The Law Society
of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

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Strategic planning defines priorities for coming years

by Herman Van Ommen, QC

THE LAW SOCIETY'S strategic plan identifies strategies and policy initiatives that advance the Law Society's objects and duties as set out in section 3 of the *Legal Profession Act*. Every three years, the Benchers revisit the plan to ensure that the Law Society continues to fulfill its mandate while at the same time responding to the most pressing issues of the day. The three-year plan provides a means for the Law Society to report annually on its progress toward fulfilling its mandate.

This is the final year of the 2015-2017 Strategic Plan, and through the remaining months of the summer, the Benchers will study and discuss policy issues for consideration in connection with preparations for finalizing the 2018-2020 Strategic Plan. In the fall they will formally adopt a plan that will guide Law Society policy development for the next three years.

In order to facilitate discussion, Law Society staff presented the Executive Committee with a memorandum outlining potential topics for consideration. CEO Tim McGee, QC gave an overview of those issues at the April Benchers meeting. These issues are summarized below. These topics are not set in stone, but are merely intended as a springboard for what I'm sure will be lively discussions over the coming months.

I urge all members to review the Law Society's current strategic plan, which is available in the "About Us" section of our website, at www.lawsociety.bc.ca/about-us. It would be helpful to the Benchers if lawyers would advise us of issues they are encountering in their practice that we should consider in developing a new strategic plan.

REGULATORY COMPLIANCE

Many regulatory bodies around the world are considering more proactive, or "outcomes-focused," models for regulation, as opposed to a reactive, rules-based model. If the Law Society were to consider a proactive model, what would it look like?

ADMISSIONS PROGRAM REFORM

There are currently interesting changes under way or on the horizon across the country in legal education and admission to the profession. Universities are creating new law programs with different teaching styles. Ontario is testing a new admission program. More and more foreign-trained applicants are coming to British Columbia. The Law Society has recently completed a review that endorses our current PLTC program, but might it do anything differently in response to an ever-changing environment in legal education and admission to the profession?

Responding to [the Truth and Reconciliation Commission's] calls to action will be among the Law Society's top priorities for many years to come.

ACCESS TO JUSTICE

Ensuring that the public interest in the administration of justice is preserved has been high on the Law Society's strategic priority list for a number of years, but more topics might be examined to find ways to ensure that the public can obtain access to legal services when they are needed. Some of the questions the Benchers might consider as they discuss updating the strategic plan include the following: How can the Law Society make legal services more affordable for more people? Are there alternatives to the adversarial system for some disputes? Is there a role for tariffs? What is the role of alternate (or

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.

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"non-lawyer") legal services providers, including notaries and paralegals?

ECONOMICS OF THE PROFESSION

The economics of legal practice and the cost of legal services have taken increasing importance in discussions regarding access to justice. Determining what it actually costs to provide legal services would inform discussions of improvements to the delivery and affordability of legal services. Is there a role for the Law Society in this important research?

TRUTH AND RECONCILIATION

The Truth and Reconciliation Commission of Canada initiated a historic discussion of past and continuing injustices and the relationship of Canada's legal system to the country's Aboriginal people. Responding to its calls to action will be among the Law Society's top priorities for many years to come. The strategic planning process provides an opportunity to identify specific goals, strategies and initiatives and to periodically measure our progress.

PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE AND THE RULE OF LAW

Protecting the public interest in the administration of justice requires not only considering the rights and freedoms of individuals, but also engaging with all stakeholders in the justice system. The Law Society has a role to play in ensuring systems function effectively and efficiently in a way that engenders public confidence in process and outcomes. How can the Law Society best discharge this important public interest function?

DISCLOSURE AND PRIVACY

The Law Society must not only regulate lawyers effectively; it must be seen to regulate lawyers effectively. At the same time, in a world of big data and social media, privacy has taken on increasing importance. Law Society regulatory processes must continue to be transparent while at the same time ensure that privacy protections keep pace with changing expectations.

FAREWELL TO OUR CEO

In closing, I would like to advise you that, after 12 years as the Law Society's Chief Executive Officer, Tim McGee, QC has decided it's time to step down and look at other opportunities, effective September 1, 2017. In his time as CEO, Tim has made many significant and lasting contributions to the Law Society and, in doing so, has earned the respect and appreciation of the Benchers, staff and justice system stakeholders. He has been a leader among the CEOs at the Federation of Law Societies of Canada and internationally as a member of the Executive Committee of the International Institute of Law Association Chief Executives.

In short, Tim has been an exemplary leader, and he will be missed. I am sorry to see him go, but I respect his decision and wish him all the best. ❖

Invitation to apply for appointment to hearing panel pools

THE LAW SOCIETY is currently inviting members of the public and non-Bencher lawyers to apply for appointment to the hearing panel pools.

Public hearing panel pool – Members of the public are invited to apply for appointment to the pool from which members of hearing panels and review boards are drawn. This is a part-time position, compensated at $250 per hearing day. Reasonable expenses are reimbursed. Assignment to hearings is on an as-needed basis. The term of appointment to the hearing panel pool is four years, renewable once.

Lawyer (non-Bencher) hearing panel pool – Qualified practising lawyers are invited to volunteer to serve as members of the hearing panel pool. This is a part-time volunteer position. Reasonable expenses are reimbursed in full. Assignment to hearings is on an as-needed basis. The term of appointment to the hearing panel pool is four years, renewable once.

For more information, go to About Us > Volunteers and Appointments > Public hearing panel pool or Lawyer hearing panel pool.❖

Law Society urges protection of lawyers from search of electronic devices

PRESIDENT HERMAN VAN Ommen, QC sent a letter to the federal government on behalf of the Law Society expressing concern about searches of electronic devices at the Canadian border. The *Customs Act* allows Canada Border Services Agency officers to demand passwords and search electronic devices. However, a CBSA operational document does not specifically advise agents that access to privileged information should be excluded from such requests.

In his letter, Van Ommen urged federal ministers to provide assurances that CBSA agents will not seek to obtain passwords from lawyers to their electronic devices, and that, if such a request is made and a lawyer refuses it, border agents will not confiscate the electronic device or otherwise detain the lawyer. The letter is available on the Law Society website (News and Publications > News).❖

Unbundling legal services provides benefits to both lawyers and clients

by Timothy E. McGee, QC

UNBUNDLING OF LEGAL services is at the forefront of access to justice discussions across the country. Justice Annemarie Bonkalo's report *Family Legal Services Review* to the Attorney General in Ontario recommends lawyers provide unbundled legal services and ensure the public knows of these services. Justice Bonkalo's report was discussed in our conversations on strategic planning at the May Bencher retreat, and her clearly articulated position on unbundling supports the direction of our unbundling initiatives in BC.

In 2016, the Law Society supported Mediate BC's Family Unbundled Legal Services Project, which recently delivered two useful tools: for lawyers, an online unbundling tool kit, and for the public, a roster of family lawyers and paralegals willing to provide unbundled services. In addition to a financial contribution, the Law Society provided the assistance of a practice advisor to review the tool kit documents. Past president David Crossin, QC also wrote a letter of support for the tool kit to encourage lawyers to familiarize themselves with unbundling. I encourage you to read and consider the tool kit on the Courthouse Libraries BC website for your own practice.

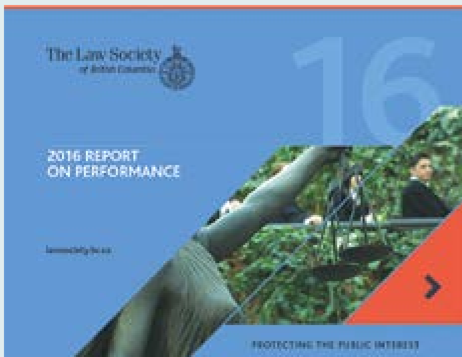
In addition to increasing access to legal services, unbundling can be a lucrative and viable business model for lawyers. The number of self-represented litigants is growing, and many of them are looking for some form of legal advice, coaching or representation. Kari Boyle, retired lawyer and former executive director at Mediate BC, is the project manager for the Family Unbundled Legal Services Project. She has great insights on the topic in this issue of *Benchers' Bulletin*. She discusses the ways lawyers and clients can benefit from an unbundled approach to the provision of legal services. I trust you will find it interesting.

As a final note, I have recently announced that, after 12 years as CEO of the Law Society, I will be stepping down in September of this year. It has been an honour to serve the Law Society and the public interest of British Columbians over that time, and I am proud of the progress we have made on many fronts. As this is my last column in the *Benchers' Bulletin*, I would like to take the opportunity to publicly recognize and thank all of the dedicated Benchers, the exceptional staff at the Law Society, and so many others in the profession and the justice system who have supported and inspired me over the years. I would also like to extend my very best wishes to the Law Society for continued success in fulfilling its important mandate in the years ahead.❖

In brief

2016 REPORT ON PERFORMANCE AND FINANCIAL STATEMENTS

The Law Society's 2016 Report on Performance and audited financial statements are available online. Our annual report provides a progress update on strategic initiatives in the second year of our 2015-2017 Strategic Plan.



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.

JUDICIAL APPOINTMENTS

John J.L. Hunter, QC, of Hunter Litigation Chambers in Vancouver, was appointed a judge of the Court of Appeal for BC. He replaces Mr. Justice E.C. Chiasson, who reached the mandatory age of retirement. Mr. Justice Hunter was a Bencher from 2002-2008, serving as president in 2008.

Andrew P.A. Mayer, with the Prince Rupert Port Authority, was appointed a judge of the Supreme Court of BC in Prince Rupert. He replaces Mr. Justice R.T.C. Johnston, who elected to become a supernumerary judge.

W. Paul Riley, QC, with the Public Prosecution Service of Canada, was appointed a judge of the Supreme Court of BC in Vancouver. He replaces Madam Justice C.J. Ross, who elected to become a supernumerary judge.❖

Brexit, Presidential Executive Orders and the Rule of Law: A discussion on the limits of executive power

ON WEDNESDAY, MAY 31, nearly 170 people attended the first annual Law Society Rule of Law Lecture to hear two international speakers talk about the role of the rule of law in limiting executive power. The Law Society established the Rule of Law Lecture Series to increase public awareness of and build confidence in the rule of law.

Anne Egeler, Deputy Solicitor General in the Washington State Office of the Attorney General, spoke about her legal team's work in challenging President Trump's executive orders on immigration. The attorney general's office worked to obtain a temporary restraining order, which was issued nationwide on February 3 in *Washington v. Trump* and later upheld by the US Court of Appeals for the Ninth Circuit. Egeler said Trump's legal team argued that the order was "unreviewable," while offering no evidence for their reasoning.

Richard Gordon, QC, lead counsel for Wales in the *Miller v. Secretary of State for Exiting the European Union*, discussed the core principles of the rule of law in relation to the Brexit case, but also examined the important constitutional balance between the rule of law and parliamentary sovereignty. His presentation was done via video due to airline travel disruptions.

The lecture was captured on video and is available online on the Law Society's website (go to Our Initiatives > Rule of Law and Lawyer Independence > Rule of Law Lecture Series).❖

Photo: Ron Sangha Productions Ltd.

Left to right: Moderator Jon Festinger, QC, speaker Anne Egeler and Craig Ferris, QC,Chair of the Rule of Law and Lawyer Independence Advisory Committee. Speaker Richard Gordon, QC appeared by video.

Law Society launches three new awards

THE LAW SOCIETY is pleased to announce three new awards recognizing excellence in the legal profession. Nominations are currently open for:

- The Law Society Excellence in Family Law Award recognizes lawyers who have contributed to the advancement of justice for families.
- The Law Society Award for Leadership in Legal Aid recognizes lawyers who have demonstrated exceptional commitment to the provision of legal aid in British Columbia.
- The Law Society Diversity and Inclusion Award honours a person who has made significant contributions to diversity and inclusion in the legal profession or the law in British Columbia.

The awards will be presented every two years, with inaugural awards presented in December this year.

The deadline for submitting nominations for all three awards is September 1. For criteria and nomination instructions, visit our website (About Us > Awards and Scholarships).❖

Articling offers by downtown Vancouver firms to stay open until August 18

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 18, 2017. 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 18, 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 18, the lawyer must receive prior approval from the Credentials Committee.

For further information, contact Member Services at 604.605.5311.❖

Unauthorized practice of law

UNDER THE LEGAL Profession Act*, only trained, qualified lawyers (or articled students or paralegals under a lawyer's supervision) may provide legal services and advice to the public, as others are not regulated, nor are they required to carry insurance to compensate clients for errors and omissions in the legal work or for theft by unscrupulous individuals marketing legal services.*

When the Law Society receives complaints about an unqualified or untrained person purporting to provide legal services, the Society will investigate and take appropriate action if there is a potential for harm to the public.

* * *

During the period of March 23 to May 15, 2017, the Law Society obtained three undertakings from individuals not to engage in the practice of law.

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

- On March 3, 2017, Mr. Justice Kenneth W. Ball granted an injunction prohibiting **Surinder Singh Trehan**, of Vancouver, doing business as A S Canada & USA Immigration Services Ltd. and Canada and USA Immigration Services Ltd., from engaging in the practice of law and from representing himself as a lawyer or from using any other title that connotes entitlement or qualification to engage in the practice of law. The court found that Trehan offered and performed immigration services for a fee, while being neither a lawyer nor a registered immigration consultant. As such, the court found that Trehan and his associated businesses had engaged in the unauthorized practice of law. The court also found Trehan had advertised himself on the Internet as a barrister and solicitor and capable and qualified to provide legal services, including immigration services. The court awarded the Law Society its costs.

- On March 8, 2017, Mr. Justice G.P. Weatherill granted an injunction prohibiting **Kazimierz Crischuk**, of Kelowna, from engaging in the practice of law and from commencing, prosecuting or defending a proceeding in any court on behalf of another. The court found that Crischuk had defended an action in the Supreme Court of BC on behalf of another, contrary to the *Legal Profession Act*. The court awarded the Law Society $2,600 in costs.

- On April 27, 2017, Madam Justice D. Jane Dardi granted an injunction prohibiting former lawyer **Vivian Pei-Hua Chiang**, of Vancouver, from engaging in the practice of law, from representing herself as a lawyer, solicitor or member of the Law Society, and from commencing, prosecuting or defending proceedings in any court on behalf of others. The court found that Chiang had wrongfully referred to herself as a solicitor of record in proceedings before the Federal Court while not a member of the Law Society. The court awarded the Law Society $1,500 in costs.

- On May 4, 2017, Mr. Justice Frits E. Verhoeven granted an injunction prohibiting **Francisco MacDugall**, of Vancouver, doing business as SITA Accelerating Social Impact Technology and "www.sita.io," from commencing, prosecuting or defending proceedings in any court on behalf of others. The court also expanded an earlier injunction granted to prohibit MacDugall from engaging in the practice of law for, or in the expectation of, a fee, gain or reward. The court had previously enjoined MacDugall from holding himself out or representing himself as a lawyer or otherwise capable or qualified to practise law. The court found that MacDugall had offered various legal services to a start-up company and awarded costs to the Law Society in the amount of $2,000.❖

FROM THE LAW FOUNDATION OF BC

Children's legal centre funded

THE SOCIETY FOR Children and Youth of BC recently announced the launch of a new children and youth lawyer initiative in British Columbia. This initiative was made possible by funding from the Law Foundation of British Columbia and the Law Foundation of Ontario, with additional financial support from the Notary Foundation of BC, the Representative for Children and Youth and the Law Society of BC.

The initiative will establish the Children and Youth Legal Centre, which will provide direct legal services to children and youth in the province relating to family matters, child protection and other legal matters. There will be an emphasis on addressing the needs of immigrant and refugee, street-involved, LGBTQ and Indigenous children and youth.

The centre will launch in fall 2017. The office will be based in the Lower Mainland, with its services available throughout BC.

"Every young person in British Columbia has a right to protection from discrimination and exploitation. When a young person's rights aren't being upheld and legal protection is required, it is our shared responsibility as a society to assist them," says Stephanie Howell, Executive Director of the Society for Children and Youth of BC.

"So often the most vulnerable in our society do not get the representation they need in the legal system. The Law Foundation of BC has always advocated for a just society, and providing legal services for some of our most vulnerable citizens is integral to our mission. By supporting this program, we hope to begin to meet the need for legal services in BC for children and youth, evaluate its work, and aim to provide long-term legal support for children and youth in BC," noted Eileen Vanderburgh, Chair of the Law Foundation.

For more information, please contact Stephanie Howell, Executive Director of the Society for Children and Youth of BC, by telephone at 604.822.0033 or email at stephanie@scyofbc.org.❖

2017 Bencher retreat

THE BENCHERS ANNUAL retreat took place this year from May 4 to 6 in Victoria.

The retreat started with panels discussing alternate legal service providers. Experts from Washington State shared their experience in determining the types of services that would be provided by Limited Licence Legal Technicians and how qualifications and standards would be set.

Representatives from the Law Society of Upper Canada spoke about their experience with setting standards for and regulation of paralegals.

The program then turned to consideration of unmet legal needs in BC, including the issues faced by British Columbians in finding affordable legal advice, and how unmet legal needs are challenging our existing regulatory paradigm.

Later, the Benchers took an in-depth look at how alternate legal service providers could work in BC.❖

FROM THE CANADIAN LEGAL INFORMATION INSTITUTE

Welcome changes at CanLII

FUNDED BY CANADA'S lawyers and notaries, CanLII provides free access to a virtual library of Canadian legal information. Since BC lawyers both support and use the services, we at CanLII would like to take this opportunity to let you in on some of our new products and services.

NEW BOARD OF DIRECTORS

In November 2016, we were lucky enough to have Professor Adam Dodek, Crystal O'Donnell, Shannon Salter and Thomas Schonhoffer, QC appointed to the CanLII board, which will be chaired by Dominic Jaar, Ad.E. They will help us further our goal of making legal materials more accessible to the public. More information on this can be found on CanLII's blog.

NEW FEATURES

Our new features span across our main CanLII site (canlii.org), as well as CanLII Connects (canliiconnects.org). Most notable on CanLII includes:

- Lexbox is now fully integrated into CanLII. For those who have never used the Lexbox extension that Lexum offers for the Chrome browser, Lexbox allows users to save search queries, set up alerts for new content that matches a search query, and create folders with saved results, and it offers a trail of your research. Until now, users were required to download the extension to save search queries on CanLII. This is no longer the case. See our blog for more details.
- The blue "Headnotes" button at the top of each case is now dynamic. This gives you a heads-up when there are related decisions in our database from either the same level of court as the one you are consulting or a higher court. Previously, this information was available by clicking the button. This improvement provides a visual cue when there is a possibility the decision you are reading is not the final decision in the matter.
- The highlighting (i.e., "Find in document") feature now allows you to change which words you want highlighted in a decision. Previously, the tool did not allow for changes mid-search. Now, you can edit your highlights "on the fly" by clicking on the little pencil at the top right of the document page.

Most notable on CanLII Connects includes:

- The ability to post multimedia content. We recognize that commentary comes in many forms, and we welcome content such as podcasts or videos. If this form of legal commentary appeals to you, just pick the embed option when you are creating content and paste the HTML embed code from hosting sites such as YouTube or Vimeo in the text box.
- The ability to save searches and set up emails. This one is pretty self-explanatory, but basically, just save your search after you run it, and you will get a daily update of new content.
- The ability to indicate negative treatment on a case. This new feature is still in its early stages but promises to be an exciting development. Each case on CanLII Connects now has the ability to be flagged by verified users to indicate that the case has received negative treatment by another case. All verified users are active members of the legal community. We will keep you posted on further developments of this feature.
- Our content is increasing every day! We are proud to announce that we now have over 45,000 separate commentaries or summaries that detail over 37,000 cases.

EXPANDED CONTENT

To further our goals of access to justice and for legal content to be publicly accessible, we have partnered with multiple entities to increase our content. Most notable includes:

- An expanded partnership with the Centre d'accès à l'information has allowed us to post thousands of decisions issued between 1980 and 2015 from Quebec administrative tribunals, including 36,500 decisions from the Commission d'appel en matière de lésions professionnelles, 41,500 decisions from the Commission des lésions professionnelles, 17,000 decisions from the Tribunal administratif du Québec and 28,000 decisions from the Commission de protection du territoire agricole du Québec. Read more on our blog.
- New "Smart PDFs" from Lexum have allowed us to upload 16,000 decisions from the Dominion Law Reports (DLR). The DLR are the second-most-cited block of cases on CanLII at 10 per cent, next only to the Supreme Court Reports (SCR) at 26 per cent. The strategically

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Law Society congratulates winner and runner-up of the secondary school essay contest on the rule of law

THE LAW SOCIETY congratulates essay contest winner Angela Tian, a grade 12 student from Burnaby South Secondary School, and runner-up Sylvan Lutz, a grade 12 student from Reynolds Secondary School in Victoria, for their outstanding essays on the rule of law. The Law Society is pleased to publish their essays in this issue of the *Benchers' Bulletin*.

At the Benchers meeting on June 9, Angela and Sylvan were introduced to the Benchers, and President Herman Van Ommen, QC presented them with their respective awards. The Law Society first launched the essay contest in 2015 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.

Left to right: Angela Tian, President Herman Van Ommen, QC and Sylvan Lutz.

Defending the Rule of Law

by Angela Tian, grade 12 student, Burnaby South Secondary School
Winner of the 2016-2017 rule of law essay contest

The year 2017 marks the 150th anniversary of Canada and its humble beginnings as a nation forged on the constitutional bedrock of the *British North America Act* and founded upon the visions of Canadians for a free and democratic country to call their own. Confederation helped to establish the foundation for the rule of law within Canada. To a fellow student who has yet to encounter this term, the characterization of the rule of law as the cornerstone of the Canadian legal system would not be enough to convey how critical of a role it has in ensuring the rights and freedoms of all individuals in civil society. In observing that no one is above the law, the rule of law not only ensures the protection of responsible government and federalism from the exploitation of power, but also the democratic ideals and liberties for which the country is recognized. Yet today, this principle of justice is threatened by current events in Canada, such as the introduction of Bill C-51 in 2015. However, in understanding its role within civil society and how it continues to shape Canada today, Canadians can defend the rule of law and the values it embodies, while ensuring that fair and righteous justice continues to be served within Canada for decades to come.

Since the law influences nearly all aspects of society on a daily basis, the observation that laws rule over Canadians is justified. What laws embody are the basic moral values of civil society, as they "impose limits on the conduct of individuals in order to promote the greater good and to make … communities safer places to live" ("The Rule"). Imagine what the world would be like if no laws existed to govern the population. The concept of personal property would be void, since there are no laws against robbery. People would live in conflict, as there are no methods for resolving disputes peacefully. However, through laws — the rules made by the government, which apply to everyone equally — the rights, obligations and protection of all citizens are upheld. In penalizing offenders for violating the moral code of society, such as through stealing, endangering others or the environment or engaging in reckless behaviour, the law shelters Canadians and their fundamental rights and freedoms as listed in the *Charter* from violation, and it is this sole objective that the rule of law seeks to fortify.

The rule of law lies at the very heart of Canada's growth as a nation, and it has shaped the lives of Canadians since its emergence as a fundamental principle of justice underlying Canadian democracy. Historians trace the rule of law back to the year 1215 in England when King John signed the Magna Carta, a document considered foundational to the rule of law, chiefly for its resistance against the exploitation of power and its prohibition of unlawful imprisonment ("Magna"). Henry de Bracton, an early judge and writer on English law, best articulates the idea that became the basis for the rule of law: "the King himself … ought not to be under man, but under God and under the law, for the law makes him king" (Scott).

The rule of law affects every individual and holds great importance even outside of the courts, as it upholds the system of laws that keeps Canadians safe, resolves disputes and allows the nation to prosper. What the rule of law seeks to reinforce is the idea that no one is above the law. Regardless of how wealthy or how powerful they may be, "every individual, private entity, and public entity must be held accountable by the law, including the government" (Currie) which only possesses powers given to it through laws. The judiciary, court system and legal profession exist to prevent violations of the rule of law while keeping anyone from rising above the law, engaging in activities the law forbids, and exercising powers the law has not given to them (Forsey 30). They aim at "separation among those who make the laws, those who interpret and apply it, and those who enforce it" ("Legal"). Failure to achieve this could result in interference from the executive branch of government, which would only serve to undermine the rule of law and the protections it yields.

The World Justice Project (WJP) offers four universal parameters for the system of the rule of law, which are summarized as follows: it must guarantee accountability under the law, embody laws that are intelligible, publicized and just, create laws in a fair and efficient process, and deliver justice in a timely and competent manner through reliable representatives (Currie). Upon satisfying these requirements, "effective rule of law reduces corruption, combats poverty and disease, and … [serves as] the foundation for communities of peace, opportunity, and equity" ("World"). Furthermore, the WJP publishes an annual report, the Rule of Law Index, which aims to reflect how people experience the rule of law in 113 countries and jurisdictions around the world and provides rankings organized around eight dimensions, including open government and fundamental rights. On last year's Index, Canada ranked 12th in its adherence to the rule of law, having placed 14th in 2015. What can thus be concluded is that Canada is largely successful in "[fulfilling] its basic duties towards its population, so that the public interest is served, people are protected from violence and members of society have access to mechanisms to settle disputes and redress grievances" ("World"). However, in light of Bill C-51, Canadians have come to question the role of the rule of law within Canada.

Since its introduction in 2015, the highly controversial Bill C-51 or the *Anti-terrorism Act* has threatened the rule of law, in proposing radical changes to the law and national security within Canada. Following the attacks of 2014, Bill C-51 took drastic measures against terrorism by limiting freedom of expression, allowing government institutions to share information about individuals that may be relevant to national security, and redefining the role of the Canadian Security Intelligence Service (CSIS) as more of a police force (Stryker). However, many Canadians have protested against the Act and called for amendments or its withdrawal, as "[it] is unconstitutional … and incompatible with the minimum norms of the rule of law" (Alford 1). Bill C-51 greatly expands the mandate of CSIS, by allowing it to disrupt any activity that may constitute a threat to national security and apply for warrants that jeopardize *Charter* rights, including the right to counsel and the right to habeas corpus. Not only does this ignore lessons of history from the 1960s and 1970s, which saw serious rights abuses by the RCMP, but it severely threatens the rule of law in undermining the integrity and independence of Canadian courts and compromising the rights of Canadians to liberty, fair hearings, privacy and freedom of expression in the name of national security (Morris). The Act distorts fundamental concepts of justice and, ultimately, it "puts Canada's compliance with … the rule of law into question [by overlooking the fact that] parliamentary and judicial oversight of the executive, even in matters of national security during public emergencies, are essential elements of any rule of law state" (Alford 26). In facing the possible deterioration of the judiciary's independence, the rule of law is threatened by Bill C-51, and as those bounded by the rule of law, Canadians and the legal profession of Canada must look for a way to defend it.

While the rule of law is difficult to define in that it reflects all the values carried through 150 years, which continue to be cherished by Canadians today, the positive outcomes of the system are indisputable and can be used to further substantiate the utter relevance of the rule of law within civil society. However, the rule of law within Canada is not unblemished, as it has neglected the values and legal traditions of the Indigenous people since Confederation and has been mired in racism and injustice (Mahoney). With the circumstances of Bill C-51, it is also demonstrated that the rule of law is not impregnable, as with the changes in society's attitudes and values alongside emerging issues of the 21st century such as the threat of terrorism, its foundation has been shaken.

Yet, it is clear that the rule of law has done much for the nation since 1867, and rather than dismissing it for its shortcomings, Canadians must reimagine the rule of law and how it will continue to transform Canada. Thus, to my fellow students and Canadians who will fight for the freedom, equality and democracy that the rule of law seeks to manifest, our duty is clear: in holding onto the values we cherish, Canadians must defend the rule of law against threats and broaden it to encompass the rights of everyone who it seeks to represent. Only then will the rule of law truly embody the unique Canadian identity that Confederation sought to forge, while continuing to serve and protect all individuals who call Canada their home.❖

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Rule of law essay submission

by Sylvan A. Lutz, grade 12 student, Reynolds Secondary School in Victoria
Runner-up of the 2016-2017 rule of law essay contest

The rule of law, a cornerstone of democracy, is the simple principle that a jurisdiction's laws must apply equally to all persons and institutions, including the government. In practice, however, it is not so straightforward. Establishing and protecting the rule of law in a state is incredibly complex; challenges to it can and will arise from every corner of society. As citizens of a liberal democracy, we are obliged to understand and protect this important principle and to remain vigilant: a threat to the rule of law in one jurisdiction is a threat to the rule of law everywhere.

A more comprehensive definition by the United Nations describes the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[1] The rule of law is an ideal rather than a set of precedents or codes. It states that the laws and institutions of a jurisdiction must be followed by all who reside within. Essentially, no one should be above the law. This principle, when followed properly by society, disables corruption and abuses of power. It ensures that governments and leaders are held to the rules they impose on their citizens, because it should be laws that govern, not individuals' arbitrary prejudices and biases.[2] It is through active participation in the political system that we can protect the rule of law for ourselves and those around us.

Although it may seem obvious that a system founded on such a principle is in the self-interest of all, the rule of law as we understand it today has been in a state of evolution for at least two millennia. Aristotle discussed this general principle before the birth of Christ, 1,500 years later it was integrated into English society via the Magna Carta, John Locke further developed the concept in the 1600s and it is still developing today. This slow process toward universal application reflects a fundamental characteristic of human nature: we have difficulty applying the same rules to ourselves as we do to others. We tend to want to favour those connected to us through kin, culture or religion over those who are different. Power only magnifies our tendencies to corrupt, making the creation of fair and just societies painstakingly slow.

In Canada, where we strive to uphold the rule of law, we can expect that any wrongs we face will be properly adjudicated. We assume that our rights as Canadians and as human beings will not be violated, that we are protected by the *Charter of Rights and Freedoms*. Our many levels of democratic government serve to spread power among the people, to keep it from being concentrated in the hands of a few. An independent judiciary defends the rule of law from those who would encroach on the principle, and safeguards the effectiveness and impartiality of the criminal justice system. These systems work together to protect the rule of law and by proxy the democracy of Canada.

We are fortunate to live in a society where the rule of law is almost taken for granted; however, without maintaining high standards and constant vigilance, some in positions of power will rise above the law, and when this happens entire states can quickly succumb to corruption. In much of the rest of the world dictatorships, oligarchies and pseudo-democracies, where leaders and other state actors disregard the principles of the rule of law, are still commonplace. Unravelling the rule of law is not only a threat to the citizens in these countries, but to all of us. When it disintegrates in one jurisdiction, it becomes fragile in surrounding states. The Middle East today is a perfect example of this. Syria, a state where the Assad government has a long tradition of violating its people's rights, has become mired by conflict within its own borders. Much to the detriment of the Syrian people, the rule of law has been completely abandoned; state-sponsored terrorism prevails. This has led to greater unrest in neighbouring Turkey due to the unchecked flow of refugees across its border and louder calls for Kurdish independence. In conjunction with

this past summer's attempted coup, this has given Turkey's president Recep Tayyip Erdoğan an excuse to discard the rule of law: he is flagrantly imprisoning political opponents, judges and teachers across the nation. He has used the ensuing confusion to consolidate his power and place himself above the well-established norms of the constitution he claims to be reforming. President Erdoğan hopes to take the executive powers of the prime minister for himself and remove the checks and balances of power; this would also allow him to appoint most of the country's top judges and extend his reign by up to 26 years.[3] Turkey's shift towards authoritarianism is a warning to all democracies: a neglected system can quickly allow leaders to abuse their power and act outside the rule of law.

Even in Canada and similar western liberal democracies, the rule of law also faces frequent threats. Policy-makers use the "fight against terrorism" as justification for granting extrajudicial powers to state and military organizations, placing their actions outside or above the law. The *Anti-terrorism Act* or Bill C-51 passed in 2015 to protect Canadians also increased the power of government. It creates an opportunity for the government to violate the fundamental freedoms of thought, belief, opinion and expression as well as peaceful assembly guaranteed in the *Canadian Charter of Rights and Freedoms* along with the legal right not to be arbitrarily detained or imprisoned.[4] Freedom of speech is violated by the provision in the law that criminalizes any expression that may support the goals of terrorists, even if the speaker has no intention of committing an act or if no act ever takes place. And since one man's terrorist is another man's freedom fighter, the door is left wide open for the ruling party to exploit this for political gains. Compounded with the expanded definition of national security to include "the economic or financial stability of Canada," any environmental or Indigenous protest against natural resource exploitation could be deemed a threat to the safety of Canadians.[5] It should not be left to the "good judgment" of politicians to determine whether their potential political enemies are threats to national security. Ordinary citizens, the press and legal professionals all share a responsibility to ensure the government is held to the promises made in the Constitution.

Simple in premise, but complex in application, the rule of law is a hallmark of western civilization that requires relentless effort to maintain. It is vital to the well-being of society that every individual, institution and entity, private or state-operated, is held to the same standards and laws. Without the rule of law there is no democracy. ❖

Endnotes

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chosen cases from the DLR represent all the decisions that have been cited in the cases contained in the CanLII collection when we started this project. This is more or less equivalent to saying that we have all the decisions in the DLR that have been cited in approximately the last 15 years in Canada or in any earlier case in the SCR. Also introduced in some of these historical DLRs are a certain number of Privy Council decisions, so we also set up a new database for this content. More information can be found on our blog.

- We introduced a new way to publish commentary. CanLII has expanded to include some secondary materials on our website. Thanks to Lexum's Qweri software that powers this new innovation, you can now read legal commentary in a more elegant format with content that is easier to search and navigate. What's next for this feature? We will have more e-books later this year and, if all goes well, we will also have law reviews, continuing legal education materials and law reform commission reports. We are also working on a program to allow individual authors (or, in fact, teams of authors and organizations) to submit long-form commentary (books or articles) to be considered for publication on canlii.org. To see more on this, read our blog. ❖

Update on law firm regulation initiatives

THE OCTOBER 2016 *Interim Report of the Law Firm Regulation Task Force* proposed augmenting the current regulatory system that is directed at individual lawyers and relies heavily on discipline as a central deterrent, with a proactive model focusing on law firms that emphasizes best practices and is monitored through a rigorous self-assessment process.

In the proposed proactive framework, firms will be assisted in developing robust management structures in key areas of firm practice referred to as "professional infrastructure elements." Encouraging firms to implement and monitor policies, processes, practices and systems in these areas will help reduce the prospect of complaints, as well as any related investigation and enforcement measures.

Earlier this year, the task force set up focus groups to obtain feedback on the recommendations in the report. Those sessions are now complete, and the task force has completed an extensive review of the feedback. Overall, lawyers were very supportive of a law firm regulation regime based on a self-assessment process.

There were, however, some concerns about the time and resources that may be necessary to complete the self-assessment and to formalize or implement the associated policies and practices, particularly among smaller and medium-sized firms. To address this issue, many participants urged the Law Society to develop model policies and other educational resources to aid firms in developing adequate management systems. These suggestions echo proposals that are contained in the task force's interim report.

A number of participants also noted that firms will need time to adapt to the new regime. Accordingly, they encouraged the Law Society to provide firms with a sufficient period of time in which to develop

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Unbundled legal services: A viable solution for lawyers and clients

An interview with Kari Boyle, project manager of the Family Unbundled Legal Services Project

SELF-REPRESENTED LITIGANTS now appear in every court and tribunal at every level across Canada, and year over year, their numbers grow. The BC Provincial Court saw a four per cent increase in self-represented appearances in its 2015-2016 fiscal year, while the Court of Appeal saw a three per cent increase in 2016. It is clear that self-represented litigants are no longer a passing trend, but are a new reality in the legal market.

Dr. Julie Macfarlane, professor of law at the University of Windsor, champions the self-represented litigant cause. According to her report *Tracking the Continuing Trends of the Self-Represented Litigants Phenomenon: Data from the National Self-Represented Litigants Project, 2015-2016*, more than half of self-represented respondents began their legal matter with a lawyer and continued to seek legal assistance for some aspects of their case when they were no longer able to afford the full services of a lawyer. Time and time again, respondents described their frustration in trying to find lawyers willing to work with them on an unbundled basis.

In this interview, Kari Boyle, project manager for the Family Unbundled Legal Services Project, shares her insights on how unbundling allows lawyers to serve clients whose needs are currently not being met and the opportunity that the unbundled legal services business model provides for lawyers.

The Family Unbundled Legal Services Project was launched by Mediate BC in January 2016, with the support of the Law Foundation and the Law Society, to encourage and support lawyers in offering unbundled legal services and to connect litigants with lawyers who offer these services. Boyle also served as Mediate BC Society's executive director from 2006 to 2015 and is currently coordinator of the BC Family Justice Innovation Lab and a committee member of Access to Justice BC.

Q. How can unbundling of legal services improve access to justice for the public and be financially lucrative for lawyers?

A. Defining the spectrum of legal services users, at one end there are those who qualify for legal aid and at the other end there are those who can afford full representation. The market for unbundling represents the people in the middle who can afford to pay something, but they cannot afford full representation. These people value things like cost predictability and playing a more active role in their own legal matter. A significant portion of them have university educations and are middle-income earners.

This is a huge untapped market. Ryerson University's Legal Innovation Zone reported in 2016 that the annual unmet opportunity in providing unbundled legal services ranges from $40 million to $200 million.

Unbundling is a very promising business model to close the access-to-justice gap. It is not the silver bullet in solving access to justice; it is only one part of the puzzle. The great thing about unbundling is that it is doable right now, because the things required are things that lawyers are familiar with and do really well. Unbundling is simply a way of dividing up everything that needs to be done for the client and deciding who is going to do it.

Q. What are the benefits to unbundling for lawyers?

A. Based on the feedback we received and literature from other jurisdictions, lawyers say that unbundling, when done well, is simple, lucrative and enjoyable. Lawyers can access this untapped market and meet the needs of a changing marketplace. There are now lawyers in BC who have set up their firms to make providing unbundled legal services the core of their practice.

Kari Boyle
Project Manager, Family Unbundled Legal Services Project

Another benefit is that you can stop being a slave to the billable hour by using other pricing models such as flat fees and subscriptions, for example, one monthly fee for a set number of hours of advice. When I was practising law, one of the things I hated was to have my whole value revolving around how many hours I spent in the office. And the billable-hours model doesn't give clients the same level of price predictability as these other pricing approaches.

Many lawyers reported improved lifestyle satisfaction. Unbundling is conducive to practising part-time, to practising virtually, to not having matters extend into the unforeseeable future in an ongoing court battle. And many lawyers said they want to give back and help people who are struggling. This is a great way to do it.

Q. Why are some lawyers reluctant to unbundle services?

A. The lawyers who filled out our initial survey had very candid and helpful responses. Three issues rose to the top.

The first concern was the fear of liability or complaints. The recent Ontario report by Justice Annemarie Bonkalo is helpful in this matter. It states that there is no evidence suggesting unbundling results in greater malpractice risks or more complaints. It is important to remember that the Law Society rules require the same level of care and attention in providing unbundled services. The use of the written retainer letter or agreement, respecting its boundaries and amending it if the client's

needs change, can help enormously with communication issues and help prevent problems down the road.

The second issue is reputational concerns. For example, if lawyers prepare a document that a client takes into a courtroom and the document is somehow discredited, they fear they will be poorly regarded by the judge or opposing counsel.

This is a huge untapped market. Ryerson University's Legal Innovation Zone reported in 2016 that the annual unmet opportunity in providing unbundled legal services ranges from $40 million to $200 million.

This comes down to education. To address this, we have been liaising with all three levels of court in BC. We provided a seminar at the Court of Appeal to give judges and staff more information on what unbundling is, what it looks like in the courtroom and the role of an unbundled lawyer. The goal of these sessions is to increase understanding of what unbundling looks like and to develop acceptance and the welcoming of it into the courts. The Provincial Court is very supportive of unbundling. We are having a session with the Supreme Court in June.

The third concern is that lawyers really believe that people should have the full representation of a lawyer. Of course, the ideal situation is for everyone to have full representation if they can afford it. But if people cannot afford full representation, should they have nothing? Unbundling provides a workable middle ground.

Q. Do you see unbundling working in other areas of law, in addition to family law?

A. Yes, I do. In other areas of law, many lawyers are unbundling already, but they might not be calling it unbundled services. I was doing a workshop on unbundling in Penticton that drew lawyers from all across the Okanagan, from all areas of practice. As I was explaining unbundling, one lawyer shot up his hand and it was like a light bulb had come on. He said, "Wait a minute. I already provide unbundled legal services!" He provides a flat-fee consultation to small-claims litigants so they can understand the process and make their way through on their own. I think there is a bright future for unbundling in many areas of the law; it just takes some creativity and willingness to do things differently.

Q. What are the next steps for the Family Unbundled Legal Services Project?

A. We are currently evaluating our progress and are inviting lawyers and clients of unbundled legal services to fill out surveys so we can learn what the impacts have been so far. The feedback is critical to building the future of unbundling. We are asking some questions that are unusual in the legal sphere. One of the goals is to increase the well-being of families, so we ask questions on well-being. Typically in justice reform, we ask what is more efficient and what is cost-effective because you need to prove that money was well-spent. But you also have to combine that with improving the experiences of the people who are using the system.

We are also working on a tool kit for clients around unbundling. The idea is that this tool kit can be used by families to figure out what unbundling is, whether it is the right tool for them, how it can help and how they can use it. This tool kit can be also used by lawyers on their own websites for their clients to download.❖

To access the Family Law Unbundling Toolkit for Lawyers, or to join the BC Family Law Unbundling Roster, visit the Courthouse Libraries BC website.

Feature – Law firm regulation ... from page 12

policies, procedures, practices and systems in relation to the professional infrastructure elements, and to reflect on them in a meaningful way when completing the self-assessment form.

It is proposed that, initially, the only requirement will be to register with the Law Society and to complete a self-assessment form that outlines the extent to which each firm has achieved the objectives of each of the eight professional infrastructure elements. The purpose of this exercise is to assess how their current processes match those identified by the task force as being essential to the competent and efficient functioning of a law firm. The information from the self-assessments would indicate where law firms may need assistance in the development of policies or procedures. The Law Society will draw on this background information to create appropriate model policies and provide additional resources to aid firms in meeting the objectives of the professional infrastructure elements.

In March 2017, the Federation of Law Societies of Canada held a meeting in Quebec City. The meeting, which was attended by President Herman Van Ommen, QC, facilitated information sharing on regional law firm regulation initiatives. Representatives from the various law societies agreed that some level of national consistency is desirable, particularly in respect of firms that operate in multiple jurisdictions. We expect to engage in more discussions with other law societies on this subject in the coming months.

The task force plans to provide the Benchers with another report on law firm regulation in July 2017. This report will include a thorough analysis of the self-assessment tool, possible approaches to the development of model policies and other educational resources, an explanation of the responsibilities of a firm's designated representative, a process for firm registration, rule development and budgetary considerations. Following these recommendations, the Law Society will provide further information regarding the expected commencement of the registration process and the launch of the first self-assessment.❖

PRACTICE ADVICE, *by Barbara Buchanan, QC, Practice Advisor*

Ethical considerations when a lawyer leaves a firm

What happens to the clients and their files when a lawyer leaves or the firm breaks up?

(This is an expanded and updated version of an article that appeared in the Summer 2014 Benchers' Bulletin.)

WHEN A LAWYER leaves a firm, what happens to the clients and their files? What if the firm breaks up altogether? What happens if the lawyer who is leaving does not intend to continue to practise law?

Some lawyers hold the view that the law firm or an individual lawyer owns a client. They may believe that a client must either stay with the firm or that the departing lawyer can simply take the client's electronic and paper files to the new firm without notice. They are mistaken. A client is neither the departing lawyer's nor the law firm's property, though the lawyer and the firm may have a financial interest in the client's file.

Practice advisors receive many calls from lawyers going through an acrimonious parting of the ways with their firm. Lawyers on both sides sometimes do and say things that they regret. When a lawyer leaves a firm, whether to practise alone, to join another firm or to stop practising law altogether, the lawyer and the law firm have a duty to honourably discharge their ethical responsibilities to clients and to each other.

Winding up a practice. If a law firm is being wound up or a lawyer is ceasing private practice, lawyers should read Winding Up a Practice: A Checklist (on our website at Support & Resources for Lawyers > Law Office Administration). Otherwise, continue reading below.

Lawyer departing firm. If a lawyer is leaving a firm to practise elsewhere, lawyers should review the duties and guidance set out in the *Code of Professional Conduct for British Columbia*, rules 3.3-1, 3.3-7, 3.5-1 to 3.5-5, 3.7-1 (especially commentaries [4] to [10]), 3.7-7 to 3.7-9, 3.4-17 to

3.4-23, 3.4-26.1 and 7.2-11. Below are ethical duties and guidelines to keep in mind, mostly based on the above Code rules and, in addition, some Law Society Rules.

1. **Duty to inform clients.** The clients' rights are paramount. The departing lawyer and the law firm have an ethical duty to inform all clients for whom the lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them (rule 3.7-1, commentary [4]). The client may choose to continue to be represented by the departing lawyer or to stay with the firm (and of course clients may always decide to move their files somewhere else altogether).
2. **Responsible lawyer.** To assist in determining whether the departing lawyer is the "responsible lawyer" in a legal matter, consider objectively, from the client's perspective, who that is. Who is responsible for overseeing the work? Who is doing the work? The responsible lawyer is not merely a name on a file and may not always be the lawyer who brought the client to the firm. It is preferable for the law firm and the departing lawyer to review the client files, mutually agree on who is the responsible lawyer, make a list of the files and inform those clients of the change. If the lawyer and the law firm cannot agree on who is the responsible lawyer on a particular file, they may opt to ask for assistance from an impartial lawyer. Another option is to err on the client's side, in other words, inform the client of their right to choose.
3. **Duty does not arise in some circumstances.** The duty to inform the clients about their options does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm (rule 3.7-1, commentary [5]). For example, if the departing responsible lawyer has been appointed a judge or has taken a full-time in-house counsel position, he or she will not be in a position to continue to represent clients but another competent firm lawyer known to the clients may be. However if the departing lawyer is the only lawyer at the firm who is competent to represent the client (e.g., the only family law lawyer at the firm or the only tax lawyer), the client may choose to go with the departing lawyer or change to a lawyer at another firm. It may be inappropriate for the existing law firm to try to hang on to the client unless the firm is bringing on a replacement lawyer competent in the practice area. Clients should be informed of such information as it might influence their choice.
4. **Duty not curtailed by contract between lawyer and law firm.** The law firm should not prevent the departing lawyer from carrying out the lawyer's duty to inform clients of their right to choose. A client's right to be informed of changes to a law firm and to choose his or her lawyer cannot be curtailed by any contractual or other arrangement. For example, despite a law firm's insistence that the firm keep the clients' business because of a contractual arrangement between the lawyer and the firm, the clients have a right to be informed and to exercise their choice of lawyer.
5. **Notify clients by letter as soon as practicable.** Notify clients of their right to choose their lawyer as soon as practicable after the effective date of the change is determined (rule 3.7-1, commentary [6]). In my view, the effective date would normally be the date that the lawyer gave notice to the firm that the lawyer was leaving as of a specific date or within a specific time frame. Preferably send the letters well prior to the lawyer's departure, to give the clients reasonable notice and to make any transition as seamless as possible for them (rule 3.7-1).
6. **Joint letter preferable.** It is best if the departing lawyer and the law firm can agree on a neutrally worded joint letter informing clients of the changes and their choices as to representation (rule 3.7-1, commentary [7]). For the clients, a joint letter may decrease confusion and anxiety, lessen concerns about continuity of representation and not expose them to any unseemly wrangling. For the firm and the lawyer, an advantage is that they will know exactly what is written, to whom and when during what can be an awkward and tumultuous period. The letter can address matters such as whom the clients should contact after making their choice and other administrative matters (also see paragraph 19). If a client doesn't respond to the letter, it may be necessary to send a second letter or to follow up in another way. If there is still no response, in most situations it will be preferable for the file to stay with the firm.
7. **Precedent letters in the absence of a joint announcement.** In the absence of a joint announcement, the law firm and any lawyers affected by the changes, including the departing lawyer, may use the precedent letters on our website (in Support & Resources for Lawyers > Law Office Administration > Lawyer Leaving Law Firm), one for the departing lawyer and one for the firm (rule 3.7-1, commentary [7]). Both precedent letters provide for the inclusion of the name of the departing lawyer's new law firm or sole practice and for the client's written instructions regarding representation and any trust account balance. The client may check a box indicating the client's choice and return it to the sender. Whether the client provides direction in this way or through other correspondence, if the file is to be transferred, there should be written direction from the client

Some lawyers hold the view that the law firm or an individual lawyer owns a client. They may believe that a client must either stay with the firm or that the departing lawyer can simply take the client's electronic and paper files to the new firm without notice. They are mistaken. A client is neither the departing lawyer's nor the law firm's property, though the lawyer and the firm may have a financial interest in the client's file.

regarding the file transfer and any trust funds. Ideally, both the firm and the departing lawyer will know the content of each other's letters, when they were sent and to whom.

8. **Not a marketing letter.** The Ethics Committee has considered whether it is proper for either the firm or the departing lawyer to include marketing materials in a letter informing clients of their right to choose representation. The committee's view (July 2011, item 3) was that, unless the lawyer and the law firm agree otherwise, such a communication must not include a marketing component.
9. **Restrictive covenants.** A client's right to be informed of changes to a law firm and to choose representation by the departing lawyer cannot be curtailed by a contractual or other arrangement (e.g., a restrictive covenant) between a lawyer and law firm (rule 3.7-1, commentary [9]). Restrictive covenants that may affect a lawyer's ability to act for prospective clients, including those with geographic restrictions, are not prohibited by the *BC Code*, though in some cases they may be unenforceable at law (Ethics Committee, May 1999, item 7). The committee's view was that "prospective clients" includes existing clients on new matters.
10. **Other communication to clients.** The departing lawyer and the law firm should agree that, prior to a client exercising his or her choice, the lawyer may continue to communicate with a client by telephone or other means reasonably necessary to discuss the client's matter (e.g., a settlement offer with a deadline for acceptance) and to minimize any adverse effects on the client's interest (rule 3.7-1, commentary [8] and rule 3.2-1).
11. **Common law restrictions.** With respect to communication other than required by the Code, lawyers should be mindful of the common law restrictions on uses of proprietary information and interference with contractual and professional relations between the law firm and its clients (rule 3.7-1, commentary [10]).
12. **Unseemly wrangling.** Once a client has received either a joint or precedent letter and has made a choice of lawyer, neither the departing lawyer nor the law firm should try to change the client's mind by ill-considered criticism of the competence, conduct, advice or charges of other lawyers (*BC Code*, Canon 2.1-4(a)). If the departing lawyer and the law firm are having a dispute about files and finances, mediation may be advisable. The Canadian Bar Association, BC Branch offers a free lawyer-to-lawyer mediation service.
13. **Conflicts from transfer between law firms.** A model conflicts of interest checklist is on the website. Prior to the departing lawyer commencing work at the new firm and transferring a client's file there, the departing lawyer, the existing law firm and the new law firm should review Code rules 3.3-7 and 3.4-17 to 3.4-23, rules that apply to conflicts that may result when a departing lawyer transfers to a new law firm. Rule 3.3-7 provides for limited disclosure of client information, with client consent, if the information disclosed (normally no more than persons' names and entities) does not compromise solicitor-client privilege or otherwise prejudice the client. The basis of the disclosure is solely for detecting and resolving conflicts that might arise from the departing lawyer's transfer to the new firm and for establishing confidentiality screens. The disclosure should be coupled with an undertaking by the new law firm to the departing lawyer's existing or former firm about the access and use of the information (rule 3.3-7, commentary [5]).
14. **Transitioning the client's "property," including the file.** Lawyers have an obligation to account for a client's "property" (as defined in rule 3.5-1) and deliver it upon request (subject to lien rights) and must minimize any adverse effect on the client's interest when a lawyer leaves a firm (section 3.5 and rules 3.7-1 and 3.7-8). This generally includes an obligation to ensure that the files are properly transitioned. The lawyers involved should cooperate to minimize expense, avoid prejudice to

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 for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

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

LifeWorks – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
Tel: 1.888.307.0590.

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers.
Tel: 604.685.2171 or 1.888.685.2171.

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

the client and do all that can reasonably be done to facilitate the orderly transfer of the matter. The departing lawyer may also be responsible for "fiduciary property" (as defined by Law Society Rule 1) to be transferred. Also see paragraph 20.

15. **Obligation to provide client documents (including electronic files) within a reasonable time.** A lawyer has an ethical duty, on request, to provide a client with documents that, at law, the client is entitled to have. A lawyer is also obliged to provide electronic documents in the same form in which the lawyer holds them at the time of the client's request, even if the lawyer previously provided them in the course of providing legal services. The lawyer must make reasonable efforts to meet a client's request. A lawyer is entitled to negotiate a reasonable number of documents to provide. For more information, see the Ethics Committee's November 2009, item 4 and December 2008, item 2 opinions on the website. To assist in determining whether it may be the client or the lawyer who owns particular file documents, see Ownership of Documents in a Client's File on the website.

16. **Billing for production of electronic documents or photocopies.** Since it is for the lawyer's benefit to retain copies of a client's file documents to defend against negligence claims, respond to complaints or deal with fee disputes, the lawyer should make any copies of a client's documents for the lawyer's own retention at the lawyer's expense. A lawyer is entitled to bill a fair and reasonable amount for providing electronic documents and photocopies of documents to the client and the costs of materials to do so (Ethics Committee, November 2009, item 4). The Law Society's August 10, 2012 Discipline Advisory provides that disbursements must be billed at their actual, rather than estimated, cost. There is also an Ethics Committee opinion (October 1997, item 5) that a lawyer may add surcharges to disbursements if they reasonably reflect actual costs incurred and are fully disclosed in the statement of account.

17. **File status.** When preparing to transition a file, consider the file's status (e.g., whether there are unfulfilled undertakings, outstanding commitments, unpaid or unbilled fees and disbursements, and limitation deadlines). An account should be issued; however, if there is a contingent fee agreement, undertakings regarding the account may be required. If the client discharges the departing lawyer, the lawyer should follow Code rules 3.7-7 to 3.7-9 and it may be necessary for the departing lawyer to detail the file's status in a memorandum for orderly succession.

18. **Outstanding undertakings.** A lawyer must fulfill every undertaking given and honour every trust condition equivalent to undertakings, once accepted (rule 7.2-11). A person to whom a lawyer has given an undertaking is entitled to assume that the lawyer will honour it personally unless the undertaking clearly states otherwise. When a client file is being transitioned to another lawyer, consider how outstanding undertakings may be satisfied or whether they may be retracted or amended. If an undertaking cannot be fulfilled by the original lawyer before the transfer, it may be possible to arrange for that lawyer to be released from the undertaking and for the successor lawyer to accept the undertaking in place of the original lawyer. The transfer of the obligation should be acceptable to the original lawyer, the successor lawyer and the person to whom the undertaking was given. Any mutually agreeable variations should be confirmed in writing.

A lawyer has an ethical duty, on request, to provide a client with documents that, at law, the client is entitled to have. A lawyer is also obliged to provide electronic documents in the same form in which the lawyer holds them at the time of the client's request, even if the lawyer previously provided them in the course of providing legal services.

19. **Solicitors' liens.** If the client has chosen to go with the departing lawyer, arrangements must be made to pay any outstanding accounts. The law firm may refuse to transfer the file and claim a retaining lien if the accounts are not paid or an undertaking regarding payment of the account is not arranged. See the practice resource Solicitors' Liens and Charging Orders – Your Fees and Your Clients on the website. A sample undertaking is included in Appendix A. Sometimes a court application is necessary to obtain a client's file (section 78, *Legal Profession Act*).

20. **Closed files, storage providers and security.** Closed files usually stay in storage with the firm rather than moving with the departing lawyer. See Code section 3.5 (preservation of clients' property) and Law Society Rules 10-3 and 10-4 for important considerations with respect to storage providers and security arrangements. See the cloud computing checklist and Closed Files – Retention and Disposition, on our website, for more information.

21. **Change of contact information requirements.** Law Society Rules 2-9 and 2-10 require a lawyer to immediately inform the Executive Director of a change of address, telephone number and email address of any of the lawyer's places of practice. Go to Support & Resources for Lawyers > Member Services for the change of contact information form and other information and forms about practice status changes. In addition to notifying clients and other counsel of your change of contact information, consider what other individuals or bodies should receive notice (Code rule 3.7-9).

22. **Problems?** If you have questions about your ethical obligations, contact a practice advisor. You may also need advice from an employment law lawyer regarding your legal obligations. Mediation may also be a good option.❖

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.

BREACH OF TRUST ACCOUNTING RULES

A lawyer breached trust accounting rules in Part 3, Division 7 of the Law Society Rules, by transferring funds from his trust account for fees totalling $7,496.96 without first preparing and/or delivering a bill to clients, contrary to Rule 3-65(2) and section 69 of the *Legal Profession Act*, and by failing to deposit retainers into his pooled trust account, contrary to Rule 3-58. The lawyer had withdrawn funds from trust in respect of his fees 10 days prior to sending a bill to the client. Upon investigation, he self-reported further similar files.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate as the trust accounting rules are a fundamental requirement of all lawyers to protect the public interest. The fact that the funds withdrawn were based on work done does not excuse these actions. Although his motive was not fraud, the subcommittee stated the lawyer had shown a blatant disregard for the accounting rules. The lawyer has taken steps to ensure there is no reoccurrence. He has made arrangements to reduce his financial stress and intends to hire a part-time assistant if and when the volume of business increases. (CR 2017-12)

CONDUCT UNBECOMING A LAWYER

Another regulatory board found that a lawyer had breached the *Prevention of Cruelty to Animals Act* (*PCCA*). Such a breach of a statutory obligation is contrary to rule 2.2-1 of the *Code of Professional Conduct for British Columbia*, as lawyers are expected to abide by the law and fulfill all of their legal duties.

The lawyer advised a conduct review subcommittee that she filed a petition seeking judicial review of the decision because she did not agree that her animals were distressed or that she breached the *PCCA*. The lawyer confirmed that she would make reasonable efforts to seek independent advice from another lawyer with respect to the pleadings and the conduct of the litigation and would seek support from the Lawyers Assistance Program regarding her stress and anger over the seizure of her animals. (CR 2017-13)

CONFLICT OF INTEREST / DEALING WITH AN UNREPRESENTED PARTY

While acting for a client in a residential conveyance, a lawyer: (a) acted in a conflict of interest by representing his client and a numbered company, without consent, where they had adverse interests, contrary to rule 3.4-1 of the *Code of Professional Conduct for British Columbia*; (b) allowed his client to swear a false statutory declaration; and (c) assisted his client with a transaction that he ought to have known encouraged dishonesty or fraud, contrary to rule 3.2-7. The lawyer understood that the property would be purchased by a numbered company controlled by the client's friend, who would also guarantee the mortgages necessary to complete the purchase and would hold the property in trust for the client and his wife. The client's friend believed that the documents were part of a plan to buy a large parcel of land up north. He thought that the client already owned the property conveyed by the lawyer, and that the funds obtained through the mortgages he guaranteed were going to be used to fund the land purchase.

The lawyer admitted that he was aware that his client was not a director or officer of the numbered company, but relied on the client's representations that he somehow controlled the company. The lawyer acknowledged that he erred in accepting his client's explanation of the other party's willingness to act as a guarantor, and that the unusual circumstances of that participation should have led him to ask more questions to determine the true nature of the transaction. He also recognized that he erred in not identifying the conflict of interest between the parties and by failing to make clear to the numbered company that he was acting only for his client in the transaction. Finally, the lawyer admitted that he did not read the statutory declaration prepared by a notary prior to arranging for it to be executed. Had he done so, he would have realized it was false as it did not make reference to the declaration of trust and promissory note prepared by the lawyer.

A conduct review subcommittee stressed to the lawyer the importance of formally identifying, to the client and to others, who the lawyer is acting for and the scope of the services being provided, and discussed how engagement letters are a useful tool in this regard. The lawyer indicated that he intends to use engagement letters going forward. The subcommittee confirmed that the lawyer has represented that he has changed his practice to ensure that he no longer acts on any real estate transactions that are not simple conveyances and to no longer act on any conveyances that conflict with his trial schedule. (CR 2017-14)

FALSE DECLARATION AND LTA BREACH

The Land Title Office issued a defect notice to a lawyer regarding the registration of an enduring power of attorney executed by the lawyer's client. The basis for the rejection was that an enduring power of attorney requires two witness signatures to be properly executed and only one witness signature was provided. In an attempt to fix the defect, the lawyer altered a copy of the original power of attorney by signing it as a witness in the absence of the client, and submitted the altered power of attorney to the Land Title and Survey Authority of BC (LTSA) along with a declaration falsely stating that the lawyer had been present to witness the client's signature. A conduct review subcommittee advised the lawyer

that her conduct fell below the standards established regarding integrity and the witnessing of signatures, specifically in relation to rule 2.2-1 and Appendix A of the *Code of Professional Conduct for British Columbia*. An investigation conducted by the LTSA determined that the lawyer's actions were also contrary to section 168.3 of the *Land Title Act*, and as a result, the LTSA revoked the lawyer's Juricert certificate.

The lawyer self-reported to the Law Society after the LTSA brought the issue to her attention. The lawyer said that during the period in question she had suffered a relapse of alcoholism and, as a consequence, had blacked out on that day and does not recall the subject events. The lawyer also disclosed her alcoholism to her law firm, took a leave of absence to attend treatment and re-establish sobriety and well-being, reached out to family for support, and resumed regular attendance at multiple support group meetings. The subcommittee emphasized that the lawyer's conduct could have resulted in a citation, but that her self-report and unequivocal acceptance and admission of responsibility, as well as her clear attempts to remedy the circumstances that led to the events in question, supported the lesser disciplinary action of a conduct review. The lawyer committed to continue attending support groups and to keeping her law firm informed about her well-being. (CR 2017-15)

ACTING AGAINST FORMER CLIENT / DEALING WITH AN UNREPRESENTED PARTY

A lawyer acted against a former client on a financing matter that was prejudicial to her interests, without her consent and without ensuring that she understood that he was no longer her lawyer and was no longer protecting her interests, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook* then in force, and rule 3.4-10 of the *Code of Professional Conduct for British Columbia*. The lawyer admitted that he ought to have told the former client to get independent legal advice. He advised a conduct review subcommittee that, following this incident, he specifically reviews each file on receipt of instructions and, if there is a conflict, he refers the matter to another lawyer. (CR 2017-16)

INCIVILITY AND ADVERTISING / MARKETING

A lawyer posted comments on a public Facebook group page that contained unprofessional and ill-informed criticisms about another lawyer and firm. The Facebook posts amounted to marketing activity by the lawyer that was not in the best interests of the public, contrary to rule 4.2-5(e) of the *Code of Professional Conduct for British Columbia*, as the posts did not reflect favourably on the legal profession nor inspire the confidence, respect and trust of the clients and the community. The public criticisms were unverifiable and unprofessional and could not have been made for any purpose other than to denigrate the other lawyer and firm in an effort to make his own legal services more attractive, contrary to rules 7.2-1 and 7.2-4. A conduct review subcommittee pointed out to the lawyer that civility among lawyers is vital to maintain the integrity of the profession and that his conduct reflected poorly on both other lawyers and himself.

The lawyer has since reviewed the Law Society's practice resource and model policy concerning social media and social networking and has modified the manner in which he uses Facebook. The lawyer advised the subcommittee that he has returned to counselling to address his maladaptive coping strategies, in particular his tendency to react impulsively to stressors and triggers in his personal and professional life. (CR 2017-17)

BREACH OF CONFIDENTIALITY OF LAW SOCIETY COMPLAINT

A lawyer submitted confidential correspondence from the Law Society at a fee review, contrary to section 87 of the *Legal Profession Act*, which provides that Law Society correspondence is not admissible as evidence in any proceeding without the consent of the Executive Director, and Law Society Rule 3-3, which provides that no one is permitted to disclose any records that form part of the complaint (the "confidentiality provisions"). The lawyer advised that he had never dealt with the confidentiality provisions before in his legal career but has now read them and understands what he did wrong. He has extended his apologies to the complainant and advises he would not take the same action in future. (CR 2017-18)

BREACH OF VARIOUS TRUST ACCOUNTING RULES

A lawyer failed to comply with the requirements of Part 3, Division 7 of the Law Society Rules by failing to prepare monthly trust reconciliations, contrary to Rule 3-73; failing to promptly correct eight trust shortages totalling $11,126.05 and report one trust shortage greater than $2,500, contrary to Rule 3-74(1) and (2); and failing to provide an accurate trust report for 2011. The breaches appeared to be largely caused by a failure to perform and review regular monthly trust reconciliations, errors in making deposits to the general account instead of trust account, and clients having insufficient funds. All of the trust shortages have been rectified.

A conduct review subcommittee advised the lawyer that accurate recording and reconciling of the amounts held in trust for each client is essential to ensuring that a lawyer does not use the funds of one client to compensate for shortages in another client's fund. The lawyer's conduct was not deliberate but caused by a lack of understanding and paying appropriate attention to the administrative obligations to keep accurate records of his trust account. (CR 2017-19)

INCIVILITY / LACK OF BOUNDARIES WITH CLIENT

While acting in a family law matter, a lawyer acted in an unprofessional and intimidating manner in his interactions with the unrepresented, opposing party at a courthouse, contrary to rules 7.2-3 and 7.2-4 of the *Code of Professional Conduct for British Columbia.* Further, the lawyer placed himself in a possible conflict of interest when he consumed alcohol with his client when he knew that the issue of his client's abstinence from drinking was in the affidavit material he commissioned on behalf of the client, contrary to rule 2.2-1. The lawyer has become a Zen practitioner, no longer drinks with his client and is learning to set boundaries and to say no. He has also reduced his file load by approximately 50 per cent. (CR 2017-20)

BREACH OF ACCOUNTING RULES / INACCURATE TRUST REPORT / JURICERT

A compliance audit of a lawyer's practice revealed that the lawyer had failed to maintain his books and records in compliance with Part 3, Division 7 of the Law Society Rules; failed to pay the trust administration fee on seven client matters, contrary to Law Society Rule 2-110; provided inaccurate responses to the Law Society in his 2015 trust report; and permitted his assistant to affix his Juricert digital signature to documents filed in the Land Title Office using the electronic filing system, contrary to one or more of his Juricert agreements, Part 10.1 of the *Land Title Act,* Law Society Rule 3-64(8)(b) and rule 6.1-5(a) of the *Code of Professional*

Conduct for British Columbia.

A conduct review subcommittee reminded the lawyer of his obligation to maintain his accounting records in compliance with the Rules and discussed with him the policy reasons behind the Rules and the *BC Code* provisions. With respect to the Juricert matter, the subcommittee reminded him that a lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents may neither permit others to use such access nor disclose his or her password to others. The lawyer advised that he has changed his Juricert password and now personally affixes his own digital signature on all documents. The lawyer has also changed his office systems with respect to his trust accounts and has committed to ensuring that he prepares his annual trust report correctly. (CR 2017-21) ❖

Credentials hearing

Law Society Rule 2-103 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 Hearing Schedules and Decisions on the Law Society website.

APPLICANT 11

Panel: Bruce LeRose, QC, Chair, Brook Greenberg and Graeme Roberts
Counsel: Jean P. Whittow, QC for the Law Society; Garth McAlister for Applicant 11

Application for call and admission

Hearing: November 1, 2016
Decision issued: November 18, 2016 (2016 LSBC 38)

BACKGROUND

Having completed nine months of articles with her principal, Applicant 11 commenced the Professional Legal Training Course (PLTC) in February 2016. On April 7, 2016, a PLTC instructor noticed similarities in the assessments submitted by Applicant 11 and another student. Upon further review, similarities were also noted in a prior assessment submitted by Applicant 11 and the same other student.

Applicant 11 admitted to working with the other student on the two assessments. Upon request, the applicant willingly provided the deputy director of PLTC with correspondence between herself and the other student. Applicant 11 sent a letter to the Credentials Committee apologizing for collaborating on the assessments and took responsibility for violating PLTC's explicit Professional Integrity Policy, acknowledging that what she did is classified as cheating.

The panel considered that the applicant immediately admitted her conduct without any evasiveness or excuses; cooperated fully in the PLTC investigation of the matter, including volunteering Facebook Messenger communications; wrote a letter of apology; and voluntarily sought counselling to address the underlying issue of her response to the extreme stresses in her life.

DECISION

The panel found that Applicant 11 satisfied the onus of demonstrating, on a balance of probabilities, that she is of sufficiently good character and repute to be called to the Bar of British Columbia and is fit for admission as a solicitor of the Supreme Court of British Columbia.

Applications concerning anonymous publication, sealing certain information and costs

Submissions received: January 16 and 23, 2017
Decision issued: March 20, 2017 (2017 LSBC 07)

BACKGROUND

In the decision issued on November 18, 2016, the panel found that Applicant 11 was eligible to be called to the Bar of British Columbia and admitted as a solicitor of the Supreme Court of British Columbia. Both parties subsequently provided additional submissions in writing with respect to costs and to Applicant 11's application to have the admission decision published without identifying the applicant.

The parties reached agreement with respect to costs and to publication of the decision without identifying the applicant. They also reached agreement on some, but not all, issues regarding proposed restrictions on the disclosure of certain information relating to the matter. The parties did not agree on whether the Law Society should be permitted to use the confidential information in potential regulatory proceedings arising from the evidence in this matter, and whether other interested parties should be permitted to apply for full disclosure of the confidential information and, if so, whether Applicant 11 should have the right to have notice of and make submissions in response to such an application.

DECISION

Both parties consented and the panel ordered that if either the admission decision or these reasons are published, they must not identify Applicant 11.

The panel also ordered restrictions on disclosure and use of specific confidential information produced in the course of this matter. Those restrictions do not apply to disclosure within the Law Society and to members of its Discipline and Credentials Committees, or to the extent the Law Society considers such disclosure necessary to investigate any conduct and to pursue any discipline or credentials process.

If the Law Society becomes aware of any application seeking disclosure of any of the confidential information in another Law Society proceeding, it must provide as much notice of the application as reasonably possible to Applicant 11.

The panel ordered Applicant 11 to pay costs of $500.❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Catherine Ann Sas, QC
- Heather Catherine Cunningham
- Lawyer 17
- Kevin Alexander McLean

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

CATHERINE ANN SAS, QC

Vancouver, BC

Called to the bar: May 19, 1989

Application for stay pending review

Decision issued: May 2, 2016 (2016 LSBC 15)

President's designate: Lee Ongman

Counsel: J. Kenneth McEwan, QC for the Law Society; Peter J. Wilson, QC for Catherine Ann Sas, QC

BACKGROUND

A citation was issued against Catherine Ann Sas, QC on August 1, 2013. A hearing panel decision on facts and determination was issued on April 20, 2015 (2015 LSBC 19), and on January 25 2016 the hearing panel imposed a four-month suspension, to take effect March 1, 2016 (2016 LSBC 03). A notice of review dated February 9, 2016 was delivered to the Law Society applicable to both panel decisions. A stay of the suspension was entered on February 24, 2016, with reasons to follow. These are the reasons.

DECISION ON APPLICATION FOR STAY

Although the Law Society was not opposed to the application for a stay pending the review, with conditions, a three-part test as set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, still had to be satisfied, namely:

- the review must not be frivolous or vexatious;
- the applicant must show that she would suffer irreparable harm if the stay was not granted; and
- the granting of the stay must not put the public at risk.

Being satisfied that the three conditions were met, the president's designate granted the stay terminating on whichever of the following occurs first:

- the applicant's review being discontinued or abandoned by the applicant;
- the applicant's review being dismissed by the review board;
- further order of the review board; or
- September 15, 2016.

The order for costs was automatically stayed pursuant to the Law Society Rules.

Review board

Review: January 23, 2017

Review board: Jasmin Z. Ahmad, Chair, William Everett, QC, Lisa Hamilton, Thelma Siglos, Robert Smith, B. William Sundhu and Sarah Westwood

Decision issued: March 31, 2017 (2017 LSBC 08)

Counsel: J. Kenneth McEwan, QC and Rebecca Robb for the Law Society; Peter J. Wilson, QC for Catherine Ann Sas, QC

BACKGROUND

A hearing panel concluded that Catherine Ann Sas, QC had committed professional misconduct in respect of a series of transactions that allowed her to "zero out" her clients' trust accounts to facilitate their closing (2015 LSBC 19). The panel ordered that Sas be suspended from the practice of law for four months (2016 LSBC 03; Spring 2016 discipline digest).

Sas sought a review of the panel's decision on disciplinary action. She argued that the panel limited its consideration of "parity" to a determination of whether disbarment or suspension was the appropriate disciplinary action, rather than to the overall length of the suspension; failed to give appropriate weight to the mitigating factors and overemphasized the principle of general deterrence; and underestimated the impact a four-month suspension would have on her practice. She argued that an order for a fine and reprimand should be substituted for the four-month suspension

DECISION OF THE REVIEW BOARD

The review board concluded that the hearing panel correctly applied the legal tests to determine the appropriate disciplinary action. The board confirmed the decision of the hearing panel to suspend Sas from the practice of law for a period of four calendar months and ordered that the suspension commence May 1, 2017, or such other date as the parties may agree.

HEATHER CATHERINE CUNNINGHAM

Surrey, BC

Called to the Bar: June 1, 2001

Discipline hearing: February 3, 2017

Single-Bencher panel: Jamie Maclaren

Decision issued: April 5, 2017 (2017 LSBC 09)

Counsel: Carolyn Gulabsingh for the Law Society; Heather Catherine Cunningham on her own behalf

FACTS

A woman retained Heather Catherine Cunningham to probate a will. They met in September 2015 to sign probate documents, and there was no further communication until May 18, 2016, when the client left

Cunningham a telephone message requesting a progress report. The client made several more attempts to contact Cunningham by telephone, email and registered letter, and finally sent a letter to her terminating her retainer and requesting the return of her file. The client made a complaint to the Law Society in July 2016.

The Law Society contacted Cunningham by telephone on August 4, 2016 and immediately afterward couriered a letter asking for a response to the complaint. In September and October 2016 the Law Society made several attempts to contact Cunningham by telephone, email and letter. Receiving no response, the Law Society cited Cunningham on November 8, 2016.

DETERMINATION

At the hearing, Cunningham did not challenge any of the Law Society's evidence, nor did she raise a defence to the allegation of professional misconduct. She apologized for having "missed" her duty to respond to the Law Society. The panel found that Cunningham's failure to respond to the Law Society constituted professional misconduct.

DISCIPLINARY ACTION

The hearing panel ordered that Cunningham:

1. provide a substantive written response to the complaint no later than February 17, 2017;
2. pay a fine of $5,000; and
3. pay costs of $1,556.74.

LAWYER 17

Nanaimo, BC

Called to the bar: August 1, 1985

Discipline hearing: September 12 and December 2, 2016

Panel: Philip A. Riddell, Chair, Don Amos and Shona A. Moore, QC

Decision issued: April 10, 2017 (2017 LSBC 10)

Counsel: Carolyn Gulabsingh for the Law Society; Richard Gibbs, QC for Lawyer 17

FACTS

In a previous discipline hearing decision, a panel found that Lawyer 17 had engaged in professional misconduct by failing to provide a full response to its request for certain email correspondence pertaining to a case involving two clients. That decision included an order that Lawyer 17 produce the emails in question. When he failed to do so, the current citation was issued.

Lawyer 17 was assisted in the case in question by another lawyer, at times as co-counsel, at other times as an unpaid volunteer. Lawyer 17 supplied the Law Society with his own email correspondence with the clients, but he maintained that, because the other lawyer was the primary point of contact for a period, that lawyer's email account contained the more complete record of email correspondence. Lawyer 17 urged the other lawyer to review his email account and to produce the emails in question so that they could be forwarded to the Law Society or, failing that, to provide Lawyer 17 with the password to the email account so that he could do so himself. Due to ill health and inadequate technical skills, the other lawyer was unable to produce the emails, and he declined to provide Lawyer 17 with the email account password.

DETERMINATION

The panel concluded that the previous panel's order did not require Lawyer 17 to provide to the Law Society emails that were not within his control, and found that the Law Society did not meet the burden of proving on the balance of probabilities that Lawyer 17 failed to comply with the order. The citation issued against Lawyer 17 was dismissed.

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

Application to dismiss the review: February 2, 2017

President's designate: Dean Lawton, QC

Decision issued: May 1, 2017 (2017 LSBC 13)

Counsel: Geoffrey Gomery, QC for the Law Society; no one appearing on behalf of Kevin Alexander McLean

BACKGROUND

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. The hearing panel found that McLean committed professional misconduct with respect to the 10 allegations (2015 LSBC 39). The panel ordered that McLean be disbarred and pay costs of $12,165.78. 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 (2016 LSBC 06; Summer 2016 Discipline digest).

McLean delivered a notice of review under s. 47 of the *Legal Profession Act* on March 11, 2016. He took no further steps to advance the review.

DECISION ON APPLICATION TO DISMISS THE REVIEW

The Law Society applied for an order dismissing the review under Law Society Rule 5-28. The president's designate determined that McLean had taken no steps to advance the review and his unexplained delay amounted to inordinate delay.

The president's designate determined it was in the public interest to dismiss the review and it was not unfair to McLean to do so. The review was dismissed.❖

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