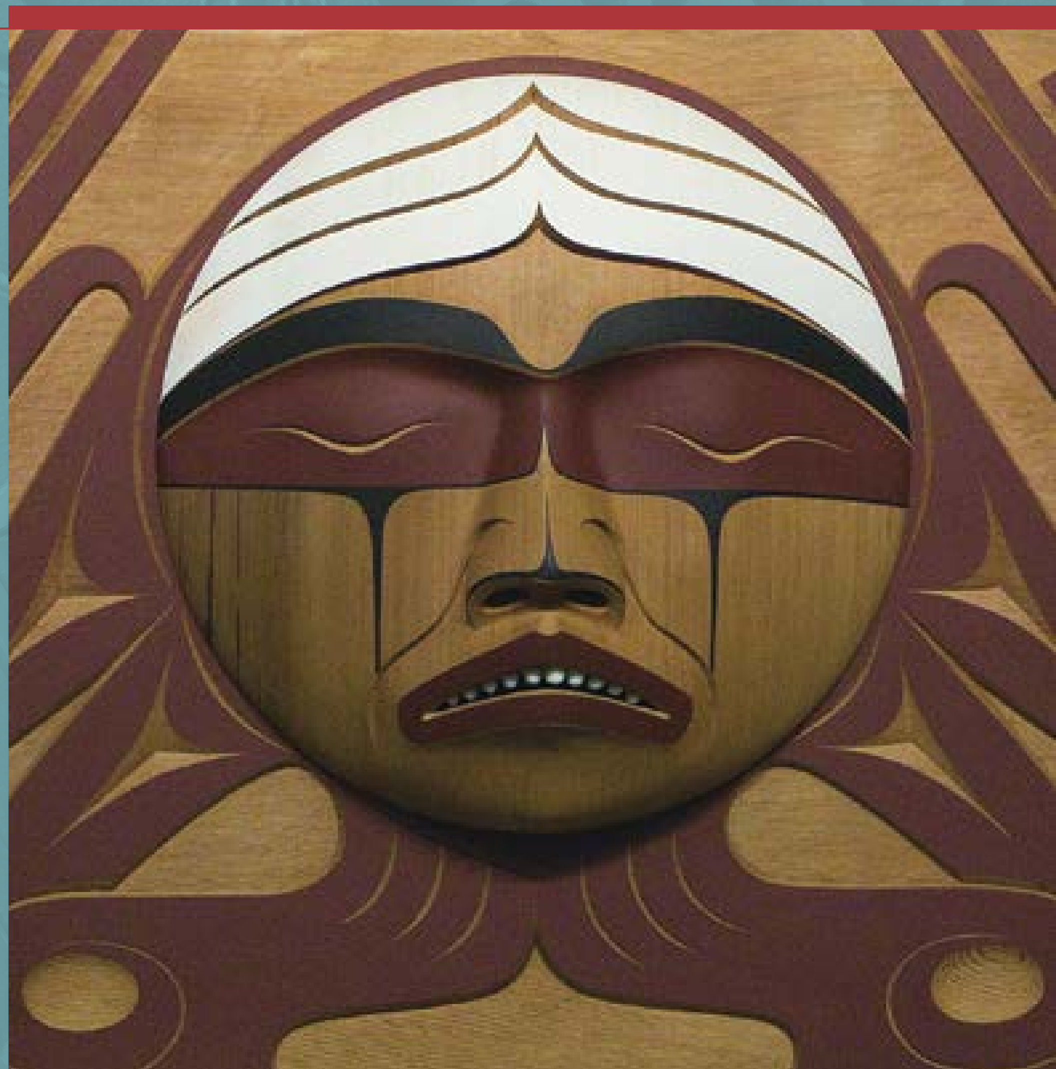
The Law Society
of British Columbia

2016: No. 1 • SPRING

BENCHERS' BULLETIN

Keeping BC lawyers informed



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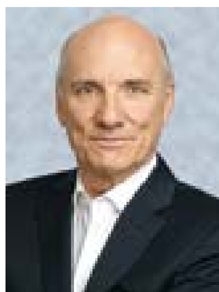

Looking forward to a busy and productive year

by David Crossin, QC

LAW SOCIETY MEMBERS elected me as Bencher six years ago. Almost the first thing I heard at the Bencher table came from my good friend Leon Getz, QC. He reminded our table of the obvious: the Law Society must always be guided by the question, "Is what we are doing important to the due administration of justice?" Since that day I have observed my colleagues at the Law Society do their very best to be guided by that principle.

The most recent example of this pursuit is reflected in the feature article in this issue of *Benchers' Bulletin*, addressing what is and will remain a fundamental priority of the Law Society. Developing an action plan in response to the recommendations of the Truth and Reconciliation Commission of Canada is a priority, and the article in this issue provides important context for the work of the Law Society going forward.

Another area for concern to the Law Society is the state of legal aid in this province. A robust, sustainable legal aid system is critical to ensuring the public interest in the administration of justice is protected and advanced.

We fall short in our province, and all of the stakeholders in our justice system must collaborate in pursuit of fundamental change.

The Law Society has struck the Legal Aid Task Force to lend our voice to that pursuit. The Benchers have concluded it is absolutely incumbent on the Law Society to take a leadership role on this issue. Our task force, chaired by Nancy Merrill, QC and co-chaired by Richard Peck, QC, will be working toward developing a clear vision on legal aid in BC and recommending how the Law Society can participate in coordinating efforts to improve this crucial component of access to justice.

A monopoly, or near monopoly, to practise law creates what the Right Honourable David Johnston, Governor General of Canada, once described as a social contract. We are duty bound to improve justice. Legal aid is an important underpinning of that social contract.

Our profession still has much work to do in relation to gender equity. The early 1990s produced two groundbreaking reports commissioned by the Law Society of British Columbia: "Women in the Legal Profession" (September 1991) and the two-volume "Gender Equality in the Justice System" (1992).

In 2012 the Justicia Project was founded with the goal of finding ways to encourage the retention and advancement of women lawyers in private practice. With the assistance of diversity officers from 17 law firms and the tremendous effort of a cohort of dedicated lawyers, the project has now published model policies and best practice guidelines in areas such as parental leave, respectful workplaces and business development for women. The model policies and guidelines are available on the Law Society's website (About Us > Access, Equity and the Rule of Law > Equity and Diversity).

With phase one completed, our Equity and Diversity Advisory Committee has embarked on the next step. It has developed a communications strategy aimed at encouraging the implementation of the Justicia recommendations in smaller firms and in regions around the province. This is another exceedingly important endeavour to enhance our profession and better serve the public.

The Law Firm Regulation Task Force, chaired by Herman Van Ommen, QC, has also been busy in the early part of this year travelling to communities around the province to consult with the profession. In the coming months the task force will work toward recommending a regulatory framework in which firms will bear some responsibility for ensuring that the public has access to competent, ethical and independent lawyers.

BENCHERS' BULLETIN

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

Suggestions for improvements to the *Bulletin* are always welcome — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. 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.

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In addition to these initiatives, the Law Society will continue to monitor a number of important issues throughout the year. For example, recent news stories have uncovered troubling revelations about the potential extent of government access to private communications. This has particular significance for the legal profession and, as you know, the Law Society has taken a public position, particularly in reference to Bill C-51 and the threat it poses to solicitor-client privilege. The Benchers will continue to advocate on behalf of lawyer independence, which is such a fundamental right underpinning the rule of law in Canada and around the world.

I am honoured to be the president this year and I look forward to engaging with you concerning these very important issues.❖

FROM THE RULE OF LAW AND LAWYER INDEPENDENCE ADVISORY COMMITTEE

Attacks on access to legal advice and what it means for the rule of law: Warnings from China and England

IN SOCIETIES WHERE the rule of law is valued, lawyers must be free to represent unpopular people — murderers, tax evaders, even terrorists — without themselves being identified with the crime or the client's cause, or being targeted for advising or representing such persons. To protect the rule of law, people need to be able to access impartial advisers who are trained to counsel clients on their legal rights and obligations. These principles are not unique to Canada or even to the Commonwealth. They are set out in the United Nations' Basic Principles on the Role of Lawyers.

In China, of late, these principles have not been upheld. Lawyers there have been detained without charge, sometimes for months. Or they have been charged with crimes such as "picking quarrels and provoking trouble" or "politicizing ordinary legal cases to attract international attention" for doing what we would view as the discharge of the normal responsibilities of a lawyer. This has profoundly negative implications for the rule of law.

Even in Western nations, however, these basic principles are sometimes challenged. The British government recently criticized lawyers who represented Iraqi nationals at an inquiry into the alleged wrongful deaths caused by the British military in Iraq. Toward the end of the inquiry, the allegations of wrongful death were withdrawn, although the Inquiry Report noted that other, less serious allegations of ill treatment by the military did exist. Nevertheless, the British government publicly criticized lawyers who had advanced the claims at the inquiry. One member in Parliament called on the lawyers "to apologize for traducing the reputations of soldiers concerned and for causing costs to the taxpayers."

Lawyers should not be criticized by the executive or legislative branches of government for representing clients with an unpopular cause. If there is an issue with a lawyer's conduct, the proper place for that to be addressed is before self-governing disciplinary bodies, rather than through public shaming.

In an expanded version of this article, the Rule of Law and Lawyer Independence Advisory Committee examines the events in China and England and discusses them in the context of the implications they may have on the rule of law: go to www.lawsociety.bc.ca/docs/about/RuleofLaw-AttacksonAccess.pdf.❖

In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2015:

Wayne E. Arnold
Kenneth J. Baxter
Elliot J. Belkin
John K. Bledsoe
Cecil O.D. Branson, QC
Patrick G.S. Bush
Colin K.K. Campbell
Patricia C. Connor
Bonnie Lou Day
Howard L.A. Ehrlich
David Garraway
John M. Hannah
Nicole M. Hayduk
Jeanette A. Hermes
Melvin R. Hunt
H. Christopher Johns
I. John Kaminsky
Andrew Kern
Morley Koffman, QC
Janice A. Leroy
Rose T. Mok
Terry Napora
Terence C. O'Brien
Jay T. Redmond
James F. Sayre
Robert D. Shantz
Jonathon N. Stubbs
Euan R. Taylor
Cheryl M. Teron
Brian J. Wallace, QC ❖

Embracing the challenge of Truth and Reconciliation

by Timothy E. McGee, QC

THE FEATURE STORY in this issue of *Benchers' Bulletin* focuses on the findings of the Truth and Reconciliation Commission of Canada, and its calls to action that specifically relate to lawyers and legal education. As Law Society President David Crossin, QC suggests in that story, building broad awareness and knowledge of the issues underlying the calls to action is a challenge, but it is one that all members of the bar can embrace. The Benchers have committed to taking a leadership role and are establishing a steering committee to help develop an action plan to address this challenge. The findings of the Truth and Reconciliation Commission are both serious and complex, yet they also provide hope and opportunity for the future. We look forward to reporting to you as our efforts unfold.

Two other major initiatives in our current three-year strategic plan are gaining considerable momentum: the Law Firm Regulation Task Force, chaired by First Vice-President Herman Van Ommen, QC, and the Legal Aid Task Force, chaired by Bencher Nancy Merrill, QC.

The Law Firm Regulation Task Force toured the province earlier this year to consult with members of the profession, and this important initiative attracted media coverage. In addition, online consultation with members has rendered valuable feedback and further one-on-one meetings with firms are scheduled. At the heart of the model for law firm regulation is the belief that firms are in a strong position to influence best practices and behaviours among their lawyers through the adoption of sound policies and systems. Law societies across Canada and in many other countries are actively pursuing this model because it is widely viewed as an effective and efficient approach to ensuring protection of the public interest. If you would like to know more, I encourage you to read the task force's consultation paper and additional information published on the Law Society's website.

The Legal Aid Task Force is commencing its work on a mandate premised on the belief that the Law Society should have a principled position on the subject of the provision of legal aid in British Columbia. The topic, of course, is not new to anyone and the Law Society has been involved at key points in the evolution of legal aid as we know it today. However, we live in rapidly changing times, and the many issues impacting this topic are being looked at afresh by the task force. We look forward to reporting on its progress later in the year.

I welcome your comments or feedback on these or any other matters of interest. Please feel free to contact us at communications@lsbc.org. ❖

The Law Society Award – call for nominations

. . . intended to honour the lifetime contribution of the truly exceptional in our profession.

You are invited to nominate a candidate to receive the Law Society Award in 2016. Nominations must be received by **Tuesday, May 31, 2016**.

The Award, if given in 2016, will be made to the recipient selected by the Benchers based on recommendations of a selection committee, and will be presented in the fall.

For more information, including how to submit a nomination, download the flyer at www.lawsociety.bc.ca/docs/about/LawSocietyAward.pdf.

In 2014, John Hunter, QC (left) received the Law Society Award from then President Jan Lindsay, QC.

In brief

JUDICIAL APPOINTMENTS

Eugene Jamieson was appointed a judge of the Provincial Court in Port Coquitlam.

Wilson Lee was appointed a judge of the Provincial Court, with resident chambers to be determined.

Philip Seagram was appointed a judge of the Provincial Court in Nelson.❖

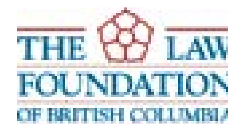
Thanks to our 2015 volunteers

THE BENCHERS THANK all those who volunteered their time and energy to the Law Society in 2015. Whether serving as members of committees, task forces or working groups, as Professional Legal Training Course guest instructors or authors, 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 a list of people who served the Society in 2015, see About Us > Volunteers and Appointments.❖

FROM THE LAW FOUNDATION OF BC

New Law Society appointments to Law Foundation board



New Law Foundation governors, left to right: Jim Sullivan, Bill Younie, QC and Sean Rowell.

IN JANUARY 2016, the Law Foundation welcomed three new Law Society appointees to its Board of Governors.

Sean Rowell, the appointee for the County of Prince Rupert, was called to the bar in 2006. Rowell works primarily in advising and assisting small businesses and deals with diverse legal issues in that role. His main areas of practice include mining law, business acquisitions and real estate (including conveyancing, leasing, financing, development and subdivision). He is the chair of the Bulkley Valley Economic Development Association advisory board, is the treasurer of the Smithers Volunteer Firefighters Association, serves on the Smithers Volunteer Fire Department, and is a past Young Lawyers Representative on the Canadian Bar Association, BC Branch executive.

Jim Sullivan, an appointee for the County of Vancouver, was called to the bar in 1988. He has appeared as counsel in BC, Alberta and Ontario, as well as before the Federal Court and the Supreme Court of Canada. He has also frequently appeared before the BC Environmental Appeal Board and other administrative tribunals. In February 2013 Benchmark Canada named Sullivan Canada's Class Action Litigator of the Year. Sullivan has represented clients in numerous major corporate commercial, class action, energy, contaminated site, regulatory offence, constitutional and product liability cases. He also advises clients on national and international compliance with foreign and domestic anti-corruption legislation.

Bill Younie, QC, the appointee for the County of Nanaimo, was called to the bar in 1984. His preferred areas of practice include creditor's remedies, acting for lenders, receivers and trustees in foreclosure and insolvency matters, commercial lending, real estate, probate and administration matters. Younie is a former president of the Cowichan Valley Bar Association. He has also been a member of the Kiwanis Club of Duncan, has served on the Kiwanis Village Society Board, was president and a member of the Board of Directors of the Lawyers Assistance Program, was a member of the board of the Cedars at Cobble Hill Society, and was on the board of the Rossland Public Library. He received his Queen's Counsel designation in 2012.❖

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.

Between August 27, 2015 and February 10, 2016, the Law Society obtained undertakings from seven individuals and businesses not to engage in the practice of law.

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

Brent Chow, d.b.a. Core Legal Services, Core Finance & Taxation, Core Accounting and "www.coretaxation.com"

On November 25, 2015, the Supreme Court ordered, by consent, that Brent Chow, d.b.a. Core Legal Services, Core Finance & Taxation, Core Accounting and "www.coretaxation.com," of Surrey, be permanently prohibited from engaging in the practice of law for a fee and from commencing, prosecuting or defending proceedings in court on behalf of others, regardless of whether he charges a fee. The Law Society alleged that Chow offered various legal services for a fee, including the preparation of pleadings and other legal documents and the provision of legal advice and corporate services. Chow agreed to pay the Society's costs in the amount of $1,500.

Mark Allan Nichol, d.b.a. ESC Executor Services Corp.

On December 15, 2015, Mark Allan Nichol, d.b.a. ESC Executor Services Corp., of Nanaimo, consented to an order prohibiting him from engaging in the practice of law for a fee and from commencing, prosecuting and defending proceedings in court on behalf of others. The Law Society alleged that Nichol prepared court documents with respect to the probate of an estate and gave legal advice for a fee. Nichol agreed to pay the Society $500 with respect to its costs.

Bradley Jonathan Renford, d.b.a. Concise Paralegal Services

On November 27, 2015, Madam Justice Koenigsberg ordered that Bradley Jonathan Renford, d.b.a Concise Paralegal Services, of Langley, be prohibited and enjoined from engaging in the practice of law for a fee, including preparing legal documents and performing legal research for others. Renford is also prohibited from commencing, prosecuting or defending a proceeding in court on behalf of another, regardless of whether he charges a fee for doing so. The Law Society alleged that Renford provided legal services for a fee, including giving legal advice and preparing various court forms in family law and small claims matters. The Law Society also alleged that Renford took in hand the overall prosecution of lawsuits on behalf of others. The court awarded the Law Society its costs in the amount of $4,130.

R. Charles Bryfogle

On June 12, 2015, Madam Justice Gray found R. Charles Bryfogle, of Kamloops, in contempt of court and sentenced him to be incarcerated for 21 days, which was suspended and to be served only if Bryfogle was found to have committed a further breach of the various orders against him. On December 2, 2015, Associate Chief Justice Cullen found that Bryfogle had breached various orders subsequent to Madam Justice Gray's order, and ordered him to be incarcerated for 21 days. The court ordered that Bryfogle remain bound by the recognizance ordered by Madam Justice Gray and awarded the Law Society its special costs.

Ralph Charles Goodwin, a.k.a. Yuxwuletun and Gaia-Watts Enterprises Ltd., d.b.a. Touchstone Committee and Touchstone Committee Law Institute

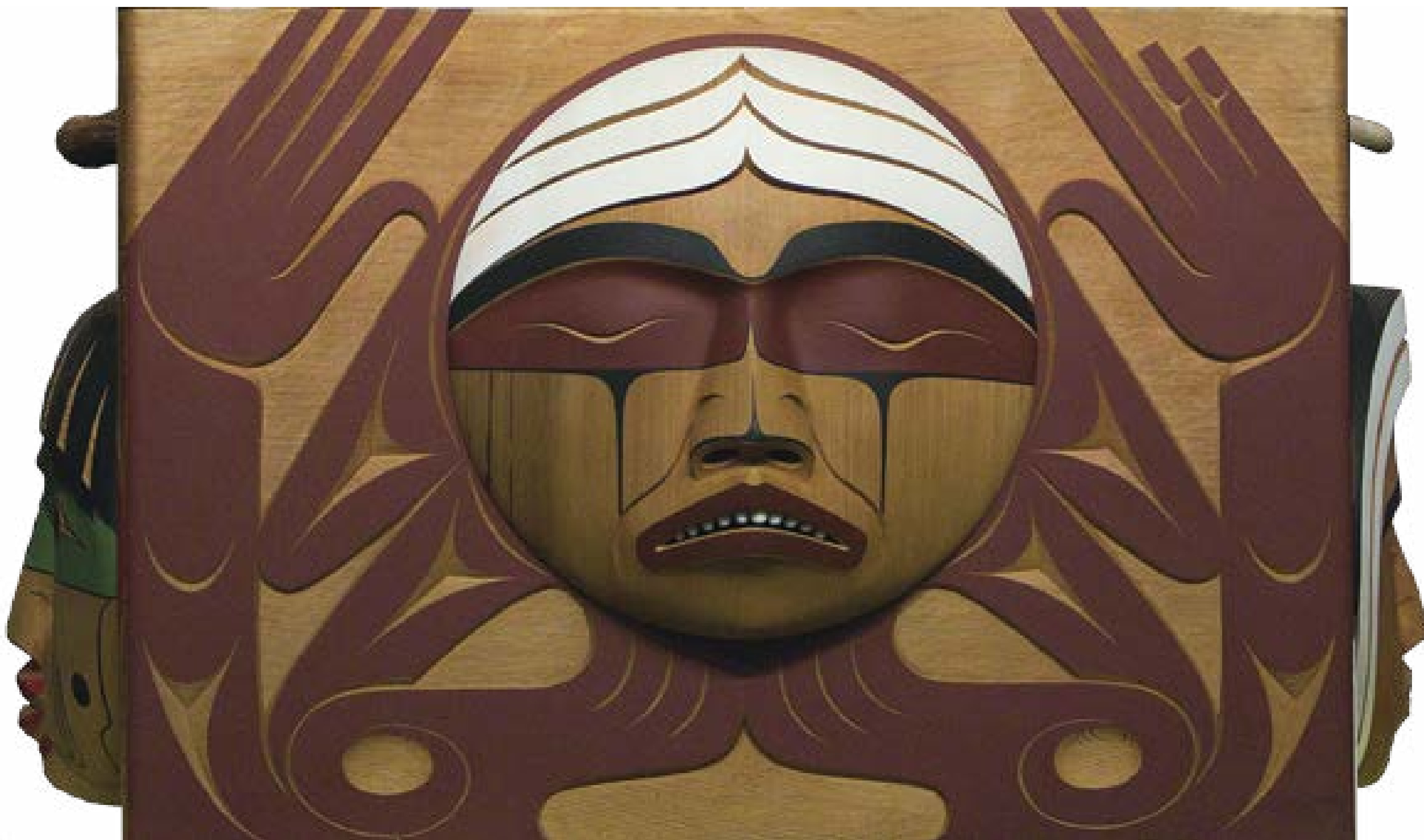
On December 11, 2015 Mr. Justice Macintosh found Ralph Charles Goodwin, of Duncan, in contempt of the injunction order of Mr. Justice Greyell pronounced on March 28, 2013. The court found that, on various websites, Goodwin had offered legal services to the public, represented himself as "Law Speaker," "Chancellor of Laws" and other titles connoting that he was entitled or qualified to engage in the practice of law, contrary to the order of Mr. Justice Greyell. In addition, Goodwin failed to inform the Law Society of his involvement in the legal matters of others as the injunction required. The court ordered Goodwin to remove various websites on or before December 25, 2015. After Goodwin failed to remove the various websites, on February 3, 2016 Mr. Justice Macintosh ordered Goodwin to be incarcerated for 30 days without remission. Upon his release, Goodwin will have 30 days to remove the offending websites or he will be subject to further contempt proceedings. The court awarded the Society $5,519.87 in costs.

Marc Pierre Boyer

On February 10, 2016, Madam Justice Adair granted an injunction prohibiting Marc Pierre Boyer, of Vancouver, from engaging in the practice of law, from representing himself as a lawyer and barrister and from commencing, prosecuting and defending proceedings in any court. The court found that Boyer had defended a party to a criminal proceeding in Provincial Court and had commenced a proceeding in Supreme Court on behalf of another. While doing so, Boyer had improperly referred to himself as a "barrister." The court awarded the Law Society $1,500 in costs.

John Rynd, a.k.a. John Schneider

John Rynd, a.k.a. John Schneider, of Alberta, consented to an order prohibiting him from engaging in the practice of law in BC and from commencing, prosecuting or defending proceedings in court, regardless of whether he charges a fee for doing so. Rynd is also prohibited from representing himself as a lawyer in BC. Rynd is a former member of the Law Society of Alberta who resigned his membership in the face of disciplinary proceedings. The Law Society received a complaint that, through a business, Rynd had provided legal services with respect to ticket disputes in the Provincial Court of British Columbia.❖



The Bentwood Box was commissioned by the Truth and Reconciliation Commission and carved by Coast Salish artist Luke Marston. It is a lasting tribute to all residential school survivors and has travelled with the Commission to events throughout Canada.

Photo: National Centre for Truth and Reconciliation Archives, *British Columbia National Event*, PHOT-E15-0774

Taking steps toward reconciliation: Addressing the Truth and Reconciliation Commission's recommendations

"We have described for you a mountain. We have shown you the path to the top. We call upon you to do the climbing."

– Justice Murray Sinclair, Chair, Truth and Reconciliation Commission

WHEN THE SURVIVORS of the residential schools system for Aboriginal children courageously brought forth their experiences in several thousands of court cases, it led to the largest class action lawsuit in our nation's history. As part of the settlement agreement, the government created the Truth and Reconciliation Commission of Canada in 2008 "to contribute to truth, healing and reconciliation."

The Truth and Reconciliation Commission spent six years travelling to all parts of Canada to hear the stories of more than 6,000 witnesses, most of whom were taken from their families and placed in residential schools. Their stories of survival reveal the atrocities our nation has committed against Aboriginal people — a past that was hidden for most of the country's history. The Commission published its final report on June 2, 2015, which called upon all Canadians to acknowledge the wrongs of the past and included 94 recommendations for us to practise reconciliation.

Law Society President David Crossin, QC urges each and every lawyer in British Columbia to read the Commission's findings and calls to action. "The bar in our province has an outstanding history in coming to the aid of our citizens suffering

injustice. I call upon them once again and urge our bar to read and reflect upon this report," said Crossin. "It is not an easy read. It is a long report, and it is painful, but it can serve as a starting point for a new beginning. There is simply no chance justice will be achieved without the hearts and minds of the BC bar."

LEGAL SYSTEM FAILS TO DELIVER JUSTICE FOR ABORIGINAL PEOPLE

The Truth and Reconciliation Commission's report revealed that the Canadian legal system has time and time again failed Aboriginal people. The federal government's amendments to the *Indian Act* in 1920 gave the government the power to compel parents to send their children to residential schools. Those who resisted residential schooling were punished by the law. In 1937, a father who refused to return his son to school was sentenced to 10 days in jail. In some cases, students who ran away numerous times could be charged under the *Juvenile Delinquents Act* and sentenced to a reformatory facility until they turned 21.

It is not an easy read. It is a long report, and it is painful, but it can serve as a starting point for a new beginning. There is simply no chance justice will be achieved without the hearts and minds of the BC bar.

– President David Crossin, QC

Former students eventually filed class action lawsuits against the federal government and the churches over the abusive treatment they received. Faced with more than 18,000 lawsuits from survivors and class action lawsuits, the federal government agreed to enter into a process to negotiate a settlement. The courts approved the Indian Residential Schools Settlement Agreement in 2006, which grants compensation for those who were forced to attend residential schools.

Still, the Canadian legal system considered only the harms caused by sexual and physical abuse and did not consider the survivors' claims of loss of language, culture and family attachments and violation of treaty rights to education. Criminal prosecution of abusers proved to be difficult. There were fewer than 50 criminal convictions stemming from allegations of abuse, insignificant compared with the nearly 38,000 claims of sexual and physical abuse.

Unable to find justice through criminal proceedings, survivors turned to civil litigation. They were faced with yet another barrier — statutes of limitations in civil proceedings meant they had a limited amount of time to file suit. This is especially true for child victims, who do not have the means or knowledge to pursue claims until they are much older. The government of Canada and the churches have frequently and successfully used statute of limitation defences, despite the Law Commission of Canada's recommendation that the federal government should not rely solely on this type of defence.

Still, the Canadian legal system considered only the harms caused by sexual and physical abuse and did not consider the survivors' claims of loss of language, culture and family attachments and violation of treaty rights to education.

There have been some encouraging changes in recent years to the legal system. British Columbia amended its *Limitation Act* in 2013 to include civil proceedings for assault and battery involving a minor, regardless of sexual nature, in its exemptions from statutes of limitations. Ontario and Nova Scotia finally loosened the statute of limitations in 2015, joining BC, Saskatchewan and Manitoba in allowing sexual assault victims to pursue a civil claim free of time restrictions.

The last residential school in Canada closed in 1996 but the legacy of residential schools will continue to impact future generations for some time to come. By removing children from their communities and families and subjecting them to religious indoctrination, cultural suppression, strict discipline and, in many cases, abuse, residential schools harmed the ability of the students to become caring and suitable parents.

Not all survivors have been successful in receiving compensation. Approximately 1,000 claims were disqualified due to a minor administrative technicality. Justice department lawyers argued that more than 50 of the schools listed in the settlement agreement ceased to be residential schools when the government took over the operations of educational facilities in the 1950s and 1960, leaving the dormitories in the churches' responsibility. Students who were assaulted anywhere but the dormitories were denied payment. In February 2016, Minister of Indigenous and Northern Affairs Carolyn Bennett promised to look into these disqualified claims. In the meantime, a halt has been ordered and the claims will be reviewed by the minister's department.

These recent developments are small steps in a long journey toward a legal system that brings justice for residential school survivors.

The Truth and Reconciliation report states that this child-welfare system is simply continuing the assimilation that the residential school system started, and calls for a commitment from all levels of government to reduce the number of Aboriginal children in care and develop support systems to keep families together.

INTERGENERATIONAL IMPACTS ON ABORIGINAL CHILDREN

The last residential school in Canada closed in 1996 but the legacy of residential schools will continue to impact future generations for some time to come. By removing children from their communities and families and subjecting them to religious indoctrination, cultural suppression, strict discipline and, in many cases, abuse, residential schools harmed the ability of the students to become caring and suitable parents.

The result is that Aboriginal children have been highly overrepresented in child protection services for the last 40 years. The number of Aboriginal children in state care today is three times the number of residential school children at the height of its operations. The 2011 *National Household*

Survey found that 48 per cent of 30,000 children and youth in foster care in Canada were Aboriginal children, though Aboriginal people only made up 4.3 per cent of the population. In British Columbia, more than 55 per cent of children not living in their parents' home were Aboriginal.

Systemic bias in the Canadian justice system means that Aboriginal people are more likely to be sentenced to prison than non-Aboriginal people. Residential schools have left an intergenerational legacy; those who experienced or witnessed serious violence become accustomed to violence and continue violent practices in their later lives.

The reasons for placing Aboriginal children in the child protection system mainly fall under the category of "neglect," which may include the failure to provide necessities like food, clothing and hygiene, failure to supervise a child, or educational, medical or emotional neglect. Researchers have found that neglect in Aboriginal families is mainly driven by poverty, inadequate housing and substance abuse — factors that are often linked to the socio-economic situation of Aboriginal people and beyond the parents' control. Despite this, Aboriginal children continue to be taken away from their parents because they are poor.

The Truth and Reconciliation report states that this child-welfare system is simply continuing the assimilation that the residential school system started, and calls for a commitment from all levels of government to reduce the number of Aboriginal children in care and develop support systems to keep families together.

OVERREPRESENTATION OF ABORIGINAL PEOPLE IN PRISON

Aboriginal people are dramatically overrepresented in Canada's prison system. Despite only making up four per cent of the Canadian adult population, the number of Aboriginal people in prison was 28 per cent in 2011-2012. For Aboriginal women, the situation is even worse — 43 per cent of women admitted into custody were Aboriginal.

The reasons for overrepresentation of Aboriginal people in prison are complex. Systemic bias in the Canadian justice system means that Aboriginal people are more likely to be sentenced to prison than non-Aboriginal people. Residential schools have left an intergenerational legacy; those who experienced or witnessed serious violence become accustomed to violence and continue violent practices in their later lives. Some turned to alcohol and drugs as a means to cope, leading to tragic consequences for themselves and their families.

Section 718.2(e) of the *Criminal Code* and the Supreme Court of Canada in the 1999 *R.* v. *Gladue* ruling have stated that judges should consider the background and systemic factors of Aboriginal offenders and make efforts to find alternatives to imprisonment.

In February 2016, Richard Daniel Wolfe, one of the founders of the Indian Posse gang based in Saskatchewan, was sentenced to five years in prison for sexual assault and assault with a weapon. The Crown had initially asked for a 10-year sentence. Wolfe's *Gladue* report played a significant role in Madam Justice Lian Schwann's decision, documenting the intergenerational impacts of residential schools, including racism, abuse, parental neglect and alcoholism.

The Truth and Reconciliation Commission emphasized that, while *Gladue* reports are helpful in sentencing, some jurisdictions provide few resources for the lengthy and expensive process of producing adequate reports. Some judges have also concluded that the reports did not apply to serious offences or a connection between the crime and the legacy of residential schools or other background factors was required. The Supreme Court has reaffirmed in 2012 that these applications of *Gladue* are incorrect.

The Commission cautions that *Gladue* reports are not enough to address overrepresentation of Aboriginal people in prison,

In February 2016, Richard Daniel Wolfe, one of the founders of the Indian Posse gang based in Saskatchewan, was sentenced to five years in prison for sexual assault and assault with a weapon. The Crown had initially asked for a 10-year sentence. Wolfe's **Gladue** *report played a significant role in Madam Justice Lian Schwann's decision, documenting the intergenerational impacts of residential schools, including racism, abuse, parental neglect and alcoholism.*

stating "[e]ven if excellent *Gladue* reports were prepared from coast to coast, they would still fail to make a difference in the amount of Aboriginal overrepresentation

The Federation of Law Societies conference in October 2015 (left to right): moderator Darrel Pink, Executive Director of the Nova Scotia Barristers' Society, Lorne Sossin, Dean of Osgoode Hall Law School, Aimée Craft, law professor at the University of Manitoba and the Honourable Justice Leonard Mandamin, judge of the Federal Court of Canada engaged in a panel discussion on why lawyers need to be culturally competent.

in the prison system without the addition of realistic alternatives to imprisonment."

When working with Aboriginal offenders, lawyers must consider the significant history and legacy of harms our nation has committed against them. Crossin reflects on a pro bono case he took on 30 years ago that demonstrated the devastating impact of residential schools on Aboriginal people. The court had asked him to speak to sentence on behalf of an Aboriginal man named William, who pleaded guilty to a series of violent rapes.

"Later, from jail, William sent me a couple of paintings. They were quite beautiful and I still have them. I was perplexed how such art demonstrating such beauty and grace could burst from such a dark and violent man.

"I had it wrong. The mystery really was how such darkness and violence could burst from such a man of beauty and grace. It was only later I realized the answer to that. As it turned out, William had spent almost his entire life in a residential school. I dare say hundreds of lawyers in our province have hundreds of stories exactly like this."

LAWYERS NEED TO PRACTISE RECONCILIATION

During the criminal prosecution of abusers and the subsequent civil lawsuits, lawyers contributed to survivors' difficult and sometimes painful experiences. The courtroom experience was often made worse by lawyers who lacked the cultural, historical or psychological knowledge to deal with survivors' painful memories. Survivors were revictimized through explicit questioning. In some cases, survivors did not receive appropriate legal services because of lawyers' lack of sensitivity. A few lawyers have even taken advantage of their clients' vulnerability and misappropriated settlement funds or mishandled their cases. Numerous residential school survivors have stepped forward in the past few years with complaints to law societies. At least one lawyer has been disbarred over fees in residential school cases while others are facing disciplinary hearings.

Two of the report's recommendations speak specifically to lawyers. The first called for action to ensure that lawyers receive appropriate cultural competency training. The second called on law schools to require all law students to take a course in Aboriginal people and the law.

Many of Canada's policies and laws on Aboriginal and treaty rights were founded on the racist assumption that Aboriginal people are inferior. Early Europeans relied on the legal basis of the Doctrine of Discovery — the belief that they had the right to claim lands they "discovered" — to justify the colonization of Aboriginal peoples and the abolishment of their rights to their territories, lands and resources. The Truth and Reconciliation Commission recommends laws based on these assumptions should be corrected. Lawyers will likely play an integral role in implementing these changes.

Other recommendations from the report reveal many legal issues that impact Aboriginal communities, including child welfare, overrepresentation of Aboriginal people in custody and the need for enhanced restorative justice programs, the disproportionate victimization of Aboriginal women and girls, the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, unresolved residential school claims, and issues concerning jurisdictional responsibility for Aboriginal peoples. The implementation of recommendations on all of these matters depends on the engagement of lawyers.

> *Later, from jail, William sent me a couple of paintings. They were quite beautiful and I still have them. I was perplexed how such art demonstrating such beauty and grace could burst from such a dark and violent man.*
>
> *I had it wrong. The mystery really was how such darkness and violence could burst from such a man of beauty and grace. It was only later I realized the answer to that. As it turned out, William had spent almost his entire life in a residential school. I dare say hundreds of lawyers in our province have hundreds of stories exactly like this.*
>
> *– President David Crossin, QC*

LAW SOCIETIES PRIORITIZE CALLS TO ACTION

All 14 Canadian law societies gathered in October 2015 at the Federation of Law Societies conference to participate in a national dialogue on the Truth and Reconciliation Commission's calls to action. Andrea Hilland, Staff Lawyer of Policy and Legal Services at the Law Society of BC, helped develop the agenda. At the conference, human rights lawyer Julian Falconer urged law societies to reflect on the role of lawyers in past and present injustices that affect Aboriginal peoples and to take steps to correct these injustices. The law societies have acknowledged the report's significance and are considering how best to move forward.

The Law Society of BC has identified the response to the recommendations as a priority. Its mandate to uphold and protect the public interest in the administration of justice goes beyond the responsibility of training lawyers. It also recognizes that there must be a balance between the desire to take action immediately and the need to ensure that actions taken are respective of Aboriginal perspectives.

The objective is not to develop additional recommendations, but to determine actionable steps within the Law Society's mandate. Reviewing previous consultations, reports and programs that have already been done will be essential in informing the Law Society's strategy and ensuring the same work is not repeated.

Actions in response to the recommendations should be meaningful, be credible and have a real impact on achieving reconciliation with Aboriginal peoples. The Benchers have identified that the next step will be to consult with members of the Aboriginal legal community and, with their input, develop a strategic plan of action.

"The Law Society is embarking upon a consultative process to determine how to go forward," said Crossin. "That process will disclose and reveal suggestions concerning what lawyers and law firms can do [to practise reconciliation]."

The Truth and Reconciliation Commission states, "Reconciliation requires that a new vision, based on a commitment to mutual respect, be developed." The Law Society aims to create and implement an action plan that contributes to that new vision of healing, respectful relationships and reconciliation.❖

DISCIPLINE ADVISORY

Lawyers to exercise extreme caution when sending items or correspondence received from third parties to clients in correctional facilities

LAWYERS MAY BE asked by a client or by a third party to mail or deliver items or correspondence to inmates in correctional facilities. Lawyers must take particular care to ensure that such materials are not contraband as defined in the *Correction Act,* SBC 2004, c.46, or deemed to be contraband by the correctional facility.

Pursuant to section 17 of the *Correction Act*:

> A person commits an offence if at a correctional centre the person possesses, delivers or sends to or receives from an inmate anything that is referred to in paragraph (a), (b) or (c) of the definition of "contraband"…

The *Correction Act* defines contraband as:

(a) an intoxicant;

(b) if possessed without prior authorization, a weapon, any component of a weapon or ammunition for a weapon, or anything that is designed to kill, injure or disable or is altered so as to be capable of killing, injuring or disabling;

(c) an explosive or bomb, or any component of an explosive or bomb;

(d) if possessed without prior authorization, any currency;

(e) if possessed without prior authorization, tobacco leaves or any products produced from tobacco in any form or for any use;

(f) if possessed without prior authorization, any other object or substance that, in the opinion of an authorized person, may threaten the management, operation, discipline or security of, or safety of persons in, the correctional centre…

Electronic disclosure now being relied upon by the Crown has created an additional dimension to the delivery of contraband that, according to some correctional facilities, includes movies, music, pornography and drugs secreted inside a hard drive. Alternatively, the hard drive itself may be deemed contraband, as some are large enough to be able to contain a weapon or drugs, all of which could result in a threat to the safety and security of correctional staff and inmates.

RELEVANT BC CODE PROVISIONS

Several rules in the *BC Code* set out lawyers' professional obligations to ensure that their actions do not facilitate delivery of contraband:

Rule 2.1-1 (a):

> A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

Rule 3.2-7:

> A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

Rule 3.2-7, commentary [1]:

> Lawyers should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

Rule 6.1-1:

> A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

If asked by a third party or client to mail or deliver items or correspondence, the best practice is for a lawyer to consider whether the request has anything to do with the matter the lawyer has been retained on and, if the answer is no, to decline the request.

CAUTION REGARDING MARKING COMMUNICATIONS AS PRIVILEGED

According to a Correctional Service Canada Commissioner's Directive, correspondence between an inmate and legal counsel is privileged and shall be forwarded unopened to the addressee. This procedure shall normally include the office and/or staff thereof. In addition to the Commissioner's Directive, each correctional facility may have policies and procedures with respect to the treatment of correspondence received from lawyers and/or their office. Lawyers who mail or deliver items or correspondence to their clients in correctional facilities must be aware of the law and other applicable policies and procedures of each correctional facility. They must also inspect and be aware of the contents being mailed or delivered to their client. Lawyers who delegate the administrative duties of mailing or delivering items or correspondence to correctional facilities must still ensure that they are aware of the contents and that the packages are marked correctly.

Correctional facilities have expressed concern that drugs and other contraband are being sent on a regular basis into jails purporting to be from law firms, often on letterhead, when the letters were in fact not sent by a law firm. Letters purporting to be sent by law firms, after raising suspicion, have been intercepted by corrections and drugs have been discovered.

The mutual trust relationship between

all parties to the criminal justice system, including defence counsel, is integral to the proper administration of justice.

CONDUCT REVIEWS ORDERED

Two conduct reviews were recently ordered to address such conduct. In one case, a lawyer sent a hard drive (deemed contraband by the correctional facility) received from a third party to his inmate client. The lawyer failed to supervise his assistant, who labelled the envelope in the usual way, as "solicitor-client privileged." The hard drive was examined and contraband was discovered (CR 2016-01).

In the other case, a lawyer unwittingly sent an illegal drug to his client in a correctional facility. The drug was embedded in letters and photographs, which had been delivered to the lawyer's office from a friend to send to the inmate client. The lawyer inspected the material before sending it to the client but did not discover the drugs. The envelope was examined by corrections and the illegal drug was discovered on one of the pieces of paper (CR 2016-02).

A conduct review is one form of disciplinary action that may be ordered by the Discipline Committee pursuant to Law Society Rule 4-4 (1)(d). A written report is prepared following the conduct review and, once accepted by the Discipline Committee, forms part of the lawyer's professional conduct record.❖

CRA demands for client documents and information

IN PREVIOUS *BENCHERS' Bulletins* (Winter 2010 and Summer 2010), we alerted lawyers to their professional obligations if they receive a notice of requirement to produce information from Canada Revenue Agency (CRA) in connection with a client's information or documents, and in particular a lawyer's duty to ensure that any privilege in the information is maintained unless the client waives it (see rule 3.3-2.1 of the *Code of Professional Conduct)*. Moreover, as noted in the Summer 2014 *Benchers' Bulletin*, the Quebec Court of Appeal declared the provisions of the *Income Tax Act* under which the notices of requirement are issued to be constitutionally invalid (*Chambre des Notaires du Québec* v. *Procureur Général du Canada*, 2014 QCCA 552). That decision was appealed to the Supreme Court of Canada and the appeal was argued in early November. The decision is on reserve.

Until the Supreme Court of Canada issues its decision, the Law Society suggests that a lawyer who receives a notice of requirement to produce information under either the *Income Tax Act* or the *Excise Tax Act* should identify the documents sought by the notice, place them in a sealed envelope and hold the sealed envelope in the lawyer's office safe against risk of loss or destruction. The lawyer should expect that CRA will not seek a compliance order for the production of the documents prior to the decision in *Chambre des Notaires* being rendered.

If, after that decision is released, the sections authorizing notices of requirements are upheld insofar as they apply to lawyers, the lawyer may expect to be contacted by CRA prior to any compliance order being sought. The lawyer can expect to be advised that the lawyer will have seven days within which to provide the documents, after which CRA may bring an application for a compliance order.

We understand that CRA, where it deems there to be an imminent risk of loss, may decide to pursue a compliance order against the lawyer prior to the decision in *Chambre des Notaires* being released, if CRA believes the documents sought are of a kind repeatedly held in the past not to be privileged. We expect these cases to be rare, but in the event a lawyer receives an application for a compliance order in such circumstances, the lawyer should immediately contact Michael Lucas (mlucas@lsbc.org) or Barbara Buchanan, QC (bbuchanan@lsbc.org) at the Law Society to obtain further guidance as to the lawyer's professional obligations.❖

Services for lawyers

Law Society Practice Advisors

Dave Bilinsky
Barbara Buchanan, QC
Lenore Rowntree
Warren Wilson, QC

Practice Advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

All communications with Law Society Practice Advisors are strictly confidential, except in cases of trust fund shortages.

Optum Health Services (Canada) Ltd. – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families. Tel: 604.431.8200 or 1.800.663.9099.

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

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson **Anne Bhanu Chopra** at tel: 604.687.2344 or 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, 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.

DELIVERY OF CONTRABAND TO CORRECTIONAL FACILITIES

A lawyer sent deemed contraband to his client in a correctional facility, contrary to rules 2.1-1(a) and 3.27 of the *Code of Professional Conduct for British Columbia*, and failed to supervise his assistant in connection with how the envelope containing the deemed contraband was marked. The lawyer received a hard drive from a third party for delivery to his client in jail. He asked his assistant to send it, and she did so by labelling the envelope in the usual way, as "solicitor-client privileged." The hard drive was examined at the correctional facility, and contraband was discovered on it. The lawyer conceded to a conduct review subcommittee that his supervision of his employee was not what it could have been; he did not think about the consequences and simply told his office to mail it to his client, mistakenly assuming that the hard drive would be vetted in due course. He accepted that he was delinquent and displayed a casual indifference to the contents of the package. He did not blame his employee and accepted responsibility without hesitation. The subcommittee accepted his forthright admissions as genuine and his assertions that he will take steps to prevent this occurring in the future, but explained the inappropriateness of his conduct and that he could be cited should a similar situation occur in the future. (CR 2016-01)

In another case, a lawyer unwittingly sent an illegal drug to his client in a correctional facility, contrary to rules 2.1-1(a) and 3.27 of the *Code of Professional Conduct for British Columbia*. Letters and photographs had been delivered to the lawyer's office from a friend of the client for transmission to the client who was being held at a correctional facility. After inspecting the material and finding nothing suspicious, the lawyer sent the letters and photographs to his client by mail. The envelope was examined upon arrival at the institution and an illegal drug was discovered on one of the pieces of paper. The contraband was likely sprayed on the paper and the recipient would chew the paper to ingest the drug. A conduct review subcommittee advised the lawyer that his conduct was inappropriate because he accepted a package from a third party to send to his client. He carefully inspected the package, but was still unwittingly taken advantage of by his client. He accepted without reservation that his conduct had fallen below the appropriate standard. The subcommittee accepted his assertion that he has taken steps to prevent this from occurring in the future but explained that the lawyer could be cited should a similar situation occur in the future. (CR 2016-02)

LAND TITLE ACT ELECTRONIC FILINGS

A lawyer failed to strictly comply with the *Land Title Act*, Law Society Rule 3-64(8)(b) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia* regarding the use of his personal digital signature in electronic filings. During a compliance audit of the lawyer's practice, it was discovered that he had permitted his assistant to routinely affix his digital signature to documents that were submitted to the Land Title and Survey Authority. He admitted his error and corrected it immediately. A conduct review subcommittee advised the lawyer that his conduct was inappropriate. He told the subcommittee that he now understood the underlying reason for the confidentiality of passwords and importance of lawyers personally affixing the electronic signature after the documents have been reviewed. The lawyer had not previously read the relevant sections of the *BC Code* and was not aware of the many warnings published in E-Brief and *Benchers' Bulletin*. He was also not aware at the time that other lawyers had been disciplined for similar conduct. He has now changed his office procedures to comply with his obligations. (CR 2016-03)

CONFLICT OF INTEREST

A lawyer acted in a conflict of interest by failing to give undivided loyalty when he acted for a company in a debt action. He also acted for the director and 50 per cent shareholder of that same company in a separate family law proceeding where the company's assets were the subject of a division of assets claim. He failed to advise or consider whether it was in the company's best interest to file a response in the debt action. These actions were contrary to Chapter 6, Rule 1 of the *Professional Conduct Handbook* then in force. The lawyer admitted to acting in a conflict of interest to a conduct review subcommittee, but expressed no intention or awareness of how to remediate or otherwise prevent future occurrences of similar concern. At the subcommittee's

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Discipline digest

BELOW ARE SUMMARIES with respect to:

- Grant David Axworthy
- Kevin Alexander McLean
- Eric John (Jack) Woodward
- Christopher Roy Penty
- Ian David Reith
- John David Briner
- Gary Russell Vlug
- Catherine Ann Sas, QC
- Douglas Edward Dent
- Maureen Joyce Wesley
- Thomas Paul Harding

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

GRANT DAVID AXWORTHY

Vancouver, BC

Called to the bar: August 28, 1992

Discipline hearing: September 23, 2015

Panel: Lynal Doerksen, Chair, Shona Moore, QC and Lois Serwa

Decision issued: October 27, 2015 (2015 LSBC 46)

Counsel: Kieron Grady for the Law Society; no one appearing on behalf of Grant David Axworthy

FACTS AND DETERMINATION

The Law Society began an investigation of Grant David Axworthy as a result of complaints from two of his clients. The investigators advised Axworthy of the complaints and asked for his reply. After initially responding to the first complaint, he became less responsive and timely and ultimately ceased to respond at all. He also failed to provide the materials requested by the Law Society. He did not respond to the second complaint.

Axworthy did not communicate with the Law Society for six months continuing up to the date of the hearing. He provided no explanation and did not attend the hearing.

The panel determined that Axworthy's persistent failure to respond to Law Society communications, promptly or at all, constituted professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Axworthy:

1. pay a fine of $3,000;
2. pay $1,236.25 in costs; and
3. provide a complete response to the Law Society's inquiries within 14 days.

KEVIN ALEXANDER MCLEAN

Vancouver, BC

Called to the bar: August 27, 2010

Not in good standing: January 1, 2015

Ceased membership: April 10, 2015

Disbarred: June 29, 2015

Discipline hearing: July 29 and September 24, 2014 and March 6 and June 5, 2015

Panel: Elizabeth J. Rowbotham, Chair, Paula Cayley and Carol Hickman, QC

Decisions issued: January 12 (2015 LSBC 01) and November 3, 2015 (2015 LSBC 47)

Preliminary question: June 2, 2014 (oral reasons: June 2, 2014; decision issued: September 3, 2014; 2014 LSBC 38)

Panel: Martin Finch, QC, Chair, Ralston Alexander, QC and Woody Hayes

Review on jurisdiction (written submissions): August 28, 2015

Decision issued: January 27, 2016 (2016 LSBC 04)

Review board: Lee Ongman, Chair, Satwinder Bains, Dean Lawton, John Lane, Graeme Roberts, John Waddell, QC and Sandra Weafer

Counsel: Alison Kirby for the Law Society; Kevin Alexander McLean appearing on his own behalf with respect to preliminary question; otherwise, no one appearing on behalf of McLean

FACTS

A citation was issued against Kevin Alexander McLean alleging that he failed to respond promptly to communications from a client's previous counsel.

Before the hearing began, McLean applied to have Law Society counsel removed. A hearing panel found that it had no jurisdiction to remove counsel and refused to make the order. As a result of its review, the panel decided to recuse itself as it had received prejudicial information.

The hearing was reconvened with a new panel. The panel found that:

- On July 2, 2012, McLean was retained to act on behalf of a client in connection with a motor vehicle accident claim. At that time, the client was represented by another lawyer.
- On August 8, 2012, the client's former lawyer sent a letter to McLean accompanied by correspondence, medical documents and a record of disbursements. The letter imposed undertakings

on McLean, including paying the previous lawyer for disbursements and services rendered, and filing a Notice of Change of Solicitor.

- Between August 8 and December 10, 2012, the previous lawyer sent four letters and made three telephone calls to McLean. McLean did not respond.
- McLean made his first response on February 17, 2013, after the previous lawyer filed a complaint with the Law Society. This was approximately six months after the initial letter sent to McLean in August 2012.

DETERMINATION

Chapter 11, Rule 6 of the *Professional Conduct Handbook* then in force states that "a lawyer must reply reasonably promptly to any communication from another lawyer that requires a response." (This obligation is continued in rule 7.2-5 of the current *Code of Professional Conduct for British Columbia*.)

The transfer of a client's file and a letter of undertaking from one lawyer to another are significant matters and must be dealt with in a timely fashion. McLean did not provide a response to the previous lawyer for approximately six months and only responded after the previous lawyer had complained to the Law Society.

The panel concluded that McLean was in breach of the *Professional Conduct Handbook* then in force, and that his conduct constituted professional misconduct.

On February 10, 2015, McLean delivered a notice of review of the facts and determination decision, stating that he did so pursuant to section 47 of the *Legal Profession Act* and Law Society Rules 5-13 and 5-15. Before the review board, the Law Society submitted that there was no jurisdiction for a section 47 review of the facts and determination decision at this stage of the proceedings.

The review board found that McLean was not entitled to a section 47 review of the facts and determination decision prior to issuance of the decision on disciplinary action. The review board quashed the notice of review and ordered McLean to pay costs of $1,300.

DISCIPLINARY ACTION

McLean did not attend the hearing on disciplinary action on March 6, 2015. The hearing was adjourned to give Law Society counsel time to consider whether to make submissions on ungovernability.

On April 10, 2015, McLean ceased to be a member of the Law Society. The hearing panel retained the jurisdiction to discipline a former member for misconduct that occurred when the person was a member of the Law Society, pursuant to sections 1 and 38 of the *Legal Profession Act*.

When the hearing reconvened on June 5, 2015, Law Society counsel did not make submissions based on ungovernability. The hearing proceeded on the basis of the panel's finding of professional misconduct.

The panel ordered that McLean pay:

1. a fine of $10,000; and
2. costs of $15,912.50.

On June 29, 2015, a separate discipline hearing panel, ruling on a matter pertaining to an unrelated citation, ordered that McLean be disbarred on the basis of ungovernability.

ERIC JOHN (JACK) WOODWARD

Campbell River, BC

Called to the bar: November 13, 1979

Discipline hearing: August 13, 2015

Panel: Lee Ongman, Chair, Dan Goodleaf and Carol Hickman, QC

Decision issued: November 9, 2015 (2015 LSBC 49)

Counsel: Kieron Grady for the Law Society; David M. Rosenberg, QC for Eric John (Jack) Woodward

FACTS AND DETERMINATION

In 2011, Eric John (Jack) Woodward issued cheques on two accounts, when he knew that there were insufficient funds to satisfy some or all of the cheques, for the purpose of concealing that there were insufficient funds in one or both accounts.

At the time, Woodward had business interests outside of his legal practice. In addition to being the director of Jack Woodward Law Corporation, he was the sole director and shareholder of a hotel on Salt Spring Island. The law firm had an account with a credit union strictly for the personal use of Woodward and not for the practice of law. The hotel also had a current account with the same credit union.

Prior to 2011, Woodward had a history of exceeding his authorized credit limit. He would ask the credit union to cover cheques he had already written on the hotel account, usually in amount of around $10,000. In January 2009, the credit union temporarily increased his line of credit from $150,000 to $185,000. Woodward continued to write cheques in excess of the line of credit and requested an extension, which the credit union granted. When it expired in February 2009, he asked for a further extension, and the credit union declined. In one instance in early 2009, Woodward used the credit union's ATM to process cheques between his hotel account and personal account, knowing that there were insufficient funds in the accounts to cover the cheques. Credit union staff advised him not to do so again.

In June 2009, Woodward asked the credit union to cover $15,000 for payroll cheques he wrote on the hotel account. The credit union approved the request, but credit union staff met with him in August 2010 to let him know that no additional credit would be extended.

Between January 1 and October 27, 2011, Woodward issued 417 cheques back and forth between his personal account and the hotel account. The majority of the cheques on the personal account had

insufficient funds to cover the amounts. He exceeded his authorized limit of $150,000 on his line of credit on 94 per cent of the days the cheques were written.

Of the 417 cheques, 414 of them were deposited into non-credit union ATMs, which extended the clearing time of the cheques to create unauthorized credit. By late October 2011, Woodward's personal account was in overdraft by approximately $535,000.

The credit union decided to end its business relationship with Woodward and cancelled all ATM cards for his accounts. On November 1, 2011 Woodward met with credit union staff and counsel, apologized for his conduct and promised to repay his debt. On December 13, 2011, Woodward's counsel delivered a trust cheque of $686,724.77 to the credit union, inclusive of penalties and interest.

ADMISSION AND DISCIPLINARY ACTION

Woodward admitted, and the panel accepted, that his behaviour was conduct unbecoming a lawyer. By writing cheques back and forth with the knowledge that there were insufficient funds, Woodward failed to act, in his private life, in a way that maintains the confidence and respect of the public.

The panel took into consideration that Woodward had been practising law for 35 years and had no professional conduct record. He took action to rectify the situation as soon as the credit union notified him that his conduct would not be tolerated, prior to the complaint and investigation by the Law Society. The credit union ultimately suffered no loss and was repaid in full. The panel also considered the number of times the conduct occurred and the significant financial benefit Woodward gained in writing the cheques.

The panel ordered that Woodward:

1. be suspended for one month; and
2. pay $1,736.20 in costs.

CHRISTOPHER ROY PENTY

Kelowna, BC

Called to the bar: May 10, 1983

Discipline hearing: October 8, 2015

Panel: David W. Mossop, QC, Chair, J.S. (Woody) Hayes and Gavin Hume, QC

Decision issued: November 12, 2015 (2015 LSBC 51)

Counsel: Alison Kirby for the Law Society; Christopher Roy Penty on his own behalf

FACTS

Christopher Roy Penty was retained by clients in November 2009 to work on an ongoing civil action. His legal assistant began to work on the civil action later that month. In February 2010, his clients instructed him to work on foreclosure proceedings, and his legal assistant began working on the foreclosure proceedings in May 2010. There was no written retainer agreement with respect to the civil action or the foreclosure proceedings. The clients were aware that Penty's legal assistant was working on their files.

In May 2011, Penty ceased to act for the clients and issued two final legal bills for services rendered for the civil action and the foreclosure proceedings. The time spent and services rendered by Penty's legal assistant were described as Penty's time and services and billed at his hourly rate of $300.

At the registrar's review in May 2012, Penty stated the files predated the start of the legal assistant's employment and he did not have much involvement other than towards the end of the projects. Penty reviewed the transcript of the hearing and his client files in the following months, and he did not correct his misrepresentation to the court.

In November 2012, Penty admitted in his written supplemental submissions that he billed his legal assistant's time as his own from time to time. He stated the bulk of the time was his own and, since his legal assistant had 20 years of experience as a lawyer, it would be appropriate to bill his time at a lawyer's rate. He emphasized that this was a very minor part of the time billed.

The registrar held that Penty's conduct was unacceptable. The registrar stated that Penty was only entitled to bill his legal assistant's time at $150 per hour and he was not entitled to bill for services that were secretarial in nature. The registrar was only able to identify 2.8 hours of legal assistant time from the statement of account for the civil action and reduced the amount by $420.

Penty and his legal assistant's timesheets reflect that approximately 31 per cent of the time billed on the civil action and 56 per cent of time billed on the foreclosure proceedings was related to work performed by the legal assistant.

ADMISSION AND DISCIPLINARY ACTION

Penty admitted to committing professional misconduct by misrepresenting the amounts he was entitled to bill his clients and making misrepresentations orally and in writing to the court. The panel accepted his admission.

The panel found that Penty's conduct showed dishonesty and a lack of integrity that suggests a suspension would be the appropriate sanction. The panel considered Penty's professional conduct record, which consisted of a prior citation and two conduct reviews and showed a pattern of misleading the court and making false representations. It also considered the personal profit he gained as a result of the misconduct.

The panel ordered that Penty:

1. be suspended for four months; and
2. pay $2,500 in costs.

IAN DAVID REITH

Whistler, BC

Called to the bar: May 19, 1989

Discipline hearing: October 19, 2015

Panel: David W. Mossop, QC, Chair, Carol Gibson and Peter D. Warner, QC

Decision issued: November 12, 2015 (2015 LSBC 50)

Counsel: Patrick M. McGowan for the Law Society; Ian David Reith on his own behalf

FACTS

Ian David Reith was employed for the first 21 years of his practice by a company in Whistler that mainly sold time-sharing properties. He left the company in January 2010 to run a private practice focused on real estate conveyancing. He continued to assist his previous company occasionally in the transfer of time-share units.

A Washington state company acquired a 2/51 interest in a time-share from the Whistler company. When the president of the Washington state company died in 1997, his widow wrote to the Whistler company to the attention of Reith advising him of her husband's death. A memorandum from the Whistler company's legal department was issued directing that ownership be transferred to the widow's name. No such transfer occurred, and the fractional interest remained in the Washington state company's name until 2011.

In January 2010, the widow spoke with Reith and advised that she wished to transfer the 2/51 interest in the time-share to her nephews. Reith sent her two land title documents to be executed and a request for $556.85 payable to him in trust for property purchase tax, fees and disbursements. The widow executed the land title documents before a notary public in Washington and returned these documents to Reith along with a cheque in the requested amount.

In May 2010, Reith received an email from an employee of the Whistler company, referring to the Washington state company as a defunct company. Reith responded that they would nevertheless submit the transfer to the land title office to see if it could sneak through the examiners. In July 2010, Reith emailed one of the nephews, the employee and another employee of the Whistler company stating a similar message, that the Washington company was a defunct company and he had told the widow they would see if the transfer sneaks through. He promised to contact the examiner to check on its status, though he did not file any documents with the land title office until six months later.

In January 2011, Reith wrote to the nephew again to say he was waiting for confirmation from the widow and/or the nephews regarding how they wanted the new ownership to show. One of the nephews emailed Reith and instructed that the interest be transferred solely to the widow. Reith took no steps to confirm the instructions with the widow. She did not advise Reith that she authorized her nephew to instruct him on her behalf, nor did she tell Reith that she wanted the interest to be transferred into her own name.

Reith filed the transfer and lease documents in the land title office, without the signature of the widow. Reith did not advise her of the financial obligations the sublease would impose on her. Funds were transferred from Reith's trust account to his non-trust account to pay conveyance costs, but Reith did not prepare or deliver a bill to her.

ADMISSION AND DISCIPLINARY ACTION

Reith admitted to the following professional misconduct: he engaged in questionable conduct that casts doubt on his professional integrity; he failed to provide a quality of service that would be expected of a competent lawyer; he acted in a conflict of interest by acting for the various parties involved; and he withdrew funds from his trust account without preparing and delivering a bill to his client.

The panel emphasized the important role of lawyers in ensuring the integrity of the land title system in British Columbia and in safeguarding the system against fraud. The panel took into consideration that Reith was genuinely trying to help the widow get the title transferred and he did not gain anything personally by his misconduct. The panel also considered his financial situation, professional conduct record, and other precedent cases to assess the appropriate penalty.

The panel ordered that Reith pay:

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

JOHN DAVID BRINER

Vancouver, BC

Called to the bar: May 26, 2003

Ceased membership: October 16, 2013

Disbarred: November 30, 2015

Discipline hearing: December 9, 2014 and June 30, 2015

Panel: Thomas Fellhauer, Chair, Dr. Gail Bellward and Richard B. Lindsay, QC, P.Eng.

Decision issued: March 31, 2015 (2015 LSBC 11) and November 30, 2015 (2015 LSBC 53)

Counsel: Alison Kirby for the Law Society; no one appearing for John David Briner (facts and determination) and John David Briner on his own behalf (disciplinary action)

FACTS

John David Briner was retained by a client in September 2011 to act in relation to a $50,000 loan. His client advanced the loan to the borrower through Briner's trust account.

On December 16, 2012, Briner's client emailed a payout statement to the borrower requesting payment of $53,164.44 to Briner, who would in turn pay out the financial institution and take care of a discharge

of mortgage. Two days later, the borrower's lawyer couriered a letter and bank draft for $50,439.44 payable to Briner in trust.

Briner forwarded his client's email to his assistant and deposited the funds to his pooled trust account. He did not allocate the deposit to his client's trust ledger. He instead directed funds to another client's trust ledger, which was in overdraft of $11,500.47. Briner transferred $10,000 of the funds to his general account and made multiple transfers to third parties from the other client's ledger. Within four days after the deposit, Briner had withdrawn almost the entire amount from the trust account and the remaining balance was only $391.99.

On January 20, 2013, Briner sent a letter to the borrower's lawyer to advise that litigation would ensue if the remaining balance of $2,725 was not paid to his firm in trust by January 25, 2013. Briner filed a notice of claim against the borrower in small claims court. In March 2013, Briner's client sent an email to him and asked whether he was still holding the payout amount in his trust account. Briner responded but did not answer the client's question.

The funds were never paid to Briner's client. No funds remained in the trust account when a custodian was appointed for Briner's practice in October 2013.

Briner did not attend the hearing on facts and determination; he did not seek an adjournment or provide evidence of his unavailability. Briner emailed that he did not object to the hearing proceeding in his absence.

DETERMINATION

The Law Society sent a Notice to Admit to Briner, to which he provided no response. As a result, he was deemed to have admitted the documents and facts set out in the notice.

Briner is deemed to admit that he misappropriated some or all of the $50,439.44 he received in trust for his client, and this constitutes professional misconduct. The panel agreed that misappropriation of client funds constitutes professional misconduct. The panel also found that Briner committed professional misconduct in failing to cooperate in an investigation and in breaching the Law Society trust accounting rules.

DISCIPLINARY ACTION

At the hearing on disciplinary action, Briner wished to submit additional evidence. Although the appropriate forum for this would have been at the initial hearing, the panel agreed to swear in Briner and allow him to provide evidence on his own behalf.

Briner stated that the misappropriation was not deliberate and it was a one-time accounting error. He testified he was going through a number of personal challenges and had gotten behind in maintaining his accounting records. He said he accidentally credited the funds incorrectly when catching up on his accounting.

He stated his prior disciplinary record consisted solely of a conduct review. He also submitted that his client was reimbursed by the Lawyers Insurance Fund and he has since reimbursed the insurance fund in full, so there was no long-term impact on the client. He submitted he gained no advantage because the funds were disbursed to a third party and he had to reimburse the Lawyers Insurance Fund with his personal funds. He claimed he has been helpful throughout the disciplinary process.

Under cross-examination, Briner repeatedly said he did not recall events during this period. The panel found the circumstances show that Briner would have been aware of the payment of $50,439.44 into his trust account and that there was a dispute about the balance owing. When his client specifically asked if he had the funds in trust, he did not reply and did not take the opportunity to reimburse his client. The panel found it difficult to believe that Briner would not have known of his accounting errors.

In the period following the errors, Briner had numerous opportunities to correct his errors. He took no further action to correct his errors or advise his client. When a custodian was appointed, Briner signed an undertaking to the Law Society to resign from membership and to cooperate with investigations. The panel found Briner took a passive role in the Law Society's investigations, failing to respond to numerous inquiries and failing to attend the hearing on facts and determination.

The panel found that Briner gained a clear advantage by using his client's trust funds to cover an overdraft in another client's trust account. This enabled him to bill his other client and pay his own general account out of trust and use those funds to pay third parties.

The panel found that Briner's testimony did not affect its determination on each of the three allegations at the hearing on facts and determination. He presented no compelling evidence that any mitigating factors were significant enough to overcome a decision to disbar. The panel referred to other hearing decisions that have disbarred lawyers who misappropriated funds and emphasized anything short of disbarment would compromise the public's confidence in the profession.

The panel ordered that Briner be disbarred.

TRUST PROTECTION COVERAGE PAYMENT

In every profession, there are occasionally members who are dishonest. Although not all professions or industries protect victims of their dishonest members, the legal profession in BC has, since 1949, provided financial protection to members of the public whose money has been stolen by their lawyer. If a claim is made against a lawyer relating to the theft of money or other property, Trust Protection Coverage (TPC) is available to reimburse the claimant, on the lawyer's behalf, for the amount of the loss.

Based on the circumstances described in relation to the allegation of misappropriation in *Law Society of BC* v. *Briner*, 2015 LSBC 11, a TPC claim was made against John David Briner and the amount of $51,097.44 paid. Briner was sued for the payment made, and the full

amount was recovered. For more information on TPC, including what losses are eligible for payment, please go to Trust Protection Coverage on the Law Society's website.

GARY RUSSELL VLUG

Vancouver, BC

Called to the bar: August 28, 1992

Bencher review: May 1 and June 10, 2015

Benchers: Kenneth Walker, QC, Chair, Haydn Acheson, Satwinder Bains, Pinder Cheema, QC, Jamie Maclaren and Elizabeth Rowbotham; A. Cameron Ward (did not participate in the decision)

Decision issued: December 31, 2015 (2015 LSBC 58)

Counsel: Carolyn Gulabsingh for the Law Society; Gary Russell Vlug on his own behalf

BACKGROUND

A hearing panel found that Gary Russell Vlug committed professional misconduct in respect of 11 allegations arising from three separate complaints, all by lawyers. The panel found that Vlug knowingly misrepresented facts in court, misled the Law Society, attached documents to an affidavit after it had been sworn, and acted with incivility in dealing with fellow lawyers.

The panel found Vlug's conduct was egregious and beneath the standards expected of members of the profession. It was of significant concern that Vlug failed to acknowledge his misconduct.

The panel determined that Vlug's conduct amounted to professional misconduct and ordered that he be suspended for six months and pay $20,000 in costs (facts and determination: 2014 LSBC 09; disciplinary action: 2014 LSBC 40; discipline digest: Winter 2014).

Vlug applied for a review of the decision. A stay of suspension was granted and extended pending appeal or further order of the court (2014 LSBC 48 and 2015 LSBC 08).

DECISION OF THE BENCHERS ON REVIEW

Vlug applied to introduce fresh evidence at the review. The Law Society opposed, arguing that it did not meet the fresh evidence test. The Benchers considered previous cases and the nature of the new evidence and dismissed the application (2015 LSBC 59).

The Benchers confirmed the hearing panel's findings of professional misconduct for seven of the 11 allegations in the citation.

Three of the allegations arose from one family law matter. The hearing panel had found that Vlug committed professional misconduct by preparing and filing court documents that he knew or ought to have known were improper and misleading.

The Benchers, however, found that there was an absence of specific and compelling evidence that Vlug knew his filings and statements were improper and misleading and reversed the hearing panel's findings of professional misconduct for these three allegations.

The Benchers were unable to reach a majority decision on one allegation of misleading the court and the Law Society where the hearing panel had rejected Vlug's evidence concerning a phone conversation. Three Benchers (Acheson, Cheema and Maclaren) would have upheld the hearing panel's finding that, on a balance of probabilities, Vlug's evidence was not credible. Three other Benchers (Walker, Bains and Rowbotham) would have reversed that decision, as they were not satisfied that the hearing panel properly considered all the evidence.

With respect to disciplinary action on the findings of professional misconduct, the Benchers ordered that Vlug:

1. be suspended for seven weeks;
2. take a remedial program in family law to the satisfaction of the Practice Standards Committee;
3. pay costs of $5,000 plus disbursements for the review; and
4. pay costs of $12,500 for the hearing.

Vlug has filed a Notice of Appeal to the BC Court of Appeal.

CATHERINE ANN SAS, QC

Vancouver, BC

Called to the bar: May 19, 1989

Discipline hearing: June 23 to 27, 2014 and September 24, 2015

Panel: Dean Lawton, Chair, Dan Goodleaf and Donald Silversides, QC

Decisions issued: April 20, 2015 (2015 LSBC 19) and January 25, 2016 (2016 LSBC 03)

Adjournment application: July 29, 2015 (2015 LSBC 38)

Counsel: J. Kenneth McEwan, QC and Rebecca Robb for the Law Society; Peter Wilson, QC and Meagan Richards for Catherine Ann Sas

FACTS

In March 2010, Catherine Ann Sas ceased practising as a sole practitioner and joined a larger law firm. In early 2011, she still held funds in trust that had been received from clients when she was practising as a sole practitioner. There were several outstanding files and unbilled time and disbursements that needed to be dealt with. She embarked on a file review project to deal with those files, including the unbilled time and disbursements and the monies held in trust.

In March and August 2011, Sas improperly billed 22 of her clients for disbursements that were not incurred and withdrew a total of $1,947.39 held in trust for those clients to pay to her law corporation. Sas knew the funds were the property of her clients, and she had not been authorized to withdraw their funds. During the same period of time, Sas also withdrew an additional $9,068.53 held in trust for 21 clients to pay bills for amounts she charged them, without immediately sending bills to any of those clients, contrary to Rule 3-57(2).

Following a compliance audit, the Law Society drew these actions to Sas's attention in April 2012. Sas did not take corrective action until November 2012. She either repaid from her own funds all or part of the monies taken from trust and either paid these monies to the clients or paid them to her new firm in trust for the clients. In other cases, she rebilled the clients a file-closing fee to replace bills previously issued for disbursements that were not incurred. For clients whose funds were previously taken to pay bills, she prepared and sent bills backdated to the dates of the original billings in 2011.

DETERMINATION

The panel found that Sas's primary motive in wrongfully withdrawing funds held in trust for clients was to clean up the accounting records relating to her sole practice and to wind up that practice. Although the total amount misappropriated was less than $2,000 and had little impact on her clients, Sas gained a significant benefit by expediting the process and reduced the inconvenience and cost of dealing with the funds appropriately.

The panel determined that these actions constitute professional misconduct and breaches of the *Legal Profession Act* or the Law Society Rules.

Sas appealed the decision on Facts and Determination to the BC Court of Appeal. The appeal was heard on January 15, 2016, and the decision is under reserve.

APPLICATION TO ADJOURN

Sas applied to the hearing panel to adjourn the disciplinary action phase of the citation hearing pending her appeal to the BC Court of Appeal. The panel was not satisfied that Sas would be prejudiced or deprived of a fair trial if the adjournment was not granted, while the public interest would be served by the timely determination of the issues in the proceeding. The adjournment was refused, and the hearing on disciplinary action went ahead as scheduled.

DISCIPLINARY ACTION

The panel considered the seriousness of the conduct and aggravating and mitigating factors, 46 letters of support tendered by Sas, letters from Sas and her accountant, and case authorities that included sanctions imposed in prior similar cases. The panel took into account that Sas did not have any prior conduct record.

At the time of her misconduct, Sas had been practising as a lawyer for almost 22 years and was a Bencher of the Law Society. She knew what her obligations were with respect to the monies held in trust for her clients.

The panel concluded that protection of the public is paramount in this case, as it is in every case where a lawyer has committed professional misconduct by misappropriating monies held in trust for clients. The panel ordered that Sas:

1. be suspended for four months; and
2. pay costs of $32,038.49.

Sas has filed a notice of review following the disciplinary action decision.

DOUGLAS EDWARD DENT

100 Mile House, BC

Called to the bar: September 14, 1976

Discipline hearing: March 23-25 and December 21, 2015

Panel: David Mossop, QC, Chair, Bruce LeRose, QC and Clayton G. Shultz

Decisions issued: July 24, 2015 (2015 LSBC 37) and February 12, 2016 (2016 LSBC 05)

Counsel: Kieron Grady for the Law Society; Ravi Hira, QC and Jason Jaffer for Douglas Edward Dent

FACTS

On February 1, 2011, the vendor and the purchaser of a large tract of land in interior British Columbia showed up unannounced at Douglas Edward Dent's office without an appointment. The vendor and purchaser wanted the deal to go through as quickly and cheaply as possible and wanted Dent to act for both parties. The agreement included an easement as one of a number of provisions. The deal went through and no one suffered loss or harm.

The purchasing corporation was owned 50/50 by a female partner and a male partner. The female purchaser was not satisfied with the accounting of monies paid for the purchase of the property and sought an accounting from Dent. Dent stated that he represented the vendor only and she was not entitled to his accounting records. The vendor wrote a letter of complaint to the Law Society. Following an investigation, the substance of the original complaint did not result in any citation. However, the investigation revealed three matters that led to a citation: Dent acted for both parties, contrary to the *Professional Conduct Handbook* then in force; Dent did not advise the purchasers he was not protecting their interests; and Dent breached an undertaking.

Dent claimed that he agreed at the meeting in February 2011 to act only for the vendor, a long-standing client of his, and he could not act for both parties as the sale had a commercial component; however, he also agreed to prepare documents normally prepared by the solicitor for the purchaser. Letters sent or drafted by Dent between February and June 2011 indicated he believed he was only acting for the vendor. Between the original meeting and the closing date, the vendor and the purchaser agreed to an option to sell the property at a reduced price. Dent prepared documents for the option for the vendor, which was used to ensure that, if the deal did not go through, the vendor would keep the amount paid for the option. Dent did not give legal advice to either the female purchaser or the male purchaser, though he did have option papers signed by them in his office.

In late May or early June 2011, the female purchaser asked Dent to represent her in a separate matter regarding a mortgage on another property owned by another corporation she owned. She arranged on her own that the mortgage to be taken out on this property would be used for the purchase of the property in question, which Dent had no knowledge of at the time. In early June 2011, the female purchaser said something to Dent's assistant that indicated she believed Dent was her lawyer on the purchase of the property in question. Dent insisted she get her own lawyer and referred her to another lawyer.

There was a mortgage on the property, which had to be removed in order for the sale to proceed. The purchaser's lawyer had put Dent on an undertaking that he would not pay out the existing charge to the holding companies until he had a mortgage discharge. Dent breached the undertaking and paid out the charge holders before he had the discharge in hand. The discharge was eventually provided to Dent within four days.

DETERMINATION

The panel dismissed all allegations except for Dent's failure to advise the unrepresented parties he was not protecting their interest.

No notes were taken of the meeting on February 1, 2011. The female purchaser had suffered a concussion recently and had trouble remembering events that took place during the meeting. The panel determined she was not a reliable witness. Dent believed he told the female purchaser to seek counsel at the meeting, but he did not remember his exact words. The panel considered his subsequent actions to determine if he was acting for the purchaser. The female purchaser's funds were put into his trust account, but if she was unrepresented, the funds would sooner or later end up in Dent's account. Dent prepared an option to purchase for the property, but he did so under the instruction of the vendor, and he did not negotiate the option. He gave no legal advice to the purchaser. Dent drafted three different easements, but on the instructions of the vendor. The panel determined there was not enough convincing evidence to show Dent was acting for the purchaser in this matter.

Although Dent asked the purchasers to get their own lawyer, he did not specifically tell them he was not protecting their interests. The panel also considered other factors that happened following the meeting that may have led the purchasers to believe Dent was protecting their interests. The purchasing money went through Dent's account. He prepared an option document and an extension of the option. He also represented the female purchaser for the mortgage of another property, proceeds of which were going to this property. In considering the cumulative effect of Dent's actions, the panel determined that Dent committed professional misconduct in failing to inform the purchasers he was not protecting their interests.

Dent admits he breached the undertaking to the female purchaser's lawyer because he forgot about the undertaking. He believes there was no professional misconduct because there was no loss as a result of the breach. The panel made it clear that forgetting an undertaking and no harm resulting is not a defence to a finding of professional misconduct. The panel considered the facts that there was a secondary undertaking as an alternative protection to the purchaser, that no one complained to the Law Society and that no one had learned of the breach until the Law Society reviewed the file. The breach only existed for six days. The panel declared this an exceptional case and dismissed this allegation.

DISCIPLINARY ACTION

While considering Dent's actions, three main factors stood out. First, no harm was done, and the deal went through. Second, Dent did refer the purchaser to retain her own lawyer, though it was four months later. Third, Dent has changed his practice, and he now has written retainers for all his clients and sends out letters of disengagement. The panel also took into account the fact that Dent has a significant professional conduct record.

The panel ordered that Dent pay:

1. a fine of $5,000; and
2. costs of $5,000.

MAUREEN JOYCE WESLEY

Burnaby, BC

Called to the bar: July 13, 1982

Discipline hearing: October 28, 2014, July 9, 2015 and January 14, 2016

Panel: Herman Van Ommen, QC, Chair, J.S. (Woody) Hayes and Bruce LeRose, QC

Decisions issued: February 17, 2015 (2015 LSBC 05) and February 17, 2016 (2016 LSBC 07)

Counsel: Carolyn Gulabsingh for the Law Society; Maureen Joyce Wesley on her own behalf (facts and determination) and Henry C. Wood, QC (disciplinary action and costs)

FACTS

Maureen Joyce Wesley attended a judicial case conference with her client on October 20, 2011. The client and her husband entered into an interim consent order regarding child support, access and custody. Wesley accepted the responsibility for preparing the interim order. In November 2011, her client had complied with the order, and her husband paid child support as required by the order.

In January 2013, the husband stopped making child support payments. Wesley's client contacted the Family Maintenance Enforcement Program for assistance to compel her husband to make child support payments. The program advised her that the order had not yet been entered. Wesley had not explained to her client that the child support term of the order could not be enforced because it was not entered. She did not advise her client of the risks of not entering the order or the reasons why she had not yet entered the order.

Wesley testified that the husband's counsel did not agree with the form of order she had prepared. Wesley did not believe the entry of the order was pressing as her client's husband was paying child support at the time.

The husband refused to resume payments unless Wesley's client consented to a divorce. However, her client would not consent to the divorce until she was paid the child support payments she was owed. Wesley and the other counsel were not able to resolve this impasse, and the husband fired his counsel in February 2013.

The husband retained new counsel, and Wesley said she attempted to have counsel sign the order. He declined as his client now preferred to attempt to settle the whole matter instead of resolving issues with the interim order. Wesley agreed with that approach and began to work on a tentative form of final order.

Wesley attempted to locate the husband's previous counsel and was finally able to make contact in April 2013. Prior counsel insisted on signing her own form of order, and only when that form of order was rejected by the registry did she ultimately agree to sign the order prepared by Wesley. It was entered on June 25, 2013.

DETERMINATION

Wesley failed for a period of approximately 20 months to take the steps required to have the order entered. When the other counsel did not agree with her form of order, she took no steps to resolve the issue. She did not advise her client of the risks she would face because the order was not entered, nor did she advise her of the costs and steps involved in having a registrar settle the form of order.

When she learned from new counsel that the husband was resiling from his agreement to pay child support, she again failed to take steps to have the order settled and failed to advise her client of the risks. Instead of settling the terms of the order in January 2013, Wesley took months to locate prior counsel and then further months to debate over the form of the order. The order was not entered until June 25, 2013.

Her error allowed her client's husband to be able to refuse to pay child support and demand her client's consent to a divorce, which could both have been avoided if the order was filed. The impasse should never have occurred.

The panel concluded that Wesley's conduct was a culpable neglect of her duties and amounted to professional misconduct.

DISCIPLINARY ACTION

The Law Society sought a fine of $3,000 and costs of $6,456.25. Wesley pointed to her difficult financial situation and suggested that the total financial penalty, including costs, should be $5,000.

The panel considered whether to require Wesley to satisfy a board of examiners that she is competent to practise law, and asked the parties to make submissions in this regard. The Law Society submitted that the misconduct included a competency component and that such an order would both aid in the rehabilitation of Wesley and protection of the public. Counsel for Wesley asserted that this order would be inappropriate, as the misconduct only pertained to one client and one order. He submitted that there must be evidence of incompetence, meaning a pattern of conduct that fails to meet standards, rather than one instance. He noted that Wesley has been practising for more than 33 years without relevant discipline. The panel found insufficient evidence to make the order.

The panel considered the gravity of Wesley's conduct, her experience, her professional conduct record and the impact on the victim. Although Wesley's actions concerned only one order, there were different points in time at which she failed to advise her client adequately of the risks.

The panel ordered that Wesley pay:

1. a fine of $3,000; and
2. costs of $6,876.25.

THOMAS PAUL HARDING

Surrey, BC

Called to the bar: August 31, 1990

Discipline hearing: November 26, 2015

Panel: Thomas Fellhauer, Chair, David Layton and Linda Michaluk

Decision issued: February 23, 2016 (2016 LSBC 09)

Counsel: Alison L. Kirby for the Law Society; Gerald A. Cuttler for Thomas Paul Harding

FACTS

In July 2011, Thomas Paul Harding was retained to act for a wife in family law proceedings. A series of his actions resulted in the failure to provide his client with an acceptable quality of service.

On November 16, 2011, Harding, his client, his client's husband and the opposing counsel attended a judicial case conference before a judge. The husband proposed that he receive weekday access to their child every morning. Harding's client objected, and no agreement was reached. The judge made an interim order that allowed the husband access three weekday mornings before school.

Harding and the opposing counsel began working on finalizing the final consent order but their discussions did not include the subject of weekday morning access to the couple's child. Opposing counsel prepared a draft final order that gave the husband weekday morning access five days a week and sent it to Harding for his comments. Harding failed to provide his client with the draft final order and consented to it when he ought to have known his client did not agree to its term regarding child access.

Harding also failed to pass on a letter from opposing counsel warning his client that she was expected to comply with the final order, and

he did not respond to his client's email asking whether he had heard from opposing counsel about varying the final order. For almost six months, Harding did not admit to his client that he made a mistake when he accepted the draft final order, and he failed to recommend that his client obtain independent legal advice in that regard. He again failed to recommend that she seek independent legal advice in respect of the costs ordered against her in November 2012. Harding stated in an email to his client that the cause of the problem was that opposing counsel had fraudulently altered the term of order after he agreed to it. When his client asked why she should pay court costs for putting the order back the way it should have been, he said he was not responsible for the "fraud" committed against her.

When he wrote to his client about closing the file in July 2013, he failed to remind her that the costs order made against her was still outstanding. He also failed to inform his client in a timely manner about the costs negotiations he engaged in on her behalf with opposing counsel.

Harding did not provide his client with reasonable notice when he withdrew as her lawyer. He could not withdraw prior to the costs hearing because he had not served his client with a notice of intention to withdraw. His only option was to apply to obtain the court's permission to withdraw, but he did not do so.

Harding's client complained to the Law Society and wrote to Harding asking for a refund of all fees, disbursements and compensation for the costs assessed against her. Harding responded that he could not deal with her because she had an outstanding complaint against him with the Law Society. Harding was reminded by the Law Society that he had agreed in an earlier email to pay the costs order made against his client. Harding wrote the wife a cheque on November 20, 2014 for $3,275, the amount of costs opposing counsel had offered to settle for and not the actual amount his client had to pay.

ADMISSION AND DISCIPLINARY ACTION

Harding admitted professional misconduct in four respects: failure to provide his client with an acceptable quality of service; two instances of failure to recommend his client obtain independent legal advice; and failure to provide his client with reasonable notice of withdrawal.

Harding proposed the disciplinary action of a fine of $15,000 and costs of $2,125. The Discipline Committee accepted Harding's admission and proposed disciplinary action and instructed counsel to recommend them to the hearing panel.

The panel noted that Harding's misconduct was serious, multi-faceted and continued over a lengthy period of time. Harding's initial error in not properly reading the final order or informing his client of its contents demonstrated a markedly deficient quality of service. His reaction upon learning that his client did not agree to the term compounded the seriousness of this initial error.

He did not admit his mistake for almost six months. He failed to advise his client to seek independent legal advice, denying her the ability to obtain an unbiased opinion as to who was at fault and should bear the responsibility for paying the costs order.

Harding's baseless allegations that opposing had committed fraud downplayed his own responsibility for the client's predicament and made it less likely that his client would take action contrary to his interests, such as discharging him, reporting him to the Law Society or seeking compensation by threatening or commencing civil proceedings. The allegations were linked to Harding's failure to recommend independent legal advice.

Harding did not pay the costs order until the Law Society reminded him of his initial promise to do so. He did not pay the full amount owed and insisted on withholding $75 on the ground that she rejected his initial advice to accept the offer to settle.

The panel considered Harding's professional conduct record, which contains two conduct reviews and four findings of misconduct. Harding's actions in this case bear similarity to previous incidents of incivility directed at lawyers, failure to provide an acceptable quality of service and failure to recommend independent legal advice.

In addition, the panel considered the significant impact on Harding's client, the advantage gained by Harding, the number of times the conduct occurred, and the range of penalties imposed in similar cases.

The panel concluded that the proposed disciplinary action was on the low end of the appropriate range in all the circumstances. However, recognizing that the role of the hearing panel in cases where an admission was made by the respondent and accepted by the Discipline Committee was to ensure that the proposed action fell within the appropriate range, the panel accepted Harding's proposal of disciplinary action and ordered that he pay:

1. a fine of $15,000; and
2. costs of $2,125.❖

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suggestion, the lawyer implemented a conflicts checks process to prevent future conflicts between a client's corporate and personal interest and sought assistance from a practice advisor. The subcommittee explained to the lawyer the concept of progressive discipline, and advised that a citation may be issued in respect of any further misconduct. (CR 2016-04) ❖

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