The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Making progress on several fronts

by Don Avison, QC

I AM DELIGHTED to begin this update on Law Society operations with news that our offices will once again be open to the public as of July 19, 2021. After 16 challenging months, Dr. Bonnie Henry and Premier John Horgan's recent announcement that vaccination rates have enabled the province to move to step 3 of BC's Restart plan is encouraging. While Law Society staff in all departments have had access to the building over this time, to work steadily to respond to the needs of the public and the profession, we look forward to welcoming those of you who have business that requires meeting in person.

Health and safety will continue to be our top priority. As part of the Law Society's communicable disease prevention plan, we ask everyone to self-assess before entering the premises and avoid coming to the building if experiencing fever or chills, coughing or other cold or flu-like symptoms. For the time being, everyone — including staff — will be required to wear a mask in the elevators and common areas inside the building. Guests are asked to check in with our 8th-floor reception upon arrival. I anticipate that many of these measures will be relaxed over time, as more British Columbians are fully vaccinated.

I am also pleased to report that the Indigenous Cultural Awareness training course has been shared with a pilot group who we asked to test the functionality of the learning platform and provide feedback on the modules. I have had the opportunity to review the materials, much of which touch upon the uniqueness of the British Columbia context. While we may expect some edits as a result of what we hear from the pilot group, I am confident that lawyers who study the modules over the next year or two will find the course engaging.

This course comes at a critical time in our history. The unmarked graves of hundreds of Indigenous children buried at residential schools in Kamloops, at St. Eugene Mission near Cranbrook, and in Saskatchewan are the first of what is expected to be further sites that confirm what survivors told the Truth and Reconciliation Commission. People are more motivated than ever to learn the full history of Canada and the laws and policies that allowed children to be taken from their families and put into residential schools. The lawyers I talk to are more motivated than ever to learn the role our profession has played, what is being done to deal with the legacy of residential schools and what we can do to advance reconciliation. For many, this course is just the start.

These past few months, the Law Society was reminded that truth and reconciliation is needed closer to home. A recent discipline matter revealed deficiencies in our current system and the limitations of the conventional adversarial process when it comes to the unique needs of vulnerable people. No one at the Law Society who was involved with the case was happy with the outcome. The Benchers have established an Indigenous Engagement in Regulatory Matters Task Force that will examine our regulatory processes and make recommendations to the Benchers to accommodate the full participation of vulnerable and marginalized complainants and witnesses, particularly Indigenous persons. The task force will consult the Truth and Reconciliation Advisory Committee as part of the process of finalizing terms of reference to be approved by the board. I am committed to providing future updates on the progress we are making on this important front.

On another front, in June, the Law Society approved the first piloted legal services to evaluate in the innovation sandbox. While these proposals were from service providers who are not lawyers, the Law Society encourages law firms who have ideas for the delivery of innovative legal services or business structures requiring some relief from current regulatory requirements to tell us about what they have in mind. Service providers in the innovation sandbox will still be monitored through a

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* and *Member's Manual* amendments are provided at no cost.

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regular reporting requirement and must limit services to what is set out in a "no action" letter. With these first approved pilots, we are on our way to improving the availability of at least some legal help for consumers who are unable to access the services of a lawyer.

Finally, I wish to report that the Law Society launched a series of virtual town halls to engage members of the profession and receive direct feedback on regulatory measures we can pursue and implement that help the delivery of legal services to the public. The first of these two sessions were focused on the impact the pandemic has been having on mental health. Since then, we have held several "regional" virtual town halls to learn more about which regulatory measures adopted during the pandemic have been helpful, which have not, and what other regulatory reforms the Law Society should be considering. The Benchers and Law Society staff are reviewing what we heard, which will inform future policy development. Participants who attended these sessions also have told us that they would like to see more events like these, and I believe that view has merit.

Until my next update, I wish you all well. It has taken a lot of hard work and sacrifice for British Columbia to reach this stage of pandemic recovery. I'm hopeful many of you will find time for a well-deserved break to refresh and to enjoy the summer weather.❖

Nominations now open for four Law Society awards

THE LAW SOCIETY is inviting nominations and applications for four awards recognizing excellence in the legal profession:

- the Excellence in Family Award, which recognizes lawyers who have contributed to the advancement of justice for families;
- the Award for Leadership in Legal Aid, which recognizes lawyers who have demonstrated exceptional commitment to the provision of legal aid in BC;
- the Equity, Diversity and Inclusion Award, honouring an individual who has made significant contributions to diversity and inclusion in the legal profession or the law in BC;
- the Pro Bono Award, which recognizes lawyers who have demonstrated exceptional commitment to the provision of pro bono in BC.

The deadline for submitting nominations or applications is 5:00 pm on October 4, 2021. The awards will be presented to recipients at the Law Society's Recognition

Dinner taking place on Friday, December 3, 2021.

For criteria and nomination instructions, visit our website (About Us > Awards and Scholarships).

ABOUT THE AWARDS

The awards are original works of art by Rod Smith, a Kwakwaka'wakw sculptor based in Qualicum Beach, best known for his precise, elegant hand-painted, Indigenous-themed abstract images.

A variety of colour schemes distinguish each of the categories:

- Excellence in Family Award – red and black, signifying bloodlines;
- Award for Leadership in Legal Aid – green and black, alluding to trees and growth in the field;
- Equity, Diversity and Inclusion Award – colours change each year, to represent diversity;
- Pro Bono Award – blue, grey and white, colours associated with clarity and communication.❖

Law Society gold medals

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

In 2021, gold medals were presented to Paige Mueller of TRU *(pictured left)*, Scott Garoupa of UBC *(right)* and Amy Wong of UVic *(not pictured)*.❖

Harry Cayton appointed for governance review

THE LAW SOCIETY'S board has appointed Harry Cayton to conduct an independent review of Law Society governance and how it meets the needs and priorities of a diverse public and legal profession. Cayton's review will examine the Society's governance structure, how it assists or inhibits the delivery of the legal regulator's core purpose and statutory functions, how it enables and supports equity, diversity and inclusion, and whether it achieves best practice in regulatory governance.

A former CEO of the UK's Professional Standards Authority, Cayton is a leader in the field of professional regulation and has provided reviews and advice to a number of professional regulators around the world. In 2018, he completed a review of the College of Dental Surgeons of British Columbia which informed changes in the college's governance that address the public interest.

Cayton has commenced his review and a final report is expected by the end 2021. Further information about the review's terms of reference are available here.❖

Innovation sandbox open for business

THE INNOVATION SANDBOX has authorized a first wave of service providers to pilot legal services to consumers in British Columbia. Approved pilots include legal research and guidance for unrepresented individuals with dementia and their families, a digital app to facilitate settlement negotiations, digital platforms for wills, powers of attorney and pre- and post-nuptial agreements, and limited-scope legal representation for ticket disputes and matters before the CRT and certain other tribunals, traffic court and small claims court.

The point of sandboxes is to establish a safe space for innovation, a place where current regulations are relaxed to enable experiments in new types of services that could benefit the public. Pilots that are authorized must adhere to conditions that are set out in a "no action" letter. The pilots are then monitored through regular reporting requirements to see whether the benefits of the services outweigh any risks or harms to the public.

In a series of virtual consultations held by the Access to Justice Advisory Committee to hear from members of the legal profession from across the province, lawyers at each of the sessions endorsed the innovation sandbox as a way to allow lawyers and others to think about solutions for improving access and to bring forward ideas.

Lawyers and law firms are invited to propose their own innovative ideas and structures that are prohibited by regulation and may require relaxing the current rules. The Utah sandbox, for example, has garnered applications from law firms wishing to invite equity partners from outside the legal profession into their firms. Legal tech solutions are being proposed in other jurisdictions. All ideas to make reliable, accurate and ethical services and outcomes available to more people will be considered.

Further information about the innovation sandbox, including how to submit a proposal, is available on our website.❖

2021 Law and the Media Workshop video now available

On April 28, more than 80 participants across the province and country attended a virtual Law and the Media Workshop, organized by the Law Society and the Jack Webster Foundation to refresh and enhance journalists' knowledge of the laws on reporting and journalism.

This year's workshop followed the fictional story of an anonymous tipster who claimed to have found a missing child decades later. A panel of experts tracked an unfolding scenario and provided insights on navigating anonymous tipsters, prison and court access, publication bans and potential for defamation. Attendees heard from media lawyer Dan Burnett, QC, investigative reporter John L. Daly at CKNW 980, city editor Cassidy Olivier at the *Vancouver Sun* and the *Province*, and Farid Muttalib, legal counsel for CBC/Radio-Canada.

The workshop received very positive feedback: 93 per cent of attendees surveyed said the workshop improved their understanding of the legal issues around reporting and journalism and 97 per cent said the panellists were excellent or good.

A recording of the workshop is available on the Law Society's YouTube channel.❖

Law Society reviews regulatory process to work toward reconciliation with Indigenous peoples

THE DISCOVERIES OF unmarked graves near former residential schools across Canada this year mark an important watershed moment for our country. The news reaffirmed what Indigenous communities knew for years, as well as the findings of the Truth and Reconciliation Commission. Canadians must acknowledge the harms our country imposed on Indigenous peoples and work together to ensure our institutions, systems and policies do not cause more trauma.

The Law Society recognized the need to do this work in its 2021-2025 strategic plan, which included an objective to address the unique needs of Indigenous people within our regulatory processes. A recent discipline matter, involving a lawyer who inadequately supervised his employee and exposed residential school survivors to a risk of substantial harm, further highlighted some of the deficiencies in the current process and the limitations of the conventional adversarial process for the participation of vulnerable people.

To address this gap and to advance the Law Society's strategic initiative, the governing board of Benchers created an Indigenous Engagement in Regulatory Matters Task Force, with a proposed mandate to examine our regulatory processes and make recommendations in accordance with terms of reference that are still to be determined. In the next months, the task force will actively engage and consult with Truth and Reconciliation Advisory Committee on the scope of this review and to finalize the terms of reference to be approved by the board at a later date.❖

In brief

MARK ANDREWS EXCELLENCE IN LITIGATION AWARD

In 2020, the Law Society established the Mark Andrews Excellence in Litigation Award to recognize lawyers with outstanding lifetime achievements in litigation. The Law Society President and the Chief Justices of the Court of Appeal and the Supreme Court will select a recipient when there is a candidate of merit.

Further information about the award, including criteria and nominations, are available on our website.

SAVE THE DATE: 2021 MENTAL HEALTH FORUM ON TUESDAY, SEPTEMBER 14

The Law Society and the Continuing Legal Education Society of BC are hosting a Mental Health Forum on Tuesday, September 14 from 9 am to 12 pm, to bring together the legal community to share practical strategies as to how practitioners, firms and other legal employers can actively work toward improving mental health within the profession. This dynamic three-hour event will include a collaborative discussion about the steps legal employers can take to address these issues, with input from firms and employers of various sizes and experts that provide wellness support and resources to lawyers.

Registration is open here and more details will be made available soon.

JUDICIAL APPOINTMENTS

Lobat Sadrehashemi, senior counsel and clinic lead at the Immigration and Refugee Legal Clinic in Vancouver, was appointed a judge of the Federal Court. Madam Justice Sadrehashemi replaces Mr. Justice Keith M. Boswell, who retired effective January 29, 2021.

Lauren Blake, principal lawyer at Legacy Tax + Trust Lawyers in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Madam Justice Blake replaces Mr. Justice Harry Slade (Vancouver), who elected to become a supernumerary judge effective March 31, 2021.

Jan Brongers, senior general counsel at Justice Canada in Vancouver, was appointed a judge of the Supreme Court of British Columbia. Mr. Justice Brongers replaces Mr. Justice Mark McEwan (Nelson), who resigned on August 31, 2020.

Julianne K. Lamb, QC, a partner at Guild Yule LLP in Vancouver, was appointed a judge of the Supreme Court of British Columbia. She replaces Mr. Justice Trevor C. Armstrong (New Westminster), who elected to become a supernumerary judge effective January 16, 2021. Madam Justice Lamb was a Bencher for Vancouver County from 2020 until her appointment to the Bench.

Sheila Archer was appointed a judge of the Provincial Court in Nanaimo.

Lorianna Bennett was appointed a judge of the Provincial Court in Kamloops.

Dannielle Dunn was appointed a judge of the Provincial Court in Abbotsford.

Derek Mah was appointed a judge of the Provincial Court in Richmond.

GLADUE REPORT PROGRAM NOW ADMINISTERED BY BC FIRST NATIONS JUSTICE COUNCIL

As of April 1, 2021, the Gladue report program in BC is being administered by the BC First Nations Justice Council (BCFNJC). Defence counsel can request a Gladue report through the BCFNJC by going to their website. Defence counsel will need to sign up for an account with the Gladue Information Management System (GIMS).

There is information on the website on how to do so, along with a video on how to use GIMS.❖

Unauthorized practice of law

THE LAW SOCIETY protects the public by taking action against individuals and businesses that are not authorized to provide legal services and are not approved participants in the innovation sandbox initiative, where they pose a significant risk of harm to the public.

Between March 2 and July 12, 2021, the Law Society obtained two written commitments from individuals to cease engaging in unauthorized practice of law. These individuals put the public at risk by performing unregulated and uninsured legal services or by 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 from engaging in the unauthorized practice of law.

- On April 6, 2021, Mr. Justice Ronald S. Tindale granted an order prohibiting **Gerald Clement**, of Alberta, from engaging in the practice of law and from commencing, prosecuting or defending a proceeding in any court in BC other than in his own name.
- On June 24, 2021, Mr. Justice Joel R. Groves granted an injunction against **Christopher James Pritchard**, aka **Christopher James**, prohibiting him from referring to himself as being a Counselor at law, lawyer, counsel, or any other title that connotes that he is entitled or qualified to engage in the practice of law. Pritchard is also prohibited from practising law and from commencing, prosecuting or defending a proceeding in any court other than representing himself as an individual party to a proceeding acting without counsel solely on his own behalf. The Law Society was awarded its costs.

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

From the Law Foundation of BC

PUBLIC INTEREST ARTICLING FELLOWSHIPS

In 2005, the Law Foundation's board of governors approved an initiative that provides funding to non-profit organizations without the resources to hire an articled student. Over the past 16 years, the Public Interest Articling Fellowships program has continued to grow.

As of early 2021, the Foundation had funded 33 articling positions at various public interest advocacy groups and clinical programs staffed by BC law students. Following a 2019 evaluation of the existing articling grants, the Foundation approved permanent funding for articled students at seven of these organizations.

Based on feedback from organizations that have benefitted from articling fellowships, the Foundation updated its approach to address the challenges often faced by newly called lawyers after articling in public interest organizations, and the need to further develop capacity among public interest organizations and community-based legal clinics in BC. For 2021, new articling grants include an option for organizations to hire back their articled student for a year after they are called to the bar (including the cost of the Professional Legal Training Course and Law Society membership for a year).

This year, new articling grants were made to the following organizations:

- BC Law Institute;
- Disability Alliance BC;
- Ecojustice;
- Immigrant and Refugee Legal Clinic, hosted at Immigrant Services Society of BC;
- Kamloops and District Elizabeth Fry Society – Clinical Program;
- West Coast Environmental Law;
- West Coast Prison Justice Society.

Groups that received articling grants in 2020 can also take advantage of the hire-back option. Sources Community Resources Society was funded to hire back their current articled student.

With these grants, the Law Foundation looks forward to fostering a strong bar that values public interest work and providing needed services to people across the province.

LEGAL RESEARCH FUND

The Law Foundation has established a Legal Research Fund of $120,000 per year. The purpose of the fund is to support legal research projects that "advance the knowledge of law, social policy and the administration of justice."

The Law Foundation is accepting applications for the fund, which is open to:

- members of the law faculties at Thompson Rivers University, the University of British Columbia and the University of Victoria, as long as the application is submitted through their dean;
- members of other faculties in British Columbia, as long as the research is law related and the application is submitted through their dean;
- members of the BC legal profession who can demonstrate they have the background, interests and capacity to carry out the proposed project; and
- non-profit organizations with expertise in carrying out legal research.

The maximum amount available for each project is $20,000. The deadline for applications is September 10, 2021.

Details of the areas of encouragement and how to apply can be found on the Law Foundation website.❖

Kim Carter and Gaynor C. Yeung elected in Kamloops and Vancouver by-elections

Kim Carter

Gaynor C. Yeung

PLEASE JOIN US in welcoming **Kim Carter**, elected in the June 16, 2021 Kamloops by-election, and **Gaynor C. Yeung**, elected in the July 16, 2021 Vancouver by-election.

Kim was called to the bar in 2008. She began her law practice in family law and then transitioned to sole practice, focusing in the areas of family law and child protection. In 2019, Kim joined Legal Aid BC as their staff lawyer at the Parents Legal Centre (PLC) and is now managing lawyer for both Kamloops and Williams Lake PLCs.

In her professional capacity, Kim is a member of the Family Court Users Committee and has frequently guest lectured at Thompson Rivers University's Faculty of Law, participated as a keynote speaker for the Federation of Asian Canadian Lawyers' BC Chapter and provided mentorship through the CBA's Women Lawyers Forum, Kamloops section.

Gaynor is a litigator and partner at Whitelaw Twining. Since being called to the bar in 1996, she has practised insurance law, litigating a broad array of matters but primarily focusing on personal injury and professional negligence claims. She has defended and advanced cases at all levels of court in British Columbia. Recently, Gaynor expanded her practice to include mediation. She is currently recognized by the Best Lawyers in Canada as a leading litigator in both insurance law and personal injury litigation.

Throughout Gaynor's career, she has been an active volunteer in the legal community. In 2018, the Vancouver Bar Association recognized Gaynor with the Peter S. Hyndman Mentorship Award for her work with students and junior practitioners. She continues to mentor our next generation of lawyers through the CBA's Women Lawyers Forum, the Federation of Asian Canadian Lawyers, and the Peter A. Allard School of Law (as well as guest lecturing at the university and at VBA programming). She has recently completed her second term as a member of the Advisory Committee to the Judicial Council. Gaynor is a volunteer for the Lawyers Assistance Program and Access Pro Bono.❖

FROM THE RULE OF LAW AND LAWYER INDEPENDENCE ADVISORY COMMITTEE

Authoritarians must not be allowed to have a stranglehold on lawyers

First published in The Globe and Mail, April 12, 2021

AUTHORITIES IN HONG KONG have recently arrested citizens there for protesting legislative changes imposed by the Chinese government. Even lawyers have been arrested simply for representing people who participated in the demonstrations or who are critical of the Hong Kong administration or of Beijing. Those who value democracy and the rule of law should find this alarming, as the number of authoritarian states surges.

One of the features of authoritarian governments is that they become uncomfortable when citizens protest their actions — and even more so when the legality of their actions is questioned. In most authoritarian states, judges are not always fully independent of the state and therefore frequently side with the state's decisions, but legal challenges can nevertheless make a regime look bad.

Most individuals would find it difficult to manoeuvre through a legal system on their own, particularly when facing a state with significant resources to suppress anyone challenging it. Many of these people look to a lawyer to assist them through that process, and so authoritarian regimes can most easily prevent a case brought against it by preventing a lawyer from representing them. Warning against taking on cases involving the government is an effective approach to discouraging lawyers; jailing lawyers, stripping them of their ability to practise law and submitting them to the possibility of severe depredations, perhaps torture, is even more effective.

China has been doing this for a number of years. Because the state controls the licensing of lawyers in China, some lawyers representing clients who challenge state activities have simply had their licences taken away. Persistent lawyers, or ones who act on matters of particular sensitivity, have been arrested. A number of human rights lawyers have been jailed for crimes such as inciting subversion of state power. More ominously, some lawyers representing clients who challenge the actions of the Chinese government have simply disappeared.

continued on page 11

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.

There were two topics for this year's essay contest:

Topic 1: How does civil disobedience impact the rule of law?

Topic 2: What role does the rule of law have in advancing reconciliation with Indigenous people?

- Winner: **Tianna Lawton**, Mulgrave School
- Runner-up: **Ireland Waal**, Sardis Secondary School

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

The Role of Disorder in Order: Civil Disobedience and the Rule of Law

by Tianna Lawton, grade 12 student, Mulgrave School
Winner of the 2020-2021 rule of law essay contest

From anti-war protestors burning their draft cards in the 1960s to "Tank Man" standing in Tiananmen Square in 1989, civil disobedience has played a key role throughout history in creating a sense of discomfort to enact change. Civil disobedience is the purposeful defiance of the law to peacefully protest. When more palatable and legal methods have been exhausted, civil disobedience calls attention to the issue at hand, and orders a reassessment of justice in the law.[1] Henry David Thoreau introduced this concept in his essay "On the Duty of Civil Disobedience," in which he wrote "let every man make known what kind of government would command his respect, and that will be one step toward obtaining it."[2] With regards to the rule of law, civil disobedience presents a complication. The rule of law is fundamental in democratic societies, despite differences in interpretation and application. At its most basic, the Rule of Law protects order and mandates objectivity in the legal system. The Supreme Court of Canada described the Rule of Law as conveying "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."[3] There are 4 key principles: the government enacts law transparently, the law is clear and applied equally, the law governs the actions of government and private persons and their relationship, and the courts apply the law independently of political or outside influence. Thus, the Rule of Law and its principles protect the rights of citizens to equality and justice.[4] The relationship between civil disobedience and the Rule of Law, both historically crucial to the development and maintenance of democracy, is worth exploration.

There are a variety of perspectives to be offered and questions to be assessed on this matter. In the interest of preserving long-term democracy, civil disobedience and the rule of law must be viewed as fundamental and connected.

The Rule of Law outlines that no individual is above the objective law. This raises an interesting philosophical debate: to what extent should people follow the law? Thomas Hobbes introduced the Social Contract Theory, which is the "mutual transferring of right,"[5] noting that we release our "right to everything" in exchange for protection from the state. This transfer, thus, is consent to the laws of the state. One relinquishes their political obligation when, and only when, the state either threatens or stops protecting its citizens' right to life. Later theories of the social contract are not absolutist. John Locke, for example, prioritizes the protection of natural rights to "life, liberty, and property"[6] by the state, and thus, political obligation is dependent on whether or not these rights are preserved. Locke has been highly influential in the adoption of constitutions in various democratic states, including Canada. Interestingly, section 52(1) of the Constitution Act, 1982 declares that Canada's constitution is the supreme law of Canada.[7] This means that any law that is "unconstitutional" is "of no force or effect."[8] Here, civil disobedience can prompt an evaluation of the constitutionality of a particular law. Direct civil disobedience — the purposeful breaking of the law that the perpetrator wants changed — can be especially influential. One example of where this notion of unconstitutionality was successfully applied was in the *R. v. S.A.* case in Alberta in 2011. A young person was deemed to be trespassing on public transportation on multiple occasions, because of a previous ban on her use of the Edmonton public transit system. In this case, the court found that banning people from public property that generally the public has open access to is in violation of the right to liberty defined under s.7 of the Charter.[9] This example is one in which civil disobedience protected the rights and freedoms of our democracy. Here, and in many other cases of civil disobedience, the rule of law was strengthened by adapting a law deemed unjust and unconstitutional, and thus not commanding the respect of the society in which it is meant to serve. Civil disobedience contests laws that no longer suit the needs of the public, thus allowing for the maintenance of a respected legal system and rule of law. This opportunity for progress in the legal system concurrent with social evolution is a key aspect of

democracy that has allowed it to survive.

On the other hand, some believe that civil disobedience is a disrespect to the rule of law. As citizens of a system which upholds liberty, there is an expectation to respect and not seek to undermine the very laws that allow for the rights of citizens. The rule of law, in indicating that the law is above all individuals, prevents people from releasing themselves from their obligation to obedience. By defying the law through civil disobedience, one is placing their own moral compass and normative ideas above the law, which is a disrespect to the rule of law.[10] However, if a law is morally questionable, why should one follow it? Many believe, in fact, that laws which conflict with morality are not to be followed at all. In the *R. v. Drainville* case, the defendant was charged with mischief for participating in a protest/blockade. He did not deny that he disobeyed the law, but used a colour of right defence to argue that he believed in his moral right to his criminal acts according to the superior laws of God.[11] Justice Fournier denied the applicability of this defence, and noted that in conflicts "between our 'legal' rules and our 'moral' rules, courts invariably have ruled in favour of … the rule of law."[12] The position that civil disobedience disrespects the rule of law is not exactly correct, however, because civil disobedience is purposeful, perpetrators understand the legality — or lack thereof — of their actions, and that they could be punished by the court as a result. Civil disobedience is not revolution: rather than denying the legitimacy of law in general, the civil disobedient accepts the system of laws and their authority, but seeks to change one specific rule. They act within the frame of legal authority and the rule of law, whereas the revolutionary neglects that frame.[13]

Justice Fournier's conclusion in the *R. v. Drainville* case raises further philosophical questions about the role of morality in the law. There are two rival views on this: natural law theory and legal positivism. Natural law operates off of the assumption that humans hold natural rights. Supporters of natural law believe that legal systems have a purpose of justice. Laws that do not adhere to this purpose of justice are not in fact laws, and are rather corruptions of the law. This view largely advocates for the use of morality in law. Of course, there are laws that are strictly practical, such as jaywalking laws. A natural law theorist notes that these laws are to be followed, as long as they respect justice and the inherent rights of people. If not, there is no moral or legal obligation to obey.[14] However, this system would raise complexity about which ethical view would be acceptable for the legal system — consequentialism, deontology, or religious rules? On the opposing side, legal positivism supports the separation of legality and morality. For something to be a valid law, it must be imposed by a certain authority, follow a specific procedure, and be enforced in society.[15] HLA Hart highlights the "separation thesis," which dictates that legal validity/right/justification is not defined by moral validity/right/justification and vice versa.[16] The more widely accepted legal position, particularly when discussing the rule of law, is Lon Fuller's view on natural law. He accepts that a legal system can be formally just, but still have specific laws that are not. This society would be one with a rule of law: similar cases must be treated as similar, there is no punishment without crime, and there is no crime without pre-existing and public law.[17]

At one point, residential schools were written into Canadian law under the Indian Act. At one point, Japanese internment was written into Canadian law under the War Measures Act.

Both of these unjust laws had no place in a democracy, and were removed. Civil disobedience, a method of protest for unjust laws such as these, is beneficial for a healthy democracy. It ensures that the law advances with society, orders the re-evaluation of unjust laws after legal methods have been exhausted, and ensures that the society in which we live is one that maintains our rights and freedoms — including the rule of law. Civil disobedience and the rule of law are not mutually exclusive: civil disobedience aids in the establishment and maintenance of the rule of law, and the rule of law ensures that these cases and reassessments of the law are treated equally and fairly. Both the rule of law and civil disobedience have been, and will continue to be, fundamental to our democratic society.

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10 Morris I. Leibman, "Civil Disobedience: A Threat to Our Society Under Law," FEE (Foundation for Economic Education, July 1, 1992), https://fee.org/articles/civil-disobedience-a-threat-to-our-society-under-law/.

11 John Helis (2011), curve.carleton.ca/27b06d80-1ab9-42a6-aabe-15a5b3e9ddab.

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Civil Disobedience and The Rule of Law:

How "Valuable" Lawbreaking Can Progress Society

by Ireland Waal, grade 11 student, Sardis Secondary School
Runner-up of the 2020-2021 rule of law essay contest

"If a plant cannot live according to its nature, it dies; and so a man," declared Henry David Thoreau in regards to civil disobedience in the mid 19th century. The idea of civil disobedience has been at the forefront of civil law for generations, and democratic global societies are nothing short of fervent when it comes to this concept. The main goal of civil disobedience is to demonstrate the unjust nature of a particular law and to move society toward changing that law for the better. This is not to assume that the entire legal system is unjust, but a particular policy or bill that has been passed. From a traditional standpoint, one would say that civil disobedience undermines the rule of law; however the reality is quite the opposite. There is an undeniable correlation between civil disobedience and the Rule of Law when it comes to striking down unjust, discriminatory laws. The Rule of Law in its most simple definition being that all persons, institutions, and entities are accountable to laws that are: publicly promulgated, equally enforced, and independently adjudicated. Civil disobedience allows a nation's citizens to be granted justice, ensures that their rights and freedoms as granted by the Canadian Charter remain protected, and progress as an ever-changing society.

When civilians go against a specific law that they view as unjust, social rights movements are born. Civil disobedience can strengthen the Rule of Law by leading to the corrections of unfair or seriously wrong laws before further discrimination can occur. Many social rights movements are created to protest against specific laws or actions that occur under the law. A recent and relevant example of this is the "Black Lives Matter" movement, the "Me Too" movement and "The Women's March." In each of these examples, individuals both nationally and globally participated in various forms of civil disobedience that led to changing laws or behavioural habits within the legal system that actively discriminated against a specific demographic or group of people (Lebron #76). During these times, there were laws in place that deliberately discriminated against certain individuals while actively benefiting others under the law. A more specific example is that women were legally not allowed to vote until 1918 due to the Persons Case (Lahey #404). This, by nature, is problematic and goes against the Charter in many ways; however, it was only amended due to the demand for justice that occurred through the non-cooperation of the "famous five." Although there will always be critics of civil disobedience, engaging with these movements leads to substantial change and justice while creating a larger community of understanding within the legal system. Another crucial example of young people engaging in civil disobedience as a "call to action" to elected officials is the "Fridays for Future" climate strikes (Thackeray #243). Students of all ages engaged in resistance by not attending school and instead choosing to spend their Friday striking as a result of feeling dissatisfied with the lack of environmental related action from their government. This is a prime example of how acts of civil unrest force the government and lawmakers alike to reflect and correct previously mishandled situations (Thackeray #248). With these acts of civil disobedience, the justice system was reminded to reflect on the rule of law and what it entails. Elected officials were also reminded of the crucial relationship between the way laws are enforced and the impact this has upon people, as well as the importance of equality under the law. Without civil disobedience or the social emphasis on improving individual and collective rights, the legal system would remain flawed indefinitely.

The "Equality Rights" section under the Canadian Charter of Rights and Freedoms states that "all persons, entities, or institutions must be held accountable under equally enforced laws," and therefore has led to a heavy emphasis on laws being non-discriminatory by specific definitions in the justice system (Canadian Charter of Rights and Freedoms). Civil disobedience and social justice movements take this into consideration and fight for equality rights to be protected under law. The sole purpose of civil disobedience is to fight for the protection of equality as outlined in the Canadian Charter and in several other official documents (Canadian Charter of Rights and Freedoms). Section 52(1) of the Constitution Act, 1982 states that any law that is inconsistent with the provisions of the Constitution is "of no force or effect" (Koshan).

Statutes which conflict with the Constitution are essentially invalid and technically do not become law. This particular section of the Constitution Act has been outlined incontestably with the main goal being to deter governments from passing unjust or harmful laws (Koshan). This further proves that social justice movements and protests are not technically classified as forms of civil disobedience in many circumstances, as long as they remain in line with the fundamental freedoms under the Charter (Fudge and Jensen #100). This means that civil disobedience can be legally justified as a reflection of certain radical laws that are not legitimate as they are not supported by the Charter of Rights and Freedoms. As granted by the Charter's equality rights, everyone is equal and has the right to equal protection and equal benefit of the law without discrimination (Canadian Charter of Rights and Freedoms). Those who participate in civil disobedience with reasonable cause to fight for equal distribution of equal rights are protected by the Charter and are entitled to proper representation under the Rule of Law.

Civil disobedience also can strengthen the Rule of Law by allowing a society's judicial system to grow and change. A society's laws reflect the core values and morals of that nation, and civil disobedience allows these laws to be truly reflective on what the people need. It is nearly inevitable

that there will in fact be laws that are unjust or discriminatory; however, social justice movements allow the repeal of unjust laws. The Rule of Law is fluid, and it can be changed as a result of civil disobedience. This is important to Canada's democracy and to Canada's legacy as a dynamic and forward looking society (Peerenboom #70). As a progressive nation, and as a state that values multiculturalism, and diversity, it is necessary for civil disobedience to maintain the fluidity of the Rule of Law. Although the Rule of Law is a foundational part of Canada's justice system, it is malleable and subject to change as society develops. The Rule of Law "guarantees to the citizens and residents of the country a stable, predictable, and ordered society in which to conduct their affairs"; this protects individuals from arbitrary state action (Billingsley). As times change and the world becomes more modern and intricate, it is important that Canada's legal system emulates this. Civil disobedience is the true way for the people of a state to give their unsolicited opinion and demonstrate their values to the legal system. It is essential to modernize the Rule of Law and maintain current social standards and equal practices. For the citizens of a country to respect the law, their judicial and governmental systems must seem legitimate to them and accurately portray their modern concerns as expressed by engaging in civil disobedience (Peerenboom #71). A new wave of civil disobedience in the COVID-19 era that has had a heavy impact on the Rule of Law has been "digital disobedience" (Scheurman #302). This refers to the new wave of online and social media activism that has been seen in the past year as an effort to hold governments accountable and demand social justice. Digital disobedience as a form of civil disobedience has been able to change the Rule of Law for the better and allow governments to adapt their judicial decisions to modern concerns (Scheurman #310). Without these acts of unrest, the Rule of Law would not accurately portray the values of Canadians.

Civil disobedience is necessary to strengthen the Rule of Law by leading to the correction of unjust or seriously wrong laws and reforming the justice system in the process in addition to allowing a nation's citizens to find justice under the law through social justice movements and protests. The power remains with the people to find a community fighting for equality. Civil disobedience ensures that people's rights and freedoms as granted by the Canadian Charter remain protected under the Rule of Law by allowing them to publicly dispute any discriminatory law and demand reformation, and finally, civil disobedience encourages Canada to progress as an ever-changing society in a modern world, and plays an essential role in the Canadian justice system to retain its classification as a forward moving country. As the world progresses, we as individuals begin to see that a nation with its citizens' voices silenced is a nation that will continue to fall behind in history.

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Authoritarians ... from page 7

When China assumed control of Hong Kong in 1997, it signed a declaration to keep its citizens' rights and freedoms unchanged for 50 years. Now, midway through this commitment, the government in Beijing is walking away from its pledge. Recently, two lawyers representing democracy activists who were caught trying to leave Hong Kong for Taiwan reportedly had their licences to practise law in China rescinded by Beijing. In January, authorities raided a Hong Kong law firm and arrested more than 50 people — including a U.S. lawyer — ostensibly for "subversion of state power" in their role in the democracy movement; the firm had reportedly represented "several opposition figures." Another lawyer, known for providing assistance to democracy protesters in 2019, was also arrested recently for helping activists caught trying to leave Hong Kong.

In Canada, lawyers are not governed by state authorities; law societies in each province regulate the legal profession and are independent of government. Only law societies may remove a lawyer's ability to practise law, and this may be done only where the lawyer has engaged in professional misconduct, and only following a hearing that is governed by legal principles of fairness. A politician or a government official may make a complaint against a lawyer, but it is the law societies, not the state, that are responsible for investigating it. This is a significant protection against the rise of authoritarianism and ensures that the merits of legal actions are based on the rule of law, rather than on the preferences of those in power.

Hong Kong is currently caught between the encroaching authority of China and the rule of law, which is protected by lawyers who are independent from the state. While Hong Kong still maintains a law society that regulates lawyers in that region, there is a growing concern that state practices prevalent elsewhere in China are making incursions and interfering in, if not overpowering, Hong Kong's legal regulator and its authority. This is all to the detriment of lawyers acting freely and without fear of intimidation, even when the government is on trial.

Governing bodies for lawyers are sometimes criticized for not being accountable to the state. But what is happening in China and Hong Kong demonstrates the importance of the fundamental principle at their core: lawyers must be independently regulated, free from even the appearance of state interference.❖

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

Real estate transactions – know your client primer

A BUSY REAL estate practice, summer holidays and a pandemic — a scammer's paradise?

Criminals are always working the angles to take advantage of any opportunity to pull their scams. The summer months, when fewer law firm staff may be working, can offer scammers a window if you aren't careful. For example, maybe a potential new client contacts you for legal services in connection with a real estate purchase that is really just a place to park their ill-gotten gains from illegal trade. Or perhaps a rogue using a fake government-issued ID hopes you don't notice as they try to convince you to deposit a phony bank draft in your trust account in hopes that you will wire money out of trust before you realize that the bank draft was bad.

In this article, I'll set out some basics for real estate lawyers on how to protect their firm and their clients. It starts with know your client obligations, but also includes identifying areas of risk and some tips and guidance. This article is aimed primarily at lawyers in private practice who are new to real estate transactions, but will also be informative for experienced lawyers who could use a refresher on their professional obligations.

GENERAL OBLIGATIONS

Your overarching obligations are to:

1. know your client;
2. understand your client's financial dealings in relation to your retainer; and
3. manage any risks arising from your professional business relationship with the client. (Rule 3-99(1.1))

In short, you must comply with the Law Society Rules in Part 3, Division 11 – Client Identification and Verification. As well, you must meet *BC Code* obligations in relation to the standards of the legal profession and integrity, anti-money laundering, confidentiality, competency, conflicts of interest, withdrawal, supervision of non-lawyer staff and compliance with the law. You must not engage in any activity that you know or *ought to know* assists in or encourages any dishonesty, crime or fraud. Further, you must comply with the accounting and trust account obligations in Part 3, Division 7.

This is a lot to think about. How to help?

TWENTY-FIVE TIPS

I have compiled 25 tips, based on experiences and questions that I've answered from lawyers. It definitely won't cover everything that a real estate lawyer needs to know but will assist with meeting your professional obligations and staying safe. At the end of this article is a list of checklists and other resources.

1. **Professional obligations** – Before taking on a new file, consider if you have enough time to fulfill your professional obligations before the closing date. For example, you will need to identify who your client is early on to check for conflicts, to appreciate whose identity you

must verify and where they reside, and to manage risks. If you check for conflicts too late and find that you cannot act, you may create problems for yourself, the client and the other parties involved. Also, if an individual is outside of Canada and you or a member or employee of your firm hasn't previously verified their identity and retained a record (Rules 3-105(2) and 3-107) and cannot physically meet with them, you will need time to retain an agent to verify the client's identity, if it's the first time, or to rely on the agent's previous verification (Rule 3-104). There may also be concerns about the client's capacity to instruct you and undue influence, all of which take time to assess (*Code* rule 3.2-9). Further, there may be unusual or suspicious circumstances regarding the client, their activities or the source of money for the transaction that you will need to check out to determine if you can act (*Code* rules 3.2-7 and 3.2-8).

2. **Defined terms** – Part 3, Divisions 7 and 11 in the Law Society Rules and the *BC Code* rules each include their own defined terms (see Law Society Rules 3-53 and 3-98 and *Code* section 1.1 respectively). For example, the *Code* definition of "client" for the purpose of a "conflict of interest" differs from the definition of "client" for the purpose of the Division 11 Rules. Applying the right defined terms for the context can help you understand your obligations. Apply the broad definition of "client" in Rule 3-98 for the purpose of Division 11. The definition of "client" includes another party that your client represents or on whose behalf your client otherwise acts in relation to obtaining legal services from you. And, in Rules 3-102 to 3-105, a client also includes an individual who instructs you on the client's behalf in relation to a "financial transaction." For example, if client Addison instructs you to register property in Addison's name but the property is in trust for Taylor, identify and verify the identities of both Addison and Taylor.
3. **Identify versus verify** – Identification is different from verification of identity. Knowing the difference is important. Identification is simple and required for most files. You are not required to obtain and retain a copy of government-issued photo ID to merely identify a client, so if you do it anyway, you should have a good reason for doing so. If you obtain a copy of the ID, you must retain it for the required period (Rule 3-107). Verification of identity is required under Division 11 when a lawyer provides legal services in respect of a financial transaction, with limited exceptions.
4. **Identification** – Identify your "client" by obtaining and recording, with the applicable date, the basic information required by Rule 3-100 for individual clients and for "organization" clients. You can obtain the information by phone, in a form that you ask the client to complete, or by email. "Unemployed" or "retired" are not occupations; obtain more descriptive information (e.g., retired BC lawyer). For other vague descriptions (e.g., self-employed, investor, consultant, entrepreneur), obtain information that identifies the nature of the individual's work and the industry involved. Remember to obtain information about the general nature of an organization's business or the activity in which it is engaged and its incorporation number or business identification number. The identification rule requires this additional information unless the organization is a "financial institution," "public body" or "reporting issuer" (as defined in Rule 3-98).
5. **Verification of identity** – Verification of the client's identity is required for real estate transactions since a "financial transaction" (broadly defined in Rule 3-98) will take place. Verify your client's identity by using a method set out in the rules and within the relevant time frame (Rules 3-102 to 3-106). If your client is an "organization," verify the identity of the individual instructing you on behalf of the "organization" client as well as the "organization" itself. The timing for verification of the identity of the individual instructing you on the organization's behalf is the same time frame as for verification of any individual: at the time that you provide legal services in respect of a

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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.

"financial transaction" (not afterward). Record the date of the verification. Obtain the information regarding directors, shareholders, trustees, beneficiaries and settlors of a trust as well as information identifying the organization's ownership, structure and control (Rule 3-103). If you aren't able to obtain the information, you must take further steps. Follow the steps in Rule 3-103(4), which includes an assessment of whether there is a risk that you may be assisting or encouraging fraud or other illegal conduct.

6. **Identity fraud** – Be aware of identity fraud, including by an attorney and the maker of a power of attorney (POA) impersonating a registered owner (see below). While this can happen at any time, property owners who are outside of Canada and who have left their homes unoccupied have been targeted recently. A scammer may use fake ID with the legitimate owner's identity, but with the scammer's photo. The scammer arranges to sell the property, and when the sale completes, asks for the sale proceeds to be wired to them. Alternatively, you may be asked to register a mortgage and provide the mortgage proceeds to the scammer. You may have no idea that you've been scammed until the money is long gone.
7. **Powers of attorney** – Be on guard when an individual claims to be an attorney, appointed under a POA. If you are to take instructions from an attorney for a conveyance or loan, this scenario needs scrutiny. For example: Is the POA a general POA or an enduring POA? Is the POA valid? Has it been revoked? Is there a subsequent POA? Is the attorney bankrupt? Was the attorney the spouse of the adult who made an enduring POA, but the marriage has ended? Is the adult still alive? Does the adult have capacity? Is there undue influence on the maker of the POA? Is this a scam? Review the *Power of Attorney Act* and see this 2018 Agreed Statement of Facts, which involved taking instructions from an attorney where the POA had expired. Remember to verify both the attorney's and the adult's identities. Be aware of scams, fraud and financial abuse targeting seniors. Note that a POA is not a person; it is a document. In June 2021, the Land Title and Survey Authority published changes to web filing forms for Power of Attorney, Revocation of Power of Attorney and Claim of Lien (*Builders Lien Act*), as well as new and revised Land Title Practice Guides.
8. **Estate matters** – If you are conveying property that is part of a deceased person's estate and take instructions from the personal representative appointed under the will, verify the identity of the personal representative. The estate is not the client. An estate means the property of the deceased person.
9. **Acting for more than one party** – Do not act for both a purchaser/borrower and a private lender in the same matter. In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted in the *Code* (rule 3.4-1, commentary [0.1] and Appendix C).
10. **Private loans** – There is a concern of increased risk of illegal activity with private loans for real estate purchases, so if you are asked to provide legal services in relation to a private loan, make inquiries and receive satisfactory answers to determine the appropriateness of your involvement. Read the Discipline Advisory on private lending to assist you with factors for which you should be on the lookout (e.g., there is no clear or plausible reason why the borrower is not using a commercial lender).
11. **Value fraud** – Watch out for value fraud attempts on lenders. I still remember the first time that I encountered this as a newly minted articled student. The purchaser, well-known in the Vancouver real estate scene and, as far as I knew, highly regarded, tried to fool a bank about the actual purchase price of the property to get a bigger loan. When I refused to assist in this dishonesty, she was livid and I was left shaken that she would try to use me in that way. Fortunately, I knew she wouldn't have gotten very far if she had complained to my principal that I'd failed to aid her scheme. Appraisal fraud can involve a buyer, homeowner or builder altering a legitimate appraisal report or creating a fake one so that it overvalues the property to deceive a lender. Similarly, scammers, working in cahoots, may churn a title, conveying a property repeatedly, increasing the price each time, to artificially inflate the property's value for loans. This is sometimes referred to as "property flip fraud."
12. **Source of money** – If there is a financial transaction, in addition to verifying the client's identity, you must obtain from the client and record, with the applicable date, information about the source of "money" (widely defined and includes shares) for the financial transaction (Rules 3-98, 3-102(1)(a), 103(4)(b)(ii) and 3-110(4)(b)(ii)). Read the source of money FAQs to assist you with the information to obtain. You have a positive duty to make inquiries and, if there are unusual or suspicious circumstances, the questions that you ask, and the supporting documents that you will want to obtain, will likely increase in order to determine whether you can properly proceed. One example is if the client has low or no income but has substantial funds at their disposal and they are purchasing an expensive property. Another example is if the client wants you to receive funds in trust from a third party not connected with the conveyance. For example, if a client tells you that X owes the client money and that, rather than paying the client, X will send you the money in trust from Y country, that is suspicious.
13. **Trust funds for legal services** – Be on guard if an individual wants to deposit money in your trust account, saying that they intend to purchase property in the future and they just want you to have the money on hand to be ready. No purchase contract has been executed. Assuming you are not currently providing any substantial legal services that are directly related to those funds, do not accept the deposit. Note, for example, discipline decision 2020 LSBC 45. Also, with respect to seller clients, the proceeds of sale should be paid out as soon as practicable on completion of the legal services (Rule 3-58.1).
14. **Division 7 – Trust and cash records**

Checklists and other resources

Check out the checklists and other resources on our website to help you comply with your professional obligations. Checklists are useful to assist with organization and to suggest things to consider, but keep in mind not to overly rely on them. Why? Checklists can quickly become out of date and are not a substitute for reading the applicable rules, for knowing the law or for applying good judgment.

- Model conflicts of interest checklist
- Client identification and verification procedure
- Client file opening and closing
- Residential conveyance procedure
- Mortgage procedure
- Mortgage drafting
- Trust accounting checklist

Other resources and information relevant to knowing your client and risks in real estate practice include the following:

- Anti-money laundering measures webinar (free and eligible for two hours of CPD credit (practice management, professional responsibility and ethics)
- Client ID & Verification FAQs (includes source of money, using an agent to verify identity, monitoring, lawyer or law firm clients, referral of a client by another lawyer, private loans and acting for a real estate developer selling to the public)
- Juricert FAQs
- Mortgage discharge reporting form
- Guidelines for solicitors to facilitate discharging or transfer of mortgages (Canadian Bankers Association)
- Contact list for matters involving mortgage discharges (Canadian Bankers Association)
- Additional property transfer tax for foreign entities and taxable trustees (Ministry of Finance)
- Changes to web filing forms for Power of Attorney, Revocation of Power of Attorney and Claim of Lien (*Builders Lien Act*), as well as new and revised Land Title Practice Guides (LTSA, June 2021)
- Bank holds on trust cheques, certified cheques and bank drafts (Practice resource)
- Protection from elder abuse and neglect (Province of BC)
- Real Estate: Risks and tips (LIF)
- Forming companies and other structures, Spring 2021 *Benchers' Bulletin* (p.8)
- Client identification and verification – addressing your questions (includes acting for a developer and virtual currencies red flag indicators), Fall-Winter 2020 *Benchers' Bulletin* (p. 12)
- Knowing your client – guidance and rules during COVID-19 (includes a discussion of the methods to verify a client's identity), Summer 2020 *Benchers' Bulletin* (p. 18)
- Know your client – addressing questions and risks (includes exemptions, previous verification by agent and real estate transactions risks), Spring 2020 *Benchers' Bulletin* (p. 8)
- Acting for a client with dementia, Spring 2015 *Benchers' Bulletin* (p. 13)
- Risk Assessment Case Studies for the Legal Profession (February 2020) (includes purchase and sale of real property and a Red Flags Quick Reference Guide)
- Risk Advisories for the Legal Profession (December 2019) (includes advisories for real estate, private lending, and trusts to purchase real property)
- Private lending, April 2, 2019 Discipline Advisory
- Country/geographic risk, February 11, 2021 Discipline Advisory

– Maintain the trust account records required by Division 7 for all trust transactions. Require clients to provide you with a receipt that includes the payer's name and the form of the deposit (e.g., bank draft, wire, certified cheque, cash) if they make a direct deposit to your trust account (Rule 3-68). Some clients may try to deposit cash to your trust account without your knowledge. In addition to complying with the trust account records required by Rule 3-68, comply with the cash restrictions and record keeping for cash (Rules 3-53, 3-59 and 3-70). If a client deposits cash beyond the rule limit, you must make no use of it and return the cash or, if that is not possible, return the same amount in cash to the client immediately. A report to the executive director within seven days of receipt is required. You can instruct your financial institution not to accept cash deposits by third parties, but this doesn't always work. Contact the Trust Assurance department for trust accounting questions (trustaccounting@lsbc.org).

15. **Breach of undertaking: trust shortage –** If you are on an undertaking to hold funds in trust but fail to do so, this is a trust shortage as well as a breach of undertaking. You must immediately pay enough funds into the account to eliminate the shortage. In addition, if the amount you were required to hold in trust was greater than $2,500, you must immediately make a written report to the executive director including all relevant facts and circumstances (Rule 3-74; also see *Code* rules 5.1-6 and 7.2-11).
16. **Bank drafts** – I understand that, by September 2021, the big Canadian banks will automatically embed the name of the purchaser of a bank draft in the draft, and that many bank branches are doing that now. You should be able to read the typed name on the draft. If the name on the draft isn't the name that you are expecting, make inquiries to determine if you should deposit it. Some credit unions are manually writing the purchaser's name on an "official cheque." It remains to be seen whether

credit unions will shift to embedding the information in the official cheque.

17. **Payment instructions scam** – You are likely highly aware of the change in payment instructions scam and steps that you can take to protect yourself from transferring funds to a fraudster. Likewise, consider informing your clients that your bank account details will not change during the course of the conveyance so that they, too, don't fall victim to a criminal posing as you and send funds intended for your trust account to the criminal.
18. **Supervision of staff** – Maintain direct supervision of non-lawyer staff and proper delegation. An assistant may fulfill your Division 11 duties on your behalf (Rule 3-99.1); however, provide education so that the assistant is competent to do the work under your supervision. Train your assistant to recognize issues and bring them to your attention in a timely manner. You remain responsible to exercise your professional judgment. See *Code* section 6.1 with respect to work that must not be delegated. See 2020 LSBC 52 with respect to a lawyer who left a series of signed blank trust cheques with her bookkeeper and was found not to have met the minimum requirements of supervision.
19. **E-filing and digital signatures** – Do not electronically file a Form A Transfer or a Form B Mortgage without having true copies in your possession (2020 LSBC 03). *Also, do not disclose your Juricert password to anyone, including an employee at your firm, and do not permit anyone else to affix your digital certificate (Rule 3-96.1 and Code rule 6.1-5).* A lawyer's obligation to *personally* affix a digital certificate is an important part of ensuring the integrity of BC's land title system. A Law Society hearing panel found that, by disclosing his password to his staff and permitting them to affix his electronic signature to documents filed with the Land Title Office for over three years, a lawyer had committed professional misconduct. The lawyer was suspended for four months and ordered to pay costs (2020 LSBC 13).
20. **Unusual or suspicious circumstances** – Don't fall into the trap of verifying ID but failing to make reasonable inquiries and recording them in the face of unusual or suspicious circumstances. Look for circumstances that ought to raise your suspicion that you might be assisting in any dishonesty, crime or fraud, including investment fraud, mortgage fraud, money laundering or terrorist financing. This is a low bar. One red flag could be enough to call for increased due diligence; generally, the more red flags, the greater your duty to make reasonable inquiries. If you have doubts about the client or the subject matter and objectives of the retainer, obtain more information until you are satisfied that you can accept money in trust and that you can act in the circumstances. If you're not satisfied with the results, withdraw. *Make a record of the results of your inquiries.* See discipline decision 2020 LSBC 45. See *Code* rule 3.2-7 and commentary; also see rule 3.2-8 and commentary when acting for a company. Also see the Discipline Advisories, Risk Assessment Case Studies for the Legal Profession for the purchase and sale of real property (incudes Red Flags Quick Reference Guide) and Risk Advisories for the Legal Profession (includes advisories for real estate, private lending and trusts to purchase real property).
21. **Monitoring the lawyer/client relationship** – Monitor the professional lawyer/client business relationship periodically while retained in respect of a financial transaction and record the measures taken and information obtained (Rule 3-110). The degree and nature of periodic monitoring should be commensurate with the degree of risk associated with the client and the legal services provided. See the FAQs on monitoring and the Monitoring Checklist on page A-1-13 of the Client Identification and Verification Procedure Checklist for more information.
22. **Retention of Division 11 records** – Maintain and retain records and any information or documents obtained for the purpose of identification, verification, source of money, use of an agent and monitoring, with the applicable dates, for at least six years following completion of the work for which you were retained (Rules 3-100 to 3-104, 3-107 and 3-110).
23. **Compliance with the law** – You must, of course, comply with the law (*Code* rule 2.1-1(a)). Be aware of the money laundering and terrorist financing provisions in the *Criminal Code*, federal economic sanctions and anti-terrorism measures (e.g., *Special Economic Measures Act*, *Freezing Assets of Corrupt Foreign Officials Act*, *United Nations Act*) and provincial legislation. Think about a strategy and framework for conducting open source searches of publicly available information to focus on specific areas of concern, when appropriate, or consider using watchlist screening software for terrorists, terrorist groups and other listed and sanctioned individuals and entities. Politically exposed persons (PEPs) screening is also available.
24. **Withdrawal from representation** – You must withdraw from representation if, in the course of identifying or verifying your client's identity, or at any time while you're retained, you know or ought to know that you would be assisting the client in dishonesty, fraud or other illegal conduct (Rule 3-109). As well, you must withdraw if the client persists in instructing you to act contrary to professional ethics (e.g., a conflict), you are not competent to continue to handle the matter or you are discharged (*Code* rule 3.7).
25. **Resources for staff** – Consider asking your conveyance staff to subscribe to the LTSA News and Updates, the Land Owner Transparency Registry News Bulletins and Law Society publications. Your staff can assist you to stay on top of important information.

FOR MORE INFORMATION

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

Conduct reviews

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

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

MISLEADING THE COURT / DISHONESTY

A lawyer made misrepresentations to court in a bankruptcy matter, contrary to Law Society Rules 2.1-2(c), 2.2-1, 3.1-2 and 3.2-1. He also facilitated the unauthorized practice of law, contrary to Law Society Rule 2-14(1) and rule 7.6-1 of the *Code of Professional Conduct for British Columbia*. The lawyer was retained to draft a petition and supporting documents, and to notarize the documents for his client who lived out of province. A friend of the client acted as his personal representative. The lawyer mistakenly believed that the trustee in bankruptcy represented all respondents to the action and, consequently, only the trustee needed to be served with the court documents. Due to this mistake, the lawyer unintentionally misled the court when he confirmed that all the respondents had been personally served. The personal representative, who was also present, advised the court that he was the lawyer's associate. The lawyer did not ensure the court did not mistakenly assume the personal representative was a lawyer. The lawyer acknowledged his misconduct. He will now have his clients sign retainer agreements regarding unbundled legal services and avoid putting his name and address on any pleadings unless he is retained to act as counsel of record. (CR 2021-17)

QUALITY OF SERVICE / WITHDRAWAL OF REPRESENTATION

After obtaining a successful result in litigation for his client, a lawyer failed to apply for an assessment of costs and failed to respond to numerous requests for updates from his client. The lawyer also withdrew his representation of the client without good cause and without first obtaining the costs assessment, contrary to Law Society Rules 3.2-1 and 3.7-1 and rule 3.7-1, commentary [1] of the *Code of Professional Conduct for British Columbia*. The lawyer considered that his retainer agreement had been completed, despite his failure to have the special costs assessed. He did not advise his client of this for several months, instead telling the client that he would set down the special costs for assessment. The lawyer acknowledged that he should have been more responsive to his client and set down the hearing. The lawyer provided assurances that he is more careful about his work obligations and the terms in his retainer agreements. (CR 2021-18)

THREATENING

A client retained a lawyer to probate her late father's will. The relationship between the client and two self-represented parties involved in the litigation was acrimonious. The client and the self-represented parties were each registered owners of a one-half interest in the deceased's residence. The lawyer arranged for the self-represented parties to retrieve some items from the residence. When they met, a physical altercation occurred between the lawyer and the parties. The parties alleged that the lawyer grabbed and pushed them with such force as to cause injuries. The lawyer admitted there was physical contact, but said he was only trying to prevent them from forcing their way into the residence. The lawyer failed to act with courtesy, honour and integrity, contrary to rules 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*. The lawyer acknowledged his mistakes. When the incident occurred, he was acting as a locum and dealing with many challenges. The lawyer acknowledged these factors did not excuse his behaviour, but provided context. If similar circumstances arise, the lawyer will seek to resolve the matter through other means or by court order. (CR 2021-19)

CLIENT ID AND VERIFICATION

Compliance audits resulted in several similar conduct reviews involving the client identification and verification rules (Part 3, Division 11 of the Law Society Rules).

A compliance audit revealed that a lawyer failed to comply with the client identification and verification rules on two client matters. On an estate matter in which the lawyer had known the family for 28 years, he did not verify the two executors' identities, contrary to Law Society Rule 3-102. On another file, he failed to verify the identity of two clients in a non-face-to-face financial transaction where he also failed to obtain an attestation from a commissioner of oaths or a guarantor, contrary to Law Society Rules 3-102 and 3-104. In both cases, the lawyer verified his clients' identities after the compliance audit. Client identification and verification is now taken on all files and is saved in digital format. As many of the lawyer's clients are referred by accountants and financial planners, he also speaks with the referral source for background information. (CR 2021-20)

Another lawyer failed to comply with client identification and verification rules in three real estate matters, two of which were non-face-to-face client matters, contrary to Part 3, Division 11 of the Law Society Rules. In the first matter, the lawyer received sale proceeds

from a notary public, deposited the funds into his firm's trust account and issued a trust cheque to the vendors. He did not take independent steps to verify the identity of the vendors, instead relying on the notary public to do so. In the second matter, the lawyer received funds from a realtor for his purchaser clients who lived in Ontario. Prior to the purchase, the lawyer had requested and received details about their identities by email, including dates of birth, social insurance numbers and occupations. He did not seek an attestation by a commissioner of oaths or a guarantor. In the third matter, the lawyer had known the client for over 20 years and had previously obtained copies of her identification; however, he did not obtain fresh evidence of her identification or perform the required verification procedures. The lawyer assured a conduct review subcommittee that he now strictly complies with the client identification and verification rules. He has also incorporated the Client Identification and Verification Checklist into his standard practice for conveyancing matters. (CR 2021-21)

Yet a different lawyer failed to comply with the client identification and verification rules on two real estate conveyancing matters. In the first matter, the client, who lived in Arizona, retained the lawyer to handle the sale of real property. The lawyer admitted that he failed to obtain the client's identification because other parties, including a notary in Arizona and a bank, had obtained and verified the necessary identification. In the second matter, the lawyer neglected to verify the client's identification because the client was a close friend of the lawyer's legal assistant. The lawyer failed to obtain the clients' full names, addresses and telephone numbers, failed to verify the identity of a client and failed to use an agent to verify client identity, contrary to Rules 3-100(1), 3-102(1) and 3-104(1). The lawyer acknowledged responsibility and has since prepared and implemented an 18-point "Client Identification, Client Verification and Source of Money" checklist as part of his practice. (CR 2021-22)

While acting for non-resident sellers of a residential property, a lawyer failed to comply with the client identification and verification rules on a non-face-to-face financial transaction. She also failed to correctly determine who the client was and to establish a direct relationship with the client. As a result, she failed to properly fulfill her obligations with respect to client confidentiality, conflicts and joint retainers, and failed to make reasonable inquiries regarding the transaction, contrary to rules 3.2-1, 3.2-7, 3.3-1, 3.4-1 and 3.4-5 of the *Code of Professional Conduct for British Columbia*. The lawyer was unaware that an agent agreement must be entered into with the party verifying the attestation in the foreign jurisdiction. The lawyer acknowledged that she breached the foregoing rules and code provisions. A conduct review subcommittee encouraged the lawyer to learn from this experience and to take all the necessary steps to identify and verify clients in the future. (CR 2021-23)

A compliance audit revealed that a lawyer failed to identify his client in three financial transactions, contrary to the client identification and verification rules. The lawyer knew the clients as friends and it did not occur to him that he was required to ask them for identification. The audit also revealed several trust accounting rule breaches that had previously been identified in a 2015 audit. In the future, the lawyer will not commence work on a client matter without obtaining client identification and a signed retainer agreement. He will have regular contact with his accountant and immediately rectify and report any inconsistencies. (CR 2021-24)

UNCIVILITY

Following a settlement conference in a small claims matter, a lawyer met with the opposing party to give her the settlement cheque. When the opposing party did not sign an acknowledgment of payment, the lawyer grabbed her arm to prevent her from leaving his office with the cheque. She eventually signed the form and received the cheque. A conduct review subcommittee advised the lawyer that physical force should never be used in any circumstance, and his actions were contrary to rules 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*, which require lawyers to treat others civilly, courteously and professionally in all communications. The lawyer acknowledged that he acted inappropriately. (CR 2021-25)

JURICERT PASSWORD

A compliance audit revealed that a lawyer disclosed his Juricert password to his conveyancing assistant and permitted her to affix the lawyer's personal digital signature on documents filed in the Land Title Office, contrary to his Juricert Agreement, Part 10.1 of the *Land Title Act*, Law Society Rule 3-96.1 and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*. The lawyer admitted it was an oversight to allow his conveyancer the ability to use his digital signature for the sake of convenience. The lawyer has obtained a new password and now reviews all documentation and affixes his digital signature. (CR 2021-26)

INTEGRITY

A lawyer applied his electronic signature to a land title form that differed from the executed version of the document and falsely represented that he had a true copy in his possession. In addition, he amended two land title forms after they were signed but failed to provide final amended copies to the executing party, contrary to the Law Society's December 2011 Notice to the Profession, s. 168.3 of the *Land Title Act* and rule 2.2-1 of the *Code of Professional Conduct for British Columbia*. The December 2011 Notice to the Profession set out what steps a lawyer should take if an amendment is required after a land title form has been executed, but before it has been electronically submitted. The lawyer acknowledged his mistake and will ensure he complies with all land title rules in the future. (CR 2021-27)

UNSATISFIED MONETARY JUDGMENT AND FAILURE TO REMIT

A compliance audit revealed that a lawyer failed to report an unsatisfied monetary judgment made against him by the Canada Revenue Agency (CRA) for unpaid personal income taxes, contrary to Law

Society Rule 3-50, and his firm failed to make GST remittances totalling $47,173.12, contrary to rule 7.1-2 of the *Code of Professional Conduct for British Columbia*. The lawyer advised a conduct review subcommittee that, during this period, the firm was having financial difficulties for a variety of reasons. As a result, he was not able to pay his personal income taxes on time. The lawyer was unaware that the CRA certificate fell within the definition of a judgment under the Rules and must be reported to the Law Society. The lawyer admitted that his firm had failed to make GST remittances and used the funds for other expenses, which he acknowledged is not permissible. The lawyer's firm has paid the outstanding GST remittances and has improved its office processes to ensure the remittances are paid when due. (CR 2021-28)

CLIENT ID AND VERIFICATION / QUALITY OF SERVICE / CONFLICT OF INTEREST / JOINT RETAINERS

While representing a client in a share sale transaction, a lawyer failed to recognize that the client's wife was also his client, contrary to rules 3.2-1 and commentary [3], 3.4-5 to 3.4-7 and commentary, and 3.4-1 and commentary [1] and [5] of the *Code of Professional Conduct for British Columbia*. He also failed to identify and verify the wife's identity in a non-face-to-face transaction, contrary to one or more of the client identification and verification rules in Part 3, Division 11 of the Law Society Rules. The lawyer failed to advise the clients of the limitations applying to joint retainers regarding confidentiality and conflicts of interest, failed to obtain written consent from them before proceeding with a joint retainer, and failed to consider whether there was a conflict of interest between the husband and wife and any related clients.

The lawyer's firm entered into escrow agreements for both the husband and wife, in which the firm agreed to act as escrow agent for the share sale. The escrow agreements provided for the firm to hold the purchase funds until receipt of the necessary documentation, after which the firm could distribute the funds to the clients. The firm received the share sale proceeds and wired the funds to each client's separate bank accounts in Australia. The lawyer acknowledged that, after reviewing the relevant rules, he understood that the wife could be considered his client. In hindsight, he would have addressed the possibility that the husband was representing his wife or acting on her behalf to obtain legal services, and he would have suggested that the wife be treated as a separate client of the firm or obtain separate legal counsel. The lawyer has created new documentation for identifying and verifying a client and a system for properly recording this information. The firm now requires that, for every new matter, the responsible lawyer must refer to the client profile and confirm the appropriate person from whom to take instructions. The firm has also held meetings to discuss how to properly identify and verify clients. A conduct review subcommittee recommended the lawyer use the Law Society's model joint retainer agreement or a similar one. (CR 2021-29)

NO CASH RULE

A lawyer accepted an aggregate total of $13,800 in cash from his client as a retainer on a criminal law matter and, after ending the retainer, refunded $6,654 to the client by way of trust cheque instead of cash, contrary to Law Society Rule 3-59(5). The lawyer's receptionist received cash deposits from the client; however, the lawyer was unaware that the deposits had been in cash. The lawyer was reminded that the refund aspect of Rule 3-59 had been specifically addressed in five *Benchers' Bulletins*. The lawyer acknowledged his mistake in not reviewing the client's trust ledger to determine whether the retainer had been paid in cash before refunding the funds. The lawyer now accepts funds from clients by e-transfer, bank draft, credit card or debit card. The lawyer no longer writes cheques, does not allow his receptionist to receive cash and receives a monthly checklist from his bookkeeper. (CR 2021-30)

In another matter, a lawyer violated Law Society Rule 3-59(5) when she authorized the return of a client retainer by way of trust cheque exceeding $1,000 when the original retainer of $10,000 was paid in cash. The lawyer acknowledged her responsibility for office system failures that led to the breach of the Rules. The firm no longer accepts cash retainers. Besides the firm-wide changes, the lawyer has instructed staff to notify her directly when a retainer is received from one of her clients. The lawyer has increased her oversight of receipt and disbursal of funds, in order to ensure adherence to anti-money laundering rules. (CR 2021-31)

CONFLICT OF INTEREST

By arranging for a member of his firm to commence litigation against a former client without the former client's consent, a lawyer was in a conflict of interest contrary to rule 3.4-10 of the *Code of Professional Conduct for British Columbia*. The lawyer was the corporate solicitor and his firm was the registered and records office for a BC company for a number of years before the company retained new corporate counsel. One of the former shareholders of the company contacted the lawyer and instructed him to commence proceedings against the remaining shareholder and the company alleging the shareholder breached a partnership agreement under a constructive trust regarding real estate held by the company. The lawyer considered whether his firm was engaging in a conflict of interest in acting for the shareholder but concluded that he possessed no confidential information that the firm could use to the prejudice of the company. He arranged for a member of his firm to handle the litigation. The lawyer did not recognize that his client was the corporation. The lawyer admitted that his knowledge and understanding of the conflict of interest rules was incomplete and that he made a serious error of judgment. To prevent such conduct reoccurring, the lawyer has thoroughly reviewed the Rules and attended a webinar on conflicts of interest. A conduct review subcommittee recommended that the lawyer use

continued on page 29

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Sonia S. Hayer
- Eric John Becker
- Sumandip Singh
- Nathan Sutha Ganapathi
- John (Jack) Joseph Jacob Hittrich
- Eric Churk-Ming Chow
- Stephen John Bronstein
- Daniel Markovitz
- Narindar Pal Singh Kang, QC
- Aengus Richard Martyn Fogarty

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

SONIA S. HAYER

Vancouver, BC
Called to the bar: December 1, 2012
Consent agreement accepted: March 5, 2021

FACTS

Sonia S. Hayer practises primarily in the areas of family law and real estate law through her firm, which employed a designated paralegal and two assistants.

Hayer was the unwitting victim of a fake bank draft scam. She received an email purportedly from the president/CEO of a company in the Netherlands, who asked her to help draft a purchase and sale agreement involving the sale of equipment to another company. The email said that a deposit of $150,000 would be made and disbursed within three to four business days. Hayer checked both companies, found that they did exist and proceeded with the matter.

An Asian male with a Chinese passport attended at her Richmond office for the meeting. He completed a client identification form and indicated he was a sales manager with a business address in the Netherlands, with an email address for the company. Hayer sent a retainer agreement to the purported president/CEO's email address that was signed and accepted. The photograph was of a Caucasian man and not the same man who attended her firm's office. Hayer did not see the photo at the time.

Her firm received a bank draft in the amount of $150,000 from the company's purported broker and she deposited it into her trust account. She received phone calls from the man who came to her office and encouraged her to wire the money within three days. She waited five days to allow the bank draft to clear, and later learned that 10 days are required to clear out-of-jurisdiction drafts.

She arranged for $144,299.25 to be sent to a bank in Japan and transferred an additional amount to her general account for payment of legal fees. The next day, she noticed the bank draft had been returned. She notified the bank of the fraud and borrowed money to fully cover the shortage within seven days. She did not report the trust shortage to the Law Society's executive director.

Hayer admitted she did not follow the client identification and verification rules. She ought to have seen several red flags:

- there was no apparent connection between the two companies and British Columbia;
- the email was from a company in the Netherlands but she met with a man with a Chinese passport in Richmond;
- the man she met with did not show any government-issued documents that matched the name of the person who emailed her;
- the man she met identified himself as a sales manager when the email described the sender as president and CEO;
- the photograph attached to the retainer agreement was of a different person;
- she received phone calls from the man she met pressuring her to send the money;
- the funds were wired to a company in Japan with no apparent connection to the company; and
- she was required to perform minimal legal services on the file.

Hayer also permitted her assistant and paralegal to use her Juricert certificates to digitally sign letters and submit documents to the Land Title Office over the course of several years. Juricert certificate holders are required to keep their passwords confidential and lawyers must use their own Juricert certificates.

Hayer initially explained her assistant brought documents to the courthouse so she could review them prior to affixing her digital signature and confirmed that only she had access to her Juricert. The Law Society subsequently obtained log sheets for her trials and the exact times the court was sitting and when breaks were taken. The documents indicated that, on several occasions, the digital signature was affixed while the court was in session.

Her written signature on various documents was also different from the signature on her firms' trust cheques. She was asked to explain the different signatures and she initially said she used different hands to execute documents. The Law Society obtained a form from the Land Title Office that showed a document signed by the paralegal. The paralegal's signature was the same as those on the trust cheques. Hayer admitted she allowed the paralegal to sign trust cheques on her behalf and to apply her Juricert digital signature while she was in trial.

When asked to produce client files during the course of the Law Society's investigation, Hayer also admitted to electronically applying the paralegal's signature to electronic documents of three pleadings.

CONSENT AGREEMENT

Hayer admitted she committed professional misconduct by disbursing funds from her trust account without making reasonable inquiries about her client and the circumstances of the retainer, failing to properly obtain and verify client identification information, and failing to report a trust shortage of $150,000 to the Law Society.

She also admitted she permitted someone else to use her Juricert password and affix her digital signature to electronic documents, improperly handled client trust funds by permitting someone else to sign trust cheques on her behalf and made false representations to the Law Society during the course of the investigation.

The Discipline Committee chair considered the agreed statement of facts and that she did not have a prior professional conduct record. The chair accepted the agreement that Hayer:

1. be suspended from the practice of law for six months; and
2. provide an undertaking she would cease working with her designated paralegal and never work with him again.

ERIC JOHN BECKER

Pitt Meadows, BC

Called to the bar: May 12, 1981

Hearing date: November 25, 2020

Decision issued: March 10, 2021 (2021 LSBC 11)

Hearing panel: Ralston Alexander, QC (chair), Geoffrey McDonald and Mark Rushton

Counsel: Irwin G. Nathanson, QC and Julia K. Lockhart for the Law Society; Gerry Cuttler, QC for Eric John Becker

FACTS AND DETERMINATION

Eric John Becker admitted to the facts in three citations before the panel. He admitted to 44 instances of misappropriation of client funds, 205 instances of misappropriation or improper handling of funds relating to charges for insurance binder disbursements during conveyances, four instances of improperly withdrawing trust funds, failing to report a trust shortage over $2,500, leaving blank pre-signed trust cheques accessible to employees, and one instance where he made charges to a client's credit card that the client later reported exceeded the authorized amount. The misconduct was not intentional in nature but rather grossly negligent. The various misappropriations were small amounts of money, with over a third concerning amounts less than $100, and the clients were all made whole with their funds returned to them or their accounts correctly reconciled later.

Becker admitted to representing his firm as a registered trademark agent when it no longer was one. Becker was a registered trademark agent but had allowed his registration to lapse, and an associate who was a registered trademark agent had left the firm. Becker sent letters to the trademark clients advising the associate left the firm and offered them the choice of remaining with his firm or transferring to the associate's new practice. The letters did not mention that his firm was no longer a registered trademark agent and was not authorized to provide trademark services. Later, in response to the Law Society's investigation, Becker gave misleading statements to suggest his firm did have qualifications as registered trademark agents, that he was applying to renew his qualifications and that there was a delay in processing his trademark application.

Becker also admitted that he did not notify clients or seek their instructions when he moved their files and records from another firm to his law firm. Becker was managing another law firm under a management agreement and he notified the owners that he was terminating the management agreement. The owners did not wish to retain the several hundred corporate clients who had registered and records offices at the law firm. Becker moved all the corporate records to his firm and changed the registered and records offices to his firm's address. He sent the clients misleading correspondence on the previous law firm's letterhead and advised it moved to a new office. The clients were not told that the new address was actually a different law firm, and they were not asked for permission to move their records.

The panel determined that Becker committed professional misconduct with respect to each of the citations.

DISCIPLINARY ACTION

The panel considered the serious and repeated nature of the misconduct and the number of clients impacted by Becker's actions, as well as his admission of the misconduct and his changes to administrative practices in his office to prevent future misconduct.

The panel accepted the proposed disciplinary action that had been consented to by Becker and the Law Society and ordered that Becker:

1. be suspended for 14 months; and
2. pay costs of $3,500.

SUMANDIP SINGH

Surrey, BC

Discipline hearing: August 27 and September 4 and 5, 2019

Further submissions: November 9, 2020

Panel: Jeff Campbell, QC (chair; hearing on facts and determination only), Ralston Alexander, QC (chair, disciplinary action) and Paul Ruffell

Decisions issued: January 8, 2020 (2020 LSBC 01) and March 15, 2021 (2021 LSBC 12)

Counsel: Mandana Namazi and Ilana Teicher for the Law Society; Joven Bahar Narwal for Sumandip Singh

FACTS

Sumandip Singh failed to tell clients or his staff that former lawyer Gerhard Albertus Pyper was not authorized to practise law and facilitated Pyper's unauthorized practice of law. Pyper attended at Singh's law firm as often as two to three times a week and used Singh's legal assistant to act as a liaison with Pyper's "clients." When Pyper's clients called Singh's firm they were transferred to Pyper. Pyper prepared legal documents using Singh's firm's letterhead.

Singh also engaged in unjustified attacks against other counsel, the judiciary and opposing parties. In a notice of application, he alleged that WorkSafeBC or its legal counsel was motivated by discrimination, had manufactured false evidence, had engaged in illegal and unethical conduct and had published false allegations in the media. Singh also filed affidavits to be used in litigation asserting that the courts were biased.

When one client learned that Pyper was unauthorized to practise law, she subsequently understood that Singh would assist her with her legal matter. Singh allowed Pyper to continue working on the matter. Singh attended a court hearing on behalf of the client but did not personally meet with the client, properly prepare for the hearing or inform the client of the outcome of the court hearing. Singh did not provide competent legal services to the client.

In the course of a Law Society investigation, Singh misled the Law Society by making numerous false statements, including that he never discussed client matters with Pyper, that Pyper was only in Singh's personal office on one occasion and that Singh did not know that Pyper remained involved in client matters.

DETERMINATION

The array of Singh's misconduct was substantial and enduring, and constitutes a marked departure from the behaviour that is expected from lawyers. All of the allegations in the citation (with the exception of client matters specified in section 1(b)) have been proven, and Singh has committed professional misconduct.

APPLICATION TO RECONSTITUTE HEARING PANEL

Singh applied to the president of the Law Society to adjourn the hearing, to reconstitute the panel to include a current practising Bencher and to hold the hearing in person.

As the jurisdiction to adjourn or to determine the procedure before the hearing panel is under the discretion of the hearing panel, the president made a decision only with respect to reconstituting the hearing panel. The hearing panel was originally constituted by the president to include former Bencher Jeff Campbell, QC, who has since been appointed a judge of the Provincial Court of BC. Singh made an application to add a sitting Bencher to the panel. He asserted that practising lawyers are better suited to assess current practice standards and he considered assessment by one's peers as an objective of the Law Society.

The president dismissed the application and ordered the hearing continue with the remaining two panel members. The president referred to the Law Society Rules, which say a panel is to be chaired "by a lawyer" and include a "Bencher" or a "Life Bencher." One of the remaining panel members is both a practising lawyer and a Life Bencher, which satisfies the Rules.

The president disagreed with Singh's objection to the composition of the panel, which suggested a public member of the tribunal ought not to have similar or equal say as a Bencher or lawyer member of the panel. The president reaffirmed the objective of the Law Society to ensure a public voice in tribunal decisions. (2020 LSBC 25)

APPLICATION TO ADJOURN THE HEARING

Singh sought to have the hearing postponed until it could be heard in a face-to-face format, as opposed to the virtual hearing format then in use, as he argued the evidence would not be effectively presented in a virtual hearing. He submitted that he has suffered personal difficulties, including the death of his father and some financial setbacks due to COVID-19, and these events caused him to become depressed. He requested time to seek counselling for his depression and to marshal evidence of the impact of his depression on the disciplinary action phase of this hearing.

The panel ordered that the hearing on disciplinary action be adjourned and the matter proceed by virtual format unless, by the date set for the hearing, the Law Society had returned to face-to-face hearings in the Law Society building. The panel ordered the matter to proceed as follows:

1. that the parties provide their availability for a new hearing date to the hearing administrator no later than seven days following the issuance of this decision;
2. that the parties make themselves available for a two-day hearing to commence no later than October 16, 2020;
3. that the parties exchange lists of documents they intend to rely upon and will-say statements of any witnesses they intend to call at the hearing no later than 30 days before the newly scheduled hearing date; and
4. that the scheduled hearing date be peremptory on Singh. (2020 LSBC 29)

DISCIPLINARY ACTION

The panel considered the very serious nature of Singh's misconduct. It noted that his misconduct happened many times over a period of several years, his lack of acknowledgement of the misconduct until the hearing, and the serious consequences to the client as a result of his behaviour. The panel also considered decisions in similar disciplinary cases but found that no other cases matched the level of misconduct Singh demonstrated.

Singh argued that his mental health should be taken into account, but no medical evidence was provided. The panel determined that,

due to the multiple instances of misconduct, rehabilitation of Singh should be of secondary importance to the need to protect the public and ensure public confidence in the legal profession.

The panel ordered Singh:

1. be suspended for two years; and
2. pay costs of $41,098.77.

Singh filed an application for a review of the disciplinary action decision and for a stay of the suspension pending the outcome of the review. He also applied for a further postponement of the commencement date of his suspension. The panel granted the extension of the commencement date of the previously ordered suspension to June 1, 2021, with the expectation that no further extensions of the commencement date of the suspension would be sought or granted. (2021 LSBC 15)

Singh has applied for a review of disciplinary action.

NATHAN SUTHA GANAPATHI

Vancouver, BC

Called to the bar: May 20, 1975

Hearing dates: November 21 and 22, 2019 and January 19, 2021

Court of Appeal: November 6, 2020 (2020 BCCA 340)

Panel: Michelle D. Stanford, QC (chair), Donald Amos (facts and determination only) and John D. Waddell, QC

Decisions issued: July 14, 2020 (2020 LSBC 36) and April 9, 2021 (2021 LSBC 14)

Counsel: Peter Senkpiel and Julia Lockhart for the Law Society; Henry Wood, QC for Nathan Sutha Ganapathi

FACTS

Nathan Sutha Ganapathi was retained by the birth parents of a girl who was placed in the care of foster parents a few days after she was born. The foster parents wished to adopt her and the birth parents were in favour of the adoption. The Director of Child, Family and Community Services (the "director") would not consent to the adoption and took the position that it was in the best interest of the child to be placed with adoptive parents in Ontario who had already adopted the child's two older siblings. In an effort to secure the adoption of the child, the foster parents retained counsel who made a series of Supreme Court applications, which were dismissed or struck.

Ganapathi represented the birth parents and joined a team of people who opposed the director's position. The team included Ganapathi, the foster parents, the foster parents' counsel, the birth parents and the father of one of the foster parents. Ganapathi provided legal advice to the foster parents and the father of the foster parent, in addition to his own clients.

Ganapathi filed a petition on behalf of the birth parents against the director, seeking to overturn all the steps taken to remove the child from the care of the birth parents. He also filed a petition jointly with the foster parents' counsel against the director, seeking a declaration that the child had already been adopted by the foster parents by way of a Métis custom adoption. The director applied to strike out these petitions as abuses of process.

The director arranged for the child to participate in a video conference with her sisters under the care of adoptive parents in Ontario. The child was accompanied by social workers. An audio recording was made of the video conference without the social workers' knowledge. Ganapathi received this audio recording from the foster parents' counsel. He believed the audio recording contradicted sworn evidence of the three social workers who had participated in the video conference.

The foster parents' counsel sent an email to Ganapathi, attaching a draft letter for counsel for the director. The letter alleged perjury by the social workers and that the director was acting in bad faith and suggested that "appropriate sanctions" may result if contested litigation continued. The letter said the foster parents and the birth parents would discontinue legal proceedings if the director consented to the foster parents adopting the child. Ganapathi reviewed the draft letter and expressed some concern about the threatening tone, but did not communicate to anyone that he did not approve of the letter. The foster parents' counsel sent the letter to the director's counsel.

The court struck Ganapathi and the foster parents' petitions as abuses of process and they were ordered to pay special costs.

DETERMINATION

The hearing panel found that Ganapathi was acting as co-counsel for the birth parents, the foster parents and the father of one of the foster parents, he was a clear participant in the strategy of how to leverage the team's position using the false affidavit of the social worker, and he made no decisive objection to the sending of the letter after reviewing it and, therefore, permitted it to be sent.

The panel determined Ganapathi attempted to resolve litigation in favour of his clients through improper means and that such conduct constituted professional misconduct.

COURT OF APPEAL DECISION

Ganapathi applied to the BC Court of Appeal for a stay of disciplinary proceedings pending the outcome of his appeal. He also sought a sealing order for the appeal. Ganapathi argued that a stay should be granted on the grounds that: (1) the appeal from the finding of his professional misconduct has merit; (2) having the disciplinary hearing proceed prior to the appeal would cause him irreparable harm; and (3) the balance of convenience favours Ganapathi.

The BC Court of Appeal held that the application for a stay of proceedings be dismissed and the application for a sealing order be granted. While the appeal has some merit, Ganapathi failed to demonstrate irreparable harm. Public confidence in the legal profession tilts the

balance of convenience in favour of the Law Society. The appeal contains sensitive and privileged information, and the application for a sealing order is uncontested.

DISCIPLINARY ACTION

The panel noted that this was serious misconduct that was planned and deliberate. It considered Ganapathi's professional conduct record that involved four conduct reviews, and the need to ensure the public's confidence in the integrity of the profession. The panel accepted that Ganapathi's main culpability stemmed from his failure to dissociate from an improper strategy when another lawyer proposed and implemented it.

The panel ordered that Ganapathi:

1. be suspended for two months; and
2. pay costs of $13,624.33.

JOHN (JACK) JOSEPH JACOB HITTRICH

Surrey, BC

Called to the bar: August 1, 1986

Discipline hearing: December 16 and 17, 2019

Written materials: December 3, 2020 and February 9, 2021

Panel: Steven McKoen, QC (chair), Anita Dalakoti and Gavin Hume, QC

Decisions issued: June 5, 2020 (2020 LSBC 26) and May 12, 2021 (2021 LSBC 16)

Counsel: Julia Lockhart for the Law Society; Peter Leask, QC, Russell Tretiak, QC and Mason Heller for John (Jack) Joseph Jacob Hittrich (facts and determination) and Hittrich acting on his own behalf (disciplinary action)

FACTS

John (Jack) Joseph Jacob Hittrich represented foster parents in matters related to their former foster daughter, who was under their care between July 2014 and December 2015.

A child protection trial was held to consider the care of the foster daughter. The foster parents were not parties to the trial but sought to become parties. Hittrich filed an application in Provincial Court for an order of guardianship of the foster daughter and joinder of that proceeding with the child protection trial. The judge declined the application and instead ordered that the child be returned to the care of her mother.

Hittrich made further applications related to this matter, including seeking access for the foster parents to the child. During the hearing, the Master asked the biological mother's counsel why a transition plan for the daughter's move was not ordered by the previous judge and stated that the transcript from the previous hearing should have been before her. She ordered the foster parents to have some access to the child.

The foster parents contacted Hittrich's office to ask whether they could obtain transcripts of the previous child protection trial. After a follow-up email, Hittrich's office confirmed that they had requested the transcripts.

Hittrich filed a notice of application on behalf of the parents requesting further access to their former foster daughter. A supporting affidavit included transcripts of the child protection trial. Each page of the transcripts had a notice stating "CFCSA – Restriction on Access" and on each cover page was a legend saying the same thing. The transcript contained frank testimony by the biological mother on certain issues in her life and the reasons behind her children having been taken into care.

The hearing for the application was held before the Master and the biological mother was not represented at the hearing. Hittrich referred to the content of the transcript. The biological mother objected to his use of the transcript and expressed concern that he even had access to it as she was under the impression that the transcripts were sealed. The Master ordered expanded access for the foster parents and ordered that the mother could not remove her daughter from the Lower Mainland.

The mother appealed the order. In a letter to Hittrich, her counsel expressed concerns respecting Hittrich's use of the transcripts, including that, because Hittrich's clients had been expressly denied joinder to the child protection proceeding, they should not have been permitted to access the transcripts. Hittrich gave various reasons to justify using the transcripts, including that the mother did not object to their use and that transcripts of an open court hearing are not covered by the confidentiality provisions of the *Child, Family and Community Service Act*. Hittrich later admitted he was mistaken and agreed that the mother objected to the use of the transcripts. The mother's counsel responded and raised a concern that Hittrich had told the Master he was permitted to use the transcripts because there was no court order preventing him from doing so, when there were applicable rules that prevented their use.

The appeal of the Master's order was heard by a Justice, who set aside the Master's order and did not order any contact between the foster parents and the former foster daughter. The Justice stated the transcript was used to cast the mother in a negative light and the foster parents should not have been able to obtain the transcript as a non-party to the proceedings.

The foster parents instructed Hittrich to appeal the Justice's order. Hittrich filed appeal books containing the affidavit to which the transcripts were attached. A Justice ordered that a doctor be appointed as an expert to prepare a report under s. 211 of the *Family Law Act*. Hittrich said he directed the foster parents to deliver an extra appeal book they had containing the transcripts to the doctor.

The mother's counsel emailed Hittrich and objected to the inclusion of the transcripts. Hittrich responded stating it was essential the doctor have all of the materials before the court, including the transcripts. The transcripts were delivered to the doctor. Hittrich wrote to the

doctor and suggested that, until the appeal of the Justice's order was resolved, she should not look at the transcripts.

DETERMINATION

The panel found that Hittrich's actions in filing an affidavit appending transcripts that were clearly marked as being subject to restrictions without inquiring about such restrictions, and subsequently filing the transcripts with an affidavit that may have exposed the identity of a child in a CFCSA proceeding, failed to meet the standard the Law Society expects of lawyers.

According to Provincial Court rules, only a party, a party's lawyer or a person authorized by a party, by a party's lawyer or by a judge may access files. As the judge did not grant the foster parents' application for joinder to the child protection trial, they were not parties in the trial and should not have been able to obtain the transcript.

The panel found that, by filing the appeal books with the transcripts in them after the Justice ruled that he and his clients should not have access to the transcripts at all, Hittrich deliberately failed to comply with the Justice's decision.

The panel found that Hittrich did not deliberately mislead the court — rather, the representations he made were reflective of his failure to inform himself of the relevant rules.

The panel found that Hittrich committed professional misconduct.

DISCIPLINARY ACTION

The panel noted that Hittrich did not deliberately mislead the court — rather, the representations he made were reflective of his failure to inform himself of the relevant rules. Hittrich's actions in filing an affidavit appending transcripts that were clearly marked as being subject to restrictions without inquiring about such restrictions, failed to meet the standard the Law Society expects of lawyers. The panel considered Hittrich's professional conduct record that involved conduct reviews and a finding of professional misconduct resulting in a three-month suspension.

The panel ordered that Hittrich:

1. be suspended for two months; and
2. pay costs of $12,985.19.

ERIC CHURK-MING CHOW

Vancouver, BC

Called to the bar: May 21, 2010

Written materials: March 19, 2021

Panel: Jennifer Chow, QC, chair, David Dewhirst and Nina Purewal, QC

Decision issued: May 20, 2021 (2021 LSBC 18)

Counsel: Kathleen Bradley for the Law Society; Michael P. Klein, QC for Eric Churk-Ming Chow

FACTS

In June 2019, Eric Churk-Ming Chow was charged with assaulting his common-law spouse. He entered a plea of not guilty, and the matter went to trial. In December 2019, Chow was found guilty of assault and was sentenced to a one-year conditional discharge. The judge rejected his claim of self-defence, stating that, while both parties exhibited childish behaviour, Chow assaulted his spouse in a serious way.

Since being charged, Chow has participated in individual and couples counselling. He explained that he hoped counselling would provide him and his spouse with the tools to communicate effectively and co-parent their son. His spouse submitted a letter of support, stating that he was working on becoming a more empathetic and understanding person, that she had gone back to school and that Chow was now the sole provider for her and their child. Chow has expressed remorse and deeply regrets his behaviour.

DETERMINATION

The Law Society submitted that, based on the agreed statement of facts and Chow's admissions, a finding of conduct unbecoming the profession was appropriate. Dishonourable or criminal conduct on the part of a lawyer reflects adversely upon the integrity of the profession and is likely to impair a client's trust in lawyers. It further submitted that the appropriate disciplinary sanction is a fine of $12,000. Chow admitted that his conduct was unbecoming the profession and consented to the fine.

The panel found that Chow had committed conduct unbecoming the profession.

DISCIPLINARY ACTION

The nature and gravity of Chow's misconduct was serious, as it involved an assault against an intimate partner. However, the panel accepted the Law Society's submission that the assault was at the lower end of the spectrum, as the spouse was not physically injured and there was no indication that the assault was part of a pattern of such misconduct.

The panel ordered Chow to pay a fine of $12,000.

STEPHEN JOHN BRONSTEIN

Vancouver, BC

Called to the bar: May 22, 1998

Hearing date: May 26, 2020

Decision issued: May 20, 2021 (2021 LSBC 19)

Hearing panel: majority decision: David Layton, QC and J. Paul Ruffell; dissenting decision: Karen L. Snowshoe (chair)

Counsel: William Smart, QC and Trevor Bant for the Law Society; Gerald Cuttler, QC for Stephen John Bronstein

FACTS

From 2009 until February 2015, Stephen John Bronstein acted for residential school survivors who made Independent Assessment Process (IAP) claims. Over this period, Bronstein allowed Ivon Johnny, whom he contracted to introduce him to potential clients and assist claimants with completing their IAP applications, to have unsupervised access to vulnerable clients. Bronstein also failed to investigate properly complaints that Johnny, who was paroled after being incarcerated for 21 years for first degree murder, was asking clients for money from their settlements.

Over a similar period of time, Bronstein failed to serve clients in a conscientious manner and to provide the quality of service expected of a competent lawyer in a similar situation. He delegated duties to explain his firm's contingency fee agreement, assess the merits of clients' claims and assess the relevance of documentary evidence to someone who was not a lawyer. His clients generally were not provided with a copy of their signed contingency fee agreement or supporting documents. He certified that he had reviewed completed IAP application forms when he had not. He did not send regular reporting letters or otherwise update clients. After certifying a client's claim over the telephone, he often did not meet with the client again in person until days before the hearing. For nearly four years, he did not sufficiently direct his staff to ensure they documented communications with clients, including messages, phone calls and meetings. He appended or had his staff append declarations to IAP applications that were false and affixed client signatures to revised documents that the clients had not read or reviewed.

ADMISSIONS AND DETERMINATION

Bronstein made a conditional admission of professional misconduct and proposed a disciplinary penalty of a one-month suspension, that he be referred for a practice review of files opened after January 1, 2017, that he commit in writing not to act for any Sixties Scoop claimants and that he pay costs of $4,000. The Discipline Committee accepted the admission and proposed penalty and directed discipline counsel to recommend them to the hearing panel for acceptance.

The hearing panel found that Bronstein's failure to exercise diligence in hiring and supervising Johnny, his inadequate investigation into complaints about Johnny demanding money from his clients, his providing inadequate service to 17 clients regarding client communications and taking their instructions and his handling of declarations signed by clients were serious misconduct. The panel found that Bronstein's conduct was a marked departure from the standard that the Law Society expects of lawyers and constitutes professional misconduct.

DISCIPLINARY ACTION

Majority decision (Layton and Ruffell)

The majority of the panel accepted the proposal on the basis that, while otherwise unduly lenient, it comes within the range of fair and reasonable outcomes because, without Bronstein's conditional admission, the Law Society would have difficulty proving the allegation at a contested hearing.

The majority considered that the nature of the misconduct, viewed in a proper historical, social and legal context, is of a very serious nature and that Bronstein exposed his very vulnerable clients to a risk of substantial harm. Because Rule 4-31 requires a hearing panel to either accept or reject a conditional admission and proposed disciplinary action, the panel cannot substitute a different determination or action. If the panel rejects the conditional admission and proposed disciplinary action, the Rules require that the panel refer the matter back to the Discipline Committee to instruct Law Society counsel to set a date for the hearing of the citation.

The majority said that a hearing panel does not determine whether it would have imposed the same disciplinary action. Rather, the proposal is accorded deference and will be accepted if the panel is satisfied that the proposed admission is appropriate and the proposed disciplinary action is within the range of fair and reasonable outcomes in the circumstances. The majority would have agreed with the dissenting panel member that suspending Bronstein for one month does not come within the range of fair and reasonable outcomes but for the fact that the Law Society would have difficulty proving the allegations absent Bronstein's conditional admission, and what tips the balance is that if the proposal was rejected there was a good or real possibility that Bronstein would face no discipline at all for his misconduct.

The majority ordered that Bronstein:

1. be suspended for one month;
2. be referred for a practice review for files opened after January 1, 2017;
3. commit in writing that he is not acting and will not act as counsel or agent for any Sixties Scoop claimants; and
4. pay costs of $4,000.

Dissenting decision (Snowshoe)

The minority agreed with the facts and evidence set out in the majority decision and that Bronstein's admissions are best characterized as professional misconduct, but considered the disciplinary action to be grossly inadequate and that it should be rejected. Bronstein's conduct is egregious and resulted in some of the most highly vulnerable members of society being subjected to continued harm and exploitation. The minority disagreed with the majority that deference is owed to the proposal.

The minority reviewed the historical, social and legal context within which Bronstein's misconduct took place, including how the Indian Residential Schools Settlement Agreement arose and was administered. Noting the purpose of the IAP, the minority detailed the expectations of lawyers working in it, including competency, what

is required upon initial contact, completing contingency fee agreements, working with clients and facilitating their healing process, legal fees and use of form fillers.

The minority also reviewed the circumstances and disciplinary outcomes in seven investigations of lawyers involving similar allegations and issues in this matter. One investigation, involving an Ontario lawyer, resulted in the Law Society of Ontario initiating a review panel that made recommendations for addressing barriers for Indigenous persons in the Society's regulatory and hearing process. The minority recommended that the Law Society of British Columbia also adopt a number of recommendations regarding competence and training of employees, external counsel and Tribunal members, as well as culturally safe alternatives to its adversarial investigative and hearing process, including permitting a witness to testify with a support worker nearby, to testify via closed circuit television or behind a screen, victim statements to be admitted as evidence for the truth of its content and ceasing an examination or cross-examination of a witness in certain circumstances.

In the minority's view, the Law Society had a number of options that it could implement in order to allow the safe participation of vulnerable witnesses like Bronstein's former clients and others from their community, and had the hearing panel rejected the proposed disciplinary action and ordered the matter proceed to a hearing, the Law Society would have elicited public confidence in its regulatory process and in the administration of justice knowing that it had done everything in its power to ensure safe participation of vulnerable and marginalized persons.

DANIEL MARKOVITZ

Vancouver, BC

Called to the bar: May 14, 1993

Hearing date: November 3, 2020

Panel: Ralston S. Alexander, QC, chair, David Dewhirst and Thomas L. Spraggs

Decision issued: May 28, 2021 (2021 LSBC 22)

Counsel: Morgan L. Camley for the Law Society; David G. Milburn and Nicholas J. Preovolos for Daniel Markovitz

FACTS

Daniel Markovitz was practising as a sole practitioner in the area of criminal law and was retained in a matter on a pro bono basis pending an application for a court-ordered retainer. He attended the accused's first court appearance as counsel and was provided with a package of disclosure material by provincial Crown counsel. The materials were sensitive and were subject to an implied undertaking to the court that the contents would not be disclosed for any purpose other than defending the accused. His retainer ended one month after it began when the accused retained new counsel.

Markovitz was later vacationing in Hawaii when he was contacted by a newspaper reporter seeking information about the accused. He said he was no longer counsel for the accused. He verified information to the reporter that was part of the information contained within the Crown disclosure, in breach of the implied undertaking. The reporter later published a story identifying him as the source for confirming information contained in the Crown disclosure.

ADMISSION AND DETERMINATION

Markovitz admitted he committed professional misconduct in disclosing confidential information from the Crown disclosure and agreed to the Law Society's proposed disciplinary action of a $15,000 fine.

The hearing panel agreed that his conduct constituted professional misconduct and considered whether the disciplinary action proposed was appropriate. It considered the serious nature of the misconduct, his significant professional conduct record, including numerous engagements with the Practice Standards Committee, several conduct reviews and a previous citation, the impact on the victim and the need to maintain public confidence in the integrity of the profession, particularly in preserving client confidentiality.

DISCIPLINARY ACTION

The panel accepted the proposal and ordered Markovitz to pay a $15,000 fine.

NARINDAR PAL SINGH KANG, QC

Surrey, BC

Called to the bar: May 17, 1991

Written submissions: January 28 and March 3, 19 and 22, 2021

Decision issued: June 2, 2021 (2021 LSBC 23)

Panel: Kimberly A. Henders Miller (chair), Lisa R. Feinberg and John Lane

Counsel: Mandana Namazi for the Law Society; Peter Leask, QC for Narindar Pal Singh Kang, QC

FACTS

Narindar Pal Singh Kang, QC got into an altercation with his spouse after returning home from a social function where he had consumed alcohol. The argument escalated and Kang struck his spouse as well as used abusive language. The police came after a 911 call from the spouse, who was not injured as a result of the altercation. Kang was charged with assault and mischief. Kang reported to the Law Society that he had been charged with a criminal offence.

Kang appeared in court in relation to the criminal charges where he agreed to enter a common-law peace bond imposed for six months. It required him to keep the peace and be of good behaviour, not to attend at his spouse's residence and to immediately leave his spouse's

presence if requested. The Crown directed a stay of proceedings in relation to the charges against Kang.

ADMISSION AND DETERMINATION

Kang admitted that his conduct constituted conduct unbecoming the profession. The Law Society and Kang jointly submitted that the appropriate disciplinary action would be a two-month suspension and costs of $1,000.

The panel agreed and determined Kang engaged in conduct unbecoming the profession. It considered the serious nature of intimate partner violence, character reference letters provided by Kang, his acknowledgement of his actions and remorse and the range of penalties in similar cases.

DISCIPLINARY ACTION

The panel agreed that the sanction proposed by the Law Society and Kang is fair and reasonable and ordered that Kang:

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

AENGUS RICHARD MARTYN FOGARTY

Called to the bar: August 5, 1987

Suspended: July 9, 2018

Ceased membership for non-payment of fees: January 1, 2020

Hearing dates: November 18 and 19, 2019 and October 19, 2020

Written submissions: April 28 and May 18, 2021

Hearing panel: Philip Riddell, QC (chair), Brendan Matthews and Carol Roberts

Decisions issued: January 5 (2021 LSBC 01) and June 9, 2021 (2021 LSBC 25)

Counsel: Kathleen Bradley for the Law Society; Aengus Richard Martyn Fogarty appearing on his own behalf

PRELIMINARY APPLICATIONS

Aengus Richard Martyn Fogarty applied to adjourn the continuation of a hearing that commenced on November 18, 2019. He stated that his files were in his home office in Galway, Ireland, and he was unable to travel from the Czech Republic to Ireland without isolating for 14 days due to the COVID-19 pandemic. Even if he were to travel there, his family members would be vulnerable and also be required to isolate.

During the hearing, the evidence was completed and, in the course of its closing submissions, the Law Society sought to adjourn to consider a situation. The Law Society applied to reopen the case and alleged that two of the exhibits in Fogarty's affidavit were fabrications.

Fogarty had not stated what in his files would answer the allegation that the two exhibits were fabrications. The hearing panel dismissed the application to adjourn and stated that the hearing would proceed via video-conference. (2020 LSBC 44)

Fogarty applied to the panel to reconsider its earlier decision. He did not provide any additional material to justify a reconsideration. He again raised the issue of his inability to travel from the Czech Republic to Ireland to access his files due to the pandemic. He did not specify how these materials would be relevant to the Law Society's application to reopen the hearing.

The hearing panel dismissed the application for reconsideration. (2020 LSBC 50)

FACTS

An individual from Washington state provided a bond to Fogarty for a purported sale for US$10 million. Fogarty was to receive a 10 per cent commission. Fogarty provided the client with a receipt, showing a physical address in London, United Kingdom, and a telephone number with a BC area code. The client complained to the Law Society about Fogarty's involvement in the sale of Chinese historical bonds and sought the return of the bond. The Law Society contacted Fogarty, and the client subsequently advised that the bond was returned.

The Law Society initiated a separate complaint against Fogarty dealing with the sale of historical bonds. The Law Society wrote to Fogarty to request materials, stating he would be suspended if he failed to comply with the requests for information. Fogarty provided sarcastic responses to some of the Law Society's questions, and he was subsequently suspended for failing to respond.

The Law Society became aware of another individual who contacted the Law Society in October 2015 regarding Fogarty's involvement in bonds. Although the individual provided documents to the Law Society, it did not make Fogarty aware of its communication with this individual until a citation had been issued.

The Law Society sent another letter to Fogarty with additional requests for information on when he became involved with historical bonds, his dealings with several clients, the names of his bank contacts and whether he had dealings with the individuals or entities in enclosed documents relating to fraud cases, charges and investigations.

Fogarty responded saying the document provided by the Law Society had no application to Chinese bonds. He criticized the Law Society's research. He did not respond to questions asking with whom he had dealings regarding historical bonds or to requests for details on bank contacts, files and records relating to his involvement in historical bond matters. He did not provide a list of places to which he had travelled.

The Law Society continued to send requests for information. Fogarty responded, saying he had no knowledge regarding some of the matters he was asked about. The Law Society staff lawyer conducting the

matter did not consider his response as full and substantive. The matter was referred to the Discipline Committee.

DETERMINATION

The panel found Fogarty committed professional misconduct in failing to respond in a substantive manner to two of the Law Society's requests for information and documents in his possession dealing with his client and his dealings with the bond.

The panel found he did not fail to respond in a substantive manner to the requests about the second matter that the Law Society was investigating. The panel expressed concerns the Law Society had not directed Fogarty's attention to this separate matter until the citation.

The panel dismissed an allegation that Fogarty destroyed records relating to transactions in the second matter. The panel found Fogarty had sent documents to the individual prior to the citation, and the Law Society did not draw attention to this matter until then.

The panel also found that, in creating the receipt, Fogarty was not representing or implying he was qualified to practise or act as a barrister or solicitor in England. The panel dismissed this allegation of the citation.

DISCIPLINARY ACTION

The Law Society sought to have Fogarty disbarred on the basis of ungovernability or, in the alternative, to suspend him until he has responded with full and substantive answers to the Law Society's requests with an additional one-month suspension to be served. Fogarty did not provide submissions.

The panel examined the issue of ungovernability and determined that there was no pattern of misconduct and Fogarty did not have any disciplinary history except for administrative suspensions related to the current citation. The panel concluded that the additional one-month suspension the Law Society sought was not justified.

The panel ordered Fogarty to:

1. be suspended starting immediately and ending when he has provided full and substantive responses to the Law Society's requests;
2. pay a fine of $7,000; and
3. pay costs of $12,354.75. ❖

Conduct reviews ... from page 19

engagement letters to make sure that corporate clients and their representatives understand that a lawyer who represents a corporation does not represent the interests of individual shareholders, directors, officers or representatives. (CR 2021-32)

BREACH OF TRUST ACCOUNTING RULES

A lawyer authorized the withdrawal of residual trust balances in 10 conveyancing matters totalling $436.61, purportedly as payment of additional fees or disbursements when no amounts were owed by the clients, as well as in two conveyancing matters totalling $9.24 as miscellaneous expenses when those funds ought to have been forwarded to the developers as interest earned on deposits, contrary to Law Society Rules 3-64(1) and 3-65 and section 69(1) of the *Legal Profession Act*. The lawyer advised that he did not instruct his staff to transfer amounts to his general account, as he knew that the firm had no entitlement to the funds. The lawyer failed to directly supervise his staff, contrary to rule 6.1-1 of the *Code of Professional Conduct for British Columbia*. The lawyer has taken responsibility. He reviewed his files to ensure there were no other accounting errors, he now carefully reviews trust cheques and supporting documents before signing them, he has hired a new accountant, his new firm protocols require all small residual amounts be dealt with immediately, the firm holds regular staff meetings to discuss their obligations as professionals and he attends continuing legal education courses each year. (CR 2021-33)

INSOLVENCY / MISUSE OF TRUST ACCOUNT

After becoming insolvent, a lawyer failed to immediately inform the executive director of his insolvency, operated a trust account without the executive director's prior permission and failed to have a second signatory, contrary to Law Society Rule 3-51. The lawyer also permitted the use of his trust account to receive and disburse approximately $65,500 and US$150,000, without providing legal services in relation to the transaction, and failed to make sufficient inquiries as to the source of the funds. He further failed to promptly deposit trust funds into his trust account, contrary to Rule 3-58, and deposited retainer funds into general accounts without first performing the services and delivering a bill to the client, contrary to Rule 3-72(3). The lawyer acknowledged that he made several errors when he began his practice, and he is planning to join two other lawyers in an independent association of lawyers. He has taken courses on money laundering and trust accounting and is in weekly contact with a senior lawyer who is mentoring him. (CR 2021-34) ❖

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The Law Society of British Columbia

845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9
Telephone 604.669.2533 | Facsimile 604.669.5232
Toll-free 1.800.903.5300 | TTY 604.443.5700

www.lawsociety.bc.ca

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