The Law Society of British Columbia

Benchers' Bulletin

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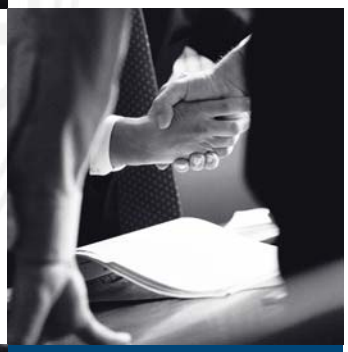

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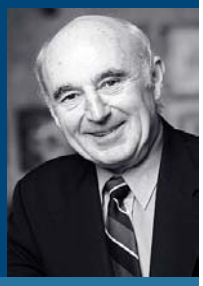

President's View

North America – last stand for an independent bar?

by Howard Berge, QC

At the Commonwealth Law Conference in Melbourne this past April, Executive Director Jim Matkin and I observed what can only be described as the precipitous decline of the common law and of the independence of the legal profession.

Governments of every Australian state and of New Zealand have set up commissions to oversee and review discipline decisions of law societies. The Tasmanian Attorney General intends to take over the investigation of complaints and lawyer discipline completely. The New South Wales government has given the 18,000-member Law Society until next July to separate its regulatory and member service functions so that the latter can be delivered on a voluntary basis. (It would be speculative to suggest that this is a precursor to taking over the discipline function completely but it would, in effect, result in a non-compulsory CBA-like function.) The Law Society of Queensland was recently dealt a serious blow as the state government moved to transfer the Society's investigatory and prosecutorial role in lawyer discipline to a new Legal Services Commission.

In each case the story is different, but some underlying themes emerge. In Queensland, controversy erupted over the Law Society's handling of complaints, especially in relation to one law firm, which prompted the state government to bring in reforms under the banner of public accountability. All of this speaks to the need for law societies to behave in a manner beyond reproach and also to defend the principle of self-regulation with conviction and integrity. Without question, our work as a Law Society must be shown as serving the public interest — our primary statutory mandate — and not our own interests as lawyers. This is fundamental to preserving public confidence in professional self-regulation.

While we traditionally have taken comfort in our common law roots as a profession, United Kingdom barristers and solicitors have not in fact fared much better than their counterparts "down under" in maintaining professional independence, and are subject to similar state review mechanisms. On another front, they face the threat of losing the common law system itself, as the UK joins with the European Community. There appears to be no discernible outcry over the gradual displacement of the adversarial system by the inquisitorial model and no deep examination of the safeguards necessary in such a transition. Where are the lawyers at this critical juncture? Here is a taste of coming changes in the United Kingdom:

- removal of the requirements of evidence, hearings and appeal procedures in extradition;
- relaxation on rules against hearsay in criminal cases;
- abolition of trial by jury in some cases, such as in serious fraud and complex cases;
- abolition of habeus corpus, allowing remands in custody without charges;
- removal of proof "beyond a reasonable doubt;"
- removal of necessity to prove intent in certain classes of fraud.

It appears that our best hope of preserving fundamental legal protections in the criminal law and in legal processes in Canada, and of reclaiming them for the non-EU Commonwealth countries, is to ally ourselves in some manner with the United States.

Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articled students on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities.

The views of the profession on improvements to the *Bulletin* are always welcome – please contact the editor.

Additional subscriptions to Law Society newsletters may be ordered at a cost of $50.00 (plus GST) per year by contacting the subscriptions assistant. To review current and archived issues of the *Bulletin* online, please check out the "Resource Library" at www.lawsociety.bc.ca.

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The Supreme Court of Canada has described the profession's independence from the state as "one of the hallmarks of a free society." I believe that, in the United States, as here, independence of the legal profession is a constitutionally protected value. This is not for the benefit of lawyers, but their clients. A cornerstone of our justice system is that people facing prosecution by the state can have faith in the independence of the judges as decision-makers and in the independence of their lawyers to defend their legal rights.

To begin these discussions, the Executive Director and I, and possibly our Vice-Presidents, will attend the American Bar Association meeting in August. We believe that a number of elected and executive officers of the Australian states and of New Zealand will also be at that meeting.

Our Law Society is well positioned to open up this dialogue. We recently led in a court challenge on federal proceeds of crime legislation, to prevent infringement of solicitor-client privilege, and on the government's unilateral closing of provincial courthouses, to protect the independence of the judiciary. Given the developments we now see on an international front, it is clear our vigilance is necessary and may encourage other law societies and state bar associations out of passivity.

This is not to say that law societies should be immune from criticism or that we should resist reform. Quite the contrary. We need to continually renew public trust in the legal profession, such as by demonstrating the fairness and transparency of our standards and regulatory processes (see, for example, our recently expanded discipline disclosure rules detailed later in this *Bulletin*). And it would be foolish not to acknowledge that some provincial initiatives, such as the appointment of lay Benchers, have benefited our profession.

But some of the changes we are seeing in other Commonwealth countries go far beyond what is reasonable for public confidence — attacking the core of professional independence. If reform places lawyers under state control, that effectively sacrifices the right of clients to independent advice and representation. That is not reform that builds public confidence. It is time to take a stand.✧

National Mobility Agreement in effect July 1

The Law Society of BC and five other provincial law societies have passed rules, in effect July 1, 2003, that make it easier for lawyers to travel and work across provincial boundaries. The rules give most lawyers greater scope to practise law temporarily in another province without the need to obtain an inter-jurisdictional practice permit and also ease the call and admission requirements for lawyers who wish to move permanently from one province to another.

Temporary practice in another province — up to 100 days in a calendar year

Under the new national mobility regime, a BC lawyer will generally be entitled to practise temporarily in another reciprocating jurisdiction for a cumulative period of up to 100 days within a calendar year. As of July 1, the reciprocating provinces are BC, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia. Law societies in each of these provinces have signed the national mobility agreement and adopted new rules to give effect to the agreement.

The Law Society of Newfoundland plans to participate in the mobility scheme but must await enabling legislative amendments. The Barreau du Québec may also join at some later date, but must first receive various approvals and will likely require separate rules, in recognition of differences between the legal systems of Quebec and the common law provinces.

While the mobility rules are essentially the same in all reciprocating provinces, a BC lawyer should read and be familiar with the specific rules in each province in which he or she intends to practise.

In BC, the new mobility provisions are set out in Part 2 of the Law Society Rules, which governs both inter-jurisdictional practice and call and admission. The rules are included in the *Member's Manual* amendment package in this mailing and online in the Resource Library/Rules section of the Law Society website at www.lawsociety.bc.ca.

Temporary practice in another province without a permit

Any lawyer wishing to practise temporarily in another reciprocating province under the new mobility rules may do so without applying for a permit, provided he or she:

- carries professional liability insurance that is reasonably comparable in coverage and limits to that required by the host law society and extends to the lawyer's practice in the host jurisdiction;
- has defalcation compensation coverage that extends to the lawyer's practice in the host jurisdiction;

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Mobility Agreement … *from page 3*

- is not subject to conditions or restrictions imposed as a result of discipline or competency proceedings*;
- is not the subject of criminal or disciplinary proceedings* in any jurisdiction;
- has no disciplinary record* in any jurisdiction; and
- has not established an economic nexus with the host jurisdiction.

* *Discipline or competency proceedings refer to formal Law Society hearings. "Disciplinary record" is a defined term within the rules and encompasses actions taken or restrictions imposed as a result of discipline proceedings.*

If a lawyer from one reciprocating province wishes to practise temporarily in another reciprocating province, but cannot meet these criteria, the lawyer must apply to the law society in the jurisdiction the lawyer intends to visit for an inter-jurisdictional practice permit.

What counts towards the 100-day limit?

A lawyer who plans to offer services in another reciprocating province under the new mobility rules is required to record the number of business days in which he or she provides legal services in that province and be prepared to prove compliance with the rules. For this purpose, a business day includes a partial day, a statutory holiday and a weekend day.

It is important to note that, under these rules, a lawyer is practising law in a province if providing legal services that relate to the laws of that province, regardless of the lawyer's physical location. For example, if a lawyer gives legal advice with respect to the laws of BC, even by email or telephone from outside BC, that time must be included in the 100-day limit. Conversely, if a lawyer from another province is in BC, but provides services that relate entirely to the laws of his or her home province, the time spent on those services would not count toward time in practice for the purpose of calculating the 100-day limit in BC. Lawyers should maintain accurate activity and time records for the purpose of verifying compliance with the rules.

If a lawyer visits a province and provides legal services in relation to the laws of Canada (for example, advice or representation on criminal law), that time will count in the calculation of the

100-day limit in that province. However, there is an exception when it comes to appearances before federal tribunals. A lawyer need not count time spent appearing or preparing to appear before the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, a federal administrative tribunal, service tribunals under the *National Defence Act* or the Court Martial Appeal Court of Canada. Time spent appearing before provincially constituted courts and tribunals (including the superior courts) does count toward the 100-day limit.

As a transitional provision, lawyers need only count days between July 1 and December 31, 2003 when tracking the "100-day" limit for the whole of 2003.

The law society in each reciprocal province will allow visiting lawyers to apply for an extension of time beyond 100 days, and an application may be granted if not contrary to the public interest. A lawyer who cannot obtain an extension must apply for an inter-jurisdictional practice permit.

As already noted, a lawyer is not entitled to take advantage of the temporary mobility rules by practising in another province if he or she has established an "economic nexus" in that province. At that point, it becomes necessary for the lawyer to apply for membership with the local law society. A lawyer establishes an "economic nexus" in another province by doing something that is inconsistent with practising in that province on only an occasional basis. This includes practising in the province for more than 100 days within a calendar year, opening an office or a trust account in the province, holding out as willing to accept new clients in that province or becoming resident in the province. The mere fact that a visiting lawyer practises from an office affiliated with the lawyer's law firm in the home jurisdiction is not, for that reason alone, enough to establish an economic nexus under the rules.

Other conditions of temporary practice

Lawyers who practise temporarily in another province are subject to the provisions of the governing legislation, law society rules and professional conduct handbook (or code of ethics) in that province in so far as applicable. The local law society can review complaints or take disciplinary action against a visiting lawyer, and it will be a matter for the home and host law societies to determine which will

assume the responsibility.

A visiting lawyer may not open a trust account or handle trust funds in the host province and may not hold out as qualified or willing to practise in the province, other than on an occasional basis under the mobility rules. Any trust funds involved in the visiting lawyer's practice of law must accordingly be handled by another lawyer who is a member of the local law society or, alternatively, handled through the visiting lawyer's trust account in the home jurisdiction (Rule 2-16(1)(a)).

Practice of lawyers between reciprocating and non-reciprocating provinces

The law societies of the three territories (Northwest Territories, Yukon Territory and Nunavut) have opted not to sign the national mobility agreement because they are concerned it would have a negative economic impact on their local bar. The Barreau du Québec intends to join the scheme, but has not yet done so, and the Chambre des Notaries du Québec continues to work with participating provinces to make special provisions for temporary mobility that are consistent with the unique role of notaries within the civil law system of Quebec.

BC lawyers who plan to practise temporarily in these non-reciprocating jurisdictions should carefully review the rules that apply since most non-reciprocating law societies may still require inter-jurisdictional practice permits and fees for temporary practice.

BC lawyers travelling to Alberta, Saskatchewan and Manitoba to practise, and lawyers from those provinces coming to BC, have previously been able to do so without a permit for up to six months in any 12-month period under a "western mobility protocol" adopted in 2001. The new national mobility rules in each of these provinces will supercede the western mobility protocol and previous inter-jurisdictional practice rules.

Reciprocating provinces under the national mobility agreement are now co-operating on a national registry of practising lawyers (Rule 2-17.1). The purpose of the registry is to allow each law society to respond to basic information requests about visiting lawyers from other provinces. For example, if a BC lawyer or a member of the public were to enquire about a visiting lawyer from Alberta, the Law Society of BC will be able to consult the database in order to confirm the lawyer's name, practice address, call date and insurance status in Alberta. To obtain further information about the lawyer, the person making the enquiry would need to contact the Law Society of Alberta directly.

Call and admission in another jurisdiction

Lawyers who apply for call and admission in another reciprocating province no longer need write transfer examinations but must instead comply with a prescribed reading requirement. Lawyers coming to BC must accordingly certify that they have read and understood the *Legal Profession Act*, Law Society Rules, *Professional Conduct Handbook* and specified parts of the Professional Legal Training Course materials, including statutory provisions.

There are important restrictions on who may apply to transfer under the new provisions. For example, the

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Coming to or leaving BC: Resources for lawyers on inter-jurisdictional practice

Visiting lawyers to BC: For more on the new inter-jurisdictional practice rules in BC, see:

- Part 2 of the Law Society Rules, set out in the enclosed *Member's Manual* amendment package and available online in the Resource Library / Rules section of the Law Society website at www.lawsociety.bc.ca; and
- Frequently Asked Questions, available in the Resource Library / Forms section of the Law Society website.

You can direct further questions on the new mobility rules in BC to Lesley Small, Supervisor, Member Services (lsmall@lsbc.org).

BC lawyers visiting other provinces: For more on the inter-jurisdictional practice and transfer rules that apply in other provinces, check the law society rules in those provinces. These are the reciprocating provinces under national mobility, in addition to BC:

Law Society of Alberta (www.lawsocietyalberta.com)

Law Society of Saskatchewan (www.lawsociety.sk.ca)

Law Society of Manitoba (www.lawsociety.mb.ca)

Law Society of Upper Canada (www.lsuc.on.ca)

Nova Scotia Barristers' Society (www.nsbs.ns.ca)✧

Disclosure and Privacy Task Force

Discipline rule changes – greater transparency over process, greater protection for privilege

The Benchers have adopted a number of rule changes recommended by the Disclosure and Privacy Task Force to clarify what discipline information can be publicly disclosed, to allow for more flexible dissemination of certain discipline information — such as through the Law Society website — and to provide specific protections for confidential, privileged and third-party information in the discipline process: see Parts 4 and 5 of the Law Society Rules as amended.

The Disclosure and Privacy Task Force, chaired by Second Vice-President Peter Keighley, QC, has worked steadily over the past year to provide the Benchers with policy options and recommendations "for balancing the Law Society's obligation to be open and transparent against the requirements of the law, considerations of privacy and the efficacy of the Law Society's duties under the *Legal Profession Act*."

In fulfilling this mandate, the Task Force plans to review disclosure and privacy issues in all major regulatory areas. The Law Society rules on the discipline process and hearings were reviewed first.

Publication of citations and hearing reports on the web

The amended rules allow publication on the Law Society website of both upcoming hearing dates and discipline citations. (Copies of Law Society citations and discipline hearing reports are currently available in hard copy form on request.) Privileged, confidential and third party personal information in the text of a citation will be removed prior to posting: Rule 4-16(4).

The Rules have also been amended to authorize publication on the Law Society website of the full text of discipline hearing reports and of admissions to the Discipline Committee under Rule 4-21. These documents will be posted on a "current reports" page in a new discipline section of the site for six months or until completion of all aspects of the penalty imposed, whichever is longer. The reports will then form part of a consolidated archive of decisions: Rule 4-48(4).

The new discipline section of the Law Society website is scheduled for introduction this Fall.

Anonymous publication orders

The lawyer's name is published as part of a hearing report, unless there is an order for anonymous publication of a case.

While the rules previously permitted a lawyer to apply for an order that a discipline decision not be published to the profession, there was no clear basis on which such applications should be granted, nor was there a clear rationale for distinguishing the circumstances in which a lawyer could apply for non-publication as opposed to anonymous publication (in which the lawyer is not identified). The Task Force was concerned that non-publication orders reduced the transparency of the Law Society's discipline process and restricted access to precedents. Under the new rules, non-publication applications are no longer available.

There will continue to be anonymous publication of discipline decisions in which all counts of a citation are dismissed, unless the lawyer wishes his or her name published: Rule 4-38.1(2). In all other cases, a discipline hearing panel has discretion to order anonymous publication only if two conditions apply: 1) the lawyer has not been suspended or disbarred, and 2) publication will cause grievous harm to the lawyer or another identifiable individual that outweighs the interest of the public and the Society in full publication: Rule 4-38.1(3).

Rule 4-38.1(4) now requires that an application for anonymous publication be made no later than 7 days after issuance of the panel report on fact and verdict.

Protection of confidentiality and privilege in hearings

As a means of ensuring the protection of privileged and confidential information in hearings, Rule 5-6(2) allows a hearing panel to order, by application or on its own motion, that a hearing or portion thereof be held *in camera* to prevent disclosure of personal, privileged or confidential information. Rule 4-27(5) has also been amended to require that such issues be discussed at pre-hearing conferences.

The Rules now allow public access to hearing exhibits, at the expense of the person making the request and subject to removal of privileged information or other information specified by the panel: Rule 5-7(2).

Rule 5-6(4) provides that no one is permitted to photograph, record or broadcast in the hearing room while a hearing is proceeding without the panel's permission, which may be given on conditions or restrictions.

The Benchers have also adopted guidelines for naming persons other than the lawyer in hearing reports. These guidelines are intended to help protect the identity of persons such as

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Admission rules

New BC articling agreement and checklist in effect August 18

As of August 18, each lawyer who begins serving as the principal to an articled student in BC must enter into a newly approved form of articling agreement with that student. Under revised rules, the principal and student must jointly file that agreement with the Law Society at the commencement of articles and subsequently file a mid-term progress report and a final report to certify completion of their respective obligations under the agreement: see new Law Society Rules 2-32.1 and 2-48.

The articling agreement is one of several reforms recommended by the Law Society's Admission Program Task Force and adopted by the Benchers this Spring. To improve the overall quality of articles, the Task Force concluded that all students should obtain during articles specific experience in lawyering skills, pursuant to a new *Articling Skills and Practice Checklist*, and experience in at least three areas of practice. The Task Force recommended that principals and students be required to file with the Law Society:

- an articling agreement, incorporating references to the checklist, at the commencement of articles,
- a joint mid-term report, accompanied by a plan for complying with the articling agreement by the end of the student's articles, and
- a joint final compliance report.

The new form of articling agreement and articling checklist, as approved by the Credentials Committee in May, are available in the Resource Library/Forms section of the Law Society website at www.lawsociety.bc.ca. The mid-term and final compliance reports are currently in development, and all principals and articled students will be advised as soon as they become available.

The Law Society will accept the previous form of articling agreement only until August 17, 2003. Principals and students entering into articles on or after August 18, 2003 must use the new form of articling agreement.

Law firms in the downtown core of Vancouver that are required by Rule 2-31 to keep open all offers of articles they make until noon on August 18 must accordingly use the new form of agreement when concluding offers.

The new articling agreement is designed to facilitate communication between students and their principals during articles to ensure that students meet all key articling requirements. The agreement may be modified by the parties to meet specific requirements of a law firm, provided that the additional terms are not inconsistent with the spirit of the rest of the agreement.

The articling checklist, referenced in the agreement, sets standards against which the progress of a student can be measured during the course of articles. Students must obtain practical experience and training in a minimum of three areas of practice, as broadly described in the checklist. The agreement also sets out mentoring, ethics and practice management requirements.

Lawyers and students will wish to take note of other new admission provisions. New Rule 2-32, for example, specifies that, if a student does not live up to his or her obligations under the agreement, such as by non-completion of the articling checklist requirements, the Credentials Committee may extend the student's articling term for up to two years. A principal in such circumstances may also be referred to the Credentials Committee before any future articles are approved.

Rule 2-44(6) extends the circumstances in which the Credentials Committee may exercise its discretion to exempt an articled student from the Professional Legal Training Course. The Committee retains discretion to exempt, with or without conditions, an articled student who has successfully completed a bar admission course in another Canadian province, and now may also exercise that discretion for a student who has engaged in the active practice of law for at least five full years in a common law jurisdiction outside Canada.

Finally, a change to Rule 2-30 *(which does not come into effect until May 1, 2004)* will increase from four to seven years the amount of practice

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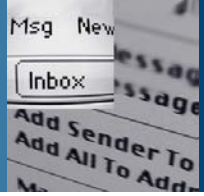


New penalties for late filing of accountant's reports in effect August 1

A lawyer who fails to file an annual trust accounting report when due will soon face, not only a late filing assessment (for a failure to file within 30 days of the due date), but possible suspension from practice (for a failure to file within 60 days of the due date), under new rules that come into effect August 1. These rules will also authorize the Law Society to complete an outstanding report at the lawyer's expense: see Rules 3-74 and 3-74.1 in the enclosed *Member's Manual* amendment package or online at www.lawsociety.bc.ca.

The Law Society trust accounting rules continue to require that an accountant's report (or a declaration for an exemption) be filed with the Law Society within three months of the end of each reporting period or the termination of a lawyer's practice. A lawyer may file a report within 30 days of the due date by paying a late filing fee: Rule 3-72.

Under the new rules, if a report is not filed within 30 days of the due date, a flat assessment of $400 per month will apply (replacing the current assessment of $50 per day per lawyer in the firm): Rule 3-74(3). While many practices have sought and been granted a waiver of late filing assessments by the Law Society Discipline Committee, the new assessment will be waived by the Committee only in special circumstances: Rule 3-74(4). Most significantly, failure to file a report within 60 days of the due date will result in the suspension of all lawyers in the practice, on at least 30 days notice, subject to the Discipline Committee's discretion not to suspend in special circumstances: Rule 3-74.1.

These measures are aimed at more effectively deterring late filings and are in keeping with the approach taken by several other law societies. They also more fully reflect the importance of the accountant's report as a key standard of financial responsibility.

Under Rule 3-74.1(5) to (8), the Law Society will have authority, for any late filing, to complete an outstanding accountant's report, through either its own or contract accountants, at the lawyer's expense. Although primarily a deterrent, this provision ensures that delinquent reports do not remain outstanding and that the Law Society can verify the integrity of the practice's handling of trust funds.

The Benchers approved these rule changes on recommendation of the Trust Accounting Reform Task Force, chaired by President Howard Berge, QC, which over the past two years has undertaken a thorough review of the Law Society trust accounting program.

In the near future, BC lawyers will see a revised form of trust accounting report to replace the current Form 47 accountant's report. The Task Force has received input from numerous lawyers and accountants and representatives of the Institute of Chartered Accountants of BC and the Certified General Accountants of BC in redrafting the accountant's report, rules and administrative processes. More information will be published to the profession within the next few months as implementation details are finalized.✧

BC paralegals surveyed on certification

The Law Society's Paralegal Task Force, chaired by former Vancouver Bencher Jo Ann Carmichael, QC, is reviewing input from over 600 paralegals in BC on a proposed paralegal certification scheme.

Through a broadcast email to the profession in mid-May, the Task Force asked all practising lawyers to invite the paralegals working under their supervision to 1) review online information on the proposed certification scheme and 2) complete an online survey on paralegal certification

The Law Society is considering paralegal certification as a way of raising the profile of paralegals in law firms and law-related workplaces and ensuring that members of the public in BC fully recognize and derive the benefit of paralegals working with lawyers in the delivery of legal services. The Task Force is also of the view that it is to the advantage of BC lawyers to use paralegals in the delivery of legal services as effectively as possible to ensure the profession meets current and future marketplace competition.

The survey is intended to gauge overall interest in certification, determine whether or not the proposed standards for certification are appropriate and ensure input on the proposal from paralegals.

While the survey was completed only by paralegals, lawyers are invited to read the Task Force's paper, *Proposal for a Law Society Paralegal Certification Scheme*, in the Resource Library/Reports section of the website and to relay their views by writing to the Task Force c/o Carmel Wiseman, Staff Lawyer, Policy and Legal Services, at cwiseman@lsbc.org, Fax: 604 443-5770.✧

Proposed changes could result in dual licensing for lawyers who sell real estate

Law Society opposes any Real Estate Act reforms restricting lawyers

The Law Society is opposing a proposal of the Ministry of Finance to limit the longstanding exemption of BC lawyers under the provincial *Real Estate Act*. That exemption makes it clear that lawyers can engage in real estate sales without any additional licensing requirements.

In March the Ministry put forward a package of reform proposals to modernize the *Act* by minimizing regulatory costs, promoting market competition, maintaining a flexible legislative and regulatory framework and ensuring accountability within the real estate industry.

In terms of the proposal to restrict the existing licensing exemption for lawyers, the Ministry said the following:

> *The new Act will clarify that the lawyers' exemption only applies to real estate trades which arise in the ordinary course of law practice.*
>
> *For example, a lawyer could sell property, without obtaining a real estate licence, where the sale is ancillary to settling an estate, administering a will, or effecting a marriage settlement, but would not be allowed to solicit new listings, or show property outside of these kinds of circumstances.*

The Law Society has pointed out that an exemption for lawyers was intentionally broad since inception of real estate legislation in the 1920s so as not to interfere with the practice of lawyers. This exemption has caused no public harm and there is no public policy rationale to restrict it.

"It is particularly difficult to reconcile the stated goals of *Real Estate Act* reforms — to enhance competition and promote ease of access to the marketplace — with new restrictions on lawyers in that marketplace," the Law Society stated in its submission to the Ministry of Finance.

"It will be impossible to restrict the involvement of lawyers in transacting real estate contracts without interfering with the public's entitlement to appropriate legal advice at each stage of the real estate sale process, including on such critical matters as best valuation information, exposing the property to the marketplace, examination and qualification of prospective purchasers, exploring the nature of the contract and participating in the closing of the transaction by registration at the Land Title Office," the Law Society submission states.

Significant differences underlie the practices of lawyers and realtors in the sale of real estate in BC, and at issue is the right of consumers to choose to receive legal representation and advice.

Under the realtor model most common in BC residential real estate sales, agents for the purchaser and for the vendor are both typically paid from the vendor's commission. In some cases an agent seeks permission to act for both parties to a transaction in a form of dual agency.

The role of real estate agents — and whose interests they represent — are of concern to consumers. In its submission, the Law Society pointed to a BC Real Estate Association survey that found 53% of those surveyed expressed concern about a realtor acting for both a buyer and a seller of the same property. According to the survey report, "those with concerns fear that realtors will be in some type of conflict of interest, for example, seeking the largest commission possible or possibly putting their own interests before those of their clients."

If a lawyer represents a vendor in the sale of a property, the lawyer does so with undivided loyalty, and the client can be assured of fully independent representation. Lawyers offer their clients many other advantages — professional legal advice on the transaction, expertise in the negotiation and preparation of the contract, competitive fees and protection through the profession's liability insurance program and a special compensation fund.

And while lawyers may properly advertise for clients by offering real estate services, they do not "solicit listings" in the manner of real estate agents, as suggested in the Ministry's discussion paper.

"There is no sound basis for changing the present exemption for lawyers to participate on behalf of their clients as advisors in all aspects of the purchase and sale of real property," the Society concluded in its submission. "The public interest is best served by ensuring the public has access to lawyers from the beginning of a real estate sales transaction to the end."

While certain other reforms of the Ministry may be well founded — and the Law Society has flagged these in its submission — the two-month window for consultation and analysis is insufficient.

A copy of the submission is available on the Law Society website (Resource Library/Reports section) at www.lawsociety.bc.ca.✧

Land Title Offices to remain open in New Westminster, Kamloops and Victoria

The Minister of Sustainable Resource Management, Stan Hagen, has announced that Land Title Offices in New Westminster, Kamloops and Victoria will remain open.

A business group from Kamloops had asked the provincial government to consider centralizing the land title system in that city.

At their May meeting, the Benchers passed a resolution that the public interest was best served by retaining a Land Title Office in New Westminster. The Benchers noted that more than half of all LTO filings originate in the Lower Mainland and that there would be increased user costs if each of these transactions had to be filed in Kamloops.

At a meeting with Mr. Hagen on May 22, representatives of the Law Society and of several other bodies, including the Vancouver Real Property Section of the CBA, the City of Vancouver, the Society of Notaries Public of BC and the Real Estate Council of BC, urged Mr. Hagen to keep the New Westminster LTO open. Although all three LTO locations will remain open, front-counter service in Victoria will be phased out.✧

The tradition continues

Peter C.G. Richards (right) is presented with a certificate honouring his 50 years at the bar from President Howard Berge, QC (left) and from Life Bencher Allan McEachern, who more than 20 years earlier had presented a certificate to Mr. Richards' father, Russell J.G. Richards, in commemoration of his 60 years in the profession. The presentation to the younger Richards took place at the Benchers meeting in May.

A partner with Richards Buell Sutton in Vancouver, Peter Richards has said he holds among his happiest memories the years he spent practising law with his father, as well as the time invested in helping to grow the businesses of his many clients "whose children and grandchildren remain clients to this day."

Discipline rules *… from page 6*

third parties who are not participants in the proceedings or clients (including complainants) who are witnesses where their evidence is highly personal or so intertwined with privileged or confidential information as to risk disclosure of that information. The guidelines will require the Benchers to consider what purpose will be served by naming a person in a hearing report and whether the use of initials or other identifiers would achieve the same purpose.

The revised rules can be found in the enclosed *Member's Manual* amendment package and on the Law Society website at www.lawsociety.bc.ca.✧

10

Benchers authorize referendum on proposed rule changes

The Benchers are seeking approval from the profession on several proposed rule changes through a mail-back referendum, to be conducted in conjunction with Bencher elections this Fall. Section 12 of the *Legal Profession Act* requires the approval of two-thirds of lawyers voting in a referendum before the Benchers can make certain rule changes, such as rule changes relating to Bencher elections, the office of Bencher and general meetings of the Law Society.

BC lawyers will be asked to vote on whether they favour the Benchers making rule changes on the following:

Webcasting of general meetings

The profession will be asked if they are in favour of the Benchers amending the Law Society Rules respecting general meetings to:

- allow members to attend and vote by way of the internet, and
- ensure that a meeting will not be invalidated by reason alone of a technical failure that prevents some members from attending and voting by way of the internet.

The Law Society is currently exploring options for webcasting the Annual General Meeting and special general meetings. The Law Society Rules would need to be amended to permit such an initiative.

Special general meetings

The profession will also be asked if they are in favour of the Benchers amending the Rules on special general meetings, to change the number of members required to request a meeting from 150 members to 5% of members in good standing at the time that the request is received by the Executive Director.

The current rule requirement of 150 members to requisition a special general meeting of the Law Society was set in the mid-1980s when the profession was much smaller. The Benchers favour making that number proportionate to the size of the profession today and adopting a percentage formula to effectively tie the minimum number of requisitioners to the size the profession in the future.

Bencher term limits

Another referendum question will ask the profession if they are in favour of the Benchers amending the Rules respecting term limits for Benchers — to increase the number of terms a Bencher is eligible to serve from the current four full or partial terms to five terms.*

* Note: A "term" would be defined to include a partial term that is more than half of a full term.

The Benchers are concerned that the current limit on terms has forced some Benchers to leave office at a time when, as a result of their experience and expertise, they are making their most valuable contribution. Increasing the maximum number of terms would allow a Bencher to run for re-election for an additional term.

Life Benchers

"Life Bencher" is a title to honour retiring Presidents and long-serving Benchers on completing their terms of service.

The profession will be asked if they are in favour of the Benchers amending the Rules respecting Life Benchers so that a Bencher who is elected or appointed a minimum of four times becomes a Life Bencher on leaving office (as in the current Rule), but is not disqualified from election or appointment as a Bencher until the term limit is reached.

The proposed rule change would ensure that Benchers remain eligible to become Life Benchers after four full or partial terms of service if they leave office at that time, or if the term limit is increased and they are re-elected for a fifth term, when they leave office after that term.✧

Articling Agreement *… from page 7*

experience necessary to become a principal to an articled student. Once the amendment to Rule 2-30 is in effect, each principal will also be limited to having two students at one time.

To review all the new admission rules, see the Resource Library/Rules section of the website and the enclosed *Member's Manual* amendment package. Please note that the general articling guidelines have been updated to reference the new articling agreement and checklist. The guidelines are also online in the Resource Library section of the site and in the enclosed amendment package.✧

A Juricert update

What's ahead for lawyers online

With the long-awaited Land Title Office electronic filing system expected to debut in the spring of 2004, BC law firms will wish to ensure that computer systems in their firms are ready to support the electronic preparation and filing of LTO documents. Lawyers should also take the opportunity well in advance of the project to register individually with Juricert (www.juricert.com), the Law Society's online professional authentication service. Juricert will play a key role in the new filing project by verifying the professional status of BC lawyers who submit documents for registration at the LTO. Here is an overview of the LTO e-filing project, as well as a brief look at other technology projects for which Juricert verifies the online identity of BC lawyers.

By this time next year, the Land Title Office should be ready to accept electronic filing of the Form A Freehold Transfer, the Form B Mortgage, Form C documents and Property Transfer Tax returns.

Electronic filing has been a strategic priority of the Land Title Branch (now part of the Ministry of Sustainable Resource Management) for the past five years. In 1998 a broad-based Electronic Filing Committee, which included Law Society representation, began identifying the legal, policy and practice issues associated with e-filing. That work led to new provincial legislation recognizing the validity of electronic documents as well several phases of development towards e-filing infrastructure at the Land Title Office.

MacDonald Dettwiler and Associates have been retained to build the new e-filing system.

What computer systems will law firms need?

In the initial stages of the Land Title Office project, lawyers will be able to e-file Forms A, B and C, as well as property transfer tax returns. The Land Title Office plans to provide these forms in portable document format (PDF), featuring data fields that can be completed electronically using Adobe Acrobat. Most lawyers will already be familiar with viewing PDF documents on the internet with Adobe Acrobat Reader (free software available for download from the Adobe website). Fewer may be aware of the full version of the Acrobat software, which allows for the creation and completion of PDF documents, including forms.

BC lawyers and their conveyancing staff will need to use the full version of Acrobat (standard or professional) to complete the forms. The software is available for purchase from software retailers and online from Adobe (www.adobe.com/acrofamily/main.html). Although the Land Title Office to date has considered its filing requirements would be based on Adobe Acrobat Version 5.0, a version 6.0 was recently released. The Land Title Branch is evaluating the impact of the version change, and will advise the profession on the specific version that will be supported by the e-filing system.

In preparing for e-filing in the coming months, law firms should ensure their conveyancing practices feature the following:

- Windows operating system 98SE or higher (Note: support for current Macintosh systems is also possible.)
- Adobe Acrobat 5.0 or 6.0 (see page 14 for minimum system requirements for version 6.0)
- a BC OnLine account
- the best broadband internet access a firm can afford, with a dial-up account for backup
- e-mail, preferably a program that supports digital signatures and encryption for secure communications
- a Juricert-authenticated signing certificate *(see below)*

Registration with Juricert

Any lawyer who plans to file documents electronically at the LTO should take steps in the coming months to register with Juricert (**www.juricert.com**), the Law Society's online professional authentication service, if he or she has not already done so.

On the Juricert website, a lawyer is asked to fill out an online application, print the application, have his or her signature on the document witnessed and submit it to Juricert. Once the Law Society authenticates the lawyer's identity and professional status in accordance with internal records, Juricert creates a "trusted digital credential" for the lawyer. This credential is then used as the basis for the issuance of the necessary digital certificates that are used as part of the e-filing process.

By digitally signing land title documents the lawyer is verifying that he or she is a lawyer (and an officer under the *Land Title Act*).

Other doors Juricert is opening

While actively participating in the LTO e-filing project, Juricert also monitors other government and court e-filing projects, both at home and abroad. Juricert has collaborated in a recent pilot at the Supreme Court of Canada and is well positioned to carry out the online authentication of professionals

continued on page 14

How a conveyance will proceed under e-filing

An underlying principle of the new e-filing system is that it will not mandate fundamental changes to conveyancing practice.

In accordance with practice in BC, it is therefore expected that the purchaser's lawyer, with the assistance of his or her staff, will continue to prepare the transfer package in residential conveyances under e-filing. Rather than creating the Form A Transfer (and other forms) in word processing software, however, the purchaser's lawyer and staff will do so in Adobe Acrobat software by filling out pre-determined fields. *(For firms that rely on conveyancing software, it can reasonably be expected that those software companies will modify their packages to integrate the new Adobe documents.)*

Each person within a firm who drafts a land title form for electronic filing, and each lawyer who signs the form as officer, will need access to Adobe Acrobat software: see *What computer systems will law firms need?*

Assuming conveyancing staff have created a transfer form in Adobe Acrobat, the lawyer will review that form along with all other documents in the package with the client. The lawyer's staff will forward the transfer package, with statement of adjustments, to the vendor's lawyer either electronically or as paper copies. The vendor's lawyer will witness execution of a paper copy of the transfer by the vendor and will sign the transfer as certifying officer. In practice, the purchaser's lawyer will need a hard copy of this signed transfer for his or her files. No hard copies will be used in electronic submissions to the Land Title Office.

As is now the case, the purchaser's lawyer must review all documents prior to submission to the LTO. Under e-filing, the lawyer will digitally sign and lock each document prior to submission, (typically the transfer, mortgage and property transfer tax form).

The actual submission of the digitally signed documents can be carried out by the lawyer's staff or third parties such as registration agents. They will log into BC Online and upload the signed documents for submission. It is anticipated that the Law Society Rules will require amendment to allow for a preauthorized debit for electronic payment of property transfer taxes. The Land Title Office system is expected to feature built-in checks on the submission, to ensure that the correct form version is used, that the digital signature is valid and that documents are not missing and are in the right order.

The Land Title Office is able to check a lawyer's digital signature and to verify the practising status of the lawyer through current Law Society data provided by Juricert.

There will undoubtedly be many practice issues that need to be tackled as the Land Title Office e-filing project is introduced, and BC lawyers in real estate practice will wish to watch for upcoming continuing legal education programs and materials. The Electronic Filing Steering Committee (with representation from the provincial government, the Law Society, the CBA (BC Branch) and the Society of Notaries Public) is expected to clarify key practice points. Comments from BC lawyers are welcome.✧

FORM_A_V18

LAND TITLE ACT
FORM A (Section 185(1))
FREEHOLD TRANSFER Province of British Columbia LOCK DR: PAGE 1 of 1 pages

CERTIFICATION:
Your digital signature constitutes a representation that you are a solicitor, notary public, or other person authorized by the *Evidence Act*, R.S.B.C. 1996 c.124, to take affidavits for use in the Province of British Columbia and certifies the matters set out in the *Land Title Amendment Act* 1999 c.168 as they pertain to the execution of this instrument.

Signature Valid

1. APPLICATION: (Name, address, phone number of applicant, applicant's solicitor or agent) Import Profile FIRM-ID
M. Lawyer and Company 99980
1234 Fort St. Attention Sandy Roberts - (250) 555-1212
Suite 100 Our file GRE123
Victoria, B.C V7Y 3Y7
Deduct LTO Fees? YES ☑

2a. PARCEL IDENTIFIER AND LEGAL DESCRIPTION OF LAND:
[PID] Use Schedule [legal description]
999-987-354 Lot 12, Plan 294376, Victoria Land District
STC? YES ☑
Pick up STC

2b. MARKET VALUE: $ 356,909.00

3. CONSIDERATION: $ 356,909.00

4. TRANSFEROR(S): Use Schedule
Samuel Green and Sheila Green

5. FREEHOLD ESTATE TRANSFERRED: Fee Simple

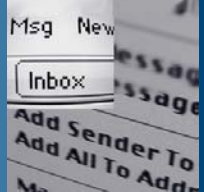
6. TRANSFEREE(S): (including occupation(s), postal address(es) and postal code(s)) Use Schedule
Robert James Smith,Baker
Silvia Rebecaa Smith,Doctor
1234 Fort St., Victoria
British Columbia
Canada V6Y 4T5 as joint tenants

7. EXECUTION(S): The transferor(s) accept(s) the above consideration and understand(s) that the instrument operates to transfer the freehold estate in the land described above to the transferee(s)

Officer Signature(s)	Execution Date Y	M	D	Transferor(s) Signature(s)
Mary Lawyer Barrister & Solicitor Victoria, B.C.	03	04	01	Samuel Green
				Sheila Green

OFFICER CERTIFICATION: More Signatures
Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the *Evidence Act*, R.S.B.C. 1996, c.124, to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the *Land Title Act* as they pertain to the execution of this instrument.

End of Document



Juricert … *from page 12*

within any future registries.

One of the first projects off the ground in BC is the Nidus e-Registry, a voluntary, non-governmental registry operated by the Representation Agreements Resource Centre in Vancouver. The registry accepts filings of representation agreements and enduring powers of attorney (or notices of these documents) from across BC. Lawyers and notaries wishing to file documents in the registry on behalf of clients must first be authenticated with Juricert. For more information, see the March-April *Benchers' Bulletin*.

On another front, Juricert is in discussion with RegistryPro Inc. — the official registry authorized to issue *.pro* top-level domains on the internet. Slated for introduction in the near future, the *.pro* domain will be strictly reserved for the websites and email addresses of accredited professionals, including lawyers. Juricert is seeking to authenticate the professional status of BC lawyers — and possibly lawyers across Canada — who apply for *.pro* domain names for their firm websites (*e.g.* XYZlawfirm.pro).

A key advantage of Juricert digital credentials is that they are designed to integrate with many online applications and services of interest to lawyers, both in the public and private sectors. Accordingly, Juricert now authenticates the online identity of BC lawyers who wish access to services and products offered by several private companies — including those that facilitate secure and private communication between lawyers and their clients. For more information, visit the Juricert website (www.juricert.com).

Juricert contacts

The Law Society and Juricert Services would like to advise that Peter Baran, CEO of Juricert Services, has accepted a position with AGTI Consulting Services (West) Inc. Mr. Baran will continue his involvement with Juricert as a consultant on special projects.

The new management team at Juricert Services is comprised of Jim Matkin, QC who continues as President of Juricert; Ron Usher who will assume responsibility as CEO for Juricert while continuing as Staff Lawyer, Practice Opportunities for the Law Society; Adam Whitcombe, CIO for the Law Society, who will also assume responsibility as CIO of Juricert; Neil Stajkowski, CFO for the Law Society who continues in his role as CFO for Juricert and Katherine Potter who continues as the Marketing and Customer Service Manager for Juricert.

If you would like to know more about the Land Title Office e-filing project or any of the other projects supported by Juricert, please contact Ron Usher at 604 605-5310 (rusher@lsbc.org) or Katherine Potter at 604 605-5363 (kpotter@juricert.ca).

To register with Juricert, go to www.juricert.com.✧

Computer system requirements for the Land Title Office e-filing project

Here are the minimum system requirements for Adobe Acrobat 6.0:

Acrobat 6.0 Professional (Windows)

- Pentium®-class processor
- Microsoft® Windows Operating System
  - Windows NT Workstation 4.0 sp6
  - Windows 2000 Professional sp2
  - Windows XP Professional & Home
  - Windows XP Tablet PC Edition
- 64 MB of RAM (128 MB recommended)
- 245 MB of available hard-disk space
- Internet Explorer 5.X or higher

Acrobat 6.0 Standard (Windows)

- Pentium®-class processor
- Microsoft® Windows Operating System
  - Windows 98 SE
  - Windows NT Workstation 4.0 sp6
  - Windows 2000 Professional sp2
  - Windows XP Professional & Home
  - Windows XP Tablet PC Edition
- 64 MB of RAM (128 MB recommended)
- 220 MB of available hard-disk space
- Internet Explorer 5.X or higher

Acrobat 6.0 Professional (Mac)

- PowerPC® G3 or higher processor
- Mac® OS X 10.2.2 or higher
- 64 MB of RAM (128 MB recommended)
- 405 MB of available hard-disk space

Acrobat 6.0 Standard (Mac)

- PowerPC® G3 or higher processor
- Apple® Mac® OS X 10.2.2 or higher
- 64 MB of RAM (128 MB recommended)
- 370 MB of available hard-disk space ✧

Deputy Executive Director Jean Whittow returns to private practice

Jean Whittow, QC, Deputy Executive Director and Director of Discipline and Professional Conduct, is leaving the Law Society to join the Vancouver law firm of Hordo and Bennett in a litigation practice that will include counsel work before administrative bodies.

Ms. Whittow joined the Law Society 12 years ago as counsel, having previously practised civil litigation at Braidwood, MacKenzie, Fujisawa, Brewer & Greyell.

After six years as Law Society counsel, Ms. Whittow became Director of Discipline with overall staff responsibility for discipline, including directing and managing the work of the Professional Conduct Department and of Law Society counsel. She also assumed responsibility for the Special Compensation Fund, Practice Standards and Audit and Investigation Departments and was later appointed Deputy Executive Director for the Law Society.

At a farewell reception in her honour in June, Ms. Whittow spoke to the values of honesty, respect and fairness — words that may sometimes be used casually, but mean much more to the legal profession. "Our job is to maintain those values of honesty, respect and fairness in the profession," Ms. Whittow reflected in her parting words to Law Society staff and Benchers.

She stressed the importance of bringing these qualities to all Law Society dealings with lawyers and the public, and dealings between colleagues within the Law Society. "I am so privileged to have been able to work in a setting where those are the critical qualities," Ms. Whittow said. "That is what binds us together in the service of the profession."

The Benchers and staff extend their appreciation to Ms. Whittow for her leadership, skill and dedication, and wish her all the best in her new practice.✧

New Lay Bencher Lilian To

Lilian To of Vancouver has been appointed a Lay Bencher, to complete the term of Valerie MacLean who resigned from the position earlier this year.

Ms. To is the Executive Director of the United Chinese Community Enrichment Services Society (SUCCESS), an organization that provides immigrant settlement services to over 300,000 people each year in British Columbia. She has served on the BC Multicultural Education Advisory Committee and the Vancouver School Board Race Relations Advisory Committee and has received a number of awards for her work, including a 1999 YWCA Women of Distinction Award and a federal Citation for Citizenship.

Ms. To holds a Master of Social Work from the University of BC.✧

Berger granted 2003 Law Society scholarship

The Benchers have awarded the $12,000 Law Society scholarship for graduate legal studies to **Benjamin Lyle Berger** in 2003.

Mr. Berger is the 2002 Law Society gold medallist for the University of Victoria Law School and currently serves as a law clerk to the Chief Justice of Canada, Beverly McLachlin, PC.

Mr. Berger plans to pursue an LL.M. at Yale, researching the legal and social impact of "human dignity" in the law of criminal rights and defences, equality, property and civil liberties. He would like to continue his academic studies to a JSD degree (Doctor of Juridical Science) at Yale and then to a career in teaching and research as a professor of law in Canada.✧

Mobility Agreement *… from page 5*

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applicant lawyer must currently be entitled to practise law in the home jurisdiction. For full requirements on call and admission by transfer, lawyers should review the law society rules in the jurisdiction in which they are applying (in BC, see Rules 2-49 to 2-49.2).

* * *

The national mobility agreement and the rules now adopted by six Canadian law societies have resulted from the work of the National Mobility Task Force of the Federation of Law Societies, which has supported a more liberal mobility regime for lawyers. For background, see the Task Force report at www.flsc.ca/en/pdf/mobility_reportMay2002.pdf.✧

A look at current conveyancing issues

Rule 3-89 on mortgage discharges

BC lawyers are reminded that, if they are required to file reports respecting mortgage discharges under Rule 3-89, they must do so online via the Law Society website at www.lawsociety.bc.ca (Resource Library/Forms section).

New Rules 3-88 and 3-89 require a lawyer to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of any real property transaction that closes March 1 or later. The new rules also oblige a lawyer to report to the Law Society the failure of another lawyer or a notary to provide satisfactory evidence that he or she has filed a registrable discharge of mortgage as a pending application at the Land Title Office within that 60-day period.

A lawyer has five business days to report under the new rules. In addition to ordinary mortgages, the new reporting rules apply to debentures and trust deeds containing a fixed charge on land or an interest in land.

The Society is collecting this information to learn more about the business processes of financial institutions, whether there are certain institutions unable to discharge mortgages within a given timeframe and whether there are situations that require Law Society assistance or intervention.

The Society will not draw adverse inferences against a lawyer by reason of his or her failure to obtain a discharge of a repaid mortgage from a financial institution, in the absence of evidence of a breach of undertaking or defalcation.

For more information on filing under the rules, please contact David Newell, Corporate Secretary (dnewell@lsbc.org).

New CBA standard form undertakings

In March the Vancouver Real Property Section of the Canadian Bar Association (BC Branch), after consultation with other real property sections in the province, approved new standard undertakings for BC lawyers to use in conveyancing transactions. The CBA's standard undertakings have been referenced for several years in clause 14 of the BC Real Estate Association "Contract of Purchase and Sale," which is used for most real estate sales in BC. Not all lawyers, however, are aware that the standard undertakings were recently revised.

Clause 14 of the Contract of Purchase and Sale agreement states as follows.

> 14. **CLEARING TITLE:** If the Seller has existing financial charges to be cleared from title, the Seller, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Buyer may pay the Purchase Price to a Lawyer or Notary in trust, on the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller.

The CBA undertakings now include "transparency provisions" respecting mortgage discharges. Specifically, clause 8.4 of the new undertakings requires that the vendor's lawyer provide to the purchaser's lawyer within five business days of the completion date copies of specified documents that demonstrate that the vendor's lawyer has made payments to existing chargeholders. In brief, copies of the following are required: mortgage payout statement, the letter from the vendor's lawyer that accompanies the payout, a payout cheque and evidence of delivery of the payout cheque. The purchaser's lawyer is not to release those documents to his or her client unless the mortgage discharge is still not received 60 days after completion.

The Vancouver Real Property Section incorporated this new step into the CBA standard undertakings in response to a recommendation of the Law Society's Conveyancing Practices Task Force in December, 2002. The Task Force had recommended prompt verification by a vendor's lawyer to a purchaser's lawyer of a mortgage repayment in conveyancing transactions. The reform is directed at avoiding or detecting such practice irregularities as arose in the real estate practice of former Vancouver lawyer Martin Wirick, specifically breaches of undertaking to clear title.

The Task Force now recommends that BC lawyers who close conveyancing transactions on the basis of undertakings use the revised CBA standard undertakings.

The transparency provisions may give rise to certain concerns over confidentiality. The vendor's lawyer may have concerns about disclosing confidential financial information of the vendor to the purchaser's lawyer, while the purchaser's lawyer may have concerns about not relaying that information to the purchaser. The Task Force believes these concerns can be managed through lawyers' communications with their respective clients.

The Task Force notes that the vendor's lawyer will need to seek the vendor's consent to the disclosure of the financial information. In the Task Force's view, the vendor should not resist authorizing his or her lawyer to disclose this limited financial information,

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When scamsters target lawyers

by Todd R. Follett, Counsel

This article is intended to alert lawyers to common elements of scams and fraudulent schemes in which they may be targeted to lend assistance. It does not describe any particular scam or any particular matter that has come before the Law Society.

Scamsters, it seems, are actively seeking out lawyers. Some lawyers have warned the Law Society about approaches to assist in questionable schemes. A few lawyers over the years, sadly, have been drawn in and come before the Law Society only in the aftermath, facing financial and professional ruin.

What is the profile of a lawyer most likely to be hooked into a scam? The most likely targets are sole practitioners and lawyers struggling in their law practices. Lawyers in serious need may be more vulnerable to persuasion by a scamster to assist with schemes they do not understand or, in the rarest cases, to embark on a lucrative venture knowing it is a scam or wilfully blind to the fact.

First, the offer to the public

Although frauds may take many forms and vary in sophistication, one of the most durable is the "prime bank scheme" — and it serves as a useful example. Typically, a scamster tells a potential investor that he or she is being offered a very rare and valuable opportunity to play with the big boys and get at the big money. The scamster explains that there are tremendously profitable investing programs used to generate the vast sums of money needed to finance institutions such as the World Bank or IMF. Occasionally, for the very well connected, there is additional room in a program for non-institutional investors.

The scamster purports to have such connections and to offer the high-yield investment opportunity confidentially to the investor. Investors are

promised that, combined with others in minimum units of several million dollars, they will gain access to the investment, which locks up the funds for a few days and generates returns of hundreds of percent a year.

These investment opportunities are presented as available only by invitation and as risk free.

Some common characteristics of investment scams

There is little in writing

Scamsters prefer to commit themselves in writing as little as possible. They justify this by the confidential nature of the investments since, if word were out to the general public, everybody would want in and the opportunity would be ruined.

The investor must agree to keep the whole project confidential

An exception to the "little in writing" rule is often a confidentiality agreement. The agreement usually says that, if its terms are breached, the investor never gets a second opportunity and all returns are forfeited. Going to the police, for example, or even discussing the matter with other investors, is a breach. These agreements can have a tremendously powerful effect on investors. As odd as it sounds, there are cases in which investors realize they have been scammed and their investment money has been stolen, but they still will not cooperate in an investigation out of fear this will jeopardize any later opportunity to be invited into a genuine scheme.

The investment is baffling

It is surprising how many people will invest in something they don't understand, especially if they think they *should* understand it. The supporting material for these schemes is often a hodge-podge of investment terms and concepts, with no real explanation of the assets being purchased or how they will generate a profit.

Whatever it is they are offering, the profits are extremely high

Promised returns of 100%, 200% or 300% per year are not uncommon. Sometimes investors in the same projects are offered different returns, apparently for no other reason than that it was difficult for the scamster to keep all the promises straight or that some investors required more persuasion than others. The common element is that these schemes are too good to be true.

It's usually a pyramid

Information is spread by word of mouth among the people involved, and the pyramid provides lots of incentive for existing investors to bring in new investors. Ideally, there is little or no contact with people who are high enough up in the pyramid to know it's a scam.

continued on page 18

Scams … from page 17

Why lawyers are a target

So far the story has been pretty straightforward. The scamster has prepared and made believable a scam to attract money from the public. All that is needed is for the scamster to persuade investors to turn over their money.

To understand just how useful it is to involve a lawyer, look at it from the standpoint of the scamster. The scam is ready to go, whether it's something novel or a hardy perennial such as the prime bank scheme. The scamster has connections in the scam industry who will distribute the scam by word of mouth and others who handle the money once it is sent offshore. However, there are some basic problems the scamster faces.

First, how to collect the money? For the scamster, there are grave drawbacks to receiving the money directly. Ideally, the people involved have direct contact only with the person who recruited them and perhaps a few in their immediate circle of investors. Giving the scamster's name and bank account information to all likely prospects is far too visible and makes the scam much too traceable. The money can be held by a third party willing to take the risk, but what risks are involved for the scamster? The third party might steal the money and leave the scamster with no recourse. Even if a third party is trustworthy, he or she may talk far too much, possibly even to the police, about the scam and the destination of funds being sent offshore.

The ideal solution is a third party who can be trusted not to steal or to talk about any involvement. A lawyer has a trust account, confidentiality obligations and solicitor-client privilege — combining as a perfect solution to the scamster's quandary. Even though communications to perpetrate a fraud are not privileged, it takes time and likely court rulings to establish that privilege does not apply. This gives the scamster at least a valuable delay as only the client has the ability to waive a claim of privilege.

Another problem faced by the scamster in taking the scam into the world and making lots of easy money is that, no matter how polished the scam, there is always the danger it will look to potential investors like it's a little dicey. Potential investors may accept the argument that there are vast fortunes to be made in, for example, historical railway bonds stored in safekeeping in the Caribbean, but they may still hold back from handing over the money.

Having a lawyer involved provides great comfort to the investor. An investor may associate paying trust money to a lawyer with legitimate investments, for example, buying a house, and may believe that the lawyer will be accountable for the money and is also endorsing the scheme. The comfort to investors provided by the lawyer in this way is called "cover." It is particularly useful for the scamster to have the lawyer attend a sales meeting, or part of a meeting. Even if the lawyer actually says little or nothing, by merely attending the meeting he or she may lend credibility to the scam.

A scamster is also challenged in moving large sums of money around fast without attracting a lot of unwanted attention. These days, a sophisticated scam sends the money offshore to a "high privacy" jurisdiction at the first opportunity. The trail for anyone looking into the matter ends there, and the money can be redirected at leisure to wherever the scamster needs to send it. A lawyer's trust cheque is respected and anonymous — an ideal solution.

The offer to the lawyer

The lawyer is a godsend to the scamster. The problem is: *how to find one?* Most lawyers are going to be skeptical when a scamster walks into their office and explains the investment scheme — and the vast majority will simply decline to take on the matter. The answer for the scamster is to keep eyes and ears open for a prospect, then persevere. If the scam is good enough to raise money from the public, it may be plausible enough to attract an occasional lawyer, particularly if the lawyer's need overcomes good judgement.

The task of recruiting a needy, gullible lawyer is occasionally made easier by the promise of big money, sometimes including fees or a small percentage of money directed to the lawyer's trust account. Note this is "the promise" of big money. On those rare occasions when a scamster has succeeded in convincing a lawyer to assist with an investment scheme, little money is paid to the lawyer and it is often for legal services such as incorporation of companies. From the scamster's viewpoint, this makes sense.

Scamsters have two ways of getting people to do what they want. Persuasion, which usually involves lying, is most common. This is easy, cheap and one of their strengths. They may even find it fun. The alternative is to actually pay for things. This is unpleasant, as the whole idea of the scam in the first place is to make a lot of easy money, not to pay it out. This is clearly to be used as a last resort. To the extent possible, the lawyer is usually paid in cheap promises rather than expensive money.

Crossing the line

Having a lawyer involved is a great convenience to a scamster, even if the lawyer is honest and believes that he or she is assisting with a legitimate investment scheme.

If the lawyer who is an honest dupe will send out money as directed, keep confidences and lend respectability to the exercise, this is well worth the scamster's recruitment efforts.

Avoiding scams and fraudulent schemes: would you like to know more?

This fall the Law Society, with assistance from the Continuing Legal Education Society of BC, is sponsoring hour-long presentations across BC to help lawyers detect and avoid fraudulent schemes and scams.

For information on upcoming dates, times and locations, check the CLE website at www.cle.bc.ca or confirm details with any of the bar associations that are hosting the presentations at their local meetings. Here are the dates booked with local bar associations so far:

- **Nanaimo**: September 9 (12:30 pm)
- **Kelowna**: September 11
- **Abbotsford**: September 16 (noon)
- **Surrey** (Fraser Valley Bar Association): September 24 (6:00 pm)
- **Prince George**: October 1
- **Kamloops**: October 16
- **Penticton**: October 23 (12:30 pm)

Any other bar association that would like to book a presentation at a meeting this Fall is welcome to contact Thelma O'Grady, CLE's Director of Programs, at togrady@cle.bc.ca.✧

However, the real prize is to have a lawyer cross the line from acting as a lawyer to becoming an active participant in the scam. Sometimes, for example, money will come to the lawyer on trust conditions that make it awkward and difficult for the scamster to get at. If the lawyer can be led into breaching trust conditions, perhaps on the belief that the investment will soon pay off and all will be made right, the scamster may find it easier to access the money. At the point of realizing that all of this is a scam, the lawyer may be so compromised as to continue to cooperate out of fear that any earlier involvement in the scam will be revealed.

Holding the bag

No matter how sophisticated schemes sound and how plausible they seem to investors, inevitably they end in tears. The sad fact is that there is no way to make massive profits risk-free. Sooner or later, investors want to see some of the enormous profits they are expecting. Inevitably any trickle of money coming back to them as encouragement will stop. Most of the investments have likely been sent offshore and directed to who knows where, never to return.

The scamster has several options at this point. With a tidy sum socked away and hard questions being asked by investors, the scamster may decide this is a good time to relocate. Some may choose to remain and defend their good name, generally explaining that they had in good faith sent the money offshore to legitimate investments that unfortunately didn't work out. Scamsters are unlikely to have local assets that might be vulnerable, and their foreign holdings will be highly confidential. The resources to deal with commercial crime in Canada are strained and the system very slow to act, so a scamster may well be able to stay, brazen it out and avoid charges, conviction or, at the very least, a significant sentence.

It's a different matter for a lawyer. Lawyers are easy to find and may well have some personal assets. Even if they don't, investors may think the deep pockets of the Special Compensation Fund or the Lawyers Insurance Fund make the lawyer worth pursuing. Indeed, the lawyer is often the only possible avenue of recovery for the now outraged investor. This is not to say the Lawyers Insurance Fund would cover the lawyer, it likely will not. The Special Compensation Fund is discretionary and covers only losses arising from the dishonest misappropriation or wrongful conversion of funds by a lawyer acting in that capacity. The lawyer may have absolutely no protection and may well face financial ruin alone.

The criminal law may not move against a lawyer who has not directly participated in a scam, but the Law Society likely will. Even if the lawyer has been honest in his or her dealings, the acceptance of investor money into the lawyer's trust account likely created duties to the investor, at least a duty to warn that the lawyer doesn't act for the investor. When the discipline process begins, there are interim remedies available to the Law Society, including the suspension of the right to practise until the citation hearing. Even if the lawyer acted perfectly honestly at all times, he or she will spend years trying to defend the conduct and clean up the mess to the extent possible, usually having received little except some fees, excitement and flattery. The lawyer is truly left holding the bag.

Questions to ask

For a lawyer to avoid having his or her reputation or trust account misused, these are some good questions to ask any potential client who is seeking assistance with an investment scheme:

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Practice Tips, by Dave Bilinsky, Practice Management Advisor

♪Dance with me, I want to be your partner
Can't you see, the music is just starting?
Night is falling, and I am falling
Dance with me … ♪

Words and music by J. Hall, recorded by Regine Velasquez

The ACES billing model

There are many ways to gain perspective on how lawyers are seen by their clients. In the case of corporate clients, one of the more insightful ways is to talk to in-house counsel who constantly work with outside law firms. In 2002, the American Corporate Counsel Association, in conjunction with American "matter management" software consultant Serengeti (www.serengetilaw.com), did a detailed survey on "managing outside counsel." According to in-house counsel surveyed, law firms should pay greater attention to these top five goals:

1. Be more concerned with costs
2. Be more practical
3. Solve problems more creatively
4. Respond more quickly, and
5. Understand business better.

While very few lawyers would find cause to complain about these goals, the devil is in the details. How do you effectively rejig the dynamics between a client and a law firm when that relationship is largely a legal one and therefore driven by legal considerations? Jeffrey W. Carr, Vice-President, General Counsel & Secretary for FMC Technologies, Inc. believes he has a solution. He advocates reworking the lawyer-client relationship to bring the law firm's interests into alignment with the goals and economics of the client. FMC has a patent pending on their system, called the ACES™ Model — for "Alliance Counsel Engagement System."

What does ACES comprise? There are four parts:

- ***Aces (Litigation and Project Base Case)*** is designed for litigation matters or engagements in which there is a definable outcome and time is of the essence. The system is designed to reward the outside law firm for efficiency and for achieving the client's success objectives.
- ***Aces LT*** is for longer-term retainers without a task-specific objective where the primary objective is high-quality service in a specific area or over several objectives.
- ***Aces² (Aces for Aces)*** is for cases in which multiple law firms are involved or for multiple cases of a similar type.
- ***Inside Aces*** is a teamwork-based bonus system for in-house counsel.

What do all four parts share in common? An economic incentive for the lawyer or law firm to meet or exceed stated criteria for success by placing 20-25% of billings in a "success bucket." If the matter is resolved according to defined success criteria, the lawyer or law firm receives the amount in the bucket and, in some cases, a defined bonus as well.

So what devil is in the details? Take *Aces (Litigation and Project Base Case)*. This model is used for engagements where the client has a definable outcome and where time is of the essence. The client defines the success criteria. Then the law firm and the client develop a budget, by grouping the major activities on the file into four or five major steps, such as initial pleadings, discovery, mediation/settlement, pre-trial prep and trial.

The overall budget breaks down into target budgets for each major step. For each step, while it is below budget, the law firm is paid 75% of its normal hourly rates, with 25% of the hourly billings being placed in the success bucket as a form of contingency. If the budget for a step is exceeded, the proportion of payment to the bucket is reversed for that step (that is, the law firm receives only 25% of its hourly billings, with 75% placed in the success bucket). If the success criteria are met for the file, the law firm will recover the amount placed into the success bucket; if not, that amount is forfeited.

If the success criteria are met for the file overall, a bonus is paid to the law firm. The bonus consists of the amount in the bucket plus a multiplier. The multiplier declines as the file progresses — hence the incentive for early resolution. Initially the multiplier is 100% (the file's early stages before substantial expenses have been incurred), then 50% (before trial) and 25% (at trial). If rapid resolution is not a success criterion, then the multiplier can be kept constant for the file.

A second-level bonus (or penalty) then comes into play. One percent is added to the bucket multiplier for each 1% of the saving for the total matter budget (i.e., if only 40% of the file budget was expended, then the law firm would be entitled to a further 60% bonus points added to the multiplier). However, if the total budget was exceeded, then there is a point-for-point penalty, reducing the bucket multiplier by 1% for each percentage point of total matter overage.

Note that this system can be adapted to time-sensitive transactional matters also — the stages being initial discussion, buyer's selection, due diligence, contract execution and closing.

For retainers that are not time sensitive or longer term retainers, *Aces LT* comes into play. In this case, a 20% bonus is based on a report card provided by the client to the law firm on a periodic basis. The evaluation criteria are agreed on with the firm and are based on such matters as quality, practicality of advice, reflection of business

objective, communication, knowledge leveraging and sharing, timeliness, and efficiency. The "grades" are Acceptable, Outstanding and Exceptional.

The Aces[2] *(Aces for Aces)* model adapts this system to situations involving multiple law firms or similar cases or projects.

Finally, the *Inside Aces* model provides a bonus incentive to in-house counsel by incorporating a 0-20% bonus of base salary based on a "report card," graded on the same basis as *Aces LT*.

What are the advantages of this system for the lawyer or law firm?:

- There is explicit discussion and agreement on the desired outcome on the file and the time scale for its completion.
- The bonus or success criteria are agreed to up front.
- The law firm is brought into the economic equation — thereby focusing the lawyer's attention not just on the legal outcome of the file, but also on the timing and financial outcomes. This gives the lawyer an incentive to achieve successful outcomes on each.
- Rapid payment of the law firm accounts is assured.
- Teamwork and collaboration are encouraged between the law firm and the client.
- The law firm has incentives to examine the total costs of the file and to take an active interest in driving down, not only third-party costs, but internal costs as well to keep the file on budget. In this model, the very fact of establishing a budget for a file is instructive — as it forces the law firm to explicitly face the issue of its own costs of handling the file.
- The law firm explicitly knows the bonus to which it may be entitled, over and above its billable hourly rates and can see how action or cost reduction will affect the equation.
- By accepting an *Aces* engagement and completing it successfully, a law firm positions itself for future engagements by the most basic of marketing criteria — doing a good job as judged from the perspective of the client.

Are Canadian firms starting to adopt *Aces*? Yes — Calgary's Reynolds, Mirth, Richards & Farmer has accepted an *Aces* retainer.

Law firms today are finding that, if they want to find a partner for the dance, it is the clients who are insisting on taking the lead. If you would like more information on the *Aces* billing system, contact Jeffrey W. Carr, Vice-President, General Counsel & Secretary, FMC Technologies, Inc., Tel 281 591-4585, jeffrey.carr@fmcti.com.

Practice Q & As

What does a lawyer do if a computer is stolen or hacked?

Q: *What are the obligations of a lawyer when his or her computer is stolen or hacked?*

A: One consideration is the *Legal Profession Act*, Rules and *Professional Conduct Handbook*. Chapter 5 of the *Handbook* states:

> **Duty of confidentiality**
>
> 1. A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court.
>
> 2. A lawyer shall take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information.
>
> 3. A lawyer shall not disclose the fact of having been consulted or retained by a person unless the nature of the matter requires such disclosure.
>
> 4. A lawyer shall preserve the client's secrets even after the termination of the retainer, whether or not differences have arisen between them.

Is there a resultant or concurrent duty to inform the client when there has been a breach or possible breach of the duty of confidentiality, such as when a computer is stolen or office network hacked? Is there possible civil liability where this occurs? *Cordery on Solicitors*, para [381]-[450] states:

> A solicitor is under a duty to take reasonable care of all documents entrusted to him by the client and will be liable if he loses or mislays them (*Wilmott* v. *Elkington* (1833) 1 Nev & MKB 749; *Reeve* v. *Palmer* (1859) 5 CBNS 84) or fails to deliver them up in reasonable condition so as to be fit for use (*North Western Rly Co.* v. *Sharp* (1854) 10 Exch 451).

Chapter 9 of *Barristers & Solicitors in Practice* [Butterworths] entitled "Professional Liability," paragraph 9.25, states:

> Although failure to comply with one of the rules of professional conduct may not lead to civil liability, in an appropriate case the particular ethical standard may be used by the court in the course of identifying and imposing a specific legal obligation (referring to *Chrysler Credit Canada Ltd.* v. *734925 Ontario Ltd.* in which the court looked to the Rules of Professional Conduct to ascertain lawyers' obligations to the court and other professionals).

In the circumstances, as part of the duty of confidentiality owed to a

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Practice Tips … *from page 21*

client, it is suggested that there is a duty to inform the client when there has been a breach or possible breach of the duty of confidentiality, such as when a computer is stolen. It is suggested that a lawyer consider notifying clients that a possible disclosure of their confidential information has occurred and also set forth any mitigating factors — such as whether or not the computer was password protected, whether or not the data was encrypted and the extent of the confidential information that was stored. In this manner, the client is able to take steps to prevent identity theft or misuse of the information, particularly where that information may include social insurance numbers, credit card information, personal banking information or sensitive personal information.

A second consideration is whether the law firm is considered to be doing any work in California. California's Senate Bill 1386, which takes effect on July 1, 2003, requires companies to disclose security breaches that involve unauthorized access to personal information. It is designed to apply to any firm, anywhere, doing business in California. The code now reads:

> Any agency that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is, reasonably believed to have been acquired by an unauthorized person. The disclosure shall be made in the most expedient time possible and without unreasonable delay ...

California law gives companies several options in notifying customers, including placing ads in newspapers. It also permits anyone whose personal information has been disclosed to file a civil suit against the company that suffered the security breach. An important proviso — the law does not apply where a company encrypts its data, although the law does not set forth what is an adequate encryption method. This may have been a deliberate choice as encryption methods keep changing — suggesting that the standard imposed would be based on what is reasonable at the time of the breach.

Should a lawyer disclose testator communications in a later estate litigation?

Q: *I have been contacted by counsel who is acting in an estate action. He wishes to discuss my communications with the testator at the time of making his last will. What are my obligations relative to solicitor-client confidentiality? Do I need the approval of the executor before speaking to counsel?*

A: The Supreme Court of Canada in *Geffen* v. *Goodman Estate*, [1991] 2 SCR 353 states that there is an exception to the general rule of solicitor-client

Services to members

Practice and ethics advice

Contact **David J. (Dave) Bilinsky**, Practice Management Advisor, to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction. **Email**: daveb@lsbc.org **Tel**: 604 605-5331 or 1-800-903-5300.

Contact **Felicia S. Folk**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. All communications are strictly confidential, except in cases of trust fund shortages. **Tel**: 604 669-2533 or 1-800-903-5300 **Email**: advisor@lsbc.org.

Contact **Jack Olsen**, staff lawyer for the Ethics Committee, on ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Committee. **Tel**: 604 443-5711 or 1-800-903-5300 **Email**: jolsen@lsbc.org.

Interlock Member Assistance Program – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society, and provided at no cost to individual BC lawyers and articled students and their immediate families: **Tel**: (604) 431-8200 or 1-800-663-9099.

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society, and provided at no cost to individual lawyers: **Tel**: 604 685-2171 or 1-888-685-2171.

Equity Ombudsperson – Confidential assistance with the development of workplace policies, training and education, prevention of discrimination and the resolution of harassment and discrimination concerns of lawyers and staff in law firms or legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**. **Tel**: 604 687-2344 **Email**: achopra@novus-tele.net.

privilege when dealing with the "execution, tenor or validity of wills:"

> … the common law has yet only recognized an 'exception' to the general rule of the privileged nature of communications between solicitor and client when dealing with the execution, tenor or validity of wills and wills alone.

A summary of the above exception is provided in *Solicitor-Client Privilege in Canadian Law*, Ronald D. Manes and Michael P. Silver (Butterworths, 1993) at 177:

> **Privilege and death of the client**
>
> Generally, privilege survives the death of the client and may be asserted by the solicitor on behalf of the deceased client and on behalf of the deceased client's beneficiaries, or by the representatives of the deceased client with respect to litigation involving the client when the client was alive.

However, with estate cases involving the intention of the testator or the existence of the will, the rule that privilege survives a client may be relaxed. This relaxation of privilege applies to situations in which the beneficiaries are contesting the deceased client's will and the execution, tenor or validity of the will is in question.

You should satisfy yourself that the questions you are asked properly fall within the solicitor-client exception with respect to the execution, tenor or validity of the will.✧

Credentials Committee reviews PLTC student collaboration

The Credentials Committee recently considered the conduct of two PLTC students who acknowledged that they had collaborated on one of the written PLTC assessments.

The Committee reviewed the performance of the students on the other PLTC assessments and examinations, as well as their explanations of how they came to be involved in the collaboration. The Committee also considered how important it is to the PLTC program that the students not engage in plagiarism or collaboration on assignments, assessments or examinations.

In the circumstances, the Committee decided that each student's enrolment in the Law Society Admission Program would be extended by one month, that each student would be required to redo the written assessment and that each must write an anonymous memorandum to be shared with future PLTC students.

In the memorandum, each student will detail his or her own experience, from detection of the collaboration to the conclusion of this matter by resolution of the Credentials Committee, and how he or she was affected by the process.✧

From the Courts

Rules Revision Committee issues discussion paper on tariff of costs

The Rules Revision Committee, chaired by Mr. Justice Malcolm Macaulay, has issued a discussion paper that proposes possible amendments to the Tariff of Costs (Appendix B of the Supreme Court Rules). In seeking wide consultation, the Committee invites submissions from members of the profession and the public.

The discussion paper is posted on the superior courts website: see "what's new" at www.courts.gov.bc.ca. The deadline for submissions is November 30, 2003. ✧

Appointments

Pro Bono Law of BC

The Benchers have appointed **Marina Pratchett**, QC of Vancouver to the board of directors of Pro Bono Law of BC to complete the term (expiring March 31, 2004) of former Lay Bencher Anita Olsen who earlier resigned from the position. The Law Society and the CBA (BC Branch) each appoint three of the six board members.✧

Forest land warning

BC Assessment reminds lawyers, notaries and realtors whose clients are purchasing private forest lands that these lands may be subject to a higher assessment because of previously harvested timber.

According to BC Assessment, the two property classes of forest land are 1) managed forest land and 2) unmanaged forest land. These classes cover all land in the Forest Land Reserve that is used for timber production, plus land outside the reserve that has "as its highest and best use the production and harvesting of timber."

Land in these classes is valued on a two-part basis, as detailed in section 24 of the *Assessment Act*. First, there is a bare land value that incorporates such factors as soil quality, accessibility, parcel size and location. Second, there is an added value for cut timber when it is harvested.

Timber harvested in the calendar year 2003 will show up as added value on the assessment notice of a forest land property for the 2005 assessment roll. For property taxes payable in the summer of 2005, part of the value may come from trees that were harvested up to two years before. Prospective purchasers of property that is classed as forest land are advised to enquire about previous harvesting on the property and its possible property tax implications.

Both the land and harvested timber are valued on the basis of rates prescribed by the assessment commissioner. The rates for the 2003 assessment year are found in BC Regulation 90/2000.

Further information on valuation and classification can be obtained from BC Assessment through either the local assessor or the Timber Appraiser, Assessment & Valuation Division, 1537 Hillside Avenue, Victoria, BC V8T 4Y2, Tel. 250 595-6211.✧

New online resources at BC Courthouse Library

The BC Courthouse Library Society is pleased to announce that all library branches have access to two new internet-based services: the *British Columbia Statute Service* and the *Canadian Human Rights Reporter*.

The *British Columbia Statute Service* contains an ongoing consolidation of the *Revised Statutes of BC 1996*, the Regulations of BC and the *British Columbia Statute Citator*. The statutes in this service are more current than those published by the Queen's Printer on its complimentary public site. The *BC Statute Service* also provides a history of amendments for each statute and features links from various sections of statutes to selected cases that interpret statutory language or intent.

The *Canadian Human Rights Reporter* online service provides the full text of all the decisions in that reporter as well as recent unreported human rights decisions.✧

Scams *… from page 19*

Are the claims of investment returns too good to be true?

If so, it's likely a scam.

Are you being asked to provide legal services for the money offered?

Scamsters don't want legal advice, they already know it's a scam. What they need is use of the trust account and the lawyer's good name. If a prospective client doesn't seem to need a lawyer except for the trust account, why is he in your office?

What is being offered to the lawyer?

Are you to be paid at an hourly rate? If so, for what services? An offer to compensate you by a percentage of money put through your trust account is not payment for legal services — it is treating you as a conduit.

The problem of lawyers being drawn into scams is a serious one for the financial integrity of the legal profession. The amounts these schemes generate are enormous, often in the millions. Once a scheme has collapsed, the Special Compensation Fund and Lawyers Insurance Fund may be subject to claims which are also in the millions. Even if the claims are not covered, the process of investigation and consideration itself is extremely expensive.

For both the individual lawyer and the profession as a whole, participation in a scheme that turns out to be a scam risks disaster.✧

Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, is available to compensate persons who suffer loss through the misappropriation or wrongful conversion of money or property by a BC lawyer acting in that capacity.

The Special Compensation Fund Committee makes decisions on claims for payment from the Fund in accordance with section 31 of the *Legal Profession Act* and Law Society Rules 3-28 to 3-42. Rule 3-39 (1)(b) allows for publication to the profession of summaries of the written reasons of the Committee. These summaries are published with respect to paid claims, and without the identification of claimants.

Martin Wirick

Vancouver, BC

Called to the Bar: May 14, 1979

Resigned from membership: May 23, 2002

Custodian appointed: May 24, 2002

Disbarred: December 16, 2002 (see DCD 03/05)

Decision involving claims 20020170, 20020407 and 20020554

Decision date: December 16, 2002
Report issued: January 29, 2003

Claimant: A Bank
Payment approved: ***$162,605.23***

The L Street property

In May, 2001 Mr. Wirick represented H in the purchase of a residential property on L Street in Vancouver for $210,000. The client had arranged for a $160,000 mortgage from A Bank to fund the purchase. On H's behalf, Mr. Wirick received in trust from the notary representing A Bank $159,618.94, which represented the mortgage proceeds less the fees of the notary.

To purchase the L Street property, Mr. Wirick did not use the mortgage funds but rather used funds from the sale and mortgaging of other unrelated properties.

In early 2002 H contracted to sell the L Street property for $239,000 to Mr. and Mrs. L. The parties agreed that a new house would be built on the property by V Ltd., a company owned by another of Mr. Wirick's clients (G). G held a power of attorney for H and signed the vendor's documents in the transaction.

After Mr. and Mrs. L arranged mortgage financing with A Bank, the lawyer representing Mr. and Mrs L and A Bank forwarded the net sale proceeds of $229,201.65 to Mr. Wirick on his undertaking to pay out and discharge the existing first mortgage of A Bank. Mr. Wirick did not in fact use the funds to pay out or discharge the mortgage, contrary to his undertaking. Instead he transferred the sums of $228,279.22 and $496.17 for use with respect to two other properties and $426.26 for his own law firm.

The Special Compensation Fund Committee exercised its discretion to give early consideration to the claims, taking into account the hardship suffered by the purchasers, Mr. and Mrs. L. As the original house on the L Street property had been demolished in preparation for construction of their new house, and as the construction had not proceeded, Mr. and Mrs. L had been forced to live in a basement suite with their two children and Mrs. L's two elderly parents.

In considering the claims before it, the Committee concluded that Mr. Wirick had acted dishonestly in breaching his undertaking to discharge a mortgage and in misappropriating and/or wrongfully converting the funds advanced to him by the purchasers' lawyer.

Subject to certain releases, assignments and conditions, the Committee resolved to pay the claim of A Bank so as to discharge its existing first mortgage on title (the mortgage from H). Following this discharge, the new A Bank mortgage from Mr. and Mrs. L would be placed in first position on title. Both A Bank and Mr. and Mrs. L would accordingly be restored to their intended positions.

The Committee noted that Mr. and Mrs. L faced the possibility of foreclosure unless A Bank were adequately compensated. The Committee accordingly determined to include interest in its payment at the mortgage rate of 5.55%. (On the claims on which it allowed interest, the Committee resolved to pay the mortgage interest rate up to May 24, 2002, the date of Mr. Wirick's custodianship, and the mortgage rate to a maximum of 6% thereafter.)

Decision involving claims 20020037, 20020422 and 20020442

Decision date: December 16, 2002
Report issued: February 25, 2003

Claimant: A Bank
Payment approved: ***$173,498.87***

The A Drive property

In January, 2002 Mr. Wirick represented G who had contracted to purchase a property on A Drive in Vancouver from Mr. and Mrs. W for $261,000. In March, 2002 Mr. and Mrs. W transferred the property to S, a nominee of G.

S financed the purchase through a $169,000 mortgage with A Bank; the mortgage and an assignment of rents were registered on title.

Two days later S agreed to sell the

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Special Fund claims *… from page 25*

property for $261,000 to Mr. and Mrs. M. These new purchasers contracted separately with G to have construction work done on the property.

Mr. and Mrs. M arranged a mortgage of $169,650 with B Bank. The lawyer representing Mr. and Mrs. M and B Bank subsequently forwarded the net sale proceeds of $246,691.45 to Mr. Wirick in trust on his undertaking to pay out and discharge the A Bank mortgage and the assignment of rents. Mr. and Mrs. M, B Bank and their lawyer all expected that the B Bank mortgage was to be a first charge on title.

Mr. Wirick deposited the net sale proceeds to his trust account, but did not use the funds to pay out the A Bank mortgage, contrary to his undertaking. Instead he paid out the funds in relation to another property.

The Special Compensation Fund Committee exercised its discretion to give early consideration to the claims. The Committee took into account the hardship suffered by Mr. and Mrs. M. The couple could not obtain funding to complete construction on the property as long as the A Bank mortgage remained on title and, in the interim, were paying rent to the new owners of their previous residence in order to live there.

The Committee found that Mr. Wirick had misappropriated and/or wrongfully converted the funds received in trust. The Committee resolved to approve the claim of A Bank in the amount of $173,498.87, subject to certain releases, assignments and conditions. The Committee also resolved to include interest in its payment at the mortgage rate of 4.9%. (On the claims on which it allowed interest, the Committee resolved to pay the mortgage interest rate up to May 24, 2002, the date of Mr. Wirick's custodianship, and the mortgage rate to a maximum of 6% thereafter.)

By discharging the A Bank mortgage, the Committee noted that Mr. and Mrs. M and B Bank would be restored to their intended positions.✧

Conveyancing issues *… from page 16*

which is necessary to allow the lawyer to comply with the undertakings. This is so particularly since clause 14 of the Contract of Purchase and Sale, to which the vendor is a party, allows for use of the undertakings and thereby contemplates disclosure of this financial information. The purchaser's lawyer should also seek client approval for the lawyer to review the vendor's confidential information without disclosing it to the purchaser.

The Task Force has taken the position that lawyers should discuss and resolve these issues in a manner consistent with both the contractual obligations of the parties and the goals of transparency.

The CBA standard undertakings have been posted in the "What's new" section of the Law Society website for reference.

Lawyers will note that clause 8.5 of the undertakings requires the vendor's lawyer to use "diligent and commercially reasonable efforts to obtain the discharge in a timely manner." The Vancouver Real Property Section has published a definition of what it considers to be diligent and commercially reasonable efforts. However, the Law Society's Task Force has not considered that definition and asks lawyers to exercise caution on a couple of points.

First, the Task Force notes that, in a lawyer's efforts to obtain a mortgage discharge, it would not be usual practice for the lawyer to contact the Law Society to obtain names of contacts within a particular financial institution. Second, it would not be usual practice for a lawyer to contact the Law Society for assistance to obtain the discharge. The Law Society cannot in fact become involved in individual conveyancing transactions. There may be certain situations in which a lawyer believes it important to contact the Law Society to flag a possible serious or systemic problem with a particular financial institution respecting mortgage discharges, but that would not be in the normal course of practice.

As already noted, lawyers are obliged to file reports with the Law Society in accordance with Rule 3-89. The Law Society plans to review filings under this Rule, with an eye to flagging systemic problems in financial institutions.

The Task Force understands that the Vancouver Real Property Section will soon review its definition of what constitutes "diligent and commercially reasonable efforts" to obtain discharges.✧

Unauthorized practice actions

Court orders

On petition by the Law Society, the BC Supreme Court has ordered that **Luc Blanchette**, of Kelowna, carrying on business as the **Public Advocacy Society**, be prohibited from drawing documents for use in a judicial or extra-judicial proceeding, negotiating or settling a claim or demand for damages, giving legal advice or offering or representing that he is qualified or entitled to provide any of these services for fee: May 17, 2002 (entered January 29, 2003).

The BC Supreme Court has ordered that **Gary De Guerre** and **Dewicked Entertainment Inc.**, of North Vancouver, be prohibited from drawing corporate documents, giving legal advice or offering or representing that they are qualified or entitled to provide these services for fee: December 10, 2002.

The BC Supreme Court has also ordered, by consent, that **Peter J. Merry** of Vancouver, a former lawyer, be prohibited from holding out that he is a member of the Law Society of BC or a member of a law society of another province and from engaging in the practice of law: November 6, 2002.

Undertakings

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