



# British Columbia Law Institute

## A Report on Year Four

### About the British Columbia Law Institute

#### Our Mission

The British Columbia Law Institute was created in January 1997 by incorporation under the Provincial *Society Act*. The purposes of the Institute are to work toward the improvement and modernization of the law and the administration of, and access to, justice. It does this through researching the law and developing recommendations about the ways in which the law of the province should be changed.

### BRITISH COLUMBIA LAW INSTITUTE

#### Constitution

2. The purposes of the society are to:
- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
  - (b) promote improvement of the administration of justice and respect for the rule of law, and
  - (c) promote and carry out scholarly legal research.



**Gregory K. Steele**  
Institute Chair

#### Highlights: 2000/2001

The past year saw the Institute continue its growth and development as a law reform body. This is reflected in a number of developments that took place or are in progress at the time this Report is published. These include

- the continuing development of the Institute's program of law reform with a major "outreach" initiative directed to a wide range of bodies and community groups seeking views on the kinds of issues the Institute should be addressing.
- the addition of new projects to the Institute's program and substantial progress on existing projects.
- the creation of a second full time staff lawyer position whose responsibilities will focus primarily on project work.
- the continuation of formal fundraising activities to help the Institute secure its financial sustainability.

Our relationship with other organizations having similar aims continues to strengthen and prosper. These include the Uniform Law Conference of Canada, the Federation of Law Reform Agencies of Canada, the Law Commission of Canada and the Canadian Conference on Personal Property Security Law. Institute representatives had a successful preliminary meeting with the Hon. Geoff Plant, Q.C. shortly after his appointment as Attorney General. We look forward to a close and productive working relationship with his Ministry.

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## BRITISH COLUMBIA LAW INSTITUTE

### Bylaws

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4. (1) The society shall consist of 14 members as follows:
- (a) two persons appointed by the Attorney General;
  - (b) two persons appointed by the executive committee of the Law Society of British Columbia;
  - (c) two persons appointed by the executive committee of the British Columbia Branch of the Canadian Bar Association;
  - (d) one person appointed by the Dean of the Faculty of Law, University of British Columbia;
  - (e) one person appointed by the Dean of the Faculty of Law, University of Victoria;
  - (f) five persons appointed by the persons appointed under clauses (a) to (e);
  - (g) one person appointed by the persons appointed under clauses (a) to (f).
4. (2) The applicants for incorporation of the society are deemed to be persons appointed under Bylaw 4(1)(f).
- (3) Membership in the society is for a term of 5 years or until successors are appointed, and a member may be reappointed.

...

25. The directors of the Society shall be the members of the Society from time to time and
- (a) every person who is appointed as a member under Bylaw 4(1) or is deemed to be appointed as a member under Bylaw 4(2) becomes a director at the time the person is appointed, and
  - (b) every person who becomes a director, ceases to be a director at the time the person ceases to be a member

## How to Find Us

British Columbia Law Institute

Mailing Address  
1822 East Mall  
The University of British Columbia  
Vancouver, BC V6T 1Z1

Voice: (604) 822-0142

E-mail: [bcli@bcli.org](mailto:bcli@bcli.org)

Geographical Address  
6050 Military Road  
The University of British Columbia  
Vancouver, BC V6T 1Z1

Fax: (604) 822-0144

WWW: <http://www.bcli.org>

The Institute's elected executive members are:

**Gregory Steele** - Chair  
**Gordon Turriff** - Secretary

**Ann McLean** - Vice-chair  
**Prof. James MacIntyre, Q.C.** - Treasurer

**Arthur L. Close, Q.C.** is Executive Director.

**Thomas G. Anderson** is Program Director



## Premises

The Institute's offices are located in the Law Annex building that is adjacent to the main Law School (Curtis) Building at the University of British Columbia. Changes in the internal configuration of our working space enabled us to set up the large boardroom table that the Institute inherited from the Law Reform Commission. This enables us to host meetings of up to 20 individuals. More and more, our UBC offices are becoming the focal point of our committee-based activity.



## Fundraising

The main source of operational funding for the Institute has been a grant from the British Columbia Law Foundation. The Institute has also received, from several other sources, grants that assist the Institute to carry out particular projects. In addition to grants, project work has also been funded through contractual arrangements with the provincial government.

Relying as heavily as we do on project funding places severe limitations on the kinds of projects the Institute can undertake. It is preferable if programming decisions are not driven by the question of whether a financial sponsor for a project can be found. The proper criteria are whether a project should be undertaken and whether we are the appropriate body to carry it out.

Our response to the need to expand our funding base was a formal fundraising campaign carried out in the autumn of 1999. The primary focus of our fundraising activity was the legal profession and its institutions and the judiciary. We were encouraged by the results of our fundraising venture and continued it during the past year. Those who responded did so generously and the amounts received will play an important part in carrying forward our program. At the same time, we must be realistic in regarding our fundraising initiatives as a first step on a long road toward financial sustainability.

## Developing and Carrying out the Program

As we work toward financial sustainability, the Institute is emerging as a law reform body capable of taking on a wider range of projects and that is able to respond more flexibly to concerns and project suggestions brought to its attention.

During the past year the Institute developed and carried out a structured and wide-ranging process of consultation in relation to the contents of its program. We canvassed the legal profession, the judiciary and a wide range of community groups and organizations that are interested in the law. Materials were sent to over 1,100 persons and groups. We are still in the process of considering and evaluating the response it generated.

Many of our projects are carried out relying largely on the Institute's own internal resources including the work of Board Members, the Executive Director, the Staff Lawyers and a Research Assistant. Some of these have a "law reform" flavour and normally result in recommendations for changes in the law. Past Reports in this category include our Reports on the Recognition of Spousal and Family Status, the Enforcement of Non-money Judgements from Outside the Province, Proposals for a *Contract Law Reform Act* and The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings.

A second category of internal document focuses mainly on the creation of information resources to improve access to the law or to provide an information-base from which further work can be done. Past projects which fall into this category include the *Builders Lien Act* materials referred to elsewhere in this Report and our Report on Gender-Free Legal Writing. A new project of this kind concerns pension division on marriage breakdown.

An alternative approach to program work is through the use of external Project Committees. These Committees normally work more or less independently of the Institute's Board although each Committee normally has two or more Board Members as part of its own membership. Committee members serve voluntarily with the assistance of a paid reporter. Several projects are being carried forward through such committees.

## Background to the Creation of the Institute

The Institute was created in response to a decision by the Ministry of Attorney General to withdraw program funding from the Law Reform Commission of British Columbia after the end of March 1997. The disappearance of the Commission, without replacement, had the potential to create a serious vacuum in the legal resources available to the people of British Columbia and carried a significant risk that the tangible and intellectual assets of the Commission would become dissipated and irretrievably lost.

After some consultation to test the support for maintaining an institutional law reform presence in British Columbia, the founding members incorporated the Institute as a successor body to the Commission. They had two hopes. The first was that the Ministry of Attorney General would permit a "rollover" of the assets and program of the Commission into this new body. The second was that sufficient financial support could be found to enable the Institute to continue, at least in part, the work of the Commission and to carry out a useful law reform program. Both of these hopes have been realized.

## About Our Predecessor, The Law Reform Commission of British Columbia

The Law Reform Commission was created in 1969 by an act of the Provincial Legislature and began its operations in 1970. The Commission ceased operations at the end of March 1997 following a decision by the Provincial Government to discontinue funding it.

Over the 27 years of its existence the Commission submitted more than 140 reports on a wide variety of topics.

Most of the Commission's work remains accessible. Printed copies of many of its reports and other documents are available through the Institute.

## Managing the Legacy of the Law Reform Commission

The Institute has concluded an agreement with the provincial government concerning the legacy of the former Law Reform Commission. There are two aspects to this.

First, the tangible assets of the Law Reform Commission have been transferred to the Institute for a token amount.

Second, the Provincial Government has granted a licence to the Institute to deal with the intellectual property left by the Law Reform Commission, including the contents of its reports and working papers. The Institute is thus enabled to distribute, reissue and sublicense these materials.

Our principal goal for the publications of the Law Reform Commission is to ensure that this body of work continues to remain accessible to the public. Elsewhere in this Report, we describe the steps the Institute has taken to ensure that the work of the Law Reform Commission is accessible through the Internet. The Institute also has an inventory of printed reports and documents which are available for purchase at a nominal charge. Ordering information may be found at our website.

<http://www.bcli.org>

## The Institute and the Internet

The Institute is dedicated to the use of the Internet as a medium for gathering and disseminating relevant legal information. The Institute maintains a site on the World Wide Web (WWW) at the following address:

<http://www.bcli.org>

There are a number of features at the website.

## Active Projects

### Questions and Answers About Pension Division on Marriage Breakdown

In March, 1996, the British Columbia Law Reform Commission published a book canvassing the operation of the British Columbia *Family Relations Act* and the *Pension Benefits Standards Act*, as these statutes apply when a marriage breaks down and one of the assets to be divided is a pension. This publication proved to be immensely helpful to lawyers, pension plans and actuaries who dealt with these issues.

Since publication of the first edition, there were a number of developments that made it desirable to publish a revised second edition:

- (1) Substantial amendments were made to the legislation in 1997 by the *Family Relations Amendment Act, 1997*.
- (2) The 1996 statutory revision of B.C. legislation resulted in all of the provisions relating to pension division being renumbered.
- (3) The pension division legislation operates against the legal background created by the British Columbia *Pension Benefits Standards Act*, which regulates pension plans in the province. The PBSA was substantially revised in 1999.
- (4) The legislation governing public sector pension plans was thoroughly revised by the *Public Sector Pension Plans Act, 1999*, and the changes there also affect how Part 6 of the *Family Relations Act* operates in connection with those plans.
- (5) In both federal and provincial legislation, the definition of who qualifies as a "spouse" has been completely revised to include (for most purposes) unmarried persons in opposite sex and same sex relationships. In B.C. this has been carried forward in the *Definition of Spouse Amendment Act, 1999*, the *Definition of Spouse Amendment Act, 2000*, the *Pension Benefits Standards Amendment Act, 1999* and the *Public Sector Pension Plans Act, 1999*. At the

federal level, the relevant legislation is the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, which recognizes "common law partners" (unmarried persons in same and opposite sex relationships).

(6) Since the first edition was published, we have had an additional five years worth of experience under the British Columbia legislation, generating a more sophisticated understanding of its operation as well as knowledge and information respecting issues in its application that had not been foreseen in 1996.

The British Columbia Law Institute, therefore, undertook as a project the revision and updating of the Q&A Publication and the other supporting materials to take into account these far-reaching developments.

The materials are in the form of questions and answers. They are based upon questions that have arisen since Part 6 of the *Family Relations Act* was introduced July 1, 1995, and that were directed to the Law Reform Commission, the British Columbia Law Institute, the Ministry of Attorney General and the Pension Standards Branch. Since it is likely that a question raised by one person will occur to others, it was concluded that this resource should be made available generally.

The revised Q&A was released in March 2001. A printed version is available from the Institute. It may also be accessed over the Internet through the Institute's website.

The Institute would like to acknowledge the financial support of the Ministry of Attorney General, the Pension Standards Branch, the Ministry of Labour and the Law Foundation in publishing the revised edition of Questions and Answers about Pension Division on Marriage Breakdown in British Columbia. Also available from



the Institute is a CD ROM containing the document in printable formats and the full Internet version for off-line browsing.

## Updating the *Limitation Act*

The *Limitation Act* governs the law on limitation of actions. The Act sets out time periods within which civil legal proceedings must be commenced. If legal proceedings are not commenced within the limitation period applicable to the particular claim, a defendant can raise the defence that the claim is statute barred. This defence results in immunity from liability for the defendant, despite the merits of the claim. The objective of limitations law is to ensure the timely resolution of legal proceedings, while at the same time balancing the interests of plaintiffs with those of defendants and society.

In 1975 a new and modern *Limitation Act* was enacted. That Act was based on recommendations made by the British Columbia Law Reform Commission in a Report submitted in 1974 and it closely paralleled draft legislation that formed part of the Law Reform Commission's Report. There have been a number of developments since 1975. A variety of amendments have been introduced to the Act, largely in response to the perceived needs of particular groups. These include an extension of the limitation period for claims involving urea formaldehyde foam insulation; an extension of the limitation period for claims based on sexual misconduct; and a shortening of the ultimate limitation period for claims against doctors, dentists and hospitals. The ultimate limitation period was the subject matter of a further Law Reform Commission Report issued in 1990 (Report no. 112).

A consideration of the 1975 legislation and subsequent developments suggests that certain specific aspects of its operation should be re-examined:

1. The 1975 legislation did not alter the common law rules concerning when a cause of action "accrues" - the event that triggers the running of time in many cases. In the result, the

With the assistance of the Pension Standards Branch, copies of the CD ROM were distributed to a large number of pension plans in the province.

running of time in relation to "latent" damage claims may be postponed for a lengthy period after the actual breach of duty on which the claim is based. It has been argued that this works a particular hardship on design professionals, contractors and others who work in the construction industry. The accrual rules in relation to obligations that are payable on demand also might be reconsidered.

2. There seems to be a general agreement that the 30 year ultimate limitation period as a basic default rule is too long and this is what has led the legislature in shortening it in certain cases. But this gives the appearance of certain professions and institutions being singled out for particularly favourable treatment under the law and the position of other equally worthy professions and bodies being neglected. Moreover, the deviations from the basic ultimate limitation period has not been uniform with the period being reduced to 10 years in one case and to 6 years in others.
3. The relationship between the ultimate limitation periods and the "basic" limitation periods is obscure. Legislation recently enacted in Alberta has attempted to clarify how the two groups of limitation periods work together. This innovation might usefully be considered for possible adoption in British Columbia.

In 1975 British Columbia was the first jurisdiction in Canada to enact modern limitations legislation. We set the pace and were able to point with pride to our success in modernizing this aspect of the law. But what was state-of-the-art legislation 25 years ago cannot safely be

## The Institute and the Internet *continued*

### *Institutional and Project Information*

Visitors to our website will find comprehensive information respecting the Institute and its structure, and up-to-date information about the status of its ongoing projects.

### *The Law Reform Database*

This is a legal resource unique in the world. It is, in essence, a computerized index to almost 7,000 reports, consultation documents and other publications of law reform agencies worldwide, and we continue to add to the database.

### *British Columbia Law Reform Commission Publications On-line*

The Institute has carried forward the work of the Law Reform Commission in making the publications of that body available through the Internet. During the past year, we completed a project to make all of the final reports of the Law Reform Commission accessible. These reports are now available through the Internet at our website and may be browsed on-line or downloaded in either of the two most popular word processing formats.

The next phase of this task will be to bring selected study papers and consultation papers into the website for access.

### *Division of Pensions on Marriage Breakdown*

This Internet resource provides information on the operation of British Columbia's legislation in relation to pension division on divorce. The original version was created by the Law Reform Commission, but in the past year a wholly new and revised version was issued by the Institute. It is described in greater detail in the body of this Annual Report.

## The Institute and the Internet *continued*

### **Builders Lien Act Materials**

The enactment in 1997 of the *Builders Lien Act* was the culmination of 25 years of work toward the creation of new and modern legislation in this area. The background to the Act included a report issued by the Law Reform Commission in 1972. We were therefore pleased to respond when the Ministry of Employment and Investment invited the Institute to prepare some resource information that would assist users in coming to grips with this new legislation. Pursuant to this arrangement, a printed publication and an Internet website were developed.

At the heart of these materials is a document entitled "Questions and Answers on the New *Builders Lien Act*", which has been published both electronically and in printed format. The printed version, over 150 pages, may be ordered through the Ministry.

The electronic version was heavily coded for easy Internet access and allows the user to move seamlessly between various parts of the publication and the legislation itself. It can be reached through a link at the Institute's website.

<http://www.bcli.org>

### **Limitation Act Case Finder**

The Institute supports a database of cases decided under the *Limitation Act*. The database may be searched interactively through queries based on section numbers or keywords. The Institute continues to maintain this site (originally created by the Law Reform Commission) but has not had the resources to update it to reflect recent legislative developments and case law.

regarded as adequately meeting the needs of British Columbians today. The social and economic background against which limitation laws must operate has changed. We have experience that demonstrates the need for improvement in the legislation. We also have the benefit of recent thinking by law reform and other bodies in relation to limitations legislation.

While this suggests that a major review of the British Columbia *Limitation Act* would

be desirable, the most critical issues could be addressed in a narrower and more focussed study confined to the matters outlined above. It is this narrower study that constitutes the Institute's project on the *Limitation Act*, which was added to the Institute's program during the past year. It is being carried out internally through a Project Committee composed of Board members. The Reporter to the Committee is our Staff Lawyer, Caroline Carter.

## Civil Enforcement of Judgments

Enforcement of judgments is an essential part of our civil justice scheme. Confidence in the justice system would be seriously impaired if courts could resolve claims, but the machinery to enforce their judgments is defective. The need to modernize and update the laws respecting the enforcement of civil judgments has been recognized in a number of jurisdictions. In this new project the Institute will examine and make recommendations for improving the laws of British Columbia respecting the enforcement of judgments and participate in work of the Uniform Law Conference of Canada that is directed toward the same goal.

Most of the province's statute law respecting the enforcement of judgements is to be found in the *Court Order Enforcement Act*. This Act has gone virtually unchanged for many years, and the more important provisions respecting execution against personal property have their roots in English legislation enacted over 160 years ago. Throughout, the statute relies on antiquated legal concepts and serves neither debtors nor creditors particularly well.

To the extent that improvements have been introduced in recent years, they have focused on two areas. The first has been to introduce much needed changes respecting the entitlement of judgment debtors to exemptions from execution. The other change was more controversial and involved the "privatization" of part of the execution process, moving the duties in relation to the seizure and sale of property from the sheriff's office to private bailiffs.

There are a number of areas to be examined:

- The law of civil enforcement needs to be recast into legal concepts that are accessible to modern reader. The priority of execution creditors should be rationalized vis-a-vis, and perhaps assimilated to, creditors whose priority is governed by the *Personal Property Security Act*.
- Concerns have been expressed that the private bailiff system lacks accountability for the way in which executions are conducted, and that debtors have few safeguards against seizures that are excessive or inappropriately timed.
- So far as the law permits execution against shares in private corporations, it does not provide for a fair balance among the interests of creditors and of other shareholders in the corporation.
- Proceedings for the attachment of debts (garnishment) are generally cumbersome. The lack of any procedure to attach a recurring debt with a single process, and to attach debts that have not yet accrued due is a serious shortcoming.
- The procedures for execution against land are antiquated.
- The procedures for the seizure of publically traded shares and securities are unworkable and are tied to concepts of share ownership that have been obsolete for over 60 years. Moreover, this process is not able to cope with indirect holdings of shares such as where they form part of a brokerage

account or are held in a securities depository.

- Not all assets are exigible. Some debtors are allowed to shelter assets where this cannot be justified by an exemptions policy.

This list is far from exhaustive, but it does give some flavour of what needs to be done.

## Project on Modernizing the *Trustee Act*

The ultimate goal of this project is not merely to redraft the Act in modern language but to make it serve the needs of contemporary trusteeship. Many features of the Act are out of step with present-day business practice and some are significant obstacles to efficient trust administration. Further, the *Trustee Act* has been a catchall over the years for many kinds of provisions that do not necessarily concern trusts and should now be more properly located in the *Estate Administration Act*, the *Property Law Act* and possibly other statutes.

In previous years the Project Committee issued final Reports on three topics. The first of these Reports, titled “Trustee Investment Powers,” contained recommendations designed to free trustees from the “legal list” currently contained in the *Trustee Act* which restricts investments to those enumerated in the list. The second Report was “Statutory Remuneration of Trustees and Trustees’ Accounts,” which set out recommendations that address the number of issues surrounding those topics. The third concerned the delegation of trustee powers and set out recommendations to define and rationalize the rules that determine the extent to which the duties of a trustee may properly be delegated to others, including the possibility of using a power of attorney for this purpose.

Later this year, the Committee will be issuing its Report on Total Return Investing by Trustees. The Report addresses the problem that the traditional distinction between the income of a trust and its capital growth is no longer consistent with

As this project moves forward we expect to draw on work done in Alberta, Newfoundland and New Brunswick, as well as a number of earlier reports of the Law Reform Commission. It is being carried out with an internal Project Committee and a staff lawyer as Reporter to the Committee. We are fortunate that Lyman Robinson, Q.C. has agreed to act as Project Director of this initiative.

modern investment practice. The Committee recommends that an alternative strategy should be available to settlors and trustees for the more rational and effective management of trust assets.

A further topic examined by the Project Committee was that of exculpation clauses. These are provisions inserted in a trust instrument designed to insulate the trustee from liability for misconduct in the management of the trust. Concern has been expressed that these clauses go much further than is required for the legitimate protection of trustees. In October 2000 the Project Committee distributed a consultation paper with tentative proposals describing its view of the proper effect and ambit of these clauses. It is in the process of considering the responses generated by these proposals.

The first stages of this project were devoted to particular topics seen as requiring the most urgent attention. As these have been dealt with, the Committee’s attention has been increasingly focused on the central task of the project – the development of a new *Trustee Act*. During the past year the Committee has considered the best strategy for approaching this challenging task. The Committee expects to be drawing heavily on the draft act prepared by the Law Reform of Ontario on the law of trusts, as well as recent English legislation and the *Uniform Trust Code* recently settled by the National Conference of Commissioners on Uniform State Laws.

The members of the Project Committee are:

## Publication List

Here is a list of publications of the British Columbia Law Institute since its creation. Each can be purchased from the Institute for the price noted along with a charge for postage and handling.

### Reports

1. The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings \$10
2. Gender-Free Legal Writing \$10
3. A Report on Year One (1997-1998) Annual Report \$10
4. Proposals for a *Contract Law Reform Act* \$15
5. Recognition of Spousal and Family Status \$25
6. Trustee Investment Powers \$15
7. Statutory Remuneration of Trustees and Trustees’ Accounts \$15
8. Enforcement of Non-money Judgments From Outside the Province \$15
9. A Report on Year Two (1998-1999) Annual Report \$10
10. Interim Report on New Home Warranties \$15
11. Statutory Powers of Delegation by Trustees \$15
12. A Report on Year Three (1999-2000) Annual Report \$10
13. Pension Division on Marriage Breakdown (2001 Revision) \$35
14. Report on Civil Remedies for Sexual Assault \$35

### Other Publications

1. Consultation Paper on Trustee Investment Powers \$10
2. Consultation Paper on Trustee Remuneration and Trustees’ Accounts \$10
3. Working Paper on Civil Remedies for Sexual Assault \$35
4. Consultation Paper on Statutory Powers of Delegation by Trustees \$10
5. Consultation Paper on Total Return Investing by Trustees \$10
6. Consultation Paper on Exculpation Clauses in Trust Instruments \$10
7. Consultation Paper on Private Care Arrangements Between Older Adults and Friends or Family Members \$10

Institute publications may be ordered by mail, telephone or fax, or through the Institute’s website.



## The Institute and the Uniform Law Conference

The Uniform Law Conference of Canada is an inter-provincial organization created for the purpose of promoting uniformity of legislation among the Canadian territories and provinces. It is now in its 83<sup>rd</sup> year of operation and a significant number of British Columbia statutes are based on Uniform Acts promulgated by the Conference.

Two people attached to the Institute participate actively in the work of the Uniform Law Conference. Institute Chair, Gregory Steele, is a British Columbia delegate to the Conference, a member of the Civil Section Steering Committee and participates in a number of the ULCC working groups.

The Institute's Executive Director, Arthur L. Close, Q.C. has, from 1998 to 2000, served as Chair of the Civil Law Section of the Conference. As such, he has been responsible for

- coordinating the work of the Section
- chairing the Steering Committee
- developing new uniform law projects
- setting the agenda for and ultimately chairing the meeting of the Civil Section in Winnipeg in August 1999

He has also assumed special responsibility for the Conference's commercial law initiative.

In August 2001 Arthur was elected President of the Conference.

In the past year, BCLI members assisted the ULCC by participating in working groups on:

- *Uniform Foreign Judgments Act*
- Uniform legislation on unclaimed intangible property

Dr. Donovan Waters, Q.C. (Chair)  
Prof. James MacIntyre, Q.C.  
Margaret Mason  
Kathleen Cunningham  
Prof. Keith Farquhar

Scott Sweatman  
Arthur L. Close, Q.C.

Gregory R. Blue is Reporter to the Committee.

## Civil Remedies for Sexual Assault

Civil claims based on sexual harm are a relatively new phenomenon. Their numbers appear to be growing in proportion to society's awareness of the frequency and harms of sexual assault. In August 1997, in response to concerns that a coherent set of legal principles has yet to emerge in this area, the British Columbia Law Institute created the Project Committee on Civil Remedies for Sexual Assault. In June 2001, after almost 4 years of dedicated work, the Committee submitted its final Report.

Civil actions for damages are one means by which survivors may seek redress after they have been sexually assaulted. Other remedies available include criminal proceedings, criminal injuries compensation, human rights complaints, negotiated or unilateral compensation packages and public and private inquiries. The Report assumes that actions for damages are an important means of pursuing redress for sexual assault. The courts play a leading role in establishing how our society will compensate claims of sexual assault, and in framing the issues, developing compensatory principles and influencing other proceedings for dealing with sexual assault.

Since this is a relatively new area of the law, the Report analyzes civil sexual assault cases with a view to determining whether reforms to the civil justice system are required to meet the needs of plaintiffs, defendants and society. It reviews the law relating to liability for sexual assault as background to a detailed discussion of issues relating to damages, and concludes with an examination of several important procedural matters. Some issues are specific to the context of sexual assault cases. Other issues may apply more broadly, but have particular significance in sexual assault cases.

The principles underlying the Report are as follows.

1. Sexual assault is a serious matter, resulting in inherent harm to survivors. This harm has not yet been fully recognized by the civil justice system.
2. The civil justice system, while not perfect, is an important process for recognizing the serious nature of sexual assault, awarding compensation to survivors, changing the behaviour of and deterring defendants and establishing benchmarks for use in other proceedings.
3. It is a reasonable expectation for survivors of sexual assault to look to the civil courts as a means of redress.
4. While recognizing that no amount of money can provide complete restitution, the general purpose of the civil damages system is to attempt as much as possible to place the plaintiff in the state she or he was in prior to the wrongful conduct. The challenge in sexual assault cases is to recognize and quantify the survivor's inherent harm and consequent injuries into a damage award which reflects that restorative principle.
5. Although sexual assault cases raise some issues which are unique, damage awards for sexual assault should be, as far as possible, in line with awards made in other tort cases.
6. There must be attention to diversity in the circumstances and needs of survivors, and to differing forms of harm which flow from sexual assault.
7. Sexual assault is a practice which is not neutral in terms of the gender, race, culture, class, abilities, age and sexual identity of survivors. As such, principles of equality must be



considered in assessing what is fair in compensating survivors.

The Committee's Report contains over 30 recommendations. Since most of the law in this area arises out of decided cases, the majority of the recommendations are directed to the courts. The Committee urges that, subject to the recognized limits on judicial "law-making," future decisions touching on particular issues should develop in ways that reflect its analysis. Other recommendations are directed to the Provincial Government and Legislature and to other bodies for action within their particular spheres of competence.

In the view of the Institute's Board, the excellence of the Report lies in its summary of this very complex area of the law and of

## The Law and the Elderly

When the Institute's program of law reform was initially developed, it identified three general categories where its attention would be focused. One of these was "Family Law and the Protection of Vulnerable Persons." A project addressing legal issues that particularly affect elderly persons falls into this category and was added to our program last year.

To assist the Institute in carrying out this project it created the Project Committee on Legal Issues Affecting Seniors. Its members are:

Professor Emeritus Donald MacDougall, UBC Faculty of Law (Chair)  
Charmaine Spencer - SFU Gerontology Centre  
Marlene Scott, Q.C. - Barrister and Solicitor, McQuarrie Hunter  
Gregory Steele - Barrister and Solicitor, British Columbia Law Institute  
Noreen Brox - Barrister and Solicitor, McCarthy Téroult  
Pearl McKenzie - Seniors' Advocate  
Gordon Turriff - Barrister and Solicitor, British Columbia Law Institute  
Carol Ward-Hall - Executive Director, B.C. Coalition to Eliminate Abuse of Seniors

The Reporter to the Committee is Institute Staff Lawyer Margaret Hall.

the fundamental underlying issues, as well as collecting together a full analysis of the authorities. The Board unanimously commends the Committee's work as a valuable resource for those who must deal with these issues on a regular basis.

Members of the Project Committee on Civil Remedies for Sexual Assault at the time the Report was settled were:

Prof. John McLaren (Chair)  
Professor Christine Boyle  
Megan Ellis  
Etel Swedahl  
Dr. Roy O'Shaughnessy  
Arthur Close, Q.C.

Jennifer Koshan was the Researcher/Reporter for the Committee.

In the course of the project we expect to examine a number of issues, but the one which will provide a point of departure concerns certain kinds of family agreements and their potential for financial abuse of elderly persons.

There is an expectation that children will support and maintain their aged parents. This expectation normally reflects the natural love and affection of children for their parents and in many societies this is the only basis on which maintenance and support rests.

In some places, (such as British Columbia) the law has evolved further and it is possible to identify an additional basis that transforms what is essentially a moral obligation into a legal one. This is a contractual obligation arising under an agreement under which some or all of the parent's property is conveyed to the child in return for a promise of "lifetime" support or care. As our society ages, it may be expected that issues arising in this context will become increasingly more common, making it all the more important that the legal rules that apply are functional and well-defined.

The contractual obligation operates most unevenly. Arrangements where a parent transfers property to a child with the

## The Institute and Other Law Reform Bodies

A priority continues to be establishing and maintaining links with other law reform bodies. Participation in the world wide "community" of law reform bodies is important. It ensures that the work of the Institute is widely exposed and that the Institute is kept up-to-date with the work of other bodies through arrangements for the exchange of documents. Receiving reports and documents from other law reform bodies enables us to keep the Law Reform Database up-to-date.

We also maintain special links with our Canadian counterparts. This is done through active participation in the Federation of Law Reform Agencies of Canada, an umbrella organization covering groups like the Institute, and by participating in *ad hoc* gatherings of Canadian law reformers.

A special relationship is evolving with the Law Commission of Canada. We were honoured in the past year by a visit from its President, Nathalie DesRosiers.

The Institute's Executive Director has also been active in working with the LCC toward the development of a project on "Federal Security Interests." This project forms part of the commercial law work of the Uniform Law Conference.

## Law Reform Document Photocopy Service

The British Columbia Law Institute provides a service under which documents in our collection can be made available to users who would not otherwise have access to them.

### Policy on copying and copyright

The British Columbia Law Institute is concerned about copyright in law reform materials. While some copyright holders derive a significant portion of their revenue from the sale of their publications, others are less concerned with copying and reprinting so long as appropriate credit is given. The general view seems to be that these materials deserve wide dissemination and that it is in the general interest of the community of law reform bodies, worldwide, to facilitate this. Bearing this in mind, we have developed a "fair use" policy concerning the extent to which requests for copies will be accommodated:

- Rule 1 The portions of a publication that may be copied is not limited where:
- (a) the publication is out-of-print, or
  - (b) the body that issued the publication has ceased operations.
- Rule 2 For the purposes of Rule 10
- (a) a publication that is more than 3 years old and which was created for consultation purposes, or
  - (b) any other publication that is more than 10 years old is deemed to be out-of-print.
- Rule 3 For publications not covered by rule 1, copying would be limited to:
- (a) a summary of recommendations (including draft legislation), executive summary or the like,
  - (b) a single chapter comprising no more than 20% of the publication,
  - (c) the table of contents of the publication, and
  - (d) pages containing the correct title, publication identifiers and institutional information concerning the publishing body.

expectation of living with the child for some indefinite period are becoming more common. Unfortunately, family arrangements are often informal and supported by little or no documentation. Parent and child often have different expectations concerning these arrangements which, for that reason, often end unhappily.

Often these kinds of family transactions represent a divestment of control over property by a parent, who places a great deal of faith in the child.

Because of the informality of these types of family transactions, the result may be that the property transfer is effective, but the other obligations are not legally enforceable against the child. Even where an obligation can be identified, its nature and extent may be unclear.

The initial project of the Committee is devoted to these issues and is titled "Private Care Agreements Between Older Adults and Friends or Family Members." The project will address the uncertainty

## Project on Shell Companies: Lifting the Corporate Veil

In law, a company has its own legal identity, separate from the company's employees, officers, directors and shareholders. These individuals are not liable for the debts or obligations of the company. As a general rule this is a good policy but occasionally it may allow the company to be used as a vehicle for abusive conduct.

Sometimes the law will ignore the separate existence of the company and hold parent companies, shareholders or officers liable for acts or omissions of the offending corporation. The courts, for example, may impose liability where the company is clearly being used as a vehicle for fraud. In other instances a statute may impose liability upon an officer or director of a company. The finding of liability behind the corporate structure is sometimes referred to as "lifting the corporate veil."

The response by the courts and the legislature to abuse of the corporate structure has always been on an *ad hoc*

and potential unfairness that surrounds these contractual obligations, and will:

- Examine the legal context in which contractual arrangements operate with particular emphasis on informal arrangements and their enforcement.
- Gather anecdotal information concerning the extent to which such arrangements are used in the community.
- Gather anecdotal information concerning the extent to which the legitimate expectations of the elderly under such arrangements are not met, including instances of financial abuse.
- Identify the principles that should govern the enforceability of such arrangements.
- Consider the need for a legislative restatement of these principles or other legislation to enhance or regulate the enforcement of informal arrangements.

In July 2001 the Project Committee distributed a consultation paper on this topic and will be engaging in further consultation over the next months.

basis, driven by the particular circumstances of each problem. There has developed no unified theory to provide guidance on when it is appropriate to find liability behind the corporate structure or, where it is appropriate to lift the corporate veil, the legal theory on which liability should be imposed.

While this project has its roots in our work on new home warranties, a separate project on lifting the corporate veil was formally added to our program late in 1999. It was our hope to review this area of law with a view to developing and restating a rational set of principles along with recommendations for legislative change if appropriate. Developing terms of reference for, and defining the appropriate scope of, a study of this kind has proven to be a much greater challenge than we had first expected. We continue to consult and examine background materials to sharpen our views on these questions and hope to make significant progress in the coming year.

## Healthcare Decisions and End-of-Life Issues

Early this year, at the invitation of the Public Guardian and Trustee (PGT) the British Columbia Law Institute embarked on the development of terms of reference for a possible study on healthcare decisions and end-of-life issues. It had been noted that with the implementation of the Adult Guardianship Legislation, and in particular the *Health Care (Consent) and Care Facility (Admission) Act*, issues have arisen where there is not a common understanding of the provisions in the legislation, and which are not easily resolved with the development of policies and procedures.

To assist in carrying out this task the Institute engaged Professor Stephan

Salzberg of the Faculty of Law, University of British Columbia. In carrying out his task Professor Salzberg consulted with officials of the PGT and others concerned with the administration of the relevant legislation.

In June Professor Salzberg presented to the Institute's Board of Directors a Report setting out the proposed terms of reference he had developed for this initiative. The Board met on two separate occasions to discuss Professor Salzberg's Report, and subsequently submitted it without change to the PGT. The Report is not, at this stage, a public document.

## Membership

The bylaws of the Institute provide for fourteen members. Eight of these members are appointed by stakeholder groups while the remainder are "members-at-large." One of the member at large positions is reserved for a person without legal training or experience.

As of July 1, 2001 our members are

**Thomas G. Anderson**

Member at large

**Prof. Keith Farquhar**

U.B.C. Faculty of Law, Dean's nominee

**Prof. Hester Lessard**

U. Vic Faculty of Law, Dean's nominee

**Arthur L. Close, Q.C.**

B.C. Law Institute, Member at large

**Sholto Heberton, Q.C.**

McCarthy Tétrault, Law Society nominee

**Ravi R. Hira, Q.C.**

Watson Goepel Maledy, A.G. nominee

**Prof. James MacIntyre, Q.C.**

U.B.C., Law Society nominee

**Ann McLean**

Min. of A.G., CBA (BC) nominee

**Kim Thorau**

Member at large

**Douglas Robinson, Q.C.**

Lawson Lundell & Co., CBA (BC) nominee

**Gregory Steele**

Steele Urquhart Payne, Member at large

**Etel R. Swedahl**

Swedahl McPherson, A.G. nominee

**Trudi Brown, Q.C.**

Brown Henderson, Member at large

**Gordon Turriff**

Stikeman Elliott, Member at large

This list reflects two changes from the previous year. We are pleased to welcome two new members. Kim Thorau joins us as the non-lawyer member at large. Prof. Keith Farquhar is the new nominee of the Dean of the U.B.C. Faculty of Law. He replaces Prof. Christine Boyle whom we wish particularly to thank for the time she devoted and energy she brought to the work of the Institute.

## Our Friends and Supporters

Our work to date would not have been possible but for the generous support of our friends, supporters and volunteers.

The contribution of the Law Foundation is particularly noteworthy. Apart from financial support, the Foundation has been a welcome source of advice and assist-

**Law Reform Document Photocopy Service**  
*continued*

### *Publications not available*

The British Columbia Law Institute, and its predecessor - the Law Reform Commission of British Columbia - makes every effort to obtain an original printed copy of a publication from other law reform agencies. In some cases, however, an original document could not be supplied, and so the Institute only has a photocopy of key elements of the publication: usually a title page, contents pages and recommendations. For this, and other reasons, the Institute is not able to provide copies of all publications in the Law Reform Database. A list of the categories of such publications may be found at our website.

### *Our Rates*

A charge will be made to recoup the costs associated with the operation of the document delivery service. A schedule of the rates charged in Canadian funds is set out below.

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#### Rush Service Surcharge

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(next business day)

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### *How to order*

Documents may be ordered by mail, fax or e-mail. In addition, when a search of the Law Reform Database is performed, and results are returned, the user is given an opportunity to order one or more of the documents retrieved.

## BCLI Support Staff

We wish to acknowledge the important role played by Institute staff in keeping things running smoothly on a day-to-day basis.

- Malise Wong, Administrative Assistant
- Marcus Patz, Librarian/Webmaster

## Staff Lawyers

The Institute is served by two full-time Staff Lawyers whose responsibilities focus solely on program work.

Margaret Hall  
Caroline Carter

We are pleased to have them with us and happily acknowledge the valuable contribution they make to our work.

## Students and Research Assistants

The Institute has adopted a policy of attempting, as far as possible, to ensure that a student/research assistant, from one of the two provincial Faculties of Law, forms part of our core operation throughout the year. This has been made possible through participation in the University of Victoria, Cooperative Program. The following people have been attached to the Institute in that capacity:

- Reiko West
- Lois Patterson
- John Richardson
- Martin Bauer
- Jesse Gelber
- Talman Rodocker
- Jeffrey Bryant
- Greg Stich
- Dana Kripp

Our Research Assistants make a significant contribution to our operation and we wish to express our gratitude to them.

ance on a whole range of issues. Our particular thanks to the Hon. Madam Justice Alison Beames, a Governor of the Foundation with special responsibilities for liaison with the Institute, and Pat Pitsula, the Executive Director of the Foundation.

We wish also to acknowledge the important support received during our start-up period from the Law Society of British Columbia and the Continuing Legal Education Society. During the first two and a half years of the Institute's existence, its operations were centered in office space provided by the Law Society on a rent-free basis and shared with CLE. Apart from the financial benefit conferred by that arrangement, it had a highly symbolic dimension as a gesture of support in principle for the kind of work the Institute does.

Our thanks also go to the Faculty of Law at the University of British Columbia for our current accommodation. While the space we occupy is not rent-free our arrangement with the Faculty of Law has made it very affordable and these arrangements carry with them a number of offsetting savings. We wish particularly to express our appreciation for the assistance that Dean Joost Blom, Q.C. and Assistant Dean Elizabeth Edinger have given us.

We also wish to thank the British Columbia Branch of the Canadian Bar Association, the Vancouver Bar Association, The Advocate Magazine, The Real Estate Foundation and The Canadian Bankers Association for the generous support they have provided both generally and in relation to particular projects.

We also wish to acknowledge the significant contribution made in the past year by the participants in our Project Committees - the members and reporters and particularly those people who have accepted the responsibility of chairing the Committees:

Dr. Donovan Waters, Q.C.  
Professor John McLaren  
Professor Don MacDougall  
Professor Lyman Robinson, Q.C.

Finally, the British Columbia Law Institute wishes to thank all those individuals and firms who provided financial support in the past year through their generous response to our fundraising campaign.

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