The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

The best laid plans

by Craig A.B. Ferris, QC

I DID NOT EXPECT to be president of the Law Society during a pandemic. But as they say, the best laid plans …

My plan for this year was to reinforce the Law Society's public interest mandate — for example, by reinvigorating debate at the Bencher table and having us focus on big issues. Legal regulatory reform. The use of technology to improve the public's access to legal services. The biggest wildcard in my planning was to balance these priorities with the Law Society's ongoing participation in the Cullen Commission of Inquiry into Money Laundering.

When COVID-19 hit, it came at full speed. Within one week, I went from participating in a welcoming ceremony at the Court of Appeal and a call ceremony for newly called lawyers, to overseeing the transition from in-person operations at the Law Society to remote delivery of services. I had daily discussions with CEO Don Avison, QC on how to successfully relocate Law Society activities to an online environment and implement work-from-home protocols.

This period of crisis management has now largely passed. We are all learning to work and live in the "new normal" for the time being. At the Law Society, this means we have returned to our agenda of reform, but with a new viewpoint. Our decisions now are informed by the experience of the COVID-19 pandemic and how we can use this experience to innovate and build a more resilient justice system and justice sector — one that avoids a full or partial shutdown, is more efficient and provides more and better access for British Columbians.

In an odd way, the pandemic has become an incredibly challenging but also opportune time to be president.

The pandemic exposed frailties in the justice system. The movement of paper, as well as other procedures and processes that we conceived as necessary, and in some cases fundamental, for protecting the integrity of our justice system became barriers to accessing the system during the pandemic. Our courts, fundamental to our constitutional system of government, were limited in their ability to function due to a lack of technology and the failure of successive governments to invest in the court system. This limit on access to the courts made clear to all of us who normally have access to the system what life is like for the great numbers of the public who do not.

The pandemic has revealed that changes can be made within the justice system quickly and efficiently when participants collaborate. The Law Society was able to participate in and, at times, drive change and innovation to provide solutions. When it became a challenge to swear affidavits in person due to public health directives, it became possible to commission them virtually. When courts could not hold in-person hearings, it became possible to attend these hearings virtually or by phone. As the business and practice of law shifted to remote offices, lawyers and law firms accelerated the move to digitize their offices and reduce reliance on paper. Many of these innovations will remain long after the pandemic. The lesson is that we can organize legal practice and the justice sector in a more efficient and technologically competent manner — ultimately allowing us to provide more efficient and better access for British Columbians.

Innovation and change are underway at the regulator. In May, the Law Society Tribunal was able to resume holding hearings with its first virtual hearing over the Zoom video-conferencing platform. These hearings continue and have become our default mode of hearing. The Benchers also held their last three meetings and numerous committee meetings over Zoom. Staff are developing a web-based, interactive

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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.

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

Operations during the Covid crisis

by Don Avison, QC

ON MARCH 13, 2020, the Law Society posted our first notice regarding Covid-19. It was a message to the public and the profession that outlined the steps we were taking to prepare for the pandemic. A few days later, when the provincial state of emergency was declared, we issued the first of what is now 28 notices to the profession and public. Through these notices, a virtual town hall and video messages from President Craig Ferris, QC, we have been striving to provide you with the necessary information and guidance to support the delivery of much-needed legal services throughout this crisis.

During the pandemic, the Law Society has continued to operate. While ensuring the health and safety of the public, members of the legal profession and our employees meant closing our doors to the public, staff in every department made the transition to working remotely. Practice advisors continued to receive and respond to calls from lawyers. The public remained able to contact our Intake team if they had a complaint. PLTC overcame initial challenges to resume delivery of the program. Trust auditors, members of our Monitoring and Enforcement teams, and those at LIF maintained service levels despite the disruption. Member Services experienced a number of challenges but are focused on addressing outstanding matters and improving response times.

Throughout the crisis, I have asked staff of the Law Society to find creative solutions to the challenges you have had to face. When you told us that public health directives requiring social distancing had an impact on your ability to meet with clients to commission affidavits, our Policy lawyers worked closely with the courts and with government to develop procedures for virtual commissioning. We also adopted a similar process for Law Society applications, which led other agencies to follow suit. In order to address what we were hearing about difficulties fulfilling CPD requirements during this extraordinary time, we began developing free, online programs to make things a little easier.

We have also heard about the economic impact that the pandemic is having on your ability to deliver legal services. To assist you, we published information and links for federal and provincial emergency benefits and relief programs. More recently, the Benchers allocated up to $3 million drawn from reserves for targeted 2021 practice fee relief and asked my team to develop a fund that may be accessed by lawyers who are facing significant hardship due to the pandemic. The fee relief program is truly meant for those who have been hit the hardest. We have developed a form, available to designated representatives of law firms in the Member Portal, that will assist in determining how to best allocate funds to law firms (including sole practitioners) most deeply impacted by the current crisis.

I want to assure all lawyers, the public and our stakeholders that throughout the next stages of the pandemic and recovery, the Law Society will continue listening and responding to you. We will continue to work hard to carry out our regulatory responsibilities. We are closely following Covid-19 announcements and recommendations of health authorities, and we look forward to a time when we can safely reopen our doors to the public. If you wish to reach us, staff are available and may be reached through the emails and telephone numbers posted on our website. Please continue to stay safe and be well.❖

Cheryl D'Sa elected in Vancouver county by-election

Cheryl D'Sa was elected a Bencher in the May 20, 2020 by-election for Vancouver county.

D'Sa was called to the bar in 2008 and is currently the managing partner of Narwal Litigation LLP, a firm devoted to criminal defence, personal injury, professional regulation and securities litigation.

D'Sa is past president of the Vancouver Bar Association and has held seats on several Canadian Bar Association committees. She has been an active volunteer in the legal profession and community, both as a mentor for Peter A. Allard School of Law first-year students, for Women Lawyers Forum members and through Federation of Asian Canadian Lawyers BC and as a guest speaker for the CBA, BC Branch, the Trial Lawyers Association of BC and the Advocates' Society, among others. She was named one of the Top Forty Under 40 by *Business in Vancouver* in 2019.

In her election statement, D'Sa expressed a desire to use her unique perspective to bring attention to several important issues. In particular, she is interested in how best to keep women engaged in the legal profession, access to justice, changes to motor vehicle claims, legal aid, and discipline and practice standards.

For by-election results, see Bencher Election Results.❖

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complaints intake platform that uses artificial intelligence to provide users with a guided pathway to determine whether they have a complaint or not and with information about their options. The Benchers have also adopted rule changes that recognize technology-based practice by supporting a move from "original" documents and signatures toward electronic versions. PLTC is being offered virtually. There is no going back.

The pandemic has also catalyzed change and innovation in our courts. While every jurisdiction in the world saw court operations reduced due to the pandemic, some jurisdictions quickly recovered operations through the use of video-conferencing platforms to conduct hearings. BC courts responded as well, with the Court of Appeal conducting appeals virtually and the Supreme Court and Provincial Court expanding the use of video-conferencing and telephone solutions where it is suitable to the matters being heard. The digitization of court processes and the expansion of technological solutions will take resources. As Chief Justice Christopher E. Hinkson has stated, things as basic as wiring and infrastructure for bandwidth are woefully inadequate. As part of our public interest mandate, the Law Society will be an advocate for this funding both now and after the pandemic. We cannot allow this opportunity to transform the technology available to provide better access to our courts to be forgotten when, as we hope, this pandemic comes to an end.

We are in a big moment. There is a real opportunity for a significant transformation of the practice of law, of regulation and of our courts. Video-conferencing and other technologies have allowed us to continue doing business, and expanding our use of them will make us more resilient for the current crisis and the next one. They are making the practice of law more efficient, which not only will improve the availability of legal services for more members of the public, but can also make the business of law better.

Moving forward, the Law Society will be involved in efforts to keep many of the reforms that have been adopted, as well as in developing further transformative solutions. Even prior to the pandemic, we struck a Futures Task Force to identify anticipated changes in the market for legal services and to assess the impact on delivery of services to the public and on future regulation of the legal profession. The task force is developing recommendations to the Benchers that will be considered in the formation of the Law Society's next strategic plan. I anticipate that we will press on in technological transformation that ensures the public has the greatest level of access to justice possible.

At some point, the pandemic will end. The question is whether we will use the lessons of the pandemic wisely. For my part, I am confident we will emerge as better, more nimble and more accessible lawyers. We will emerge providing better service and access to all British Columbians.❖

In brief

THE LAW SOCIETY AWARD – CALL FOR NOMINATIONS

Nominations for the 2020 Law Society Award are open until **August 14, 2020**. To nominate a candidate who has made exceptional contributions to the legal profession and the public interest, or for more information, go to our website.

JUDICIAL APPOINTMENTS

Lindsay M. Lyster, QC, a partner at Moore Edgar Lyster LLP in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Madam Justice Lyster replaces Mr. Justice A.H. Silverman (Vancouver), who elected to become a supernumerary judge effective November 26, 2019.

Andrew Majawa, regional director and general counsel at the Department of Justice Canada in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Mr. Justice Majawa replaces Mr. Justice N.H. Smith (Vancouver), who elected to become a supernumerary judge effective October 10, 2019.

Matthew Taylor, senior legal counsel at the Ministry of Attorney General of British Columbia in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Mr. Justice Taylor replaces Mr. Justice L.W. Bernard (New Westminster), who elected to become a supernumerary judge effective May 11, 2019.

Hugh William Veenstra, QC, associate counsel at Jenkins Marzban Logan LLP in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Mr. Justice Veenstra replaces Mr. Justice K.N. Affleck (Vancouver), who retired effective November 5, 2019.

Sandra A. Wilkinson, senior legal counsel at the Ministry of Attorney General of British Columbia in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Madam Justice Wilkinson replaces the vacancy created by the transfer of Madam Justice C. Murray (Vancouver) into the vacancy created by Mr. Justice B.D. MacKenzie, who elected to become a supernumerary judge effective October 22, 2019.

Wendy Bernt was appointed a judge of the Provincial Court and will be sworn in on August 10, 2020. She will be assigned to the Northern Region with chambers in Smithers, replacing Judge Doulis who is relocating to Prince George.

Oliver Fleck was appointed a judge of the Provincial Court and will be sworn in on August 10, 2020. He will be assigned to the Northern Region with chambers in Fort St. John.

Tamera Golinsky was appointed a judge of the Provincial Court and will be sworn in on August 10, 2020. She will be assigned to the Northern Region with chambers in Dawson Creek.❖

Shifting demographics of the legal profession

THE PUBLIC IS best served by a legal profession that is inclusive and reflects BC's diverse communities. In order to promote equity, diversity and inclusivity, the Law Society has been asking lawyers to volunteer information in annual practice declaration surveys since 2013. The survey asks questions on broad categories of self-identity: Indigenous, visible minority, sexual orientation and identity, and persons with a disability. The information helps the Law Society better understand demographic trends, identify barriers that some groups face for entering and remaining in the profession, and develop programs and initiatives to promote equity, diversity and inclusivity in the legal profession.

The results of five years of data collection are available on our website. While there has been progress to increase diversity, the data also shows that more needs to be done.

The Equity, Diversity and Inclusion Advisory Committee is reviewing the data more closely and will prepare an action plan to present to the Benchers this Fall.❖

Unauthorized practice of law

THE LAW SOCIETY acts to protect the public against individuals who hold themselves out to be lawyers when they are not and from those who provide legal services to the public when they are not authorized to do so.

Between February 12 and June 22, 2020, the Law Society obtained three written commitments from individuals to cease engaging in unauthorized practice of law. These individuals and businesses put the public at risk by performing unregulated and uninsured legal services or misrepresenting themselves as lawyers. If they break their commitments, the Law Society may obtain a court order against them.

The Law Society also obtained two court orders prohibiting the following individuals and businesses from engaging in the unauthorized practice of law.

On February 26, 2020, the BC Supreme Court issued a consent order prohibiting **Ranbir Raymond Atwal**, also known as **Raymond Atwal**, of Surrey, from engaging in the practice of law and from commencing, prosecuting or defending a proceeding in any court on behalf of another.

On June 10, 2020, the BC Supreme Court issued a consent order prohibiting **James Anthony Comparelli**, of Vancouver, from engaging in the practice of law regardless of whether he charges a fee and from representing himself as being a lawyer or any other title that connotes he is qualified or entitled to practise law.

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

FROM THE LAW FOUNDATION OF BC

New clinics to provide free legal services

IN A TIME of many challenges, the Law Foundation is pleased to announce that an integrated network of seven new legal clinics is now providing free legal services for low-income people across BC. Lawyers will assist individuals with more complex matters that are impossible for non-lawyer advocates to handle.

The Government of British Columbia provided funding to support this important new initiative, and the Law Foundation staff and board of governors worked together to identify areas of law and regions of the province where legal clinics could meet a pressing need. The Law Foundation worked with host agencies to set up the clinics and provided those agencies with support to cover startup costs.

Regional poverty law lawyers based in Prince George, Kamloops, Kelowna and Surrey provide free poverty law services (advocacy, judicial review and systemic work) on issues connected to housing, income assistance, disability benefits and related matters.

There are also now three specialized legal clinics providing legal representation and systemic advocacy to people across the province:

- The Housing Law Clinic provides legal representation, and initiates test cases and systemic advocacy work on residential tenancy issues, as well as those not governed by that legislation, such as mobile homes, co-ops and other non-RTA housing situations.
- The Disability Law Clinic supports clients with appeals of provincial disability benefits applications as well as federal programs such as CPP, work on particularly complex cases and work for substantive legal and procedural changes.
- The Immigration and Refugee Legal Clinic provides legal representation on complex immigration and refugee matters, including appeals, judicial review and related systemic work.

These clinics supplement the services provided by the network of advocates funded by the Law Foundation in over 40 communities around BC, the poverty law lawyer at Together Against Poverty Society in Victoria and a family law lawyer at the University of Victoria Law Centre.

Contact information for any of the clinics is available at www.lawfoundationbc.org/legal-help/advocates-contact-2/.❖

Province enacts legislation to deal with limitation, other measures once emergency is lifted

THE PROVINCIAL GOVERNMENT introduced the *Covid-19 Related Measures Act*, legislation that establishes a transition period for measures created by ministerial orders in response to the pandemic either to be formalized or unwound after the state of emergency ends. Under the Act, some ministerial orders will be extended for up to 90 days, while other ministerial orders will be extended for up to 45 days. The legislation, including a schedule of all the ministerial orders and the length of time that they are to be extended, is available here.

Included in the legislation are ministerial orders for limitation periods, electronic witnessing of enduring powers of attorney and representation agreements, electronic witnessing of wills and Supreme Court and family applications. The 45- or 90-day extensions following the end of the state of emergency will give lawyers and the public adequate notice to plan and prepare. The act will also provide the possibility for extension of Covid-19-related orders by up to one year, if required.

While there will be time to adapt after the state of emergency ends, lawyers should look ahead to ensure they have a transition plan in place to meet limitation periods, to access in-person services at the courts if necessary and to accommodate in-person witnessing with safety measures. Practice advisors at the Law Society continue to be available to answer questions about practice and professional obligations (practiceadvice@lsbc.org or 604. 443.5797).❖

Rule of law essay contest

EACH YEAR, THE Law Society invites BC secondary school students to enter an essay contest on the rule of law. The contest is intended to enhance students' knowledge of and willingness to participate actively in civic life.

This year, in light of the Covid-19 pandemic, the Law Society expanded the contest to add a second topic that draws from our current, extraordinary circumstances.

Topic 1: Does government and/or corporate monitoring of social media adversely affect the rule of law? Please provide specific examples.

- Winner: **Tristan Byrne**, Vancouver Technical Secondary School
- Runner-up: **Yuwen Zhang**, Gleneagle Secondary School

Topic 2: How is the rule of law affected by a global pandemic?

- Winner: **Shayel Moriah Fisher**, Sir Charles Tupper Secondary School
- Runner-up: **Amelia Hadfield**, Brentwood College School

Congratulations to the winners and runners-up of the rule of law essay contest. We are pleased to publish their essays in this issue of the Benchers' Bulletin.

Protecting the Rule of Law:

Emerging threats against the principles of the Rule of Law

by Tristan Byrne, grade 11 student, Vancouver Technical Secondary School
Winner of the 2019-2020 rule of law essay contest, topic 1

The written laws governing countries are vast, complex, and comprehensive.

Paradoxically, the most important of these rules is often left unwritten or undefined in the legal codes of many jurisdictions – it is more likely that the Rule of Law is taken as a general principle. The Canadian Charter of Rights and Freedoms begins, "Whereas Canada is founded upon

principles that recognize the supremacy of God and the Rule of Law" (Canadian Charter of Rights and Freedoms). In fact, the Rule of Law is a rule so fundamental that it need not be written in law. As every Canadian statute is in reference to this rule, that all are equal under the law, defining it in the Charter is unnecessary. However, the Rule of Law is by no means uniform and unchanging. It is a working concept, and legal scholars often have different definitions of the Rule than ordinary people do. Legal scholars may take the Rule of Law to mean rule by general norms, rather than by specific laws, instead of the more common definition of equality under the law (Waldron, Stanford Encyclopedia of Philosophy). In contrast to this contestation about the nature of the Rule of Law, courts and governments have agreed upon certain aspects of the Rule: that laws must be transparent, citizens must have access to legal remedy, and the judiciary must operate independently from the legislative and executive branches. These notions form the basis of just legal systems, and are crucial safeguards against arbitrary and unequal government. To the detriment of the integrity of the law, there have been several recent threats against the Rule of Law.

The Rule of Law is undermined where there exists a discrepancy between rapidly advancing digital technology and the ability of the legal system to keep up with said technology. The definition of the operation of the Internet in the case of *Perfect 10, Inc. v. Google Inc*., argued before the United States Court of Appeals for the Ninth Circuit as recently as 2007, is already vastly out of date (Griffith, Suffolk University School of Law). Data protection laws are rapidly evolving with technology. However, not all aspects of the law can adapt to novel technologies. During the United States Congressional hearings of Facebook CEO Mark Zuckerberg, members of the US Senate, effectively investigators in the hearing, were largely confused about Facebook's workings, particularly on the subject of the sale of data (Griffith).

Accordingly, one could conceive of ways that the Rule of Law could be subverted due to the lack of awareness surrounding technology. Indeed, due to this legal-technological gap, violations of the Rule of Law have occurred.

Paramount to a discussion of the effects of social media monitoring on the Rule of Law is the mention of the British data analytics firm Cambridge Analytica, and the multiple allegations and lawsuits in numerous jurisdictions of the firm's wrongdoings. The most notorious of these claims involves the firm's use of Facebook to harvest the personal information of up to 87 million United States citizens using, according to one of Facebook's messages to users, their "public profile, current city, timeline, and messages" (Satariano et al., *The New York Times*).

Most of Cambridge Analytica's clients were political candidates from around the world, and the information was used illegally to sway individuals towards these candidates. Subsequently, in 2018, the United Kingdom Information Commissioner's Office announced its intention to fine Facebook £500,000 ($817,000 CDN), saying Facebook "contravened the law by failing to safeguard people's information" (Monetary Penalty Notice).

In 2019, the United States Federal Trade Commission fined Facebook an unprecedented $5bn USD, settling the investigation into the scandal ("FTC Imposes $5 Billion Penalty"). Thus, the flagrant breach in the Rule of Law, in the case of this 2016 scandal, does not lie in Facebook's legal consequences, but in the inadequate consequences for Cambridge Analytica's Chief Executive Officer, Alexander Nix. Nix helped to orchestrate the illegal data mining of 2016, helped the *Leave.EU* campaign with its successful Brexit, and helped influence many more elections globally for his clients (Campaign). In 2018, Nix was suspended from his company after video footage showed him claiming his company was using illegal traps, bribery sting operations, and prostitutes, among other tactics, to influence more than 200 elections for his clients (Gilbert, Vice News). Harvesting data while contravening laws is a wrong both on the part of Nix, and on the part of Facebook. In fact, much of the evidence that led the US Trade Commission and the UK Information Commission to bring consequences to Facebook, also implicates Nix. Despite many claims, witnesses, and evidence all amounting to reasonable suspicion, no legal remedy for Nix's wrongdoing has commenced. Equality under the law is a pillar of the Rule of Law, and Nix's case is a flagrant breach of this principle integral to international society. Furthermore, the case is an example of the lack of awareness of technology in legal systems, and its adverse effect on the Rule of Law. The fact that corporate monitoring of social media is complex and involves recently invented technology may have contributed to this breach.

The Rule of Law is a core component of just societies, and the recent pandemic has further exposed the unfortunate consequences of breaching it. In an effort to curb the spread of COVID-19, and at the urgent recommendation of public health experts, governments worldwide have accepted sweeping restrictions on public life. Citizens have been ordered to stay in their homes, obey curfews, and avoid unnecessary travel. Basic tenets of democracy have been compromised under the justification of prevention of the spread of the novel coronavirus. As such, to prevent the misuse of power, democracies have established oversight to keep this power within its necessary bounds. However, the UN-declared pandemic has also provided pretext for authoritarian governments to wield power beyond an amount necessary for stopping the spread of COVID-19. In certain nations, the concentration of power in the hands of leaders, combined with lack of oversight, has led to effects detrimental to democracy and the Rule of Law.

In March 2020, Slovakia passed a measure allowing state institutions to access data from telecommunications providers, giving the government the ability to monitor the cell phone activity of citizens (Deutsche Welle). Also in March, Bulgarian President Rumen Radev partially vetoed a controversial law that would introduce prison sentences for spreading false information about infectious diseases ("Czech and Slovak Governments to Use Mobile Data to Track Virus."). As well, four members of the Council of Europe – Armenia, Latvia, Moldova and Romania – have

announced they are temporarily disregarding the provisions of the European Convention on Human Rights ("Reservations and Declarations for Treaty No.005").

However, looming behind these instances of mobile phone tracking and partial vetoes of controversial laws, there is a far greater violation of the Rule of Law. After the onset of the recent pandemic, the Hungarian National Assembly voted to authorize Prime Minister Viktor Orbán to rule by decree for an indefinite period of time (Walker et al., The Guardian). Since then, Hungary has seen increased control of the country's judiciary by Orbán's administration, resulting in a lack of transparency of law. The Prime Minister's decrees can effectively bypass Parliament and even existing laws. In addition, the administration has modified the country's criminal code. As of March, anyone who publicizes a "falsehood" that "obstructs or prevents successful protection" from the disease can be punished with up to five years in prison (Zerofsky et al., The New Yorker). The Committee to Protect Journalists has condemned this move, warning that it poses risks to journalists and doctors alike (Committee to Protect Journalists).

This amendment of the criminal code has widely been seen as a way for the country's government to silence criticism of the administration. Hungarians have been stripped of their human right to due process. Due to COVID-19, the Rule of Law in Hungary has been severely undermined, and its justice system crippled.

History has shown that the Rule of Law is the sole feature that can bind the people of a society together as equals. By subordinating citizens to the law, rather than to a ruler, president, or prime minister, it ensures the safety of communities from the arbitrary and unequal use of power. To the detriment of the global community, there are multiple emerging threats to the Rule of Law. Novel technologies can outpace the equalizing hand of the law. Social media monitoring can weaken the Rule, as shown through the case of Cambridge Analytica. Finally, in times of crisis, nations can be quick to vest power in the hands of leaders, while taking it away from the law. The most prized element of any just society must be the Rule of Law, for without it, true justice cannot exist.

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

Rule of Law: Under Surveillance

by Yuwen Zhang, grade 12 student, Gleneagle Secondary School
Runner-up of the 2019-2020 rule of law essay contest, topic 1

"It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter."

– Judith Shklar

This "ruling class chatter" forms a vital framework of law, but only when current legislation reflects its principles. It must be continually upheld, especially as its jurisdiction progresses into unprecedented territory. Cases such as Facebook-Cambridge Analytica show the growing value of mass user data and the general public's ignorance of the extent their information can be collected, sold, and used. As surveillance is brought to the forefront of the collective public consciousness, the corresponding laws and regulations should also become as prevalent and accessible as social media itself. As stated by the Right Honorable Lord Bingham in his 2006 lecture, "if everyone is bound by the law they must be able without undue difficulty to find out what it is." However, social media surveillance is progressing at a pace where law has not followed, creating weaknesses that compromise rule of law.

Rule of law is an "underlying constitutional principle," forming the framework of law and its interactions with the people (Scott, 2013). It underpins the entire system, requiring all people, no matter their rank, to be held answerable to the same public courts. As a natural consequence, "the law must be accessible and so far as possible intelligible, clear and predictable" (Bingham, 2006).

All bound by law, all are equal under the law, all can access and understand the law. These concepts boil down to three major principles: accessibility, clarity, and equality. Only when everyone can find and understand the law can they be effectively bound by it. This understanding takes "law" from the intangible into the mundane. It is crucially important to maintain these three principles, as if compromised, they erode the fairness of law, the accountability of the government, and the trust of the people. With social media and social media surveillance growing ever more prevalent, laws and regulations have failed at ensuring those three principles. The Canadian government adversely affects the Rule of Law due to inaccessible and unpredictable regulations on social media surveillance.

Public access has become much easier with technology, but the RCMP's Project Wide Awake is surprisingly under-publicized, despite its relevance to Canadians. It conducts both proactive and reactive monitoring of social media, without any information on what falls under scrutiny, or what would require "proactive policing" (Carney, 2019). The project uses Social Studio, a software that claims to be a "fly on the wall" and allows the user(s) to "monitor multiple social accounts and topic profiles, monitor discussions from owned social accounts and broader social news" (Salesforce).

However, their marketing statements don't paint a comprehensive picture of RCMP monitoring, nor should a Canadian

citizen have to research the functionalities of an American software to understand their own laws. Although currently under internal audit, there is nothing accessible on whether its monitoring is ongoing, or any publication of regulations or restrictions on use (Tunney, 2019). The RCMP's statement on their use of the controversial Clearview AI facial recognition app is equally unclear, with "a few units in the RCMP" using it "on a trial basis with respect to criminal investigations" (Meyer, 2020). Yet this statement was only in response to Clearview AI's entire client list being stolen and publicized. Without that leak, Canadians would not know that their photos on social media were being analyzed, by an unknown number of units, for an unknown period of time. It was immediately put under investigation by the OPC, but "given the office is investigating, no further details are available at this time" (OPC, 2020). There is a distinct lack of transparency on the RCMP's use and collection of social media data, with important operational information made inaccessible to the public.[1] However, what information *is* available is neither predictable nor easy to understand.

Laws in Canada make provisions for a "reasonable expectation of privacy," supported with many physical examples in Section 8 of the Charter, but none digital. These reasonable expectations seem to change depending on the judge, with Justice Brown stating in *Leduc* v. *Roman*, 2009: "A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile," but Justice Price in *Schuster v. Royal & Sun Alliance Insurance Company of Canada*, 2009 ruled in favor of the Plaintiff, who had "set her Facebook privacy settings to private and [had] restricted its content to 67 "friends," therefore proving that "she had not created her profile for the purpose of sharing it with the general public. Unless the Defendant establishes a legal entitlement to such information, the Plaintiff's privacy interest in the information in her profile should be respected." "Reasonable expectation of privacy" is no longer a reliable legal definition. Collection and use of social media data hinges on "public" or "open source" information, but it's becoming more and more evident that *all* information is public. Bill C-59 defines it as "any information that is published or broadcast for public consumption, but also any information that is accessible to the public on or off the Internet … and information that is available to the public upon request, by subscription or even by purchase" (Scotti, 2018). The bill works to exclude "Canadian citizens, permanent residents, Canadian corporations, anyone in Canada or at any portion of the global information infrastructure in Canada," but collecting incidental information is acceptable if Canadians weren't the initial targets (Parliament of Canada, 2019). This vagueness seems to imply that the CSE would be perfectly within its rights to obtain information from Canadians, as long as they aim slightly to the side. The CSE is directed "to ensure that measures are in place to protect the privacy of the aforesaid groups," without further clarification. It is difficult for the general public to understand how they and their data would be affected by Bill C-59. Existing terms are unclear and unpredictable, despite forming the legal framework for government surveillance. These overarching issues with government social media surveillance create a legal quicksand, where cases and Canadians may fall through the cracks.

Rule of law dictates that all are equal under the law, a tenet likely to be compromised by lack of accountability, caused by the inaccessible and unclear legislation so far. Public outcry for Colten Boushie, Cindy Gladue, and other high-profile cases involving Indigenous victims are able to generate only so much discussion and increased awareness due to the case being public knowledge, exposing institutionalized weaknesses within Canada's justice system. Accountability, privacy protection, and general education are possible only if procedures are visible, which "doesn't work in a big data age, because its systems are invisible to us" (Vonn, 2019). With information on government surveillance and the impact of collected data on law enforcement being vague and insufficient, it creates an environment that perpetuates inequality. Like "other types of surveillance technologies, social media monitoring appears likely to disproportionately affect communities of color" (Levinson-Waldman, 2018). Many growing software and AI based tools for law enforcement are based on existing databases of information, including their historical overrepresentation of minorities. With Clearview AI lacking any "actual racial bias methodology" and Social Studio's system being unknown, the results of these tools may only magnify existing issues, and more easily pass under the radar due to the mistaken idea that software is objective (Thomson, 2018). Due to lack of publicly accessible information on social media surveillance, systemic discrimination may be directly uploaded into these tools for the 21st century. Having already identified systemic discrimination as a serious criminal justice issue, Canada should avoid potentially worsening inequality (Department of Justice, 2019).

There are clear weaknesses within the current system, weaknesses that adversely affect the rule of law. These issues of accessibility and clarity need to be rectified to prevent future consequences and to guide legislation in uncharted territory. One cannot pick and choose which areas to fix, as any one principle is useless on its own: accessibility is meaningless without understanding, equality is dysfunctional if inaccessible. Only in conjunction do they function as the backbone of our constitution. Only under an updated framework that considers the needs of the public with respect to social media surveillance can there be true rule of law, and not just empty words.

[1] Both Social Studio and Clearview AI are headquartered in the United States, so perhaps operating and data-collection systems would be unpredictable and inaccessible to those without access to their proprietary software.

To read the list of references, download the PDF.

Are we equal in the eyes of disease?

by Shayel Moriah Fisher, grade 12 student, Sir Charles Tupper Secondary School
Winner of the 2019-2020 rule of law essay contest, topic 2

If you were walking down the street and were arrested just because a cop didn't like the colour of your shirt, how would you feel? How about when you were released from prison you changed your shirt to a different colour, and then were arrested by another cop that didn't like the colour of your new shirt? It would feel unfair and unjust, right? Apply the shirt colour to race, gender, sexual orientation, wealth or status, and this essentially is what the rule of law tries to avoid. It's a complex topic and attempting to describe it is much like trying to explain how a complex math formula works. Someone can understand it, but not know how to put it into words. However, on the most basic terms, the purpose of the rule of law is to treat everyone equally in the eyes of law. Therefore, if a police officer robbed a bank, they would still be taken to court for their crimes, just like the baker that robbed a bank just a week before, and the two would not be treated differently, despite their different professions and wealth.

So during a pandemic, how can the rule of law change and be affected? Some people may argue that because anybody can get a disease (currently being Covid-19), everyone is considered equal. That may not be entirely true though. Poor or homeless people may find it more difficult to stay healthy and clean. Prisoners aren't treated to certain luxuries or even necessities to prevent illness, including being in a crowded building and lack of resources. We also must look at the court system and how this may be affected. Due to limited amounts of people allowed in a building, as well as the general high risk of catching Covid-19 when around people, certain court cases will be prioritized over others. When we look at these possibilities and real occurrences, especially during our current pandemic, we can begin to ask, are we actually equal in the eyes of disease?

Even if disease may not go after specific people based on race or identity, it still can hit certain "unfairly" treated people the hardest. People with lower income often live in neighborhoods that are highly dense, making it more difficult to socially distance, as well as being exposed to more people generally. These people are also less likely to have access to clean water, soap, healthy food, and anything else necessary to keep their immune systems up to prevent themselves from getting the disease. In First Nations reserves, which are government founded, there is an ongoing water crisis where there is limited access to clean water. In an article posted by Human Rights Watch, Marcos Orellana explains just how difficult it is to get clean water and wrote, "As of December 31 [2018], there were six 'boil-water advisories' and three 'do not consume advisories' affecting eight First Nations Indigenous communities in British Columbia." This "water crisis" still continues to this day and is increasing the chances of First Nations people on reserves getting severe cases of Covid-19, with 186 confirmed cases.

Needing to go outside and work can also increase the chances of people not social distancing, and if they are caught, their lack of money can make it difficult for these people to pay the fees, as well as increasing their struggle to get their basic needs met.

We can see that crowded areas and low quality resources all increase someone's chances of getting Covid-19, so what about a building honing all of these things? We see a real-life example of this when there was an outbreak in a prison in BC. Mission Institution has recently recovered from the largest prison outbreak during the pandemic, with 106 cases in a 289-populated building, but how exactly did it start so quickly? Just like nursing homes, prison guards travel from prison to prison, meaning if a guard caught Covid-19 and did not know, they could easily spread it.

However, also just like nursing homes, prisoners are in the unfortunate position of being more exposed to disease in the first place. The food is lower quality, access to cleaning supplies is difficult, and most importantly, it is a communal building. Prisoners share cells, showers, and the cafeteria, so social distancing is practically impossible. Covid-19 has allowed some cleaning processes to be put into place and staff must wear masks, but the prisoners themselves, for the most part, are left to their own devices. Jeff Wilkins, president of UCCO-SACC-CSN, expressed his disappointment in preparation, as well as action when the outbreak started. "There should have been planning done to have areas of the institution that were readily available to quarantine a significant number of inmates away from another...If there was any failure it was certainly that correctional officers were not included in the planning process early before any onset of the virus," Wilkins told CTV News. When discussing the prison conditions, Doctor Henry said, "It's a very difficult environment to effectively isolate people who are ill from others." Even more, Wilkins has gone on to say that "There's infected people in every single living unit...It's gotten to the point where we're not even being told who has the virus and who doesn't." This lack of care and attention to the prisoners has not only exposed other prisoners to the disease, but also the staff. This shows that, in a way, prisoners are not equal and not protected by the rule of law when it comes to a pandemic.

However, unlike Mission Institution, no amount of planning could have prepared the court system for what to do with their hearings during this pandemic. With old and new cases coming in, crimes must be put to court, but not all of them can go through. Therefore, some cases either need to be put off until the pandemic is over, or others are even dismissed entirely. This puts people in a difficult position where they must choose what cases are worth being put into court. Will a white person's robbery be more important than a minority being robbed? Is a rape case less important than aggravated assault? Is one murder

more important than another? Though all are extreme and unlikely hypotheticals, we can see this difficult decision already happening in the BC courts. Only the most urgent cases are being heard, but what defines "most urgent?" Micah Villarroel, who had gotten into a severe car crash four years ago, was waiting for a court hearing on April 20th for an injury lawsuit against Insurance Corporation of BC. "The waiting for this trial date was already so long … I can't imagine how much more horrible and long it'll be once this whole pandemic resolves," she said. Villarroel is not the only one. Everyone has a reason for their court hearing, but with such a backlog, it is getting more and more difficult to go to court. It is a hard ethical and moral decision to decide who should be heard right now and who should not. A decision no one wants to make, but unfortunately must be made.

Though disease itself doesn't have eyes or thoughts to decide who should get ill, the society we have created has allowed it to hit certain people more than others, making it more difficult for the rule of law to be enforced. Should poor and homeless people get more benefits? Should prisoners get better treatment? How should we approach court hearings? These are all questions we must begin to ask during our pandemic. But what happens afterwards? The pandemic has brought new ideas to the floor and ways we can change, even after everything is over. Poor people may be given benefits, or the quality of First Nations reserves may increase. Prisons should begin to prepare for something similar if it happens again, as well as, like the First Nations reserves, paying more attention to the quality and service provided to the people. The court hearings are already in the works of being faster and more efficient. "If we do this right, if we make these reforms now and with urgency, we can emerge from the COVID-19 pandemic with a more just British Columbia society," John Rice, president of Trial Lawyers Association, said in a CBC interview. Attorney General David Eby continues this sentiment by saying, "This is an historic opportunity to make our justice system fairer, faster and cheaper and also more accessible." Even if this pandemic has pressed and bent the rule of law, it is possible that after the state of emergency is over, we may begin to see change and strengthen the rule of law.

To read the bibliography, download the PDF.

How Rule of Law is Affected by a Global Pandemic

by Amelia Hadfield, grade 12 student, Brentwood College School
Runner-up of the 2019-2020 rule of law essay contest, topic 2

A pandemic, much like any crisis, is an excellent catalyst for authoritarianism.

Definitionally, rule of law must be curbed to address a crisis, insofar as "well defined and established laws" (Lexico Dictionaries, 2020) are nearly impossible to create in response to an immediate threat. However, the extent to which the rule of law is infringed upon has more to do with pre-existing politics than the pandemic. Democracies with well-established judicial and governmental systems see only a marginal negative effect on their ability to maintain rule of law compared with those for whom authoritarianism, or at the very least a deteriorating rule of law, was already predicted. This is chiefly exposed by the lack of societal buy-in due to diminished legitimacy, and the increased power of executive branches who were teetering on the brink of authoritarianism. Israel, the United States, Hungary, China, and Canada each serve as excellent examples demonstrating how different political cultures prior to the pandemic affect the degree to which rule of law is undermined.

A strong democratic judicial system requires a high degree of societal buy-in. These are intricately connected and contribute to the broader concept of the "social contract" (Koren, 2020). A state's ability to handle a pandemic is largely reliant on the strength of the social contract, which, in turn, serves to either reinforce or undermine the rule of law. Much like a Pantheon made of playing cards, these concepts are intertwined in a muddled relationship of cause and effect, in which each part exerts just enough pressure to sustain and be sustained by the others. So, when a pandemic makes the legitimacy of the state waver, the rule of law is likewise disquieted.

When citizens lose their faith in the competence of the government they likewise lose their compliance; at which point there is little basis upon which to establish laws that don't seem arbitrary. Notably, a key component of the rule of law, according to the Oxford Lexicon, is the "restriction of arbitrary power" (Lexico Dictionaries, 2020). However, during such a crisis the government has no choice but to create emergency laws which undermine or circumvent the system of establishments, and thus generate a negative response that diminishes the legitimacy of the system. For example, in Israel, where there were already protests on the overreach of the rule of law, the governmental provisions against the COVID outbreak added fuel to the protestors' flames. The sentiment against the government was solidified. The impact of this loss of respect is twofold: it "is likely to undermine trust," and "increase gaming and circumvention attempts" on behalf of citizens (Koren, 2020). Compliance and trust are vital to maintaining an effective rule of law, since, without them, there is little authority within the judicial system. A crisis that reveals fragilities or causes a country to falter on their established system of rule of law severely exacerbates the issues of legitimacy. Further, as Niva Elkin-Koren, a professor of Law at the University

of Haifa, explains in her recent paper on the rule of law in Israel, the "deepen[ed] distrust in government agencies" extends beyond the outbreak and poses lasting legitimacy issues. The outcome of such a decrease in societal buy-in is protest, or, in some cases, vigilantism.

The current environment in the United States is another example of the rule of law losing legitimacy. The anti-lockdown protests — which seem to be exposing a fear and distrust that is an epidemic in itself — are putting the government's ability to rule effectively and fairly to the test. Trump's actions have been erratic, to say the least. There is little cohesion within the levels of government, which is creating a perception of arbitrary rule. States such as Texas and Ohio have "used the lockdown to try to ban abortions" (Economist, 2020), capitalizing on and exacerbating the shaken and distracted rule of law. Such breaches prompt the citizenry to lose faith in their system's fairness, as the rule of law becomes less established and more arbitrary. While systems scramble to regain the authority they once held, certain moves, that under normal circumstances could have been stopped, slip through the cracks. Such situations make regaining rule of law all the more difficult. Similarly to Israel, the long term effect is a deeper distrust in government with similar outcomes of disregarding the law, or taking it into one's own hands. According to Theda Skocpol, a government and sociology professor at Harvard, "Scepticism of the government is a deep strain in America" (Maqbool, 2020), and these government protests are somewhat of a climax in this distrust. Unfortunately, in such circumstances as this, deep government distrust becomes a bandwagon, and the mass protests extend these sentiments from the fringes of American political culture, where they used to dwell, into the general population.

That said, it is important to note that the pandemic has been a catalyst for the sentiments which were already brewing. In some cases, such as Canada, it can reaffirm good legitimacy, and thus the rule of law. Before the pandemic, Canada was among the top ten countries in the State Legitimacy Index (The World Economy, 2019). According to a poll recently conducted by the CBC, "69 per cent [of Canadians] said they felt their provincial governments were doing a good job handling the pandemic," which is 18 points higher than the response in March (Grenier, 2020). This increased legitimacy, in part, can be attributed to a general respect for government as well as our comprehensive Constitution, which uses the rule of law to account for such a crisis. Moreover, the Notwithstanding Clause in our Canadian Charter of Human Rights allows for the government's actions to be backed by rule of law, which bolsters legitimacy in the competent system, rather than curbing it. Although the Israeli constitution has a similar provision in Section 8 of their charter, the way in which the laws were implemented did not respect the stipulations of proportionality (Koren, 2020); hence the deterioration of the rule of law.

In Israel, much like in the 84 other countries where there has been a "vesting of extra powers in the executive," the greater issue of executives being able to circumvent the rule of law altogether has been and is being actualized (The Economist, 2020). This harkens back to the "restriction of arbitrary power" — or a lack thereof. The loss of independence of the judicial branch and a corresponding overreach of the executive branch is common in times like these; often resulting in long-lasting detriment to the rule of law. Once again, the results are twofold; a more autocratic government that is less responsive to long established rule of law, and a citizenry who finds their freedom of expression, information, and speech curtailed. For example, Viktor Orbán, the prime minister of Hungary, recently passed a law which allows him to rule by decree and severely limit freedom of information (The Economist, 2020). This, like Israel's government having "bypassed" a refusal to approve a regulation by a government check, is an overt circumvention of the rule of law. In Hungary's case, there is no time clause limiting extension of his powers. During a global pandemic, such actions are difficult to prevent because some aspects of legal red tape must, arguably, be bypassed for the sake of public health and efficiency.

According to the Economist, "it is in this gap between legal theory and political reality that Mr. Orbán thrives" (Economist, 2020).

Similarly, in China, the global attention that is being paid to the virus has taken international attention away from the continued suppression of rule of law in Hong Kong (Economist, 2020). Likewise, Donald Trump is claiming to have powers which constitutionally he does not hold, and is using this emergency as an opportunity for rule by law, rather than rule of law. A prime example of this is the "resignation" of the Commanding Officer of the USS Theodore Roosevelt, due to his early whistleblowing of the disease (Economist 2020), which eerily mimics China's hushing of its whistleblowing doctors a few months ago. In many countries, citizens' right to privacy is also being threatened, without due process, in the name of public health. Under normal circumstances, the press would be able to hold the government accountable to the rule of law, even if the judiciary cannot. However, freedom of the press is also undermined as the only close doors journalists are behind is their front door (The Economist, 2020).

This outcome is similarly a test of the independence and tendencies of leaders prior to the pandemic. Orbán, Trump, Netanyahu, and Jinping all tended to be blasé with the rule of law before this crisis acted as a catalyst for lasting effects both for the regime and the rights of citizens. Likewise, Canadian, British, and Nordic citizens are generally experiencing a degree of rights and freedoms reinforced by their executive's cooperation with other branches of government.

For better or for worse, the true nature of the rule of law has been exposed. Some say true character is revealed during a crisis, and, as far as the judiciary is concerned, that couldn't be more true.

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

Pandemic resources and guidance

Over these last months, members of the legal profession and their employees have demonstrated their professionalism and dedication to the practice of law and ensuring the public has access to legal services. Like everyone else, you had worries about the health risks of Covid-19, but you also had additional worries about how to deliver essential services safely. Throughout the pandemic, the Law Society has been working on your behalf to develop new procedures to keep the system running, guidance on best practices for secure remote offices and technologies, resources for your health and links to information on government emergency benefits.

In this section of the Benchers' Bulletin, we are reproducing some of the articles, guidance and information available on our website, in case you missed it.

Video-conferencing technology

WHAT SHOULD LAWYERS THINK ABOUT WHEN CONSIDERING VIDEO-CONFERENCING MEETINGS?

OVER THE PAST month, many law firms and lawyers made a rapid transition to meeting and providing some legal services virtually, using video-conferencing technology. Some of these solutions are likely to endure even after the Covid-19 pandemic has subsided. Lawyers who are working remotely are beginning to turn their mind to which video-conferencing products and platforms are the best ones for facilitating meetings with clients, other lawyers and their employees, while maintaining client confidentiality and security of records.

There are several video-conferencing products on the market, including Skype for Business, Zoom, Amazon Chime, Microsoft Teams, Cisco's Webex Meetings, TeamViewer, GoToMeeting, Signal, Jabber and the ones associated with particular operating systems, such as FaceTime and WhatsApp. Each has different advantages and disadvantages. Some support up to 100 participants. Some, but not all, offer end-to-end encryption that is difficult to hack. The Law Society cannot endorse particular products. Our goal is to provide you with background information that helps you to choose what works best for you.

SETTING UP YOUR HOME OFFICE

Before deciding on which video-conferencing platform to use, it is important to set up an appropriate space for working with confidential communications. Even a home office has to take into account how to keep client and other confidential information protected from family members and others. The conditions you should be looking for in your home office or remote workplace should include:

- working in a private area;
- protecting your passwords and locking your computer if it is left unattended; and
- ensuring there is a space for taking calls where conversations will not be overheard.

The Office of the Information and Privacy Commissioner for British Columbia has developed a Protecting Personal Information Away from the Office resource that provides guidelines on how to keep information secure when working remotely. The Law Society's Lawyers Sharing Space is a practice resource that offers tips and information about sharing space with people who are not lawyers in your firm.

It is also important to ensure there are reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure of your records. Take steps to put into place technological, physical and organizational safeguards specific to working from home for you and your staff. You can test your home or remote office set-up using Securing Personal Information: A Self-Assessment Tool for Organizations from the BC OIPC in regard to establishing and maintaining reasonable security arrangements.

IS VIDEO-CONFERENCING THE BEST OPTION UNDER THE CIRCUMSTANCES?

There has been a flood of media reports

about the security (or lack thereof) of video-conferencing software. It can be hard to know how to keep meetings secure. Although many video-conferencing products include security settings such as end-to-end encryption that can prevent hacking, often users are left with little to no security training to configure these settings. If technology is not your forte, it is a good idea to have an IT professional assist you with setting things up if you can.

When it comes to what is the appropriate degree of security for your situation, it will depend upon the nature of the conversations and business you are transacting. Even with virtual transactions, *BC Code* rule 3.2-1 applies. Commentary [3] to the rule states that what is effective communication will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

In any event, if the conversation to be had is of a deeply sensitive nature, confidentiality and security may be better achieved with a phone call rather than a video call. Conversely, if the purpose of the video call is a social check-in with an employee, a lawyer may reasonably be less concerned about making a video call.

Many video calls fall somewhere between the two scenarios outlined above. For example, you may have planned to call a client just to check in about how they are managing their business through the current pandemic, but the client may move from giving a general summary to seeking advice or services about a particular problem. You should consider what you intend to discuss, and whether that conversation is confidential or privileged, to seek out a software with sufficiently robust security features. Features lawyers may want to seek out include:

- end-to-end encryption;
- the ability to set up a meeting ID, which is randomized and is assigned to each meeting to keep credentials private;
- the ability to set up participant passcodes, which are a second level of authentication that can be enabled for each meeting;
- a way for the host to lock the meeting;
- a way to expel participants; and
- waiting room features that allow participants to wait in a separate virtual room before the meeting and allow the host to admit only people who are supposed to be in the room.

In addition to the above, use a firewall to prevent unauthorized network traffic from reaching your devices, and always make sure that you use the latest version of the operating system you have chosen to video conference your clients.

SELECTING A SERVICE PROVIDER

Many video-conferencing tools engage cloud-based services. The Cloud Computing Checklist is a helpful tool in determining whether a product is compliant with the Law Society's requirements. Answers to the questions in the checklist can often be answered by reviewing publicly available sources and the service provider's terms of service.

It is a good idea to consider using an enterprise software (rather than personal, consumer grade) for client meetings. Consumer tools may not have all the administrative and security tools you need to ensure that a call is private. Although no video-conferencing service can guarantee 100 per cent protection from threats, you are much more likely to get a more complete set of security tools with products geared for enterprise use.

BEST PRACTICES FOR VIDEO-CONFERENCING

When using video-conferencing for the provision of legal advice or services, lawyers should:

- advise the client not to share the links with anyone else;
- access the links through a secured Wi-Fi network;
- confirm the client's consent to proceed in this manner;
- ask that all individuals in the remote location introduce themselves;
- ensure no one else is at the remote location who may be improperly influencing the client;
- make sure that audio and video feeds are stable and that you can hear and see all parties;
- do not allow clients to screen share by default, and manage the screen sharing as the host;
- do lock the meeting once the client or clients have joined the call;
- where identification is produced to support verification of identity, ensure that a copy of the document (front and back) is sent to you in advance of the online meeting (consider requesting high resolution) and that when it is produced during the meeting the entire document is visible and legible;
- determine how to provide the client with copies of the document executed remotely;
- confirm your client's understanding about the documents they are executing and provide adequate opportunity for them to ask questions during the video conference; and
- maintain detailed records, including date, start and end time, method of communication, identity of all present and minutes of content of meeting.

Many products provide the ability to record the video-conference meeting, and as part of maintaining detailed records, you may think about recording the conversation between you and your client. Ensure you abide by *BC Code* rule 7.2-3, which states that a lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

RISKS AND TIPS WHEN USING VIDEO-CONFERENCING TECHNOLOGY

Review the Lawyers Indemnity Fund's risk management tips for video-conferencing here to reduce the risk of a negligence claim.

QUESTIONS

If you would like to discuss a specific issue regarding video-conferencing software with a practice advisor, please feel free to contact practiceadvice@lsbc.org.

FROM THE LAWYERS INDEMNITY FUND

Risks and tips when using video-conferencing technology

WHETHER YOU ARE conducting an initial interview, providing independent legal advice or taking an affidavit or instructions to draft a will, here are some steps to consider to reduce the risk of a negligence claim:

1. USE CHECKLISTS

Now more than ever checklists are a critical tool in effectively managing and communicating with your client. Consider having your client complete an initial client questionnaire and provide you with any relevant documents before your meeting. Review the completed questionnaire and other documents before your intake meeting to be in a better position to effectively communicate with your client. Also use a checklist during the virtual meeting to remind yourself of the questions to ask and areas to consider. The checklist can also be used to form a record of what was discussed. The Law Society has produced a number of helpful checklists, including Best practices for video-conferencing, LIF Annotated ILA Checklist, Family Practice Interview, Will-Maker Interview, Will Drafting and Practice Checklists Manual.

2. OBTAIN YOUR CLIENT'S CONSENT

Make sure everyone has consented to proceed by video conference. While many are comfortable with video conferencing, some clients may be uncomfortable disclosing personal information this way. Also consider if the legal work is too complex to accomplish only by virtual client meetings. If there is no concern about delay, it may be advisable to put off the completion of the legal work until you are able to have face-to-face meetings. If you proceed, take the time to make sure everyone can see and hear everyone else and that the audio and video feeds are stable.

3. WATCH FOR UNDUE INFLUENCE

At the outset of a virtual meeting with the client, ask the client if anyone else is in the room or can hear what is being discussed and if so, why. Make a record of everyone who is present on the call or within earshot. It may be that the client needs assistance with technology. However, lawyers should be alive to the possibility of someone influencing the client. This is not a new risk; however, your ability to identify circumstances where undue influence is occurring may be more difficult with a virtual connection because you can't see what is going on off-screen. For example, it is important to ask clients why they are seeking a will at this time and ask questions to satisfy yourself that the client is acting independently. Further, if a client is instructing you to make a change to their will, make inquiries into the relationship your client has with each beneficiary. Encourage the client to ask you to repeat anything you've said and to ask questions. Summarize what you understand to be your instructions. Take detailed notes reflecting your consideration of undue influence, particularly if there are circumstances of concern.

4. MAKE SURE YOUR CLIENT UNDERSTANDS YOUR ADVICE AND THE DOCUMENTS

This is a continued responsibility but may take longer in a virtual setting. Spend time to confirm the decision the client has landed on or the remaining options that the client will be thinking about. Often the tools available will allow you to share your screen with your client so that they can follow along with you when reviewing specific parts of a document. Consider highlighting specific client requests in the document and sharing your screen. Discuss and confirm in writing how your client's concerns have been addressed.

5. CLIENT CAPACITY

This is not a new risk, but if it is an issue, your ability to assess it may be more difficult. Ask open questions and dig as deep as may be necessary. If your client is someone about whom you have concerns about mental capacity, see Acting for a client with dementia (Practice Watch, Spring 2015) for helpful suggestions. Consider also whether your client is capable of successfully participating in a virtual meeting with you.

6. DOCUMENT THE VIRTUAL MEETING

Take more notes than you usually would and be detailed in documenting what occurred, what was said, the timing and your consideration of capacity, particularly if you have any concerns.

7. SEND A REPORTING LETTER

As part of your standard practice consider sending a reporting letter soon after virtual meetings and confirm what was discussed. This will help ensure that you and your client are on the same page and will serve to confirm your legal advice and your instructions. If the client needs to provide you with additional information or instructions, ensure you put that in writing as well.

8. DIARIZE FOLLOW-UP WITH THE CLIENT

Where necessary, remember to diarize following up with the client. Don't let matters fall by the wayside on the assumption that the client doesn't want to deal with them during the Covid-19 lockdown.

9. POST-EMERGENCY FOLLOW-UP

After the lockdown ends and it is safe to do so, consider recommending that your client re-execute documents, particularly if you have any concerns.

10. KEEP UP TO DATE

Continue to monitor the Law Society's Covid-19 response FAQs for further updates and practice resources.❖

Beware of increased cybersecurity risk during Covid-19

Cyber-criminals often seek to take advantage of rapid change, heightened stress and confusion. In Manitoba, two law firms had their entire computer systems infected with ransomware, which blocked access to their computers, client lists, emails, accounting and financial information and other digital files. The firms were asked to pay an enormous ransom to regain access to their computers, which were likely attacked when a lawyer or employee clicked on a link in an attachment or email. Ontario and elsewhere report that hackers are circulating phony, but legitimate-looking, Covid-19 outbreak maps or emails purportedly from IT teams or vendors that ask recipients to click links to open attachments that are infected with malware.

With many lawyers now working remotely, the increase in virtual access to work servers requires extra vigilance. To protect yourselves and your law firm, be on alert and remind all lawyers and staff to take the following precautions:

- Always think before you click.
- Never open a link or attachment in an email or text message from anyone you do not know.
- If you receive a link or attachment that you were not expecting — even if it is from someone you know — call the sender using the telephone number you have on file (not the number listed in the message) to confirm the message is legitimate.
- If you open a link or attachment that you should have avoided, and a box opens that asks for your password or other information, stop. Close out. Immediately call your IT department to run a scan on your device(s).
- Avoid public Wi-Fi, and do not use unsecured Wi-Fi to connect to your work server, to do any banking or to send any confidential or personal information.
- Avoid working in public spaces where third parties may view screens or printed documents.❖

Guidance for lawyers who test positive for Covid-19

A lawyer who has tested positive for the Covid-19 virus, or who is being treated as presumptively positive, may be required to provide information to the provincial health officer or her designate under the *Public Health Act* and its regulations. The information may include the names and contact information of clients or other individuals with whom the lawyer has had recent contact. Such information is confidential if acquired during the course of the professional relationship and, in some unusual circumstances, may be privileged.

Rule 3.3-3 of the *Code of Professional Conduct for British Columbia* provides a future harm/public safety exception to a lawyer's duty of confidentiality:

> 3.3-3 A lawyer may disclose confidential information but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

The Supreme Court of Canada recognized an exception to privilege if a serious and imminent threat to public safety exists to an identifiable person or group of persons (*Smith v. Jones* [1999] 1 SCR 455).

EXTENT OF INFORMATION COMMUNICATED

A lawyer who has tested positive for the virus or is being treated as presumptively positive may disclose the names and contact information of clients with whom the lawyer has been in recent contact. However, the lawyer must not disclose more information about those individuals than is required to protect public safety or prevent future harm. In particular, the lawyer should take care not to identify any individuals as clients in the disclosure, nor make any unnecessary reference to the purpose or circumstances of the contact.

Where the health authority asks about additional circumstances, such as the proximity, location, duration or how recent the contact, the lawyer should provide information only to the extent necessary to answer the inquiry.

STEPS FOR LAWYERS TO TAKE

A lawyer who believes that disclosure may be warranted or is unclear whether disclosure is warranted should contact the Law Society for ethical advice. If practicable and permitted, a lawyer may seek a judicial order (see commentary [4] of rule 3.3-3); however, this would be rare.

Client consent in advance of the disclosure of information is not required, although notice of the disclosure to any affected clients should be provided within a reasonable time.

RECORD-KEEPING REQUIREMENTS

If confidential client information is disclosed, the lawyer should prepare a written record as soon as possible, in accordance with commentary [5] of rule 3.3-3, and retain the record. The record should include the information below:

> [5] If confidential information is dis-

closed under rule 3.3-3, the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication in which the disclosure is made;

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm the lawyer intended to prevent, the identity of the person who prompted the lawyer to communicate the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

Practice advisors continue to be available to answer questions about practice and professional obligations. Contact information may be found on the About Practice Advice page on the website.❖

17 tips for the business of law amid Covid-19

The Covid-19 pandemic has brought unprecedented challenges for lawyers and law firms, including economic pressures and potential changes to the business of law. The Law Society has heard from many lawyers in British Columbia who are concerned about their economic future as individuals and as businesses. Our practice advisors and other departments have put together some tips and advice for lawyers and students that address the business impacts they are experiencing during this difficult time.

We are indebted to the Law Society of Alberta, which produced similar recommendations, some of which we have modified for the BC context:

1. Apply for federal or provincial grants, programs or other relief available for individuals and small businesses.
2. Speak with commercial lenders about interest relief or deferral of loan payments without interest.
3. Discuss rent reduction or deferrals with landlords, and apply for utility and property tax deferrals.
4. Seek remote bookkeeping services in the event you or your bookkeeper are quarantined.
5. Ask insurers about policies and business interruption insurance for Covid-19. If no business interruption coverage is available, consider improvements to the existing policy and consider products by other insurers.
6. Learn about student loan deferrals made available by the federal and provincial governments.
7. Be aware of leave provisions and employment standards regarding layoff and termination of employment related to Covid-19. Keep in mind the requirements for lawyers leaving firms. Read "Ethical considerations when a lawyer leaves a firm" in the Summer 2017 *Benchers' Bulletin* (p.15).
8. Continue to comply with the Law Society's trust assurance requirements. With staff working remotely, supervision becomes a bigger challenge, which creates more risk for anyone handling money. Lawyers must continue to be vigilant about monies leaving their trust and general accounts.
9. Although pursuant to s. 9 of the *Emergencies Act* limitation periods are suspended from March 26, 2020 until the date of declaration of a state of emergency regarding Covid expires or is cancelled, ensure you take care of filings as soon as you can and well in advance of the day the emergency order expires or is cancelled.
10. While working remotely, take steps to protect client confidentiality and maintain security over books and records.
11. If you are struggling, reach out for help. If you are having trouble coping with economic pressure, isolation or any type of anxiety or depression, the Lawyers Assistance Program remains open to support you by phone or through other means. LifeWorks is also available to provide counselling and resources.
12. Make sure that all staff are coping well. Keep in touch with your teams while working remotely.
13. Be cautious about phishing attempts and emails that are out of the ordinary or that contain instructions to send money or share passwords or contact information. Fraudsters may take advantage of the disruption and panic surrounding the pandemic. Read risk management tips here.
14. Keep up to date on issues affecting your practice areas and solutions that others have developed. Tap into your professional associations to stay connected. Be sure to check the Law Society's web page dedicated to updates on Covid-19.
15. Stay in touch with clients. Give clients regular updates on any legal developments and discuss strategies that can be implemented once the pandemic is over.
16. This may not be the best time to be aggressively pursuing outstanding statements of account, and this should be considered on a client-by-client basis.
17. Carve out some time to think about the future and the services that will be needed after the pandemic. Make sure you are well prepared for the next possible disaster or pandemic. Document any processes that worked well or areas for improvement.❖

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

Knowing your client – Guidance and rules during COVID-19

THE COVID-19 PANDEMIC has created challenges for the business and practice of law. In particular, public health directives for physical distancing have required individuals to maintain more than two metres' distance from each other and have meant rethinking how to do certain tasks and legal services that have previously been done in person. One of these, for example, is verifying a client's identity for financial transactions.

For this extraordinary period of serious public health concerns with in-person meetings, the Law Society provided guidance about using a virtual means to verify the identity of an individual located in Canada under unique circumstances. This virtual means is limited to situations where lawyers are unable to avail themselves of any of the verification methods provided for in the existing rules in Part 3, Division 11 – Client Identification and Verification. The March 17, 2020 Notice to the Profession set out the following:

> *In the context of COVID-19, can a lawyer use a virtual means, such as video-conferencing or telephone, for client identification and verification?*
>
> There are two methods for verifying a client's identity that do not require a face-to-face meeting with the client — the dual process method or using information in a client's credit file. Lawyers should also consider whether they may be able to rely upon the previous verification by another person (for example, a real estate agent) where permitted under the Rules.
>
> In unique circumstances where lawyers [are] unable to avail themselves of any other verification method, the Law Society will take a reasonable approach in its compliance activity, if the lawyer verifies identification of a client located in Canada by using video-conferencing technology. Lawyers who verify a client's identification using video-conferencing technology should be able to demonstrate that they:
>
> - are reasonably satisfied that the government-issued identification is valid and current;
> - were able to compare the image in the government-issued identification with the client to be reasonably satisfied that it is the same person;
> - record (with the applicable date) the method used to verify the client's identification;
> - treat the transaction as a high-risk transaction and continue to monitor the business relationship as a high-risk transaction; and
> - document the efforts that were made to verify the client's identity in accordance with the existing rules and the reasons why they were unable to verify the client's identity in accordance with the existing rules.

Meet your client in person if possible. If unique circumstances have left you unable to use any of the methods in the existing rules to verify the identity of an individual located in Canada and you are considering using a virtual means, treat the transaction as high risk. Also, monitor the professional business relationship as high risk (Rule 3-110). You have a duty to make sufficient inquiries about the client, the financial transactions and the source of money for the transactions to mitigate and manage risks. Practise within your area of competence so that you will be more likely to know what questions to ask and recognize questionable activities.

Fraudsters and criminal organizations often seek to exploit disruptive events — times when their targets are distracted, anxious or simply adapting to change. Conduct enhanced due diligence. The rules and procedures for verification of identity are important for preventing money laundering, terrorist financing or other illegal activity. Consider the following:

- Assess whether there is a risk that you might assist in or encourage any dishonesty, fraud, crime or other illegal conduct if you act or continue to act for the client. Review Law Society Rules 3-99(1.1), 3-102, 3-109 to 3-110, *BC Code* rules 3.7-7, 3.2-7 and 3.2-8 and the associated detailed commentaries.
- Note the wide definition of "client" in Rule 3-98 for verification of identity and your duties to obtain information identifying the ownership, control and structure of an organization (Rules 3-102 to 3-103).
- See the six "source of money" FAQs on the Client ID & Verification web page and the information about obtaining supporting documents. Be cautious of a client who is evasive about the source of money for financial transactions.
- Be mindful of risks associated with certain types of legal services (e.g., real estate, shell corporations, private loans, trusts, various types of debt recovery) and certain types of clients and parties (e.g., use of power of attorney, nominees, from or formerly from or incorporated in a high-risk jurisdiction, recent change of lawyer, foreign buyer, especially if on a watch list, politically exposed persons or persons associated with them, funds disproportionate to an individual's age and occupation). Risks may be increased if the transactions are conducted on a cross-border basis.
- Familiarize yourself with the Risk Advisories for the Legal Profession addressing risks in the areas of real estate, shell corporations, private lending, trusts and litigation and the Risk Assessment Case Studies for the Legal Profession. Note the Red Flags Quick Reference Guide in the appendix to the case studies.

- Screen for clients who may be on a government watch list. The Public Safety Canada website maintains information on listed terrorist entities (individuals and groups). Global Affairs Canada maintains a listed-persons web page that contains names of individuals and entities designated under the *Special Economic Measures Act*, the *United Nations Act* and the *Justice for Victims of Corrupt Foreign Officials Act*.
- Review the Law Society's Discipline Advisories, especially Securities fraud Micro-cap stocks (May 29, 2020), Private lending (April 2, 2019) and Lawyers are gatekeepers (April 10, 2018).

LAW SOCIETY RULE METHODS TO VERIFY AN INDIVIDUAL'S IDENTITY

Before turning to the virtual verification guidelines, you should understand the three basic methods to verify an individual's identity set out in Rule 3-102 and the use of agent method in Rule 3-104. Why? Because if you can avail yourself of any of these methods, you do not actually have a good reason to verify identity virtually. The rules provide for three main methods to verify an individual's identity:

1. Government-issued photo ID method (requires physical meeting).
2. Credit file method (no physical meeting required).
3. Dual process method (no physical meeting required).

I will briefly discuss each of these methods and, in addition, the opportunity to use an agent to verify the client's identity, either by fresh verification or previous verification. If a lawyer is able to rely on the previous verification of identity of an individual by an agent, no new physical meeting with the individual is required. If you verify an individual's identity virtually, document the efforts that you made to verify identity in accordance with the rules and also why you were unable to do so. Understand your obligations regarding record keeping and retention of documents used to verify the identity of any individual set out in Rule 3-107.

For all of these methods, keep in mind that you must verify the individual's identity *at the time you provide legal services in respect of a financial transaction*, not after the transaction (Rule 3-105(1)). This includes an individual instructing you on behalf of an organization. Although there is a 30-day rule for organizations, it does not apply to the instructing individual. When a lawyer has verified the identity of an individual previously, the lawyer is not required to repeat verification unless the lawyer has reason to believe the information, or its accuracy, has changed (Rule 3-105(2)).

Government-issued photo ID method

The government-issued photo ID method

has long been the most popular method of verifying a client's identity. It's usually a simple process and has the added advantage that an in-person meeting gives the lawyer and the client an opportunity to establish a relationship. This method requires that you (or a member or employee of your firm) use the individual's valid, original and current photo ID in the physical presence of the client to verify that the name and photograph are those of the client (Rule 3-102(1)(b) and (2)(a)(i)). An ID issued by the Canadian government, a province or territory or a foreign government are acceptable; an ID issued by a municipal government is not.

Some lawyers, or their agents, have continued to verify an individual's identity in a physical setting during the COVID-19 pandemic by meeting with individuals at a two-metre distance, while employing masks, handwashing, disinfecting and other recommended safeguards. If, for example, an individual goes shopping for groceries or physically accesses some other settings outside the home, that person may be comfortable with this method. Please note: viewing the client's ID and the individual by a virtual means does not currently fulfill the Rule 3-102 requirements.

Credit file method

Using the client's credit file is a new method of verification that has been available since January 1, 2020, and it does not require the individual client's physical presence before the lawyer to verify identity. This method can be used in situations where the individual has a credit file located in Canada that has been in existence for at least three years (Rule 3-102(1)(b) and (2)(ii)). Information in the credit file is used to verify that the name, address and date of birth in the credit file are those of the individual. The information in the credit file must match the name, address and date of birth that the individual has told you. Before using this method, you will need to obtain the individual's consent. You must verify ID at the time you provide legal services in respect of a financial transaction.

The information to verify the client's identity must be obtained directly from a Canadian credit bureau (or a third-party vendor authorized by a Canadian credit bureau to provide Canadian credit information). You cannot rely on a copy of credit file information provided by the individual whose identity you need to verify.

Note that obtaining a credit assessment or credit rating on an individual is not the same as verifying an individual's identity. A credit assessment or credit rating is not needed to verify ID.

Information obtained from a foreign credit bureau about an individual is not acceptable for the credit file method.

Equifax Canada and TransUnion Canada are the two Canadian credit bureaus. They both have verification of identity services. You can contact the credit bureaus to discuss their services and products, how an individual's identity could be verified, speed of obtaining results, security, privacy, accuracy, pricing and other considerations that may be important to you, such as adding global watch list searches and politically exposed person searches.

Dual process method

An individual's physical presence is also not required for the dual process method of verifying an individual's identity. Rule 3-102(2)(a)(iii) requires that lawyers must use any two of the following sources of information:

- Information from a reliable source that contains the individual's name and address that is used to verify that the name and address are those of the individual.
- Information from a reliable source that contains the individual's name and date of birth that is used to verify that the name and date of birth are those of the individual.
- Information that contains the individual's name and confirms that the individual has a deposit account or a credit card or other loan amount with a "financial institution" (as defined in Rules 3-98 and 3-53) that is used to verify that information.

Note the following additional requirements in subrules (2)(a)(iii), (3) and (4) of Rule 3-102:

- The information referred to must be from different sources.
- It is not acceptable for the individual, the lawyer or an agent to be a source.
- Documents must be valid, original and current; information must be valid and current.
- An electronic image of a document is not a document or information for the purposes of the rule.

A reliable source of information would be a source that is well known and considered reputable, such as the federal, provincial, territorial and municipal levels of government, Crown corporations, financial institutions and utility providers.

You cannot use the same source for two categories of information. For example, you cannot rely on a chequing account statement from Bank A that contains the individual's name and address and a term deposit statement from Bank A that contains the individual's name. This example could work if two different banks were used.

Some examples of reliable source documents are a bank statement, credit card statement, utility bill, insurance documents (home, car, life), mortgage statement, municipal property tax assessment, provincial or territorial vehicle registration, investment account statements (RRSP, TFSA, RRIF), Canada Pension Plan statement, Canada Revenue Agency notice of assessment or birth certificate. A document must be valid, original and current; an electronic image is not acceptable.

To avoid a physical meeting during the COVID pandemic, the individual could provide original source documents to you by Canada Post or another delivery method.

Information that is not in a document could also be obtained. For example, with the client's consent, you could directly contact the individual's financial institution and speak with a representative from the institution who could confirm that the individual has a deposit account, credit

card or loan. You would make a record of the conversation with the applicable date. This would fulfill the requirement that the information is valid and current. This could be followed up with a confirming email from the financial institution to you or vice versa.

Previous verification by an agent

Another option is to use an agent to obtain the information required to verify client identity (Rule 3-104). During the COVID-19 pandemic, the utility of new subrule (7) has caught the attention of some lawyers. Why? If circumstances permit, neither the agent nor the client needs to physically meet to repeat what has already been done. As verification of identity has become commonplace in Canada and numerous other countries as an anti-money laundering measure for regulated professionals, it's possible that a suitable agent exists who has verified the client's identity recently and has retained records.

Subrule (7), effective January 1, 2020, permits lawyers to rely on an agent's previous verification of an individual client in the following circumstances:

> (7) A lawyer may rely on an agent's previous verification of an individual client if the agent was, at the time of the verification
>
> (a) acting in the agent's own capacity, whether or not the agent was acting under this rule, or
>
> (b) acting as an agent under an agreement or arrangement in writing entered into with another lawyer required under this division to verify the identity of a client.

If you wish to rely on an agent's previous verification of an individual, you must have a written agreement or arrangement with the agent. The verification information that you obtain from the agent must match what the individual client provided to you when you obtained their basic identification information. You must satisfy yourself that the information from the agent is valid (authentic and unaltered) and current (not expired) and that the agent verified the individual's identity through a permitted method (e.g., government-issued photo identification). If, for example, the agent used an expired driver's licence to verify the individual's identity, this is not acceptable. Note the date that you receive the agent's confirmation of verification, as this relates to whether the information is recent and the timing within which verification must take place with respect to the "financial transaction" (Rule 3-105).

An agent should be someone reputable who takes the verification of client identity seriously. Consider using someone who is a member of a regulated profession. Check their status and contact information with the regulator. See the six "using an agent" FAQs and a sample agreement with an agent published on the Client ID & Verification web page.

NEW RULE – GOVERNMENT REGISTRY SEARCHES

You may now use electronic documents or information obtained directly from a government registry to verify the identity of an organization, such as a corporation or a society that is created or registered pursuant to legislative authority. To facilitate this change, subrule (3.1) was added to Rule 3-102 in April 2020:

> (3.1) Despite subrule (3), an electronic image of a document that is created by and obtained directly from a registry maintained by the government of Canada, a province or a territory or a foreign government, other than a municipal government, may be treated as a document or information for the purposes of subrule (2)(b).

This is a helpful addition to the rules during the COVID-19 pandemic.

COVID-19-RELATED CAUTIONS – SCAMS AND MONEY LAUNDERING

It cannot be stated too often: this is not a time to let down your guard. It is a time to be more vigilant. Be on the lookout for phony new clients, fake law firms, fake company websites, spoofs of financial institutions and government department emails to misdirect funds, overpayment scams, counterfeit essential medical supplies and fraudulent investment schemes (e.g., for drugs to cure COVID). Criminals may try to convince you to bypass the Law Society's anti-money laundering measures with respect to client verification and source of money for financial transactions.

The COVID-19 pandemic has created an environment where scammers are pivoting away from criminal activities negatively impacted by the virus and toward other forms of illegal conduct. As long as criminals have access to computers and the internet, they will find opportunities. Some scams have a COVID theme (e.g., purchase and supply of personal protective equipment, misappropriation or misuse of financial aid) and others do not (e.g., collect a debt, act for a borrower obtaining a loan from a private lender). Cybercrimes, such as ransomware attacks and email phishing, have been on the rise. This is a good time to check your insurance coverage, especially for social engineering scams and data breaches. Read the Law Society's fraud alerts and resources.

The government of Canada's Canadian Anti-Fraud Centre provides fraud report statistics. Between March 6 and May 25, 2020, the centre reported 1,005 Canadian reports of COVID-19 fraud, 269 victims of COVID-19 fraud, and $1.8 million lost to COVID-19 fraud. The centre's website has lots of good information about scams. Consider reporting scam attempts against you to the centre and well as informing the Law Society.

NEW WEBINAR – ANTI-MONEY LAUNDERING MEASURES (July 2020)

The Law Society is offering a free two-hour program provided by Practice Advisor Barbara Buchanan, QC and Audit Team Leader Tina Kaminski to help lawyers comply with the Law Society's anti-money laundering rules. The program includes information on money laundering, cash, client identification and verification, red flags and risk management. The program is eligible for two hours of CPD credit. View the program on YouTube.

FOR MORE INFORMATION

For more resources, see the Client ID & Verification web page and Anti-Money Laundering initiative. If you have questions about client identification and verification or anti-money laundering, or if you wish to discuss a possible scam, you are welcome to contact me at bbuchanan@lsbc.org or 604.697.5816. Please contact an auditor for trust account and general account questions at trustaccounting@lsbc.org or 604.697.5810.❖

The departing lawyer in the age of COVID-19 – Ethical, legal and practical guidance

by Claire Marchant and Sara Forte

THE ECONOMIC FALLOUT from the COVID-19 pandemic has led to widespread disruptions to employment relationships, including between law firms and lawyers. Employment lawyers and Law Society practice advisors are busy fielding questions from firms and associates about professional and legal obligations and rights in these extraordinary circumstances. In this article, we have brought employment law and ethical advice together to address some of the most frequently asked questions about departing lawyers in the age of COVID-19.

My firm can't keep me on. What are my and the firm's ethical and legal obligations?

Claire Marchant: Your first stop should be to read my colleague Barbara Buchanan, QC's valuable article "Ethical considerations when a lawyer leaves a firm," which sets out the obligations of the firm and the departing lawyer.

A fundamental duty of lawyers and firms when a lawyer leaves the firm is client notification. When the responsible lawyer on a matter is departing, the client must be notified and provided the opportunity to go with the departing lawyer, stay at the firm or find new counsel. Ideally, the firm and lawyer will send a joint letter to the client, but the letters can also be sent by the firm or the departing lawyer. Template client choice letters can be found on the Law Society website. Two letters need not be sent, if the firm and the departing lawyer are satisfied that the letter sent by one of them satisfies the obligation to notify the client. The party that does not send the letter should ask for copies of the letters that were sent (or be copied on the letters) or an example copy of the letter and a list of clients to whom it was sent, to ensure the duty has been observed.

To the greatest degree possible, this process is best handled in a coordinated manner through compromise and cooperation with a singular message to the client. It reflects poorly on the professionalism of the firm and the departing lawyer if the client has to parse through competing messages or be drawn into a dispute between the firm and departing lawyer. To me, the driving motivation behind this process is the preservation of client choice. The client is in charge, not the departing lawyer or the firm, and the goal is to provide continuity of service in as professional a manner as possible.

Sara Forte: Relationships between law firms and lawyers can be structured as either employment or independent contracting. The first step in understanding legal obligations on termination is to figure out which of these categories applies. In a true independent contractor situation, notice is determined solely by the contractual terms between the parties. Use of the qualifier "true" independent contractor is because some contractors are found to be employees or dependent contractors when the relationship is analyzed (see our blog for more information on this determination).

If the working relationship is set up as employee-employer (or if the lawyer is paid as a contractor but is actually an employee or dependent contractor), reasonable notice of termination is owed. Reasonable notice can be actual advance notice, pay in lieu of notice or a combination of advance notice and pay.

A properly drafted, enforceable employment agreement in which reasonable notice is addressed can be determinative. If the contract is silent or the termination clause is unenforceable (or if there is no written contract), common law notice is applicable based on the lawyer's age,

length of service, nature of the job and availability of alternate employment. The firm's financial situation is not generally relevant in determining reasonable notice requirements (frustration of contract being one possible exception in exceptional circumstances). Members of the Law Society and articled students enrolled under the *Legal Profession Act* are excluded from the *Employment Standards Act*, which is the legislative scheme that would apply to many other employment relationships.

Advance notice of termination can be mutually beneficial to lawyers and law firms and of great assistance in ensuring professional obligations to clients are met.

If the firm lets an associate go, can it just re-assign their files? What if there is a non-competition or non-solicitation clause in place?

Claire: This question turns on whether the associate is the responsible lawyer on a given file. Here's an excerpt from "Ethical considerations when a lawyer leaves a firm" on determining the responsible lawyer on a file:

> 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.

If the associate is not the responsible lawyer on the file, then the file can be re-assigned internally. Although a client choice letter is not required in that circumstance, it is good practice to acknowledge the associate's departure to the client as a matter of customer service.

If the associate is the responsible lawyer, the general rule is that the client must be notified and provided with choices. There is a limited exception to this, when the lawyers affected by the change, acting reasonably, conclude that the circumstances make it obvious that the client will continue as a client of a particular lawyer or the law firm (*BC Code* rule 3.7-1, commentary [5]). The right of clients to be informed of changes to a law firm and to choose their lawyer cannot be curtailed by any contractual or other arrangement (including restrictive covenants such as a non-competition or non-solicitation clause). I should note that the Ethics Committee has opined that the *BC Code* does not prohibit restrictive covenants regarding prospective clients (including existing clients on new matters), but such a covenant may be unenforceable at law in any event.

To me, the driving motivation behind this process is the preservation of client choice. The client is in charge, not the departing lawyer or the firm, and the goal is to provide continuity of service in as professional a manner as possible.

Sara: Irrespective of contractual limitations, professional obligations are really the driving principle in terms of what happens with clients. No lawyer or law firm owns a client. There has been judicial consideration of law firms seeking to enforce post-employment restrictions on departing lawyers, and the public interest has weighed heavily against enforcement, for example in *MacMillan Tucker MacKay v. Pyper* (2009) BCSC 694:

> The public interest is not served by restrictions on the right of qualified professional persons to practice their profession at the location of their choice …
>
> To the extent that the restrictive covenant would prevent Mr. Pyper from practising law at all for a period of three years within a five-mile radius of Cloverdale Town Centre and thereby inhibit some existing or potential clients in that area from having ready access to his services, granting the injunction would weigh against the public interest in facilitating access by clients to the lawyer of their choice.

My firm has let me go and I don't have a new position lined up yet. What should we put in the client notification letter?

Claire: If the departing lawyer does not have a new firm yet, the firm and departing lawyer could, depending on the circumstances, agree to "placeholder" language while the departing lawyer is figuring out next steps.

For example, instead of the client choice letter saying:

> On [date], [departing lawyer] is leaving [or left] our firm to join the law firm of XYZ [or to commence practice as a sole practitioner].

It could be changed to:

> On [date], [departing lawyer] is leaving [or left] our firm. [Departing lawyer] plans to continue in private legal practice and will advise as soon as possible on their new place of practice.

The firm and departing lawyer would need to agree in advance that one or the other will notify the clients of the departing lawyer's new place of practice when determined. Clients could then communicate their decision.

This course of action would only be appropriate if: (a) the departing lawyer was going to set up their own practice or join a new firm in relatively short order; and (b) the client did not have any imminent hearings or other deadlines, to avoid client prejudice or a gap in client service.

Of course, every situation has its own different twists and turns, and both firms and departing lawyers should contact the practice advisors for advice on their specific circumstances.

Our departing associate is going to stop practising for a while. Do we still need to send the client notification letter, and what should it say?

Claire: If the departing lawyer is the responsible lawyer on the file, the clients still need to be provided with a letter notifying

Services for lawyers

Law Society Practice Advisors

Barbara Buchanan, QC
Brian Evans
Claire Marchant
Edith Szilagyi

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.

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

◆

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

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, law students and support staff of legal employers.
Contact Equity Ombudsperson **Claire Marchant** at 604.605.5303 or equity@lsbc.org.

them of the associate's departure and the option to be re-assigned to a different lawyer at the firm or to find new counsel.

The obligation to notify in this scenario does not arise if the departing lawyer and firm, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of the law firm (pursuant to *BC Code* rule 3.7-1, commentary [5]). Whether this commentary applies is contextual and fact driven, so it very much depends on the circumstances at hand. If you have questions, feel free to contact a practice advisor.

I've been let go by my firm. If I do legal work from my home, on contract, or for other firms, what do I need to tell the Law Society?

Claire: You need to notify our Member Services department (memberinfo@lsbc.org) about your change of practice circumstances. They will help and advise you of the requirements.

If you are considering setting up your own practice, check out our Opening Your Law Office practice resource for tips and tricks for setting up your own law office.

How would temporary layoffs apply to lawyers in a law firm setting?

Sara: In a law firm setting, temporary layoffs of lawyers are a termination of employment unless the written employment contract expressly allows for temporary layoffs or the employee agrees to them. When associates are given a notice of temporary layoff, they can either accept or reject the layoff. Given our current economic climate, many workers are accepting temporary layoffs in the hope that they will have a job to return to when things improve. If an associate rejects a temporary layoff and insists on severance pay, the employment relationship ends. This rejection has significant consequences, and it is advisable to obtain legal advice before making this move.

Can a firm lower an associate's salary or otherwise negatively change terms of employment due to a business downturn?

Sara: Fundamental, unilateral changes to employment contract terms can be a constructive dismissal. These could include significantly changed core duties or responsibilities or a reduction in compensation. While there is no set amount required to be a "fundamental" change of compensation, relatively small reductions are unlikely to be constructive dismissal. Generally, reductions in excess of 20 per cent will be found to be "fundamental." Similar to a temporary layoff, if a fundamental compensation reduction is imposed, the employee can choose to either accept the change (which can be to express acceptance or acquiescence by continuing to work under the new terms without objection) or reject the change and assert constructive dismissal. Lawyers should be careful before rejecting changed terms, though, because dismissed employees have a duty to mitigate to seek and accept new work, and being offered work on changed terms can complicate the assessment of liability for pay in lieu of notice. It is strongly recommended that lawyers seek employment law advice before rejecting changed terms.

I have questions! Who should I call?

Claire: Practice advisors continue to be available to answer questions about ethics and practice management and can be reached at practiceadvice@lsbc.org or 604.443.5797.

Sara: Lawyers and law firms can also avoid costly disputes by calling an employment lawyer for advice. All inquiries are confidential, per solicitor-client privilege. All of our lawyers at Forte Law have experience advising clients in the legal industry, and we can be reached at info@fortelaw.ca or 604.535.7063.❖

Claire Marchant, Manager, Practice Support and Equity Ombudsperson, oversees the Law Society's practice advice team and spearheads the production of resources to help lawyers be honourable and competent.

Sara Forte is an employment lawyer and founder of Forte Law – Employment Law Solutions, a boutique firm focused exclusively on workplace legal issues based in Surrey, BC. Sara and her team advise workers and businesses, including law firms and lawyers.

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 15

Hearing (application for enrolment): June 5, 2019

Panel: Christopher A. McPherson, QC, chair, Nan Bennett and Kimberly Henders Miller

Decision issued: March 5, 2020 (2020 LSBC 15)

Counsel: Michael Shirreff for the Law Society; Craig Jones, QC for the applicant

BACKGROUND

The applicant has a significant criminal history and numerous driving offences and occurrences. He first experienced behavioural difficulties during secondary school. He began drinking alcohol by the age of 13, and at the age of 14, he was found by the police in a park with a BB gun and later in an unoccupied house with friends drinking and smoking marijuana.

Over the course of several years, he committed a series of driving offences, including numerous moving offences, and received 24-hour prohibitions as well as prohibitions imposed by both the Superintendent of Motor Vehicles and the courts.

In 2009, he was involved in an altercation with a male friend and his girlfriend. His girlfriend intervened in a fight between the two men. He struck his girlfriend and she fell to the ground. He was charged with assault and released with numerous conditions, including no contact with her.

He repeatedly contacted his ex-girlfriend, who was still a youth. He went to her place of work at least twice. He gained access to her email and social media accounts and changed her passwords. He threatened to damage her home. He uttered a threat to her to cause death or bodily harm to a young man whom he believed she was dating. He later apologized to her.

As a result of his conduct, he was charged with uttering threats to cause damage to property, criminal harassment, attempting to obstruct, pervert or defeat the course of justice (three different counts representing various means of obstruction, namely threats, concealing the passwords and repeatedly communicating with his ex-girlfriend), and uttering threats to cause death or bodily harm to the young man he believed she was seeing. He was arrested and remained in custody.

He entered a guilty plea and was sentenced to 30 days and two years' probation for the assault of his girlfriend, 30 days and two years' probation for the breach of the no-contact order with his girlfriend, 49 days and two years' probation for criminal harassment and 49 days and two years' probation for uttering threats. In addition, he was ordered to have no contact with his ex-girlfriend and the young man he believed she was seeing, not consume or possess any alcohol or non-prescribed drugs, participate in counselling as directed and take steps to maintain himself so his condition of adjustment disorder, depression and obsessional behaviour would not cause him to act dangerously.

He took anger management and substance abuse counselling while incarcerated, and the probation officer did not direct any further counselling after his release from jail. He did not abide by his probation order. He repeatedly contacted his ex-girlfriend. He was charged with contacting her and with possessing and consuming drugs. He pleaded guilty to possessing and consuming drugs, and the prosecution stayed the charge of contacting his ex-girlfriend. The probation order was later amended to remove the condition not to contact her. His last conviction was in 2011 for driving while prohibited. He entered a guilty plea and received a one-year driving prohibition and a fine of $800.

Despite this behaviour, he did well academically and entered the University of British Columbia in fall 2009. He withdrew from UBC in 2010 due to his incarceration beginning in January 2010. He returned to UBC in fall 2010. He was admitted to law school in 2017 and was expected to graduate in May 2020.

He received an offer for summer articles in 2019 from a firm in Vancouver. He took two weeks' training at the firm but was unable to continue with summer articles due to this hearing. He received an offer for articles at a different Vancouver firm and was due to begin in May 2020.

The applicant said he came to the realization that he had to change his behaviour, beginning with his time on remand and his jail sentence. He described how scary it was for him to be at the pre-trial centre with older inmates, many of whom were charged with serious offences. One inmate threatened him. He was transferred to a different correctional centre after he was sentenced and took anger management and substance abuse counselling, which he found somewhat helpful. He gradually cut himself off from peers who were still involved in criminal behaviour.

He accepted that his behaviour caused hardship to his family and he was remorseful for it. He described the pressure he previously experienced from his peers, some of whom are now facing very serious charges. He has tried to help some of them and his relatives who are still struggling. He testified that he was not proud of who he had

been, but was proud of who he had become. He said the process of rehabilitation for him is ongoing.

The panel found insight into how the applicant had changed over the years in letters from people who knew the applicant during his period of behavioural and legal difficulties. The panel found these letters demonstrated he was a person who had rehabilitated himself and addressed many of the issues regarding his character as a young man.

The panel also reviewed transcripts that showed academic difficulties during his undergraduate studies, which coincided with the period of his criminal behaviour. The transcripts show much improvement from 2011 to 2015. His law school marks were above average and showed he was applying himself to his studies.

The panel found that the applicant was forthright and complete in his answers. The panel heard from a long-term employer of the applicant and found her description of his character and conduct while under her supervision to be particularly helpful. The panel accepted evidence from the applicant's sisters that his behaviour and character had changed since his last conviction nearly 10 years prior. He was far less angry, more mature, more empathetic and more caring toward others. The panel found their evidence on how they now trusted him with young relatives and how he had reached out to other troubled relatives to be persuasive.

DECISION

The panel determined that the applicant was of good character and repute and fit to become a barrister and a solicitor of the Supreme Court. He can be enrolled as an articled student in BC.❖

Conduct reviews

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

JURICERT PASSWORD

A compliance audit revealed that a lawyer disclosed his Juricert password to his assistant and, on at least one occasion, allowed her to affix his personal digital signature on documents filed in the Land Title Office. The lawyer also left signed blank trust cheques in his office when he was away from the office, which were accessible to his staff. In the lawyer's absence, his staff would prepare an invoice and complete a signed trust cheque to pay the invoiced fee. The lawyer admitted that his conduct was contrary to his Juricert agreement, Part 10.1 of the *Land Title Act*, Law Society Rule 3-96.1 and rules 3.5-2 and 6.1-5 of the *Code of Professional Conduct for British Columbia*. The lawyer has changed and memorized his Juricert password and he no longer signs and leaves blank trust cheques in his office. (CR 2020-07)

IMPROPER THREAT

While acting for clients on an estate matter, a lawyer wrote a letter threatening to report alleged criminal activities of the opposing party to the authorities in order to secure a benefit for his clients. The letter was written to advance his clients' interests in a settlement, but the lawyer thought he was addressing a serious and urgent situation and did not at the time think that he was making a threat. A conduct review subcommittee suggested the lawyer review rule 3.2-5 and commentaries [1] and [2] of the *Code of Professional Conduct for British Columbia*, and to refrain from mentioning to opposing parties the possibility of the police becoming involved. (CR 2020-08)

REFUND OF TRUST FUNDS

A lawyer accepted $7,800 cash into his trust account on a criminal matter and refunded $5,224 by way of a trust cheque. As the retainer had been paid in cash and the balance was in excess of $1,000, the lawyer was required to refund the remaining retainer in cash in accordance with Law Society Rule 3-59(5). The lawyer was alerted by his accounting staff that a cash retainer had been returned with a trust cheque. The lawyer self-reported to the Law Society that there had been a breach of Rule 3-59. He acknowledged his error, has taken appropriate steps to train his staff and has put procedures in place to prevent a reoccurrence. (CR 2020-09)

In another matter, a lawyer accepted a cash retainer in the amount of $10,000 and subsequently refunded $2,851.34 to the client by trust cheque as opposed to cash, contrary to Law Society Rule 3-59(5). The lawyer acknowledged responsibility for his error and the importance of the rule. He said the misconduct was inadvertent and he will not accept cash retainers in the future. (CR 2020-10)

COMMUNICATING WITH A PERSON REPRESENTED BY COUNSEL

In relation to a personal family law matter, a lawyer communicated with his ex-spouse when he knew she was represented by counsel, contrary to rule 7.2-6 of the *Code of Professional Conduct for British Columbia*. The lawyer had discussions with his ex-spouse about Canada Revenue Agency re-assessments. He arranged to transfer money from the matrimonial house sale proceeds, which were held in his firm's trust account, to pay the re-assessments. The lawyer improperly withdrew or authorized the withdrawal of the trust funds that he knew or ought to have known were subject to undertakings and conditions, contrary to Law Society Rule 3-64(1). The lawyer failed to

realize that the nature of the discussions clearly involved legal matters upon which he was representing himself, and his spouse had separate representation. The lawyer acknowledged that his conduct was inappropriate and his objectivity was compromised given the upsetting and deeply personal nature of the family proceedings. In future, the lawyer will retain counsel on matters in which he is personally involved. (CR 2020-11)

DISHONOURABLE CONDUCT

In the course of meeting with a family law client, a lawyer made sexual advances toward and had physical conduct of a sexual nature with his client, which led to the breakdown of the solicitor-client relationship. The conduct was contrary to Chapter 2, Rules 1, 3 and 5, of the *Professional Conduct Handbook*, then in force. The lawyer understood his conduct was a serious breach of his ethical and moral boundaries. It caused his client to lose confidence in the lawyer-client relationship and, potentially, emotional trauma. A conduct review subcommittee discussed the fiduciary obligation that a lawyer owes to a client, which includes the obligation to refrain from engaging in a personal relationship or from having sexual relations with a client. (CR 2020-12)

OPPOSING PARTY IN FAMILY PROCEEDING

While acting for the wife in a family law dispute and a related criminal case against the husband, a lawyer offered to drop the criminal charges in exchange for the husband agreeing to a protection order, contrary to rules 3.2-6(b), 5.1-2(n) and commentary [3] of rule 5.1-2 of the *Code of Professional Conduct for British Columbia*. The client asked the lawyer to contact Crown counsel regarding the criminal charges against her husband. Crown counsel advised the lawyer that he encourages parties in family law proceedings to resolve issues themselves and stated that he would drop the criminal charges against the husband if a consent protection order were in place. When the lawyer wrote the letter to the husband's lawyer, she intended to convey only her understanding that Crown counsel had indicated they would not proceed with the criminal charges if protection orders were in place. The lawyer advised a conduct review subcommittee that it was not her intention to negotiate a settlement for her client in return for dropping criminal charges or to gain an advantage for her client, or to do so without Crown counsel's consent. The lawyer acknowledged that she breached rule 3.2-6(b) of the *BC Code* and that she was aware of the rule when she wrote the letter but did not turn her mind to the fact that her letter was in violation. The lawyer has learned from her mistake, and any time a matter arises that is outside of her comfort zone, she will check with a colleague or the Law Society practice advisors. (CR 2020-13)

BREACH OF TRUST ACCOUNTING RULES

A lawyer pre-signed four blank trust cheques for use by his office staff when he was away from the office, contrary to Law Society Rule 10-4(1) and rule 3.5-2 of the *Code of Professional Conduct for British Columbia*. The lawyer explained that if funds needed to be disbursed on a personal injury file in his absence, he would have provided instructions by email to the paralegal. None of the cheques were used. The lawyer acknowledged to a conduct review subcommittee that he violated the rules, now understands the possible consequences of the pre-signed cheques and has stopped that practice. The subcommittee recommended that the lawyer take the online courses for trust accounting and small firm practice to help him manage his practice and avoid future rule violations. (CR 2020-14)

A lawyer issued an account to clients that included disbursements that had not yet been incurred, contrary to Law Society Rule 3-64(1). The clients had submitted documentation to Canada to start the process of applying for permanent residence. The lawyer did not submit the application for permanent residence as the clients' submission was rejected and they were not ultimately invited to apply for permanent residence. As a result, the lawyer did not incur any of the disbursements for which he billed the clients. The lawyer now understands that withdrawal of trust funds without entitlement to those funds is improper and could be construed as misappropriation. The lawyer agreed to return the funds for the disbursements to the clients. He acknowledged that he was inexperienced in immigration law, and he no longer accepts immigration-related files. (CR 2020-15)

CLIENT ID AND VERIFICATION

A lawyer failed to comply with one or more of the client identification and verification rules set out in Part 3, Division 11, of the Law Society Rules. The lawyer acknowledged that four client files did not contain the appropriate client identification and verification for non-face-to-face financial transactions and that ultimately it was her lack of knowledge of the rules that resulted in the misconduct. The lawyer has familiarized herself with the rules, has adopted the Law Society checklist and is aware she can consult a Law Society practice advisor. In addition, she has taken the CLE-TV course, Anti-Money Laundering – Client Identification and Verification Rules, concerning the changes to the rules that came into effect January 1, 2020. She no longer does conveyancing, practises in commercial law under the firm's partner and is finding the additional supervision and mentorship beneficial to her practice. (CR 2020-16)

BREACH OF UNDERTAKING

While acting for a client in a personal injury matter, a lawyer breached an undertaking when he failed to promptly notify the client's previous lawyer of the amount of the settlement reached in the matter, contrary to one or more of rules 2.1-4(b), 5.1-6, and 7.2-11 of the *Code of Professional Conduct for British Columbia*. When alerted that the previous lawyer had reported the breach of undertaking to the Law Society, the lawyer reviewed the file and complied with the undertaking. The lawyer acknowledged he did not adequately review the undertaking before he accepted it. The lawyer has acknowledged the need for increased care and attention, both when granting and when discharging undertakings. (CR 2020-17) ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Konrad Malik
- Rene Henri Daignault
- Sanda Ling King
- David Jacob Siebenga
- Christopher James Wilson
- David Allen Kidd
- Crystal Irene Buchan
- John (Jack) Joseph Jacob Hittrich
- Mark William Sager
- Douglas Joseph William Hammond
- Douglas Bernard Chiasson

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

KONRAD MALIK

Vancouver, BC
Called to the bar: October 22, 2008
Ceased membership: January 1, 2020
Admission and undertaking accepted: March 30, 2020

AGREED FACTS

Konrad Malik practised primarily in securities and corporate law on behalf of junior issuers. A personal acquaintance reached out to him to request his legal services on behalf of a corporation, particularly to draft a Form 8-A to be filed with securities regulators in the United States. By engagement letter, the corporation retained Malik to act as its counsel. The letter was signed by Malik and was countersigned by two of the corporation's directors.

Malik did not speak or meet with the directors despite their being the listed directors and officers of the corporation. He did not confirm with the directors that they wanted him to prepare documents on behalf of the corporation.

The outstanding shares of the corporation were later sold. Malik's acquaintance located the buyer and organized the sale. Malik received instructions regarding the change of control and management of the corporation from his acquaintance and a purported consultant of the corporation and an individual he was advised would be taking over control of the corporation. Malik did not communicate with the directors of the corporation regarding the change of control and management. Years later, the BC Securities Commission issued findings that an individual had engaged in conduct contrary to the public interest by deceiving securities regulators and the public about the true ownership and control of the company.

ADMISSION AND UNDERTAKING

Malik admitted that he failed to make reasonable inquiries or exercise due diligence regarding the legitimacy of the business, affairs and transactions he was engaged to complete. Specifically, he did not make reasonable inquiries to obtain information about the company's purported directors and officers or their purported consultants. While the engagement letter to retain him was countersigned by two individuals listed as directors, he did not contact them, meet with them or speak to them directly. He did not confirm the instructions he had received from others with the directors when he prepared and filed documents to change control of the company away from them and to effect the sale and transfer of 100 per cent of their shares.

The Law Society accepted Malik's admission of professional misconduct. In making its decision, the Discipline Committee considered Malik's residence overseas, that he had not been an active Law Society member for seven years, his willingness to make admissions and the absence of a disciplinary record.

Malik agreed to undertake for a period of nine months commencing March 31, 2020:

- not to engage in the practice of law in British Columbia with or without the expectation of a fee, gain or reward, whether directly or indirectly;
- not to apply for reinstatement to the Law Society of British Columbia;
- not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society of BC; and
- not to permit his name to appear on the letterhead of, or work in any capacity whatsoever for, any lawyer or law firm in British Columbia without obtaining the prior written consent of the Discipline Committee.

Should Malik wish to apply for reinstatement to the Law Society when his undertaking expires on January 1, 2021, he will have to satisfy the Credentials Committee that he is of sufficiently good character and repute to practise law in BC.

RENE HENRI DAIGNAULT

Vancouver, BC
Called to the bar: November 19, 1993
Hearing date: March 12, 2020
Panel: Kenneth Walker, QC, chair, Monique Pongracic-Speier, QC and Guangbin Yan
Decision issued: April 17, 2020 (2020 LSBC 18)
Counsel: Jaia Rai for the Law Society; William MacLeod, QC for Rene Henri Daignault

FACTS

Rene Henri Daignault has practised as a sole practitioner through his law corporation since 2002, and his areas of practice include securities law. His law corporation maintains trust accounts, one in US dollars and one in Canadian dollars. From approximately 2002 to 2013, he represented a corporation and took instructions from its principal.

In 2011, Daignault received an email from someone overseas confirming that US$40,000 was on its way to his trust account for the purchase of shares in an over-the-counter trading company connected to the principal of the corporation he was representing. The person who sent the email described himself as the managing partner of an asset management firm in Switzerland. The instructions said that funds for the purchase would come from one entity but the shares should be registered in the name of another entity. The names of the funder and the registered purchaser were given in the email. Daignault did not know either the funder or the purchaser and did not make inquiries about them. He did not know the identity of the vendor of shares and did not inquire. He did not inquire about the source of the funds.

The funds were wired into Daignault's trust account, and the transfer documentation indicated that the funder was an "overseas management company" in the British Virgin Islands. Based on verbal advice from his client — the principal of the corporation he was representing — he treated the funds as his client's funds. In his correspondence with the person who emailed him, Daignault did not caution him that the funds transferred would be considered as his client's funds and that he would take instructions only from his client regarding the disbursement of funds.

The principal of the corporation gave Daignault instructions to disburse the funds. He paid US$20,000 out of trust to one company as a loan and issued a cheque for US$20,000 to his general account, which was then wired to a California bank to the credit of another company as a loan. Daignault drafted convertible promissory notes in relation to the loans. When he disbursed the funds, he did not know the share purchase transaction had not completed.

Daignault corresponded with the person who sent him emails from overseas over a period of many months about the incomplete share transaction. Daignault said he did not receive any funds. He never returned the funds to the person who sent the email instructions, the funder or the purchaser. No civil action was taken against him in relation to the transaction.

The person Daignault was corresponding with was arrested in Manitoba and charged with money laundering. The BC Securities Commission found him guilty of conduct contrary to the public interest for his part in an illicit stock promotion and suspended him from participating in trading activities for five years. He also complained about Daignault to the Law Society, which opened an investigation. In the course of its investigation, the Law Society examined two other concerning trust account transactions.

In the first of the two transactions, Daignault received $40,828.70 into his trust account by wire transfer from a Panamanian company, which transmitted the funds on behalf of the company's client. The principal of the corporation he was representing gave written instructions to pay $40,000 to a bank in Santa Monica, California, as loan proceeds for a convertible note. Daignault completed the wire transfer. He did not know the identity of the payer, the relationship between the Panamanian company and the payer or the identity of the parties to the share transaction. He did not know the details, terms or conditions of the transaction. He did not request, obtain or prepare any written documentation for the transaction.

The share transaction did not complete. The payer sent an email to Daignault noting that they had not received a purchase and sale agreement or the shares. Daignault did not respond. The payer sent further emails requesting a refund. Daignault forwarded these emails to the principal of the corporation he was representing, who replied he would work on it. The funds Daignault held in trust to the client's credit were not sufficient to repay the funds.

A business associate of the principal wired $100,000 into the trust account and gave Daignault written authorization to take instructions from the principal. Under the principal's instructions, Daignault refunded the money by paying $40,828.70 in trust to a law firm indicated by the payer.

In the other transaction the Law Society investigated, a company paid $33,760.50 into Daignault's trust account. He did not communicate with the company and permitted his trust account to be used to receive and disburse funds based on instructions from the principal of the corporation he was representing. He credited the funds to his client and was informed the funds were payment for consulting services. Daignault did not provide any legal services in connection with the receipt or disbursement of the funds. He disbursed the funds in four transactions: $3,000 as a loan to a corporate entity, $22,000 as a loan to the principal, $8,000 as a loan to cover an invoice for audit fees for a company related to the principal, and as payment of an invoice Daignault himself issued. He did not advise the depositor of the funds that he was not protecting their interests.

ADMISSION AND DETERMINATION

Daignault admitted he committed professional misconduct in each of the transactions. He admitted he did not caution any of those involved in the transactions that he was not protecting the interests of those who were not his clients, and he failed to provide any substantive legal services in connection with these transactions.

The panel accepted his admission and found that his conduct constituted professional misconduct.

DISCIPLINARY ACTION

Daignault and Law Society counsel jointly submitted that the disciplinary action should be a two-week suspension.

The panel considered the repetitive nature of Daignault's misconduct and his lack of disciplinary history and found that inattention, rather

than intention, was at the root of his actions. The panel agreed with the proposed sanction and ordered that Daignault be suspended for two weeks.

SANDA LING KING

Surrey, BC
Called to the bar: February 20, 1998
Ceased membership: December 31, 2019
Admission and undertaking accepted: April 29, 2020

AGREED FACTS

Sanda Ling King and David Jacob Siebenga established the Siebenga & King Law Corporation with its main areas of practice in real estate and conveyancing. King and Siebenga had a number of trust accounts and a general account. They were the only signatories to their trust accounts. They employed several administrative and conveyance staff to carry out their high-volume real estate conveyance practice, under their supervision.

The ordinary practice of the firm for real estate conveyance matters was to confirm the amount of the firm's statement of account in an order to pay that was approved by the client around the time of closing. In matters where the total anticipated liabilities and the firm's statement of account did not use all of the money held in trust for a client, money was left over in the trust account. In some cases, the firm would then issue a cheque to the client for the residual balance. If the cheque was not cashed within six months of issue, the cheque would become stale-dated. In some cases, the firm would not issue a cheque to the client for the leftover funds and the residual balance would be held in trust, unresolved, for extended periods.

Siebenga & King Law Corporation's bookkeeper prepared a trust liability report on a monthly basis, which she provided to King and Siebenga for their review with the monthly trust reconciliations. The report provided the amounts and the aging of the firm's outstanding trust liabilities, including all stale-dated cheques and residual balances.

When the firm issued a statement of account to a client, the billed amount was not immediately withdrawn from trust and deposited into the firm's general account. The firm used a "fee ledger" system and each trust account had a separate fee ledger. The amount in the statement of account would be transferred from the client ledger to the respective fee ledger in the firm's trust account. The bookkeeper would periodically review the fee ledgers and prepare a single cheque from each trust account into the firm's general account for the total amount of fees recorded as due from clients. King and Siebenga signed the cheques to authorize the transfer of funds from fee ledgers in the trust accounts to the general account. The cheques included amounts that had not been properly billed to the client and were not authorized for withdrawal.

In 2009, Siebenga and King completed their trust report and answered "no" to a question asking if the practice had outstanding stale-dated cheques during the reporting period. King answered "no" when she knew or ought to have known that her answer was incorrect.

The firm received notification that the Law Society's Trust Assurance department would be conducting a scheduled compliance audit. Under Siebenga's direction, before the audit, King and Siebenga began a process of reversing stale-dated cheques and paying the reversed amounts into the firm's general account and paying unresolved residual balances held in trust into the firm's general account. In total, $12,971.51 was wrongly transferred in 158 instances prior to the audit. The firm had no entitlement to the misappropriations. To create apparent justification for the misappropriations, Siebenga and King each participated in the creation of 197 false statements of account, either backdated or with no dates.

King and Siebenga exchanged email communications about the misappropriations and invoices before the audit. Siebenga sent instructions to King on how to create invoices for "earlier dates" and warned to use the appropriate tax rate for the date of the invoice. There was an ongoing exchange between them for several weeks about the preparation of client invoices. King emailed Siebenga documents that included draft invoices that were backdated and never delivered to the clients. The fees and disbursements in the invoices had not actually been incurred and were not properly charged to clients. The invoices were created to mislead the Law Society auditor. The misappropriations were not discovered during the audit.

After the 2009 audit concluded, the process of reversing stale-dated cheques and transferring those trust funds into the firm's general account continued, as well as transferring unresolved residual balances from trust accounts to the general account. Between 2009 and 2013, further misappropriations occurred in 257 instances for a total sum of $50,858.01.

In 2012, King and Siebenga completed the firm's trust report for the previous year and answered "no" to the question asking whether the practice had outstanding stale-dated cheques issued from the trust account. King ought to have known her answer was incorrect.

The Law Society's Trust Assurance department carried out another compliance audit of the firm's practice in 2012. The audit identified numerous concerns, including the issue of reversing stale-dated cheques and paying client trust funds into the firm's general account. King and Siebenga responded and provided 214 false statements of account to justify the further misappropriations. King knew or ought to have known that the later invoices were backdated to create the appearance they had been prepared before their actual date of creation, were not delivered to the clients and included fees and disbursements that had not been incurred or were not properly charged to clients.

The Law Society's Trust Assurance department referred the matter to the Professional Regulation department. A Law Society forensic

auditor conducted an investigation pursuant to Law Society Rule 4-43 (now Rule 4-55).

ADMISSION AND UNDERTAKING

King admitted that she misappropriated a total of $63,829.52 on 415 occasions, created 197 false statements of account and gave incorrect answers in two trust reports when she knew or ought to have known the answers were not true. She admitted that these actions constituted professional misconduct.

King wrote a letter to the Law Society's investigator and acknowledged her wrongdoing. She wrote that she did not dispute what happened, though she did not recall inserting the dates and other details. She said after she merged her practice with Siebenga's, she had a basic understanding of accounting and deferred to Siebenga, who was her senior. She remembers "just trying to keep above water" with a busy practice and acknowledged she turned a blind eye to what was occurring.

In making its decision, the Discipline Committee considered a letter to the chair of the Discipline Committee in which King admitted the disciplinary violation and gave her undertaking not to practise law, her prior professional conduct record and her former member status.

King agreed to undertake for 10 years, commencing on April 23, 2020:

- not to engage in the practice of law in British Columbia with or without the expectation of a fee, gain or reward, whether directly or indirectly;
- not to apply for reinstatement to the Law Society of British Columbia;
- not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society of BC; and
- not to permit her name to appear on the letterhead of, or work in any capacity whatsoever, for any lawyer or law firm in British Columbia, without obtaining the prior written consent of the Discipline Committee.

Should King wish to apply for reinstatement to the Law Society when her undertaking expires in 2030, she will have to satisfy the Credentials Committee that she is of sufficiently good character and repute to practise law in BC.

DAVID JACOB SIEBENGA

Surrey, BC
Called to the bar: June 12, 1987
Ceased membership: December 31, 2019
Admission and undertaking accepted: April 29, 2020

AGREED FACTS

David Jacob Siebenga and Sanda Ling King established the Siebenga & King Law Corporation with its main areas of practice in real estate and conveyancing. Siebenga and King had a number of trust accounts and a general account. They were the only signatories to their trust accounts. They employed several administrative and conveyance staff to carry out their high-volume real estate conveyance practice, under their supervision.

The ordinary practice of the firm for real estate conveyance matters was to confirm the statement of account in an order to pay that was approved by the client around the time of closing. In matters where the total anticipated liabilities and the firm's statement of account did not use all of the funds held in trust for a client, money was left over in the trust account. In some cases, the firm would then issue a cheque to the client for the residual balance. If the cheque was not cashed within six months of issue, the cheque would become stale-dated. In some cases, the firm would not issue a cheque to the client for the leftover funds and the residual balance would be held in trust, unresolved, for extended periods of time.

Siebenga & King Law Corporation's bookkeeper prepared a trust liability report on a monthly basis, which she provided to Siebenga and King for their review with the monthly trust reconciliations. The report provided the amounts and the aging of the firm's outstanding trust liabilities, including all stale-dated cheques and residual balances.

When the firm issued a statement of account to a client, the billed amount was not immediately withdrawn from trust and deposited into the firm's general account. The firm used a "fee ledger" system and each trust account had a separate fee ledger. The amount in the statement of account would be transferred from the client ledger to the respective fee ledger in the firm's trust account. The bookkeeper would periodically review the fee ledgers and prepare a single cheque from each trust account into the firm's general account for the total amount of fees recorded as due from clients. Siebenga and King signed the cheques to authorize the transfer of funds from fee ledgers in the trust accounts to the general account. The cheques included amounts that had not been properly billed to the client and were not authorized for withdrawal.

In 2009, Siebenga and King completed their trust report and answered "no" to a question asking if the practice had outstanding stale-dated cheques during the reporting period. Siebenga answered "no" when he knew or ought to have known that his answer was incorrect.

The firm received notification that the Law Society's Trust Assurance department would be conducting a scheduled compliance audit. Under Siebenga's direction, before the audit, he and King began a process of reversing stale-dated cheques and paying the reversed amounts into the firm's general account and paying unresolved residual balances held in trust into the firm's general account. In total, $12,971.51 was wrongly transferred in 158 instances prior to the audit. The firm had no entitlement to the misappropriations. To create apparent justification for the misappropriations, Siebenga and King each participated in the creation of 197 false statements of account,

either backdated or with no dates.

Siebenga and King exchanged email communications about the misappropriations and invoices before the audit. Siebenga sent instructions to King on how to create invoices for "earlier dates" and warned to use the appropriate tax rate for the date of the invoice. There was an ongoing exchange between them for several weeks about the preparation of client invoices. King emailed Siebenga documents that included draft invoices that were backdated and never delivered to the clients. The fees and disbursements in the invoices had not actually been incurred and were not properly charged to clients. The invoices were created to mislead the Law Society auditor. The misappropriations were not discovered during the audit.

After the 2009 audit concluded, the process of reversing stale-dated cheques and transferring those trust funds into the firm's general account continued, as well as transferring unresolved residual balances from trust accounts to the general account. Between 2009 and 2013, further misappropriations occurred in 257 instances for a total sum of $50,858.01.

In 2012, Siebenga and King completed the firm's trust report for the previous year and answered "no" to the question asking whether the practice had outstanding stale-dated cheques issued from the trust account. Siebenga ought to have known his answer was incorrect.

The Law Society's Trust Assurance department carried out another compliance audit of the firm's practice in 2012. The audit identified numerous concerns, including the issue of reversing stale-dated cheques and paying client trust funds into the firm's general account. Siebenga and King responded and provided 214 false statements of account to justify the further misappropriations. Siebenga knew or ought to have known that the later invoices were backdated to create the appearance they had been prepared before their actual date of creation, were not delivered to the clients and included fees and disbursements that had not been incurred or were not properly charged to clients.

The Law Society's Trust Assurance department referred the matter to the Professional Regulation department. The chair of the Discipline Committee ordered an investigation of the books, records and accounts of the firm pursuant to Law Society Rule 4-43 (now Rule 4-55). A Law Society forensic auditor conducted the Rule 4-43 investigation and delivered a final report with the findings.

ADMISSION AND UNDERTAKING

Siebenga admitted that he misappropriated a total of $63,829.52 on 415 occasions, created 197 false statements of account and gave incorrect answers in two trust reports when he knew or ought to have known the answers were not true. He admitted that these actions constituted professional misconduct.

Siebenga agreed to undertake for 15 years, commencing on April 23, 2020:

- not to engage in the practice of law in British Columbia with or without the expectation of a fee, gain or reward, whether directly or indirectly;
- not to apply for reinstatement to the Law Society of British Columbia;
- not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society of BC; and
- not to permit his name to appear on the letterhead of, or work in any capacity whatsoever, for any lawyer or law firm in British Columbia, without obtaining the prior written consent of the Discipline Committee.

Should Siebenga wish to apply for reinstatement to the Law Society when his undertaking expires in 2035, he will have to satisfy the Credentials Committee that he is of sufficiently good character and repute to practise law in BC.

CHRISTOPHER JAMES WILSON

Saanichton, BC

Called to the bar: July 10, 1980

Hearing date: May 17, 2019

Written materials and submissions: December 5, 2019 and February 11 and 12, 2020

Panel: Craig A.B. Ferris, QC, chair, Ralston S. Alexander, QC and J. Paul Ruffell

Decisions issued: July 9, 2019 (2019 LSBC 25) and April 30, 2020 (2020 LSBC 20)

Counsel: Michael Shirreff and Maya Ollek for the Law Society; Richard Margetts, QC for Christopher James Wilson

FACTS

A trust compliance audit of Christopher James Wilson's firm revealed numerous irregularities. Following a Law Society investigation, Wilson admitted to giving a person who was not a lawyer blank trust cheques, permitting staff to withdraw funds from his trust account by way of cheques that were not signed by a lawyer, failing to comply with Law Society Rules regarding client identification and verification, and either failing to ensure the security of his electronic-signature password or disclosing his password to staff and allowing them to affix his digital signature on electronic instruments.

The Law Society and Wilson submitted an agreed statement of facts, and the hearing panel approved a joint application to proceed on written materials only.

DETERMINATION

The panel accepted Wilson's admissions and determined that he committed professional misconduct with regard to each of the four allegations contained in the citation.

DISCIPLINARY ACTION

Wilson and the Law Society provided written submissions in support of an agreed disciplinary action of a $15,000 fine. The panel, however, was of the view that the agreed action did not respond to the severity of the misconduct.

The panel considered Wilson's professional conduct record, the numerous instances of misconduct and the nature and seriousness of the events. Further, the panel found that Wilson was an experienced lawyer and these were not "rookie" mistakes, but instead were the result of intentional neglect or, at least, studied indifference to compliance obligations.

The panel considered the primary obligation of the Law Society to regulate the profession in protection of the public interest. No aspect of that public interest ranks higher than the administration of trust funds and, in that regard, the panel determined a significant disciplinary action must follow these many instances of trust account mismanagement.

The panel observed that the fine penalty has been less impactful as a deterrent as a result of the impact of inflation on the value of money and suggested that the amount of fines ought to increase over time to account for the time value of money.

The panel ordered that Wilson pay:

1. a fine of $25,000; and
2. costs of $4,509.71.

DAVID ALLEN KIDD

Nanaimo, BC
Called to the bar: January 9, 1987
Ceased membership: February 20, 2019
Admission and undertaking accepted: May 27, 2020

AGREED FACTS

David Allen Kidd was working as deputy regional Crown counsel in Nanaimo when he met with a family member of a homicide victim to discuss the trial. The family member had found a handwritten document by the victim regarding her relationship with her boyfriend, who was charged with first-degree murder for her death. At the meeting, Kidd saw that the family member had the document, but he did not read or take it from her possession.

Kidd remembers telling the family member that anything she gave him, he was obligated to give to defence. He remembers telling her he did not see how the document was relevant. The family member remembers it differently. She recalls telling Kidd she brought the document and right away Kidd said he did not want to deal with it as it will just "fuel the fire." She said she did not tell him many details about the document, but she did say that it was partly in relation to the victim's relationship with the accused.

At a subsequent meeting, Kidd and a newly assigned Crown counsel met with the victim's family member and other members of the family at the Port Alberni courthouse. Kidd remembers the family member bringing a bag with the document inside. Kidd said when the family member tried to present the document, he did not want the new Crown counsel to be taken by surprise, so he told the family member, "Not right now." The family member recalled it differently and stated she did not bring the document to this meeting. Kidd said he recalled informing new Crown counsel of the written document immediately after the second meeting; however, the new Crown counsel did not recall Kidd advising him of the written document.

According to the newly assigned Crown counsel, he met with the family member approximately two months later, at which time the family member first informed him of the written document. Immediately after the meeting, the new Crown counsel took steps to obtain the document. Some time later, the RCMP contacted the family member to take custody of the document. However, the family member was not able to locate the document.

Subsequently, the new Crown counsel wrote to defence counsel to provide details of the circumstances regarding the existence and later loss of the document. The Crown directed a stay of proceedings in relation to the homicide charges. The stay of proceedings was the result of a number of issues and not limited to Kidd's conduct. The Public Service Alliance conducted a review into the prosecution of the matter and issued a public statement in that regard.

In a decision by the trial judge, following the stay of proceedings in relation to a media application for access to court records, the judge referred to the new Crown counsel's letter to defence counsel.

ADMISSION AND UNDERTAKING

Kidd admitted he committed professional misconduct when he failed to take reasonable steps in relation to the written document, including ensuring that he understood the nature of the document, informed other prosecutors on the file of the document, advised police officers to preserve the document and disclosed the document to the accused. Kidd also admitted that he failed to keep records of his knowledge and dealings with the written document.

Kidd agreed to undertake for five years, commencing on May 29, 2020:

- not to engage in the practice of law in British Columbia with or without the expectation of a fee, gain or reward, whether directly or indirectly;
- not to apply for reinstatement to the Law Society of British Columbia;
- not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society of British Columbia; and
- not to permit his name to appear on the letterhead of, or work in any capacity whatsoever, for any lawyer or law firm in British

Columbia, without obtaining the prior written consent of the Discipline Committee of the Law Society.

Should Kidd wish to apply for reinstatement to the Law Society when his undertaking expires in 2025, he will have to satisfy the Law Society's Credentials Committee that he is of sufficiently good character and repute to practise law in BC.

CRYSTAL IRENE BUCHAN

Victoria, BC

Called to the bar: May 15, 1992

Written materials: April 3 and 23, 2020

Decision issued: June 4, 2020 (2020 LSBC 24)

Hearing panel: Craig A.B. Ferris, QC, chair, Lindsay R. LeBlanc and Laura Nashman

Counsel: Tara McPhail for the Law Society; J.M. Peter Firestone for Crystal Irene Buchan

FACTS

While representing a client in a family law matter, Crystal Irene Buchan failed to sign a court order and to take steps to have the order entered in a timely manner. She failed to act courteously and in good faith when dealing with opposing counsel in respect of another order, when she did not take steps to have the second order entered in a timely manner.

She also failed to answer with reasonable promptness communications from the opposing party.

ADMISSION AND DETERMINATION

The hearing panel found that Buchan had exhibited a serious pattern of misconduct. She failed in her duty to enter two court orders and compounded this wrongdoing by failing to respond to the numerous requests for a response on the status of the orders. This unnecessarily delayed and increased the cost of the litigation and wasted valuable court resources.

Buchan acknowledged that her conduct was a marked departure from the standard the Law Society expects of lawyers. She admitted, and the panel agreed, that her actions constituted professional misconduct.

DISCIPLINARY ACTION

The panel considered Buchan's professional conduct record, which evidenced a serious pattern of poor file management, poor client service and failures to respond to communications from other lawyers. In particular, she was the subject of a previous finding of professional misconduct in 2019. In that case, Buchan was suspended for 45 days, referred to the Practice Standards Committee and ordered to pay costs of $6,347.05. The panel took a global approach and considered the previous discipline. The timing of the incidents was relatively similar, and the misconduct related to similar acts.

The panel accepted Buchan's proposed disciplinary action and ordered that she:

1. be suspended for 30 days; and
2. pay costs of $1,000.

JOHN (JACK) JOSEPH JACOB HITTRICH

Surrey, BC

Called to the bar: August 1, 1986

Hearing dates: March 4 and 5, April 12, 2019 and January 15, 2020

Written submissions: April 6 and 20, 2020

Panel: Philip Riddell, QC, chair, Linda Michaluk and Shona Moore, QC

Decisions issued: July 8, 2019 (2019 LSBC 24) and June 8, 2020 (2020 LSBC 27)

Counsel: Peter Senkpiel and Julia Lockhart for the Law Society; Peter Leask, QC, Russell S. Tretiak, QC and Rasajovan S. Dale for John (Jack) Joseph Jacob Hittrich

FACTS

John (Jack) Joseph Jacob Hittrich was acting on behalf of foster parents whose application to adopt a child under their care had been rejected by the director of Child, Family and Community Services. The director had refused on the basis that it was in the best interests of the child to be reunited with her two siblings, who were under the care of adults in Ontario.

An interim order was granted prohibiting the removal of the children pending the outcome of petitions and appeals filed by Hittrich.

The director arranged for a video conference attended by the child, the child's two siblings and social workers accompanying the child.

The foster parents were not allowed to attend the video conference, but one of the foster parents surreptitiously made an audio recording of the conference. Afterward the foster parents told Hittrich that the social workers had referred to the Ontario adults as "mommy" and "daddy." The foster parents considered this to be evidence of a de facto decision to remove the child from their care, and potentially to be a breach of the interim order. The social workers affirmed in affidavits that the Ontario adults had not been referred to as "mommy" and "daddy."

Hittrich sent a letter to counsel for the director, stating that he had a transcript of the video conference indicating that the social workers had lied when denying they had referred to the Ontario adults as "mommy" and "daddy." Referring to this as "perjury," Hittrich stated that, if the director was prepared to consent to the foster parents adopting the child, then his clients were prepared to discontinue all legal proceedings with the exception of finalization of the adoption. Hittrich referred to the possibility of "appropriate sanctions" against the social workers should the litigation proceed further.

The director rejected the settlement proposal outlined in the letter.

Hittrich was unsuccessful in overturning the director's rejection of the foster parents' application for adoption, and costs were awarded against him with regard to one of the petitions he had filed, which had been struck as an abuse of process.

DETERMINATION

In the course of the Law Society investigation, Hittrich admitted to understanding that perjury is a criminal offence.

The *Code of Professional Conduct for British Columbia* provides that a lawyer "must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten … to initiate or proceed with a criminal or quasi-criminal charge."

The panel found that Hittrich's reference to perjury was a threat to commence a criminal proceeding and that Hittrich offered not to initiate a criminal proceeding in return for the director consenting to the foster parents adopting the child.

The panel found that Hittrich committed professional misconduct.

DISCIPLINARY ACTION

The Law Society characterized Hittrich's conduct as trying to "blackmail a government official into taking a step inconsistent with that official's statutory duty to act in the best interest of a child." The acts were both serious and deliberate, and the Law Society sought a disciplinary action of a four-month suspension and costs of $18,655.85.

Hittrich suggested a two- to six-week suspension and costs of $16,965.85. He noted the panel's finding that, although the conduct was serious, there was a lack of *mala fides* on his part.

The panel considered Hittrich's professional conduct record, which consisted of four conduct reviews and a practice standards referral. Hittrich pointed out the length of time over which these matters arose, and that there were no citations before 2018.

The panel found that the misconduct was not the result of an impulsive act but was planned and committed for tactical advantage. This is a case where the seriousness of the conduct emphasizes the need to ensure the public's confidence in the integrity of the profession.

The panel ordered that Hittrich:

1. be suspended for three months; and
2. pay costs of $18,665.85.

MARK WILLIAM SAGER

West Vancouver, BC
Called to the bar: March 15, 1991
Hearing dates: March 19 and 20, April 24, 2019 and February 26, 2020
Panel: Nancy Merrill, QC, chair, Donald Amos and David Layton, QC
Decisions issued: July 3, 2019 (2019 LSBC 22) and June 9, 2020 (2020 LSBC 28)
Counsel: Kieron Grady for the Law Society; Henry C. Wood, QC for Mark William Sager

FACTS

Mark William Sager acted for an elderly client, JB, whom he had known since childhood, when Sager's mother and JB had been close friends. Sager and his sister viewed JB as their aunt.

In late 2012 JB fell in her home, where she had lived alone since separating from her husband many years before. She spent time in the hospital and subsequently moved to a care centre and then an independent living facility.

JB contacted Sager in June 2013, and in September of that year she granted Sager power of attorney. At about that time, JB's estranged husband retained counsel to commence divorce proceedings, and JB retained Sager to act as counsel in the matter. Sager negotiated an agreement according to which JB bought out her husband's interest in their house for one-half of its appraised value at the time.

Sager supervised and assisted in preparing the house for sale and assisted JB in locating and moving into the independent living facility in January 2014. Sager also arranged for care providers for JB. Sager kept JB's nephew generally apprised of the assistance he was providing to JB. The nephew had taken on some responsibility for looking after other aspects of JB's affairs.

Sager's firm had prepared a will for JB in 2003, according to which JB's sister and the sister's two children would each receive one-third of the estate. In 2013 JB told Sager she wanted to make a new will. Sager told a junior associate at his firm that, because JB wanted to name him as a beneficiary, Sager was in a conflict, and the associate agreed to handle the matter. The associate prepared the new will for JB, which listed five people as beneficiaries, including Sager and his sister.

A provision of the *Code of Professional Conduct for British Columbia*, which had been in effect for about a year at the time, stipulates that "a lawyer must not prepare or cause to be prepared an instrument giving the lawyer … a gift or benefit from the client, including a testamentary gift."

JB's house sold in June 2014 for approximately $250,000 more than the appraised value. In July 2014 JB gave Sager a gift of $75,000. At the same time, she gave a slightly larger gift to her nephew.

A provision of the *BC Code*, which at the time had been in effect for about 18 months, provides that a lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

In December 2015 JB gave her nephew and Sager each a further gift of $25,000.

JB died in January 2016. Sager received $96,000 as a beneficiary under the will, commensurate with his 24 per cent share of the residue of the estate.

DETERMINATION

The panel found that Sager breached the *BC Code* when he caused his associate to prepare a will for JB under which he was a beneficiary. The panel determined that the breach constituted professional misconduct.

The panel also found that, when Sager received the gift of $75,000 in July 2014, he was in a solicitor-client relationship with JB, that JB did not receive independent legal advice, and that accepting the gift breached the *BC Code*. The panel concluded that the breach constituted professional misconduct.

The panel found that, when Sager received the gift of $25,000 from JB in December 2015, he was not in a solicitor-client relationship with JB, and that receiving the gift therefore did not breach the *BC Code* and did not constitute professional misconduct.

DISCIPLINARY ACTION

In determining the appropriate disciplinary action, the panel considered the serious nature of Sager's conduct. While he recognized the conflict in drafting a will in which a client bequeathed a testamentary gift to him, delegating the drafting of the will to his junior associate who reported to him did not solve the conflict. Sager had a very close familial relationship with the elderly client, who was vulnerable and had become very dependent on him. While the panel did not find evidence of intent to manipulate or exercise undue influence, the breaches were nonetheless serious and created a risk of harm to his client's interests.

The panel considered Sager's extensive experience of 22 years in practice, his lack of professional conduct record and the large volume and content of character references provided. While he acknowledged at the facts and determination phase that he breached the *BC Code*, he did not acknowledge that the breaches constituted professional misconduct. The panel also considered the range of sanctions in similar cases.

The panel ordered that Sager:

1. pay a fine of $20,000; and
2. pay costs of $20,225.69.

DOUGLAS JOSEPH WILLIAM HAMMOND

West Vancouver, BC
Called to the bar: May 20, 1988
Written materials: May 21, 2020
Panel: Brook Greenberg, chair, Donald Amos and H. William Veenstra, QC
Decision issued: June 22, 2020 (2020 LSBC 30)
Counsel: J. Kenneth McEwan, QC and Laésha J. Smith for the Law Society; Patrick F. Lewis for Douglas Joseph William Hammond

FACTS

Douglas Joseph William Hammond practised as a sole practitioner primarily in the areas of corporate, commercial and real estate law. Between 2014 and 2016, he provided legal work for investors, officers and consultants of a British Columbia company. Some of this legal work was referred to him by another lawyer who acted as corporate counsel for the company. Hammond had known the other lawyer for around 30 years and considered him to be trustworthy.

The other lawyer advised Hammond that an investor wished to make a further investment of US$474,000 in the company in tranches, which were based on achievement of performance milestones agreed to by the investor and the company. Hammond understood from both the other lawyer and the investor that the investor and the company wanted the investment funds to be held in a lawyer's trust account to provide certainty that the funds were in place and to assure timely payment.

The other lawyer advised Hammond that, because there was a conflict of interest between the company and the investor, he could not act on behalf of both parties and needed other counsel to be involved. A vice-president of the company sent an email introducing Hammond and the investor to each other and advised that Hammond could help with the "US$500,000 escrow."

Hammond spoke with the investor by phone and requested identification documents. He then received scanned pictures of the documents by email. He did not meet with the investor to verify his identity.

Hammond opened a US dollar trust account. He emailed the terms of engagement to the investor, which included that Hammond would hold funds in trust and would pay out amounts as directed, would charge $200 for processing each payment, was acting solely for a company for which the investor was the sole director and officer, was not acting for the investor or the other corporation and was merely facilitating the transfer of money and not advising or determining whether performance milestones had been met.

The investor deposited a bank draft of US$474,000 into the trust account and instructed Hammond to make a payment to another company that the other lawyer advised was a subsidiary of the corporation. Hammond paid $473,000 to the company through five payments in accordance with directions provided by the investor. Hammond took a fee of US$200 from the funds held in trust for each of the five payments, resulting in a net payment of $1,040 after bank fees. He did not provide any other services. He did not make or record inquiries with respect to the performance milestones or other terms relating to the investor's further investment or payments.

ADMISSION AND DETERMINATION

Hammond admitted his conduct constituted professional misconduct.

The panel accepted Hammond's admission of professional misconduct. The panel noted that Hammond's conduct pre-dated the adoption of Rule 3-58.1(1), which prohibits lawyers from allowing funds to be deposited into or disbursed from a trust account where no related legal services were provided. Nevertheless, prior to this rule, lawyers were obligated to make and record inquiries of any client who sought the use of a trust account without requiring any substantial legal advice.

DISCIPLINARY ACTION

Hammond and the Law Society jointly submitted that the disciplinary action should be a two-week suspension and payment of costs of $1,000.

The panel considered the serious nature of the conduct, Hammond's lack of prior discipline history, his acknowledgement of misconduct and cooperation with the investigation, the range of penalties imposed in similar cases and the fact that there was no evidence of loss or fraud.

The panel agreed with the proposed sanction and ordered that Hammond:

1. be suspended for two weeks; and
2. pay costs of $1,000.

DOUGLAS BERNARD CHIASSON

Squamish, BC
Called to the bar: May 18, 1990
Written materials: December 10, 2019
Panel: Tony Wilson, QC, chair, Darlene Hammell and Lindsay R. LeBlanc
Decision issued: June 30, 2020 (2020 LSBC 32)
Counsel: Ilana Teicher for the Law Society; Douglas Bernard Chiasson appearing on his own behalf

FACTS

Douglas Bernard Chiasson is a sole practitioner who practises primarily in the areas of family law, residential real estate law, civil litigation, including motor vehicle plaintiff work, and wills and estates. In 2013, a client met with Chiasson to discuss a civil claim for sexual assault and instructed him to commence the claim. Chiasson advised the client that the claim should be brought in small claims court but did not advise the client on any possible attendant employment or human rights issues. This was the only sexual assault file he had ever taken on.

Between 2013 and 2018, Chiasson and the client corresponded about the case. The client continued to follow up with Chiasson with increasing frustration and urgency. Chiasson took no substantive steps on the client's file and did not answer the client's reasonable requests for information.

The client complained to the Law Society, which notified Chiasson about the complaint. Chiasson wrote a letter to the Law Society in which he agreed that the client communicated with him, he failed to respond to the client's requests and he failed to engage and act on the client's behalf. He sent a personal apology and returned the $1,130 retainer to the client.

ADMISSION AND DETERMINATION

Chiasson admitted his conduct constituted professional misconduct, and the hearing panel accepted his admission.

DISCIPLINARY ACTION

The panel considered the serious nature of the conduct, which involved a failure to advance the client's file for a period of five years. As a result, the client suffered undue stress, confusion and frustration. The panel also considered his professional conduct record, which revealed similar issues around procrastination and quality of service.

The panel approved the proposed sanction agreed to by Chiasson and the Law Society and ordered that he pay:

1. a fine of $10,000; and
2. costs of $1,000.❖

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