was terrified by the thought that I might lose my daughter," she recalls. "I know now that losing custody was not an option, but at the time I felt so vulnerable. I felt that without a lawyer to represent me anything could happen."

Muller sought the services of a lawyer who could at least offer some limited advice and help her figure out which forms she needed to file, how to fill them out and how to comport herself when appearing before a judge. She Googled "lawyer" and "Vancouver" and started making calls, only to find that no lawyer was willing to help her on an hourly basis as a consultant or advisor. Finally, on the suggestion of a friend, she contacted Mark Lecovin, a Vancouver lawyer specializing in family law, who agreed to help her, albeit reluctantly. She met with him for two hours every other week, paying $350 an hour for his advice.

In all, Muller's case would span 13 months and she would appear before eight different judges. Most of those appearances were interim hearings: a judge would make a temporary custody order lasting six or eight weeks, and Muller would have to reapply to have the order continue or to make changes to it. For the first couple of hearings, Muller was represented by the lawyer she had initially hired. Thereafter, she appeared on her own behalf, guided by advice from Lecovin for her final two or three appearances.

Muller recalls one appearance before a judge, where she was seeking permission to make a deposition. "I was meticulous in all my written statements, was painstaking in getting it right," she recalls. At one point during the hearing, Muller cited a rule and the judge asked her for the rule's index number. "I had the book in a bag by my feet and I asked if I could look it up," Muller recalls. "He said, 'No, go home and come back when you know the rules.'"

When her case was finally heard in court, Muller appeared on her own behalf, with the benefit of Lecovin's advice. She faced expert legal counsel representing the opposing side.

Muller was ultimately unsuccessful, but she was fortunate to have found a lawyer who saved her from appearing in court entirely on her own. While the courts track numbers of litigants representing themselves, there is no way of knowing how many, unable to find help navigating the process, simply give up in frustration. Full representation is of course preferable, but some legal counsel is certainly better than none.

Nanaimo lawyer Denice Barrie can attest that, in some circumstances, a few hours of advice and coaching can even be enough to guide a self-represented litigant to success in the courtroom.

Barrie articled in Ontario and launched her career as a sole practitioner offering a range of services, including wills and estates, real estate and some family law. After moving to BC, she joined a roster of lawyers providing limited legal advice at the Justice Access Centre in Nanaimo. At first she was skeptical: "I started out thinking that this was a Band-Aid service provided by the province in an attempt to backfill for cuts to legal aid, that everybody needs a lawyer," she explains.

I realized that, with some strategic support, if you're there at the right time and the right place, and you can offer some coaching and support, people can do a lot on their own.

– Nanaimo lawyer Denice Barrie

One experience changed Barrie's perspective. A forestry worker with little education had been laid off and had fallen $60,000 in arrears in his child support payments. With just a few hours of advice, Barrie helped him prepare an application to retroactively change the support order and present it in the Supreme Court of BC. The application was successful.

"I realized that, with some strategic support, if you're there at the right time and the right place, and you can offer some coaching and support, people can do a lot on their own," Barrie recalls.

Barrie went on to restructure her practice. Through her company, Waymark Law, she now offers "unbundled" legal services — of the kind she offered the forestry worker — for $250 an hour, coaching for $150 an hour and legal research for $75 an hour. When the occasional client asks her to represent them in court, Barrie will handle the case through her other business, a separate law corporation, and represent the client at a rate of $250 an hour, with a maximum retainer of $2,500.

Barrie understands that unbundled services alone are not the solution to insufficient access to legal representation in the courts. "Of course, on balance, experienced counsel has an advantage," she says. "But I have had clients who fared extremely well against experienced counsel." She explains that self-represented clients who do well tend to be educated and motivated to learn about the court system, and to have the time required to prepare their case and present it in court.

Barrie also understands that her model will not suit every lawyer. "People go to law school for a reason, and it's not usually because they want to be a coach. Most like taking over and running a case." However, she derives immense personal satisfaction from empowering her clients and believes there are similarly inclined lawyers who would benefit from a business model similar to hers.

The kind of "unbundled" legal services that Barrie has built her practice around — and that Muller received from Lecovin — are often more formally known as limited scope representation, where a lawyer provides legal services for part, but not all, of a client's legal matter. The Law Society made limited scope retainers possible in 2008 with changes to the Law Society Rules, and the provision of such services was further facilitated by amendments to the *Code of Professional Conduct for British Columbia* in 2013. Those amendments were aimed at addressing lawyers' concerns, such as potential conflict of interest or being held responsible for matters beyond the scope of the agreement.

Nevertheless, for self-represented litigants it remains very difficult, if not impossible, to find a lawyer offering such services. While lawyers cite various reasons for reluctance to offer limited scope representation — such as concerns about adequate remuneration, or the potential for client complaints — ultimately, the biggest obstacle may be outdated attitudes about law and the role of lawyers.

* * *

Having begun his career as a general litigator with a big Toronto firm, Kelowna

lawyer Ron Smith, QC understands the prestige that comes with winning big cases. Today, however, he believes the winner-take-all approach is outdated, particularly in family law. Improved access to justice, he believes, depends on "the willingness of us old grizzly bears to see that our job is not to win in court, but to resolve disputes. I still see too many grizzly bears who count professional success on the basis of scalps on their belt."

It's an attitude that may help explain why clients like Jennifer Muller are so easily persuaded that placing their case in the full control of a lawyer is the only option. Smith suggests that, rather than approach the initial consultation as an opportunity to convince clients they need to hire a lawyer, lawyers might view the initial consultation as an opportunity to explain the legal process, outline the options and explain what services a lawyer can provide.

Clients also bear some responsibility for educating themselves before hiring a lawyer, Smith says, as well as for asking questions at the initial consultation. "Imagine building a house. If a contractor tells you, 'I'll build it, but I can't tell you how much it will cost, how long it will take or what it will look like,' would you hire him? No, but that's what people do with lawyers all the time."

As Smith describes it, a lawyer might provide just one piece in a complex array of professional services. A divorce coach, for example, might offer advice about resolving conflict, or a tax specialist might suggest a mutually beneficial way to divide assets.

Such an approach has the potential to make a significant improvement in access to justice, Smith says. "What unbundling really means is how can we provide better access to justice for the public by providing them with smaller chunks, and realizing that as counsel our job is not to win cases but to resolve disputes."

Perhaps the concern most often cited by lawyers reluctant to offer limited scope representation is that they may be held responsible for matters beyond the scope of the retainer agreement. That's understandable, but not borne out by experience, says Victoria lawyer Aesha Faux.

Faux is a family lawyer who offers a range of services, from collaborative dispute resolution and mediation to full-service litigation. She estimates that about 30 per cent of her practice involves unbundled services of one kind or another.

Clients seeking unbundled services are in fact less likely to complain, Faux says, because they know what they're looking for: "They don't want you to be involved in everything. They understand you're not responsible for the larger scope and they only want you to be involved in a small piece of it."

Where problems are likely to arise, Faux says, is when a client thinks they're hiring a lawyer on a full retainer but the lawyer thinks it's a limited retainer. That's why it's important, she says, to draft an agreement that very clearly specifies which services are and are not included — and then to stick to the agreement. Scope creep is a very real possibility: "You get busy and the client asks you to do something and you think, okay, I need to do this." The solution, Faux says, is not to simply draft an agreement and consider the matter closed, but to continually reassess the agreement as a case proceeds, and revise it or draft another one if necessary.

What unbundling really means is how can we provide better access to justice for the public by providing them with smaller chunks, and realizing that as counsel our job is not to win cases but to resolve disputes.

– Kelowna lawyer Ron Smith, QC

* * *

While Muller was fortunate to find a lawyer willing to help her on a limited scope basis, lawyers offering such services remain the exception rather than the rule, and finding those who do remains a challenge. A number of initiatives aim to educate lawyers about the potential benefits of offering limited scope retainers, and to make such services more accessible to the public.

Access to Justice BC, headed by the Honourable Robert Bauman, Chief Justice of British Columbia, is a leadership group committed to improving the family and civil justice systems. As an executive member of Access to Justice BC, Jennifer Muller is a co-lead of a working group focused on promoting unbundled legal services. That working group will gather input from lawyers currently offering limited scope representation in an effort to promote the practice among the profession.

Muller's co-lead in that working group is Kari Boyle, executive director of Mediate BC, an organization that has launched its own initiative aimed at encouraging more lawyers to offer unbundled services. Boyle explains that Mediate BC's Family Unbundled Legal Services Project is currently in an initial research phase, which has two goals: to find out who is already offering such services and what is working for them, and to find out what is keeping more lawyers from offering unbundled services.

As part of that initial research, Mediate BC has launched a two-part online survey: one for lawyers and one for members of the public. The survey will remain online until the fall; to participate, visit mediatebc.com/unbundle. Boyle reports a strong early response from lawyers, with about 40 responding in the early weeks of the survey.

According to Boyle, two themes have emerged in early responses from lawyers: fear that unbundled services could lead to a complaint and potential disciplinary action by the Law Society, and fear that judges or colleagues on the bar will think poorly of lawyers offering unbundled services.

The second phase of the Family Unbundled Legal Services Project will be to develop resources aimed at making more unbundled services available to the public. Boyle explains that the goal is to produce a toolkit for lawyers, including sample limited scope retainer agreements with checklists specifying which services are and are not included. Mediate BC also hopes to produce a roster of lawyers offering unbundled services so that members of the public seeking such services will have an alternative to searching the Internet. ❖

More information is available on the Law Society website, including an online seminar and sample documents. Go to www.lawsociety.bc.ca and type "limited scope retainers" into the search box.

Supreme Court of Canada releases decisions concerning CRA notices of requirements

THE ISSUE CONCERNING lawyers' professional obligations where they receive a notice of requirement to produce information from the Canada Revenue Agency (CRA) in connection with a client's information or documents has been discussed several times over the last number of years in previous *Benchers' Bulletins*. Most recently, in the Spring 2016 issue it was noted that the Quebec Court of Appeal had declared the provisions for the *Income Tax Act* under which the notices of requirement were issued to be constitutionally invalid, and that the decision was appealed to the Supreme Court of Canada.

The Supreme Court recently released its decisions in *Canada (Attorney General)* v. *Chambre des Notaires du Quebec*, 2016 SCC 20, and *Canada (National Revenue)* v. *Thompson*, 2016 SCC 21.

In the former case, the court concluded that a notice of requirement issued under the *Income Tax Act* constitutes a seizure within the meaning of s. 8 of the Charter, and that the seizures made under s. 231.2 of the Act were unreasonable and contrary to s. 8 because the requirement scheme did not provide adequate protection for solicitor-client privilege.

In particular, the court held that the procedures set out in the *Income Tax Act* did not require the holder of the privilege (that is, the client) to be informed of the notice of requirement or of any proceeding brought by CRA to obtain an order to provide the information or documents required to be produced. Moreover, the procedure also placed the entire burden of protecting the privilege on the lawyer. The court also concluded that neither the Attorney General nor CRA had established that it was absolutely necessary to impair solicitor-client privilege. Because the impugned provisions did not minimally impair the right to solicitor-client privilege, they could not be saved under s. 1. As such, the sections in question (ss. 231.2(1) and 231.7 of the *Income Tax Act*) were declared to be unconstitutional and inapplicable to lawyers and Quebec notaries in their capacity as legal advisors.

The court also held that the definition of "solicitor-client privilege" in s. 232(1) of the *Income Tax Act* was unconstitutional and invalid. The manner in which it limits the scope of solicitor-client privilege is not absolutely necessary to achieve the purposes of the *Income Tax Act*, and therefore the exception is contrary to s. 8 of the Charter.

In *Thompson*, the court noted that the definition of "solicitor-client privilege" in s. 232(1) of the *Income Tax Act* is unequivocal, and Parliament's intent to define privilege so as to exclude a lawyer's accounting record from its protection "could hardly be clearer." While Parliament may, with clear and unambiguous language, evince an intent to abrogate privilege in respect of specific information (see *Canada (Privacy Commissioner)* v. *Blood Tribe Department of Health*, 2008 SCC 44), the question of whether a legislature can abrogate solicitor-client privilege over a class of documents in which the seizure of such documents is permitted cannot be answered, the court concluded, on the basis of *Blood Tribe* alone. In *Thompson*, the Supreme Court noted that Parliament's intent and its ability, in constitutional terms, to define solicitor-client privilege in a particular way are not necessarily equivalent.

Where a seizure is involved, s. 8 of the Charter comes into play. As noted in *Chambre des Notaires*, the court concluded that the purported abrogation of solicitor-client privilege over accounting records in s. 232(1) of the *Income Tax Act* is constitutionally invalid because it permits the state to obtain information that would otherwise be privileged to a far greater extent than is absolutely necessary for the administration of the *Income Tax Act*.

As a result of the court's decisions, ss. 231.2 and 231.7 of the *Income Tax Act* are unconstitutional and inapplicable to lawyers and Quebec notaries in their capacity as legal advisors, and the exception in the definition of solicitor-client privilege in s. 232(1) of that Act is constitutionally invalid.

Lawyers who are currently the subject of an outstanding notice of requirement pursuant to s. 231.2 or who are a party to an application for a compliance order under s. 231.7 should contact Barbara Buchanan, QC (bbuchanan@lsbc.org) or Michael Lucas (mlucas@lsbc.org) at the Law Society if they have any questions.❖

PRACTICE ADVICE

Top 10 questions asked of practice advisors

LAW SOCIETY PRACTICE Advisors typically answer thousands of emails and telephone calls a year. It doesn't take long for patterns to emerge, so we thought it would be useful to compile our list of the top 10 questions asked of Practice Advisors.

The answers will not fit all fact patterns and may not go into sufficient detail for every situation. Lawyers should consult the *Code of Professional Conduct for British Columbia* (the website version contains annotations of Ethics Committee opinions, discipline decisions and case law), the *Legal Profession Act*, the Law Society Rules, and the numerous manuals, checklists, forms or practice resources on the Law Society website.

Contact a Practice Advisor if you remain unclear or have further questions. All calls to Practice Advisors are confidential, except in the case of trust fund shortages. Read about the role of Practice Advisors on our website at Lawyers > Practice Support and Resources > Practice Advisors.

1. When do I have a duty of confidentiality?

Refer to section 3.3 of the *BC Code*. The duty of confidentiality is broader than the common law concept of privilege (rule 3.3-1, commentary [2]); it continues indefinitely even if others share the same knowledge.

The exceptions to the ethical duty of confidentiality currently set out in the Code include:

- authorization by the client, as required by the court, or to deliver information to the Law Society (rule 3.3-1);
- as necessary until a representative is appointed to protect a client from imminent harm when he or she is lacking in capacity (rules 3.2-9, commentary [5] and 3.3-1, commentary [10]);
- to prevent future harm for risk of death or serious bodily harm (rule 3.3-3);
- to defend against criminal or civil liability, allegations of negligence involving a client's affairs, or alleged professional misconduct (rule 3.3-4);
- to collect fees (rule 3.3-5); and
- to secure legal or ethical advice from another lawyer about your proposed conduct (rule 3.3-6).

In all cases, the lawyer should only disclose as much confidential information as is necessary. Also, a lawyer who is required under federal or provincial legislation to produce a document that is privileged must, unless the client waives privilege, claim solicitor-client privilege (rule 3.3-2.1).

The Code currently does not explicitly provide an exception for the exchange of confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from a lawyer's change of employment or from changes in the composition or ownership of a law firm. Such an exception is under review and a rule may eventually be included in the Code to address this. In the meantime, lawyers are encouraged to read rule 3.3-7 of the Federation of Law Societies Model Code at www.flsc.ca (National Initiatives > Model Code of Professional Conduct) and speak with a Practice Advisor.

The exceptions to the duty of confidentiality can be difficult to discern at times and a call to a Practice Advisor is recommended in most situations where one is contemplated.

2. Am I in a conflict of interest on this file?

Refer to the definition of "conflict of interest" in rule 1.1-1 and section 3.4 (Conflicts) of the *BC Code*. See also the Model Conflict of Interest Checklist on our website (go to Lawyers > Practice Support and Resources > Confidentiality/privacy/conflict of interest). There is a wide variety of topics covered in the Conflicts portion of the Code, including the duty to avoid conflicts of interest, joint retainers (Practice Support and Resources > Retainer agreements, limited scope retainers and joint retainer letters), conflicts arising from transfer between law firms (see also Appendix D of the Code; "Ethical considerations when a lawyer moves on," Practice Watch, Summer 2014 *Benchers' Bulletin*; and E-Brief, May 2016, Consultation on transferring lawyer rules), conflicts with clients and doing business with clients, how to give independent legal advice under the Code (Lawyers > Lawyers Insurance Fund > Preventing claims > Independent legal advice), and space sharing arrangements (Practice Support and Resources > Lawyers Sharing Space).

3. Can I withdraw from this file?

Refer to section 3.7 and rule 3.6-2, commentary [2] of the *BC Code*. The basic rule for withdrawal is found in rule 3.7-1, which in essence says a lawyer can only withdraw for good cause and on reasonable notice. Unless your situation fits one of the exceptions found in rules 3.7-2 and 3.7-7, you must always give reasonable notice to your client before withdrawing. Withdrawal for nonpayment of fees is no exception to the reasonable notice requirement (rule 3.7-3). If you are in process with a transaction or have an upcoming proceeding set on behalf of a client, contact a Practice Advisor to determine whether there is sufficient time for you to withdraw in the circumstance. The manner of withdrawal is dealt with in rules 3.7-8 to 3.7-10.

There are additional aspects to consider when withdrawing in a criminal case (rules 3.7-3, commentary [2] and [3], and 3.7-4 to 3.7-6), and where a contingency agreement is in place (rule 3.6-2, commentary [2]).

For information on the ownership of the file contents, see the article "Ownership of Documents in a Client's File" on our website at Lawyers > Practice Support and

Resources > Client Files. If you are withdrawing from a file because you are changing firms, refer to rule 3.7-1, commentary [4] to [10] and the information available at Practice Support and Resources > Lawyer leaving law firm.

4. Does my client have capacity?

Refer to rules 3.2-9 and 3.3-1, commentary [10] of the *BC Code*. When a client's ability to make decisions is impaired because he or she has a mental disability (or is a minor), the lawyer must maintain a normal lawyer and client relationship as far as reasonably possible. Although a doctor's assessment may assist in determining capacity, ultimately it is a legal test, and you must make the decision whether the client has capacity. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision (rule 3.2-9, commentary [1]).

If you decide to engage a doctor or other professional to assist in making the determination, it is crucial that the professional understand the nature of the decision to be made by the client. Often the client has the capacity to make certain decisions, even though the doctor's opinion may be that she or he generally has an impaired mental state. It can be worthwhile to find out if the client has better times of day or conditions (e.g., before or after medication) that can assist with his or her mental functioning when a decision needs to be made.

Further information on capacity is on our website at Lawyers > Practice Support and Resources > Capacity: "Acting for a client with dementia" (Practice Watch, Spring 2015 *Benchers' Bulletin*) and the BC Law Institute Report on Common-Law Tests of Capacity. If there are issues with a client's capacity, there may also be concerns about undue influence. For insight into undue influence and a checklist for recognition and prevention, see the BC Law Institute's Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide (Practice Support and Resources > Wills).

If the client is incapable of giving instructions and if you reasonably believe he or she has no other agent or representative and a failure to act will result in imminent and irreparable harm, you may take action to the extent necessary to protect the person (rule 3.2-9, commentary [2] to [5]). Rule 3.3-1, commentary [10] makes an exception to the duty of confidentiality in such a circumstance.

5. Where can I find information on client identification and verification?

Read Law Society Rules 3-98 to 3-109. See also the extensive information available on our website at Lawyers > Practice Support and Resources > Client Identification and Verification. You will find a Client Identification and Verification Checklist, a sample attestation form for verification of identity attached to the Checklist as Appendix I, a sample agency agreement attached to the Checklist as Appendix II, and FAQs devoted to this topic.

6. How do I deal with the tax components of my bill?

There are several resources on our website at Lawyers > Practice Support and Resources > Law office management > Tax. However, the Law Society is not able to provide tax advice. We suggest you contact your bookkeeper or accountant or a tax lawyer if you have specific questions and refer to the following resources:

- BC Ministry of Finance Bulletin PST 106 – Legal Services at www.sbr.gov.bc.ca/documents_library/bulletins/pst_106.pdf;
- Provincial Sales Tax FAQs at www2.gov.bc.ca/gov/content/taxes/sales-taxes/pst/faqs (or email CTBTaxQuestions@gov.bc.ca);
- Canada Revenue Agency (CRA) GST/HST Policy Statement P209R – Lawyers' disbursements (taxable/nontaxable) at www.cra-arc.gc.ca/E/pub/gl/p-209r/README.html; and

- CRA advance rulings at www.cra-arc.gc.ca/tx/txprfssnls/srvcs/menu-eng.html.

7. I am considering a space share arrangement — what issues should I bear in mind?

First, refer to rules 3.4-42 and 3.4-43 of the *BC Code*. Then read the article "Lawyers Sharing Space" on our website (Lawyers > Practice Support and Resources > Lawyers Sharing Space). We recommend you call the Practice Advice department if you have specific questions or scenarios.

8. Where can I find information on dealing with client files?

There are two helpful articles on our website; go to Lawyers > Practice Support and Resources > Client Files. Read "Closed Files: Retention and Disposition" for information on what to keep and for how long, including information on secure destruction of physical and electronic documents. "Ownership of Documents in a Client's File" explains the ownership of file contents.

9. I am a sole practitioner and I am considering retirement — what do I need to think about?

If you are still at the planning stage for retirement, see the succession plan information on the Law Society website (Lawyers > Practice Support and Resources > Practice Coverage and Succession Planning). Succession planning is an important consideration for any sole or small firm practitioner in advance of retirement. If you are actually beginning the process of winding down, see the article "Winding Up a Sole Practice: A Checklist" (Practice Support and Resources > Closing a law practice).

10. When do I have to report myself or another lawyer to the Law Society?

On the financial side, there are rules about reporting judgments, insolvency and trust shortages. Law Society Rule 3-50(1) requires a lawyer against whom a "monetary judgment" (defined in Rule 3-47) is entered and who does not satisfy the judgment within seven days after the date of entry to notify the Executive Director in writing immediately. Rule 3-51 requires an "insolvent lawyer" (defined in Rule 3-47) to immediately notify the Executive Director in writing that he or she has become an insolvent lawyer and deliver the information and material described in that rule. A lawyer must immediately make a written report to the Executive Director, including all relevant facts and circumstances, if the lawyer discovers a trust shortage greater than $2,500, or is or will be unable to deliver up, when due, any trust funds held by the lawyer (Rule 3-74).

Lawyers, articled students, practitioners of foreign law and applicants must report criminal charges in writing to the Executive Director (Rule 3-97).

Code rule 7.1-3 requires a lawyer to report to the Law Society a number of other circumstances, only one of which explicitly refers to money, i.e., a shortage of trust funds. The most frequent question asked of Practice Advisors about this rule is whether a lawyer has to report a breach of undertaking. The rule requires a lawyer to report a breach of undertaking that has not been consented to or waived. Sometimes the lawyer who has been the recipient of the undertaking will waive or consent to the breach when his or her client has not been materially prejudiced; waiver or consent can occur after the time for fulfillment of the undertaking has passed. The Intake and Early Resolution department of the Law Society is of the view that lawyers must also self-report their own breaches of undertaking, as well as breaches by other lawyers. See Code rule 7.1-3 for all the other types of matters that must be reported to the Law Society.

Another frequent question is whether a lawyer should report another lawyer for incivility or bullying. This is not required, but it may be reported if the lawyer feels it is warranted. Lawyers are encouraged to call a Practice Advisor to discuss reporting a lawyer to the Law Society as it is a serious matter.❖

Services for lawyers

Law Society Practice Advisors

Dave Bilinsky
Barbara Buchanan, QC
Lenore Rowntree
Warren Wilson, QC

Practice Advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct*
- 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.

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Optum Health Services (Canada) Ltd. – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
Tel: 604.431.8200 or 1.800.663.9099.

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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.

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Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson **Anne Bhanu Chopra** at tel: 604.687.2344 or email: achopra1@novuscom.net.

Conduct reviews

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

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

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

CLEARING AGED TRUST BALANCES

A lawyer acted improperly by issuing invoices for disbursements that did not accurately or sufficiently describe the services provided. The lawyer was acting for clients in conveyancing matters and issued trust cheques to clients to reimburse funds held in trust for insurance binder fees. When the clients did not cash the cheques and they became stale-dated, the lawyer reversed the cheques and instructed staff to prepare invoices for disbursements in an amount equal to the funds remaining in trust. The invoices were mailed to the respective clients, and the funds were removed from trust contrary to then Law Society Rule 3-56(1)(b) (now Rule 3-64). A compliance audit of the lawyer's trust account identified nine such invoices in which the binder refund cheques were categorized as disbursements and the funds were removed from trust. The lawyer was not aware of the proper procedure for handling unclaimed trust balances. The lawyer now understands that the invoice for disbursements misrepresented what was being done and was inaccurate as those disbursements, as described, were not incurred but were simply an expedient way to deal with the funds remaining in trust. The lawyer expressed remorse to the conduct review subcommittee and no longer invoices clients in this way to deal with unused funds. (CR 2016-05)

LAND TITLE ACT ELECTRONIC FILINGS

A lawyer failed to strictly comply with s. 168-9 of the *Land Title Act*, Law Society Rule 3-64(8)(b) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia* regarding the use of her personal digital signature in electronic filings. A compliance audit conducted by the Law Society revealed that the lawyer provided her password to staff members and allowed them to sign electronically conveyancing documents for submission to the Land Title Office. The lawyer had reviewed and approved the form and content of the documents before staff affixed her signature. The lawyer stated that this process gave her some comfort that the electronic signature was only used after the forms were reviewed and manually signed by her. The lawyer changed her password immediately after the audit revealed the problem. She read the terms and conditions of the Juricert Agreement, the relevant section of the *BC Code* and Law Society Rule 3-64(8)(b). A conduct review subcommittee accepted that the lawyer now understands the underlying reason for the confidentiality of passwords and the importance of lawyers personally affixing their electronic signatures. The subcommittee recommended that the lawyer explain the importance of the electronic system to staff to avoid improper use of the system or fraud. (CR 2016-06)

REPORTING CHARGES TO THE LAW SOCIETY

A lawyer breached Law Society Rule 3-90 (now Rule 3-97) by failing to report to the Law Society charges relating to a driving offence. The lawyer, while prohibited from driving due to a 90-day roadside suspension, was stopped by police while driving. The lawyer had consumed alcohol earlier that evening. The lawyer panicked and knowingly provided false information, including a false name and false date of birth, to the police officer investigating his driving, contrary to rules 2.1-2, 2.1-5, 2.2-1 and 2.2-2 of the *Code of Professional Conduct for British Columbia*. The lawyer was charged with driving while prohibited, impaired driving, driving with a blood alcohol level over .08, and obstruction. It was only after the lawyer retained counsel that he learned he was required to report the charges to the Law Society, which he then did. He pleaded guilty to driving with undue care and attention and driving while prohibited. The other charges were stayed. The lawyer told a conduct review subcommittee that, looking back, his actions were embarrassing and shocking to himself. The lawyer reached out to others and worked on improving personal relationships. He took steps to improve his health and advised that he has been successful in those efforts. He acknowledged the importance of lawyers conducting themselves with honour and integrity. The lawyer assured the subcommittee that he will not repeat similar misconduct in the future. (CR 2016-07)

FALSE OR MISLEADING STATEMENTS

A lawyer failed to exercise adequate care in reviewing documents that sought substantial public funding before signing and submitting them. The documents contained false and misleading information, contrary to Chapter 1, Rule 1, Chapter 2, Rule 1, Chapter 3, Rule 3 and Chapter 4, Rule 6 of the *Professional Conduct Handbook* then in force. The lawyer was a director of a government-funded non-profit association. The lawyer was also a director of a for-profit company that

was intended to become the general partner in a fund designed to raise and direct private investment funding to organizations focused on innovation in an industry. The lawyer received no compensation for his work as a director for either the association or the company.

At a directors' meeting, the lawyer was asked to sign documents pertaining to the application for funding, including a post-dated invoice, claiming payment for salaries and other expenses that had not yet been incurred. The lawyer took the documents with him to review, but claimed not to have had the time to do so. Sometime later, the lawyer was prompted again to sign the documents immediately. The lawyer signed all the documents without giving them further consideration. The requested funding was never advanced and the non-profit association demanded evidence of the expenses shown on the invoice. When none was produced, a police investigation commenced on the suspicion of fraud, but resulted in no charges being laid. The lawyer admitted he was careless and was remorseful.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate because he was negligent, specifically in failing to review carefully the documentation that he signed as a director and in not taking adequate care to investigate his concerns with the company representatives, either as counsel or as a director of the company. The lawyer assured the subcommittee that, while he continues to sit as a director outside his practice on a volunteer basis, he carefully reads all documents and takes the time and attention necessary for the task. The subcommittee explained the concept of progressive discipline and, if this were to occur again, a citation could be issued for his misconduct. (CR 2016-08)

FAILURE TO SUPERVISE STAFF

A lawyer admitted that he had not properly supervised his staff on a conveyance, contrary to rules 6.1-1 and 6.1-3 of the *Code of Professional Conduct for British Columbia*. The lawyer acted for the purchaser of a manufactured home. Letters of undertaking were exchanged between the lawyer and the vendor's lawyer. Although the letter containing the undertaking purported to have the lawyer's signature on it, he did not personally sign it. The letter was signed by the lawyer's paralegal. The registration documents were provided to the lawyer on his undertaking not to register the transfer of the home until he had sufficient funds in his trust account to cover all sale proceeds, including the final advance. The lawyer relied upon the lender's assurances that he would receive the funds. The lender subsequently forwarded those funds directly to the borrower, and the lawyer did not receive the funds. The lawyer said that he was not aware of the undertaking until a few months later but, had he been aware, his practice was to take all funds into trust from the financial institution so that he would have control over the funds. However, as the lawyer had not properly reviewed or supervised his paralegal's conduct of the file, he never contacted the lender to verify that funds would be available.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate because he allowed his staff to assume a level of control of his file that exceeded the proper level of authority. The events of the transaction resulted in the lawyer being unable to comply with the undertaking. As a result, the lawyer violated Chapter 11, Rule 7 of the *Professional Conduct Handbook* (in force until January 1, 2013) and rules 7.2-11, 6.1-1 and 6.1-3 of the *BC Code*. The lawyer acknowledged that he has to increase the level of his supervision of his paralegal, and he has taken steps to rectify his conduct. The subcommittee set out specific steps for the lawyer to take to avoid or prevent a similar problem and to be aware that if he fails to improve his conduct a citation may be issued in respect of any further misconduct. (CR 2016-09)

BREACH OF TRUST CONDITIONS

A lawyer breached trust conditions imposed on her when she received $4,000 in trust in partial settlement of an action commenced by the lawyer's client and paid $3,000 of those funds to the client and $1,000 for fees, contrary to one or both of Chapter 11, Rule 7 of the *Professional Conduct Handbook*, then in force, and Law Society Rule 3-65(7). The terms of the settlement required the defendants collectively to pay $12,000 to the plaintiff. The settlement funds were to be made payable to the lawyer's law corporation in trust for the plaintiff by a set date. If the full settlement funds were received, all claims or cross-claims in the action would be settled. However, if the settlement payment was not received, the trial would continue. Although it was past the due date, the lawyer received $4,000 payable to her firm in trust from two of the defendants, in full and final settlement of the matter. Payments were not received from the other defendants. The lawyer was not at liberty to disburse the money except for the purpose for which it was entrusted to the lawyer, which was to pay the settlement amount. The lawyer did not acknowledge the undertaking when the funds were received. The lawyer did not understand that the funds belonged to the opposing party and were held by the lawyer in trust for that party, until the undertaking was complied with. The lawyer took the position that there was no breach of an undertaking.

A conduct review subcommittee advised the lawyer that the conduct was inappropriate because, prior to paying out the $4,000 in settlement funds, the lawyer did not take any steps either to obtain instructions from the client or to clarify from the two defendants whether the funds could be disbursed, particularly where the payment of the settlement funds was not in accordance with the terms of the settlement. The lawyer also failed to notify the defendants who paid the $4,000 that the action was not settled. The lawyer did not accept that there were trust conditions attached to the $4,000 settlement proceeds and took the position that any trust conditions were ambiguous at best. The subcommittee felt that the issue was one of competence and not honesty or ethics. It was troubled by the lawyer's adamant refusal to acknowledge that the transaction was handled in an inappropriate manner. The subcommittee recommended that the lawyer be referred to practice standards. The Discipline Committee subsequently accepted the recommendation and referred the lawyer to practice standards. (CR 2016-10) ❖

Credentials hearings

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

For the full text of hearing panel decisions, visit the Hearing decisions section of the Law Society website.

LYLE DANIEL PERRY

Review: September 23, 2015

Review board: Maria Morellato, QC, chair, Jasmin Ahmad, Dennis J. Day, Miriam Kresivo, QC, Richard Lindsay, QC, Jamie Maclaren and June Preston

Decision issued: December 3, 2015 (2015 LSBC 55)

Counsel: Jean Whittow, QC for the Law Society; Henry Wood, QC for Lyle Daniel Perry

BACKGROUND

Lyle Daniel Perry had previously been called to the bar in South Africa. After immigrating to Canada, he engaged in the unauthorized practice of law by offering and providing legal services. The Law Society directed Perry to immediately cease practising law and to sign an undertaking not to engage in the practice of law. Perry signed and returned the undertaking in December 2011. Concerns were raised regarding whether he had engaged in the unauthorized practice of law after signing the undertaking and, if so, if he had done so knowingly.

At a credentials hearing into Perry's application for enrolment in 2014, the majority of the hearing panel concluded Perry is a person of "good character and repute" and allowed him to be admitted to the Law Society Admission Program. The chair of the panel disagreed with the majority decision: see hearing decision 2015 LSBC 13 and the credentials summary in the Summer 2015 *Benchers' Bulletin*.

The Credentials Committee applied for a review of the hearing panel's decision.

DECISION OF THE REVIEW BOARD

The review board determined that the hearing panel majority correctly assessed Perry's character.

The review board highlighted the distinction between conduct and character. After an independent analysis of Perry's character in respect of every allegation and finding of improper conduct, the hearing panel majority concluded that, while the conduct itself was improper, it did not necessarily reflect "bad character" given the circumstances.

The review board determined that the hearing panel majority did not place undue reliance on Perry's testimony, considered each concern that gave rise to the credentials hearing and provided detailed reasons and findings in its assessment of Perry's character.

The review board confirmed the decision of the hearing panel majority that Perry is a person of good character and fit to be admitted into the Law Society admission program.

APPLICANT 8

Review: January 28, 2016

Review board: Gregory Petrisor, chair, Ralston S. Alexander, QC, Glenys Blackadder, Craig Ferris, QC, Jamie Maclaren, June Preston and Sandra Weafer

Decision issued: March 22, 2016 (2016 LSBC 12)

Counsel: Gerald Cuttler for the Law Society; Michael Tammen, QC for Applicant 8

BACKGROUND

Applicant 8 was involved with a criminal proceeding in 2013 concerning the alleged assault of his wife and the circumstances surrounding those charges. The proceedings were resolved when the applicant entered into a recognizance that required him to admit there were reasonable grounds to fear that he would cause personal injury to his spouse.

At a credentials hearing into Applicant 8's application for enrolment held February 2-5, 2015, a majority of the panel concluded that the applicant does not have such a defect in character that it should prevent him from starting on the road toward becoming a lawyer and granted his application to become enrolled as an articled student. One panel member dissented, stating that the facts and submissions did not inspire confidence that Applicant 8's character defects would not resurface when he faces the pressure, conflicts and disagreements that lawyers must routinely cope with in an objective and balanced fashion. (See hearing decision 2015 LSBC 23 and the summary in the Fall 2015 *Benchers' Bulletin*.)

The Credentials Committee referred the hearing panel's decision for a review on the record.

DECISION OF THE REVIEW BOARD

The review board found that the hearing panel erred in failing to recognize the test of character is the same for admission as an articled student as it is for admission as a member of the Law Society. The test for character is identical for applicants regardless of the nature

of their application.

The hearing panel majority suggested that the determination of character would come later when the decision of the criminal proceedings was released and when the applicant applies to be admitted to the bar. The postponement of the test for character is not permitted by the law and the *Legal Profession Act* does not leave room for improvement during articles. The determination of the applicant's character must occur at the time of the hearing.

The review board examined the facts to determine if the applicant had met the burden upon him to demonstrate he was a person of good character and repute. The applicant was not entirely candid in his testimony during the divorce proceedings. His apology for the physical altercation, if it did occur, was not consistent with his subsequent conduct in commencing a small claims action within a month or two. His abusive and profane text messages to his wife and his threat to report the wife's uncle to the authorities might be considered conduct unbecoming a lawyer. He suggested to his counsel that his true feelings regarding his relationship with his wife be kept confidential until after the criminal proceedings. He was prepared to deceive his wife about the degree of interest he had in repairing the relationship in order to persuade her to soften her approach to the criminal charges he was facing. The evidence showed that the finding made by the hearing panel that the applicant was of good character was not reasonable.

The review board rejected an application by Applicant 8 to admit additional evidence as the decision pertained to February 2015 and there was no probative value in evidence dating from and after July 2015.

The review board determined that the applicant had not met the burden upon him to demonstrate he was of good character. The review board reversed the decision of the majority hearing panel and rejected the application of Applicant 8 for enrolment as an articled student.

APPLICANT 9

Hearing (application for enrolment): December 15-16, 2015 and February 2, 2016

Panel: Jamie Maclaren, chair, Dr. Gail Bellward and Sandra Weafer

Decision issued: April 25, 2016 (2016 LSBC 14)

Counsel: Gerald Cuttler for the Law Society; Henry C. Wood, QC for Applicant 9

BACKGROUND

On October 29, 2014, Applicant 9 applied for enrolment as an articled student in the Law Society admission program. On May 6, 2015, the Credentials Committee ordered a hearing to determine whether the applicant meets the standard for enrolment as an articled student under section 19(1) of the *Legal Profession Act*.

The hearing panel inquired into a number of circumstances.

On or about September 22, 2006, the applicant's driver's licence was suspended for 30 days following two marijuana-related incidents. In one he was found by police to be smoking marijuana in his vehicle; in the other he was issued a 24-hour driving prohibition for operating his vehicle while under the influence of marijuana.

In summer 2009, while working as a pizza delivery person in Kamloops, the applicant was friendly with the owners' 15-year-old daughter. Her mother discovered indecent messages and photographs exchanged between her daughter and the applicant, and contacted police. The applicant pleaded guilty to the summary conviction offence of Internet luring on August 23, 2011. He was sentenced to a one-year conditional sentence with a probation order. His sentence included an automatic order that he comply with the *Sex Offender Information Registration Act* for a period of 10 years.

In November 2014 the applicant attended a social evening organized by the UBC Law Students' Society at which he flung the contents of his alcoholic beverage at a classmate's back. As a result, he was banned from future Law Students' Society social events.

The following month, the applicant was subjected to a roadside alcohol test for which he registered a "fail" status. His vehicle was impounded, and he received a 90-day driving prohibition.

DECISION

After considering all of the evidence and submissions, the hearing panel found that the applicant failed to establish, on a balance of probabilities, that he is fit to be enrolled as an articled student.

An unsuccessful applicant for enrolment may reapply for enrolment two years after the decision denying the application or after an earlier date set by the panel. The panel did not consider it necessary for the applicant to wait two years before reapplying for enrolment, and therefore reduced the applicant's minimum time period for re-application to 12 months from the date of the panel's decision.❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Thomas Paul Harding
- Jason Bawa Mann
- Robert Collingwood Strother
- Kevin Alexander McLean
- Krista Margret Jessacher
- James Leslie Straith
- Gavin Clark Crickmore
- Melissa Ann Daniels

For the full text of discipline decisions, visit the Hearing decisions section of the Law Society website.

THOMAS PAUL HARDING

Surrey, BC

Called to the bar: August 31, 1990

Review date: May 14, 2015

Review board: David Mossop, QC, chair, Don Amos, Lynal Doerksen, Richard Lindsay, QC, Lois Serwa, Tony Wilson and Donald Silversides, QC

Decision issued: October 20, 2015 (2015 LSBC 45)

Counsel: Robin McFee, QC for the Law Society; Gerald Cuttler for Thomas Paul Harding

BACKGROUND

In June 2012, Thomas Paul Harding agreed to assist his mother-in-law with a possible claim arising from a motor vehicle accident. Her vehicle had been towed to a towing facility where, the day after the accident, Harding arrived intending to take photos of the damage to the vehicle. Harding got into a dispute with an employee over his right to photograph the vehicle. He moved his car to block access to the storage area, called the police and said he needed "someone there to talk to these idiots because otherwise you'll have to send a police officer probably to arrest me because I'm going to go get a crowbar and smash up the place."

A discipline hearing was held to determine whether Harding violated the prohibition against dishonourable or questionable conduct that reflects badly on the integrity either of the lawyer or of the profession and, if so, whether the conduct was a marked departure from acceptable standards. The hearing panel determined that Harding's actions — in making the crowbar comment, taking photographs and blocking the entrance to the storage area — were not a marked departure from the conduct expected of Law Society members and dismissed the citation (2014 LSBC 29; Fall 2014 Discipline digest).

DECISION ON REVIEW

The Discipline Committee sought a review of the hearing panel decision as the "marked departure" test has been reframed in light of the 2012 case of *Doré* v. *Barreau du Quebec* in which the Supreme Court of Canada held that a lawyer is required to behave with "transcendent civility" (at para. 68).

The review board found that the hearing panel erred by reasoning that, since the "crowbar" comment was not a threat, it was therefore not professional misconduct. Harding had stepped outside of his professional obligations and escalated the situation by raising the possibility of violence, with the intent of causing the police to attend. The review board majority determined that Harding committed professional misconduct and reversed the finding of the hearing panel.

One member of the review board (Silversides) disagreed with the majority. Silversides gave deference to the hearing panel's finding that Harding did not intend to lead the RCMP dispatcher to believe he would become violent.

Harding has appealed the decision of the review board to the Court of Appeal.

JASON BAWA MANN

Vancouver, BC

Called to the bar: April 28, 2004

Discipline hearing: October 8, 2015

Panel: Sharon Matthews, QC, chair, Laura Nashman and John Waddell, QC

Decision issued: November 6, 2015 (2015 LSBC 48)

Counsel: Carolyn Gulabsingh for the Law Society; Henry Wood, QC for Jason Bawa Mann

FACTS

In October 2011, Jason Bawa Mann received $4,000 in cash as a retainer from a client. Mann provided the client with a receipt but did not keep a duplicate receipt for his records. Mann has no recollection of what he did with the cash retainer. He explained that it was not uncommon for him to have large amounts of cash in his possession at that time.

The client trust ledger did not reflect any deposit for the cash retainer. In December 2013, Mann emailed the client in response to her request for a statement of account, and he confirmed he held $4,000 in trust on her behalf. In fact, he only held $52.85 in trust at the time.

Mann's practice was the subject of a Law Society compliance audit

in September 2013. The auditor asked him about the trust balance of $52.85 he held on his client's behalf. Mann responded that there was unbilled work on the client's file, but he did not realize that the cash retainer was not reflected in the trust balance. In April 2014, the client complained to the Law Society about the quality of service and expressed concern about her trust funds.

Subsequent to the receipt of the cash retainer and throughout the Law Society investigation, Mann acknowledged that he had received the cash retainer and advised the Society, and the client's trust ledger included the cash retainer. Mann provided a copy of his client trust ledger to the Society in July 2014, and it was then that he discovered that the cash retainer was never deposited. He did not report the trust shortage to the Executive Director, as required under the accounting rules, until approximately three weeks later. In August 2014, he deposited $4,000 into trust to eliminate the shortage, and he returned the full balance of $4,052.85 to his client the following month.

ADMISSION AND DISCIPLINARY ACTION

Mann admitted he committed professional misconduct in his failure to deposit his client's cash retainer into trust, to properly record the trust transaction, to keep a copy of the receipt of the cash retainer, to immediately repay the trust shortage once discovered, and to immediately report the trust shortage to the Executive Director of the Law Society.

The panel accepted his admission and ordered him to pay:

1. a fine of $4,000
2. $4,672.50 in costs

ROBERT COLLINGWOOD STROTHER

Vancouver, BC

Called to the bar: May 12, 1981

Ceased membership for non-payment of fees: January 1, 2008

Discipline hearing: May 26-30 and August 21, 2014 and August 19, 2015

Panel: Gavin Hume, QC, chair, Gregory Petrisor and Alan Ross

Decisions issued: February 26 (2015 LSBC 07) and December 11, 2015 (2015 LSBC 56)

Counsel: Henry Wood, QC and Lars Kushner for the Law Society; Peter Gall, QC, Robert Grant, QC and Joanne Thackeray (facts and determination) and Peter Gall, QC (disciplinary action) for Robert Collingwood Strother

The citation was issued on September 8, 2009; however, a number of preliminary applications had to be resolved prior to the panel hearing the facts of the case.

Strother took issue with a portion of the Law Society's proposed evidence and applied for an order limiting the evidence to be relied upon by the Law Society in the proceeding. On January 4, 2012, the panel issued its decision (2012 LSBC 01), saying it did not find reason to limit the scope of the evidence to be tendered by the Law Society on the basis of the doctrine of abuse of process.

Strother then requested a ruling from the panel relating to allegation 1 of the two allegations in the citation. The panel was asked to rule on the applicability of Chapter 7, Rule 1(a) of the *Professional Conduct Handbook* to Strother's conduct during the period in question. If the panel found that the scope of Chapter 7, Rule 1(a) did not contemplate the conduct alleged in the citation, then allegation 1 of the citation would be dismissed.

In its decision issued May 3, 2012 (2012 LSBC 14), the panel found that:

(a) Chapter 7, Rule 1(a) did not create an absolute prohibition against both acting for and taking a financial interest in a client; and

(b) Chapter 7, Rule 1(a) did not act to protect other clients of the lawyer, only the one in which the lawyer took a financial interest.

As a result, the panel dismissed allegation 1 of the citation.

The Law Society then applied to amend the remaining citation, arguing that since allegation 1 had been struck, it was necessary to import certain details that had been included in allegation 1 into the remaining allegation to provide transactional context and to allow allegation 2 to be a meaningful stand-alone allegation. In its decision issued September 11, 2012 (2012 LSBC 28), the panel granted the Law Society's application to amend the citation.

FACTS

Although Robert Collingwood Strother ceased to be a member of the Law Society as of January 1, 2008, section 38(4)(b)(v) of the *Legal Profession Act* gives a hearing panel the jurisdiction to make a finding of professional misconduct against a former member if the conduct of the former member, if he or she had been a member, constituted professional misconduct.

Strother was counsel in the 1990s for a corporation that devised and marketed film-industry tax shelter investments. In 1997 the federal government closed the tax shelter through an amendment to the *Income Tax Act*. Relying on Strother's advice, the client wound down its business except to administer its ongoing obligations.

In early 1998 Strother was approached by the company's former chief financial officer, who had an idea for a similar venture and who asked Strother to seek an advance tax ruling from Revenue Canada. On January 30, 1998, Strother entered into an agreement with the former CFO under which he would seek an advance tax ruling and take steps to incorporate a new company. That agreement gave Strother a financial interest in the venture.

On October 6, 1998, Strother obtained an advance tax ruling favourable to the new corporation, and by December 31, 1998, the new company had closed transactions worth $260 million.

Strother continued to consult with the original company on tax matters as late as December 8, 1998. The principals of the original company did not hear about the new company's transactions until early 1999, at which time they severed their relationship with the firm at which Strother was a partner.

In February and March 1999, while he was still a partner with that firm, Strother received two advances from companies related to the new company, totalling $785,000.

Strother resigned from the law firm effective March 31, 1999, and joined the new corporation as a 50 per cent shareholder.

DETERMINATION

The hearing panel found that Strother had a duty of loyalty to his original client and that his failure to provide material disclosure to that client of his financial interest in a potential competitor deprived the client of any opportunity to consider whether it wanted to continue to retain and rely on Strother despite that financial interest. The panel found that Strother breached his duty to that client in favour of his own financial interest.

The panel concluded that:

- Strother's failure to provide material disclosure to the original client of his interest in a potential competitor constituted professional misconduct;
- Strother's failure to advise the original client that his previous negative legal opinion concerning an amendment to the *Income Tax Act* should be reconsidered constituted professional misconduct; and
- Strother's failure to advise the original client of the favourable tax ruling constituted professional misconduct.

DISCIPLINARY ACTION

The panel found that Strother's submissions clearly identified that the disciplinary action sought by the Law Society of a suspension of five to six months is on the high side of penalties imposed in Canada where a lawyer is suspended for acting in a conflict situation. However, the panel concluded that, given the actions outlined in its finding of facts and determination, the appropriate discipline is a lengthy suspension.

The panel ordered that Strother:

1. be suspended for five months; and
2. pay costs of $54,792.38.

Strother has applied for a review of the hearing panel's decision.

KEVIN ALEXANDER MCLEAN

Vancouver, BC

Called to the bar: August 27, 2010

Not in good standing: January 1, 2015

Ceased membership: April 10, 2015

Disbarred: June 29, 2015

Discipline hearing: May 26 and December 7, 2015

Panel: Pinder K. Cheema, QC, chair, Dennis Day and Brian Wallace, QC (facts and determination); Pinder K. Cheema, QC, chair (disciplinary action and costs)

Decisions issued: August 24, 2015 (2015 LSBC 39) and February 12, 2016 (2016 LSBC 06)

Counsel: Alison Kirby for the Law Society; no one appearing on behalf of Kevin Alexander McLean

FACTS

A citation was issued against Kevin Alexander McLean on October 7, 2014 concerning 10 allegations arising from three matters:

- McLean's representation of two tenants in a dispute with a landlord regarding a bill of costs;
- a defamation action commenced by McLean against the landlord; and
- McLean's conduct in relation to the Law Society.

When the panel convened on May 26, 2015 numerous attempts had been made to deliver to McLean the citation, a Notice of Hearing and a Notice to Admit. McLean had not responded to any of the Law Society's correspondence nor had he filed any material. He had been advised that the hearing may proceed in his absence. The panel determined that McLean had been served in accordance with the Law Society Rules. Section 42(2) of the *Legal Profession Act* permits a panel to proceed if it is satisfied that the respondent has been duly served.

At the time of the hearing McLean was a former member of the Law Society.

Pursuant to then Rule 4-20.1(7), McLean was deemed, for the purposes of the hearing, to have admitted the truth of the facts described in the Notice to Admit. However, the Law Society still had to prove to the satisfaction of the panel that the alleged conduct amounted to professional misconduct.

DETERMINATION

The hearing panel found that McLean committed professional misconduct with respect to the 10 allegations, except for portions of two of them.

The bill of costs

1) In the course of representing the two clients, McLean:

- sent correspondence to the clients' landlord on five occasions

saying that, if the landlord did not pay the bill of costs, McLean would execute against his assets;

- unilaterally set a date for assessment of the bill of costs when McLean knew the landlord was not available; and
- advised the landlord that his cheque had bounced and that McLean would execute against the landlord's assets, when he knew or ought to have known the cheque had not bounced.

2) McLean failed to respond to communications from the landlord regarding scheduling a mutually convenient date for an appointment to tax the clients' bill of costs.

3) McLean told a master of the Supreme Court of BC at the assessment hearing of the bill of costs that he had not responded to the landlord's scheduling requests because the landlord was represented by counsel, when McLean knew or ought to have known that this was untrue.

The defamation action

4) McLean commenced a defamation suit against the landlord and, representing himself, failed to respond to multiple communications from opposing counsel.

5) In the course of representing himself in the defamation action, McLean:

- unilaterally filed a notice of trial for two days without confirming opposing counsel's availability after failing to respond to opposing counsel's requests to set a mutually convenient trial date;
- entered a settlement agreement and said he would file a notice of discontinuance by a specified date, but failed to do so;
- filed the notice of discontinuance only after opposing counsel said he considered McLean to have repudiated the settlement and withdrew his consent for McLean to file the notice of discontinuance;
- failed to attend a Supreme Court hearing; and
- failed to attend a scheduled examination for discovery.

6) In the course of representing himself in the defamation action, McLean failed to attend Supreme Court hearings and comply with the directions of the court by:

- failing to comply with directions to file a doctor's letter relating to his missed appearances;
- failing to attend a scheduled hearing that was peremptory on him; and
- failing to comply with a direction to provide information to support his email to the Supreme Court trial coordinator that he had a scheduling conflict.

Conduct in relation to the Law Society

7) McLean told the Supreme Court he would be unable to attend a hearing because he was "currently in trial on the Island," when he knew this was not true or he had created the conflict after the hearing had been scheduled.

8) McLean failed to notify the Law Society that he had failed to satisfy monetary judgments against him and to explain how he proposed to satisfy the judgments.

9) McLean offered to settle the defamation case against the landlord if the landlord withdrew his complaint to the Law Society.

10) McLean failed to reply to communications from the Law Society regarding the complaint made against him by the landlord.

DISCIPLINARY ACTION

McLean did not attend the disciplinary action hearing, nor did anyone appear on his behalf. He did not file materials or respond to the Notice of Hearing. The panel determined that McLean had been served with notice of the hearing date in accordance with the Rules.

The Law Society sought a finding of ungovernability against McLean and submitted that, if such a finding is made, disbarment is the appropriate disciplinary action.

On June 29, 2015, a separate discipline hearing panel, ruling on a matter pertaining to an unrelated citation, had ordered that McLean be disbarred on the basis of ungovernability. A review of that decision is pending.

The panel considered McLean's professional conduct record, and found him to be ungovernable for the following reasons:

- consistent and repetitive failure to respond to the Law Society's inquiries;
- neglect of duties with respect to trust account reporting and records;
- misleading behaviour directed to a client or the Law Society;
- failure or refusal to attend at discipline hearings convened to consider the offending behaviours;
- history of allegations of professional misconduct over time, in different circumstances;
- breaches of undertaking without apparent regard for the consequences;
- engaging in practice while under suspension;
- the number of citations and conduct reviews McLean has acquired.

The panel ordered that McLean:

1. be disbarred; and
2. pay costs of $12,165.78.

McLean has applied for a review of the hearing panel's decision.

KRISTA MARGRET JESSACHER

Vancouver, BC

Called to the bar: May 21, 1999

Discipline hearing: February 4, 2016

Panel: Pinder K. Cheema, chair, Gavin Hume, QC and Graeme Roberts

Decision issued: March 18, 2016 (2016 LSBC 11)

Counsel: Kieron Grady for the Law Society; no one appearing on behalf of Krista Margret Jessacher

FACTS

Krista Margret Jessacher has been a non-practising member since July 2010 and, as such, she gave an undertaking not to practise law. In December 2014, the Law Society received a complaint about Jessacher's conduct and, as part of the investigation, wrote to her with questions and requests for documents. She did not fully respond to the requests.

The Law Society issued a citation in June 2015 for her failure to respond and scheduled a discipline hearing in September 2015. Jessacher did not attend the discipline hearing. The panel in that hearing determined that Jessacher's failure to respond showed a marked departure from the conduct expected of a lawyer and constituted professional misconduct (2015 LSBC 43; Discipline digest: Winter 2015). As part of its disciplinary action, the panel ordered Jessacher to provide a complete and substantive response to the enquiries made in the Law Society's letters by September 16, 2015. Jessacher did not comply with the order.

The Law Society issued a second citation for her lack of compliance. She did not attend the discipline hearing on February 4, 2016, or provide an explanation for her absence.

DETERMINATION

The panel determined that Jessacher's consistent pattern of failure to respond to inquiries and failure to comply with a hearing panel's order reflects a gross culpable neglect of her duties as a lawyer and constitutes professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Jessacher:

1. provide a substantive response to Law Society letters dated February 2 and March 19, 2015;
2. be suspended until she fully complies with the order to respond; and
3. pay costs of $1,236.25.

JAMES LESLIE STRAITH

North Vancouver

Called to the bar: August 1, 1985

Discipline hearing: February 1, 2016

Panel: Herman Van Ommen, QC, chair, Jasmin Z. Ahmad and John Lane

Decision issued: April 1, 2016 (2016 LSBC 13)

Counsel: Kieron Grady for the Law Society; James Leslie Straith on his own behalf

FACTS

In February 2014, two former clients made a complaint to the Law Society about James Leslie Straith's handling of certain aspects of their file. On May 28, 2014, the Law Society sent a letter to Straith and AB, his co-counsel at the time of the complaint, asking them to respond separately and to provide documents and information to assist in the investigation of the complaint.

After several delays and deadline extensions, on May 13, 2015, the Law Society reviewed the information provided to date and concluded that documents important to the investigation were still missing. It requested delivery of specific documents by May 28.

By May 28, 2015, neither Straith nor AB had provided the requested information.

The Law Society gave two unsolicited extensions of time to Straith, moving the deadline to June 29, 2015. Straith advised that he anticipated being able to respond by July 30, 2015, but he never did.

On September 30, 2015, the Law Society issued a citation against Straith alleging that he "failed to provide a full and substantive response promptly or at all to communications from the Law Society concerning its investigation."

DETERMINATION

At the hearing, Straith did not deny that he had not fully responded to the Law Society's request to produce documents including, in particular, email correspondence to and from and within his firm. He argued that he took steps to respond to that request by delegating the obligation to AB and, based on what AB told him, believed that a response had been provided. Straith claimed that those steps should be sufficient to vitiate a finding of professional misconduct.

The Law Society maintained that Straith's response to its initial request was limited and that none of those responses resulted in the production of the requested documents.

The hearing panel found that Straith's failure to provide the requested documents was exacerbated by the persistence of that failure, despite being given ample opportunity to respond. By the date of the hearing, approximately eight and one-half months after the initial request for

information, Straith had still not produced the requested documents.

The panel determined that Straith had committed professional misconduct.

DISCIPLINARY ACTION

The hearing panel ordered that Straith:

1. pay a fine of $3,500;
2. pay costs of $2,472.50; and
3. produce all emails as requested in the May 13, 2015 letter within two weeks of the order.

GAVIN CLARK CRICKMORE

Vancouver, BC

Called to the bar: September 1, 1995

Discipline hearing: December 18, 2015

Panel: Elizabeth Rowbotham, chair, Donald Amos and Shona A. Moore, QC

Decision issued: May 20, 2016 (2016 LSBC 16)

Counsel: Kieron Grady for the Law Society; Henry C. Wood, QC for Gavin Clark Crickmore

FACTS AND DETERMINATION

In or about 2014, a client of Gavin Clark Crickmore filed a complaint with the Law Society regarding Crickmore's representation of her infant child in 1995. At the time of the 1995 matter, Crickmore was a junior litigation associate with a law firm that ceased to practise as a firm in 2003. After corresponding with Crickmore and receiving his explanation of his handling of the 1995 matter, a Law Society investigator interviewed Crickmore on February 15, 2015. After that interview the investigator asked Crickmore to provide electronic files relating to the claim and his notes of any conversations or meetings with the complainant or her child.

Crickmore failed to produce his electronic files and notes and, on June 22, 2015, the investigator wrote Crickmore advising that, if she did not receive the electronic files and any relevant notes before June 26, 2015, the matter would be referred to the Discipline Committee with the recommendation that a citation be issued.

Crickmore admitted that he engaged in professional misconduct when he failed to respond promptly and fully to a Law Society request for documentation and information.

DISCIPLINARY ACTION

The Law Society sought a fine of $4,000. The panel considered several factors, including that this was Crickmore's first citation and that he did not gain any advantage from his misconduct, and ordered that Crickmore pay:

1. a fine of $2,500; and
2. costs of $1,772.50.

MELISSA ANN DANIELS

Victoria, BC

Called to the bar: May 29, 2014

Ceased membership for non-payment of fees: January 1, 2016

Hearing date: January 27, 2016

Panel: Nancy Merrill, QC, chair, Lance Ollenberger and Donald Silversides, QC

Decision issued: May 27, 2016 (2016 LSBC 17)

Counsel: Kieron Grady for the Law Society; no one on behalf of Melissa Ann Daniels

FACTS

On April 10, 2015, the Law Society sent a letter to Melissa Ann Daniels, by email, asking for a written response to three questions relating to a complaint made against her.

Despite repeated requests from the Law Society and multiple deadline extensions, by the date of the hearing Daniels had only responded with two emails, neither of which provided any response to the Law Society regarding the complaint or the three issues she was asked to address in the letter of April 10, 2015.

DETERMINATION

Daniels did not attend the hearing; the hearing panel determined that she had been properly served and proceeded in her absence.

The panel found that Daniels failed to cooperate fully with the investigation of the complaint or to respond fully or substantively to the Law Society's request for an explanation or to provide information and that, by failing to do so, Daniels breached the Rules. This failure to respond and provide information was a marked departure from the standard of conduct the Law Society expects of lawyers, and it therefore constituted professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Daniels pay:

1. a fine of $2,500; and
2. costs of $1,236.25.❖

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