



# BENCHERS' BULLETIN

Keeping BC lawyers informed

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## Alternate service providers: A historic opportunity

by Miriam Kresivo, QC

AS I STEPPED into my role as president this year, I not only contemplated a busy agenda for the Benchers in 2018, but also looked ahead to the goals of the new three-year strategic plan that was approved at the end of 2017.

The strategic plan envisions, among other things, improving access to legal services, responding to the recommendations of the Truth and Reconciliation Commission and pursuing proactive methods of regulation. It is an ambitious agenda, and the 2018-2020 Strategic Plan includes specific, measurable objectives. But, of course, it can't all be accomplished in one year. One area where I see a real opportunity for the Law Society this year is improving access to legal services by creating and regulating a new class of legal service provider.

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*I am optimistic that amendments to the Legal Profession Act that enable regulating alternate legal service providers are on the horizon. We have to be ready once those amendments are in place, and that will require defining the necessary qualifications, as well as outlining a regulatory framework for credentialing and regulating new providers of legal services in discrete areas of practice.*

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The Law Society has laid the groundwork for alternate legal service providers with a number of initiatives in recent years. In 2010, the Benchers approved the creation a new class of paralegals called Designated Paralegals, who, under the supervision of a lawyer, may deliver a range of legal services. In 2013, the

Benchers agreed to develop a regulatory framework for a broader class of credentialed and regulated alternate service providers who would be able to offer a defined scope of services independent of the supervision of a lawyer. In 2014, the Law Society asked the province for amendments to the *Legal Profession Act* that would enable the creation of this new class of legal service provider.

Our engagement with the provincial government continues, and I am encouraged that Attorney General David Eby, QC understands and appreciates the benefits of permitting the Law Society to establish new classes of legal service providers. I am optimistic that amendments to the *Legal Profession Act* that enable regulating alternate legal service providers are on the horizon. We have to be ready once those amendments are in place, and that will require defining the necessary qualifications, as well as outlining a regulatory framework for credentialing and regulating new providers of legal services in discrete areas of practice.

Because family law has been identified as being in particular need of attention and resources, the Benchers have agreed to focus initially on establishing new classes of legal service providers in family law. A working group has been struck to develop recommendations for qualifying, credentialing and regulating non-lawyer legal service providers in family law practice.

As chair of the working group, I am eager to make progress on developing these credentials and regulations. Improving access to legal services is one of the most pressing challenges facing the justice system in our province today and I'm confident that the working group's contributions will allow the Law Society to make a significant and lasting impact on improving access. ❖

### BENCHERS' BULLETIN

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

Suggestions for improvements to the *Bulletin* are always welcome — contact the editor at [communications@lsbc.org](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 \$70 per year (\$30 for the newsletters only; \$40 for the *Member's Manual* amendments only) by contacting the subscriptions assistant at [communications@lsbc.org](mailto:communications@lsbc.org).

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FROM THE LAW FOUNDATION OF BC

## Public Interest Law Participation Fund 2018

THE LAW FOUNDATION of British Columbia has established the Public Interest Law Participation Fund, a new annual fund of \$100,000, effective January 1, 2018. The maximum amount of any Participation Fund grant is \$10,000.

The purpose of the Participation Fund is to enhance public participation in public interest law matters in British Columbia, particularly to address:

- the need to support the inclusion in public interest law matters of perspectives and voices not otherwise represented through Law Foundation funding; and
- the need to support the balancing of differing public interests and perspectives, including urban and rural.

Any organization or individual resident in British Columbia may apply. Applicants will be given priority if they demonstrate that their participation would not be possible without the requested funding and that their participation will broaden the diversity, inclusiveness and balance of views being discussed. Participation Fund grants are intended to support public participation in proceedings arising in a formal legal process convened by a governmental, regulatory or other public body and demonstrating the following qualities:

- raises an issue or issues concerning the public at large and falling within one of the Law Foundation's mandate areas (legal education, legal research, legal aid, law reform and law libraries);

- provides opportunity for public input;
- includes public hearings, public inquiries and public consultation; and
- includes non-public proceedings that raise an issue of public interest (certain coroner's inquests).

For more information on the types of expenses covered, details of the application process and application guides, see the Law Foundation's [website](#).

Potential applicants are encouraged to contact Bill McIntosh, program director ([bmcintosh@lawfoundationbc.org](mailto:bmcintosh@lawfoundationbc.org) or 604.689.2048) to discuss their application prior to submission. ❖



*Kathleen Kendall*

## Law Society appointee joins the Law Foundation Board

THE LAW FOUNDATION is pleased to announce that Kathleen Kendall, Law Society appointee for Yale County, has joined its board. Kendall graduated in law from the University of BC in 1983. From 1985 to 2010, she worked with the Legal Services Society as both a staff and managing lawyer, where she was responsible for administrative and family law cases and did community outreach and public legal education in her community. Since 2010, Kendall has run a private practice but also works as lead family duty counsel for Kamloops. ❖

## Thanks to our 2017 volunteers

THE BENCHERS THANK all those who volunteered their time and energy to the Law Society in 2017. Whether serving as members of committees, task forces or working groups, as Professional Legal Training

Course guest instructors or authors, or as fee mediators, event panellists or advisers on special projects, volunteers are critical to the success of the Law Society and its work.

For more on volunteer opportunities and the list of people who served the Society in 2017, see About Us > [Volunteers and Appointments](#). ❖



## Working together to accomplish our strategic goals

by Don Avison

DURING MY FIRST three months, I have had many opportunities for productive discussions with Benchers, the Executive Committee, the senior management team and the highly dedicated staff here at the Law Society of British Columbia.

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*I am looking forward to working with everyone to further strengthen the capacity of the Law Society and to addressing the key objectives set out in the 2018-2020 Strategic Plan approved by the Benchers at their meeting of December 8, 2017.*

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I am looking forward to working with everyone to further strengthen the capacity of the Law Society and to address the key objectives set out in the 2018-2020 Strategic Plan approved by the Benchers at their meeting of December 8, 2017.

While our goal over the next three years will be to make progress on all priorities contemplated by the Strategic Plan, the emphasis in the first year will be on:

- access to justice initiatives with a continuing focus on the Law Society's "Vision for Publicly Funded Legal Aid Services" and securing the legislative amendments necessary to provide for the licensing and regulation of alternate legal service providers;

- improving mental health and wellness within the legal profession;
- moving ahead with regulatory innovations through implementation of the pilot and evaluation phase of recommendations arising from the Law Firm Regulation Task Force; and
- developing and acting on responses to the calls to action set out in the report of the Truth and Reconciliation Commission (TRC).

Working to address meaningful change in relation to the TRC's calls to action is an area of particular interest to me and I believe there is great potential for making progress. I was at the November 2017 Truth and Reconciliation Symposium sponsored by the Law Society and the Continuing Legal Education Society of BC (CLEBC) that, in my view, was a great start, but much more remains to be done. For those who haven't yet had an opportunity to watch the video *But I Was Wearing a Suit!* I would urge you to take the 25 minutes necessary to do so. You can find it on the CLEBC [website](#) under "News" or on the Law Society's [YouTube channel](#).

News that the Government of British Columbia will be providing funding to help support the commencement of the Indigenous Law program at the University of Victoria was also encouraging. Here, the Law Society students entering the Professional Legal Training Course program

in mid-February participated in a blanket exercise focused on increasing Indigenous cultural competency, and further work is under way to strengthen this important aspect of our program.

Another significant new initiative in the strategic plan is addressing mental health in the legal profession. Lawyers who want and need to seek help for a mental health or addiction issue often fear stigma. We have to change that for the good of the profession and for the benefit of the public.

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*I am honoured to have the opportunity to work with [the staff at the Law Society], and with the Benchers, in furtherance of the public interest.*

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Every day our staff here at the Law Society do exceptional work in our core areas of responsibility. They are deeply committed to the mandate of the organization, to upholding and protecting the public interest in the administration of justice and to ensuring the public has the continued benefit of highly competent lawyers who consistently meet the standard of excellence expected of them. I am honoured to have the opportunity to work with them, and with the Benchers, in furtherance of the public interest. ❖

## In brief

### STRATEGIC PLAN 2018-2020

The Benchers approved the 2018-2020 strategic plan, which outlines the Law Society's priorities and goals for the next three years. The strategic plan can be found on our [website](#) (see About Us > [Strategic Planning and Annual Reports](#)).

### REMINDER – RULE OF LAW ESSAY CONTEST

The Law Society is inviting all BC Grade 12 students and any secondary school students who have taken, or are currently enrolled in Law 12 or Civic Studies 11, to submit an essay on the following topic: How does social media interact with the rule of law?

The winning entry will be awarded a \$1,000 prize, and the runner-up will receive a \$500 prize. The first place winner and runner-up will be invited to an awards presentation event at the Law Society in Vancouver. The deadline for submissions is **April 6, 2018**.

For further details, see the information sheet and submissions guidelines on our website at [Our Initiatives > Rule of Law and Lawyer Independence > Secondary School Essay Contest](#).

### JUDICIAL APPOINTMENTS

**The Honourable Richard Wagner** was named as Chief Justice of Canada. Following Chief Justice Beverley McLachlin's retirement on December 15, Justice Wagner took the oath of office as Chief Justice and was sworn in as a member of the Queen's Privy Council for Canada on December 18.

**The Honourable Susan A. Griffin**, a judge of the Supreme Court of British Columbia, was appointed a justice of the British Columbia Court of Appeal and a judge of the Yukon Court of Appeal. She replaces Mr. Justice R.B.T. Goepel, who elected to become a supernumerary judge effective September 30, 2016.

**Barbara J. Norell, QC**, a partner with Harper Grey LLP, was appointed a judge of the Supreme Court of British Columbia in New Westminster. She replaces Mr. Justice J.D. Truscott, who resigned effective July 4, 2017.

**Wendy A. Baker, QC**, a partner at Miller Thomson, was appointed a judge of the Supreme Court of British Columbia in Vancouver. She replaces Mr. Justice J.W. Williams, who elected to become a supernumerary judge effective October 10, 2017.

**Sharon Matthews, QC**, a partner with Camp Fiorante Matthews Mogerman, was

appointed a judge of the Supreme Court of British Columbia in Vancouver. She replaces Madam Justice L.B. Gerow, who elected to become a supernumerary judge effective October 10, 2017.

**Diane MacDonald**, general counsel for the BC Teachers' Federation, was appointed a judge of the Supreme Court of British Columbia in Vancouver. She replaces Mr. Justice Peter Leask, who retired effective September 18, 2017.

**Jasvinder S. (Bill) Basran**, regional director general and senior general counsel with Justice Canada, was appointed a judge of the Supreme Court of British Columbia in Vancouver. He replaces Madam Justice Barbara L. Fisher, who was appointed to the Court of Appeal of British Columbia on September 14, 2017.

**Francesca Marzari**, a partner at Young Anderson Barristers and Solicitors, was appointed a judge of the Supreme Court of British Columbia. She replaces Madam Justice Victoria Gray, who resigned effective August 31, 2017.

**Delaram Jahani** was appointed a judge of the Provincial Court in Surrey.

**Peter Whyte** was appointed a judge of the Provincial Court in Williams Lake. ❖

## Innovation update: Law firm regulation pilot project

SINCE 2014, THE Law Society of BC has been consulting the legal profession about law firm regulation. Law firm regulation is moving forward. Registration of law firms will begin in May 2018. This summer, the Law Society will launch a pilot project. Participating firms will evaluate the functionality and accessibility of a self-assessment tool. As the Law Society finalizes the self-assessment tool, it wishes to take this opportunity to communicate with the membership about the pilot

project and next steps in the implementation of law firm regulation.

### WHY LAW FIRM REGULATION?

Law firm regulation will give lawyers the tools to improve practice management so that they can focus on the practice of law.

The overall objectives are to assist law firms and lawyers in managing their practices better, to address problems or concerns before they become issues for their clients, and to minimize and manage

risks that lead to client dissatisfaction. It should lessen the regulatory burden on individual lawyers by making law firms responsible for regulating areas that are the collective responsibility of the firm, such as advertising, client relations, accounting, conflicts of interest, and file and records management.

*continued on page 8*

## Unauthorized practice of law

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

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

\* \* \*

During the period of November 11, 2017 to February 15, 2018, the Law Society obtained seven undertakings from individuals and businesses not to engage in the practice of law.

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

**Mumtaz Ali Khan and M. Khan & Company Immigration Counsellors Ltd.**, of Surrey, BC, consented to an order entered January 30, 2018, prohibiting them from engaging in the practice of law, representing themselves as lawyers or a law firm and from commencing, prosecuting or defending proceedings in court. In its petition, the Law Society alleged that Khan offered and prepared court documents for divorce proceedings for a fee and wrongfully represented himself as capable and qualified to do so. As a term of the order, Khan and the company were required to repay the \$2,500 the company received to perform the divorce services. The order does not prohibit Khan or the company from performing immigration services pursuant to the federal

immigration statutes as long as he remains a licensed immigration consultant.

On February 22, 2018, Mr. Justice McEwan ordered that **Adam Wilson**, doing business as Adam Wilson LLC and "www.adamwilsonllc.com," be permanently prohibited from engaging in the practice of law, falsely representing himself as a lawyer and commencing, prosecuting or defending a proceeding on behalf of another party. On the website, Wilson falsely represented himself as being a Canadian lawyer and managing partner of a law firm in British Columbia and Arizona and offered immigration and other legal services for a fee. The court awarded the Law Society \$3,000 in costs.

To read the orders, search by name in the Law Society's [database of unauthorized practitioners](#). ❖

## Law Society Award for Leadership in Legal Aid



*Richard Strahl (left) and 2017 president Herman Van Ommen, QC (right)*

THE LAW SOCIETY is pleased to award Richard Strahl the 2017 Law Society Award for Leadership in Legal Aid. Strahl was called to the BC bar in 1988 and practises criminal defence in the East Kootenay region. He has consistently taken on legal aid files for nearly 30 years and has appeared throughout the Kootenay region, not only on behalf of legal aid clients, but also acting pro bono for people challenged by the court process.

Strahl was the Kootenay legal agent for the Legal Services Society from 2002 to 2016 and continues to routinely accept legal aid retainers and perform duty counsel services.

In addition to a lifelong commitment to helping those in need of legal counsel, Mr. Strahl is known among his colleagues for generously making himself available as

a mentor and source of advice for junior counsel. He is widely respected by members of the Bench, the Crown, defence counsel and community support agencies.

"This award recognizes the often overlooked efforts of all members of the criminal bar who do so much for those who struggle through the court process," said Strahl.

"Rick is known throughout the Kootenay region as ethical, diligent and an excellent advocate for his clients. Judges appreciate the advice he provides to the court as well as to those in need. Lawyers know him not only as a tireless advocate, but also as a friendly and affable individual with a certain charm that makes him one of those people everyone likes," said Sarah Westwood, chair of the Award for Leadership in Legal Aid selection committee. ❖

## Law Society Excellence in Family Law Award



Trudi Brown, QC (left) and 2017 president Herman Van Ommen, QC (right)

THE LAW SOCIETY is pleased to award Trudi Brown, QC, the 2017 Law Society Excellence in Family Law Award. Brown was called to the BC bar in 1974 and practised

for four years with the BC Crown Counsel Office in Victoria. Since leaving the Crown she has concentrated her practice in family law and is currently a partner at Brown Henderson Melbye in Victoria.

Known for championing innovation in the delivery of legal services in family law matters, Brown was one of the first lawyers in Victoria to embrace collaborative practice and was a staunch believer in resolving family law disputes without going to trial, well before that mandate was included in the current *Family Law Act*.

She is a long-time contributor to and current co-chair of the National Family Law Program, a highly respected legal education program. She also sits on the editorial board of the Continuing Legal Education Society's *British Columbia Family Practice Manual*, a resource used by lawyers across the province every day. She has served as a governor of the Law Foundation of BC, a director of the

Continuing Legal Education Society of BC, and the president of the Canadian chapter of the International Academy of Family Lawyers. Brown is a Life Bencher and was president (then known as treasurer) of the Law Society in 1998.

"This award recognizes that family lawyers play a major role in the community and probably touch more clients than most other forms of law, often in very difficult circumstances," said Brown. "I would like to share this award with all those who practise in this area."

"Trudi is a trailblazer in family law in this province. She has led by example through her passionate interest in the practice of family law, her innovation in the delivery of legal services and her dedication to the reform of family justice processes and legal education," said Nancy Merrill, QC, second vice-president and chair of the Excellence in Family Law Award selection committee. ❖

## Law Society Diversity and Inclusion Award



Jennifer Chow, QC (left) and 2017 president Herman Van Ommen, QC (right)

THE LAW SOCIETY is pleased to award Jennifer Chow, QC the 2017 Law Society Diversity and Inclusion Award. Chow was called to the BC bar in 1990. From 1990 to

1997 she was in private practice as a civil and criminal litigator (with some time out to earn a master's degree in public administration) and since 1998 has been a senior legal counsel and team leader for the Department of Justice in Vancouver.

In 2015, Chow became the first visible minority president of the Canadian Bar Association, BC Branch. In 2017 she was elected as a Bencher of the Law Society.

In her role as president of CBA BC, Chow made promoting equality and diversity the first of her three goals. She also initiated a dialogue with the provincial and federal governments on a law student loan forgiveness program that would have immediate and direct benefits for both new lawyers facing challenging student debt and underserved rural communities in BC.

Chow has devoted considerable time to mentoring junior lawyers, paralegals

and articling students. She actively participates in knowledge sharing and regularly contributes to continuing legal education, both within the Department of Justice and through Continuing Legal Education of British Columbia and the CBA BC. She regularly updates the Aboriginal Law Section of the CBA BC on significant procedural and substantive case law.

"The Law Society Diversity and Inclusion Award is important because it promotes a profession that includes and respects the diversity in our society," said Chow.

"Through perseverance and dedication, Jennifer has helped move diversity and inclusion to the top of the agenda for change in the legal profession, and she is an inspiration to all of us," said Jamie Macclaren, chair of the Diversity and Inclusion Award selection committee. ❖

*Innovation update: Law firm regulation pilot project ...from page 5*

## FIRM REGISTRATION

In early May, law firm registration will commence. Registration will enable the Law Society to confirm it has complete information about firms practising in BC. Firms will be sent a pre-populated form containing details about the firm, and they will be asked to confirm the information or make any necessary changes.

As part of the registration process, firms will also be required to appoint a designated representative to act as a communications liaison between the firm and the Law Society.

Organizations that do not provide legal services to clients, such as government, Crown corporations, non-profits and those providing pro bono work, as well as corporations with in-house counsel, will not be required to register.

## THE PILOT PROJECT

To determine the most meaningful way to engage law firms, the Law Society will launch a pilot project to test a self-assessment tool that helps firms to evaluate their practice management systems and firm culture. The self-assessment places focus on the firm because a firm's

systems, norms and culture greatly influence the conduct and overall practice of its lawyers.

Working through the self-assessment tool will help a firm recognize its own strengths and indicate opportunities for improvement in relation to its practice management policies and processes. The Law Society will also be developing further resources that firms can use to address the practice management concerns that they identify.

The Law Society recognizes that lawyers are busy people, and collecting resources and assessing infrastructure can be time-consuming. The self-assessment tool is designed not only to facilitate a process for self-evaluation, but also as a convenient way to link to resources to help lawyers improve their practice management and better serve their clients.

## WHO WILL TAKE PART IN THE PILOT PROJECT?

Because the regulation of law firms is a relatively new idea in Canada, it is important for the Law Society to test the self-assessment tool through a pilot project and receive feedback from members before determining whether this new approach should be fully implemented and, if so, how. Participants in the pilot will be encouraged to comment on the

self-assessment tool and their experience with the pilot project generally. At the end of the pilot, the Law Society should know more about the functionality and accessibility of the self-assessment tool and how it may be used in helping firms work with the Law Society to ensure sound practice management systems are in place.

The Benchers and their firms have volunteered to participate in the pilot project. Additional participants will be a representative sample of BC law firms. Each firm will be tasked with completing the self-assessment tool, which references a number of principles relating to practice management and firm culture, and reporting results back to the Law Society.

Following the completion of the pilot project, all feedback will be reviewed in the fall and will be crucial to the determinations the Benchers will make about further implementation.

## WHAT'S NEXT?

The ultimate goal of this initiative is to foster a more collaborative relationship between the Law Society and lawyers and firms. As the Law Society moves toward implementing a proactive approach to regulation, it will continue to take effort to create approaches that are practical, productive and meaningful for both the Law Society and members. ❖

# In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2017:

A. Stewart Andree  
 Donald R. Andrews  
 William S. Armstrong, QC  
 Edward D. Bates, QC  
 Daryl E. Clark  
 Bruce J. Collingwood  
 Robert F. Dawson  
 Mark P. Eikland  
 Michael Galambos  
 Charles G. Harrison  
 Maureen Headley

Anne M. Hutchinson  
 Jeffrey Jones  
 David W. Kington  
 Roy A. Logie  
 Albert K. MacKinnon  
 Paul A. McDonnell  
 James McIntyre  
 Gary E. McShane  
 Peter J. Millward, QC  
 Roderick V. Naknakim  
 Donald L. Nundal

William M. Philip  
 Reginald Poole  
 Norb H. Poschwatta  
 William Shkwarok  
 Ian H. Stewart, QC  
 Kenneth S. Tessovitch  
 W. Roy Wellman, QC  
 Fermie Wilder  
 Anthony Wooster





## Mental health issues in the legal profession

*The Law Society prioritizes increasing awareness and reducing stigma*

By Brook Greenberg, Bencher and Chair of the Mental Health Task Force

LAST SUMMER, MANY Canadian lawyers shared a poignant article from the *New York Times* about the drug-related death of a successful Silicon Valley lawyer.

Other recent media stories in *Canadian Lawyer* ("High-pressure law jobs linked to depression") and *The Globe and Mail* ("Lawyers more likely to experience mental health problems the more successful they are: study") convey statistics from a growing body of academic research that reveals the troubling reality of how pervasive and serious mental health and substance use issues are within the legal profession.

### STARTLING STATISTICS

A 2016 study published in the *Journal of Addiction Medicine* of almost 14,000

American lawyers found that over 36 per cent showed signs of possible alcohol dependence, as compared with 15 per cent for physicians. More than 45 per cent of responding lawyers described experiencing depression, and 11.5 per cent reported having had suicidal thoughts at some point in their careers.

If those findings are extrapolated to British Columbia, 4,241 lawyers in the province may be dealing with alcohol dependence, 5,325 have experienced depression and 1,340 have had suicidal thoughts. Even if you are not currently experiencing these types of difficulties yourself, it is likely that someone you care about in the profession is suffering from a mental health or substance use issue.

### THE PROBLEM OF STIGMA

According to the same study, the primary barrier to lawyers seeking treatment or assistance is stigma and the fear of others finding out that they need help. Stigma and secrecy surrounding mental health and substance use issues are literally killing members of the legal profession.

Mental health and substance use issues are also driving lawyers to leave the profession early, some after they have become the subject of discipline proceedings, complaints or other claims, or after experiencing interpersonal difficulties at home or at work.

### THE PARTICULAR SUSCEPTIBILITY OF LAWYERS

Anecdotal evidence suggests that some

traits that make many lawyers successful — perfectionism, fear of failure, self-doubt, meticulous attention to detail and the ability to identify worst-case scenarios — also make lawyers more susceptible to mental health and substance use issues. Operating in an adversarial profession may also play an aggravating role. Other professions are stressful, competitive and difficult. However, as noted in the *New York Times* article, surgeons do not have other doctors on the opposite side of the table trying to undo an operation.

Susceptibility to mental health and substance use issues may even be aggravated by perceived success in the profession. New research by the University of Toronto, reported in *The Globe and Mail* at the end of last year, found that lawyers are more likely to experience depression and mental health issues the more financially successful they are in their field.

The competitive and adversarial environment in which lawyers operate encourages them to portray themselves as impervious to stress, always strong and fault-free. Holding to these unrealistic standards increases the impact of the stigma surrounding mental health and substance use issues and drives these difficulties deeper into the shadows. Many lawyers treat these as matters to be hidden from everyone at all costs. As a result, many suffer alone and in silence. However, the statistics make clear that lawyers experiencing mental health and substance use issues are far from alone. Rather, such lawyers comprise a substantial portion of the profession.

## THE LAW SOCIETY'S MENTAL HEALTH TASK FORCE

Given that the prospect of others discovering that a lawyer has mental health or substance use issues is the primary barrier to seeking assistance, lawyers must feel safer requesting confidential assistance and seeking support from colleagues. Lawyers must also become better educated and able to recognize in themselves and others when help may be required and how best to offer it. All of these goals require greater education and a culture shift within the profession.

The Law Society of BC has made a commitment to improve education and support a culture shift in how the profession

approaches mental health and substance use issues. The Law Society's Strategic Plan 2018-2020 makes addressing the issues surrounding mental health and substance use a priority. As a regulator, the Law Society has vowed to identify ways to reduce stigma and to review its discipline and admissions processes to consider how best to deal with mental health and substance use issues.

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*Addressing mental health and substance use issues is difficult and requires long-term commitment by the Law Society and its members. While the current picture is daunting, there is cause for optimism — if awareness is increased and stigma reduced within the profession, significant progress can be made for the benefit of lawyers and the public they serve.*

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In order to advance this strategic priority, the Law Society established a Mental Health Task Force at its January meeting. The role of the task force will be to recommend specific ways to achieve these goals. The Law Society is considering a range of ideas to better address mental health and substance use issues, including increasing education and resources, incorporating a voluntary and remedial "diversion" program as part of the discipline process and looking for ways to change attitudes within the profession to reduce stigma.

In December 2017, the Benchers approved professional wellness education programs for continuing professional development (CPD) accreditation in the province. The experience of law firms that have increased their resources with respect to mental health and substance use issues is heartening. One submission from a national law firm to the Law Society's Lawyer Education Advisory Committee described "professional wellness" as "likely the most important CPD-related program" it runs. The firm explained that in its experience, the benefits of offering professional wellness education included greater retention of lawyers who may otherwise have left the profession and that its lawyers were performing at a higher professional level with fewer claims and complications.

## Resources for lawyer wellness and support

If you or someone you know requires support, do not hesitate to reach out for help. The Law Society funds personal counselling and referral services through LifeWorks Canada Ltd. Services are confidential and available at no cost to individual BC lawyers and articulated students and their immediate families. For more information on how to access LifeWorks' services, log in to [member portal](#) or call 1.888.307.0590.

In addition, the Lawyers Assistance Program provides confidential support, counselling, referrals and peer interventions for lawyers, their families, support staff and articulated students who need help to deal with alcohol or chemical dependencies, stress, depression or other personal problems. For more information, visit the Lawyers Assistance Program's [website](#) or contact them at 604.685.2171 or [info@lapbc.com](mailto:info@lapbc.com).

Of course, the Lawyers Assistance Program (LAP) remains available for confidential peer counselling for all members of the profession, as well as articling students and staff. It is important for everyone to know that the LAP's services are there not only for those in crisis. Confidential peer counselling can help address difficulties that cause one to feel "off," unhappy with practice or discontented generally. Seeking early assistance and support may help lawyers to avoid reaching a crisis point.

Addressing mental health and substance use issues is difficult and requires long-term commitment by the Law Society and its members. While the current picture is daunting, there is cause for optimism — if awareness is increased and stigma reduced within the profession, significant progress can be made for the benefit of lawyers and the public they serve.

To contact the Law Society's Mental Health Task Force, email [mentalhealth@lsbc.org](mailto:mentalhealth@lsbc.org). ❖

## PRACTICE ADVICE

# Crossing the border into or out of the United States

by Barbara Buchanan, QC, Practice Advisor

## NEW US DIRECTIVE FOR BORDER SEARCHES OF ELECTRONIC DEVICES

In recent months, articles have appeared in the mainstream press as well as legal publications expressing concerns about United States border officials asking travellers, including lawyers, for their passwords to search travellers' mobile phones and other electronic devices at airports and land border crossings, both inbound and outbound. On January 4, 2018, the U.S. Customs and Border Protection (CBP) issued a revised *Directive on Border Search of Electronic Devices*, CBP Directive No. 3340-049A, which the Law Society encourages lawyers travelling to the United States to read (see the Department of Homeland Security [website](#)).

Below is a summary of some of the key points set out in the directive and some suggestions.

### PURPOSE

The directive states that it is to "provide guidance and standard operating procedures for searching, reviewing, retaining and sharing information contained in computers, tablets, removable media, disks, drives, tapes, mobile phones, cameras, music and other media players and any other communication, electronic, or digital devices subject to inbound and outbound border searches by U.S. Customs and Border Protection." The searches include searches conducted at the physical border, the functional equivalent of the border or the extended border. Some types of electronic device searches are excluded from the directive, such as searches performed pursuant to a warrant, consent or abandonment, or in response to exigent circumstances.

### PROCEDURES

The border search will include an examination of only the information that is resident upon the device and accessible through the device's operation system or through other software, tools or applications.

Officers may not intentionally use the device to access information that is solely stored remotely.

To avoid retrieving or accessing information stored remotely and not otherwise present on the device, officers will either request that the traveller disable connectivity to any network (e.g., by placing the device in airplane mode) or, where warranted by national security, law enforcement, officer safety or other operational considerations, officers will disable network connectivity themselves.

### BASIC SEARCH

During a basic search, with or without suspicion, an officer may examine an electronic device and may review and analyze information encountered at the border.

### ADVANCED SEARCH

An advanced search is described as "any search where an officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy and/or analyze its contents."

Advanced searches should be conducted in the presence of a supervisor and in the presence of the individual whose information is being examined unless there are considerations that make it inappropriate to permit the individual's presence. Even if an individual is permitted to be present during a search, it does not mean that the individual will observe the search.

### REVIEW AND HANDLING OF PRIVILEGED CLIENT INFORMATION

Officers encountering information they identify as, or that is asserted to be, protected by "attorney-client privilege or attorney work product doctrine" are required to adhere to a set of detailed procedures set out in the directive. For example:

- The officer shall seek clarification, if practicable in writing, from the individual asserting this privilege as to specific files,

file types, folders, categories of files, attorney or client names, email addresses, phone numbers or other particulars that may assist CBP in identifying privileged information.

- Prior to any border search of files of other materials over which a privilege has been asserted, the officer will contact the CBP Associate/Assistant Chief Counsel office, which will coordinate with the US Attorneys' Office as needed. Officers will ensure any privileged material is segregated from other information examined during a border search. The process to segregate materials will involve establishing and employing a Filter Team composed of legal and operational representatives or through another appropriate measure with written concurrence of the CBP Associate/Assistant Chief Counsel office.
- At the completion of the CBP review, unless any materials are identified that indicate an imminent threat to homeland security, copies of materials maintained by CBP and determined to be privileged will be destroyed, except for any copies maintained in coordination with the CBP Associate/Assistant Chief Counsel office solely for the purposes of complying with a litigation hold or other requirement of law.
- Information that is determined to be protected by law as privileged or sensitive will be shared only with agencies or entities that have mechanisms in place to protect such information, and such information will only be shared in accordance with the directive.

### REVIEW AND HANDLING OF PASSCODE-PROTECTED OR ENCRYPTED INFORMATION

"Travellers are obligated to present electronic devices and the information contained therein in a condition that allows inspection of the device and its contents."

If the device is protected by a passcode,

## Services for lawyers

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Practice advisors assist BC lawyers seeking help with:

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encryption or other security mechanism, an officer may ask for means of access or passcodes. The passcodes may be retained as needed to facilitate examination of the device or its information, including information that is accessible through software applications. Passcodes will be deleted or destroyed when no longer needed to facilitate the search and may not be used to access information that is stored remotely.

If an officer is unable to complete an inspection of an electronic device because it is protected by a passcode or encryption, the officer may detain the device pending determination as to its admissibility, exclusion or other disposition. The directive includes procedures for detention and review that take into account time frames (not ordinarily more than five days, with provisions for extensions of time).

The directive provides some insight as to what lawyers might expect when crossing the border, including some improvements over the previous version, Directive 3340-049. While there remain many issues of concern for the proper protection of solicitor-client privilege, the directive now allows BC lawyers to plan ahead to protect privileged information before travelling to the United States.

### PLAN BEFORE YOU GO

If you are planning to bring a smartphone or electronic device during your travel to the United States for a holiday or a meeting, plan ahead as to what electronic devices you really need to take across the border and whether or not there is client information on them. Your personal convenience should not be your first priority; rather, as a lawyer, you should prioritize maintaining the confidentiality of your clients’ information and your professional obligations. For some clients, exposing their confidential information in the United States could be highly prejudicial and such clients may not authorize you to cross borders with their confidential information on your electronic device. It would be prudent for you and your firm to develop a policy about bringing electronic devices to the United States and other countries.

Having read the directive, and knowing your clients, you will have a sense of how vulnerable your client’s confidential

information may be when crossing the border. Consider the following suggestions:

- Develop a policy concerning travelling with smartphones, laptops and other electronic devices across foreign borders.
- Use secure passwords and encryption for electronic devices regardless of travel plans, as the devices can become lost or stolen.
- Use bare electronic devices for travel that have no client records on them and only the bare necessities to operate. Connect remotely with your office through your server residing in Canada.
- Before you travel, if you intend to use your existing electronic device used for law practice purposes, obtain professional help to forensically clean it. For example, purge old emails, client contact information and documents and delete your browsing history.
- Turn your electronic device off before crossing the border. If you turn it on, put it in airplane mode.
- Carry identification that shows that you are a lawyer, such as your Law Society of British Columbia member identification card and a business card.
- Take a copy of the directive with you.

### PROFESSIONAL RESPONSIBILITIES

Rule 3.3-1 of the *Code of Professional Conduct for British Columbia* requires lawyers to hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship. A lawyer must not divulge the information except in accordance with the limited exceptions set out in the Code (for example, unless the client consents or the lawyer is required by law or a court order). The ethical rule of confidentiality is wider than privilege — all privileged information is confidential but not all confidential information is always privileged. For example, even a client’s identity and the fact that the lawyer has been retained for a legal issue is generally confidential, but in some cases the client’s name and the fact that the lawyer has been retained may also be privileged.

*continued on page 19*

## Conduct reviews

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

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

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

### BREACHES OF UNDERTAKING

A lawyer breached an undertaking not to reproduce or distribute certain medical documents sent to him by opposing counsel that contained highly sensitive and personal medical information relating to the opposing party. In doing so, the lawyer breached rule 7.2-11(b) of the *Code of Professional Conduct for British Columbia*. This release of information was inadvertent and occurred due to the failure to adequately supervise his staff, contrary to rule 6.1-1 of the Code. Opposing counsel sent the medical information in order to provide context in a dispute that arose between the parties. Although the lawyer could discuss the information contained in these documents with his client, he gave an undertaking not to distribute or reproduce them. As the lawyer was not fluent in English, he sent an email to his assistant for translation and transmission to the client. The medical information was attached to the email. The assistant did not realize the medical information was attached to the email when she sent it and was not aware of the undertaking.

A conduct review subcommittee emphasized the importance of undertakings in the Law Society's objective of protecting the public interest, especially when dealing with highly personal or confidential material. The lawyer acknowledged his failure to fulfill his undertaking and his inadequate supervision of his staff. The lawyer now deals with sensitive materials and any undertakings personally, rather than delegating these tasks to his staff. The lawyer will ensure that his electronic filing system is set up in such a way that confidential information is placed in protected files to prevent its release. The lawyer acknowledged his misconduct and the importance of taking steps to safeguard sensitive information entrusted to him. (CR 2018-01)

In another case, a lawyer breached an undertaking on a real estate conveyance file by failing to provide payout particulars within five business days of the completion date, contrary to rules 2.1-4, 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*. The documents were not provided until over two weeks after the required date. The lawyer failed

to have a strong bring-forward system in place to ensure that undertakings with specific deadlines were not missed due to the busy workload and staff absences.

The lawyer has since put in place reminder systems and office procedures to manage deadlines. Files with pending undertakings are placed in a separate file cabinet organized by the date undertakings are due and are reviewed daily by a lawyer. The lawyer has discussed with his staff and real estate conveyancer the importance of undertakings and the consequences of a breach. The lawyer acknowledged the misconduct and demonstrated insight into how to prevent similar situations in the future. A conduct review subcommittee explained the concept of progressive discipline to the lawyer and cautioned the lawyer that future misconduct may result in a citation. (CR 2018-02)

In a similar case, a lawyer breached an undertaking on a real estate conveyance file by failing to provide mortgage payout particulars within five business days of the completion date, contrary to rules 2.1-4, 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*. The breach occurred because of insufficient staff and file supervision and inadequate office procedures to ensure the fulfillment of undertakings. A conduct review subcommittee advised the lawyer that the adherence to the fulfillment of undertakings is an extremely serious matter that goes to the heart of public confidence in the legal profession. The lawyer stated that he handles approximately 100 real estate conveyance files per month. The subcommittee urged the lawyer to consider taking on fewer files, in order to give his files more personal attention. The subcommittee pointed out that it was his responsibility, and not his staff's, to fulfill undertakings. The lawyer acknowledged that breaching an undertaking is an extremely serious matter. He has improved his office procedures respecting undertakings and has added an associate and a staff member to manage his workload. He has begun paying more personal attention to his files, instituted an electronic system for diarizing undertakings and automated the generation of payout particulars. (CR 2018-03)

In another case, a lawyer breached the terms of an undertaking to the Law Society to have all of his clients sign a retainer agreement, contrary to Chapter 11, Rule 7(b), of the *Professional Conduct Handbook* then in force, and rule 7.2-11 of the *Code of Professional Conduct for British Columbia*. During a Law Society compliance audit, the lawyer was unable to produce signed retainer agreements with respect to five client files.

The lawyer is a sole practitioner in criminal law and most of his clients are from outside the Lower Mainland. The lawyer acknowledged the breach of undertaking and that he did not attempt to have the undertaking amended or cancelled when he realized that he was having difficulties having his clients sign retainer agreements. A conduct review subcommittee advised that it is important that lawyers appreciate and respect the sanctity of undertakings by ensuring that they are fulfilled. The lawyer has since taken steps to ensure each of his clients signs retainer agreements. Given the difficulties in complying with the undertaking, the subcommittee recommended that the lawyer seek an amendment to the terms of the undertaking. The lawyer indicated that he would do so immediately. (CR 2018-04)

A lawyer breached an undertaking in a civil action by submitting a consent order for entry without first delivering a fully executed release to opposing counsel, contrary to rules 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*. Opposing counsel had sent a consent order and a release to the lawyer under certain undertakings that restricted the use of these documents and specified the manner of execution and delivery. The terms of the undertaking were as follows: that the release not be used in any way until it was signed and initialled by the lawyer's clients and delivered to opposing counsel's offices; to return the consent order without using it in any way if the release could not be delivered to opposing counsel by a certain date; and to deliver to opposing counsel a copy of the entered consent order by a certain date or else deliver a letter explaining any delay in delivering a copy of the entered order by that same date. The lawyer breached the first two terms of the undertaking by failing to see that her clients had not initialled the first page of the consent order and by filing the consent order before she had received proof of delivery that opposing counsel had received her letter enclosing the signed release.

The lawyer took the steps necessary to rectify the breaches of the first two terms but purported to deny having accepted the third term on the grounds that she had no control over the timing of when the order would be entered. The lawyer eventually came to understand that she did not fully read and understand the third term of the undertaking. She admitted that she ought to have been more thorough in reviewing the documents returned to her by her clients and that she should have obtained proof of delivery of her letter enclosing the signed release to opposing counsel before proceeding to enter the consent order.

A conduct review subcommittee impressed on the lawyer that undertakings must be rejected at the outset if it is not completely within the lawyer's control to comply. The lawyer acknowledged her mistakes that led to the breaches of two undertakings and her improper rejection of the third undertaking and has made several changes to her practice, including reading correspondence containing undertakings thoroughly several times before acting, setting out a plan, with her staff, for compliance in writing and initiating bring-forward reminders to ensure each step of a plan is properly completed. (CR 2018-05)

### CLIENT IDENTIFICATION AND VERIFICATION

A lawyer failed to verify her client's identity when the client was not physically before her and not present in Canada, contrary to Rule 3-104 of the Law Society Rules. The lawyer was retained by a Canadian citizen living in Hong Kong to assist in the sale of his residential property in BC. The transaction closed without the lawyer having verified the client's identity using independent source documents (such as valid government-issued identification). Before the release of the holdback funds, the lawyer did obtain a copy of the client's identification through an agent. The lawyer was aware of the identity verification rules applicable to non-face-to-face financial transactions and relied on her conveyancer to ensure that the client's identity had been verified in accordance with the Rules. The lawyer also admitted that she inadequately supervised a satellite conveyancer.

A conduct review subcommittee advised the lawyer that her conduct was inappropriate as it contravened Rule 3-104 and advised that client identification and verification rules are essential in combatting money

laundering and fraud. The lawyer, not her staff, is responsible for compliance with the Rules. The lawyer acknowledged that her conduct was inappropriate and stated that she understood the importance of client verification rules and of adequate supervision of staff.

The lawyer has since increased her vigilance and has made several improvements in her practice. She now has two conveyancers in her office and encourages her clients to attend in person. She personally ensures compliance with client identification and verification rules. The lawyer also has in place a standard form written agency agreement that she uses for identity verification in non-face-to-face financial transactions. (CR 2018-06)

### FAILURE TO MEET FINANCIAL OBLIGATIONS AND BREACH OF TRUST ACCOUNTING RULES

A lawyer failed to register for Provincial Sales Tax (PST) in a timely manner and failed to promptly remit taxes owing on fees and disbursements, contrary to rule 7.1-2 of the *Code of Professional Conduct for British Columbia*. The lawyer did not promptly register for PST when he was required to do so due to changes in tax legislation. He eventually registered for PST as his practice was undergoing a Law Society compliance audit. The lawyer subsequently and knowingly made a false statement on his 2014 annual trust report when he certified that he had paid PST on time, when he knew he had not, contrary to Law Society Rule 3-72, then in force (now Rule 3-79(5)(b) and rule 2.20-1 of the *BC Code*).

The lawyer accepted responsibility for his conduct and acknowledged wrongdoing. A conduct review subcommittee advised the lawyer that his conduct was serious and inappropriate because it was a breach of the specific rules relating to the high standards required by lawyers to honour payment obligations. The lawyer admitted he failed to remit funds for three consecutive years and that he made a false declaration on his annual trust report. He explained that this occurred during a particularly difficult time in his life. The lawyer has since taken remedial steps by arranging a monthly repayment agreement with the provincial government and voluntarily set up automatic monthly remittances. The agreement also requires that the lawyer's PST account from his law practice be kept in good standing. The lawyer acknowledged the subcommittee's recommendation to use services available from the Law Society for practice advice and assistance when necessary. The subcommittee raised the issue of staffing needs but was satisfied of the lawyer's competence in doing his own accounting based on the lawyer's completion of commerce courses at university. (CR 2018-07)

### QUALITY OF SERVICE

In a conveyancing matter, a lawyer failed to inform his client of a defect notice received from the Land Title Office and failed to take any substantive steps to address the defect, contrary to rules 3.2.-1 and 7.8-1 of the *Code of Professional Conduct for British Columbia*. The lawyer was hired to transfer a matrimonial home from an ex-spouse to his client. The signed Form A Transfer was submitted to the Land Title and Survey Authority (LTSA), and a few days later, the LTSA issued a defect notice because the lawyer's client had previously registered a lien on the property. For three months, the lawyer did not return his client's phone calls, until the client discovered that she was not properly registered as the owner of the property. That day, the client called the lawyer, and she attended at his office

to sign a Form D to remove the lien off the title. Although the client was never at risk, the lawyer never provided an explanation to the client's full satisfaction.

The lawyer admits that he did not keep his client informed and failed to correct his error in a timely manner. He explained that his office was busy and that he had new staff. A conduct review subcommittee advised that the conduct was inappropriate because a lawyer is required to be competent, conscientious and diligent, in accordance with rule 3.2-1 of the *BC Code*. The subcommittee reminded the lawyer of the requirements under rule 7.8-1 of the Code, where if a lawyer has erred and cannot remedy the error in a timely manner, the lawyer must promptly inform the client of the error, recommend that the client obtain independent legal advice and advise the client that the lawyer may no longer be able to act for the client. The subcommittee suggested incorporating defect notices into his bring-forward system, and recommended that the lawyer inform clients in writing along with a copy of the defect notice together with the steps

needed to be taken. In addition, the subcommittee recommended that the lawyer complete the Law Society's online Communication Toolkit course to help him better communicate with his clients and consider hiring an articulated student to assist with his files. (CR 2018-08)

### BREACH OF "NO-CASH" RULE

While acting for a buyer in a business transaction, a lawyer allowed his client to deposit 15 separate cash payments totalling \$90,500 directly into his law firm's trust account, contrary to Law Society Rule 3-59(3). The lawyer provided his client with the firm's trust account number for the purpose of making the deposits because his client lived many hours away from the lawyer's firm. Several cash deposits were made in the amount of \$7,500 on the same day, and each was made at a separate branch of the bank.

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## Credentials hearing

LAW SOCIETY RULE 2-103 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement.

For the full text of hearing panel decisions, visit [Hearing Schedules and Decisions](#) on the Law Society website.

### VANESSA LAUREN DE JONG

Hearing (application for enrolment): November 9, 2017

Panel: John Waddell, QC, Chair, Paula Cayley and Brook Greenberg

Decision issued: December 12, 2017 ([2017 LSBC 44](#))

Counsel: Michael D. Shirreff for the Law Society; Henry Wood, QC for Vanessa de Jong

#### BACKGROUND

In February 2017, Vanessa de Jong applied to be enrolled in the Law Society Admission Program. Because that application included her history of criminal conduct, criminal charges and a conviction, the Credentials Committee ordered a hearing.

De Jong's criminal conduct began in 1999 when she was approximately 15 years old and continued until 2007. She began socializing with students at her high school who were members of a gang and were involved in selling illegal drugs. As a result, she began to use drugs, including crystal meth, and to sell drugs, primarily marijuana. After she left home in 2000, she quit using crystal meth but continued to use marijuana and to sell drugs.

In 2002, the apartment de Jong was living in with her then boyfriend was raided by police and she was charged with possession of cocaine and possession of the proceeds of crime. In June 2006, she was pulled over while driving and was charged with possession of cocaine for the purpose of trafficking, possession of marijuana and possession of the proceeds of

crime. In August 2006, the hotel room she was living in was raided by the police, and she was charged with possessing the proceeds of crime, possessing a weapon and breaching a recognizance. In October 2006, the police raided the townhouse she was living in, and she was charged with 20 criminal counts, including breach of a recognizance, possession of a firearm, possession of stolen property and possession for the purpose of trafficking cocaine. She pleaded guilty in May 2010 to possession of cocaine for the purpose of trafficking and was sentenced to 20 months' community imprisonment.

While in custody, de Jong realized she contributed through her activities of selling drugs to the adverse circumstances of some of those with whom she was incarcerated. She testified that her experience in custody made a significant impression upon her and led to her commit to addressing justice issues such as the over-incarceration of Indigenous people in Canadian prisons.

She began attending law school at the University of Victoria in 2013. She completed her law degree at the University of British Columbia from 2015 to 2017, where she excelled academically. She sought out articles from a criminal law firm because she wished to engage in legal aid criminal law work. She has been volunteering with the firm as well as doing some paid clerical work. She has received an offer of articles from the firm if she is admitted to the Law Society's Admission Program.

#### DECISION

The panel considered de Jong's extensive criminal past but noted it has been approximately 10 years since she engaged in such conduct. It also considered her explanation of the events that convinced her to change the direction of her life, her forthrightness and honesty about her past conduct, her demonstrated dedication to her study of law, her volunteer work and the confidence and support of those with whom she has worked. The panel accepted she has rehabilitated herself.

The panel was satisfied that de Jong was of good character and repute and that she was fit to be admitted into the Law Society Admission Program, and subsequently to be admitted as a barrister and solicitor if and when she has completed the program. ❖

## Discipline digest

BELOW ARE SUMMARIES with respect to:

- Darryl Wayne Larson
- Ian Frank McTavish
- Pamela Suzanne Boles

For the full text of discipline decisions, visit [Hearing Schedules and Decisions](#) on the Law Society website.

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### DARRYL WAYNE LARSON

Vancouver, BC

Called to the bar: August 26, 1988

Discipline hearing: September 22, 2017

Panel: Jamie Maclaren, Chair, Dr. Gail Bellward and Carol W. Hickman, QC

Decision issued: December 6, 2017 ([2017 LSBC 43](#))

Counsel: Carolyn Gulabsingh for the Law Society; Peter J. Wilson, QC for Darryl Wayne Larson

#### AGREED FACTS

In January 2012, a client retained an associate at Darryl Wayne Larson's law firm to facilitate the client's immigration to Canada from Iran and provided a \$15,000 cash retainer to the associate while the associate was travelling in Iran. The associate brought the funds to Canada and deposited them into the law firm's trust account.

After Larson assumed primary conduct of the file, the client emailed Larson to terminate the retainer and to arrange for the refund of all unused retainer funds, which Larson calculated to be \$10,318.60. The client instructed Larson to pay the funds to a designate. The designate requested that the funds be made payable to the designate. Larson secured the bank draft, and his assistant gave it in person to the designate.

#### ADMISSION AND DETERMINATION

A hearing panel found that Larson's conduct contravened the cash refund requirement of Law Society Rule 3-51.1(3.2) then in force. The panel approved Larson's conditional admission of professional misconduct and proposed disciplinary action.

#### DISCIPLINARY ACTION

The panel ordered that Larson pay:

1. a fine of \$4,000; and
2. costs of \$1,262.05.

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### IAN FRANK MCTAVISH

Salmon Arm, BC

Called to the bar: June 26, 1974

Discipline hearing: October 6, 2017

Panel: Joost Blom, QC, Chair, June Preston and Sarah Westwood

Decision issued: January 17, 2018 ([2018 LSBC 02](#))

Counsel: Carolyn Gulabsingh for the Law Society; William B. Smart, QC for Ian Frank McTavish

#### AGREED FACTS

A client engaged Ian Frank McTavish in May 2011 to settle the estate of his late mother.

The client and his brother were co-executors of the will. In May 2012 the client's brother offered to renounce his status as co-executor and release all claims to the estate, in exchange for a payout of \$60,000 before the granting of probate.

Although his client instructed McTavish to accept the offer in early June, he did not inform the client of the brother's consent to the agreement until September 2012.

On September 6, 2012, the brother's lawyer sent the signed renunciation to McTavish, and on September 19 McTavish forwarded \$60,000 to the brother's lawyer, with a release executed by his client.

In December 2012, McTavish's assistant told him she could not find the renunciation signed by the client's brother.

Between March 2013 and January 2014, McTavish wrote the brother's lawyer on several occasions asking for another signed renunciation, unaware that the lawyer had passed away in November 2013. Between August 2013 and January 2014 he took no other steps or actions to advance the estate matter.

On March 19, 2014, McTavish received a newly signed renunciation and release form from the firm where the brother's lawyer had worked.

On April 15, 2014, McTavish learned that probate could not proceed by way of desk order and he chose to speak to the matter in court. McTavish told the Law Society that, when he attended court on May 29, 2014, he was told more documents needed to be filed and that he communicated that information to his client. However, McTavish did not send a reporting letter to the client regarding the court appearance, and he had no notes of the court appearance or records of communication conveying the information to his client.

On February 4, 2015, McTavish told his client he would send the file to another lawyer to complete the "final application." On August 29, 2015, the client filed a complaint with the Law Society. On January 21, 2016, the court granted probate of the will.

#### ADMISSION AND DETERMINATION

McTavish admitted that he failed to take appropriate steps to probate the client's late mother's will or administer her estate, failed to keep the client reasonably informed about the matter, failed to respond to communications from the client between March and September 2015 and failed to provide the client with complete and accurate relevant information about the status of the application for probate and the status of administration of the estate. McTavish also admitted that this conduct constitutes professional misconduct.

A hearing panel found that McTavish had failed to provide the quality of



service expected of a competent lawyer and that the conduct constitutes professional misconduct. The panel approved McTavish's conditional admission of professional misconduct and proposed disciplinary action, both of which had been accepted by the Discipline Committee.

## DISCIPLINARY ACTION

The panel ordered that McTavish pay:

1. a fine of \$6,000; and
2. costs of \$1,288.05.

## PAMELA SUZANNE BOLES

Vancouver, BC

Called to the bar: November 17, 1989

Discipline hearing: April 11 and 12, 2012, June 22 to 24, August 31 and October 1, 2015, and July 6, August 31, October 12 and November 2, 2017

Panel: Bruce LeRose, QC, Chair, Ralston S. Alexander, QC and Clayton G. Shultz, FCA (for the 2014 and 2015 hearing dates)

Bench review: May 4 and September 28 and 29, 2016

Review panel: Gregory Petrisor, Chair, Jeff Campbell, QC, Lisa Hamilton, QC, Dean Lawton, QC, Sharon D. Matthews, QC, Steven McKoen and Mark Rushton

Decisions issued: June 11, 2012 ([2012 LSBC 21](#)), January 14 ([2016 LSBC 02](#)) and December 28, 2016 ([2016 LSBC 48](#)) and January 24, 2018 ([2018 LSBC 03](#))

Counsel: Thomas R. Manson, QC (2012 hearing date), Mark D. Andrews, QC and Gavin Cameron (2014, 2015 and 2017 hearing dates) for the Law Society; Henry C. Wood, QC (2012 hearing date), Richard C. Gibbs, QC (2014, 2015 and 2017 hearing dates) for Pamela Suzanne Boles

## INITIAL FACTS AND DETERMINATION

Between 2004 and 2008, Pamela Suzanne Boles failed to report in writing four monetary judgments entered against her or her law corporation to the Law Society within seven days after the date of entry. The initial citation included allegations of nine incidences, five of which are no longer pursued by the Law Society.

Boles did not file income tax returns for the taxation years 2001, 2002 and 2003. Canada Revenue Agency issued an arbitrary assessment of income earned by Boles, and she failed to pay the amount owing. CRA issued a certificate for \$157,019.45 on April 1, 2005, and registered it against title to land owned by Boles. She became aware of the certificate on approximately April 19, 2005, and paid it on April 28, 2005.

Boles' law corporation failed to pay Goods and Services Tax owing on legal fees and disbursements charged to clients. CRA issued a certificate under the *Excise Tax Act* for \$48,005.06 on July 27, 2004. A hearing panel believed that Boles became aware of the certificate on April 19, 2005, and paid the debt on August 15, 2005.

As a result of Boles' non-payment of income taxes, CRA issued a certificate for \$9,371.91 on February 6, 2004, and registered it on February 19

against title to land owned by Boles. Boles stated she did not become aware of the certificate until April 2005, but the panel's analysis indicated that she became aware of the certificate in March 2004. The debt was fully paid on April 28, 2005.

Boles' law corporation did not pay Social Service Tax owing on legal fees and disbursements charged to clients, and the Province of BC issued a certificate for \$6,528.46 on September 2, 2005. The amount was fully paid on October 19, 2005.

Boles testified that she was not aware of the change to the Law Society Rules in December 2003 that stated lawyers must notify the Law Society of "any certificate, final order or any other requirement under a statute that requires payment of any money to any party." Until she received a letter from the Law Society on January 22, 2009, she was not aware that the various certificates had to be satisfied or reported within seven days of filing.

The panel at the initial hearing in April 2012 determined Boles had committed professional misconduct.

## APPLICATION FOR JUDICIAL REVIEW AND APPLICATIONS TO HAVE THE CHAIR STEP ASIDE

On October 18, 2012, Boles applied to the Supreme Court of BC for judicial review, seeking an order to quash the panel's decision as unfair, unreasonable and made contrary to the rules of natural justice. Madam Justice Adair dismissed the petition on January 9, 2013 ([2013 BCSC 22](#)).

On June 7, 2013, Boles applied to have the chair of the panel removed, as he was no longer a sitting Benchers. This application was dismissed by the president's delegate in a memorandum dated August 24, 2013.

On April 10, 2014, Boles made application to the panel seeking an order that the chair of the panel step aside due to the reasonable apprehension of bias arising from Boles acting against members of his family and his family's business in proceedings in the Supreme Court of BC. The chair concluded that Boles either failed to raise the allegation in a timely manner or, more likely than not based on the timing of the application, created the apprehension of bias through her own conduct. The application was dismissed with costs ([2014 LSBC 47](#)). Boles filed a notice of appeal to the BC Court of Appeal. The appeal has not proceeded.

## FACTS AND DETERMINATION REOPENED

The panel was petitioned to reopen the hearing on facts and determination. Counsel for both parties at the time had agreed that Boles did not deliberately delay reporting the certificates and did not intend obstruction. The panel was not advised of this and found that Boles' failure to report the certificates was motivated by secrecy or intention to mislead. The Law Society agreed to reopen the hearing to permit additional evidence to be presented.

On June 12, 2015, before commencement of the continued hearing, the Law Society applied to the panel to quash summonses issued by counsel for Boles as ill-conceived and inappropriate. The Society submitted that the summonses were not properly constituted, as they purported to require the target of the summonses to produce documents, when there is no authority in the rules for such a requirement. The panel found that the summonses were not properly constituted ([2015 LSBC 27](#)).

At the continued hearing, Boles admitted that she breached a rule but argued that she did not commit professional misconduct. She submitted evidence to show that her financial affairs were in disarray at the time the certificates were issued. The accountant Boles employed had become increasingly neglectful in record keeping, and she eventually changed accountants. She had considerable difficulty recovering her records from her previous accountant and was only able to receive less than half of her financial records for 1998, 1999 and 2000 only after threatening civil action. At that time, she was also involved in civil litigation concerning her family. Boles described her state of mind during these times as “frozen.”

Boles’ financial difficulties came to a crisis point in 2004. In the absence of income tax returns from Boles, CRA assessed tax based on “arbitrary assessments” and imposed a 90-day deadline to file. The accountant filed a notice of objection, which is supposed to suspend all collection proceedings until resolved by a hearing officer. Nevertheless, a certificate was filed against Boles’ property just prior to the closing date of the sale of the property — the proceeds of which Boles had intended to use to pay her outstanding debts.

The panel heard evidence of 15 writs of execution that were served to Boles’ practice or law corporation from April 2004 to September 2005. The writs were paid upon presentation. The practice reports provided to the Law Society from 2005 to 2008 revealed that Boles had issued a total of 68 cheques that were dishonoured when presented for payment. For each year, the dishonoured cheques had all been replaced.

The purpose of this evidence was to negate any suggestion of secrecy surrounding the difficult financial circumstances facing her practice and to argue that the Law Society was aware of Boles’ precarious finances and was not deprived of the opportunity to launch an investigation.

When determining whether Boles’ actions constituted professional misconduct or the lesser issue of a breach of the rules, the panel took into account a number of factors, including the gravity, its duration, the number of breaches and the presence of wilful blindness.

Boles’ chaotic financial circumstances clearly represents a marked departure from the standard the Law Society expects of lawyers; however, the state of her financial affairs is not the subject of the citation. The citation charges a failure to report four certificates.

The panel found that the further evidence showed Boles did not have any malevolent intentions with her non-reporting, there was no indication of bad faith and no harm was caused to her clients. The panel reversed its earlier finding of professional misconduct and determined instead that Boles had committed breaches of the Law Society Rules.

The Discipline Committee applied for a review of the hearing panel’s determination.

## DECISION OF THE BENCHERS ON REVIEW

Boles applied for an order that the Law Society disclose documents and information regarding lawyers who have failed to report such information in the past and what has been done in respect of those failures to

report, and to include that evidence in the record for the review. Boles argued that such information was relevant because it would assist in determining whether her conduct constituted professional misconduct.

The Law Society argued that the information sought was not relevant or admissible. The *Legal Profession Act* and Law Society Rules prohibit disclosure of a complaint, a lawyer’s response to a complaint or any documents created by the Law Society concerning an investigation, audit, inquiry, hearing or review.

In reaching their decision, the Benchers considered that they would have to determine whether Boles’ conduct constituted professional misconduct, and the critical determination in this application to introduce fresh evidence was whether the information sought by Boles was relevant.

The Benchers concluded that information concerning breaches of Rule 3-44 committed by other lawyers over a specific time period and the outcome of each such breach would not, in and of itself, be helpful in that determination. The Benchers did not accept that there were special circumstances that would allow them to hear evidence that was not part of the record.

The Benchers dismissed Boles’ application to introduce fresh evidence ([2016 LSBC 32](#)).

The issue on review was whether the hearing panel erred by considering that the new evidence on Boles’ lack of intention or knowledge in not reporting monetary judgments determined that her conduct could not be professional misconduct.

The Law Society asserted that the finding that Boles was not aware of the duty to report did not preclude a finding of professional misconduct and that she was grossly neglectful of her duty to report. Boles argued that gross culpable neglect cannot be made out because changes to the Rules were inadequately publicized and tax certificates were different from a BC Supreme Court monetary judgment that Boles had previously failed to report, resulting in discipline.

The Benchers on review found that a lack of knowledge of a rule cannot preclude a finding of professional misconduct; however, they concluded that the hearing panel did not reduce its consideration solely to the lack of intention and knowledge on Boles’ part. The Benchers determined that Boles’ lack of knowledge did not amount to gross culpable neglect. They also considered the gravity of the conduct, duration of the misconduct, the number of breaches and harm to the public.

The Benchers determined Boles’ conduct did not amount to a marked departure from the conduct expected of lawyers and did not support a finding of professional misconduct.

## DISCIPLINARY ACTION

The panel ordered that Boles pay a fine of \$7,500. In reaching that conclusion the panel considered appropriate factors, including Boles’ admission of the breach of the rules and the concept of progressive discipline. The panel placed little weight on letters of reference as a result of Boles’ professional conduct record. ❖

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On the day of the multiple deposits, the bank informed the law firm's managing partner, and the managing partner advised the lawyer that these deposits were in breach of the Law Society Rules. The lawyer immediately self-reported to the Law Society. The firm took the necessary steps to refund all cash deposits to the client, less the amounts the firm had already disbursed before becoming aware of the rule breach. The lawyer acknowledged the misconduct and explained that he misunderstood the no-cash rule to apply only in circumstances where the client physically delivers cash to a lawyer.

A conduct review subcommittee advised the lawyer that the rules governing cash transactions are vital to the legal profession's continued exemption from money laundering rules set by the federal government. The profession must show that sufficient safeguards are in place and that all members follow these rules scrupulously. The subcommittee impressed upon the lawyer that even a hint that the Law Society or its members may be involved in money laundering, even inadvertently, would bring the administration of justice into disrepute. The subcommittee was particularly concerned about deposits of exactly \$7,500 and expressed skepticism that the lawyer's client chose this amount referred to in Rule 3-59 with no input from the lawyer. The subcommittee accepted the lawyer's explanation that he misunderstood the rule and had no reason not to accept his assurance that he made no improper suggestions about cash deposits to his client. The lawyer stated that he fully understood the rule and the reasons for it.

The lawyer has implemented a number of changes in his practice. He no longer deals in cash, and all deposits go through the firm's bookkeeping department under the supervision of the managing partner. The lawyer no longer provides the firm's trust account number to clients, so clients must go through the firm itself. The subcommittee was satisfied that there would be no repetition of this serious misconduct. (CR 2018-09)

In another case, a lawyer accepted over \$7,500 in cash from two different clients but with respect to one client matter or transaction, contrary to Rules 3-51.1(1) and (3) of the Law Society Rules then in force (now Rules 3-59(1) and (3)). The lawyer mistakenly believed he was not in breach of the no-cash rule if the cash payments came from two different clients even if the payments were for a single transaction. A conduct review subcommittee emphasized the importance of the no-cash rule in combatting

money laundering and terrorist financing. Without strict compliance with the Law Society's anti-money laundering measures, there is a considerable risk that the exemption for lawyers under the federal government's anti-money laundering regime will come under criticism. The lawyer acknowledged his misconduct and accepted his responsibility for knowing and fulfilling his professional obligations. The lawyer told the subcommittee that the breach arose because he inaccurately remembered the details of the no-cash rule. He has now familiarized himself with the details of the rule, rarely accepts cash and will abide by the no-cash rule in the future. (CR 2018-10)

**INADVERTENT COMMUNICATION OF PRIVILEGED INFORMATION**

A lawyer received apparent privileged materials, not intended for him, from a former client. The lawyer acted properly by immediately deleting the information without reading it. However, the lawyer failed to inform the party to whom the privilege belonged that he had received and deleted the privileged materials. In doing so, the lawyer failed to fully comply with the requirements of rule 7.2-10 of the *Code of Professional Conduct for British Columbia* having regard to a lawyer's obligations with respect to inadvertent disclosures. The lawyer was not acting for the client at the time he received the privileged material but was later retained by the client.

The lawyer did not fully appreciate that rule 7.2-10 of the Code obligated him to advise the party to whom the privilege belonged that he had received and deleted the privileged material. A conduct review subcommittee considered that the lawyer believed he owed a duty of confidentiality to his client in not notifying the privilege holder. As noted in the online annotations to rule 7.2-10 of the Code, while a lawyer's communications to a third party are subject to client instructions, if the client will not provide consent to notify the third party of an inadvertent disclosure, the lawyer must withdraw, in accordance with rule 3.7-7 of the Code.

The lawyer acknowledged his wrongdoing. The subcommittee indicated that the lawyer ought to have reviewed the Code provisions and identified the full scope of his obligations under the Code. He also should have sought advice from a Law Society Practice Advisor to confirm his obligations. The subcommittee recommended that the lawyer continue to seek practice advice where appropriate and especially in cases where there are potentially conflicting duties. (CR 2018-11) ❖

*Crossing the border into or out of the United States ...from page 12*

The duty to maintain confidentiality not only applies to the lawyer, but also requires that the lawyer impress upon associates, employees, articulated students, summer students and other lawyers engaged under contract with the lawyer or the firm the importance of maintaining confidentiality both during their employment and afterward (rule 3.3-1, commentary [9]).

BC Code rule 3.3-2.1 provides that

where a lawyer is required, under federal or provincial legislation, to produce a document or provide information that is or may be privileged, the lawyer must claim solicitor-client privilege in respect of the document, unless the client waives the privilege. This duty to claim privilege also extends to travel outside of Canada.

If a border official wants to access your electronic device and the device contains confidential client information that is or may be privileged, you should make a claim of privilege. If you refuse to provide the password or other information to

make your device accessible, your device could be seized and detained. In addition, your entry into the country could be delayed or refused.

If you lose custody or control of your electronic device and the device contains any of your client's confidential information or the records are accessed or copied, please read Law Society Rule 10-4. In such case you would be required to immediately notify the Law Society's executive director in writing of all of the relevant circumstances (Law Society Rule 10-4). ❖

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The Law Society  
of British Columbia



845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9

Telephone 604.669.2533 | Facsimile 604.669.5232

Toll-free 1.800.903.5300 | TTY 604.443.5700

[www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)

Lawyers Insurance Fund

Telephone 604.682.8911 | Facsimile 604.682.5842

