

BENCHERS' DIGEST

Volume 11, Issue # 2 March, 1998

John Stamatinos, a partner in the firm Stamatinos Leland Koskie, was elected a Bencher in 1994. Mr. Stamatinos is currently Chair of the Professional Standards Committee, Vice-Chair of the Finance Committee, a member of the Gender Equity and Annual Meetings Committees, and the Law Society representative on the Real Estate Practice and Fee Review Committee. He has served as Vice-Chair of the Professional Standards, Libraries and Ethics Committees, and as a member of the Complainants Review and Queen's Counsel Selection Committees.

John L. Stamatinos, Q.C.

Real Estate Practice and Fees Review

The Real Estate Practice and Fee Review Committee was established by the Benchers in 1998 for the purpose of reviewing and if possible, making recommendations on three issues affecting lawyers who practice Real Estate Law.

The first issue is the Tariff of Fees. The profession has seen many changes to the fees charged in real estate transactions since the advent of legal advertising. Some lawyers have taken the opportunity to advertise their low real estate fees, thus capturing a greater share of the real estate legal work. This has caused other lawyers to try and maintain their market share, thus leading to excessive price competition. In many areas of the Province, fees charged in Real Estate transactions no longer reflect fair compensation for professional services rendered,

Many members of the profession have recognized that this type of price competition is not conducive to good Real Estate Law practice and complaints about fee cutting have been heard by local Bar Associations, the CBA and, of course, the Law Society.

As a result of members' concerns, the Benchers have established this committee composed of representatives from each part of the province including the Canadian Bar Association Real Property Sections, North and South, in order to review the current tariff for Real Estate transactions and if thought so, to recommend to the Benchers a revised tariff or some other form of dealing with the issues.

The members of this province-wide committee are as follows:

Gordon Balon	Prince Albert	Robert Munkler	Humboldt
Laurie Burrows	Saskatoon	Mervin Nidesh	Moose Jaw
Richard Carlson	Saskatoon	George Patterson	Moose Jaw
Guy Chicoine	Estevan	Randy Rooke	Saskatoon
Bernard Duchin	Regina	Randy Sandbeck	Regina
Stuart Eisner	Melfort	Daryl Shirkey	Regina
Lyle Jones	North Battleford	John Stamatinos	Yorkton
Randy Katzman	Saskatoon	Murray Walter	Swift Current
David Leland	Saskatoon	Greg Willows	Regina
Lee Mountain	Assiniboia		

The committee will strive to arrive at a tariff for Real Estate transactions which is fair to lawyers and their clients. Such tariff must also recognize the professional responsibility of lawyers and the insurance risks involved in practicing Real Estate Law. The committee will also be sensitive to the needs of rural practitioners who have seen their Real Estate fees drop with declining Real Estate values. It will also strive to recognize the needs of urban practitioners where price competition is having an adverse effect on their practices.

The second objective of this committee is to review and, if thought possible, standardize Real Estate trust conditions throughout the province Real Estate practitioners are frustrated by the variety of trust conditions used and it would service the profession well to have one set of trust conditions in Real Estate matters throughout the province.

The third objective of this committee is to review the issue of conflicts in Real Estate matters. Should one lawyer act for more than one party in a Real Estate transaction? Are we placing ourselves in a potential conflict by acting for the Vendor, the Purchaser and the Mortgagee? Should lawyers act for both the Vendor, the Purchaser and the Mortgagee in

a commercial Real Estate transaction? Are we incurring greater insurance risks by so doing? The committee will examine the above issues while keeping in mind the unique nature of Saskatchewan Real Estate practice to determine whether any recommendations to deal with the above issues should be placed before the Benchers and if so, whether the recommendations should be province-wide or be modified to take into account rural practitioners' and rural clients' needs. Should clients be inconvenienced and be forced to travel to a different location in order to have their land or house transferred because there is only one lawyer in their community?

We are cognizant of the fact that we cannot as a Society combine to fix prices. The committee's intention is not in any way to limit competition or attempt to fix prices but rather to recommend to the profession a tariff structure that is fair to both lawyers and their clients.

Members are invited to contact the committee representative in their area and provide such representative with their views and opinions regarding the issues to be dealt with by the Committee.

Highlights of the Meeting of the Benchers held January 29 & 30, 1998 (A. Kirsten Logan)

Future of the Legal Profession Conference

The Benchers reviewed the proposed agenda for the upcoming Future of the Legal Profession Conference. The Benchers are of the opinion that this conference is of great importance to the Benchers, the members, and the public. The Benchers have agreed that their attendance at the Conference is essential and following the Conference, part of the April Convocation will become a retreat in order for the Benchers to focus on governance issues after the turn of the century.

Title Insurance

The Benchers declined a request by the Canadian Lawyers Insurance Association (CLIA) to provide funding to explore the development of a title insurance product that lawyers would market. The Benchers are of the opinion that title insurance is not necessarily a product which they should be promoting. However, recognizing that financial institutions nationally are looking for consistency in reporting, at the recent meeting of the Federation of Law Societies of Canada, it was agreed that the Federation would establish a working group to further study title insurance in relation to issues of governance, technology, liaison with financial institutions and other consumers, products to support the processes, the management of the risks associated with the process and product, and pilot projects.

Gender Equity

The Gender Equity Committee further considered details about the upcoming planning session at which a new focus for the Committee will be considered. A facilitator has been chosen and the date will be set shortly. The Committee has provided input to the facilitator as to the members who might be invited to the session. It is hoped that delegates with wide-ranging views and attitudes can take part in this session in order to develop a meaningful vision for the Committee. As a starting point, the Committee is of the opinion that the name of the Committee should be changed from the Gender Equity Committee to the Equity/Diversity Committee and that a broadened mandate will have to be developed. While it is recognized that gender issues need continued attention, there are more issues facing the profession which relate to equality that are equally important.

1998 Annual Meeting

Merv Nidesh, the Bencher liaison with the Moose Jaw 1998 Annual Meeting Planning Committee, advised the Benchers that the Moose Jaw Committee is well-organized and making headway towards a successful Annual Meeting to be held at the Temple Gardens Mineral Spa. In addition, John Stamatinos has confirmed that the Yorkton Bar Association has agreed to host the 1999 Annual Meeting of the Law Society of Saskatchewan.

Corporations Branch

The Law Society has been advised that as part of the Corporations Branch computerized restructuring process, there are plans to have a registry of nonperson entities which are not corporations pursuant to The Corporations Act or The Non-Profit Corporations Act. Such entities would include the Law Society of Saskatchewan which was created by special statute. The Benchers are in agreement with the creation of such a data base and is agreeable to providing the Corporations Branch with data regarding the Law Society for inclusion in that data base. However, the Benchers are not willing to have a membership list included in that data base which would be available to the public.

Incorporation

The Benchers have noted that there is a strong possibility that legislation may soon be passed that would allow doctors to incorporate. Over the years, the Benchers have received inquiries from members who wish to be allowed to incorporate. When The Legal Profession Act last underwent a major revision, i.e. in 1990, the hope was that incorporation would be allowed at that time. However, the Benchers were advised that for financial reasons, the government was not prepared to pursue it. However, in light of this latest development, the Benchers have agreed that this will remain on our agenda for meetings with the Minister of Justice and Department of Justice officials.

Professional Conduct Ruling (Iain A. Mentiplay, Q.C.)

The mandate of the Ethics Committee is to make rulings on questions of professional ethics for the guidance of the profession. The rulings given by the Ethics Committee relate to the ethics of particular situations and are not determinations of the legal issues which arise from those situations.

Conflict of Interest (Chapter V)

Facts:

Lawyer X acted for Mr. A on several criminal matters and also matrimonial proceedings involving divorce, custody and access. He also acted for Mr. B in matrimonial proceedings. Initially, he was not aware of any relationship between Mr. B and Mr. A's ex-wife, Mrs. A. Subsequently, he became aware of Mr. B's relationship with Mrs. A. He continued to act for Mr. B in establishing access to his daughter. Mr. B. is now married to Mrs. A. Mr. A alleged that Lawyer X's advice to Mr. B concerning matrimonial issues would be passed onto his ex-wife to be used against Mr. A. He also alleged that Lawyer X contacted his ex-wife directly. Lawyer X then sued Mr. A for his account and Mr. A's new lawyer suggested that he negotiate a lesser amount of the account in return for a withdrawal of the complaint.

Ruling:

The Ethics Committee was of the opinion that the facts were in dispute regarding the timing of the relationship which resulted in a conflict and the advising of the parties as to the various relationships. The Committee was of the view that it is appropriate to remind Lawyer X and the profession generally that when accepting employment from more than one client, a potential conflict exists. There should be documentation disclosing the relationship which exists and the clients should be advised that no information received from one party can be treated as confidential insofar as any of the other parties is concerned. The Committee was of the view that Lawyer X's contact with Mr. A's ex-wife was acceptable since the contact which permitted access to the children occurred during periods of time in which she was not represented by a lawyer.

On the third issue, the withdrawal of the complaint, the Committee was of the view that this was not appropriate, and that Mr. A's new lawyer should be advised accordingly.

Responsibility for Photocopying Charges (Miscellaneous)

Facts:

Lawyer A and Lawyer B discussed an agreement regarding responsibility for photocopying costs for which they requested directions. There were three situations. They were in agreement on the first two situations but not on the third situation.

1. When a law firm requests copies of documents that are in the possession of the Plaintiff or his or her counsel, a photocopying charge of 35 cents per page is rendered and paid.
2. Where a defendant's counsel requests copies of clinical notes and records from physicians upon whom the plaintiff has attended which are not already in the possession of the plaintiff or his/her counsel, a request is made of the health care provider to forward the same. The plaintiff makes copies at his or her expense and the originals that are received from the health care provider are passed on to a third party with the health care provider's account for their payment.
3. When documents not included in the above situations are requested by the third party which are not in the possession of the plaintiff or his/her counsel, they are then obtained by the plaintiff or his/her counsel without a charge by the author or person in possession of the said documents, and the copies are then forwarded to the third party. There was a disagreement as to whether the defendant should be paying for the photocopies provided.

Ruling:

The Committee was of the view that this was not an ethical issue. It was, however, prepared to provide an opinion that the obligation resides with the lawyer receiving the original documents to photocopy them at his/her expense and then provide the original documents to the party requesting the same with the costs becoming costs in the cause.

***Insurance and Loss Prevention
(Thomas J. Schonhoffer)***

A trend which Saskatchewan does not follow is an increase in claims for intentional torts. The Barreau du Quebec states that over 20% of all insurance claims are for abuse of process and injury to reputation. The National Association of Bar Related Insurance Companies, a collective of Canadian and American insurers, reports that 10% of its claims are for intentional tort. While Saskatchewan does not keep these statistics, an equivalent occurrence rate in Saskatchewan would mean 15 to 20 such claims per year. In my experience, such claims are rare.

The big concern in Quebec is abuse of process.

The Barreau du Quebec tells lawyers:

"As a lawyer you have a duty to use proper judgment. You may not urge a client to take legal action which is bound to fail, solely for the purpose of delaying, proceeding, or intimidating adverse parties. You are an officer of the Court, not a docile and servile tool in the hands of your clients: you must learn to temper your client's wishes, you must go beyond the mere observation of the rules of common courtesy and avoid bringing the administration of justice into disrepute."

Chapter IX of our own The Code of Professional Conduct, states:

"2. A lawyer must not for example, (a) abuse the process of the tribunal by instituting or prosecuting proceedings that although legal in themselves are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party.

Given the low number of claims here, Saskatchewan lawyers should be congratulated on their practice. However, such practice requires constant vigilance. We urge all members to keep up the good work in minimizing these claims.

The other intentional tort of concern in other jurisdictions is libel and slander. Once again, our own claims rate is low, but lawyers giving interviews must be careful.

Finally, lawyers should be aware that coverage for acts which are found to be malicious is, excluded pursuant to paragraph 3.7 of the Policy.

***COPYRIGHT NOTICE - February, 1998
Federation of Law Societies of Canada***

The Federation has recently been advised that CANCOPY wishes to proceed in late March 1998 to deal directly with lawyers and law firms across Canada in an effort to have them sign licenses. The Federation is not yet aware of the precise terms of the proposed licenses.

The National Copyright Committee (NCC) of the Federation was struck in 1995 to monitor the issue of copyright and its repercussions on access to law and legal materials in Canada. Since that time, it has lobbied the government for clarification and amendments to *The Copyright Act*, and has entertained discussions with CANCOPY with a view to ensuring that for purposes of any proposed photocopying licence for Canadian law firms and lawyers, the law will be respected and interpreted uniformly across Canada.

Contrary to some published reports, the Federation did not arrive at any agreement with CANCOPY over the past year or at any other time.

The NCC has advised CANCOPY that it is prepared to continue its discussions in an effort to work out appropriate mechanisms for measuring the amount of compensable copying, if any, carried out within law firms and libraries and the level of compensation for such copying. In the meantime, however, the NCC is not prepared to make a recommendation as to how law societies or their members or libraries should address this matter.

The NCC believes that there are several very important legal questions which surround this issue. These questions are currently the subject of litigation between the law book publishers and the Law Society of Upper Canada, and will hopefully be resolved in that litigation.

Although the NCC recognizes that the photocopying of copyrighted works gives rise to copyright infringement in certain circumstances, the NCC believes that the majority, if not all, copying undertaken by lawyers falls within the "fair dealing" exemption from copyright infringement under The *Copyright Act*.

Additionally, much of the copying undertaken by lawyers relates to judicial decisions, legislation and the like for use in court, which copying is acknowledged to be non-compensable by many of the law book publishers. There are also other important public policy and legal issues surrounding the issue of copyright in legal publications, particularly those which involve usage of judicial decisions and legislation for which the publishers do not own the underlying copyright.

The NCC is pleased to note that in recent correspondence, the Minister of Justice and Attorney General of Canada has proposed that consideration be given, perhaps in the next phase of copyright reform, to an exception for judicial proceedings in a larger context that may include consideration of exceptions for purposes of parliamentary proceedings and judicial administration. The Minister will most likely propose such course to the Ministers of Industry and Heritage.

The Minister has also noted that the legal community should look carefully at the option of collective licensing. The NCC has certainly looked carefully at this option and it is precisely for that reason that the Federation originally entered into discussions with CANCOPY.

At the same time, the NCC remains of the view that it is important to agree on the mechanisms for determining the amount of compensable copying, if any, occurring within law firms and libraries and the value of such copying before licenses are signed and license fees are established.

Law firms and libraries may wish to seek their own advice with respect to any approaches made by CANCOPY to sign direct license agreements.

For more information on this matter, we invite you to communicate with A. Kirsten Logan, Q.C. (Secretary/Co-Administrator) or Allan Snell, Q.C. (General Counsel/Co-Administrator)

(Tel: 306/569-8242) or with the Federation's Office (Tel: 514/875-6350). For ongoing information on the issue of Copyright and Canadian lawyers, you are invited to visit the following website of the Federation: www.flsc.ca.

Certified General Accountants Association of Saskatchewan

The Certified General Accountants Association of Saskatchewan has expressed an interest in having a member of the legal community serve as one of two public representatives on their Board of Governors for their fiscal year commencing July 1, 1998. The Association holds five, six hour, meetings per year, which are normally held in Saskatoon. The agenda for these meetings includes committee reports and review of policies, strategic plans, mission statement, vision statement, etc. Their governance style focuses on strategic leadership which emphasizes the future rather than the past and present. The Board keeps its major involvement to the long-term impact of the organization. The term of the appointment is three years.

Any member wishing to fill this position is requested to contact the administration office of the Law Society. The Association's deadline for applications is April 30, 1998, with the Nominations Committee meeting to be held the first week of May, 1998.

In Memoriam

David Melvin Keith, Q.C. died January 9, 1998. A graduate of the College of Law University of Saskatchewan, he articulated to Douglas John Thorn, K.C. and Arthur Haymore, and was admitted to the Law Society of Saskatchewan in 1940. He served with the R.C.A.F. during World War Two. Mr. Keith practiced law in Regina as a partner with the firm MacLean Keith McDonald & Love, retiring in 1982. In 1968, he received his Queen's Counsel designation.

D'Arcy C. H. McCaffrey, Q.C., passed away on January 18, 1998. In 1963, he was called to the Bar of Manitoba, and in 1985 was admitted to the Law Society of Saskatchewan. Mr. McCaffrey practiced law in Winnipeg, Manitoba and was a founder of the firm Taylor McCaffrey. In 1974, he was appointed a Queen's Counsel.

Judicial Appointment

Congratulations are extended to Mary Ellen Turpel-Lafond on her appointment as a Judge of the Provincial Court of Saskatchewan. Judge Turpel-Lafond will preside in Saskatoon.

Judge Turpel-Lafond was admitted to the Nova Scotia bar in 1991 and to the Saskatchewan bar in 1994. She obtained a Bachelor of Laws from Osgoode Hall Law School in 1985, a Masters in International Law from Cambridge University in 1988 and her Doctorate of Law from Harvard Law School in 1991.

Judge Turpel-Lafond has written extensively on Aboriginal and law reform issues. She has taught law at Dalhousie School of Law, the Faculty of Law at the University of Toronto, the University of Saskatchewan College of Law and held a position as the Aboriginal Scholar there, and Notre Dame Law School in South Bend, Indiana. She was the first Aboriginal person to become a tenured professor of law in Canada. She has received many post-graduate research grants and awards, such as the Nova Scotia

Law Foundation grant for research on Aboriginal peoples and international law and the Therese F. Casgrain Fellowship, awarded by the Social Sciences and Humanities Research Council of Canada, for research on women and social change in Canada. Judge Turpel-Lafond will be the first female Aboriginal judge in Saskatchewan history.

1998 Law Society/CBA Annual Meeting

The 1998 Annual Meeting of the Law Society of Saskatchewan and the Canadian Bar Association Saskatchewan Branch will be held in Moose Jaw from June 11 to June 13, 1998. On behalf of the planning committee, we wish to extend an invitation to all members to join us in the Friendly City.

Moose Jaw, centrally located in the Province, is a short 45 minute drive from Regina, a hour and one-half from Swift Current and two hours from Saskatoon, It is a City of 35,000 residents with lovely stores and shops downtown and a mall located at the north end of Main Street. Accommodations should be booked early.

Activities revolve around the Temple Gardens Mineral Spa. The Spa is fed by natural heated water to a muscle relaxing 45 degrees Celsius with an indoor and outdoor pool and oasis life enhancement centre. Book your life enhancement choice early to avoid disappointment.

There will be a kick-off reception on Thursday at 7:00 p.m. at the Heritage Inn. This will allow everyone to renew old acquaintances and make new friends.

Friday, the Law Society Meeting will be held at the Spa in the morning. This will be your opportunity to review, discuss and vote on various resolutions of importance to the practice of law in Saskatchewan. For those budding and blooming Tiger Woods among us, Friday afternoon will be devoted to a fun (and we stress fun!!) 18 holes of golf at the gorgeous Hillcrest Golf Course, located a five minute drive from the heart of the City. For those who prefer not to hit the links, a luncheon at and bus tour of the Canadian Armed Forces base has been arranged. The base is home to the world famous Snowbirds, Canada's winged ambassadors. The day concludes with a supper at the Temple Gardens Mineral Spa. Bring your jeans and cowboy boots because the theme of the supper is "Western Hospitality".

Saturday begins with a continental breakfast at the Spa and the conclusion of the Law Society meeting followed by the CBA Meeting. The noon luncheon will be hosted by the Canadian Bar Association. To give everyone an opportunity to see what our City has to offer, we have not set any meetings for Saturday afternoon. Might we suggest that you take the Mural Tour? Over twenty businesses in our City are decorated with picturesque murals that tell the history of the community. Or maybe you prefer to take the Tunnel Tour? There are tunnels that run under many of our downtown buildings; rumour has it the tunnels were used to transport illegal substances from building to building under the eyes of the constabulary and that Al Capone and his colleagues used the tunnels to run rum during the roaring twenties. Or maybe you would prefer just to lounge in the spa pool or get a facial or massage at the Oasis in the Spa? The choice is up to you. Your stay in Moose Jaw concludes with a gala dinner and dance at the Heritage Inn on Saturday evening.

As you can see, we have planned a fun-filled and enjoyable Annual Meeting for 1998 (although there will be some teal work!!) This is the perfect opportunity to meet other lawyers, establish contacts with colleagues, put faces to names and renew friendships. Please mark your diaries the days of June 11th through to the 13th for the best Annual Meeting ever.

We look forward to seeing you here in Moose Jaw.

Brian Hendrickson and Merv Nidesh, Q.C. - Co-Chairs.
