

BENCHERS' DIGEST

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Kent Roach is a graduate of the University of Toronto and Yale University. He served as Law Clerk to Madam Justice Bertha Wilson of the Supreme Court in 1988- 89. From 1989 to 1998, he was a member of the University of Toronto's Faculty of Law. On July 1, 1998, he assumed his present duties as Dean of Law at the University of Saskatchewan, Bencher of the Law Society of Saskatchewan and a member of the Law Foundation of Saskatchewan. His book *Constitutional Remedies in Canada* (Canada Law Book, 1994) won the Walter Owen Prize awarded by the Foundation of Legal Research for the best English law book published in 1994 or 1995. He is also the author of *Criminal Law* (Irwin Law, 1996) and *Due Process and Victims' Rights: The Changing Law and Politics of Criminal Justice* (University of Toronto Press, forthcoming in 1999), as well as numerous articles in Canadian and international publications. Dean Roach has appeared four times before the Supreme Court of Canada acting pro bono as counsel for civil liberties and Aboriginal groups. With his wife, Jan Cox, and two daughters, Erin and Carey, he lives in Saskatoon.

Renewal at the College of Law

Along with other Colleges, the College of Law has been asked to prepare a renewal plan by December 1, 1998 for approval by the University of Saskatchewan administration. This process provides the College with an opportunity to define its aspirations and the areas that it hopes to develop over the next five years.

The College relies on the able and dedicated work of many practising lawyers in order to offer a full range of courses. The Law Foundation of Saskatchewan provides generous and essential support for many of the College's activities including the Law Foundation Chair, annual conferences in Saskatoon, student research assistants, faculty and student participation at conferences, and the moot and speakers' programme. To commemorate its 25th anniversary, the Law Foundation recently donated \$50,000 to endow an entrance scholarship. This and other generous entrance scholarships will allow the College to continue to attract the best students from Saskatchewan and beyond.

The extraordinary support that the College receives from the legal profession was recognized by the *Macleans* survey of Canadian law schools. The College of Law was ranked number one in its relations with the local bar. This outstanding relationship gives the College an important advantage in confronting increased competition from other Canadian law schools.

One way that the College hopes to build on its close relationship with the legal profession is by designating dispute resolution, including the changing nature of the legal profession, as one of its areas for future development. The legal profession faces challenges on many fronts, including the increased emphasis on mediation, restrictions on litigation, multidisciplinary practices and title insurance. The profession can benefit from research into these changes and the College can benefit from a better understanding of the changing nature and challenges of legal practice, as well as continued work on legal ethics and lawyering skills.

The College is aware of the need to maintain a full range of courses and to respond to new concerns such as the importance of biotechnology and intellectual property, international trade and Aboriginal peoples to the province. The College also hopes to provide clinical and/or cooperative opportunities for its upper year students. These initiatives can only succeed with active support and participation from members of the bar.

These are challenging changes for both legal educators and practising lawyers. The College is confident, however, that it can build on its mutually beneficial partnership with the legal profession. With modest increases of resources from the University and the continued support of the profession, the College could quickly become an undisputed national leader in legal education. The College welcomes input from the legal profession concerning the development of its renewal plan and looks forward to continuing to work with the profession to provide the best possible legal education.

Highlights of the Meeting of the Benchers

held September 17 & 18, 1998

(A. Kirsten Logan, Q.C.)

Title Insurance

At the Annual Meeting of the Federation of Law Societies of Canada there was to be presented a resolution dealing with Title Insurance. This is a major issue across Canada, especially in Ontario. There, LPIC, Lawyers' Professional Indemnity Company, has developed its own Title Insurance product, Title Plus. Some of the other Law Societies are concerned in that Title Insurance is being sold to consumers as protecting their interests, however the interests protected by Title Insurance in most cases are those of financial institutions. This is especially true in the western provinces which have the Torrens System.

The Federation's Title Insurance Committee had been dealing with the issue for several months, following the Federation's Mid-Winter meeting in February. The Committee recommended the creation of a national real estate lawyers' organization to serve as a lobby group and as a national interface with the financial institutions. The Committee believed that a national organization was necessary since the majority of the financial institutions are national and the Canadian Bar Association had at the Mid-Winter Meeting declined to become involved.

At the Annual Meeting, many jurisdictions had concerns regarding the proposed resolution including the proposed costs. However, the resolution did not make it to the floor. In his presentation to the Federation delegates, the newly elected President of the Canadian Bar Association, Barry Gorlick, indicated that he believed that this was an issue the Canadian Bar Association should pursue and he requested the Federation not to proceed.

Representatives from the Law Societies of the four western provinces are continuing their work in reviewing real estate practices in Torrens System provinces to develop a process so that consumers will not be required to purchase Title Insurance.

No-Fault Insurance

The Benchers approved a contribution to the Joint Canadian Bar Association/Law Society No-Fault Committee in the amount of up to \$20,000. The Committee believes that a great deal of work is required to prepare for the five-year review written into the amendments to The Automobile Accident Insurance Act, including town hall meetings, preparation of material, media training and financial analysis.

The Committee did not specify the amount requested, however, the Benchers were advised that the Canadian Bar Association Saskatchewan Branch is contributing \$20,000.00. The Benchers are requesting that the Committee provide more details as to their project and overall expenditures but agreed in the interim to match the contribution of the Canadian Bar Association.

Bar Admission Course

Rule 159 provides that the Bar Admission Course be taken in order, i.e., the First Segment in August and the Second Segment in May. The Course was designed so that the skills taught in the First Segment assist students throughout the articling year and the Second Segment deals with issues that may have arisen during the year. In addition, the Second Segment builds on the skills and topics taught in the First Segment.

Periodically, the Admissions and Education Committee receives requests from students to take the Course out of order. The policy adopted by the Committee is that waivers of the rule will only be granted in exceptional circumstances. Types of circumstances have included clerking in the Supreme Court, having taken a similar First Segment in another jurisdiction, and believing to have had a position in another jurisdiction which then fell through.

It is not necessary for students to have an articling position to take the First Segment and they are advised of this during orientation sessions held at the College of Law during the student's third year. In 1998, three students took the First Segment without having an articling position. Similar numbers of students have done the same thing in previous years.

In the seven instances where students have been allowed to take the Course out of order, five of the students have failed the Course.

The Admissions and Education Committee considered an application by a student who had opted not to take the Course because she did not have a position. She then secured one which commenced in August, two weeks after the course commenced.

The Benchers did not grant the student a waiver of Rule 159, believing that the circumstances were not exceptional, especially considering other students in her situation have taken the Course without a position or have been required to take the Course in order.

Mediation Course

SIASST Palliser Campus had requested that the Admissions and Education Committee approve a mediation course pursuant to Rule 570. Members wishing to act as mediators must take a course approved by the Committee.

In this instance, the request by SIASST was not approved. The Benchers would like to advise the membership that the thirty-nine hour mediation course offered by SIASST Palliser Campus entitled Mediation 223 is not approved such that members taking the course will not be entitled to act as mediators pursuant to Rule 570.

Student Survey

The sixty students who attended the Second Segment of the Bar Admission Course completed a survey on their experiences as a student. This survey is a project by the Gender Equity Committee with input from the Admissions and Education Committee. The survey will be conducted on an ongoing basis to allow trends to be revealed.

Survey Results:

- i. Existence of Gender Bias: 96% of the students believe there is gender bias against women and 45% of the students believe there is gender bias against men.

The predominant opinion (52%) is that gender bias against women is wide-spread but subtle. The source of that opinion is experience at law school, with opposing counsel and with clients. 41% of the respondents believe that gender bias against men exists but it is not wide-spread. The respondents indicated the same sources for their opinions.

Respondents believed that gender bias against women manifested itself in issues relating to career advancement (73%), attaining partnerships (60%), lack of accommodation for family commitments (57%), and assignment of files (47%). The views most widely held relating to discrimination against men related to lack of accommodation for family commitments (20%), and judicial appointments (17%).

- ii. Child Care: Female students with children continue to have more of the care responsibilities than the male students. The average percentage response given by the female students regarding the proportion of child-care responsibilities in the home was 65%. The average per-cent proportion given by the male students was 28%. The women spent on average 49 hours per week on child care, with men spending on average 24 hours per week. However, the average working week for female students was 41 hours, while that of the male students was 56 hours.
- iii. Mentoring Skills: The students felt that their principals and other lawyers in the firm were helpful in understanding the practice of law and observing standards of professional conduct. Fewer principals involved the students in learning the business affairs of the office or developing relations with other institutions such as the Courts, Land Titles Office, Sheriff, etc. These functions were more likely to be carried out by the other lawyers in the office.
- iv. Areas of Law: The areas of law with the greatest divergence of percentage of involvement between men/women were: environmental 3/9; family -youth 15/26; and insurance 14/4.
- v. Other: The male students were more likely to prefer to article in a large firm than females, however, the preference was equal as between men and women for the other settings such as corporations, government and smaller firms. 92% of the students wanted to article in Regina or Saskatoon. The male students on average applied to 30 offices for a position and of those averaged 10 interviews. The women applied to an average 20 offices and were granted an average of 6 interviews.

Incorporation

In early September, Mr. Snell and Ms. Logan attended a meeting with representatives from the Chartered Accountants, Certified General Accountants, Accountants, Surveyors and Dentists to discuss the issue of professional incorporation. Lawyers have been allowed to incorporate in Alberta and British Columbia for many years. Other professions in Saskatchewan and other jurisdictions are allowed to incorporate. The Institute of Chartered Accountants of Saskatchewan is undertaking a major initiative with the Government of Saskatchewan to push for legislative amendments to permit limited liability partnerships and/or incorporation. The Benchers have agreed to keep this issue on the agenda in meetings with the Minister of Justice.

Claims Adjusting

From 1981 until 1988, Paul Greening, CLA, did adjusting for the Law Society Self-Insurance program through American Home Insurance. Since 1988 and the creation of SLIA, Paul, through H. J. Eisler Adjusters, had a contract with SLIA to provide adjusting services on an hourly rate basis. Effective September 1, 1998, Paul will provide in-house errors and omissions claims adjusting services to SLIA as an independent contractor. He will be located at the Law Society office three days per week. The Benchers and the Insurance Committee are of the view that this arrangement will increase efficiency in investigating, settling and otherwise dealing with insurance claims.

New Notices of Potential Claim were circulated to the membership in August along with the 1998-1999 Insurance Policy. This is a reminder that notices of potential claim are to be forwarded to Tom Schonhoffer, SLIA Counsel, at the Law Society office. It is no longer required that Paul Greening or Iain Mentiplay, former Secretary-Treasurer of SLIA, be provided with copies of materials by lawyers reporting a claim.

1999 Convocation Dates

February 11 & 12, 1999	Saskatoon
April 22 & 23, 1999	North Battleford
June 9 & 10, 1999	Yorkton
September 9 & 10, 1999	Waskesiu
October 28 & 29, 1999	Regina
December 9 & 10, 1999	Saskatoon

1999 Budget

The Benchers were advised that the Administrative staff are preparing the budget for 1999. The Finance Committee will be meeting in mid-October with the Benchers giving final approval at the Convocation to be held October 29 & 30. Annual fee notices will be sent the first week of November with the payment deadline being December 1, 1998. In addition to covering the operations of the Law Society which include discipline, professional standards, admissions, etc., the budget will deal with funding for Libraries, Continuing Legal Education, the Bar Admission Course, and Lawyers Concerned for Lawyers.

Law Society Scholarships

The Law Society First Year Scholarship has been awarded to Nolan Dooley of Saskatoon who was selected by an interview committee consisting of Mary Ellen Wellsch, Chair of the Admissions and Education Committee, Abena Bua hene, Executive Director of Saskatchewan Legal Education Society Inc. and Kay Robertson, In-House Counsel at Federated Co-operatives Ltd. The scholarship is valued at \$6,000. It is a continuing scholarship. \$2,000 was awarded to Mr. Dooley at the College of Law First Year Banquet on October 8, 1998. The scholarship may be renewed for second and third year provided that Mr. Dooley maintains an average of 70% in his first and second years.

Annual Meetings

The 1998 Annual Meeting in Moose Jaw was successful despite a rather low attendance. Lively discussions occurred on several issues including the format of the joint Canadian Bar Association / Law Society meeting. At the September Convocation a committee consisting of Maurice Laprairie, Randy Baker, Marty Popescul, John Stamatinos, Barry Morgan and Merv Nidesh was struck to make recommendations to the Benchers regarding the format of future annual meetings and the location for the year 2000. Close consultation with the CBA will also be required.

Professional Conduct Rulings (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.

Conduct Unbecoming-Chapter XIX, Commentary 10

Facts:

Lawyer M entered into a Retainer Agreement of \$10,000.00 with a client to represent the client in criminal and family law proceedings. Lawyer M, as security for his fees, took an assignment of the proceeds of an ongoing damage claim being handled by Lawyer H's firm. Upon completion of his retainer work, Lawyer M notified Lawyer H of his claim on the proceeds. The client disputed that Lawyer M had earned his full fee. Lawyer M did not issue a statement of account but based his claim for payment on the Retainer Agreement. Lawyer H advised the client to request an account and tax the bill. Before that happened, the damage claim was settled and funds became available. The client instructed Lawyer H not to pay the \$10,000.00 fee to Lawyer M.

Lawyer H asked the Law Society for direction and was told that Lawyer M must render an account to be entitled to receive fees. Lawyer H subsequently sent the \$10,000.00 to Lawyer M in trust to hold pending issuance of the statement of account and conclusion of taxation. The trust conditions were refused by Lawyer M and Lawyer M sent a letter to Lawyer H outlining his view of the law of assignments and received no response. Lawyer M then prepared a draft Statement of Claim against Lawyer H and his firm and sent it to Lawyer H threatening to sue if they did not proceed as Lawyer M wished. Lawyer H then sent the \$10,000.00 to Lawyer M without conditions. The client taxed the Retainer Agreement and the account was reduced. Lawyer M refunded the difference to the client. Lawyer H complained about Lawyer M's threat to sue another solicitor.

Ruling:

The Ethics Committee was of the opinion that there was no breach of ethics. It was acceptable for one lawyer to sue another lawyer in a dispute over a civil matter.

Breach of Confidential Information Chapter IV, Commentary 3

Facts:

Lawyer H was told by a Credit Union that it would no longer instruct him to prepare mortgages on its behalf. The reason given for the decision was that the Credit Union took issue with Lawyer H's advice to his own clients regarding Credit Union policies re a waiver of letters probate, waiver of mortgage prepayment penalties, as well as his criticism in receiving mortgage discharge documents. Lawyer H appealed to the Credit Union and apologized for any unintended criticism of their policies and stated that he believed that he was only describing those policies as he understood them. The Credit Union did not wish to change its position.

Lawyer H then drafted a letter to his clients telling them that in the future he would not be able to act for them on Credit Union mortgages and outlining the reasons given by the Credit Union. The letter informed the clients that they would have to go out of town for legal representation and invited them to go to other financial institutions for their mortgages if they wished to use his services. Lawyer H requested that the Ethics Committee review this situation and the letter.

Ruling:

The Committee was of the opinion that a lawyer should treat the reasons for termination of a relationship with a client as privileged unless the reasons are disclosed to protect the lawyer's reputation or integrity against allegations of malpractice or misconduct and then only to the extent necessary.

Unprofessional Communications - Chapter XV, Commentary 3

Facts:

A non-profit organization billed Lawyer M's client for certain services. The client formally rejected the billing at its board level and advised the non-profit organization in writing. The non-profit organization resubmitted its bill directly to the client's accounting office.

The client had engaged Lawyer M to respond to the non-profit organization on its behalf. Lawyer M stated assumptions in a letter to the non-profit organization that it was trying to obtain payment through inadvertence and that it had an unlawful purpose doing so. Lawyer M told the non-profit organization to cease and desist or face legal alternatives available to the client. The non-profit organization stated to the Law Society that the letter was threatening, based on assumptions, and was unprofessional and inappropriate.

Ruling

The Committee was of the opinion that the language used in the letter was intemperate but was not unethical.

**Search of Lawyers' Offices
(Allan T. Snell, Q.C.)**

Although it happens very infrequently, there are occasions where authorities, most often Revenue Canada or RCMP Commercial Crime, search lawyers' offices in the course of an investigation. Although this may occur as a result of investigation of particular clients of the lawyer or law firm, or in the case of Revenue Canada in the course of a random audit, the ethical problems to lawyers are very similar.

Many lawyers will, at some time in their careers, have had occasion to review the law with respect to privilege and confidentiality. Nonetheless, it is difficult to effect instant recall of these principles when faced with a search warrant. One of the first things to

remember is that *The Income Tax Act*, *The Excise Tax Act*, and *The Criminal Code*, all have similar provisions with respect to searching lawyers' offices, which provisions contain a definition of solicitor/client privilege. This definition is narrower than what has traditionally been recognized by the Courts. Furthermore, the ethical requirement to keep confidential information which might not be legally privileged only increases the anxiety and uncertainty as to what information must be disclosed and what must legally and/or ethically be withheld.

First and foremost, it must be remembered that the privilege in each case is the client's privilege. It is not for the lawyer to determine that the information in question, although privileged, is relatively unimportant and therefore may be disclosed. When in doubt and unless the client consents, privilege should be claimed.

Your first step should be to review the search warrant or documentation allowing the search in order to specify what is being sought. You should then locate the files or documents in question yourself. If privileged documents are to be seized, obtain copies if possible and seal the documents in the receptacle provided by the police.

In Revenue Canada audits, there is usually notification to the lawyer in question prior to the attendance of Revenue Canada officials. In many cases, agreement can be reached with the Revenue Canada official which will ensure that privilege and confidentiality is maintained while still allowing Revenue Canada to obtain the information it needs. The Law Society of Saskatchewan has been meeting with Revenue Canada and continues to do so in order to define a protocol which will accomplish this. There have also been preliminary discussions with the Federal Minister of Justice's office.

In all cases where any client information is obtained through search and seizure procedures, the client must be advised immediately of the circumstances, the client's rights and obligations, and further the client's right to obtain independent legal advice. There is presently in the legislation an onus on the client to make his/her claim for privilege before the Court. The case of *Lavallee v. Canada (Attorney General)* (Alta. Q.B.) held that this procedure is unconstitutional. This case is presently under appeal and it is therefore wise to err on the side of caution.

CHECKLIST

1. Read the search authorization. Is it valid on its face? What is being sought?
2. Locate the documents yourself. The police or officials present may wish to accompany you and this is not objectionable as long as they cannot see any privileged or confidential documents.
3. Determine if the documents are privileged in the traditional common law definition (eg see *Wigmore* or *Slavutych v. Baker* (1975) 55 D.L.R. (3d) 224 S.C.C.) and *Descoteaux v. Mierzinski* [1982] (S.C.R. 860). Any doubt should be resolved in favour of maintaining privilege.
4. If privilege is being claimed, seal the documents in the envelope provided by the officers.
5. If you are satisfied that the documents are not privileged or confidential they may be released to the officers.
6. In any case, ask to make copies.
7. Notify the clients concerned. If they do not wish to claim privilege, obtain a written waiver if possible. Make sure they understand their rights. Remember, even documents which may seem innocuous can be privileged.

Judicial Appointment

Congratulations are extended to Clifford Toth on his appointment as a Judge of the Provincial Court of Saskatchewan. Judge Toth will sit in Estevan, filling a vacancy created by the transfer of Judge Kolenick to Saskatoon.

Judge Toth graduated with distinction from the University of Regina with a Bachelor of Arts in Sociology, before earning a Bachelor of Laws from the University of Saskatchewan in 1980. He has been employed by the Saskatchewan Legal Aid Commission in Moose Jaw for 18 years.

Judge Toth was appointed to the SIAST Board of Directors in 1996 and has been active in a number of local organizations. He has also been a regular speaker to community organizations, including the Moose Jaw Child Abuse Council and Moose Jaw Victims Services. In announcing the appointment, Justice Minister John Nilson stated Judge Toth's impressive career with the Saskatchewan Legal Aid Commission has provided him with extensive experience in criminal defence work that will serve him well in his new role as a Provincial court Judge.

Mediation of Complaints

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.

Notes from the Library (Susan Baer)

The Benchers' Digest provides an excellent medium for the library to keep the members informed of new developments, new materials, and exciting changes that occur in the dissemination of legal information. The library intends to provide information regularly through the Benchers' Digest.

The Law Society's web site was a feature article in the May issue of the Benchers' Digest and the staff who wrote, designed, and developed the web site did an excellent job, especially in such a short period of time. Peta Bates, who is currently on sabbatical, worked many, many hours of extra time in order to deliver the web site to you before her leave. Norma Power is Peta's temporary replacement and Norma will be helping us to update and constantly improve our web site, in addition to her other duties. Our Law Society's web site is currently the only Law Society site that provides its members with searchable databases of case law, with hypertext links. It is certainly cutting edge and Saskatchewan is the first to do this! We have plans on providing more information through our site and details about our plans and developments will appear in future issues of the Benchers' Digest. We encourage you to subscribe to the web site. Contact the libraries in Regina at 569-8020 or in Saskatoon at 933-5141 to subscribe. Subscriptions are only \$95 per year.

Other information notes include the launching of Carswell's electronic products. Carswell has booked demonstrations for October 26 and 27 in Regina and Saskatoon respectively to demonstrate four new online products. Three of those products were supposed to have been ready for September: family, insolvency and securities law partners. Pricing structures have yet to be determined only a few weeks before the products are ready. The library is interested in knowing what Carswell's pricing structure will be and just how affordable the subscription services will be. While these electronic services may deliver more legal information to a lawyer's desktop, the services do not add up to any cost savings for the Law Society libraries. In fact, depending on the pricing structure, the electronic online products may not result in any savings for members or firms with similar printed products, but just another mechanism for retrieving the information. The pricing structure will probably be a subscription-based service, with some form of online search charge as well. Past experience dictates that we watch the launching with a critical eye and remain vocal about our concerns over pricing and functionality for all of our members.

In Memoriam

Raymond Gerald Cariou, Q.C., passed away on August 28, 1998. Mr. Cariou graduated from high school in Ituna, and went on to earn degrees in History and Law from the University of Saskatchewan. He moved to Meadow Lake in 1962 to begin his law practice. His tireless efforts towards community development in Meadow Lake were recognized when he was named the town's first Citizen of the Year in 1978. He remained an active volunteer his whole life. Mr. Cariou's career expanded into the forestry industry, as he was first on the Board of Directors of the Prince Albert Pulp Company, and later served as the Chairman of both Norsask Forest Products and Mistik Management Ltd. He was instrumental in forming a cohesive business unit between the co-owners of Norsask; the Meadow Lake Tribal Council; the employee investors; Techfor; and Millar Western Pulp Co. He was proud of being able to bring an environmentally sensitive approach to the forestry industry. In 1982 he was appointed a Queen's Counsel. Mr. Cariou loved to spend time on his farm. He hunted, fished and golfed and was passionate about the outdoors. He read widely and maintained a keen interest in history and current affairs. Throughout a very demanding career, he always made time for family and friends and was the centre of every gathering.