



# BENCHERS' BULLETIN

Keeping BC lawyers informed

## PRESIDENT'S VIEW:

Effective regulation ... so much more than discipline / 2

## CEO'S PERSPECTIVE:

Keeping an eye on the ball / 4

## NEWS:

Your fees at work – Courthouse Libraries BC / 5

Invitation to serve as counsel in complaint and discipline matters / 5

2011 volunteers / 6

In memoriam / 7

## PRACTICE:

Practice Tips: Tech security for lawyers / 9

Practice Watch: Practice checklists, new BC Code, scams, client ID and counterfeit cheques / 10

## CONDUCT & DISCIPLINE:

Conduct reviews / 16

Discipline digest / 18



## FEATURE

**The bottom line for law firms on diversity / 12**

*A new report on Aboriginal peoples and visible minorities in the legal profession*



## Effective regulation ... so much more than discipline

by Bruce A. LeRose, QC

SLIGHTLY MORE THAN eight years ago, I became a Benchers of the Law Society of British Columbia. To say that there is a steep learning curve when one becomes a Benchers is an understatement. What one quickly realizes is that the Law Society is a multi-dimensional, multi-purpose and multi-faceted organization.

Over the course of my presidency, I plan to speak to as many stakeholders as possible about the Law Society, the many services it provides and how it demonstrates it is effectively and transparently protecting the public interest.

The Law Society strives to be a model regulator and does so in many more ways than just receiving complaints and disciplining lawyers.

The Law Society is responsible for admissions to our profession and does this through its credentialing program – one of the most comprehensive in all of North America. Part of this admission and credentialing program includes the operation of what is effectively an on-site college that delivers the Professional Legal Training Course.

This Law Society also administers the mandatory Continuing Professional Development initiative, the first in Canada, now recognized nationwide as the template for similar programs in other law societies.

The Practice Advice Program offers the services of five highly skilled and experienced practice advisors who assist lawyers to serve the public effectively by providing advice and support on ethical and practice management issues.

Practice standards and competency is another core function of the Law Society, supporting lawyers with educational resources and law office management tools, conducting practice reviews of lawyers whose competency is in question, recommending and monitoring remedial programs and overseeing the continuing operation and enhancement of our

approved online lawyer support programs.

The Law Society operates a highly successful in-house custodianship program that ensures that the public is protected through the appointment of the Law Society as custodian to manage and, where appropriate, wind-up legal practices in an effective and efficient manner when members cannot continue to practise due to illness, death, disciplinary action or other reasons.

Another core function is managing reports of people posing as lawyers and providing legal services. When the Law Society receives a report of unauthorized practice,

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*And, of course, there is the Law Society's overwhelming commitment to regulating professional conduct by enforcing the ethical, professional and competency standards set for the profession.... This core function utilizes more than 40% of all Law Society resources, which demonstrates, to me at least, its significance.*

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it will investigate and, where appropriate and in the public interest, seek remedies to restrict or eliminate this risk to the public and the profession, including seeking court injunctions.

The trust assurance program is another in-house program that is designed to assure the public that funds entrusted to lawyers will be used as instructed and accounted for properly. Through annual filings and a random audit program which sees all law firms audited at least once every six years, the Law Society ensures that lawyers manage trust funds in accordance with our trust requirements.

The Law Society also operates an insurance company. The Lawyers Insurance Fund (LIF) provides professional liability insurance for BC lawyers that offers reasonable limits of coverage and exceptional

### BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled students and the public on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities. BC lawyers are responsible for reading these publications to ensure they are aware of current standards, policies and guidelines.

Suggestions on improvements to the *Bulletin* are always welcome — contact the editor at [communications@lsbc.org](mailto:communications@lsbc.org).

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. Print subscriptions may be ordered for \$50 per year (\$20 for the newsletters only; \$30 for the Member's Manual amendments only) by contacting the subscriptions assistant at [communications@lsbc.org](mailto:communications@lsbc.org).

Current and archived issues of the *Bulletin* are published online at [lawsociety.bc.ca](http://lawsociety.bc.ca) (see Publications and Resources).

#### PHOTOGRAPHY

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Lindsey Donovan Photography: page 3

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service at premiums that compare very favourably to other jurisdictions. In addition to coverage for negligent acts by lawyers, LIF protects the public in the very unhappy event of defalcations and misappropriation of funds.

The organization and, in particular the Benchers, are well-served by the work of our policy group, our own "think-tank" that monitors the issues of the day and forecasts those yet to come. Working with the advisory committees, the group assists the Benchers with policy and other decisions that have shaped the Law Society's stand on everything from access to justice to cloud computing. The policy group is a large part of the reason the Law Society is recognized as a leader in the regulatory arena.

And, of course, there is the Law Society's overwhelming commitment to regulating professional conduct by enforcing the ethical, professional and competency standards set for the profession. This is accomplished through effectively and efficiently investigating and evaluating concerns and complaints about lawyer conduct, and recommending action when necessary. This core function utilizes more than 40% of all Law Society resources, which demonstrates, to me at least, its

significance.

On top of all this is the substantial work that Law Society staff, volunteers and Benchers take on at the Federation of Law Societies level in developing national standards such as the Model Code. This work is further enhanced by extensive monitoring of international developments through involvement in groups such as the Commonwealth Lawyers Association, the International Bar Association and the International Institute of Law Association Chief Executives.

All of the above is delivered by a highly educated, truly motivated and deeply caring staff who do their level best to carry out our mandate and serve the public and the membership in a courteous, professional manner. For this, lawyers and, most importantly, the public should feel fortunate to have the benefit of their hard work.

Having said all this, the Law Society and the Benchers are committed to continuous improvement in regulation and governance.

While CEO Tim McGee pursues a number of initiatives designed to enhance Law Society operations, the Benchers have committed to a new, three-year strategic plan. There are three principal goals in the three-year plan: the Law Society will be a

more innovative and effective professional regulatory body; the public will have better access to legal services; and the public will have greater confidence in the administration of justice and the rule of law.

Among the many initiatives identified in the plan, the Benchers have agreed that it is time to undertake a thorough review of our governance processes. It's been over 17 years since the Benchers last completed a governance review, something that all good organizations should do regularly. The governance review will be an opportunity for the Benchers to step up and take responsibility for modernizing our roles and approaches to setting policy, assessing the composition of the Bencher group and considering the committees for which we are responsible.

Finally, on a personal note, I simply want to say that becoming president of the Law Society is for me a great honour and privilege. This organization has been described to me by people outside the province as being the "gold standard" for professional regulation. My intent is to ensure that reputation persists through the ongoing dedication of Benchers and staff to finding ways to better serve the public interest. ♦



**New President and Benchers take oath of office** – Bruce LeRose, QC was sworn in as president by Lance Finch, Chief Justice of BC at the Benchers' first meeting of the year on January 27, 2012. Also sworn into office were first vice president Art Vertlieb, QC, second vice president Jan Lindsay, QC, and all other Benchers.



# Keeping an eye on the ball

by Timothy E. McGee

THE LAW SOCIETY of Ireland is currently engaged with its national government in what can best be described as a high-stakes negotiation over the future of the legal profession in that country. The current government, faced with a serious raft of social and economic ills, is looking to shake up the established order. The Law Society has fallen into the crosshairs, at least in part because it acts both as the advocate and the regulator of lawyers in that country. This dual role now seems likely to fall by the wayside as part of the government's populist political agenda. But the Law Society of Ireland has also voluntarily walked away from the business of handling and resolving complaints against lawyers. This function is being surrendered to a non-lawyer based body in what appears to be a conciliatory gesture in an ongoing jurisdictional debate.

What does this mean for the regulation of lawyers in Canada? There are many important distinctions between our circumstances and those in Ireland, including the clear separation of the representative and regulatory functions. However, as a public interest regulator, it is always important to be aware of the issues faced by other similar organizations and to strive to find ways to be more effective and efficient in our core activities. We also don't assume the public or anyone else will know how well we are doing. That is why we are proactive in communicating our standards, in sharing our results and standing by our performance.

Take, for example, the handling and resolving of complaints against lawyers. This is one of the Law Society's core regulatory activities. We receive approximately 1,100 complaints a year. While the vast majority of these are not serious and are readily resolved, we have a set of Key Performance Measures we use to determine whether the public is

satisfied with the thoroughness, timeliness and fairness of our complaints-handling process. We track those measures and post our results every year on our website. We have been meeting our targets and improving our complaints-handling performance incrementally over the past few years. Our complete Key Performance Measures results for 2011 will be included in our next annual report, which will be published in April 2012.

I believe that the public and, indeed, our members demand that complaints against lawyers be handled effectively and efficiently. We will continue to strive to do this and to share our results and to improve wherever we can. While the Law Society of Ireland may have had no choice but to surrender this function, we have no plans to do so at the Law Society of BC. We will keep our eye on the ball and continue to do our best to earn the trust and confidence of the public and those whom we regulate. ❖



## 2012–2014 Strategic Plan

THE BENCHERS HAVE approved a three-year strategic plan to guide the Law Society.

The principal goals are:

- the Law Society will be a more innovative and effective professional regulatory body;
- the public will have better access to legal services;
- the public will have greater confidence in the administration of justice and the rule of law.

Michael Lucas, Manager of Policy and Legal Services, helped to direct the process. "We started planning for the 2012–2014 strategic plan in the spring of 2011, when we had about nine months left in the first strategic plan." Working with CEO Tim McGee and Chief Information and Planning Officer Adam Whitcombe, the policy group considered initiatives in the 2009–2011 plan that were likely to remain of strategic importance through to 2014, as well as ongoing and emerging issues deemed to be of potential interest to Benchers and the Law Society.

In the summer, the Benchers decided on the goals for the 2012–2014 Strategic Plan. They then debated the merits of a host of potential strategies and initiatives brought forward in the planning process, as well as a few new ones identified by the Benchers themselves. In the fall, the Benchers prioritized strategies in relation to the goals, and after the most important were identified, they were distilled into the plan under the relevant goals. The final plan was approved in December.

The goals, strategies and initiatives set out in this strategic plan are in addition to the overall operational goals of the Law Society's core regulatory programs, such as discipline, credentials, and practice standards. These programs are fundamental to fulfilling the Law Society's mandate and will always be strategic priorities for the Society.

The strategic plan is available on the Law Society website in About Us > Strategy and Performance Management. ❖

## Your fees at work – Courthouse Libraries BC

*The Law Society will regularly highlight some of the many services included in the annual practice fee so that lawyers are aware of and can take full advantage of benefits to which they are entitled.*

IN THIS ISSUE, we feature **Courthouse Libraries BC**, a non-profit organization providing legal information services to the legal community and the public. Over the years, Courthouse Libraries BC has grown from a bricks and mortar book repository to a multi-channel resource that collects and curates legal information and makes it available when and where it is needed.

**New online lawyers' Reading Room portal** allows lawyers to access Irwin Law and HeinOnline materials remotely through the library website. From law journals to an updated text on the Law of Evidence, it's easy to sign in and search. This service will continue to expand in order to offer information tools directly to desktop and mobile devices.

**Training and research support** is provided in response to increasing demand. Courthouse Libraries BC now offers free regularly scheduled CPD-eligible training sessions to ensure lawyers are able to get up to speed with online information

tools. These training sessions will soon be taken on the road to branches across the province.

**Legal community liaisons** make it easy for lawyers to stay current on legal developments. Two legal liaison officers have been added to staff, both of whom have experience "in the trenches" of small firm legal practice and are available to provide advice on becoming more effective.

**Dedicated practice portals** have been added to the website for civil litigation, family law, personal injury, wills and estates, and practice management. These spaces are intended to be collaborative environments for practitioners and combine legislation, case law, secondary sources, blogs and social media commentary from practitioners all in one place. The goal is to provide a one-stop-shop for getting started and staying up to date in each of these core areas. A criminal law portal will be added soon.

**Local library revitalization** will ensure

branch locations remain essential hubs for legal information, both online and in print, as well as for supporting training and lawyer needs for work space away from the office. The revitalization will transition the branches from basic book storage to fully equipped spaces where lawyers can access a broad range of digital tools and office-away-from-the-office services, such as computing and wireless network access.

**Simplified – and cheaper – fees** have been implemented to address the frequently raised issue of complex library fees. For 2012, simple flat rates for document delivery and printing as well as a rate of \$15 for every 15 minutes of legal research assistance (the first 20 minutes remain free) are being offered.

**Clicklaw** is a website for the public aimed at enhancing access to justice in British Columbia. Clicklaw features legal information and education designed for the public from over 24 contributor organizations.

For more information on how Courthouse Libraries BC can help you, visit [www.courthouselibrary.ca](http://www.courthouselibrary.ca). ❖

## Lawyers invited to offer services as counsel for lawyers in complaint and discipline matters

LAW SOCIETY INVESTIGATIONS and discipline hearings have potentially serious consequences, and the Society urges all lawyers who are or may be subject to discipline proceedings to retain counsel.

Traditionally, a relatively small group of senior counsel have assisted or represented lawyers in most proceedings, often for reduced fees or on a pro bono basis. To help ensure the widest availability of counsel throughout BC who can offer representation during the investigation and disciplinary processes, the Law Society will compile a list of available counsel. The Society will provide this list to lawyers on request and when a citation is issued.

Lawyers will be included on this list by their request and their inclusion is *not* a

representation by the Law Society regarding their experience or ability. The Society will *not* become involved in any fee arrangements. In each case, it will be entirely up to a lawyer consulted from the list and the lawyer seeking representation as to whether they wish to form a lawyer-client relationship.

Before putting your name forward, consider whether you are or may be in a conflict situation or in a situation that may give rise to an appearance of conflict. Refer to the *Professional Conduct Handbook* provisions about conflicts and disclosure to clients (Canon 3(2), Rule 3(k) of Chapter 3, Chapters 6 and 7 and Rule 1(c) of Chapter 8) and, if applicable, Benchers policies about acting for members. Benchers and

lawyers in the Law Society's hearing panel pool would be in an apparent conflict.

If you are a lawyer, and would like to have your name on the list, please send the Law Society a letter with your name, contact information and an expression of whether you would be willing to act on a pro bono or reduced fee basis. Also, please indicate whether you wish to assist members at the investigation stage, the hearing stage, or both.

Please forward your information to: Andrea Brownstone, Manager, Investigations, Monitoring and Enforcement, Law Society of BC, 845 Cambie Street, Vancouver, BC V6B 4Z9, Fax: 604.605.5399 ❖



## Thanks to our 2011 volunteers

THE BENCHERS THANK and congratulate all those in the profession and the legal community who volunteered their time and energy to the Law Society in 2011. Whether serving as members of committees, task forces or working groups, as PLTC guest instructors or authors, as fee mediators, event panellists or advisors on special projects, volunteers are critical to the success of the Law Society and its work.

Over the past year, the Society has enjoyed the support and contributions of over 300 volunteers, all of whom deserve acknowledgement.

Quentin J. Adrian	Alexander S. Burton	Garth E. Edwards	Michael Hewitt
John N. Ahern	Mark Philip Bussanich	Michael R. Eeles	Roger E. Holland
Paul R. Albi, QC	Lino Bussoli	Perry S. Ehrlich	William Hopkins
Ralston Alexander, QC	W. Bryce Cabott	J. Timothy Ellan	Charles B. Hotel
Joel M. Altman	John R.W. Caldwell	Christine Elliot	Kyra L. Hudson
Karen Anderson	Elizabeth A. Campbell	Meldon Ellis	Elizabeth Hunt
Rebecca A. Anderson	Jeffrey T.J. Campbell	Silvana Facchin	John Hunter, QC
Robert Anderson, QC	Robert Campbell	John Ferber	John J. Hyde
Jeffrey P. Andrews	James L. Carpick	Craig Ferris	Oleh W. Ilnyckyj
Kenneth Armstrong	Nigel Cave	Robert A. Finlay	Nicole C. Jedlinski
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Joe Battista, QC	Carolyn R. Christiansen	Eugene Fraser	Jennifer Johnston
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Tim Bezeredi	Heather D. Craig	Mr. Justice Geoffrey Gaul	Kathleen P. Keilty
John Bilawich	Azim Dato, QC	Kelly-Lynne Geddes	Jocelyn M. Kelley
Geoffrey Bird	Samantha L. Davey	Amir Ghahreman	Callum G. Kelly
Heather Blatchford	Mark Davies	Kerri Gibson	Patrick Kelly
Johanne Blenkin	Nicholas Davies	Jonathan R. Goheen	Judith Kennedy
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Charles W. Bois	Ian T. Davis	Peter Gorgopa	Paul G. Kent-Snowsell
Kim Bolan	Michael G. Demers	Eric V. Gottardi	Richard B. Killough
Joseph A. Boskovich	Craig Dennis	Renee Collins Goult	Martha Jane Konig
John-Paul E. Boyd	Michael Dery	Jennifer L. Gray	Darren S. Kozol
Dan Burnett	Rajwant K. Dewar	Lewis J. Grenier	Edwin G. Kroft, QC
Melanie M. Bradley	M. Joyce DeWitt-Van Oosten, QC	David Grunder	Terence La Liberté, QC
Mark R. Braeder	Jennifer D.S. Dezell	Frederick W. Hansford, QC	Annamarie Laing
Tannis D. Braithwaite	Kelly R. Doerksen	David W. Hay	Theresa Lalonde
Michael L. Bromm	Christopher Doll	Ian C. Hay	Stanley Lanyon, QC
David Brown	Michaela E. Donnelly	Harmon C. Hayden	Michael J. Lawless
Marian K. Brown	Frank R.C. Dorchester	E. Ian B. Hayward	P Daniel Le Dressay
Peter J. Brown	Emil Doricic	Lisa J. Helps	Gerald J. Lecovin, QC
Mike J. Brundrett	Jennifer Duncan	Jane Henderson, QC	Adrienne V. Lee
Alexander Budlovsky, QC	Sandra L. Dworkin	Colleen Henderson	Roger D. Lee
Susan P. Burak	Janelle L. Dwyer	Arlene H. Henry, QC	Marcel E. LeHouillier

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 Robert J. Lesperance  
 Jason W. Levine  
 Janet Lew  
 Janneke P. Lewis  
 Marvin Lithwick  
 John S. Logan  
 Jeremy T. Lovell  
 Helen H. Low  
 Hermann C. Luitingh  
 Edward Macaulay  
 Trudy A. Macdonald  
 Robin C. MacFarlane  
 Rodrick H. MacKenzie  
 William MacLeod  
 Pat Madaisky  
 S. Nicola Mahaffy  
 Karl A. Maier  
 Valerie Mann  
 Kevin Marks  
 Phillip Marshall  
 Dinyar Marzban, QC  
 Joseph C. McArthur  
 Roderick H. McCloy  
 Christopher McEwan  
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 Jonathan McLean  
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 Kar Miu  
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 Geoffrey Sherrott  
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 Wayne E. Stilling, QC  
 Dan M. Sudeyko  
 Linda M. Sum  
 Jill Swanston  
 Vivian Tang  
 Deborah H. Taylor  
 Joyce Thayer  
 Angela E. Thiele  
 Garry K. Thomas  
 Michael G. Thomas  
 Donald Thompson  
 Sandy Thomson  
 Michael J. Todd  
 Gordon Turriff, QC  
 Tony Vecchio  
 H. William Veenstra  
 Magnus C. Verbrugge  
 James Vilvang, QC  
 Kay M. Vinall  
 Kathleen Walker  
 Brian Wallace, QC  
 Mark Warkentin  
 Karl F. Warner , QC  
 Eric Warren  
 Penny Anne Washington  
 Eric Watson  
 Richard M. Wenner  
 Angela Westmacott  
 Karen Whonnock  
 Michael D. Wilhelmson  
 Gary J. Wilson  
 Mary-Jane Wilson  
 Steven M. Winder  
 Janet Winteringham  
 Joseph Wong  
 Bruce Woolley, QC  
 Katharine P. Young  
 David A. Zacks, QC ❖

## In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2011:

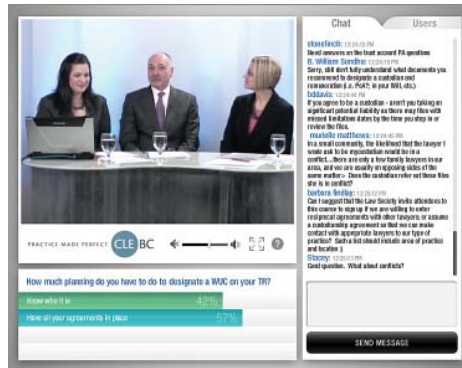
G. Andy Advani  
 J. Trevor Alexander  
 Stafford D.R. Alliston  
 Gordon V. Anderson  
 Laurel Bauchman  
 Timothy Blenkarn  
 Donald I. Brenner, QC  
 Lynne K. Eversole  
 J. Glenn Gates, QC  
 Michael O. Harris  
 Denise H. Heap  
 Allan G. Helgason  
 Thomas F. Isherwood  
 A. Roderick M. Johnston  
 Asgarali A. Kaderbhoj  
 Charles C. Locke, QC  
 Roderick I.T. MacDonald  
 Shawn M. MacDonald  
 Robert D. McIntosh  
 Jill H. McIntyre  
 Jonathan Oliphant  
 Liisa K. Spoor  
 Etel R. Swedahl  
 Gillian P. Wallace, QC  
 Roger D. Watts  
 Christopher J. Wilcox  
 Stanley H. Winfield  
 M. Byron Woods  
 Thomas M. Wylie ❖

## SUCCESSION PLANNING WEBINAR

## Law Society's first webinar a success

THE LAW SOCIETY hosted its first webinar on March 8, 2012, as part of our campaign, *Succession Planning, it's good practice*. Put on with the broadcasting capabilities and partnership of the Continuing Legal Education Society of BC, nearly 500 lawyers registered for the webinar.

The webinar featured live, on-camera discussion involving Sherelle Goodwin, manager of Custodianships, and Bruce Thompson, a sole practitioner, as the experts and Communications Officer Dana Bales as the moderator. The noon-hour



webinar also included on-line chat and real-time poll surveys.

Based on initial feedback, the response to the webinar was excellent with viewers expressing their thanks to the Law Society and indicating they found it to be very useful and informative. ❖

## In Brief

### JUDICIAL APPOINTMENTS

Hon. Madam Justice **Anne MacKenzie** has been appointed to the BC Court of Appeal, replacing Mr. Justice P.D. Lowry, who elected to become a supernumerary judge. She was formerly Associate Chief Justice of the Supreme Court of BC in Vancouver.

Hon. Mr. Justice **Austin Cullen**, of the Supreme Court of BC, was appointed Associate Chief Justice of the Supreme Court of BC.

**Robert Jenkins**, of Jenkins Marzban Logan in Vancouver, was appointed a judge of the Supreme Court of BC in Vancouver. He replaces Mr. Justice Austin Cullen, who was appointed Associate Chief Justice.

**Patricia Bond**, a partner with North Shore Law LLP in North Vancouver, and a Bencher, was appointed a judge of the Provincial Court of BC in Surrey.

**Gregory Brown**, a partner with McEachern, Harris and Brown in Maple Ridge, was appointed a judge of the Provincial Court of BC in Abbotsford.

**Randall Callan**, a legal officer with the Canadian Forces in the Office of the

Judge Advocate General, was appointed a judge of the Provincial Court of BC in Prince George.

**Victor Galbraith**, administrative Crown counsel in Quesnel, was appointed a judge of the Provincial Court of BC in Prince George.

**Melissa Gillespie**, QC, regional Crown counsel for the Fraser region, was appointed a judge of the Provincial Court of BC in Surrey.

**Ted Gouge**, QC, with the Legal Services Branch, Ministry of Attorney General, was appointed a judge of the Provincial Court of BC in Nanaimo.

**Patricia Janzen**, of Harris & Company in Vancouver, was appointed a judge of the Provincial Court of BC in Port Coquitlam.

**Gregory Koturbash**, administrative Crown counsel in Salmon Arm, was appointed a judge of the Provincial Court of BC in Penticton.

**Terence Wright**, an associate with Warner Bandstra Brown in Terrace, was appointed a judge of the Provincial Court of BC in Smithers. ❖

## Unauthorized practice of law

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

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

From November 11, 2011 to February 15, 2012, the Law Society obtained undertakings from 11 individuals and businesses not to engage in the practice of law.

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

**Charles Bryfogle**, of Anaheim Lake, formerly of Kleena Kleene, BC, is prohibited from unlawfully engaging in the practice of law as defined in section 1 of the *Legal Profession Act*, and from commencing, prosecuting and defending an action in any court on behalf of others without leave of the court. Bryfogle is also required to notify the Law Society with respect to his involvement in any legal matter. On January 17, 2012, after the Law Society's application, the court found Bryfogle in contempt of the previous order for failing to notify the Law Society of his involvement in several legal matters. The court sentenced Bryfogle to a \$5,000 recognizance with several conditions for one year and awarded the Law Society its special costs.

**Arron Hong**, aka **Eric Joon Hong**, of Vancouver, BC, provided legal advice and offered to prepare pleadings and other legal documents for a fee. The Law Society obtained an order permanently prohibiting Hong from engaging in the practice of law as defined in section 1 of the *Legal Profession Act*. The court awarded the Law Society its costs. ❖



PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

## Tech security for lawyers

*♪ I don't know 'bout the plans  
That I have to save  
My security has never  
Been enough for me...♪*

Lyrics, music and recorded by Pete Murray

AT A RECENT presentation, BC lawyer Nicole Garton-Jones stated that technology is changing the way we, as lawyers, think. I think Nicole is onto something. No longer is technology just a tool that we use – it is now so integrated into how we work that it is effectively rewiring our brains. This change is both positive and negative. On the positive side, technology, particularly the Internet, has given lawyers an incredible tool for research, communication, marketing and delivering legal services. A lawyer in a small community can develop (and indeed in many cases, already has) a national reputation and practice, courtesy of the reach of the Internet.

The negative side of technology is the onus that it has placed on all of us to be and remain competent with technological tools in order to meet our professional responsibility, confidentiality, competence and ethical duties to our clients.

Indeed, Bloomberg reporting on the hack of Toronto Bay Street law firms concerning a potash acquisition deal, stated on February 8 ([tinyurl.com/7yqrek3](http://tinyurl.com/7yqrek3)) that: "As financial institutions in New York City and the world become stronger, a hacker can hit a law firm and it's a much, much easier quarry," according to Mary Galligan, head of the cyber division in the New York City office of the US Federal Bureau of Investigation.

The article went on to state that 80 law firms were hacked in the US: "... the FBI issued a warning to the lawyers: Hackers see attorneys as a back door to the valuable data of their corporate clients."

Forbes.com ([tinyurl.com/6swdbc6](http://tinyurl.com/6swdbc6)) on January 31, 2012 reported on two partners of a New York firm who were contacted by the FBI after all of their client files were found on a server in another country – this particular server was used to send information "to a large Asian country."

In this column, I will run through some

tools that we use, highlight potential security issues, and suggest ways to help deal with these issues.

### DESKTOPS AND LAPTOPS

I have received many calls from lawyers who have had a computer stolen. My first question is: "What information did you have stored on that computer, including remote access capability?" My second question is: "What security did you have in place on that computer?"

Invariably, lawyers tell me that all sorts of confidential client information (as well as confidential information regarding their own practice) was on that stolen laptop. This is particularly acute for family law lawyers, who may have detailed financial records of their clients, including tax returns containing SIN numbers, banking, credit card and business information. They may also have remote access software installed that can access the office network, thereby opening up even more information to prying eyes.

When it comes to the security on that computer, typically I am told that it has a "Windows password." Unfortunately, tools such as the Ophcrack (a free download on the Internet) can crack a 10-character Windows password in about 40 seconds ([pcsupport.about.com/od/toolsofthetrade/tp/passrecovery.htm](http://pcsupport.about.com/od/toolsofthetrade/tp/passrecovery.htm)).

Solution? Turn on full hard drive encryption combined with a strong and safe password.

Wikipedia states that the benefits of full disk encryption are as follows:

"Full disk encryption has several benefits compared to regular file or folder encryption, or encrypted vaults. The following are some benefits of disk encryption:

1. Nearly everything including the swap space and the temporary files is encrypted. Encrypting these files is important, as they can reveal important confidential data. With a software implementation, the bootstrapping code cannot be encrypted however. (For example,

BitLocker drive encryption leaves an unencrypted volume to boot from, while the volume containing the operating system is fully encrypted.)

2. With full disk encryption, the decision of which individual files to encrypt is not left up to users' discretion. This is important for situations in which users might not want or might forget to encrypt sensitive files.
3. Immediate data destruction, as simply destroying the cryptography keys renders the contained data useless. However, if security towards future attacks is a concern, purging or physical destruction is advised."

Full disk encryption is built into the Ultimate and Enterprise versions of Windows 7, into Mac software (upgrade to version 10.7 "Lion") and is available as third-party add-on software. A comparison of full disk encryption software can be found at [en.wikipedia.org/wiki/Comparison\\_of\\_disk\\_encryption\\_software](http://en.wikipedia.org/wiki/Comparison_of_disk_encryption_software).

### MOBILE DEVICES

These devices, which include USB flash drives, portable hard drives, CD-ROMs, smart phones, iPads and other tablet computers, can become lost or stolen. USB drives in particular can easily fall out of a pocket and be lost.

Solution? Here is a good and short article by Stanford University that summarizes mobile computing guidelines ([stanford.edu/group/security/secure-computing/mobile\\_devices.html](http://stanford.edu/group/security/secure-computing/mobile_devices.html)). When it comes to USB flash drives, it is a good idea to encrypt the data to prevent anyone from plugging the drive into a computer and accessing the information.

### CLOUD COMPUTING

The Law Society has issued the final report of the Cloud Computing Working Group and is currently working on a checklist for

*continued on page 23*

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

## Practice checklists, new BC Code, scams, client ID and counterfeit cheques

### THE PRACTICE CHECKLIST MANUAL

The Law Society's *Practice Checklist Manual* is a web-based reference available free of charge to BC lawyers and articulated students (go to Publications and Resources > Practice Resources on the Law Society website at [lawsociety.bc.ca](http://lawsociety.bc.ca)). Developed by the Law Society with the assistance of the Continuing Legal Education Society of BC, the manual contains 41 checklists in nine subject areas:

- Client Identification and Verification (one checklist and sample forms)
- Corporate & Commercial (13 checklists)
- Criminal (four checklists)
- Family (six checklists)
- Litigation (six checklists)
- Real Estate (three checklists)
- Wills & Estates (five checklists)
- Human Rights (one checklist)
- Immigration (two checklists)

While it's not mandatory for lawyers to use the manual, it's obviously prudent to use checklists in practice so that important steps aren't missed. Although an attempt has been made to be comprehensive, and the checklists are the result of careful consideration of each subject area, the checklists aren't exhaustive and aren't intended as a substitute for a lawyer's professional judgment as to the correctness and applicability of the material to the lawyer's file. They're intended primarily to assist in organization and to suggest points that a lawyer should consider. It is expected that lawyers will use other resources as well. For example, if using part 4 of the Testator Interview Checklist (Fraud, Undue Influence, Suspicious Circumstances), a lawyer may also want to read the October 2011 Guide prepared by the BC Law Institute: *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*. Lawyers should refer to applicable statutes, regulations and case law for

definitive answers in any subject area.

In many situations, it won't be necessary to carry out all of the activities contained in a checklist. The checklists are available in Word so that lawyers can customize them for their use.

The checklists are generally updated once a year on a rolling basis. For example, one subject area's checklists may be updated and available on the website before another subject area.

More information is available on the website about the use of the *Practice Checklists Manual* and highlights of the most recent changes.

### NEW BC CODE – DUTY TO REPORT

On March 2, 2012, the Benchers set January 1, 2013 as the implementation date of the new *Code of Professional Conduct for British Columbia*, which will replace the current *Professional Conduct Handbook*. Most rules in the current Handbook have counterparts in the Code; however, some have changed or are new. For example, under Chapter 13, Rules 1 and 2 of the Handbook, a lawyer must report another lawyer to the Law Society as follows:

- (1) Subject to Rule 2, a lawyer must report to the Law Society another lawyer's:
  - (a) breach of undertaking that has not been consented to or waived by the recipient of the undertaking,
  - (b) shortage of trust funds, and
  - (c) other conduct that raises a substantial question as to the other lawyer's honesty or trustworthiness as a lawyer.
- (2) In making a report under Rule 1, a lawyer must not disclose any confidential information respecting the lawyer's client acquired in the course of the professional relationship or any privileged communications between them, unless the client expressly or implicitly consents.

In Rule 6.01(3) of the new Code, the duty

to report has been expanded and helpful commentary is added. Notably, it appears that a lawyer has a duty to report himself or herself, as well as another lawyer, in the following circumstances:

#### Duty to Report

6.01 (3) Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society:

- (a) a shortage of trust monies;
- (b) a breach of undertaking or trust condition that has not been consented to or waived;
- (c) the abandonment of a law practice;
- (d) participation in criminal activity related to a lawyer's practice;
- (e) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;
- (f) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
- (g) any other situation in which a lawyer's clients are likely to be materially prejudiced.

#### Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the

advice of the Society directly or indirectly (e.g., through another lawyer). Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counselors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

#### THE BAD CHEQUE SCAM (FAKE CERTIFIED CHEQUES AND OTHER NEGOTIABLE INSTRUMENTS)

Scamsters continue to try to trick lawyers into voluntarily paying out funds from their trust account. We have reorganized and expanded the bad cheque scam information in the Fraud Alerts section of the Law Society website to further assist lawyers. Read about how to avoid getting caught and become familiar with the common characteristics, red flags, ruses and twists and developments, and steps you can take to manage the risk. Check out the names and documents page. It includes an alphabetical list of some of the names that fraudsters have used in BC along

with the types of ruses they attempted. Please note that real people with the same names may be the victims of fraudsters or of coincidence, but are not suspected of wrongdoing.

Read about what to do if you suspect a new client may be a scamster or discover you've been scammed. Contact Practice Advisor Barbara Buchanan (bbuchanan@lsbc.or) or 604.697.5816 if you would like confidential practice advice in determining if a new matter may be a bad cheque scam that you should report to the police and your bank, or to report any new potential scams and fraudsters. Reporting allows us to notify the profession, as appropriate,



and to update the list of names and documents.

These names have been added recently:

- Commercial loan – Brian McKinley
- Commercial invoices (collecting on a phony overdue business debt) – Ronal Fortis, Taro Hagiwara
- Personal loan agreement – Yu Sheng Li
- Phony debt collection in the matrimonial context – Isabella Minor, Tammy Brewer, Tammy Schwartz

#### VERIFYING THE IDENTITY OF A CLIENT OUTSIDE OF CANADA

In the bad cheque scam scenarios, a new client often initially contacts a lawyer by email and says that he or she resides in another country and, for that reason, cannot meet with the lawyer in person. The client usually emails a scan of a driver's licence

or passport hoping that the lawyer will accept the scan for verification of identity. This is not sufficient.

If you can't meet with the potential new client in person, you must enter into a written agreement or arrangement with an agent. The agent must meet with the client in person to verify the client's identity, then send that information to you. You may use your discretion to determine who is an appropriate agent in the circumstances. It may be a lawyer or notary or some other reasonable person. Of course it would be prudent for you to choose the agent yourself rather than relying on suggestions from a potential scamster.

For more information about how to verify the identity of a client outside of Canada, refer to Law Society Rules 3-91 to 3-102 and the Client Identification & Verification Procedure Checklist in the Practice Checklists Manual. The checklist includes, in Appendix II, a sample agreement with an agent for verification of identity and a sample attestation form for the agent's signature. You can also refer to the frequently asked questions in the Client Identification and Verification web page (go to Publications and Resources > Practice Resources on the Law Society website).

#### COUNTERFEIT LAW FIRM TRUST CHEQUE

A BC lawyer had quite a shock in February to find that someone created a counterfeit trust cheque in the name of his law firm. The cheque was deposited and money was removed from the account initially, but was quickly returned by the financial institution after it learned the cheque was fake. There were a number of discrepancies between the law firm's real trust cheques and the fake cheque. Advice? Keep a close watch on your trust account and your cheques.

#### FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604.697.5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch. ❖





Lawyer Isabel Jackson

## The bottom line for law firms on diversity

*A new report on Aboriginal peoples and visible minorities in the legal profession*

IN MANY WAYS, Isabel Jackson is a typical lawyer and working mother. She has spent more than a decade juggling the rewards of a legal career with the needs of her children and family. But Jackson is not a typical lawyer. She is practically a statistical anomaly in this province.

Not only is she a woman operating in a profession where her peers leave law at a disquieting rate, but she is also a member of the Gitksan First Nation. Indigenous lawyers represent only 1.5 percent of the legal profession in BC, according to a new report, *Towards a More Representative Legal Profession: Better practices, better*

*workplaces, better results*, to be released by the Law Society this spring. Based on data provided by Statistics Canada, *Towards a More Representative Legal Profession* marks the first time the Law Society has done an in-depth report into the demographics of the BC legal profession. It includes a focused break out on visible minority and Aboriginal lawyers.

"In our view, the legal profession has a responsibility to promote equality and diversity," said Law Society President Bruce LeRose, QC, "and this report will help give firms and the legal community at large the foundation they need to work together to

create effective solutions."

It's clear that solutions are needed. The report notes the demographics of Canada and BC are shifting dramatically: by 2031 Vancouver, alone, is expected to have a visible minority population of 59 percent. In addition, BC is home to the second largest Aboriginal population in Canada. Yet the legal profession doesn't come close to reflecting that.

### THE IMPORTANCE OF ROLE MODELS AND MENTORS

The report notes the significant underrepresentation of Aboriginal lawyers in BC is

connected to the barriers they face, such as a lack of mentors and role models.

Jackson knows the value of a good mentor. She credits one at her workplace, the Department of Justice, with having made a tremendous difference in her legal career.

"This is a fellow who, as soon as I came in the door, took me under his wing and agreed to be my mentor. He's not Aboriginal, himself, he is just somebody who really supports Aboriginal people. It's been really good for me, and it's been about 10 or 11 years now."

Jackson is now paying that forward. In addition to formally mentoring articulated students of all backgrounds, she came up with an idea to help senior Aboriginal lawyers connect with more junior Indigenous lawyers and law students. Jackson is the vice-chair of the Aboriginal Lawyers Forum of the Canadian Bar Association, BC Branch. They and the University of British Columbia Indigenous Law Students Association held their first so-called speed mentoring event last year and are planning another one for March of this year. In it, mentor and mentees are paired up for eight-minute mentoring sessions, after

which the beat of a traditional Aboriginal drum alerts participants it's time to switch and move on to the next pairing. At the conclusion, participants are encouraged to keep in touch and establish a deeper mentorship relationship.

"That was a really fun format for

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*"As soon as you get this inkling of an idea that achievement is attainable, then things can really happen. The opposite is also true that if you think you're really stuck with your lot in life, you won't even try. But it's hard to try if you don't have someone else who can prop you up and encourage you and make you see yourself differently."*

—Isabel Jackson

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someone who hasn't yet picked up on the idea of being a mentor. There were obvious benefits for the mentees, but just being asked to be a mentor has been uplifting for many," said Jackson.

"What's key is for a person to have confidence. I hate to admit it, but as an

Aboriginal person you know you're part of a group that, if you look at yourself statistically, chances are you're not going to achieve. Those are the stats. I've always said that there is kind of a communal lack of self-esteem and self-confidence operating within the Aboriginal community, largely speaking. So I think if you can get over that, that's a huge part of being able to succeed at anything."

And Jackson believes it is role models and mentors who help Indigenous people overcome that hurdle. "As soon as you get this inkling of an idea that achievement is attainable, then things can really happen. The opposite is also true that if you think you're really stuck with your lot in life, you won't even try. But it's hard to try if you don't have someone else who can prop you up and encourage you and make you see yourself differently. It's really hard to be self-inspired or self-motivated."

Jackson has seen that play out in her own family. Her daughter, Carmen, cited the inspiration Jackson provided in her application to medical school. Carmen's

*continued on page 14*

## Marking Black History Month

Minnijean Brown Trickey was the keynote speaker at the BC Chapter of the Canadian Association of Black Lawyers event on February 23, 2012 for Black History Month.

Brown Trickey was one of the "Little Rock Nine," a group of 14 to 16-year-old African Americans who came face-to-face with an angry mob when they arrived at Little Rock Central High School in 1957, following the decision in the US Supreme Court that paved the way for the integration of American schools. It was a decision that was met, by many, with resistance and hostility, including the Arkansas governor who called in the National Guard to surround the school and declared that "blood will run in the streets."

President Bruce LeRose, QC attended the event and is pictured here with (L-R): Natasha Allen (Treasurer, CABL BC), Appointed Bencher Satwinder Bains, Karen Ameyaw (President, CABL BC), Minnijean Brown Trickey and Susanna Tam (Law Society Staff Lawyer, Policy & Legal Services).



## Making the case for diversity

A sneak peak at the upcoming report, *Towards a More Diverse Legal Profession: Better practices, better workplaces, better results*

*TOWARDS A MORE Diverse Legal Profession: Better practices, better workplaces, better results* provides both data illustrating the current demographics of the legal profession in BC and the case for promoting and encouraging diversity within law firms.

### RESPONDING TO A CHANGING SOCIETY

The data indicates that, even though society is becoming increasingly diverse, the legal profession does not reflect that. For example, in 2006 the visible minority population in Vancouver was 42%. By 2031, that percentage is projected to reach 59%. The percentage of visible minority lawyers in Vancouver is 18%.

### BUSINESS IMPERATIVES

Law firms are encouraged to consider the business imperatives for diversity, in order to:

- meet client demands for diversity in legal representation;
- better serve an increasingly diverse society; and
- attract, retain and advance the best and brightest lawyers, particularly young lawyers from a generation with expectations of equality.

### CLIENT DEMANDS

Firms competing for corporate clients are increasingly expected to demonstrate their commitment to diversity. A recent example is "Legal Leaders for Diversity: A Statement of Support for Diversity and Inclusion by General Counsel in Canada," which was introduced in May 2011 by Canada's general counsel community. Nearly 60 general counsel, including from large companies such as DuPont, Bell and RBC, have committed to practising and advancing diversity and inclusion by:

- promoting diversity within their own departments;
- considering diversity in their hiring and purchasing practices; and
- encouraging Canadian law firms to follow their examples, among other actions.

### FACING THE CHALLENGES IN FIRMS

*Towards a More Diverse Legal Profession* highlights challenges that could be preventing diversity from flourishing within law firms. It suggests the following strategies to create a more welcoming work environment:

- raising awareness of and correcting unconscious bias;
- developing bias-free performance evaluations;
- developing equitable systems for assigning work;
- promoting flexibility; and
- encouraging mentorship.

The report concludes by recognizing there is no one-size-fits-all solution and that the Law Society, law firms and lawyers need to work together to create effective solutions to enhance diversity in the profession.

Watch for the full report, available soon at [lawsociety.bc.ca](http://lawsociety.bc.ca). ❖



*Bottom line on diversity... from page 13*

now in her third year and Jackson's son is in high school and weighing the career paths of an accountant or engineer. Her other daughter studied culinary arts.

"Our research shows role models are invaluable, but that's not enough on its own," said Susanna Tam, a Law Society policy lawyer, who prepared *Towards a More Representative Legal Profession* for the Equity and Diversity Advisory Committee.

"We encourage law firms that are aiming to realize the competitive advantages of diversity to strive to create fair and inclusive work environments. Our report highlights many ways to do that – everything from implementing meaningful workplace equality policies to developing bias-free performance evaluations. There are lots of good reasons for firms to take these kinds of steps."

### TAKING LEADERSHIP TO PROMOTE THE BUSINESS BEHIND DIVERSITY

One of the big reasons for firms to take such steps, according to Annelle Wilkins, is because of the business advantages of embracing and promoting diversity. Wilkins is a Vancouver-based lawyer and Senior Vice-President and General Counsel Corporate Secretary for HSBC Bank Canada. She's also an advocate for diversity.

"Early in my career," said Wilkins, "I was nominated for an award for my actions in support of diversity. I was stunned by the nomination, because I thought everything I was doing was merely common sense. When I realized that it's not common sense for everyone, I decided to become an advocate. Working with others who are involved and passionate about the issue is invigorating – the energy is contagious."

Wilkins is currently working with others as the new BC Regional Chair for Legal Leaders for Diversity and Inclusion, which is a national initiative launched by Canadian general counsel in May of 2011. It has nearly 60 other signatories throughout the country, including general counsel from DuPont, Deloitte, Kellogg's, Bell, RBC and Bombardier. Wilkins anticipates the movement will have an impact on diversity in law.

"I sense an excitement about this initiative, with the collective voice and influence of Canada's general counsel being





Annelle Wilkins

recognized, and a strong message being delivered through more than just discussion, but by demonstrating our commitment to making a difference.”

A similar legal diversity initiative, A Call to Action Canada, also highlights the dedication of corporate counsel to promote diversity in the legal profession. It's clear that firms competing for corporate clients are increasingly expected to demonstrate their commitment to diversity. Wilkins explains why her company wants to hire such firms.

“We expect a diverse organization to be more creative in its approach to problem-solving, given the multiple perspectives brought to the issue. We also want to support those in the profession who demonstrate a true commitment to diversity and inclusiveness. And as part of an international organization, we want our professional advisors to be just as sensitive to different perspectives across jurisdictions as they are to technical differences in the law.”

Wilkins has, at times, been disappointed with what she's seen. “I certainly wasn't impressed when a law firm that was pitching for our business mistakenly believed that it was best to put forward a female partner as the proposed relationship manager. It was quickly apparent that her practice area had nothing to do with

our business, and that it was a superficial attempt to demonstrate the firm's diversity of gender. It delivered the exact opposite message – we're not interested in form over substance.”

“For those firms that are just starting the journey,” added Wilkins, “it's critical to understand the real value and strength in having a diverse workforce. It isn't just the right thing to do, it actually makes good business sense. There is empirical evidence showing the positive bottom-line impact in having a diverse workforce.”

For her part, Jackson also believes clients get a better legal product if the law firm embraces diversity.

“I think the best lawyers are able to see both sides of an issue and that's not always possible unless you don't insulate yourself with one or like viewpoints. You have to be open to the idea that there are other ways to look at something, and I think that's where we would come in. So, for example, me as an Aboriginal employee, I know that I have certainly weighed in and expressed a

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*“For those firms that are just starting the journey, it's critical to understand the real value and strength in having a diverse workforce. It isn't just the right thing to do, it actually makes good business sense. There is empirical evidence showing the positive bottom-line impact in having a diverse workforce.”*

–Annelle Wilkins

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point of view that totally comes from my being Aboriginal, and it's really out there so-to-speak in comparison to other voices. But I figure that's my job and that's my role. I think that's why I was hired, in part because I'm Aboriginal. It's not tokenism. My department needs that perspective.”

“We know the perspective of a diverse group of lawyers brings value to law,” agreed President LeRose. “But as a regulator, the Law Society cannot effect change on its own. This report marks a step toward articulating the barriers and potential solutions so that lawyers and law firms, and the people in BC who rely on their services, can start or continue down a path that will allow them to enjoy the benefits of a more diverse legal profession.”❖

## Services for lawyers

### Practice and ethics advisors

**Practice management advice** – Contact **David J. (Dave) Bilinsky** 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.

**Practice and ethics advice** – Contact **Barbara Buchanan, Lenore Rowntree or Warren Wilson, QC** to discuss ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Ethics Committee.

Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships. Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org. Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org. Contact Warren at: tel: 604.697.5837 or 1.800.903.5300 email: wwilson@lsbc.org.

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

◆  
**PPC Canada EAP Services** – 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 articulated 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 articulated students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of “lawyers helping lawyers,” LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers. tel: 604.685.2171 or 1.888.685.2171.

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

## Conduct reviews

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

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee, which may also be attended by the complainant at the discretion of the subcommittee. The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, which include:

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

### CR #2011-36

This conduct review addressed a lawyer's conduct in failing to keep a client reasonably informed about the status of her matter. The lawyer agreed to act for her on a pro bono basis to deal with costs owing by her after her condo was sold in foreclosure and to obtain payment out of the balance of the funds held in court. The lawyer was required to provide a reasonable quality of service under Chapter 3 of the *Professional Conduct Handbook*, regardless of whether he was paid. He failed to do so, by not returning the client's repeated phone calls and emails. The lawyer accepted the subcommittee's recommendation that he take the online Communications Toolkit course.

### CR #2011-37

The conduct review was ordered after a compliance audit revealed a lawyer failed to comply with the accounting rules (Part 3, Division 7 of the Law Society Rules). His practice did not maintain supporting documents for the trust and general accounts, did not use a cash receipt book, and the general account was used as a personal account. Due to sloppy accounting, he also erred by reporting in his trust report that all PST had been paid, when it was not. The subcommittee recommended the lawyer take the on-line Small Firm Practice Course, hire a bookkeeper and review with her the *Trust Accounting Handbook*, a resource available on the Law Society website.

### CR #2011-38

The conduct review arose from a lawyer's payment of settlement funds to his bankrupt client rather than the trustee, contrary to an undertaking imposed by the trustee as a condition of the lawyer retaining conduct of the action. The lawyer wrongly thought that he was relieved of the undertaking when the client was discharged from bankruptcy. The lawyer acknowledged that he made two mistakes: he carelessly agreed to an undertaking when he did not fully understand its terms and he failed to determine if he was actually released from the undertaking by the fact of the discharge. The subcommittee cautioned him that he should not practise in any area of law with which he is not familiar.

### CR #2011-39

The conduct review addressed a lawyer's conduct in making submissions that contained incorrect statements drawn from a misleading medical opinion. The lawyer ought to have known that the report and his submissions were not true, but he did not, as a result of an oversight and his lack of diligence in reviewing the file. He did not review the file thoroughly because of his client's limited ability to pay for legal services and now recognized the problem that created.

### CR #2011-40

The conduct review arose as a result of aggressive and combative comments made by a lawyer when responding to a complaint brought by another lawyer. The subcommittee reminded the lawyer of the obligation in the *Canons of Legal Ethics* to conduct himself with courtesy and good faith and scrupulously avoid personal remarks. It observed that the lawyer was able to express himself well and could apply that skill to defuse rather than escalate a situation. The lawyer acknowledged that he should have treated the complainant and Law Society staff in a more straightforward and collegial way. He agreed to take the online Communications Toolkit course.

### CR #2011-41

This conduct review also addressed a lawyer's lack of civility in sending a letter in which he referred to another lawyer as a liar and a disgrace to the profession. The subcommittee advised him that if he believed that another lawyer had acted unethically, the appropriate response was to complain to the Law Society, not to make rude and disrespectful comments.

### CR #2011-42

This conduct review addressed the ongoing nature of the duty of undivided loyalty to a client and a lawyer's conduct in acting in a situation adverse to the interest of a former client where the matter was not "substantially unrelated." One of two co-accused in a drug trafficking charge was a former client of the lawyer, whom he had represented a few years earlier on a similar charge. The lawyer acted for the other co-accused. The two co-accused were adverse in interest because each claimed the other was the principal offender. At trial, the lawyer cross-examined his former client. The former client was convicted based on the judge's assessment of credibility; the current client was acquitted. The lawyer accepted that his retainer by the current client was not substantially unrelated to his representation of the former client, given the defences advanced, and was contrary to Chapter 6, Rule 7 of the *Professional Conduct Handbook*. He altered his file management practices to ensure that he avoids this kind of potential conflict of interest.

### CR #2011-43

The conduct review arose from a lawyer acting in a conflict of interest, by giving advice and providing services to clients involved in a business venture. When their interests diverged, he breached his duty of undivided loyalty by accepting service of legal documents based on the instructions of only one client. He also drew an indemnity agreement for one client in connection with the breakdown of the business venture. The lawyer failed to properly advise each client of the effect of his joint representation of them, contrary to Chapter 6, Rule 4 of the *Professional Conduct Handbook*. The subcommittee reviewed with him that rule, as well as Rule 7

which sets out the circumstances in which a lawyer may not act against the interests of a former client.

## CR #2011-44

The conduct review was directed following a lawyer's failure to provide a reasonable quality of service to his legal aid client in a family law matter and, in particular, his failure to promptly return phone calls from the client and from the Legal Services Society and to attend in court on behalf of his client, resulting in a final order being made against her. The lawyer's conduct was inappropriate and showed a lack of knowledge. He missed the court date in part because he had prepared and filed a Notice of Change of Solicitor, but he did not deliver it to the opposing party, erroneously believing that the Supreme Court registry would ensure it was delivered and that the address for service of the opposing party was insufficient. He did not understand the significance of an order stating that the hearing date would be peremptory upon his client. The lawyer acknowledged that he had learned from the complaint and would voluntarily restrict his practice to the area of family law in Provincial Court, with few exceptions.

## CR #2011-45

This conduct review addressed a lawyer's conduct in pleading guilty to harassment of his former girlfriend pursuant to s. 265 of the *Criminal Code* and to a breach of a no-contact order pursuant to s. 145(3) of the *Criminal Code*. The conduct was related to a medical diagnosis of anxiety and depression. The lawyer had obtained treatment and learned to identify problems or trends in his life and health that could indicate further difficulties and to take appropriate steps when those occurred.

## CR #2012-01

This conduct review addressed a lawyer's conduct in preparing a codicil to a will in circumstances where he could be perceived to have an indirect financial interest. The codicil included a bequest to the lawyer's father, which had a value of approximately \$25,000. The client and the father had been friends for many years. The subcommittee reminded the lawyer of the conflict of interest rules in Chapter 7 of the *Professional Conduct Handbook*.

## CR #2012-02

The conduct review arose from a compliance audit, which disclosed a failure by a lawyer to comply with the accounting rules in Division 7 of Part 3 of the Law Society Rules and to maintain his books and records in accordance with them. The subcommittee noted that the integrity of self-regulation depends on lawyers complying with the accounting and trust assurance rules, which were implemented to protect the public. The subcommittee observed the presence of factors that often lead to conduct issues: as a new lawyer, he became an "overnight generalist" without adequate experience, training or support; he had no prior law office management experience when he opened his own office; and he practised from two locations in different communities, which strained his limited time and resources. As a result of the compliance audit and subsequent investigation, the lawyer restructured his practice to close one location and put in place appropriate financial and accounting controls. The subcommittee urged the lawyer to develop relationships with other colleagues who are willing to assist with questions that arise in practice.

## CR #2012-03

This conduct review was ordered after a lawyer missed two court dates, resulting in prejudice to his client, who was arrested following issuance of a bench warrant. The subcommittee reviewed the lawyer's conduct

in failing to properly serve his client in accordance with the standards set out in Chapter 3, Rule 3 of the *Professional Conduct Handbook*. The lawyer advised that he had taken steps to avoid future problems, by hiring a new receptionist and providing clear instructions about handling messages.

## CR #2012-04

The conduct review addressed a lawyer's breach of an undertaking in a real estate transaction. The lawyer acted for the purchasers and, when an issue about an encroachment arose, he gave an undertaking to hold funds in trust and only pay them out when a revised subdivision plan was accepted or as required for disbursements to resolve the encroachment issue. The lawyer released the funds to his client, without receipts or any other proof that the clients had incurred expenses to resolve the encroachment, and also without notifying the vendor. The subcommittee impressed on the lawyer that, when he is not certain of the wording or meaning of an undertaking, he should take steps to clarify the meaning with the person to whom it was given, before taking any steps. The *Canons of Legal Ethics* also require a lawyer to be candid and courteous in relations with other lawyers, and in this case the lawyer should have consulted with the vendor's legal counsel before he paid out the holdback.

## CR #2012-05

This conduct review addressed a lawyer's failure to comply with the accounting rules. The rule breaches included failures to maintain a trust transfer journal or accounts receivable records, to perform trust account reconciliations in a timely way, and to send the CDIC letter to banks in which his firm had trust accounts. This lawyer had set up his practice in a small community when he had little training in office procedures and accounting. He became overwhelmed by the volume of work. The subcommittee reminded the lawyer of the importance of compliance with the accounting rules and also expressed concern over the careless completion of his 2009 trust report, which contained inaccurate responses. As a result of the audit and investigation, the lawyer hired a chartered accountant to do his bookkeeping and took steps to restrict his practice.

## CR #2012-06

The conduct review arose from a lawyer's conduct in acting as general counsel for two companies with adverse interests, which placed him in a position in which he could not give undivided loyalty to each client, as required by Chapter 6, Rule 1 of the *Professional Conduct Handbook*. The subcommittee explained that, even though the two companies were working cooperatively with common management, there was a fundamental conflict between the legal and commercial interests of each, in particular because of the debtor-creditor relationship between them. The lawyer should therefore not have acted for both, despite the fact that there was no dispute between them when he agreed to do so, because he was not in a position to give full and impartial advice to each client without at least potentially compromising the interests of the other. The lawyer acknowledged that he had made a mistake and needed to be more alive to potential conflicts.

## CR #2012-07

The conduct review was ordered after a judge made comments in a decision that questioned the integrity of a lawyer who had testified as a witness. The subcommittee reviewed with the lawyer the judge's comments, the evidence at trial, the lawyer's testimony, and the lawyer's explanations about the matter. Lawyers are reminded that they are officers of the court and are required to act with the utmost integrity, whether appearing as counsel, a witness or a party. ♦



## Discipline digest

PLEASE FIND SUMMARIES with respect to:

- Gregory Charles Cranston
- Lawyer 12
- Gerardus Martin Maria Laarakker
- Gary Russell Vlug
- Robert Douglas Cole Malcolm
- Brian John Kirkhope
- Paul Cameron Wilson
- Andrew James Liggett

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

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### GREGORY CHARLES CRANSTON

Burnaby, BC

Called to the bar: July 13, 1977

Discipline hearing: April 19, 20 and 21, 2011

Panel: David Renwick, QC, Chair, Haydn Acheson and Patricia Bond

Report issued: August 24, 2011 (2011 LSBC 24)

Counsel: Jaia Rai for the Law Society and David Sutherland and Dana Kripp for Gregory Charles Cranston

#### FACTS

Between January 2007 and February 2009, defence counsel Gregory Charles Cranston missed numerous court appearances on 17 separate occasions and made misrepresentations to the court in five instances.

Ten of the allegations in the citation related to missed appearances involving fix-date appearances, pre-trial conferences or trial confirmation dates or failure to make arrangements to have an agent attend. These allegations did not involve any missed trial dates.

Another three allegations related to Cranston representing to the court that he had filed Notices of Appeal when he had not.

Four allegations were not pursued by the Law Society.

The allegations arose as a result of one of Cranston's misrepresentations to the court. The Chief Judge made a formal complaint to the Law Society.

#### ADMISSION AND DISCIPLINARY ACTION

Cranston admitted to the allegations that he failed to attend the fix-date appearances and that he made misrepresentations to the court. He admitted that his conduct constituted incompetent performance of duties undertaken in his capacity as a lawyer, but he was not prepared to admit that his conduct amounted to professional misconduct.

Cranston attributed his problems to extensive health issues, which resulted in fatigue and faulty memory, calendar conflicts and reliance on support staff to make arrangements for agency appearances and to file documents. The panel recognized that medical issues and treatments had a significant effect on Cranston's general health; however, he failed to realize the effect that his medical condition had on his professional obligations, both to his clients and to the courts.

Cranston also failed to have a proper diary system in place, moderate his workload or hire additional help to properly run his busy practice.

In the panel's view, the evidence did not support a finding that the misrepresentations made to the court were deliberate or that there was any intention to mislead. In each instance, the Notices of Appeal had been signed prior to Cranston's appearance in court, and he was under the mistaken honest belief that they had actually been filed in the court registry.

Cranston relied on his staff and expected that the Notices of Appeal had been filed as he had instructed. However, he failed to determine the true state of affairs before making his representations and was negligent in carrying out his responsibilities as a lawyer.

The panel noted that Cranston had a professional conduct record that included a conduct review as well as a finding of professional misconduct for affixing his signature as a witness on a Bill of Sale that had not been signed in his presence.

The panel heard from witnesses and reviewed a number of reference letters attesting to the respect that Cranston had earned.

Cranston cooperated with the Law Society during the investigation and made admissions that shortened the hearing significantly.

The panel agreed that the discipline violations committed by Cranston were serious and significant in number and length of time in which they occurred. However, none of the violations involved dishonesty or intentional misconduct. None of the missed appearances were for a trial, but were part of the process leading up to the actual trial date.

After carefully reviewing the circumstances surrounding each of the allegations as well as Cranston's extensive medical history, the panel found that Cranston incompetently performed his duties as a lawyer over the course of two years by missing numerous court appearances and making several misrepresentations to the court.

The panel ordered that Cranston:

1. pay a fine of \$10,000;
2. pay \$10,000 in costs;
3. continue receiving medical care;
4. submit to a practice review and follow any recommendations;
5. obtain a medical, psychological or psychiatric assessment, or counselling and follow any recommendations; and
6. practise in a setting approved by the Law Society, including supervision by a lawyer.

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### LAWYER 12

Bencher review: October 6, 2011

Benchers: *Majority decision:* Gregory Petrisor, Alan Ross, Catherine Sas, QC and Kenneth Walker; *Concurring decision:* Leon Getz, QC; *Minority decision:* Bruce LeRose, QC, Chair, and Benjimen Meisner

Report issued: December 12, 2011 (2011 LSBC 35)

Counsel: Jaia Rai for the Law Society and David Taylor for Lawyer 12

## BACKGROUND

The Law Society issued a citation to Lawyer 12 for failing to comply with a 2009 hearing panel order to provide a written report prepared by a qualified accountant stating whether the books and records of his practice were maintained in compliance with Law Society rules.

Lawyer 12 failed to communicate directly with the certified general accountant he retained concerning the nature of the report, which resulted in a report being submitted to the Law Society that did not address the requirements of the rules as ordered.

In the decision of the single-Bencher hearing panel (facts and verdict: 2011 LSBC 11; Discipline Digest: 2011 No. 2 Summer), it was found that Lawyer 12's conduct was not a marked departure from the conduct expected by the Law Society of its members. Further, the single-Bencher panel was not persuaded that Lawyer 12's conduct demonstrated gross culpable neglect of his duties as a lawyer and concluded that his conduct did not amount to professional misconduct.

The Law Society sought a review of that decision to determine whether the single-Bencher panel correctly applied the law to the facts when it decided to dismiss the citation.

## DECISION

### *Majority (Petrisor, Ross, Sas and Walker)*

The majority upheld the dismissal of the citation by the single-Bencher panel.

The majority did not agree with the Law Society's position that it was not reasonable for Lawyer 12 to rely on his bookkeeper to perform the task entrusted to him of advising the certified general accountant what the 2009 order required. In the majority's view, the single-Bencher panel reached the correct conclusion.

In its reasons, the majority disapproved *Re: Lawyer 10*, (2010 LSBC 02), which found that it is not professional misconduct if the "conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake." The majority preferred to consider the conduct as a whole. If the conduct arose because of: a) events beyond one's control; or b) an innocent mistake, then the conduct cannot be considered conduct that falls below the norm in a marked way.

### *Concurring (Getz)*

The concurring panel member agreed with the majority's conclusion that the single-Bencher panel was correct in dismissing the citation and with its reasons for reaching that conclusion, but did not agree that it was either necessary or appropriate to express any view about whether *Re Lawyer 10* was correctly decided.

### *Minority (LeRose and Meisner)*

The minority found that Lawyer 12 had once again engaged in professional misconduct and should be dealt with accordingly.

Given the long history of Lawyer 12's transgressions in complying with the trust accounting rules, the minority determined it was not reasonable for Lawyer 12 to rely on his bookkeeper and staff. The minority determined that Lawyer 12's transgression in this case was more than a mere oversight or innocent mistake, but rather a continued pattern of ignoring his responsibilities in this regard.

The minority also concluded that none of the uncontested facts that

transpired from the time of the 2009 order to the non-compliance in March 2010 should relieve Lawyer 12 from his duty and obligation to comply strictly with the order of the hearing panel.

## GERARDUS MARTIN MARIA LAARAKKER

Vernon, BC

Called to the bar: November 14, 1997

Discipline hearings: July 14 and December 1, 2011

Panel: Leon Getz, QC, Chair, Nancy Merrill and Alan M. Ross

Reports issued: September 21, 2011 (2011 LSBC 29) and January 10, 2012 (2012 LSBC 02)

Counsel: Carolyn Gulabsingh for the Law Society and Gerardus Martin Maria Laarakker appearing on his own behalf

## FACTS

In November 2009, Gerardus Martin Maria Laarakker was retained by a client regarding a demand letter that she had received from an out-of-province lawyer. The demand letter sought payment of \$521.97 as damages related to the client's teenage daughter, who had been caught shoplifting at a retail outlet. The demand letter stated that the retailer had a right to claim damages against the parent of a young person who had been caught shoplifting on the basis that the parent had failed to provide reasonable supervision.

The demand letter threatened that if the client did not pay the settlement amount, a civil suit may be filed against the client seeking an amount greater than the settlement amount.

After consulting with his client, Laarakker sent a letter to the out-of-province lawyer that contained discourteous and personal remarks.

Laarakker also posted a comment on an internet blog in response to two postings made by an individual who had received a similar demand letter. His blog posting contained discourteous and personal remarks about the out-of-province lawyer.

The out-of-province lawyer made a complaint to the Law Society about Laarakker's letter and blog posting.

## DETERMINATION

Laarakker claimed that his letter to the out-of-province lawyer and his blog posting were justified because the actions of the other lawyer were blameworthy.

He felt a connection to his client, and he was personally offended by the steps that were being taken by the opposing lawyer. While these facts do not justify his actions, the panel acknowledged that they do speak to the reason that he took the steps that he did.

Laarakker submitted to the panel that he believed that he was allowed to do what he did in the face of a "rogue lawyer." He conceded that, if the out-of-province lawyer was found to have conducted himself professionally and ethically according to Law Society standards, then his actions in denouncing the other lawyer were wrong and he would apologize.

The panel found that Laarakker had committed professional misconduct by making discourteous remarks about another lawyer on an internet blog and in a letter directed to the other lawyer.

*continued on page 20*

*Discipline digest ... from page 19*

## DISCIPLINARY ACTION

Laarakker's professional conduct record was not an aggravating or mitigating factor. Further, Laarakker removed the blog posting as soon as he was asked to do so by the Law Society, and he issued a form of apology to the other lawyer.

The panel stated that, although incivility is not the most serious form of misconduct, it does reflect poorly on the legal profession.

The panel ordered that Laarakker pay:

1. a \$1,500 fine; and
2. \$3,000 in costs.

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## GARY RUSSELL VLUG

Vancouver, BC

Called to the bar: August 28, 1992

Discipline hearings: April 13 and 14, 2010, June 14 and 15 and December 15, 2011

Panel: Gavin Hume, QC, Chair, Bruce LeRose, QC and Thelma O'Grady  
Reports issued: July 22, 2010 (2010 LSBC 16), August 31, 2011 (2011 LSBC 26) and January 18, 2012 (2012 LSBC 03)

Counsel: Eric Wredenhagen (facts and determination) and Maureen Boyd (application to adduce rebuttal evidence and disciplinary action) for the Law Society and Gary Russell Vlug appearing on his own behalf

## FACTS

In May 2006, Gary Russell Vlug, represented four clients in a personal injury claim. Vlug settled the claims with ICBC without a trial.

On January 12, 2008, his clients signed a release provided by ICBC for payment of \$32,000. Vlug forwarded the executed release to the ICBC adjuster with a letter requesting reimbursement for disbursements.

On January 24, Vlug received a letter from ICBC that indicated that the settlement of \$32,000 and reimbursement of \$2,316 were enclosed. The cheque, however, was in the amount of \$45,264. There were no details showing a breakdown of how the amount was calculated.

Vlug deposited the cheque into his trust account and credited a quarter of the total (\$11,316) to each of his clients in trust. He met with the clients on January 30 and issued invoices to each client to show the amount of \$8,000 deposited into trust for each of them and not \$11,316.

In July 2008, the Law Society conducted a compliance audit of Vlug's law practice. The auditor discovered that the amount received from ICBC differed from the amount reported and disbursed to the clients.

These excess funds were recorded in Vlug's accounting records as being held in trust for his clients. Vlug's handwritten notes of his discussion with his clients on January 30 indicated that the funds were to be kept until an apparent limitation date expired.

In November 2008, Vlug finally contacted the ICBC adjuster to request a breakdown of the payout and to inquire if there was an error. The adjuster mistakenly confirmed that the cheque for \$45,264 was the correct amount without referring to the original file.

In December 2008, Vlug paid out the balance of the funds to the clients, less his fees.

## DETERMINATION

At the conclusion of the April 2010 hearing, the Law Society applied for leave to call rebuttal evidence from the ICBC adjuster. The hearing reconvened in June 2011.

Vlug submitted that the excess funds were a payment for bad faith on the part of ICBC. The panel did not accept that evidence as no reference was made to bad faith in any of his correspondence with ICBC or with the Law Society.

The panel considered a number of other factors in this case.

Vlug's clients knew of the excess funds held in his trust account, though, contrary to Law Society rules, it did not appear that that information had been accounted for in writing to the clients. The panel noted that the only logical reason for not dispersing all the funds was that Vlug thought an error had been made by ICBC.

Vlug had no communication with the ICBC adjuster regarding the excess funds until after the Law Society commenced its investigation. The extra payment remained in his trust account until ICBC mistakenly confirmed that they had forwarded the correct amount.

In the panel's view, Vlug should have immediately communicated with ICBC about what was obviously a mistake with the payment. His failure to do so cast doubt on his competence and also reflects adversely on the integrity of the legal profession.

The panel concluded that Vlug committed professional misconduct as this was a marked departure from the conduct expected of a lawyer in such circumstances.

## DISCIPLINARY ACTION

Vlug's professional conduct record disclosed three conduct reviews in 2005, 2010 and 2011, which the Law Society submitted demonstrates a continuous pattern of bad judgment as well as poor communication. The panel agreed that the most important factor in determining the appropriate disciplinary action was the need for specific deterrence. It was decided that the negative financial impact caused by Vlug's bad judgment would serve as the appropriate and necessary deterrent.

The panel ordered that Vlug pay:

1. a \$5,000 fine; and
2. \$10,500 in costs.

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## ROBERT DOUGLAS COLE MALCOLM

Vancouver, BC

Called to the bar: May 15, 1968;

Retired membership: July 1, 2011; ceased membership: January 1, 2012

Discipline hearing: November 4, 2011

Panel: Joost Blom, QC, Chair, Don Amos and Alan M. Ross

Report issued: January 18, 2012 (2012 LSBC 04)

Counsel: Carolyn Gulabsingh for the Law Society and Robert Douglas Cole Malcolm appearing on his own behalf

## FACTS

Robert Douglas Cole Malcolm made a complaint to the Law Society about a lawyer who acted for beneficiaries of a client who was suing Malcolm. During the course of investigating the complaint, the Law Society



required Malcolm to answer questions about his dealings with the client and the related financial transactions.

The Law Society wrote Malcolm in December 2009 and August 2010. He replied to each letter with only partial responses.

Malcolm invited the Law Society's representative to meet with him in January 2011. The Law Society obtained various documents from him.

After reviewing the documents, the Law Society sent another letter to Malcolm in May 2011 asking more detailed questions. Malcolm's email reply indicated that he needed time to respond. When the Law Society gave him a deadline, Malcolm replied that he did not have the resources to comply and stated that he was prepared to meet with the Law Society's representative again.

The Law Society reminded Malcolm that the answers to their inquiries were required in writing and that any failure to respond to questions and requests from the Law Society may be referred for disciplinary action.

No written response was received.

## DETERMINATION

Malcolm's position was that he did not have the financial resources available to respond to the Law Society's inquiries. He said that he had done what he was financially and physically able to do, given that the information necessary to answer the inquiries was contained in numerous boxes of client files in his home.

Malcolm appeared to be of the view that it was the Law Society's responsibility to review the boxes of documents and determine the answers to the questions.

The panel found that Malcolm's claim of impecuniosity was not believable. Several of his statements about his financial situation seemed implausibly exaggerated. He did not introduce any information or evidence regarding his financial or health status to support his position.

He admitted that the documents containing most of the relevant information were in his possession. The Law Society's correspondence made it clear that he, not the Law Society, was responsible for sorting through the documents to obtain the information. He therefore did not provide a reasonable excuse for his failure to respond to the Law Society's inquiries.

The panel found that Malcolm's actions in failing to respond to the inquiries of the Law Society constituted professional misconduct.

## DISCIPLINARY ACTION

The Law Society submitted that it was an aggravating factor that Malcolm still had not provided a substantive response.

The panel ordered that Malcolm:

1. pay a \$2,000 fine;
2. pay \$2,000 in costs; and
3. provide complete answers to the Law Society's requests for information.

## BRIAN JOHN KIRKHOPE

Nanaimo, BC

Called to the bar: August 31, 1990

Discipline hearing: October 25, 2011

Panel: Leon Getz, QC, Chair, Gregory Petrisor and Alan M. Ross

Oral reasons: October 25, 2011

Report issued: January 31, 2012 (2012 LSBC 05)

Counsel: Jaia Rai for the Law Society and Henry Wood, QC for Brian John Kirkhope

## FACTS

Brian John Kirkhope was retained by a client in a matrimonial dispute against his wife. The primary asset in the dispute was the family home.

On May 5, 2005, Kirkhope and counsel for his client's wife appeared in court and consented to an order restraining both parties from alienating title to any family asset until further order of the court. Kirkhope drafted the restraining order, which was executed by all parties.

In February 2006, Kirkhope's client indicated he did not have funds to pay for his legal services. At Kirkhope's suggestion, the client executed a \$20,000 mortgage in favour of Kirkhope's law firm to secure legal fees. The law firm mortgage was registered by Kirkhope against the undivided one-half interest of the ex-husband in the family home.

In August 2006, Kirkhope ceased representing his client and, as of that date, the family law action was outstanding, the law firm mortgage was on title to the family home, and legal fees were owed by the client to Kirkhope.

Kirkhope's former client retained another lawyer to represent him in the family law action.

In March 2007, Kirkhope was apprised that the wife of his former client was seeking a division of assets, including a 100 per cent reappportionment of the family home. The family home was subsequently listed for sale in October 2007; however, when it did not sell, the mortgagor commenced foreclosure proceedings.

At a November 2009 court hearing, counsel for the wife took the position that the law firm mortgage was invalid and should be declared null and void. Kirkhope advised the court that he had forgotten about the restraining order when the law firm mortgage was registered. He stated that, upon realizing in March 2007 that the law firm mortgage had been filed in violation of the restraining order, he prepared a discharge of that mortgage and sent that discharge to the husband's new lawyer. The court ultimately declared and ordered the law firm mortgage null and void.

## ADMISSION AND DISCIPLINARY ACTION

Kirkhope admitted that he caused and permitted the execution and registration of the law firm mortgage for purposes of securing his legal fees when he ought to have known that the registration of the mortgage was in violation of the restraining order. He further admitted that his conduct constituted professional misconduct.

The panel noted that Kirkhope was an experienced family law lawyer, and a restraining order was not unusual in this practice area. Kirkhope said that he forgot about that order, despite the fact that he consented to it, drafted it and filed it. Forgetting about the order in these circumstances, and permitting the execution and registration of the law firm mortgage in breach of the order, was a marked departure from what the Law Society expects of its members.

Further, after taking steps to partially rectify the potential problem, Kirkhope continued to attempt to enforce the law firm mortgage as against

*continued on page 22*

*Discipline digest ... from page 21*

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his former client's interest in the family home, despite his knowledge that the mortgage was in breach of the restraining order. Those acts were deliberate.

Kirkhope has a professional conduct record for dishonourable conduct in accepting and making use of a tape recording made by another matrimonial client of privileged telephone conversations between the client's wife and her counsel. The panel considered that, although this prior offence may not be directly related, it was a close cousin of the current offence.

The panel accepted Kirkhope's admission and ordered that he pay:

1. a \$4,500 fine; and
2. \$3,000 in costs.

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## PAUL CAMERON WILSON

Vancouver, BC

Called to the bar: July 12, 1983

Discipline hearing: September 27, 2011

Panel: Thelma O'Grady, Chair, Leon Getz, QC and Gregory Petrisor

Report issued: February 02, 2012 (2012 LSBC 06)

Oral Reasons: September 27, 2011

Counsel: Jaia Rai for the Law Society and Robin McFee, QC for Paul Cameron Wilson

### FACTS

Although Paul Cameron Wilson practised as a solicitor in the field of environmental and energy law, he agreed to meet with a client on short notice to take instructions for a will, prior to the client undergoing surgery.

The will was prepared by another lawyer in Wilson's firm, and the client executed the will prior to the surgery. The will appointed Wilson as executor and trustee, and appointed the lawyer who prepared the will as alternate executor.

Following the client's surgery, Wilson provided non-legal services to the client, including assisting her with errands and arranging for transportation to and from medical appointments. When a medical assessment concluded that the client was not capable of living independently or handling her own affairs, Wilson filed a petition in the Supreme Court of BC and was appointed committee of the person and estate of the client. He engaged the services of a 24-hour home care agency and arranged for payment of the client's bills and expenses.

The client passed away on October 8, 2003. For six years afterward, Wilson did not make an application for the grant of probate, nor did he renounce his executorship. As a result, the client's estate was not probated. Wilson continued arranging for payments to be made for the upkeep and securing of the client's home and property.

During this six-year period, Wilson also did not file tax returns for the client's estate, even though he knew the estate was earning income.

Between 2003 and 2008, a friend of the client communicated with Wilson on a number of occasions regarding the status of the application for the grant of probate. Despite these communications, Wilson did not advise the friend that she was a beneficiary under the will.

On November 7, 2008, the friend emailed Wilson to further express her

concerns regarding his failure to dispose of the client's estate and the deplorable condition of the client's residence.

In December 2008, the friend made a complaint to the Law Society alleging delay and inactivity by Wilson concerning the application for the grant of probate and failure to respond to her inquiries.

Wilson had made some attempts to determine the requirements to make the application for grant of probate in 2003, and later in 2008 and 2009, but he did not follow through with those attempts. He did not take any effective steps to advance the matter until November 2009 when he retained a lawyer practising in the area of wills and estates with another firm.

On the advice of his lawyer, Wilson renounced his executorship on March 11, 2010. He continued working with the chartered accountant he had retained to finalize the outstanding tax returns, and those were filed on March 31, 2010 for the years 2005 through 2009.

On June 21, 2010, the court appointed a trust company for the client's estate, and accordingly, Wilson's powers and obligations as committee ceased.

### ADMISSION AND DISCIPLINARY ACTION

Wilson admitted early in the Law Society's investigation that the complaint was valid and that he had not obtained probate of the will. He admitted that he had engaged in conduct unbecoming a lawyer. The panel acknowledged that Wilson had taken steps to redress the wrong.

The panel accepted Wilson's admission and ordered that he pay:

1. a \$4,500 fine; and
2. \$3,000 in costs.

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## ANDREW JAMES LIGGETT

Port Coquitlam, BC

Called to the bar: May 17, 1991

Discipline hearings: May 11 and November 24, 2011

Panel: Gavin Hume, QC, Chair, Nancy Merrill and Thelma O'Grady

Reports issued: August 11, 2011 (2011 LSBC 22) and February 7, 2012 (2012 LSBC 07)

Counsel: Jaia Rai for the Law Society and David Taylor for Andrew James Liggett

### FACTS

Andrew James Liggett received a letter from the Law Society, dated July 19, 2010, to notify him that the date for the hearing of a previous citation was to be mutually agreed upon and proposed that the hearing be held on September 24, 2010.

At that time, Liggett was committed to attend the second day of a two-day family law trial on September 24. He knew the proposed citation hearing date would be scheduled in the absence of any response from him; however, he took no action.

On August 6, Liggett was served with a letter from the Law Society to confirm that the hearing would proceed on September 24.

In a letter dated August 10, Liggett sought an adjournment of the citation hearing on the grounds that he had a trial on September 24. The Law Society opposed the application, for lack of substantiating documentation.

On September 2, the Chambers Benchers considering the adjournment requested a copy of the Notice of Trial from the court action and Liggett's alternative dates in September.

On September 7, prior to providing the information requested, Liggett attended a pre-trial conference in the family law matter, at which time the September 24 trial date was cancelled.

The Law Society followed up with Liggett concerning the information the Chambers Benchers had requested. Liggett finally and hurriedly responded to the request by faxing a copy of the Trial Notice printed on July 27, 2010 with a separate letter setting out an alternate date. He did not disclose the fact that the September 24 trial date had been cancelled, nor did he advance any other grounds for an adjournment. The Law Society learned of the adjournment directly from the Provincial Court registry.

## DETERMINATION

Liggett testified that, during the summer of 2010, he was very busy with his sole practice and personal commitments. He also felt that, due to his schedule in the time-frame leading up to September 24, he did not have the time to properly prepare for the citation hearing. He determined he did not need to advance any grounds other than the position that he was committed to a trial appearance on the hearing date.

The panel found Liggett had committed professional misconduct when he sent a Notice of Trial to the Law Society and, either knowingly or

recklessly, misrepresented that he continued to be unavailable for a discipline hearing.

## DISCIPLINARY ACTION

The panel considered Liggett's professional conduct record. Liggett's record, for the most part, involved his systemic failure to maintain his books and records in accordance with Law Society rules and failure to produce records in the course of an investigation. In the panel's view, there existed a clear pattern of Liggett overextending himself in his workload, number of offices, and his law practice management skills.

Over a number of years, the Law Society has made recommendations and directions aimed at assisting Liggett to manage his finances and his workload, and to maintain his books and records in accordance with the rules.

The panel concluded that a suspension was required to impress upon the profession and the public that a lawyer's obligations to their self-governing body, especially in the context of discipline proceedings, must be approached with the utmost integrity and good faith. Conduct falling below such a standard will result in serious consequences.

The panel ordered that Liggett:

1. be suspended for one month; and
2. pay \$6,000 in costs.❖

### *Practice Tips ... from page 9*

lawyers looking to work in the cloud. In the meantime, the recommendations in the cloud report is a great place to start when considering the security implications of moving to the cloud ([lawsociety.bc.ca/docs/publications/reports/CloudComputing\\_2012.pdf](http://lawsociety.bc.ca/docs/publications/reports/CloudComputing_2012.pdf)).

### OUTSIDE THE ORGANIZATION

A CBC article addressed those hackers who attempted to gain access to a Canadian law firm's confidential information: [cbc.ca/news/politics/story/2011/11/29/pol-weston-hacking-firms.html](http://cbc.ca/news/politics/story/2011/11/29/pol-weston-hacking-firms.html).

There are free firewall testing tools on the web such as [grc.com](http://grc.com) (Shields Up! And LeakTest – that look for both incoming and outgoing holes in your firewall) and SecurityMetrics home office and business server firewall tests ([securitymetrics.com/portscan.adp](http://securitymetrics.com/portscan.adp)), among others. Of course, adequate security measures should be more than just firewall tests – consider seeking the advice of a computer security expert regarding your law firm's security practices, hardware and software.

### INSIDE THE ORGANIZATION

It is unfortunate, but there are occasionally insiders or disgruntled staff who seek to damage the IT systems of a business, before or even after leaving the organization. The Electronic Frontier Foundation details several such examples in this article: [ilt.eff.org/index.php/Computer\\_Fraud\\_and\\_Abuse\\_Act\\_\(CFAA\)](http://ilt.eff.org/index.php/Computer_Fraud_and_Abuse_Act_(CFAA)).

The solution? Change the access capabilities of anyone who is leaving the firm – immediately. If you get an inkling that someone is leaving on bad terms, you may want to quietly restrict their ability to erase valuable files.

### PASSWORDS

All of us have been reminded, time and time again, to use "secure" passwords. This article "How secure is your email password?" is a frightening look into how an adjunct professor of software security – on a challenge – set out to "steal" a CNET reporter's email password ([news.cnet.com/8301-27080\\_3-20016442-245.html](http://news.cnet.com/8301-27080_3-20016442-245.html)) at the request of the reporter.

The solution? Get a secure password and a secure password-keeper program.

[grc.com](http://grc.com) offers the "Perfect Passwords" service that will generate a 64 random character password each time you visit. Password Safe ([passwordsafe.sourceforge.net](http://passwordsafe.sourceforge.net)) is a free open-source password manager, but there are many others available as well.

### MALWARE, VIRUSES AND TROJANS

Even if you use a Mac, you are susceptible to malware, viruses, trojans and other malicious software. No one security system can fully protect you, but having a good and up-to-date software security suite can at least stop the vast majority of attacks in their tracks. "Top 10 Reviews" has been testing internet security suites for years now – the 2012 report "Best Internet Security Suites Software Comparison" is a great resource when you are looking at changing your suite (and useful in terms of checking out how your current suite stacks up against the competition) ([internet-security-suite-review.toptenreviews.com](http://internet-security-suite-review.toptenreviews.com)).

When it comes to confidential information, your security can never be enough ... ❖



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