SCHOLARSHIP | EDUCATION | ENGAGING THE BUSINESS COMMUNITY

2009 ANNUAL REPORT

UNIVERSITY OF BRITISH COLUMBIA
NATIONAL CENTRE FOR BUSINESS LAW

OCTOBER 2009
The National Centre for Business Law is rounding out its third year in existence as of the date of this report, and already it has a remarkable record of accomplishment behind it. In the four years that I have been involved with this project, it has gone from an ambitious dream to a fully-functioning and highly successful vehicle for business law scholarship, teaching, and conversation around the key business law issues of the day. It is with pleasure that I report on its ongoing development.

2008-09 was a busy year for the NCBL, as the pages within attest. The Centre has continued in its service of the three pillars of its mandate: scholarship, education, and engagement with the community. Its affiliated scholars have published notable works in several areas of business law. Through its Business Law Concentration, a new scholarship, and through hiring distinguished new faculty, the NCBL plays an important role in making UBC Law an attractive destination for graduate and JD students interested in business law. The Centre has also become a valuable forum for fostering thoughtful dialogue between practitioners, scholars, judges, policy makers, regulators and senior business people on timely and important issues.

I am also excited to share with you the NCBL’s new Strategic Plan, put forth this past spring by the Strategic Planning Subcommittee of the Centre’s Dean’s Advisory Committee. The Strategic Plan proposes a number of specific initiatives to further the Centre’s core mandates and to continue to build on its success to date. It recommends a strong emphasis on the Centre’s research mandate, supported by such important initiatives as the Fasken Martineau visiting scholar initiative and the TMX Group Capital Markets Research funding. It recommends a continuing commitment to the Centre’s role in enhancing the student business law experience at UBC. The Centre’s supporters can also expect to see more major topical events and public policy forums in the years to come, in lieu of some lunchtime speakers series events, as the Centre refines its strategies for engaging with the business law community in high impact and fruitful ways.

I would like to extend my sincerest appreciation to the planning committee and to the Dean’s Advisory Committee in general, who have committed so much of their time and energy to creating an environment of intellectual engagement and interdisciplinary research in business law. I would also like to thank this year’s Co-Directors, Mary Condon and Cristie Ford. Their dedication to the NCBL was evident to all through the numerous conferences, roundtables, and symposia hosted by the NCBL this past year. It is with great pleasure that I introduce the new Director of the National Centre for Business Law, Professor David Duff. Professor Duff has spent the past twelve years on faculty at the University of Toronto, and is one of this country’s leading tax law scholars. He was a tremendous asset to the NCBL in 2008-09, during which he was visiting at UBC, and the Faculty of Law was thrilled to welcome him on a permanent basis in July 2009.

As I complete my tenure as Chair, I should like to thank Dean Bobinski and Professor Janis Sarra for all their support and for their commitment to the NCBL. Finally, I am pleased to welcome the new Chair, The Honourable Donald Brenner, QC, Senior Counsel, Farris, Vaughn, Wills & Murphy LLP. Mr. Justice Brenner joined Farris on September 14, 2009 after 17 years on the Bench as Chief Justice of the British Columbia Supreme Court, and a distinguished prior career in legal practice. Mr. Justice Brenner has been actively involved in the Centre’s Annual Review of Insolvency Law over the years and I’m certain will be equally dedicated in his new role as Chair of the Committee.

THE HONOURABLE FRANK IACOBUCCI QC, LLD

The Honourable Frank Iacobucci retired as a Justice of the Supreme Court of Canada in 2004. He joined Torys as Counsel and is currently Chair of the Higher Education Quality Council of Ontario. He was Chair of the Dean’s Advisory Committee for the National Centre for Business Law from 2006 – 2009.
We were privileged to serve as Co-Directors of the National Centre for Business Law in 2008-09.

It has been an eventful year for the Centre. The high points are many and are described in the pages that follow, but certainly include the Annual Review of Insolvency Law, as well as our conference on the Supreme Court of Canada’s decision in Lipson v. Canada, co-sponsored by the Canadian Tax Foundation and the University of Toronto Faculty of Law, which attracted 1000+ in-person and remote participants. In fulfilling our education mandate, we are pleased with the ongoing success of the Business Law Concentration, and excited to be able to announce a new JD scholarship and an affiliation with the law school’s student-run Law & Business Society (LBS). We are also exceptionally proud to have launched the NCBL Visiting Senior Scholar program this year, thanks to the generous gift of our Platinum Sponsor, Fasken Martineau.

It was Dr. Janis Sarra’s extraordinary vision, talent, and energy that created the NCBL and attracted our founding sponsors. This year, the third since our launch in October 2006, was an appropriate moment to evaluate our progress thus far. The Honourable Frank Iacobucci therefore struck a Strategic Planning Subcommittee of the Dean’s Advisory Committee he chairs. With the assistance of the Co-Directors, that thoughtful and dedicated group met several times over the year to develop a set of priorities around the Centre’s three pillars of scholarship, education, and engagement with the community. The results were a number of specific recommendations with respect to each of those pillars, as well as a clearer sense of the NCBL’s core competencies and strategic direction. (Full details are available through NCBL Program Coordinator Michelle Burchill, at businesslaw@law.ubc.ca.)

The Strategic Planning exercise was instructive to us in identifying the important role that the NCBL stands to play in the local, national, and international law and business law communities. Among our unique strengths is our ability to provide an independent forum within which experienced practitioners, scholars, judges, policy makers, regulators and senior business people can engage with each other in sophisticated dialogue around timely business law questions. Located as we are in Vancouver, we are well situated to represent a Western Canadian voice on business law issues of national significance. Vancouver is also a truly global city, and NCBL and UBC Law scholars produce highly significant work at the international and transnational levels. Above all, we play to our strengths when we springboard from the strong and diverse business law research being conducted by NCBL-affiliated scholars at the UBC Faculty of Law and beyond. We serve a key function in helping to bridge the gap between scholarship and practice.

We greatly appreciate the ongoing support of our generous sponsors, the list of which can be found to the right of this message, who have allowed the Centre to be the success it is. We have been most fortunate in having the support of those sponsors, our affiliated scholars, UBC Law students, and the business law community as a whole in carrying out this work over the past year. It has been an honour and a pleasure working with you. Under the direction of our incoming Director, David Duff, we look forward to many more valuable exchanges in the years to come.

Professor Mary Condon
Co-Director, National Centre for Business Law

Assistant Professor Cristie Ford
Co-Director, National Centre for Business Law
Natasha Affolder
Assistant Professor and Director, Centre for Global Environmental and Natural Resource Law
LLB (Alberta), BCL (Oxford), DPhil. (Law) (Oxford)
Professor Affolder teaches Transnational Law, Sustainable Development Law, International Business Transactions and Land Use Planning. She joined the Faculty of Law in 2004 and is a Faculty Fellow at the Liu Institute for Global Studies. Professor Affolder holds an LLB from the University of Alberta and a Bachelor of Civil Law (BCL) and doctorate from Oxford University where she was a Rhodes Scholar. Prior to joining UBC, Professor Affolder practiced law in private practice in Boston and was a Research Associate in the area of large project negotiation at Harvard Business School. She has also worked in various capacities for international non-governmental and inter-governmental organizations including Oxfam and the United Nations Environment Programme (UNEP). Dr. Affolder’s current research addresses the emergence of “international standards” as a source of regulation. As part of this research, she is tracing how transnational corporations use international treaties as a source of environmental standards. Professor Affolder is also the principal investigator for a project funded by SSHRC and the British Columbia Law Foundation that explores the use of contract law as a tool of biodiversity protection in global mining projects.
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LL.B. Toronto 1990, S.J.D. Toronto 2004
Ron Davis’ research interests are pension law, corporate law, trust law, law and economics, law and society, and insolvency law. He is the author of books and articles on pension law, corporate governance and insolvency law; he has presented papers on these topics both nationally and internationally. Ron was called to the Bar of Ontario in 1992, thereafter joining the pension law practice of Koskie Minsky in Toronto. Prior to joining the UBC Law Faculty in 2003, he taught Occupational Health and Safety and Worker’s Compensation Law at the University of Toronto’s Law Faculty, as well as Pension and Benefits Law at the Faculty of Law, University of Western Ontario. He has lectured at the Osgoode Hall Law School LL.M. Specialization in Securities Law Program, as well as to the Investment Management School sponsored by the Schulich School of Business, York University and MERCERS Consulting and taught at the Civil Law Symposium of the National Judicial Institute.
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Bruce MacDougall
Professor
Professor MacDougall joined the Faculty of Law as Assistant Professor in 1988. He was Associate Professor from 1996-2002 and has been Professor of Law since 2002. Professor MacDougall studied at Oxford University as a Rhodes Scholar and served as Law Clerk at the Supreme Court of Canada for Mr. Justice Gerald Le Dain from 1986-87. He has also practised law in Toronto and Vancouver. He teaches Contracts, Commercial Transactions and Secured Transactions.
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Shigenori Matsui
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Professor Shigenori Matsui joined UBC Faculty of Law in January 2006 as Director of Japanese Legal Studies.

Robert Paterson
Professor
LL.B. (New Zealand) 1968, J.S.M. (Stanford) 1972
Robert K. Paterson was admitted to the Bars of New Zealand in 1969 and B.C. in 1981. Professor Paterson chaired the B.C. Task Force on International Commercial Arbitration (1986) and is co-author of International Trade and Investment Law in Canada (1994) and co-editor of UNCTRAL Model Law in Canada (1989). He is a panelist under Chapter 19 of the NAFTA (Trade Remedy Bi-national Review Panel). Apart from international trade law his major interest is cultural heritage and art law. He drew attention to Aboriginal repatriation issues by organizing the ﬁrst global conference on the subject (with UNESCO support) at UBC in 1994. The conference proceedings were published as a special issue of the UBC Law Review (1995). He is the author of numerous articles in the ﬁelds of Corporations, Securities Regulation, International Trade and

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Cristie Ford is an Assistant Professor and immediate past Co-Director of the National Centre for Business Law. She joined UBC in 2005 from Columbia University, where she pursued her graduate degrees and taught in the law school in a variety of capacities between 2000 and 2005. She also practised law for six years, at Guild, Yule and Company in Vancouver, and at Davis Polk & Wardwell in New York. Her academic interests include comparative administrative and public law, securities regulation, corporate governance, and the legal theory surrounding public decision-making.
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Professor Blukovic teaches Contracts, European Union Law, External Relations of European Union, and Comparative Law at the Faculty of Law. Her current research interests are the adaptation of international legal norms by national governments, the impact of regionalism on multilateral trade negotiations and the development of European Union Law.
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Joost Blom joined the Faculty of Law in 1972, served as Associate Dean 1982-85, and was Dean 1997-2003. His research and writing is concentrated in the areas of Contracts and Torts, focusing on the relationship between them; in Conflict of Laws (Private International Law); and in Comparative Law. Professor Blom teaches Contracts, Torts, Conflict of Laws and Intellectual Property.
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Pitman Potter
Professor

Pitman Potter is a Professor of Law at UBC Law Faculty and Hong Kong Bank Chair in Asian Research at UBC’s Institute of Asian Research. Dr. Potter’s teaching and research are focused on PRC and Taiwan law and policy in the areas of foreign trade and investment, dispute resolution, intellectual property, contracts, business regulation, and human rights. He has published several books, including most recently A Guide to Business Law in Asia (w/ Ljiljana Blukovic, Lexis/Nexis 2008). In addition to his academic activities, Dr. Potter is admitted to the practice of law in British Columbia, Washington, and California, and serves as a consultant to the Canadian national law firm of Borden Ladner Gervais LLP. As a Chartered Arbitrator, Dr. Potter is engaged in international trade arbitration work involving China.

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Dr. Sarra is Professor of Law, University of British Columbia Faculty of Law, Vancouver, Canada and was founding Director of the National Centre for Business Law. She teaches commercial insolvency law, corporate and securities law and corporate finance. She served as Associate Dean of the Faculty of Law to 2007 and Senator of the University from 2003 to 2008. In 2008-2009, Professor Sarra was on sabbatical, and was visiting scholar at the Faculty of Law, University College, London UK; the University of New South Wales in Sydney Australia; Harvard Law School and the University of Texas at Austin, US. This past year, she held the Honourable Lloyd Houlden Fellowship in Insolvency Law. She serves as Editor in Chief of the Annual Review of Insolvency Law.

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Professor Sheppard joined the Faculty in 1969. His current teaching and research interests include Creditors’ Remedies, Equitable Remedies, Evidence and Taxation. He has practised as a tax lawyer and a prosecutor. He is the author of Fiscal Federalism for the Royal Commission on the Economic Union and Development Prospects for Canada (MacDonald Commission), and of Evidence (revised edition, 1996). He has given continuing legal education lectures in his areas of interest.

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Mira Sundara Rajan holds the Canada Research Chair in Intellectual Property Law. She is the author of a book, Copyright and Creative Freedom, and has been appointed Series Editor for a new Oxford University Press series on Intellectual Property in Central and Eastern Europe. Her current research also includes projects on copyright harmonization in Europe, moral rights, and traditional knowledge, and is supported by the Social Sciences and Humanities Research Council of Canada. Mira joined the Faculty of Law at UBC in 2004, after five years of research and teaching in the UK. She holds a doctorate specializing in Copyright Law from Oxford University, and has been a law tutor at St Peter’s College, Oxford and a Herchel Smith Fellow in Intellectual Property Law at the Queen Mary Intellectual Property Research Institute of the University of London. Mira’s teaching experience ranges from tutoring law undergraduates in the Oxford tutorial system to training judges from developing countries in the intricacies of intellectual property rights.

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Ian Townsend-Gault
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Ian Townsend-Gault taught at universities in Britain and Norway, and also at Calgary and Dalhousie before coming to UBC in 1989. He teaches and researches in international law, especially marine resource law, maritime boundaries, maritime co-operation, and the protection of the marine environment. He has acted as a consultant to the United Nations, the Asian Development Bank, and the international development agencies of Canada, Norway, Sweden and Finland, and has advised governments in Southeast Asia and Eastern Europe on international legal issues.

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Joseph Weiler was called to the Bar of B.C. in 1973, joined the Faculty of Law in 1974 as Assistant Professor and was promoted to Associate Professor in 1979 and Full Professor in 1987. Professor Weiler boasts a long career in alternative dispute resolution during which he acted as a mediator and arbitrator in over 400 disputes and was elected to the National Academy of Arbitrators in 1984. He served as Special Advisor to the Vancouver Canucks Hockey Club from 1992-5. He currently serves as Past Chair of the Board of the West Vancouver Arts Centre Trust and sits on the District of West Vancouver’s 2010 Olympic/Paralympic Committee. Professor Weiler has edited, co-edited and authored a variety of publications. Professor Weiler teaches Labour Law and Policy, Sports Law, Media and Entertainment Law, Law of Cyberspace and Law of the Olympic Games.

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Claire Young
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Prior to joining the Faculty of Law in 1992, Claire Young practiced law with the Alberta Attorney-General’s department for several years and taught law at the University of Western Ontario from 1984-1992. She is the co-author of two books and the author of numerous articles on tax law and policy. She has consulted with the Department of Finance and several international organizations on tax policy issues and is currently a member of the Joint Commonwealth Secretariat and the International Development Research Centre (IRDC) research team (based in London, U.K.) working on The Gender Responsive Budget Project. In 2003 Claire Young was awarded the Therese Casgrain Fellowship in recognition of her research on women and economic issues. Professor Young teaches Taxation Law, Tax Policy, Taxation of Trusts and Estates and Perspectives on Sexuality and Law.

www.law.ubc.ca/faculty/Young
VISITING FACULTY

David G. Duff
Professor Duff was a visiting scholar at the U.B.C. Faculty of Law during the 2008-09 academic year, on leave from the University of Toronto Faculty of Law where he has taught tax law and policy since 1996. He joined U.B.C. Law on a permanent basis effective July 1, 2009 and is currently Director of the National Centre for Business Law. Professor Duff’s research addresses three broad areas in tax law and policy: the interpretation and avoidance of tax laws, both domestically and internationally; the relationship between taxation and public policy, particularly environmental policy; and concepts of tax fairness and their connection with broader theories of distributive justice.

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Mary G. Condon
While visiting at UBC as the Walter S. Owen Chair, Professor Mary Condon taught Corporations and also co-directed the National Centre for Business Law for the 2008-09 year with Professor Cristie Ford. In March 2009, she delivered the Walter S. Owen lecture. Her lecture was entitled “Canadian Securities Regulation and the Global Financial Crisis”. In May 2009, with Professor Ford, she co-facilitated an academic conference held at UBC for international scholars of regulation on the theme “New Governance and the Business Organization.”

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AFFILIATED SCHOLARS

Edward M. Iacobucci
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Edward Iacobucci is Osler Chair in Business Law and Professor of Law at the Faculty of Law, University of Toronto. He started at the Faculty of Law in 1998. He was Visiting Professor at New York University Law School in 2007, Visiting Professor at University of Chicago Law School in 2003 and a John M. Olin Visiting Fellow at Columbia University Law School in 2002. Prior to joining the Faculty of Law, he was the John M. Olin Visiting Lecturer at the University of Virginia in 1997-98 and served as Law Clerk at the Supreme Court of Canada for Mr. Justice John Sopinka in 1996-97. His areas of interest include corporate law, competition law, and law and economics more generally.

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Professor O’Byrne has published in the areas of good faith in contractual performance; recovery of mental distress damages in a breach of contract action; employment law; disclosure duties; and economic justice. Her work has been recognized and cited by the Supreme Court of Canada. Professor O’Byrne teaches contracts law, corporations law and judicial remedies.

Dr. Masafumi Nakahigashi
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Dr. Nakahigashi is Professor of Law, School of Law, Nagoya University, Japan and Scholar of the University of Nagoya Centre for Asian Legal Exchange.

Stéphane Rousseau
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Professor Brooks’ current research includes “Toward a Fairer Share of Tax Revenues: A Comparative Look at Canada’s Tax Treaty Policy Towards Developing Nations” and “Is there a Continued Use for Tax Sparing?” Professor Brooks was awarded the Honorary Research Fellow – Department of Business Law and Taxation, Faculty of Business and Economics, Monash University (March 2008 – March 2011).

Dr. Nakahigashi is the author or co-author of numerous books, including: Practice on Shareholders’ Capital (Shin-nihon-hoki: 2006); UJ vs. Sumitomo Trust vs. Mitsubishi Tokyo: Legal Risks in M&As (Nippon-hyon-sha: 2005); Revised Commercial Code, Accounting and Tax (Shin-nihon-hoki: 2d ed., 2004); Practitioners’ Guide: Law and Tax on Corporate Reorganizations (Seibunsha: 2002); Practitioners’ Guide: Law and Tax on Corporate Divestitures and Mergers (Seibunsha: 2001); and Business Combinations, Corporate Governance and Corporate Finance (Shinzansha: 1999). He is an international affiliated scholar of the National Centre for Business Law.

George Triantis
Eli Goldston Professor of Law, Harvard Law School
B.A., J.D. (Toronto); J.S.D. (Stanford)
Professor Triantis’ teaching and scholarship are in the fields of contracts, business law and bankruptcy. He formerly held the chairs of Sey-

**Yoshihiro Yamada**

Associate Professor
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Professor Yamada’s research interests include corporate law, securities regulation and commercial law, and he has recently studied the function of shareholder remedies and corporate governance. He was a Visiting Scholar at the National Centre for Business Law in 2007.

**Anita Indira Anand**

Associate Professor
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Anita Anand is Associate Professor at the University of Toronto Faculty of Law and served as Associate Dean (JD Program) from 2007-2009. She was Associate Professor at Queen’s University (2003-2006) and Assistant Professor (1999-2003). She is cross-appointed to the University of Toronto’s School of Public Policy and Governance. During the 2009-2010 academic year, Professor Anand will be a Visiting Scholar at the Bank of Canada in Ottawa and will be conducting research on the regulation of Canada’s financial markets. In 2006, she was a Canada-US Fulbright Scholar and Visiting Olin Scholar in Law and Economics at Yale Law School. During the Fall 2005, she was a Visiting Lecturer in Law at Yale Law School where she taught comparative corporate governance. Her main research and teaching areas are corporate law, securities regulation, and bankruptcy and insolvency law.

**Christopher C. Nicholls**

joined the Faculty of Law of the University of Western Ontario as a Professor in 2006. Before coming to Western, Professor Nicholls was a member of the Dalhousie University Faculty of Law where he held the Purdy Crawford Chair in Business Law and acted as Director of Dalhousie’s LL.B. Business Law Specialization Program. Before joining Dalhousie, he practiced corporate and securities law, first with two of Toronto’s largest corporate law firms, then as a corporate finance and securities attorney in Hamilton, Bermuda.

Professor Nicholls currently serves as Associate Editor of the Canadian Business Law Journal, is a member of the editorial board of the Canadian Journal of Law and Technology, and is the author of numerous articles and monographs, as well as four books: Corporate Finance and Canadian Law (Carswell, 2000); Corporate Law (Emond-Montgomery, 2005); Mergers, Acquisitions and Other Changes of Corporate Control (Irwin, 2007); and (with Jeffrey MacIntosh of the University of Toronto), Securities Law (Irwin, 2002). He is currently completing a fifth book on the regulation of financial institutions. He is a graduate of the University of Ottawa, Osgoode Hall Law School, and Harvard University.

**Dimity Kingsford Smith**

teaches in the areas of corporations law and regulation of securities and financial services. She teaches a master of laws course on the regulation of online investing and another on corporate governance.

Professor Kingsford Smith joined the University of New South Wales Law Faculty in January 2005. She was professor of law and Director of the Centre for Law in the Digital Economy at Monash University between 2000-2004. She previously held appointments at the University of Sydney and in the UK at University College London and Warwick University. In 1999 she was a visitor at the London School of Economics law department. Professor Kingsford Smith’s research and publication is in the areas of corporate and financial regulation and regulatory theory and policy. She is currently the first chief investigator in an Australian Research Council Discovery Grant 2005-08 examining the regulation of online investing. Entitled ‘One Day, We’ll All Invest This Way! Regulating Online Investment’ the project includes leading Australian, US, Canadian and UK researchers. Recent publications include: ‘Financial Services Regulation and the Investor as Consumer’ in Ramsay, Howells et al (ed) The International Handbook of Consumer Law & Policy (2009) (in press) and ‘Regulating Risk: Individuals and the Global Financial Crisis’ in University of New South Wales Law Journal Vol 32(2), (2009).

**Jay L. Westbrook**

is the Benno C. Schmidt Chair of Business Law at the University of Texas School of Law. He received his BA and JD at the University of Texas at Austin. One of the nation’s most distinguished scholars in the field of bankruptcy, he has been a pioneer in this area in two respects: empirical research and international/comparative studies. Professor Westbrook also teaches and writes in commercial law and international business litigation. He practiced in all these areas for more than a decade with Surrey & Morse (now part of Jones, Day) in Washington, D.C., where he was a partner, before joining the faculty in 1980. He is co-author of The Law of Debtors and Creditors (Aspen, 4th ed., 2001), As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America (Oxford, 1989), and The Fragile Middle Class (Yale, 2000). He has been Visiting Professor at Harvard Law School and the University of London, and is a member of the American Law Institute, the National Bankruptcy Conference, and the American College of Bankruptcy. He has served as a consultant to the International Monetary Fund and the World Bank. He is a director of the International Insolvency Institute and President-Elect of the International Academy of Commercial and Consumer Law.
SCHOLARSHIP

RECENT PUBLICATIONS

Ljiljana Biukovic
Associate Professor

Professor Biukovic’s 2008 presentations include: “Power of Arbitrators to Award Equitable Remedies”. The 2009 Farris Lecture, Vancouver, BC (April 7, 2009). As a Farris Grant recipient in 2008/2009 Professor Biukovic researched how, over the last two decades, courts in Canada, US and England have responded to challenges of powers of arbitrators to award equitable remedies in domestic commercial disputes. She analyzed the relationship between different sources of an arbitrator’s power in selecting an appropriate remedy and how much flexibility they offer to an arbitrator deciding a dispute. Professor Biukovic’s research revisits the basic principles of independence of arbitration and the powers of the court to supervise arbitral proceedings and it comments on possibilities of legislative reform in BC and the revision of the current statute governing domestic commercial arbitration.

“Arbitration Reforms: Lessons from Europe”, Lecture for the Continuing Legal Education of British Columbia course on Advanced Arbitration Law, Vancouver, BC (May 1, 2009). Professor Biukovic lectured on the recent legislative reforms in Europe and commented on the complex web of current European statutes governing commercial arbitration. She compared reform initiatives and processes undertaken in various European countries in order to draw useful lessons for a possible legal reform in BC.

Professor Biukovic’s 2008 publications include:

“Anatomy of an Experiment: Consolidation of EU Contract Law” (2008) 42:1 UBC Law Review 277-314. The article is based on the lecture given at the NCBL Commercial Contracting Symposium held in Vancouver, BC in October 2007. It analyzes the process of harmonization of Contract Law in the EU in the context of the general debate on the need for international harmonization of commercial law on one hand, and, on the other hand, in the context of the integration of the European market and the omnipresent European discussions on the need for harmonization, appropriate methodologies for reform and on the institutional competence to pursue harmonization process. The article closes by commenting on the potential influence of this EU project on international and national law reforms, especially in multi-jural states such as Canada.

Ljiljana Biukovic and Pitman B. Potter, eds, Guide to Doing Business in Asia, authored Chapter Two entitled “International, Regional and National Laws Intertwined in Asia” (Lexis/Nexis Canada, 2008) 21-45. Business law in Asia may be seen as involving a dynamic of change whereby globalized rule regimes are adapted to local norms and conditions. The essays in this volume illuminate much about these local norms and conditions and so further understanding of the dynamic interplay between the global and the local in China, Hong Kong, Indonesia, Japan, Korea, India and Taiwan.” In “International, Regional and National Laws Intertwined in Asia” Professor Biukovic provides an overview of the multifaceted regulatory environments in China, Hong Kong, India, Indonesia, Japan, Korea and Taiwan in order to emphasize the unique historical, political and cultural context in which local laws have emerged, and to call attention to the massive web of national, regional and international rules that frame business practices in those countries. She argued that doing business in Asia requires both an analysis of all of the laws that regulate business transactions and an understanding of business dealings in the context of the specific cultural settings that is social, political and historical.

“A Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan”, in D. Steger, ed., Redesigning the World Trade Organization for the Twenty-first Century (Wilfrid Laurier University Press, forthcoming in August 2009). This article focuses on the importance of Chinese and Japanese local practices, their regulatory infrastructure and local cultural norms related to transparency as factors in the selective adaptation of the World Trade Organization norms. International laws can acquire a variety of local meanings that require an understanding of the local history and culture in addition to knowledge of the local economy and laws. This article analyzes the selective adaptation paradigm, which allows for a determination of the extent to which noncompliance or less than full compliance can be attributed to the cultural particularities of states political factors such as the relationship between the central and local authorities. This article argues that a shift in perception of regulatory transparency norms in China and Japan has occurred, and that this shift has had important economic and political consequences internally and externally, which has brought about significant administrative law reforms and improved compliance with international norms.

Joost Blom, QC
Professor

On 7 November 2008, Professor Joost Blom gave a talk in Calgary on Lloyd’s Underwriters v. Cominco Ltd., 2007 BCCA 249, 279 DLR (4th) 257, the appeal from which was about to be heard by the Supreme Court of Canada. It deals with one of the most difficult issues in international commercial litigation, that of parallel proceedings in which each side seeks to have the issues decided in a different forum. The Lloyd’s litigation is about insurance coverage for enormous claims that are being made against Teck Cominco in federal court in the state of Washington for the costs of cleaning up pollution caused by slag from the Trail smelter that, for several decades, was discharged into the Columbia River. Teck Cominco wants the insurance issues to be decided by the United States court whereas the insurers want them to be decided by a British Columbia court, primarily on the ground that British Columbia law presumably governs the policies. The United States court has decided it will hear Teck Cominco’s case against the insurers. The British Columbia Court of Appeal decided that the insurers’ proceeding against Teck Cominco in British Columbia may also continue. The Supreme Court of Canada dismissed Teck Cominco’s appeal, 2009 SCC 11. Prof. Blom’s comment on the Court of Appeal’s decision, “Concurrent Jurisdiction and Forum Non Conveniens — What Is To Be Done?”, was published as part of a symposium on the case in (2009), 47 Can. Bus. L.J. 166.

Ronald B. Davis
Associate Professor

“Survival of the Trustee Model of Governance in the Era of Financial Engineering” in A Super Act – 2009 in proceedings of the Annual Meeting of the Superannuation Committee of the Law Council of Australia, February 26 – 29, 2009 [CD Format]. This paper explores the problems for superannuation [pension] fund governance by lay trustees in face of the increasing complexity of modern financial markets and the innovative products traded in those markets. By lay trustees, he is referring to individuals who serve on boards of trustees for superannuation funds on a volunteer, part-time basis for inconsequential remuneration out of a sense of social solidarity with, and moral obligation to, the superannuation scheme’s members. The question is whether lay trustees without expertise in financial decision-making are putting scheme member’s interests at risk because they do not possess the ability to create an optimum investment strategy. Although it is recognized that the sense of obligation of lay trustees

SCHOLARSHIP
offers some benefits in the form of reducing the costs of representation and providing a sense of collective commitment to beneficiaries’ welfare, doubts have been expressed that these benefits outweigh the potential costs to a fund’s investment earnings.

This paper examines the tension between representation and expertise in superannuation fund governance, the response to the “expertise deficit” in the form of delegation to experts, advice from experts and legislated standards for trustee knowledge and understanding. It will also examine various models of governance, assess how they have reconciled representation and expertise and try to evaluate their impact on scheme members’ interests. A possible reconciliation of expertise and representation is the creation of cooperative non-profit superannuation funds large enough to employ their own experts on a cost-effective basis, while requiring lay trustees to undertake intensive training to meet legislated standards.

“A Case of Constitutional Apples and Oranges: A Functional Comparison of Pension Priority and Benefit Guarantees in US, U.K. and Canadian Insolvency and Pension Law Regimes” (2009) 18 International Insolvency Review 135 – 152. Canada’s insolvency law reform increased the priority granted to employer-sponsored pension claims. The article compares the treatment of such claims in the US, the U.K. and Canada. A comparison of the legislative provisions concerning pension funding shortfalls from contribution arrears or economic underperformance finds that insolvency law has been used to address the former risk, but risks from economic underperformance have been addressed by pension benefit insurance. The article suggests that the absence of any insolvency policy rationale for changing priority for shortfalls from economic underperformance and the likely disparity between the assets available to satisfy these claims in insolvency and the size of the claim makes insolvency law much less effective than insurance in addressing this risk.

Canada, however, has not adopted the insurance policy instrument used in the US and U.K. to mitigate the impact of pension funding shortfalls. The constitutional inability of Canada’s Parliament to legislate in respect of matters of pension law that would allow it to control the well-known insurance problems of moral hazard and adverse selection may explain why it has only chosen to adopt an insolvency policy instrument. However, a change in priorities in insolvency may generate incentives for secured creditors that either undermine or reinforce this policy choice. Secured creditors choices will be influenced by the bankruptcy courts’ interpretation of the preference provisions in the insolvency legislation.

Quarterly Updates – Directors’ Liability in Canada (North Vancouver: Specialty Technical Publishers)

Professor Davis has been the principal author for this loose-leaf publication since 2005 and provides quarterly updates on legislative and jurisprudential developments that have an impact on the personal liability of directors in Canada over a wide range of subjects including corporate management, securities law requirements, taxation, employment and insolvency. http://www.stpub.com/pubs/dlcan.htm

“Carbon Taxation in British Columbia” (2008), 10 Vermont Journal of Environmental Law 87-107. Taxes on the carbon content of fossil fuels represent an economically attractive but politically difficult measure to discourage carbon dioxide emissions that contribute to global warming. First introduced in the Scandinavian countries in the early 1990s, British Columbia became the first North American jurisdiction to levy a broad-based tax along these lines when the British Columbia carbon tax came into effect on 1 July 2008. This paper, published in a special issue of the Vermont Journal of Environmental law devoted to the subject of carbon taxation, explains the essential features of the B.C. Carbon Tax Act and reviews the political debate preceding and following introduction of the tax. Completed in the fall of 2008 shortly after the federal election in which the Liberal Party’s “Green Shift” policy failed to attract broad support, the paper concludes by speculating on ways that a carbon tax might be made more appealing politically. http://www.vjel.org/journal/pdf/VJEL10076.pdf

“Tax Avoidance in the 21st Century” C. Evans and R. Krever, eds., Business Tax Reform in Retrospect and Prospect, (Sydney: Thomson, 2009) 477-501. Over the past few decades, several factors have contributed to what several commentators have identified as a significant increase in domestic and international tax avoidance. In response to this apparent increase, governments have adopted various measures, both legislative and administrative. This paper considers the causes of increased tax avoidance over the past several years as well as governmental responses to this phenomenon in key common law jurisdictions, notably Australia, Canada, New Zealand, the United Kingdom and the United States. Emphasizing the increasingly international dimension of tax avoidance, the paper questions whether governmental responses are fully adequate to address the problem of tax avoidance in the twenty-first century.

“Whither the Canadian GAAR? Lipson v. Canada,” [2009] British Tax Review 161-69. On January 8, 2009, the Supreme Court of Canada released its much-anticipated judgment in Lipson v. Canada, the third decision in which the Court has considered the General Anti-AVOIDANCE Rule (GAAR) which was added to the federal Income Tax Act in 1988 in order to limit the traditional Duke of Westminster principle that taxpayers may arrange their affairs to avoid tax. This short comment, based on Professor Duff’s review of the case at the NCBL-sponsored symposium on the judgment on February 9, 2009, examines each of the three opinions comprising the judgment and remarks on its lessons for the application of the Canadian GAAR and general anti-avoidance rules more generally.
that compiles expert research and analysis from around the world with a thematic focus related to corruption. TI commissioned Professor Ford to contribute her work on new trends in regulatory enforcement. Her article identifies several novel approaches – such as compliance and structural reform orders, monitorships, and “partial business line blockouts” – which seek to realign corporate-level incentives in order to meet the goals of the law, including by strategically harnessing business and reputational forces.

Cristie Ford, “Principles-Based Securities Regulation,” Expert Panel on Securities Regulation. The Expert Panel on Securities Regulation, chaired by the Honourable Tom Hockin, was struck to provide independent advice and recommendations to the federal Minister of Finance on how to improve the structure, content, and enforcement of securities regulation in Canada. The Expert Panel commissioned Professor Ford to prepare a research study on principles-based securities regulation. Professor Ford’s study, which is available at www.expertpanel.ca, defines principles-based regulation with a strong emphasis on the importance of effective implementation. It identifies best practices and critical success factors, and risks and opportunities for Canada in moving toward a more principles-based system, and makes a series of recommendations.

Cristie Ford & David Hess, “Can Corporate Monitorships Improve Corporate Compliance?” (2009) 34 J. Corp. L. 679. This article examines the trend among prosecutors and securities enforcement staff in Canada and the United States to rely on settlement agreements to combat securities law violations. Many of these agreements require the use of corporate monitors to oversee the corporation’s compliance with the settlement and its implementation of a compliance program to prevent future violations of the law. This article follows from one of the first empirical studies into whether corporate monitors tend to achieve their stated goals. Based primarily on interviews with individuals directly involved in monitorships, it evaluates the entire monitorship process from negotiation through closure. It finds that decisions at critical points during this process lead to monitorships that seem unlikely to achieve their goals on any consistent basis. After identifying the problems, the article suggests measures for reform.

Professor Ford has also given several presentations and media interviews in the past year in Canada and the United States, particularly on the topic of principles-based securities regulation. To view more of Professor Ford’s recent work, visit http://www.law.ubc.ca/faculty/Ford/index.html.

Bruce MacDougall
Professor

Professor MacDougall’s recent publications include Personal Property and Secured Transactions (Lexis/Nexis, 2008). This work is one of the volumes in the new Halsbury’s Laws of Canada, a comprehensive treatment of all laws of Canada. The volume by Professor MacDougall deals with the law relating to personal property and especially those laws dealing with the use of personal property in secured transactions. It deals with the provincial regimes set up under the Personal Property Security Acts and also those regimes set up federally, most notably under the Bank Act. It is a comprehensive treatment of the laws of all provinces and territories, except Quebec. The use of personal property as security is a basic feature of commercial life today and has become even more important in the current economic situation where lending has become tighter. Also, the introduction of the Securities Transfer Act in about half the jurisdictions of Canada (with the others except Quebec expected to follow) has made the dealing in one particularly valuable form of personal property, namely investment property, more complex. This book deals with the ramifications of that statutory regime on secured transactions. Professor MacDougall is working on a related work that deals specifically with this subject matter in the BC context.

Janis Sarra, Professor


Pitman Potter
Professor, Director, Institute of Asian Research

Professor Potter has published several books, including most recently A Guide to Business Law in Asia (w/ Ljiljana Biukovic, Lexis/Nexis 2008), as well as numerous articles for such journals as Law & Social Inquiry, The China Quarterly, and The International Journal.

Edited by Doctor Pitman Potter and Doctor Ljiljana Biukovic of the UBC Institute of Asian Research, A Guide to Business Law in Asia is a multi-contributed text that offers an integrative theoretical and practical approach to the development of business laws in China, India, Indonesia, Hong Kong, Korea, Japan and Taiwan.

Each chapter provides an overview of the business law system in the selected
country, identifying key local issues and the adaptation of international regimes, eg: World Trade Organisation, and reviews local conditions and provides insight into their meaning, eg: property regime in Indonesia, with discussion of possible future developments. Each chapter also provides an appendix of current laws and regulations for the economy selected, as well as lists of text and electronic resources on business law and regulation.

This extensive and comprehensive work is a thorough reference and guide to all major areas of business law and investment in the People’s Republic of China, and offers a wide-ranging analysis and commentary on Chinese business laws. Designed for those who are either planning to invest in China or who already have an established presence, Doing Business in China provides a detailed examination of all relevant legislation and practice in China that affects business and investment. It also closely examines key issues and potential pitfalls involved in all areas of business and investment. http://www.lexisnexis.ca/bookstore/bookinfo.php?pid=1619 (A Guide to Business Law in Asia) http://www.jurispub.com/113/doing-business-in-china (Doing Business in China)

FASKEN MARTINEAU SENIOR VISITING SCHOLAR

The National Centre for Business Law is pleased to announce its inaugural Fasken Martineau Senior Visiting Scholar, Professor John Braithwaite, Australian Research Council Federation Fellow at the Regulatory Institutions Network of the Australian National University.


Professor Braithwaite is also founder of the Regulatory Institutions Network – an affiliation of scholars from different disciplinary backgrounds whose work in the field of regulation and governance seeks to advance understanding of and approaches to regulation through evidence-based theory, policy and practice. For a full account of Professor Braithwaite’s work, please visit http://www.anu.edu.au/fellows/jbraithwaite/.

Professor Braithwaite will be visiting the NCBL at UBC Law from September 19 to October 3, 2010, during which time he will deliver a public lecture on current aspects of his work and the Centre will host a conference addressing the influence of his work on various fields of business law scholarship.

The Fasken Martineau Senior Visiting Scholar Program has been made possible by an extremely generous gift from the NCBL’s founding Platinum Sponsor, Fasken Martineau.

TSX GROUP ANNUAL LECTURE

Institutional Reform and Novel Remedies in North American Securities Law Enforcement

Chair: John McCoach, Vice-President TSX Group, now President TSX Venture Exchange

TSX Lecturers: Professor Cristie Ford, National Centre for Business Law, University of British Columbia; and Professor David Hess, Ross School of Business, University of Michigan

Professors Cristie Ford and David Hess gave the third TSX Lecture on September 22, 2008, at the Four Seasons Hotel in Vancouver, BC. The research, sponsored by the National Centre under the TSX Capital Markets Initiative, examines the use of corporate monitorships in the United States and Canada.

Over the last few years, prosecutors and securities law enforcement agencies have increasingly relied on corporate monitorships, imposed through settlement agreements, to combat securities violations and other corporate criminal acts. Especially in the United States, a great deal of scrutiny has been brought to bear on criminal prosecutors’ use of monitorships as part of deferred prosecution agreements with major public companies and firms (including WorldCom, Computer Associates, and KPMG). Many of these agreements require the use of corporate monitors to oversee the corporation’s compliance with the settlement and its implementation of a compliance program to prevent future violations of the law.

Although these agreements have received significant attention from legislators and scholars, there has been no investigation into the critically important question of whether or not the use of corporate monitors achieves its intended goals. In the TSX Lecture, Professors Ford and Hess presented the results of their recent, interview-based empirical research into the use of corporate monitorships. Their research considers the entire monitorship process – including the selection of the monitor, how the monitor conducts his or her work, and what happens after a monitorship – and finds that decisions taken at critical points during the process can lead to monitorships that are significantly less ambitious than government pronouncements behind them, and that seem unlikely to achieve their goals on any consistent basis.

Their research, subsequently published as, “Can Corporate Monitorships Improve Corporate Compliance?” (2009) 34 J. Corp. L. 679, draws a number of conclusions and suggests measures for reform regarding the role of the monitor, the goals of monitorships, and best practices for regulators in creating effective processes.
The “Managing Business Risk Roundtable” in January 2009 drew together scholars from western Canada and elsewhere in an intellectual exchange on business risk allocation. The research collaboration allowed legal scholars to think about the allocation of risk in a deeper way and to develop a shared understanding of the linkages between business risk and the law. Professor Janis Sarra of UBC Faculty of Law presented a paper that explored the conceptualization and management of risk in financial products markets, examining how legal rules in business law apportion risk to contracting parties, to capital markets participants, and to individuals and companies engaged in economic activity.

Professors Shannon O’Byrne, University of Alberta Faculty of Law and Ronnie Cohen, Christopher Newport University School of Law presented a paper titled “Risk Allocation and Misplaced Emotion: The US Subprime Crisis”, which advances the view that an important cause of the United States’ subprime mortgage crisis is contract law’s derisory response to emotion and the defective risk allocation model that it helped to generate. The originate-to-distribute model of subprime lending allowed the subprime mortgage industry to take advantage of the borrower’s “imperfect rationality”, designing subprime mortgage contracts with the express objective of burying the long-term cost of loans.

Dr. Ronald Davis of UBC Faculty of Law analysed business risk in the choice of pension fund asset allocations, observing that unprecedented losses in the values of all types of financial instruments, together with a global recession has put the viability of the largest business enterprises at risk and led governments to intervene in all facets of the economy. Pension funds have been hard hit by these events with dramatic losses in the market value of their investments and continued low long-term interest rates increasing the current value of their liabilities; the paper explores these developments and potential policy options.

Professor Rebecca Johnson, University of Victoria Faculty of Law presented a paper titled “As a Matter of Fact: Reflections on Risk, Dissent, and Unimagined Alternatives in Business Law”, analyzing Supreme Court of Canada’s corpus of business cases, and particularly, the lack of dissent about ‘risk’ when it comes to questions of business and the economy. The paper suggests that risk is theorized quite differently in criminal and business law. Professor Freya Kodar, also of the University of Victoria Faculty of Law, discussed payday loans and conceptions of risk in the payday loan regulation debate. Professor Michael Ilg, University of Calgary Faculty of Law presented a paper titled “Reconciling International Humanitarian Health Priorities with Economic Incentives for Research and Development” examining the risks associated with business and R&D incentives and activities.

Remus Valsan of McGill University presented a paper on Risk and Corporate Governance, co-authored with Professor Moin Yahya of the University of Alberta Faculty of Law. The paper suggests that with respect to the optimal level of risk to be undertaken by a firm, the courts have constantly been reluctant to interfere, as long as the directors acted prudently and on a reasonably informed basis. The paper analyzes the way in which the corporate governance system protects capital investors against prejudicial managerial decisions, focusing on tensions that may arise among managers, shareholders and creditors during periods of near-insolvency and change of control transactions.

The Roundtable is part of a continuing initiative of the National Centre to draw together scholars from western law schools to advance scholarship on timely business law questions.

NEW SCHOLARSHIP ANNOUNCEMENT

This year, we have a new award to announce that is specific to the Business Law Concentration: The Association of Women in Finance Scholarship in Law. The Association of Women in Finance is an organization that encourages and supports women in the financial profession, and they have established an annual $1,500 scholarship that will be awarded to an outstanding student enrolled in the Business Law Concentration.

The 2008-2009 recipient of the award is Mario Rubio.

L-R: David Duff, Professor and Director National Centre for Business Law, Mario Rubio, Crisite Ford, Assistant Professor and former Co-Director, National Centre for Business Law
On May 25-27, 2009, with the support of the Social Sciences and Humanities Research Council (SSHRC) and the Law Foundation of British Columbia, the National Centre for Business Law co-sponsored a two day intensive workshop of 15 interdisciplinary international and Canadian scholars on the topic of “New Governance and the Business Organization.” NCBL Co-Directors Cristie Ford and Mary Condon hosted the event, with papers presented by:

- Ken Bamberger, Boalt Hall School of Law, Berkeley, California
- Benjamin Cashore, School of Forestry & Environmental Studies, Yale University
- Larry Cunningham, George Washington University Law School; and David Zaring, Wharton School of Business, University of Pennsylvania
- David Hess, Ross School of Business, University of Michigan [with Cristie Ford]
- Bridget Hutter, Centre for Analysis of Risk and Regulation, London School of Economics
- Christine Parker, University of Melbourne Law School
- Susan Silbey, Department of Anthropology, Massachusetts Institute of Technology; and Ruthanne Huising, Desautels Faculty of Management, McGill University
- Bill Simon, Columbia Law School
- Susan Sturm, Columbia Law School
- Cynthia Williams, Osgoode Hall Law School, York University, and University of Illinois College of Law
- Stepan Wood, Osgoode Hall Law School, York University

New governance is an emerging scholarly approach that endeavours to advance our understanding of prescriptive approaches to regulation of business organizations. It represents a fundamental challenge to classical command-and-control regulation, where government’s primary role is to set definite rules and then punish noncompliance. The key insight of new governance scholarship is that pragmatic, problem-based experimentation at the local, business-specific level can be enhanced through centralized outcome analysis to forge a participatory, flexible, “best practices”-driven process of continual improvement and ongoing learning. New governance style methods have been shown to effect positive change with respect to seemingly intractable problems in diverse areas of concern. On the other hand, the global financial crisis that gathered momentum in fall 2008 represents a profound challenge to contemporary regulatory approaches, like new governance, that rely on regulated entities to participate in cooperative relationships with regulators, and to generate and respond to information in an environment defined by enforced self-regulation.

These changes in the nature of regulation represent the most significant shift in public governance in decades, and their impact on business organizations needs to be investigated. The relationship between new governance trends and practical questions of how business organizations operate, and how they are best regulated, has never been more significant in intellectual, cultural, economic, and social terms. Yet there has been a lack of dedicated attention to the relationship between new governance theory and business organizations. The focus of this workshop was on the interfaces between new governance theory and business organizations. These interfaces are myriad, influencing both the regulation of business organizations and their internal operations. Panels were convened on the topics of “Contemplating and Examining Risk,” “Regulatory Design,” “The Promise of International Standards,” and “Sanctioning Theory and Practice.” Major cross-cutting themes examined the new governance project itself; the possibilities for and limits of conscious regulatory design; how change happens, where it does; and questions of agency. The ultimate product of this workshop will be a book of essays, edited by Cristie Ford and Mary Condon, that aims to fill this crucial vacuum in the scholarship and to become an important resource for those concerned with business, corporate law, regulation, and legal theory.
UBC Faculty of Law introduced a Business Law Concentration in September, 2006. During the J.D. program, students may undertake a range of courses that emphasize areas of law that are essential to the practice of business law. This group of courses constitutes the ‘Business Law Concentration’. It is an optional program signaling that students have completed legal studies providing them with a solid theoretical, doctrinal and practical education in business law.

To complete a Business Law Concentration, students must take six out of their required upper year courses in the foundational business law categories of Business Organizations Law, Business Finance Law, Business Transaction Law and Business Policy, with at least two additional courses in a specialized stream of Tax and Trust Law, Asian & European Law and Trade, Intellectual Property, Natural Resources Law, Employment Law, Dispute Resolution and Land Use Law. The program also facilitates connections between students and the business law community by integrating classroom learning with participation in seminars in which practitioners and nationally recognized legal scholars discuss current developments in business law.

The Capstone Course, which is the final requirement to complete the Concentration, was taught for the first time in spring 2008. This course allows the student to demonstrate that they have achieved the learning goals of the business law concentration and are able to apply that understanding in a broader array of circumstances that frequently confront the business lawyer. It is designed to be integrative and interdisciplinary, and to incorporate theoretical and practical elements of business law.

The course incorporates core business law concepts, including corporate governance issues, selected disclosure issues, legal principles and terms involved in merger and acquisition transactions, financing options and structures and bridge broader legal subject areas to expose students to a broad array of circumstances encountered by many business lawyers. It also introduces students to practical litigation issues encountered by business and in-house lawyers to give students a broader perspective on the practice of law from an in-house counsel perspective. Through this course, students are expected to draw greater connections between substantive areas of the law, make clear connections between business law and governance issues, develop rudimentary drafting and negotiation skills, enhance their legal research and reasoning skills and oral advocacy skills. Students are exposed to practitioners, financiers and regulators with different perspectives on a variety of business law issues. The course is delivered through lectures, presentations and small group activities. Lectures and class instruction are lecture based and socratic with regular class participation expected.

“The Business Law Concentration, culminating in the Capstone class, provided me with a unique and practical experience that has been invaluable to my understanding of the current issues surrounding business and corporate law. The broad variety of courses allows students to follow their individual interests, while the rigorous curriculum ensures we understand the big picture. I feel confident that the hands-on negotiations, analysis of actual transactions, and considerations of governance and ethical issues taught by leading practitioners and academics has prepared me well for my entry into practice.”

Christina Bulbrook
Business Law Concentration
LL.B. Graduate, May 2009

The 2008-09 Capstone Course was taught by Co-Adjunct Professors Heather Northrup and Janet Grove, Bull, Housser & Tupper LLP. This year’s class exposed the students to the issues and documents involved in a corporate M&A transaction and discussed current issues in corporate governance, executive compensation and corporate risk management. The largest project the students undertook was a team based assignment in which each team was required to evaluate a different recent M&A transaction, review the relevant agreements and public filings related to that transaction, provide an in-depth analysis of the transaction and also put themselves into the shoes of the lawyers on each side to explain and justify some of the business and legal decisions made in connection with that transaction as well as areas that they would have addressed differently.

Other assignments required the students to consider and advise their client on corporate governance and takeover issues relevant to a proposed transactions and to advise on strategies to manage corporate risk following a mock news event.

A special thank you to those who participated as guest lecturers in this year’s class.

Guest Lecturers included:

- William J. McFetridge, Senior Partner, Bull, Housser & Tupper LLP discussed letters of intent and the key issues to be considered when advising on letters of intent in the context of a merger or acquisition;
- Brent Holliday of CapWest Partners and David Hunter, a partner with Bull, Housser & Tupper LLP, discussed the role of venture capital lenders, typical venture capital business terms and legal documentation;
- Sandy Jakab, Director, Capital Markets Regulation with the British Columbia Securities Commission and Marion Shaw, a partner with Bull, Housser & Tupper LLP, discussed regulations surrounding takeover bids;
- Ron Lauenstein, Legal Counsel with the Department of Justice Aboriginal Affairs Branch discussed legal issues involved in transactions involving First Nations and First Nations properties.
was the founder and Chief Executive of Intercounsel Limited. He also served in law. He served as a special assistant to the Prime Minister of Canada and to Canada and to Canadian enterprises. He is one of the private-sector architects of the North American Free Trade Agreement.

Mr. d’Aquino’s career combines experience in government, business, and leadership, the Council has played an influential role in shaping the direction of fiscal, taxation, trade, energy, environmental, competitiveness and corporate governance policies in Canada. Mr. d’Aquino and his colleagues have worked on a wide range of North American and global issues germane to Canada and to Canadian enterprises. He is one of the private-sector architects of the North American Free Trade Agreement.

Mr. d’Aquino’s career combines experience in government, business, and law. He served as a special assistant to the Prime Minister of Canada and was the founder and Chief Executive of Intercounsel Limited. He also served as an international trade lawyer and as an adjunct professor of law. He serves on boards and advisory committees in Canada and abroad and has been considered one of Canada’s most effective global business ambassadors. He has been a regular commentator on radio and television and a frequent speaker in Canada, the United States, Europe, Asia, and Latin America. Mr. d’Aquino has addressed audiences in 25 countries and more than 100 cities.

Mr. d’Aquino is the author of numerous publications and the coauthor of Northern Edge: How Canadians Can Triumph in the Global Economy. He was educated at the University of British Columbia, Queen’s University, University College London, and the London School of Economics. He holds BA, LLB, and LLM degrees, as well as Honorary Degrees of Doctor of Laws from Queen’s University and Wilfrid Laurier University.

While at the NCBL Mr. d’Aquino gave the keynote address at the 2nd Annual General Meeting, speaking on Maximizing Canadian Competitiveness in a Transforming Global Economy: A CEO Perspective to a standing room only lecture hall at UBC Robson Square. He also held a Plenary Session with members of the UBC Law Faculty and students on The Future of the North American Free Trade Agreement and the Politics and Economics of Continental Cooperation and was a Guest Lecturer at a Securities Regulation class speaking on Corporate Social Responsibility – Beyond The Bottom Line. Mr. d’Aquino met with faculty and students on an informal basis to share ideas on timely issues and also met with members of the Dean’s Advisory Committee and NCBL affiliates.

The National Centre for Business Law was honoured to have Mr. Thomas Paul d’Aquino as its 2008 Executive in Residence in October. Mr. d’Aquino is a lawyer, entrepreneur, author, educator, and strategist.

For nearly three decades he has been Chief Executive and President of the Canadian Council of Chief Executives (CCCE), a nonpartisan and not-for-profit organization of the chief executives of 150 of the country’s leading enterprises. The Council speaks on behalf of Canadian businesses on public policy issues in Canada, the United States and internationally. Under Mr. d’Aquino’s leadership, the Council played an influential role in shaping the direction of fiscal, taxation, trade, energy, environmental, competitiveness and corporate governance policies in Canada. Mr. d’Aquino and his colleagues have worked on a wide range of North American and global issues germane to Canada and to Canadian enterprises. He is one of the private-sector architects of the North American Free Trade Agreement.

The LBS is very proud to have developed an affiliation with the NCBL since September 2009. After a very successful inaugural Business Law Reception that brought together students interested in pursuing business law, representatives of the NCBL affiliates and the NCBL Dean’s Advisory Committee, the LBS is excited to co-host this event with the NCBL for many years to come. The LBS will also be working with the NCBL on co-hosting lunch time speaker series, and promoting various NCBL events to the student-body. We are confident that our collaboration with the National Centre for Business Law will help both organizations carry out their respective mandates in a stronger, and more efficient way. (www.ubclbs.org)

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ENGAGING THE COMMUNITY

SECOND NCBL ANNUAL GENERAL MEETING AND RECEPTION

The National Centre for Business Law hosted its second Annual General Meeting and Reception on October 23, 2008. Mr. Thomas Paul d’Aquino, Chief Executive and President of the Canadian Council of Chief Executives (CCCE) and 2008 NCBL Executive in Residence gave the keynote address that followed a series of panels covering a range of business issues. UBC Law Dean Mary Anne Bobinski welcomed guests and the meeting Chair was the Honourable Frank Iacobucci, QC, LLB Counsel, Torys LLP, Toronto and former Chair, NCBL Dean’s Advisory Committee. The line-up included:

- Provincial Enforcement of Securities Regulation: Data and Debates
  Professor Mary Condon, Osgoode Hall Law School and 2008 Visiting Owen Chair, UBC Law; Douglas Hyndman, former Chair, BC Securities Commission Commission and current Chair & CEO, Canadian Securities Transition Office; and Mark Skwarok, Partner, Lang Michener LLP

- International Tax Policy: A New Era
  Professor Kimberley Brooks, H.eward Stikeman Chair in the Law of Taxation, Faculty of Law, McGill University; Jalia Kangave, PhD Student, UBC Law; Professor David Duff, Faculty of Law, University of Toronto and Visiting Scholar, UBC Law; and Michael Taylor, Counsel, Tax Law Services, Department of Justice

- Sustainability Issues from a Business Perspective
  Professor Stephanie Bertels, School of Business, SFU; Professor Shi-Ling Hsu, UBC Law; and Selina Lee-Andersen, Blake, Cassels & Graydon LLP

On January 22, 2009, the NCBL and KPMG co-sponsored a symposium on international tax reform, at which academics, practitioners and business representatives discussed the Final Report of an Advisory Panel on Canada’s System of International Taxation which the federal Minister of Finance established in November 2007. The Advisory Panel’s final report was released on December 10, 2008 and is available at the Advisory Panel’s website at http://www.law.ubc.ca/ncbl/index.html.

The symposium discussed each of the recommendations in the report, as well as its implications for Canadian international tax reform. After a brief introduction by Walter Pela (the Managing Partner of KPMG’s Vancouver Office) and Mary Condon (Co-Director of the National Centre for Business Law), the symposium began with a general overview of the Advisory Panel and its Final Report by the Panel’s Executive Director, Brian Mustard.

This introductory session was followed by two sessions addressing the Advisory Panel’s recommendations concerning the taxation of inbound and outbound direct investment (chapters 5 to 7 of the Final Report) and the taxation of outbound direct investment (chapter 4 of the Final Report). Each of these sessions involved a back-and-forth discussion between a tax academic and a tax practitioner – Tim Edgar (University of Western Ontario Faculty of Law) and Mark Meredith (Moskowitz and Meredith) discussing the taxation of inbound direct investment, and David Duff (University of British Columbia) and Tony Martin (KPMG) discussing the taxation of outbound direct investment.

A final session involved a panel discussion with academics, practitioners, and business representatives, including Rod Bergen (Managing Director of Taxation for the Pattison Group and Chair of the Tax Executives Institute) and Bruce Flexman (President of the British Columbia International Financial Centre). More information on the symposium can be found on the NCBL’s website at http://www.law.ubc.ca/ncbl/index.html.

On February 9, 2009, the NCBL co-sponsored a symposium on the recent Supreme Court of Canada decision in Lipson v. Canada, 2009 SCC 1, together with the Canadian Tax Foundation and the University of Toronto Faculty of Law. The decision (which can be accessed at http://csc.lexum.umontreal.ca/en/2009/2009scc1/2009scc1.html) is the third Supreme Court of Canada decision to address the general anti-avoidance rule (GAAR) in section 245 of the federal Income Tax Act, and is a highly controversial judgment in which a slim majority of four justices applied the rule, with three justices dissenting.

The symposium consisted of two sessions, the first discussing the case itself and the second discussing its implications for tax planning, followed by comments by Chief Justice Gerald Rip of the Tax Court of Canada. The first session was chaired by Claire Young (University of British Columbia) and involved comments on the case by David Duff (University of British Columbia), Ben Alarie (University of Toronto), Tim Edgar (University of Western Ontario), Robert Carvalho (Department of Justice) and Ed Kroft (McCarthy Tétrault LLP). The second session was chaired by Tim Duholke (Davis LLP) and involved comments by Mark Meredith (Moskowitz and Meredith), Deen Olsen (Department of Justice), Warren Mitchell (Thorsteinssons LLP), and Wayne Adams (Canada Revenue Agency). The symposium was webcast live, and can be accessed at the NCBL’s website at http://www.law.ubc.ca/ncbl/index.html.

THE FUTURE OF CANADIAN SECURITIES REGULATION?

THE EXPERT PANEL REPORT

One of the highlights of the NCBL’s year was the very successful all-day conference organized to consider the recommendations of the Expert Panel on Securities Regulation, which reported in January 2009. Held only a month later at the Four Seasons hotel, the conference brought together a broad range of perspectives on the recommendations from a distinguished group of speakers. These included the Chairs of the BCSC and the ASC, Heather Zordel (a member of the Expert Panel), Ermanno Pascutto (Executive Director of FAIR) and Peter German (Assistant Commissioner of the RCMP). Speakers from academia included; Robin Elliott and Kristie Ford (UBC Faculty of Law), Jean-Francois Gaudreau-Desbiens (Université de Montréal), Peter Hogg (emeritus professor at Osgoode Hall Law School) Mark Gillen (University of Victoria) and Lorne Sossin (University of Toronto Faculty of Law). Topics canvassed included: the meaning and impact of the principles-based and proportionate regulatory approaches recommended by the Expert Panel, the structure of the proposed Canadian Securities Commission, the intended role of the proposed small issuer and consumer consultation panels and the constitutionality of the proposals made by the Panel.

SYMPOSIUM ON INTERNATIONAL TAX REFORM

L-R: Bev Dahlby, Institute for Public Economics, University of Alberta, Bruce Flexman, President, International Financial Centre British Columbia, Tim Edgar, University of Western Ontario Law

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The Centre was host once again to Canada’s leading national conference on insolvency law and policy. The 6th Annual Review of Insolvency Law (ARIL) conference was held on February 13, 2009, in Banff Alberta, drawing 350 practitioners, scholars, judges and regulators. The conference co-chairs were Madam Justice Barbara Romaine, Alberta Court of Queen’s Bench; Dr. Janis Sarra, UBC Faculty of Law; Howard Gorman, Macleod Dixon LLP; and Neil Narfason, Ernst & Young Inc., Calgary.

The plenary panel explored the landmark proceeding of the year, the restructuring of the third party asset-backed commercial paper market in Canada, chaired by Madam Justice Georgina Jackson, Saskatchewan Court of Appeal, and featuring key players in the proceeding from Goodmans LLP Toronto: Benjamin Zarnett, Gale Rubenstein, Francesca Guolo, and Stephen Halpérin, discussing various aspects of the complex $32 billion restructuring, with commentary from Craig Hill, Borden Ladner Gervais LLP giving the monitor’s perspective.

The conference also addressed the implications of the current financial crisis for US insolvency law, drawing on the expertise of US judges and lawyers. Panels debated the use of the oppression remedy in insolvency restructuring cases; and credit derivatives and credit insurance as risk management tools. Mr. Justice Clément Gascon of the Québec Superior Court led a discussion on the cross-border treatment of business enterprise groups with a distinguished panel featuring Jenny Clift, Secretariat, UNCITARL, Vienna; Mahesh Uttamchandani, Senior Counsel, World Bank, Washington DC; Chris Redman, Husch Blackwell Sanders LLP, US Delegate to UNCITRAL Working Group V; and Susan Grundy, Blake, Cassels & Graydon LLP, Toronto.

Madam Justice Marina Paperny, Alberta Court of Appeal, led a discussion on director and officer indemnification in insolvency restructuring proceedings, including an exchange regarding recent cases and new statutory provisions. Another panel addressed forbearance agreements as the new workout strategy. The conference hosted the first debate on whether liquidating CCAA proceedings are an appropriate use of the statute, featuring comprehensive articles by Shelley Fitzpatrick, Davis LLP and Bill Kaplan, Blake, Cassels & Graydon LLP; that panel chaired by Mr. Justice Geoffrey Morawetz, Ontario Superior Court of Justice, with commentators Richard Morawetz, Alvarez & Marsal Canada ULC and Alec Zimmerman, Borden Ladner Gervais LLP, both of Toronto.

Distinguished legal scholar Professor George Triantis of Harvard Law School discussed The Future of Material Adverse Change Clauses: Should They Be More Specific? In respect of consumer insolvency, one panel debated the question of the feminization of poverty in Canadian insolvency practice, with a thoughtful paper given by Registrar Michael Bray, New Brunswick Court of Queen’s Bench. The conference discussed the latest developments in the treatment of exempt assets on discharge, led by Registrar Andrew Diamond, Ontario Superior Court of Justice. Uwe Mansaki of BDO Dunwoody presented a paper titled Of Death and Taxes, and Of Compliance Clauses, on a panel with Robb English, Aird & Berlis and Diane Winters, General Counsel, Justice Canada, Toronto.

The first experience with the new Wage Earner Protection Program was analysed, both from the federal government and trustee perspective. Practitioners and legal scholars gave a cross-country update on commercial insolvency cases, discussed the Securities Transfer Act and systemic risk, pay day loans and the risks inherent in the settlement of tort claims in insolvency proceedings.

A panel on “priorities and protection”, chaired by Madam Justice Sarah Pepall, Ontario Superior Court of Justice, presented three papers, Equitable Subordination by Michael MacNaughton and Sam Rappos, Borden Ladner Gervais LLP, Toronto; The Federal Enhanced Deemed Trust: a New Source of Liability for Financial Institutions?, by Roger Simard, Fraser Milner Casgrain LLP, Montréal; and Prior Agreements and Section 95 of the BIA by Gordon Levine and Anastasia Flouri, with Professor Thomas Telfer, Western Faculty of Law, London as commentator.

Our very sincere thanks to all those firms and organizations that made the conference possible, and in particular, to our platinum sponsor, Borden Ladner Gervais LLP, and our gold sponsors Alger and Associates Inc., Alvarez & Marsal Canada ULC, BDO Dunwoody Ltd., Blakes LLP, Fraser Milner Casgrain LLP, PricewaterhouseCoopers and the Insolvency Institute of Canada. Thank you also to all the authors that contributed to this year’s volume, which contains comprehensive analysis of the year’s developments in insolvency law. We also recognize the work of the ARIL review board and the reviewers for their insightful comments, our student editors, and all the speakers who gave their time and energy to making the conference a success.

Next year’s conference is Friday February 5, 2010 in Kelowna, BC. The themes include risk and return: operating and exit financing in commercial restructuring proceedings; conflicting priorities in debt claims; real estate insolvencies; recent developments in the treatment of pension claims; insights for Canadian practitioners appearing before the US bankruptcy court and a host of other issues arising from the recent legislative amendments and current proceedings.

For information, contact Dr. Janis Sarra at sarra@law.ubc.ca; or for conference registration, contact Michelle Burchill at burchill@law.ubc.ca.
VANCOUVER BUSINESS LAW SPEAKER’S SERIES

We would like to thank the following speakers for offering their insights on their research and allowing an opportunity for discussion and debates over the past year:

The SEC, Retail Investors and the Process of Institutionalization
Donald C. Langevoort, Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Centre

An Explanation and Evaluation of Corporate Governance Reforms in the United States During the First Years of the 21st Century
Harvey Goldschmid, former Commissioner and General Counsel at the United States Securities and Exchange Commission and Dwight Professor of Law at Columbia Law School

The Tax Implications of the Free Movement of Capital Rules in the EU for Canadian Investors and for EU Investors in Canada
Professor Martha O’Brien, Faculty of Law, University of Victoria

Moving to Principles-Based Regulation - Canada’s Registration System Reforms
Sandy Jakab, Director, Capital Markets Regulation, British Columbia Securities Commission

A Reappraisal of the Regulatory Framework for Reviewing Target Board Responses to Unsolicited Bids
Naizam Kanji, Senior Legal Counsel, Take-over Bids, Mergers & Acquisitions, OSC

The 2008 Bankruptcy Reforms and the Global Financial Crisis
Stephanie Ben-Ishai, Associate Professor of Law, Osgoode Hall Law School, York University

Does Opting out of Mandatory Corporate Law Add Value? Income Trust Governance Choices and Value
Ed Iacobucci, Osler Chair in Business Law, University of Toronto Faculty of Law

Sticky Contracts (or Why Don’t Law Firms Have R&D Departments?)
Mitu Gulati, Professor, Duke Law (co-authored with Robert Scott)

CALGARY BUSINESS LAW SPEAKER’S SERIES

A special thank you goes to Bennett Jones LLP and McLeod Dixon LLP for their generous sponsorship of the Calgary Speaker’s Series.

Financial Innovation, Regulation and the Credit Market Turmoil
Christopher Nicholls, Faculty of Law, University of Western Ontario

Examining the Behaviour of Independent Boards
Associate Dean Anita Anand, Faculty of Law, University of Toronto

Competition Policy, Product Distribution and the Role of Economics
Ralph Winter, Canada Research Chair in Business Economics and Public Policy, University of British Columbia, Sauder School of Business, Strategy and Business Economics Division

Litigating in Multiple Jurisdictions as an Offensive or Defensive Tactic - When and How Should Judges Control It?
Joost Blom, UBC Faculty of Law

Takeovers and Directors’ Duties in Canada
Poonum Puri, Osgoode Hall Law School, York University

Developments in the Law of Fraudulent Conveyances and Preferences: The Recent BIA Amendments and Reform of Provincial Law
Tamara Buckwold, Faculty of Law, University of Alberta

Tax Newsletter

The National Centre for Business Law issued the 5th Tax Newsletter in March 2009. To eliminate mailing costs, the method of distribution was changed from post to email. Professor Tony Sheppard, UBC Faculty of Law was the editor, and authored an article on the tax consequences of a government bailout. This issue also highlights important tax-related events of the Centre in 2009, introduces one of UBC Law’s newest professors with a special interest in taxation, David Duff, and profiles careers of some of the Faculty’s LL.M. graduates in taxation. It was sent electronically to 500 tax practitioners in Canada. To view the newsletter visit www.law.ubc.ca/files/pdf/nccbl/2009_Tax_Newsletter.pdf.

GOLD AFFILIATE OF THE NATIONAL CENTRE FOR BUSINESS LAW

BRONZE AFFILIATES

Macleod Dixon LLP
At its meeting in October 2008, the Dean’s Advisory Committee (DAC) determined that the Co-directors of the NCBL should engage in a strategic review of the NCBL’s operations during the first three years of its existence and determine if changes needed to be made. Accordingly, a strategic planning sub-committee of the DAC was formed. The members of the subcommittee were Sharon Geraghty (chair), Mitch Gropper, Audrey Ho, Bill Kaplan and Stu Morrow, along with the two co-directors. We would like to express our deep appreciation to the members of the subcommittee for the invaluable advice and guidance they provided as we sought to think about how best to build upon the NCBL’s strong beginnings, so as to further assure its position as a valuable national forum for research, outreach and student education on business issues. The sub-committee deliberated over the course of several lengthy conference calls, ably chaired by Sharon Geraghty, and considered a number of draft planning documents prepared by the co-directors. A final version of the strategic plan was presented at the DAC’s meeting in March 2009 and will form the basis of the NCBL’s activities for the next several years.

With respect to its education mandate, in the years to come the NCBL will be paying particular attention to the role it can play in making UBC Law an attractive destination for students interested in business law at both the graduate and JD level. The establishment of the Business Law Concentration at the JD level was a clear accomplishment in this regard. This year we were also able to present the inaugural Association of Women in Finance Scholarship in Law to Mario Rubio, the Business Law Concentration student that achieved the highest GPA in business law classes in the second year of the JD program. We have established a new working relationship with UBC’s Law & Business Society, the largest independent student-run club in the law school. We will also seek to enhance our efforts through research paper or other prizes for JD students, increased support for graduate student education, and facilitating student attendance at our conference and seminar series events.

To facilitate cutting-edge research, the NCBL will be implementing specific initiatives that encourage faculty members both at UBC Law and elsewhere (via the affiliated scholar initiative) to collaborate on projects and disseminate the results of NCBL-sponsored research. A critical component here is the Fasken Martineau visiting scholar initiative mentioned earlier in this report. The research funds provided by the TSX’s Capital Markets Initiative, which support especially interdisciplinary and collaborative research, have also been a major boost to this endeavour. With the support of the Social Sciences and Humanities Research Council and the Law Foundation of British Columbia, the NCBL also co-hosted an exciting workshop in May on the topic of “New Governance and the Business Organization.” This two day event brought together an interdisciplinary group of 15 prominent international and Canadian scholars for a very productive exchange of ideas, and we welcome the opportunity to host similar events in the coming years. Going forward, a key priority will be on attracting additional talented business law scholars to UBC Law and to the NCBL. The recruitment of our incoming NCBL Director, Professor David Duff, a senior tax scholar from the University of Toronto, is an exciting first step in further expanding our base of business-related expertise.

The third pillar of our mandate is engagement with the broader community. We have learned from the success of some more high-profile and partnered major conferences this year (such as our full day symposium on the Expert Panel on Securities Regulation, and our conference on the Lipson decision) that we can have a larger impact by hosting or co-sponsoring fewer, more strategic, and timely events. Accordingly, the NCBL will seek to consolidate its efforts around more focused, theme-oriented public events that will be relevant and timely, that will engage our key communities, and that will be broadly accessible, including through publication of conference proceedings after the fact. We will actively seek out opportunities for collaboration with other scholarly business and business law centres and public policy organizations, within UBC and across the country. We will also be “going virtual,” and devoting greater attention to webcasting and web-based opportunities.

For more information on the strategic plan, please contact Michelle Burchill at business-law@law.ubc.ca.