

BENCHERS' DIGEST

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Peta Bates joined the Law Society Libraries in 1979 as Saskatoon Librarian. She provides a reference and research service to the bar and catalogues books for all libraries in the system. In 1987 she designed and moved the Saskatoon Library to its new location in the court house. Peta has been a speaker at Continuing Legal Education seminars and the Bar Admission Course, and is currently Chair of the Saskatoon Association of Law Libraries. Internet technology offers great possibilities for the Law Society Libraries and Peta is proud to have been instrumental in making the Web Site a reality.

The Law Society of Saskatchewan Web Site

We are pleased to announce the launch of the Law Society of Saskatchewan Web Site which is located at www.lawsociety.sk.ca. The Web Site is a unique combination of two information sources; information and services provided to members by the Law Society office, and the legal database collection of the Law Society Libraries. In this article we take you on a tour of the Web Site.

Information About the Law Society

From the Main Page of the Web Site information is available about Law Society services and programs complete with a list of the appropriate staff members to contact. The currently elected Benchers, Bencher Committees and Law Society representatives are listed.

Many of the Law Society publications are now searchable on the WebSite. Members can keyword search the full text of The Legal Profession Act, 1990, The Rules of the Law Society of Saskatchewan, The Code of Professional Conduct and current and back issues of the Benchers' Digest.

There are links to other legal Web Sites, including other provincial Law Society web pages, the Federation of Law Societies web page and the web page of the Saskatchewan Branch of the Canadian Bar Association.

Information for Articling Students

All the information contained in the Guide to Articling in Saskatchewan Handbook is now available on the Web Site. Information about the Bar Admission Course, articles of clerkship, schedules for the current year and all the necessary forms are also available.

Information for Out of Province Lawyers

The Guide for Transfer Applicants to Saskatchewan describes the transfer process, requirements for admission as a lawyer in Saskatchewan, the transfer examination procedures and provides all the necessary forms.

Information for the Public

The Web Site is designed to provide information to the public about the Law Society and the legal profession. The structure and administration of the Law Society along with areas of responsibility for admissions, education, professional standards, ethics and discipline are outlined. There is information about the Lawyer Referral Service and the Seniors Legal Assistance Service.

Frequently Asked Questions (FAQ's) about the legal profession, legal fees and the judicial process are also provided.

Information from the Law Society Libraries

The second part of the Web Site is the legal database collection from the Law Society Libraries, formerly available through the "LINE" system. These are now offered via the Web Site with improved search capabilities and linked information between databases.

As with the LINE system, some of the Libraries' databases are offered free of charge and others are available through an annual subscription of \$95.00.

Case digests of Court of Appeal and Queen's Bench decisions from 1986 to present are now linked to the fulltext of the same judgments. The Library Catalogue lists books from all the Law Society libraries in Saskatchewan and the Index of Continuing Legal Education Papers indexes all papers which have been published in CLE seminars published by the Saskatchewan Legal Education Society, the Saskatchewan Trial Lawyers Association, and the Canadian Bar Association (Saskatchewan Branch). There is also a Saskatchewan Bills Tracker which covers Acts amended and proclamation dates for the past four sessions of the Saskatchewan Legislature.

Future additions to the database collection will include the newly updated text of the Queen's Bench Rules of Court Annotated.

The Reference Service offered by the Law Society Libraries is now available via the Web Site through an online Reference Request Form and print publications can be ordered by an online Publication Order Form. (The old "LINE" system will be available to current subscribers until the end of August 1998 at which point the system will be discontinued. As the LINE databases will not be updated after June 30 there will be no charge to access them from July 1 - August 31.)

Web Site Design

The Law Society Web Site was designed by Peta Bates with information provided by the Law Society and the technical assistance of 3P Computer Services Inc., Peta also coordinated the "Internet Project" in the Law Society Libraries which involved conversion of the "LINE" databases to the Web Site and installation of dedicated Internet lines, new Windows-based computers, networked software and email for all library staff.

Conclusion

The new Law Society of Saskatchewan Web Site will enable us to provide information to our members and to the public in a more timely, cost effective and efficient manner. In addition, we now offer the convenience of communicating by email with staff in the Law Society office.

As always, we welcome your comments and suggestions about the Web Site, We are proud and pleased to be able to bring you this new service.

Highlights of the Meeting of the Benchers held April 23 & 24, 1998 (A. Kirsten Logan, Q.C.)

Rule Amendments

Rule 170

This Rule was amended by removing the requirement that the transfer examination be written 30 days prior to the enrollment date.

Rule 302(5)(a)

This amendment allows files in which the Chair of the Professional Standards Committee directs no further action in the first instance to be referred to the complainants' review process.

Rule 605(4)

In 1994, the Department of Justice removed prosecutors from the mandatory insurance program. Since that time, discussions have been ongoing with the Department to determine the transitional coverage and reporting issues. Those issues have now been finalized. Rule 605(4) required amendment to set out the exemption from SLIA of prosecutors and lawyers employed by the Department of Justice Canada. There had been some concern expressed among the Benchers that the public would not be protected if one of those exempted lawyers were to make an error on a side deal for friends or family. However, the Benchers were satisfied by the undertaking which the exempt members must provide to the Law Society in order to maintain their exemption. It provides that the lawyers undertake not to provide legal advice or services to anyone except their employer whether for fee or reward or otherwise.

The Benchers would like to remind all members employed by the Department of Justice Canada or by the Provincial Department of Justice as a prosecutor or who exclusively practice as prosecutors on a contract for the Provincial Department of Justice of this undertaking.

Rule 963(1)(c)

Rule 963 sets out the required non-trust books, records and accounts which members in private practice are required to maintain. Rule 963(1) (c) was amended to delete a fees book as an appropriate type of record with regard to statements of account. Mr. Ogrady, the Auditor/Inspector, is of the opinion that a fees book is inadequate in today's environment because the rule was made prior to GST audits becoming part of our reality. He advised that one of the first requirements that the auditors will present is that the law firm make available for examination all of the firm's invoices for the past two or three years. If the firm is not maintaining a chronological file of these invoices, there will be a real problem in accommodating the requirements of the audit.

Federation of Law Societies of Canada

The Federation of Law Societies of Canada is an umbrella organization of all the Law Societies in Canada. The Board of Directors of the Federation is made up of representatives from the various regions of the country. Saskatchewan and Manitoba are jointly represented on the Board. For the past six years, the Manitoba/Saskatchewan member of the Board of Directors has been Don Little, Q.C., of Brandon. He is now been appointed to Bench. At Convocation, the Benchers agreed to nominate Lynn MacDonald, the Law Society President, to the Federation Board of Directors. That nomination will have to be ratified by the Law Society of Manitoba. The President of the Law Society of Manitoba sat in on the deliberations at Convocation and it was her indication that such ratification would be quickly forthcoming.

Title Insurance

At the Federation of Law Societies Mid-Winter Meeting held in February, most of one day was devoted to discussions regarding title insurance. In addition, Tom Alton of the Bank of Montreal expressed the view that financial institutions are attracted to title insurance not for the product it is but for ease of process. At that meeting, a committee was struck with a view to developing a national alternative to title insurance.

Randy Baker, the Benchers closely studying the title insurance issue, then attended a meeting of the four western provinces to discuss a national plan in light of the Torrens Land Registration System. The western group has made excellent progress and will continue its review. Ontario has developed its own title insurance product, Title Plus. Nova Scotia may be launching a pilot project for Title Plus. However, the Federation's goal is for the development of a national plan and that committee's work is proceeding in that regard.

Multi-Disciplinary Practices

Multi-disciplinary practices were another matter discussed at the Federation Mid-Winter Meeting. Mike Milani is now the Law Society contact for the Federation working group which will be putting together a report by the end of June.

Insurance

(i) Claims Record

The Committee was pleased to note that as of March 31, 1998, 77 claims had been reported for the 1997-1998 policy year. This appears to be the lowest number of claims since SLIA's inception, however, predictions cannot be made since one-quarter of the policy year remains. Since 1998, the accumulated liability report indicates the total losses including payments and reserves are in excess of \$18,900,000, of which SLIA is responsible for \$9,800,000. Claims falling within the commercial/general category make up the highest amount paid and reserved (\$5,000,000), while civil litigation general (not automobile) has the highest number of claims being 177.

(ii) 1998-1999 Insurance Assessment

The Committee approved the 1998-1999 insurance assessment at \$2,400, unchanged from the previous year. As explained in the recent assessment notice, SLIA has enjoyed two years of relatively stable claims experience and has been in a position to increase its subscriber's equity in CLIA which had fallen to \$120,000. It now stands at \$640,000. In addition, successful settlement of several claims, a reduction in actuarial and legal expenses and increased investment revenue has resulted in a higher surplus for SLIA. The actuaries have recommended that SLIA aim for a surplus of between \$2,100,000 and \$2,500,000. We are presently standing at \$1,200,000. Should we experience another favourable insurance year, we may be in a position to reduce the premium in the future.

Interjurisdictional Practice Protocol

The Admissions and Education Committee received a draft set of rules which would be necessary to fully implement the Interjurisdictional Practice Protocol. As the protocol is quite complex in the nature of interjurisdictional mobility, Barry Morgan, a member of the Admissions and Education Committee, has agreed to review the proposed rules and make recommendations.

Unsatisfactory Principals

For several years, the Admissions and Education Committee has debated the issue of unsatisfactory principals relating to past discipline problems, financial problems, or conflicts between the principals and students. In addition, the articling questionnaires filed during the year reveal that some students are not exposed to many areas of law. The current rules do not provide the Committee with a satisfactory method of dealing with these issues. The Committee will be reviewing the system in place in Manitoba where principals must apply annually for approval to take students. Discipline and insurance histories are taken into account and further, the principal and student must file an articling plan to indicate what types of experience the student will receive in all areas of practice.

The Committee will report further as its study of this issue progresses.

Public Relations

At the Future of the Legal Profession Conference, statements were made by many of the presenters that lawyers and the Law Society have "image problems". However, depending on the perspective of the presenter, those problems could be wide-ranging. Over the years, the Public Relations Committee has looked at many issues. However, there is a feeling on the Committee that its work has been scattered, diminishing its effectiveness. The Committee will be meeting with a communications consultant in an attempt to define the Committee's focus and set a budget for that process.

OOPS! In the March issue of the Benchers' Digest we published the 1998 Bencher Directory for members' assistance in contacting the Bencher from his/her electoral division. We regret the omission of John McIntosh, Bencher representative from the South West Division. Mr. McIntosh's telephone number is (306)778-5240.

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.

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Conflict of Interest - Chapter V, Commentary 8

Facts:

Lawyer X represented the Department of Social Services on behalf of three children who were the alleged victims of sexual assault by their parents and another person. The same children were allegedly victims of sexual abuse charges when they were in the foster care of others. Lawyer X was retained to represent the interests of the children. There was an application by the Star-Phoenix to gain access to the court and publish information obtained during the trial.

As the case proceeded the charges were dropped against several accused. Lawyer Y brought a civil action against 12 persons allegedly damaged by what they regarded as improper charges. Lawyer X was engaged by one of the defendants to act in defence of the claim. Lawyer Y tried to subpoena the three children. Social Services retained Lawyer X to contest the subpoenas which was done successfully. Lawyer X says that his retainer was always with the Department of Social Services. He met only one of the three children personally and only for five minutes. Lawyer Y contends that Lawyer X is in a conflict of interest.

Ruling:

The Committee was of the view that the perception of conflict of interest is clearly an issue. The rule relating to confidential information states that a lawyer who has acted for a client in a matter should not thereafter act against the client in the same or any related matter or take a position where the lawyer might be tempted or appear to be tempted to breach the rule relating to confidential information. Even if confidential information was not used, this was a situation where the matters are closely related and the children had been represented and they are not able to give their consent. The Committee was of the opinion that even in the best light, the facts give rise to the perception of a conflict of interest. The Committee therefore recommended that Lawyer X

withdraw as counsel.

Conflict of Interest - Chapter 5

Facts:

Lawyer W's firm was asked by a number of members of three First Nations to act for them in residential school abuse actions. The three First Nations were formerly one entity. The division into three had not been simple and there was an ongoing dispute amongst them as to treaty entitlement provisions and boundary issues. Lawyer W's firm acted for the original entity and its remaining nucleus. The law firm also acts on an ongoing basis for one of the First Nations on a possible treaty land entitlement claim and a claim with respect to their north boundary. The law firm has a concern regarding two potential conflicts:

1. That their ongoing relationship with one of the First Nations and their acting for individuals who are members of the other two First Nations on their residential school matters will bring them into an "appearance of conflict" because:
 - a. Each First Nation is representative of the members of that First Nation and therefore the members would be the beneficiaries of their First Nations actions in regards to the Treaty Land Entitlement, boundary issues and trust agreement matters;
 - b. The individuals involved in the residential school abuse cases may be or become counselors of their respective First Nations and therefore be directly involved in the Treaty Land Entitlement, boundary and trust agreement matters which may be contested between the First Nations.
2. That their relationship with the one First Nation and the request to assist another First Nation with their Reserve Creation under their Specific Claim will bring them into an "apparent" conflict and the three First Nations may be in opposition to each other in the areas of Treaty Land Entitlement, the boundary issues and trust agreement matters.

Lawyer W has requested a ruling as to whether in each case they are in a conflict of interest position and therefore cannot act for one or all of the parties.

Ruling:

If a dispute arises between the two First Nations represented by Lawyer W's firm over a settlement issue, they will not be able to act for both sides. With respect to the representation of individuals on residential school issues, in the absence of any possible or foreseeable connection as between individual concerns and the land settlement issues, there does not appear to be a serious potential for conflict. However, when acting for persons on an individual basis for their individual interests who also act in a representative capacity, there arises at least the appearance of acting for and against a client simultaneously. There is a distinct possibility that continued representation of the two First Nations and individuals from different First Nations will produce serious conflict issues. If these conflicts were to materialize, the law firm would be obliged to withdraw from representation on all matters.

Interviewing Other Party's Witnesses - Chapter IX, Commentary 6

Facts:

Lawyer S acted for the plaintiff and Lawyer M acted for the defendant in an action set for trial. Lawyer S was using an expert witness and as required by the Rules of Court prepared a summary of his evidence and served it on Lawyer M. Lawyer M tried to speak to the witness. The witness questioned whether he should be talking to him and said he would consult with Lawyer S. Subsequently, he informed Lawyer M that Lawyer S advised him not to talk to him. He would have his chance at trial. Lawyer M questioned whether in advising the witness not to speak with him, Lawyer S acted in contravention of Commentary 6 of Chapter IX of The Code of Professional Conduct which states that a lawyer may properly seek information from any potential witness but should take care not to procure the witness to stay out of the way.

Ruling:

The Committee was of the opinion that Lawyer S was not in breach of Commentary 6 of Chapter IX of The Code of Professional Conduct, but was however of the opinion that it was improper for him to tell the witness not to speak to Lawyer M. It was up to the witness to make that decision.

Representation as an Intervener Before the Courts

Facts:

A Provincial Court Judge was asked by Lawyer E to consider removal of a Crown Prosecutor from a case on the basis that the prosecutor once acted for the accused on a show-cause hearing while the prosecutor was in private practice. The Judge invited Lawyer E and the Crown to ask the Law Society if it wished to provide argument to the Court or intervene.

Ruling:

The Committee was of the opinion that having regard to the fact that the Law Society had defacto concurrent jurisdiction to determine matters of conflict with the courts, it would be improper for the Society to make representations as an intervener and still less so to be seen as supporting one side over another. The Committee was satisfied that the issues and the law are properly placed before the Court and that the Law Society ought not to presume to suggest to the Judge as to how he might rule on the issue or how he ought to.

Breach of Integrity - Chapter 2

Facts:

A request was received for a ruling from a member who wished to remain anonymous regarding the following fact scenario:

Items were stolen from a Legion hall in Ontario including war medals and an artifact of great importance to the Metis Nation. Lawyer M has been approached by a third party, Y, who has offered to return the artifact to the Metis Nation and the medals to the Legion through Lawyer M. The third party purports not to have the items but only to have access to them. Lawyer M is suspicious of the third party but has no other facts.

Ruling:

The Committee was of the opinion that Lawyer M cannot become involved in the proposal by Y as it stands. Lawyer M should try to explore further legitimate alternatives to achieve the same result including Saskatchewan Heritage's interests in seeing the artifact returned to the rightful owner.

Breach of Trust Condition - Chapter XVI, Commentary 10

Facts:

Lawyer D delivered to Lawyer F a cheque in trust as part of a settlement offer. The settlement offer was withdrawn. Lawyer F kept the trust cheque because negotiations were ongoing. The return of the trust cheque had to be demanded and pursued at the expense of Lawyer D's client. Lawyer D's client asked for a ruling on the ethical obligations of Lawyer F in returning the cheque. There is a dispute as to the facts as to whether Lawyer D told Lawyer F to keep the cheque. No time limit was imposed for return of the cheque on the original trust conditions.

Ruling:

The Committee was of the opinion that Lawyer F was wrong in keeping the trust cheque and should have sent it back. Although it was Lawyer F's understanding that there was a discussion with Lawyer D as to whether or not a settlement offer would still be open, the Committee considered this sharp practice in Lawyer F's attempting to negotiate when she still had the trust cheque in her possession. She should have returned the cheque immediately after it became apparent that the settlement was not accepted. Once a demand was made for return of the cheque, there was no excuse for not returning it. The Committee had a concern about the non-observance of the trust conditions and came very close to referring the matter to Discipline.

Mediation of Complaints

For the past year, the Law Society has expanded its process of resolving complaints by telephone conciliation to a more formal process of mediation of certain types of written complaints about the services provided by a member of the Society, particularly where there has been ineffective communication or delay.

The Society would like to use the services of experienced mediators in specific cases in addition to the complaints officer, Iain Mentiplay. The services would be provided on a pro bono basis, subject to reimbursement of out-of-pocket expenses. Anyone wishing to volunteer his or her services should contact Iain Mentiplay, (306) 569-8242, at the Law Society office.

Insurance and Loss Prevention

(Thomas J. Schonhoffer)

Missed limitation periods are continuing to cause claims against the insurance fund. The following are examples of limitation claims in the last year:

1. The claimant had a mortgage on land and made a proof of claim as a secured creditor in a bankruptcy.

The trustee disallowed the claim pursuant to Section 135 of The Bankruptcy and insolvency Act and sent notice to the claimant about May 31, 1996. The claimant's solicitor did not appeal the Notice of Disallowance but began a foreclosure action against the land on or about July 22, 1996. The trustee was successful in having the foreclosure action dismissed on the grounds that the solicitor had failed to appeal the Notice of Disallowance within 30 days pursuant to Section 135(4) of The Bankruptcy and Insolvency Act.

2. We have two claims in which the lawyer represented an insured making a claim against an insurer. In both cases, there was coverage by more than one policy. The lawyers commenced an action on only one policy and the insurer has pleaded a limitation defence to subsequent claims against the other policies. These claims emphasize the importance of thoroughly researching all causes of action before issuing a statement of claim. The claims also provide further statistical evidence of a trend I have noticed. Often when lawyers have two causes of action of unequal value, one cause of action becomes dominant in the lawyer's mind and is the subject of the statement of claim. The second cause of action is often neglected.
3. We have notice of one claim for failure to commence a mechanics lien action. In Penner v. Hupka, (1995) 133 Sask R 140, Madam Justice Dawson holds that Section 12 of The Limitation of Actions Act applies to mechanics liens. In that case, mechanics liens were registered in 1982 and 1984. In 1994, the land owner served each of the lien claimants with a Notice to Lapse and the lien holders commenced an action. The Court held that Section 12(1) of The Limitation of Actions Act required the claim to be commenced within ten years after the date when the cause of action arose and therefore dismissed the action and ordered the removal of the liens.
4. We have notice of one claim for a possible failure to commence an action against a municipality within one year pursuant to The Northern Municipalities Act. Anyone considering a claim against a municipality ought also to consider the notice provisions and the limitation periods in those acts.

For the assistance of the profession, SLIA, with the assistance of the Law Foundation, is currently working on a limitations manual which we hope to distribute to members within the next year.

Medical/Legal Affairs Committee

The Medical/Legal Affairs Committee is composed of representatives of the Canadian Bar Association, the College of Physicians and Surgeons, the Saskatchewan Medical Association, and the Law Society of Saskatchewan. As part of its mandate, the Committee will attempt to resolve individual instances of dispute between doctors and lawyers. This will be an informal process and will not replace the Ethics or Discipline functions of either the College of Physicians and Surgeons or the Law Society.

Any member who wishes the Committee to deal with a particular matter should send a written outline of the circumstances together with any relevant documentation to: Allan Snell, 1100 - 2500 Victoria Avenue, Regina, Saskatchewan, S4P 3XZ; fax (306)352-2989; or e-mail address:

allan@lawsociety.sk.ca

Judicial Appointment

Congratulations are extended to Marty Irwin, City Commissioner of Saskatoon, on his appointment as a Judge of the Provincial Court of Saskatchewan.

Judge Irwin received his Bachelor of Law from the University of Saskatchewan in 1969. He articulated with the Provincial Department of the Attorney General from May, 1969 to September, 1970 and spent time in private practice and with the Saskatchewan Legal Aid Commission before joining the City of Saskatoon as a solicitor in 1975.

Judge Irwin was appointed to the position of City Commissioner of Saskatoon in 1985, a position he held until this appointment. During this time, he received such distinguished awards as Human Resources Canada's Organization of the Year Award for outstanding improvement in human resources development and the Canadian Association of Municipal Administration's Willis Award for Excellence in Municipal Administration. He implemented several important programs in the City of Saskatoon such as the Employment Equity Plan, the Employee and Family Assistance Plan and a Race Relations Committee.

Judge Irwin was the Chairperson of the Provincial Court Commission in 1993.

He has been involved with many community organization, including the Saskatoon Regional Economic Development Authority, Wanuskewin Heritage Park and the Saskatoon River Centre. Judge Irwin was the Vice President and legal counsel for the 1990-91 World Junior Hockey Championships.

In Memoriam

The Honourable Madam Justice Patricia Mabel Blackjack-Linn, passed away March 18, 1998 after a four-year battle with cancer.

Madam Justice Linn graduated from the College of Law, University of Saskatchewan, in 1972 and was called to the Bar of Saskatchewan in 1973. From 1974 to 1979, she practiced law with the Valley Legal Assistance Clinic, and was its Director as of 1977. She then joined the firm of Prosser, Goldenberg. From 1981 to 1986, she practiced family law with the firm of Hnatyshyn & Co. She was appointed to the Provincial Court of Saskatchewan in 1986; in 1994, she was appointed Administrative Judge for the Saskatoon Provincial Court; and in 1996, was appointed a Judge of the Court of Queen's Bench for Saskatchewan in Saskatoon.

Madam Justice Linn was the Chairperson of the Saskatchewan Indian Review Committee and the Saskatchewan Metis Review Committee in 1991-1992, the recommendations from which have had a lasting impact in Saskatchewan justice.

William John "Bill" Gardner, Q.C., passed away May 5, 1998 at the age of 83 years. Born in Moose Jaw, he was educated at Alexandra School and Central Collegiate. In 1937, he enlisted in the Regina Royal Rifles militia unit in which he served until 1940. In 1940, he enlisted in the regular forces in which he served until 1945 with the infantry rifle corps. He served in the Second World War and reached the rank of second lieutenant. After serving as a member of the United Nations peacekeeping force in Korea following the Korean War, Mr. Gardner attended the University of Saskatchewan and Queen's University in Toronto where he received his Bachelor of Law degree. He spent a short time practicing law in Montreal before returning to Saskatchewan. In 1948 he was enrolled in the Law Society of Saskatchewan, later serving as the registrar at the Court of Appeal in Regina and helping design the Court building in Regina. In 1959, he returned to Moose Jaw where he continued to practice law until his retirement in 1988. In 1966, he was appointed a Queen's Counsel.

Mr. Gardner was also active in the community, helping establish the Victorian Order of Nurses branch in Moose Jaw and serving on the Moose Jaw Arts Council, the local Consumer Association and the Saskatchewan Association for the Mentally-Retarded (now referred to as the Saskatchewan Association for Community Living). He also served as the Chancellor of the Diocese of Qu'Appelle for the Anglican Church, offered his legal expertise to the community and served as legal counsel for the local Scouting association and was legal advisor for the Royal Canadian Legion Branch 59 in Moose Jaw. Following his retirement, he volunteered his legal expertise through Canadian Executive Services Association, travelling throughout the province to work with First Nations businesses.