



British Columbia Law Institute

A Report on Year Five

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.

Highlights: 2001/2002

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 addition of new projects to the Institute's program and substantial progress on existing projects.
- the celebration of the fifth anniversary of the creation of the Institute. The occasion was marked by a public lecture on law reform.
- the continuation of formal fundraising activities to help the Institute secure its financial sustainability.
- implementation in legislation of Institute recommendations.

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.

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

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BRITISH COLUMBIA LAW INSTITUTE

Bylaws

- ...
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

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The Institute's offices are located in the Law Annex building which is adjacent to the main Law School (Curtis) Building at the University of British Columbia.

The Institute's elected executive members are:

Gregory Steele - Chair
Ann McLean - Vice-chair
Gordon Turriff - Secretary
Prof. James MacIntyre, Q.C. - Treasurer

Arthur L. Close, Q.C. is Executive Director
Thomas G. Anderson is Program Director



Fifth Anniversary Celebration

The Law Institute was incorporated in January 1997 and became fully operational in March of that year. In celebration of the occasion, the Institute sponsored a public lecture on law reform, followed by a reception, both held at the Law Courts Inn on March 14, 2002.

The featured speaker was the Honourable Mr. Justice Kenneth C. Mackenzie of the Court of Appeal for British Columbia. The title of his talk was "Where does Law Reform Go From Here." The full text of his address may be found at the Institute's Website.

We were gratified to note that those in attendance at this event included leaders of the province's Bench and Bar as well as the Attorney General of the province. We would like to express our gratitude to Mr. Justice Mackenzie for his most stimulating and thoughtful address and to the firm of Stikeman Elliott for its financial support for this event.

Guests at the Celebration



Hon. Mr. Justice
Kenneth C.
Mackenzie



Hon. Geoff
Plant, Q.C.
Attorney General



Blair
Suffredine, Q.C.
M.L.A.



Hon. Allan
McEachern Hon. Mr.
Justice Peter
Fraser Hon. Mdm.
Justice Mary
Newbury

Relationship with the Provincial Government

Without sustaining funding that can be directed to project work the Institute must look to sponsors for individual projects. The provincial government has so far sponsored several past and present projects. These arrangements, thus far, have been part of the legacy of the previous provincial government but we are most optimistic that support will continue under the current government, with even the possibility that sustaining funding will be provided when provincial finances permit.

Several times during the past year the Honourable Geoff Plant, Q.C., Attorney General for British Columbia, has stated his commitment to private law reform and has referred favourably to the Institute in that context. On February 8th, 2002, speaking at a Continuing Legal Education Society course, he made the following observations:

[L]et me begin ... by stating clearly my own commitment to reinvigorating law reform in British Columbia.... By law reform, I mean the ongoing need to clarify, modernize, and improve the law by means of legislation. Law reform is essential to ensuring that the law is as just, clear, predictable, and effective as possible; and that the processes of justice are as fair, efficient, timely and affordable as possible. This kind of law reform begins with the recognition that as economic and social times change, the principles of common law—created in and for other economic and social circumstances—may need to be rethought; that legislation which establishes or is at least part of the framework for commercial relations and civil liability may need to be updated; and that the institutions we have created to administer justice may need to be improved to ensure that they continue to serve an evolving public interest.

...

I have expressed my commitment to the continuing reform of private law in the light of changing economic and social needs. ... A body of modern and effective private law is crucial to ensuring that British Columbia business is able to be as competitive as possible in the international economy, and that British Columbia is attractive to international investment....This aspect of law reform entails working with the legal profession through the Canadian Bar Association, and with bodies such as the British Columbia Law Institute and the Uniform Law Conference of Canada to identify issues and subjects for reform and to formulate and enact law reform initiatives.

...

The British Columbia Law Institute, which plays a crucial role in law reform.... My own view is that government has a role to play in providing sustained funding to support the work of an independent law reform agency. Unfortunately, the current fiscal climate is a barrier to finding the dollars necessary for sustained funding to the BC Law Institute. However, it is equally important that government be willing to act on the work done and the proposals made by law reform agencies. Put another way, I think government has an obligation to make space on the legislative calendar for private law reform. In this regard it is possible to build on the work the Institute has already done, and to continue to draw upon the work done by the Uniform Law Conference of Canada, by acting upon reports done and work yet to be completed. In the months to come I am confident there will be room on the legislative calendar in Victoria for private law reform initiatives.

We look forward to a fruitful relationship with the provincial government.

Fundraising

The main source of operational funding for the Institute has been a grant from the British Columbia Law Foundation. As noted already, the Institute also receives funding to assist it in carrying out particular projects. 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 has been a series of formal fundraising campaigns, starting in the autumn of 1999 and continued in 2000 and 2001.

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.

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 primary focus of our fundraising activity has been the legal profession and its institutions and the judiciary. 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 these fundraising initiatives as a short step on a long road toward financial sustainability.

Carrying out the Program

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 the projects 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 document generated internally 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, our Report on Gender-Free Legal Writing and the "Question and Answer" publication on pension division on marriage breakdown.

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

Implementation

The work of the Law Institute has begun to bear real fruit: there is now legislation based on its work. The most recent session of the provincial Legislature saw the introduction of the *Trustee Investment Statutes Amendment Act, 2002*. This Act, which received Royal Assent on May 9, repeals the archaic "list" of authorized trustee investments, replacing it with the "prudent investor" standard. The Act draws directly on recommendations made by the Institute in its 1999 Report on Trustee Investment Powers.

Active Projects

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, British Columbia was the first Canadian jurisdiction to enact a new and modern *Limitation Act* to replace the archaic *Statute of Limitations*. The new Act was based on recommendations made by the British Columbia Law Reform Commission in a Report submitted in 1974 (Report No. 15). There have been some amendments, 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, hospitals and hospital employees. 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 some specific aspects of its operation should be re-examined:

- There seems to be a general agreement that the 30 year ultimate limitation period as a basic default rule is too long and this has led the Legislature to shortening it in certain cases. But the result is that it could be argued that certain professions and institutions have been singled out for particularly favourable treatment under the law and the position of other equally worthy professions and bodies neglected. Moreover, the deviations from the basic ultimate limitation period have not been uniform with the period being reduced to 10 years in one case and to 6 years in others.
- 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 actual damage is an essential element of a plaintiff's cause of action which does not “accrue” until it occurs. In the result, the running of time in relation to such claims may be postponed for a lengthy period after the actual breach of duty on which the claim is based. This can work a hardship on defendants, particularly those who work in the construction industry. The accrual rules in relation to obligations that are payable on demand are also problematic and in need of reconsideration.

Today's *Limitation Act* can no longer safely be regarded as adequately meeting the needs of British Columbians. 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 other law reform in relation to limitations legislation.

While this suggests that a major review of the British Columbia *Limitation Act* would be desirable, the Institute simply does not have the resources to undertake a full-scale project hence the decision to undertake a narrower study confined to the question of the ultimate limitation period. It is this focused study that constitutes the Institute's project on updating the *Limitation Act*. The principal researcher and writer is our Staff Lawyer, Caroline Carter.

In July 2002, the Institute released its Report on “The Ultimate Limitation Period: Updating the *Limitation Act*.” One purpose of releasing the Report at this time was to ensure it would be available to the Attorney General for consideration in the context of the larger initiative being carried out by his Ministry - the “Civil Justice Review.” This would also give other interested persons an opportunity to comment on the Institute's recommendations in a timely fashion.

The major recommendations set out in the Report may be summarized as follows.

- The 30 year ultimate limitation period of general application should be reduced to 10 years.
- A special ultimate limitation period of 30 years should continue to apply in certain cases involving fraudulent conduct or wilful concealment of material facts.
- The special ultimate limitation period of six years for medical practitioners, hospitals and hospital employees should not be retained.

The Institute and the Internet *continued*

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 2001 a wholly new and revised version was issued by the Institute. It is described in greater detail in the Annual Report for that year.

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

The Institute and the Internet *continued*

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. In the past year, the website was identified by the Provincial Government as a non-core function. The Institute has, therefore, assumed direct responsibility for hosting it at the BCLI 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.

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 \$15
2. Gender-Free Legal Writing \$15
3. A Report on Year One (1997-1998) Annual Report \$15
4. Proposals for a *Contract Law Reform Act* \$20

- Where a cause of action is based on a breach of duty, the limitation period should begin to run from that breach.
- In the case of an infant plaintiff, the running of the ultimate limitation period should be postponed until the age of majority.

- A confirmation of a cause of action should restart the running of time under the ultimate limitation period.
- The limitation period for demand obligations should run from the date of the default in performance after a demand is made.
- A balanced transition provision should be adopted.

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 decide not enforce its decisions. In this project, the Institute will examine and make recommendations for improving the laws of British Columbia respecting the enforcement of judgments.

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.

The need for change has been the subject of a number of different studies in the province. The Law Reform Commission of British Columbia issued five different Reports which examined various aspects of law and procedure. While many of its recommendations retain their currency, others call for reconsideration in the light

of changes in the law and practice since they were made.

The need to modernize and update the laws respecting the enforcement of civil judgments has been recognized in a number of jurisdictions. In recent years, other provinces facing similar problems have turned their attention toward improving their laws in this area. A wholly new and integrated scheme of judgment enforcement was brought into force in Alberta. It was based on a major study by the Alberta Law Reform Institute. Newfoundland has also enacted a new *Judgment Enforcement Act*. The Newfoundland statute built on the Alberta work but introduced a number of changes that were necessary to achieve harmony with local practice. More recently, a Report issued in Saskatchewan picked up on these themes and set out a tentative draft act.

These developments inspired the Uniform Law Conference of Canada to add the topic of Civil Enforcement of Judgments to its program. The objectives of this project are to streamline and clarify judgment enforcement procedures and to provide for a searchable registry of monetary judgments. British Columbia has carriage of this project on behalf of the ULCC and the Law Institute is the agent through which the province is acting. Institute personnel are heavily involved in a national working group of the ULCC. This includes the contribution of Lyman Robinson, Q.C. who acts as Project Director of the BCLI initiative and who leads the ULCC working group. The work being carried out for the ULCC will form the starting point for recommendations for B.C. legislation.

Project on Modernizing the *Trustee Act*

The ultimate goal of this very large project is to ensure that the *Trustee Act* serves the needs of contemporary trusteeship. Many of its features are out of step with present-day business practice and constitute significant obstacles to efficient trust administration. Moreover, 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 other legislation.

The essential goals in this project are to:

- identify provisions in the Act that have outlived their usefulness, or are inconsistent with current sound business and financial practices and require revision for this reason, even if there is still a case for retention on other grounds.
- formulate positions on the issues addressed by those provisions or that are raised by their repeal.
- formulate positions on areas of trust law that may not be specifically addressed in the current *Trustee Act*, but which call for consideration in light of the demands of modern trusteeship.
- once necessary policy decisions have been made, formulate recommendations to implement them.
- draft a new *Trustee Act* in modern language incorporating what needs to be retained from the current Act as well as provisions reflecting new policy.

In previous years the Institute issued three final Reports prepared by the Project Committee: “Trustee Investment Powers”; “Statutory Remuneration of Trustees and Trustees’ Accounts” and “Statutory Powers of Delegation by Trustees”. These have been described in previous Annual Reports.

In the past year, the Institute issued two further Reports. The Report on Total Return Investing by Trustees addresses the problem that the traditional distinction between the income of a trust and its capital growth is no longer consistent with

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.

The other new Report concerned 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. The Report’s recommendations attempt to strike an appropriate balance between settlor autonomy and the need to hold trustees accountable for their conduct.

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*. The Committee expects to be drawing heavily on the draft act prepared by the Law Reform Commission of Ontario in its major study on the law of trusts, recent English legislation and the *Uniform Trust Code* settled by the National Conference of Commissioners on Uniform State Laws.

The members of the Project Committee are:

Dr. Donovan Waters, Q.C., Bull Houser & Tupper (Chair)
Prof. James MacIntyre, Q.C., Faculty of Law, University of British Columbia
Margaret Mason, Bull Houser & Tupper
Kathleen Cunningham, Royal Bank
Prof. Keith Farquhar, Faculty of Law, University of British Columbia
Scott Sweatman, PricewaterhouseCoopers Inc.
Arthur L. Close, Q.C., British Columbia Law Institute

Gregory R. Blue, McEwen, Schmitt & Co., is Reporter to the Committee.

Publication List

continued

5. Recognition of Spousal and Family Status	\$30
6. Trustee Investment Powers	\$20
7. Statutory Remuneration of Trustees and Trustees’ Accounts	\$20
8. Enforcement of Non-money Judgments From Outside the Province	\$20
9. A Report on Year Two (1998-1999) Annual Report	\$15
10. Interim Report on New Home Warranties	\$20
11. Statutory Powers of Delegation by Trustees	\$20
12. A Report on Year Three (1999-2000) Annual Report	\$15
13. Pension Division on Marriage Breakdown (2001 Revision)	\$40
14. Report on Civil Remedies for Sexual Assault	\$40
15. A Report on Year Four (2000-2001 Annual Report)	\$15
16. Total Return Investing by Trustees	\$20
17. Exculpation Clauses in Trust Instruments	\$20
18. Private Care Agreements Between Older Adults and Friends or Family Members	\$25
19. The Ultimate Limitation Period: Updating the <i>Limitation Act</i>	\$25

Other Publications

1. Consultation Paper on Trustee Investment Powers	\$15
2. Consultation Paper on Trustee Remuneration and Trustees’ Accounts	\$15
3. Working Paper on Civil Remedies for Sexual Assault	\$40
4. Consultation Paper on Statutory Powers of Delegation by Trustees	\$15
5. Consultation Paper on Total Return Investing by Trustees	\$15
6. Consultation Paper on Exculpation Clauses in Trust Instruments	\$15
7. Consultation Paper on Private Care Arrangements Between Older Adults and Friends or Family Members	\$15

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 84th 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
- setting the agenda for and ultimately chairing the meetings of the Civil Section in Winnipeg in August 1999 and in Victoria in August 2000

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

In August 2001 Arthur was elected President of the Conference and has served in that capacity for the past year. As such, he has been responsible for the overall management and direction 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

Legal Issues Affecting Seniors

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, Mc-
Carthy Tetrault
Pearl McKenzie - Seniors' Advocate
Gordon Turrieff - 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.

Ultimately, the Committee will consider several "seniors" questions. It began with a consideration of certain kinds of family agreements and their potential to harm the interests of elderly persons, and usually family members who provide care. A "care agreement" involves a senior's transfer of property (usually the family home) to a family member or friend in exchange for a promise of care and support in the home.

Unfortunately, care agreements are often informal and supported by little or no documentation. Parent and child often have different expectations concerning these arrangements which, for that reason, can 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 that 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 work of the Committee was devoted to these issues and its Report titled "Private Care Agreements Between Older Adults and Friends or Family Members" was issued by the Institute in March 2002. The Report contains recommendations for reducing or mitigating the problems associated with private care agreements and stresses the need for education of seniors, the general public, and of professionals who may encounter a private care agreement "hidden" under an apparent gift of property. The recommendations also set out "guidelines for good practice" and legislation is proposed that would allow a court to set aside or vary a private care agreement in certain circumstances.

A background paper exploring the legal issues in greater depth has been prepared and is available at the Institute's website. The background paper was recently published in the *Estates, Trusts & Pensions Journal*, (2002) 21 E.T.P.J. 209.

The consultation that surrounded this project carried with it a very large element of community "outreach." Margaret Hall, one of the Institute's Staff Lawyers and the principal Reporter and Researcher to the project, met with a number of community groups and, what was originally envisaged as a process that would inform the Law Institute and guide its work, evolved into information sessions for seniors eager to learn more about the legal aspects of these arrangements. This process continues, albeit on a somewhat reduced scale, even though this portion of the project is now complete.

There are two important spinoffs from this project. First, in an attempt to meet the need for information about care agreements the Institute has developed a small brochure outlining the "what ifs" that seniors and caregivers should consider before entering into a private care agreement. The published

brochure will be made available through senior citizen centres and other suitable outlets and we hope to see it widely distributed. Support for this initiative has been provided by The Notary Foundation.

The second spinoff is a decision to move on with a second phase of our work on legal issues affecting seniors. Funding for this continued work has recently been committed by the Law Foundation of British Columbia and the Law Commission of Canada. The focus of the second phase will be financial arrangements between older adults and family members, in particular, the use of home equity to provide financial assistance and the characterization of undocumented intra-family loans.

Rising property values have created a substantial asset base within the older population. A discrepancy has developed between this asset base and the resources of younger family members who may be struggling to

keep up with high housing costs or who need capital to establish themselves in business. It is desirable for seniors to use their assets for the benefit of younger family members but there must be protection against exploitation or other abuse. The nature of the parent child relationship may increase the senior's vulnerability. The basic objectives of this phase of the project are:

- To collate the relevant law and serve as a resource for people seeking information on this subject.
- To raise the profile of the issue, and the dangers and complications which can arise where individuals proceed without full information and advice, and to increase awareness regarding options where plans do not work out as hoped for.
- To clarify the law in this area and to suggest possibilities for reform.

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. Some examples are:

A person owns more than one company and deliberately leaves one of them undercapitalized. When debts or other liabilities are incurred by this company, and creditors pursue what is owed to them, then there are no assets to satisfy these debts even though the other related company has sufficient funds.

A residential builder creates a company for each new development and shortly after all the units have been sold, the funds are removed from the company leaving it a mere shell. There may be sound business reasons for structuring the development this way but one result is that if any claims are made against the company based on poor quality work, the buyers may find it difficult or impossible to have their claims satisfied. This was one of the issues identified in the Institute's

project on "New Home Warranties" although no conclusions emerged.

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. For instance, in the *Employment Standards Act* (s.96) a director or officer is directly liable for up to two months wages for each employee if they are not paid by the 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 *ad hoc*, 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, where it is appropriate to lift the corporate veil, or

The Institute and the Uniform Law Conference *continued*

- Uniform civil enforcement (judgments) legislation
- Uniform personal property security legislation
- Uniform legislation to implement the UNIDROIT Convention on Mobile Equipment

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 with the Law Commission of Canada continues to evolve. We were honoured in the past year by visits from its President, Nathalie DesRosiers, and its Executive Director, Bruno Bonnevillie. These meetings reflect the interest of the LCC in the Institute's work in relation to the law and the elderly. The LCC is providing some financial support for the second phase of that project.

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.

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

Healthcare Decisions and End-of-life Issues

Last 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 who consulted with officials of the PGT and others concerned with the administration of the relevant legislation. In June 2001 Professor Salzberg presented to the Institute's Board of Directors a Report setting out

Short Projects

Most of the active projects described in this Annual Report are relatively long term in the sense that a year or more will elapse between the time active work commences and when it culminates in a final report. To achieve a degree of balance, in the program we are adding to it a group of short projects that will be sharply focussed and address discrete legal topics. For each of these short projects, we will use as a resource a substantial body of work that has already been done. This may take the form of uniform legislation developed by the Uniform Law Conference of Canada or it may be part of the existing body of unpublished research

with recommendations for legislative change if appropriate. Developing terms of reference for, and defining the appropriate scope of, a study of this kind has proved 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.

the proposed terms of reference he had developed. The Board met twice to discuss the Report, endorsed its contents and submitted it to the PGT.

Following its submission in July 2001, the Report was considered internally within the office of the Public Guardian and Trustee and the Ministry of Health Services. The latter Ministry is in the process of developing a strategy to address a variety of health care issues through a number of initiatives. This includes development of a provincial strategy for end of life care under the auspices of the Minister of State for Intermediate, Long Term and Home Care. As a result of this development, the Law Institute does not expect to play any further role in relation to this topic although it is our understanding that Professor Salzberg's Report will assist in informing these processes and constitute an important contribution to the ongoing debate. The Report will be formally published by the Institute later this year.

that forms part of the "legacy" of the Law Reform Commission. We also expect to select topics where the need for reform, and the form it should take, is largely uncontroversial and on which extensive consultation would not be required.

The first short project to be brought forward will concern builders liens and arbitration and is built on uniform legislation promulgated by the Uniform Law Conference in 1998. Other short projects under consideration include adopting the *Uniform Liens Act*, choice of law in tort, firm offers, the law of evidence in relation to altering an accident site and testamentary and stand-by guardianship.

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, 2002 our members are

Thomas G. Anderson

Member at large

Prof. Keith Farquhar

U.B.C. Faculty of Law, Dean’s nominee

Prof. Martha O’Brien

U. Vic Faculty of Law, Dean’s nominee

Arthur L. Close, Q.C.

B.C. Law Institute, Member at large

D. Peter Ramsay, Q.C.

Ramsay Thompson, 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

Craig Goebel

Insurance Corp of B.C., 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

A number of appointments expired early in the year and this list reflects a mix of re-appointments and fresh appointments. Re-appointed as members were Thomas G. Anderson, Arthur L. Close, Q.C., Prof. James MacIntyre, Q.C., Ann McLean, Gregory Steele, and Gordon Turriff. We are pleased to welcome three new members. Craig Goebel joins us as the CBA(BC) nominee; Prof. Martha O’Brien is the new nominee of the Dean of the University of Victoria Faculty of Law; and D. Peter Ramsay, Q.C. is the nominee of the Law Society. They replace, respectively, Douglas Robinson, Q.C., Prof. Hester Lessard and Sholto Heberton, Q.C. We wish to thank all of these people for the time they devoted and the energy they 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 assistance on a whole range of issues. Our particular thanks go to the Hon. Madam Justice Alison Beames, a Governor of the Foundation with special responsibilities for liaison with the Institute, Pat Pitsula, the former Executive Director of the Foundation, and Wayne Robertson, her successor in that office.

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 quartered in office space provided by the Law Society rent-free, 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.

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.

Photocopying Rates

\$5.00 / item to 20 pages

\$0.25 / page thereafter

Fax Surcharge

\$1.00 / page in Canada

\$2.00 / page elsewhere

Rush Service Surcharge

\$5.00 / item

(next business day)

Other Charges

shipping - postage

or courier charges

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. Sadly, owing to financial constraints, we were not able to engage any students over the past year.

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 Sitch
- Dana Kripp

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

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 they 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 Associate Dean Elizabeth Edinger have given us.

We wish as well to thank the British Columbia Branch of Canadian Bar Association, the Vancouver Bar Association, The Advocate Magazine, The Notary Foundation and The Real Estate Foundation 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 but especially those people who have accepted the responsibility of chairing the Committees:

Dr. Donovan Waters, Q.C.
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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