

# BENCHERS' DIGEST

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## Highlights of the Meeting of the Benchers held April 22 and 23, 1999

*(A. Kirsten Logan, Q.C.)*

### **Award of Appreciation**

The April Convocation was held at the Jackfish Lake Lodge, Cochin, Saskatchewan. On the Thursday evening, the Benchers and staff joined the Battlefords Bar Association at a dinner meeting. The Benchers and staff enjoyed the warmth and collegiality of the members of the Battleford Bar.

After the dinner, Harvey Grant Walker, Q.C. was presented with the Law Society of Saskatchewan award of appreciation in recognition of exemplary service to the public and the legal profession. He was suggested by a committee of the Battlefords Bar which was happily and fully endorsed by the Benchers.

The following is the text of the presentation of the award by George Thurlow, the Benchers for the Battlefords electoral district as prepared by Don Wilhelm, Q.C.:

"Harvey has for many years been a leader at the Bar, both at the local level and in the Province generally. He is well known here as the President of the Battlefords Bar Association. His accomplishments are many.

Harvey was born January 14, 1941, obtained his B.A. from the University of Saskatchewan in 1964 and his LLB in 1969.

Between those dates, he served as a Social Worker with the Department of Social Services in North Battleford but decided to pursue a career in law and in 1966 enrolled at the University of Saskatchewan, College of Law.

Harvey articulated with the Cuelenaere Beaubier & Priel law firm and then joined the firm of Sallows, Osborn, Noble, Wilhelm and Woloshyn which later became Sallows, Osborn, Noble, Wilhelm, Woloshyn and Walker. In 1975 Harvey was appointed Senior Crown Prosecutor for the Judicial Center of Battleford. In 1977 he joined Reg Cawood after Don Woloshyn had left practice to go farming and the firm became Cawood-Walker.

In 1985 Harvey was elected as Bencher for the Battlefords Electoral District and served in many positions and on many committees during his years as a Bencher until 1991, including: the Legal Education and Scholarships Committee (which he chaired), Annual Meeting Committee, Rules of Court Committee (which he chaired), Discipline, Executive Committee, Culliton Scholarship Committee, Chairman of the ad hoc Committee on lay Benchers, and on Paralegals, Joint Committee for the Law Society/C.B.A. annual meeting, and chaired the Queen's Bench Tariff of Costs Committee. He was Benchers' representative to the Canadian Legal Information Center. He served on other committees and in many other capacities during his very active tenure as a Bencher. He recently volunteered to sit as a non-Bencher member at discipline hearings as allowed by recent amendments to the Legal Professions Act/Rules.

Locally, Harvey has been equally active. He served as Chairman of the North Battleford Board of Education from 1985 to 1988, was appointed by the Attorney General to sit on a commission to study the proposed merger of District and Queen's Bench courts (otherwise known as the "Grotsky Commission").

Harvey chaired the committee of the Battleford' Justice Advisory Council established to effect the creation by the Province of a minimum or no security community correctional center for non-violent male offenders. This center as

established became the Battlefords Community Correctional Center.

Mr. Walker was Executive Secretary to the 1983 and 1997 Saskatchewan Federal electoral Boundaries Commission and Administrative Services Officer for the 1993 Commission.

Among his many other duties, the recipient found time to lecture in criminal law at the Bar Admission Course. He chaired the Professional Responsibility Section 1984 through 1987 and chaired the panel on Ethics in Advocacy and lectured at a Civil and Criminal Advocacy seminar in 1980. He was recipient of one of two outstanding volunteer awards from SKLESI in 1996.

In 1984 and '85 Harvey was Chairman of a commission appointed by the City of North Battleford as to future use of St. Thomas College facilities (now known as the Don Ross Center).

As mentioned Harvey has served as president of the Battlefords Bar Association and is its present president.

Mr. Walker was honored with and appointed a Queen's Counsel in 1990.

Most members will recall with fondness the Annual Meeting of the Law Society/Canadian Bar Association held in North Battleford. Mr. Walker chaired this event which was a great success.

Harvey remains an active Rotarian since 1985. He has been particularly interested in the Youth/Student exchange program. He has had, on many occasions, young students living at home with himself and Ivy, and frequently brings the student to regular Rotary meetings of sees that the student's host of someone else does so. In 1997, he was honored with a Paul Harris Fellowship from Rotary in recognition of outstanding service.

Harvey has been a Mason since 1981.

Harvey has, since 1994 been Chairman, spokesman and chief negotiator for the Government Trustee negotiating and grievance committee relative to grievances involving the Saskatchewan Teacher's Federation.

It is apparent that Harvey has given much to his community and the Society. Some of his additional general outstanding achievements have not been documented. Needless to say, his leadership in the Battlefords Bar has been tireless. This Bar owes a great debt of gratitude for his leadership and energy in seeing that Resolutions are presented to the Annual Meeting where appropriate and he is usually there to speak to them.

He has kept the Battlefords Bar in the forefront.

He has always adhered to the finest qualities of practice and ethical behavior, and is an example to us all."

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The Law Society Award of Appreciation Policy is:

"1. Overview The Law Society Appreciation Award is intended to recognize contribution to the Law Society made by a member of the profession, which would not likely otherwise be recognized. The focus is on an individual having undertaken assignments for the Law Society typically without remuneration and performing such assignments without a high degree of visibility in the profession or otherwise. Examples of the kinds of contributions to be recognized are:

1. Service on committees of the Law Society;
2. Service on the Board of SKLESI;
3. Lecturing at the Bar Admission Course;
4. Serving as a representative of the Law Society on bodies to which the Benchers are entitled to make appointments such as the Law Foundations, Senates of the Universities, etc.;
5. Undertaking discipline and professional standards work such as Law Office Management Reviews, pro bono counsel work, etc.; and
6. Undertaking other special assignments for the Law Society.

2. Recipients of the Appreciation Award will be lawyers who are not current Benchers, but who might in the past have served as Benchers.

3. The focus of these awards is service rendered to the Law Society as an entity as opposed to the profession in the wider sense. Whereas service to the profession or the public by lawyers tends to have a more public aspect to it, oft times services performed on behalf of the Law Society are performed in the context of confidentiality and with a very low profile. The award is intended to recognize those types of services.

4. The awards will be presented by the President or his or her designate at the Thursday night dinner which is usually held in conjunction with the local Bar and regular Bencher meetings. Recipients of the award will be pre-selected."

### **SKLESI Board of Directors**

The Benchers approved Mr. Justice R. D. Laing as a joint Law Society/Canadian Bar Association Saskatchewan Branch appointee to the Saskatchewan Legal Education Society Inc. Board of Directors. Mr. Justice Laing has long been interested in continuing legal education and presented a paper on the future of the articling process at the Future of the Legal Profession conference last March. We are confident that Mr. Justice Laing will be an excellent addition to SKLESI's Board.

### **Incorporation**

The Executive Committee sought input from three lawyers practicing in the tax field, Dwayne Anderson, Dick Batten and Alain Gaucher, in order to continue with the discussions with the government for legislation to allow lawyers to incorporate. It would appear that the loss of revenue to the province would be minimal. The recent changes to family trusts announced in the last Federal budget will make incorporation less attractive, however, the issue will be put forward on behalf of those members (sole practitioners and two-person firms) who still may benefit from incorporation.

### **No-Fault**

The Joint Canadian Bar Association/Law Society No-Fault Committee successfully made application to the Law Foundation of Saskatchewan to fund a project to review the results of PIPP and to make recommendations for changes to No-Fault which are economically feasible. The Committee has hired Lindquist Avey, a forensic and investigative accountant firm of Vancouver, which was involved in a review of the proposed no-fault plan which was ultimately rejected in British Columbia. The report is to be used as part of the review which under s.220 of *The Automobile Accident Insurance Act* is to be conducted in the year 2000.

### **Rule Amendments**

#### **Rule 80**

The Benchers passed amendments to Rule 80 which will allow for posting of the Law Society Annual Report on the website rather than mailing a copy to each member. It is hoped by this measure that considerable savings will be accomplished by not printing and mailing the Annual Report to every member. Written reports will still be available by request.

#### **Rule 1615**

The Benchers approved an amendment to Rule 1615 to provide for a limited exception to the prohibition against the use by members of the terms "specialist" or "leader". Lawyer directories such as *Lexpert* will show lawyers as "leader" in various areas of law based on recommendations of other lawyers. The Rules did not permit Saskatchewan lawyers to be so identified, putting them at a disadvantage vis-à-vis other lawyers in Canada. In October 1998, the Benchers had placed a moratorium on the enforcement of the Rule for directories such as *Lexpert* pending review and an amendment to the Rule.

## Rule 1903

On occasion, the Benchers are requested to waive Rules, most often for certain filing requirements in the admissions process. Other requests can sometimes raise controversy. Rule 1903 provided that application for waiver required unanimous approval by the Benchers. In rare situations, this led to skewed results or to Benchers abstaining from voting in order not to oppose the view of the majority. The Benchers approved an amendment to Rule 1903 to allow waivers of Rules to be granted by a 2/3-majority vote.

## Audited Financial Statements

The Benchers approved the audited financial statements for 1998, prepared by Price Waterhouse Coopers. The General Fund showed a surplus of \$219,000 for the year. The Special Fund, which under the Act is required to protect the public from defalcations, stands at \$2.3 million. The Self-Insurance Fund, which covers professional liability claims made prior to 1988, stands at almost \$601,000.

## Insurance

As members are already aware, the Benchers approved the 1999-2000 Insurance Assessment in the amount of \$2,000, down \$400 per member from the previous year. The decrease is due mostly to a favorable claims experience and an increase of the CLIA group deductible from \$100,000 to \$200,000. Under the new arrangement, SLIA will pay the first \$200,000 of any claim. It is the view of the Benchers that the increased premium to CLIA was not justified in light of the infrequency of claims over \$100,000. The Benchers also are of the view that the various loss prevention initiatives have had an effect in decreasing the number of claims. Members are to be commended for the increased care taken in their practices, which has helped to reduce the number of claims. Members are reminded that payment of the insurance premium is due by June 15, 1999.

## Donna Sigmeth Joins the Law Society

Donna Sigmeth.jpg (13502 bytes)



Donna Sigmeth has been hired as the new Complaints Officer of the Law Society. Donna graduated from the U. of S. College of Law in 1993. She completed her articles with George Tkach Law Office and with the Olive Waller Zinkhan and Waller Law firm. Donna joined Olive Waller as an associate in 1994 upon her admission to the Law Society of Saskatchewan. Donna was raised in Saskatchewan, on a farm in the Balgonie area. She attended the University of Saskatchewan and earned an undergraduate Arts (English) degree in 1987. After travelling and working for a few years, Donna resumed her studies at the University of Saskatchewan and obtained her Law degree in 1993.

Donna is a member of the Canadian and Regina Bar Associations and the Estate Planning Council of Saskatchewan. She has lectured for the Public Legal Education

Association on the topic of wills and estates and appeared on a Saskatchewan Community Network television program "Estate Planning for Farm Families". This past year, Donna was involved with the Board for the Regina Indian Community Awareness Inc., which administers the "Chili for Children" Program.

Donna has been engaged in general practice of law, primarily in the areas of civil litigation, debtor/creditor, wills/estates and real estate.

Donna will begin working in her new position on June 23, 1999.

## Confidentiality

(Allan T. Snell, Q.C.)

The Law Society has recently received a number of complaints involving breach of a solicitor's duty to maintain confidentiality regarding client information. Most members are extremely careful with maintaining solicitor/client privilege and properly so. However, *The Code of Professional Conduct* in Chapter IV does not restrict itself to privilege situations. Commentary 2 of Chapter IV states:

"The ethical rule must be distinguished from the evidentiary rule of the lawyer and client privilege with respect to oral or written communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge."

Thus, while a client's address or the fact that the lawyer is representing the client may not be privileged in the strict legal sense (although in some cases it may be) nonetheless, there is an ethical duty on the lawyer to maintain clients' secrets. This is expected of the lawyer not only by the Law Society but also by clients. The complaints that have been raised about lawyer's indiscreet disclosure of seemingly innocuous information have come from clients. It is important to them.

The Ethics Committee and the Professional Standards Committee have thus far dealt with such matters by means of simple exhortation to the member involved to be more aware of the client's requirement for confidentiality. However, indiscreet disclosure does offend *The Code of Professional Conduct* and future breaches may well be referred to discipline.

## Articling Student – Minimum Wage

With the new "crop" of articling students recently having joined or about to join firms throughout the province, this is a reminder that the provisions of *The Labor Standards Act* (including payment of wages) apply to articling students except only with regard to hours of work and overtime.

**Beth Bilson Appointed as Dean of the College of Law, University of Saskatchewan**

Beth Bilson, first-ever-female Dean of the College of Law, has been appointed to a five-year term. Ms. Bilson received three degrees from the University of Saskatchewan including a Bachelor of Arts and a Master's degree, both in history. She also earned a Ph.D. from the faculty of laws at the University of London in 1982. Ms. Bilson has been a member of the faculty since 1979. She served as chair of the Saskatchewan Labour Relations Board from 1992 to 1997, was assistant Vice-President of Administration from 1986 to 1988 and was Assistant Dean of the College in 1988 to 1990 and 1991 and 1992.

Pursuant to *The Legal Profession Act, 1990*, the Dean of the College of Law sits as a Bencher of the Law Society of Saskatchewan. Ms. Bilson's appointment begins July 1, 1999.

## Judicial Appointments

### **Mr. Justice James C. MacPherson**

The Honorable Anne McLellan, Minister of Justice and Attorney General of Canada announced on May 26, 1999, that Mr. Justice James C. MacPherson, Superior Court of Justice (Ontario) Judge, has been appointed Judge of the Court of Appeal for Ontario.

Mr. Justice MacPherson graduated from Dalhousie University with an LL.B. in 1974 and from Cambridge University with an LL.M. in 1976 as well as a Diploma in Comparative Legal Studies in 1977. He was called to the Saskatchewan Bar in 1982 and to the Ontario Bar in 1989.

Prior to his appointed to the Ontario Court of Justice in 1993, Mr. Justice MacPherson was Dean of Law at Osgoode Hall Law School, a position he held since 1988.

## Excerpts from SKLESI's 1998 Annual Report

*(Abena Buahene)*

"I am convinced that life-long learning is an absolute must for every lawyer anywhere who is committed to providing quality service to clients. Job one for all of us is to convince lawyers of that fact. We must raise the profile of Continuing Legal Education. It isn't a day away from the office with a chance to meet old friends and pick up a few precedents. It's a lifeline." P. Andre Gervais, c.r., Past President, Canadian Bar Association

It is my pleasure to report that CLE is alive and well in Saskatchewan. In 1998 SKLESI delivered a multitude of topics ranging from our usual substantive law update courses to challenging and intensive skills training sessions. Many of the programs we offered were a first-hand on-computer research, clear legal writing and trial advocacy. A total of 1362 lawyers "took a day away from the office" (many of whom attended more than one course) and 200 additional sets of course materials were purchased. 1998 was also the first year in which the loss prevention credit system was introduced. The Law Society's Insurance Committee awarded loss prevention credits to eight out of thirteen seminars. In addition to our CLE duties, SKLESI had the privilege of playing a major coordination role in the Future of the Legal Profession Conference. The experience was both rewarding and challenging for our staff.

In February at its retreat, the Board of Directors identified a number of long-term CLE projects: The development of a computer education curriculum for lawyers, the design and delivery of a business/ practice management series, the LAND project and skills training in advocacy, and possibly, in alternative dispute resolution.

On the publications side, SKLESI edited and published the Saskatchewan Labour Relations Board Reports and embarked on an updating process for the Law Society's Practice Checklists. These publications complement CLE activities.

In 1998 SKLESI relied on the expertise and generosity of 190 members of the Bench and bar to assist us in carrying out our mandate. There is no doubt that in our quest for diversity and quality in course offerings and publications, enhancing what we do in the Bar Admission Course, and the stewardship of SKLESI could not be accomplished without the commitment from the our Board of Directors, the Bench and bar at large. Thank you.

In closing, the CLE opportunities we offer through SKLESI must be an integral part of a lawyer's tool kit in maintaining competency and excellence. We invite the profession to be active participants in crafting their educational and professional lifelines.

## Bar Admission Director Report

*(Ken Koshgarian)*

### Bar Admission Course

I am pleased to report that the Bar Admission Course is sound and continues to improve. During the last year we evaluated and tested our marking and appeal process. We passed! Considering our resources, our Bar Admission Course compares very favorably with those offered in the other provinces.

In order to pass the course, students must now complete a clause drafting assignment, an interviewing assessment, an advocacy assessment, a legal opinion assessment, and three written examinations. Our approach to marking is from a practitioner's viewpoint: would this work be acceptable to present to a client?

The two-segment format of the Bar Admission Course is no longer "new"; it is now five years old. We intend to evaluate its effectiveness from the principal's viewpoint by conducting a principal's forum in 1999-2000.

In addition, we have undertaken an internal review to ensure that any form of cultural bias is removed from our materials, presentations, assessments, and examinations.

### Transfer Applicants

We are also responsible for setting and administering the transfer examinations to lawyers from other jurisdictions who seek their call in Saskatchewan.

Prior to adopting the *Federation of Law Societies of Canada Inter-Jurisdictional Practice Protocol* in November 1997, there were on average two or three applicants per year.

Now, there is no longer any articling requirement among Canadian jurisdictions. This year saw a marked increase in the number of applicants. We had 16 applicants, who wrote the 2 exams, 5 of who had to write supplementals.

We continually strive for improvement in the quality of the course and in the delivery of our services. If you have any comments or suggestions, or if you wish to volunteer in any way, please let us know.

## Notes From the Library

*(Susan Baer)*

## Rural Libraries

I have had the chance to see some of our libraries firsthand and agree with the comments I have received that the libraries need a great deal of work. I have received several calls from lawyers expressing concern about their libraries. I appreciate that they have taken the time to comment. From what I have seen from six libraries, each library faces the same issues before it.

"Fixing" them will not occur overnight and we are in the process of developing a plan for dealing with the rural libraries' organization and the lawyers' needs. We must involve the local bars, the local library staff, and receive cooperation from the government. We must also take into consideration all formats of legal materials and other possible sources of legal materials in each community. Placing computers in each rural collection and equipping them with CD-ROMs is not the answer. CD-ROMs are considered an interim technology, or are more appropriate as supplements to larger collections that have staff to maintain the equipment, the CD-ROMs themselves, and to assist lawyers with their use. Perhaps five years ago, before the explosion of information on the Internet and the launching of new online products, the CD-ROM technology filled a niche. But that initiative has been eclipsed by even newer technology. Desktop access for certain types of legal information should be our ultimate goal. How we achieve that is the challenge.

According to the *Standards for Canadian Courthouse and Law Society Libraries*, a library system should develop a class structure of libraries in order to help develop and maintain the collection appropriately. To this end, our library system will be developing classes of libraries where libraries in each class will have similar collections. Certainly we will take into consideration the other legal materials available in the courthouse or the community and the specific needs of the local bar, as well as the format of the material. This is not the end of print and we still need print to do proper legal research. However, we have the opportunity to provide broader access to legal information using electronic formats. The most logical method of delivery will be using our web site to act as a gateway for electronic services.

The library staff is currently working on a new version of the Law Society's web site. We will be adding features and providing access to other sites through annotated links to the free materials on the Internet. I have already started discussing the possibility of *wide area networks* for some subscription services. That is the beginning of establishing gateway services on our web site for our members. This is a relatively new concept for the publishers and pricing schemes for licenses have yet to be determined in many of the publishing firms. For example, it could be possible technically to provide access for our members to a variety of CCH products through their web-based products. Some of the products could include the *Canadian labour law reporter*, the *Canadian family law guide*, the *Canadian tax reporter* and its derivatives, for example. The possibility of proceeding in this direction for certain materials is directly related to the cost associated with the access. We are only in preliminary discussions. If affordable, we will proceed in that direction.

The next area of concern when using electronic legal information is how to use it. Training will be a big factor and we are also developing plans for accommodating some of your training needs with respect to our databases and the web site. Our library system has had discussions with SKLESI about partnering and coordinating our training efforts.

At the last Library Committee meeting, the Committee recommended undertaking a study of the rural libraries, in the hopes of coordinating materials with the courts or Department of Justice, determining what should be done regarding space issues, access, printed books, and electronic materials. As a beginning phase, I will be continuing to travel to the rural libraries collecting information and assessing their individual situations. I look forward to meeting many of you to discuss these issues and to hear your comments. I certainly am interested in hearing from you if you have concerns or comments. Ideas for training facilities are also welcomed. Please contact me via email at [sbaer@lawsociety.sk.ca](mailto:sbaer@lawsociety.sk.ca), or call me at (306) 569-8020. How we undertake the entire study is still being formulated but certainly the decision of the Library Committee shows that the rural libraries need to occupy a higher priority than they have in the past.



## In Memoriam

**Walter Paul Paulson** died April 10, 1999. Mr. Paulson, born on December 11, 1918, graduated from Saskatoon Normal School in 1940. Following graduation, he taught at various rural schools in Saskatchewan until he joined the Royal Canadian Air Force. He served in England during the war and then returned to further his education at the University of Saskatchewan. He graduated with a B.A. in English and his LL.B. in 1950. Mr. Paulson served his articles with G. T. Killam of Foam Lake and once admitted, took over his practice there. In 1960, Mr. Paulson took over the law practice of R. J. Pratt in Wynyard and he continued in both practices until retirement.

Mr. Paulson was active in his community including the Chambers of Commerce, the Lions, the Civilian Committee of the Air Cadets, the Legion, the Masonic Lodge #66 and many other ad hoc committees promoting the local community.

**Donald Wilhelm, Q.C.** passed away May 12, 1999, at the age of 59. Mr. Wilhelm received his Bachelor of Arts degree in 1960 and a Bachelor of Laws degree in 1963, both from the University of Saskatchewan. He served his articles under the now Honorable Mr. Justice George Noble of the law firm Sallows, Osborn and Noble in North Battleford. Mr. Wilhelm was an active member of the Battlefords Bar Association. In 1978, he was appointed a Bencher of the Law Saskatchewan of Saskatchewan, to complete the term of Gulak, and continued for two more terms as Bencher. He sat on various committees including the Legal Education and Scholarships Committee, the Professional Conduct Committee, the Legislation Committee and the Alcoholism Committee. In 1981, he was appointed Queen's Counsel. In 1983, he was elected as vice-president of the Law Society and one year later, became president of the Law Society. During Mr. Wilhelm's presidency, Lawyers Concerned for Lawyers was established. Mr. Wilhelm also sat as Commissioner on the Legal Aid Commission for Saskatchewan. He was a member of the Centennial Park School Board, sat on the committee which established the first Indian Metis Friendship Center in the Battlefords, member of the Kinsmen Club and Rotary Club, sat on the Provincial Board of Directors of the Western Development Museum and was a director of the Battlefords Alcohol and Drug Abuse Center. On September 12, 1996, Mr. Wilhelm received the Law Society of Saskatchewan award in recognition of his exemplary service and contributions to the public and the legal profession and he retired in 1997. On January 22, 1998, he was the first and to date the only recipient of a Life Membership in the Battlefords Bar Association.

**Donald Frederick Woloshyn, Q.C.** passed away on March 30, 1999. Mr. Woloshyn was born in Wilkie on December 22, 1937. He received his B.A. (Econ.) and LL.B. from the University of Saskatchewan in 1964. He articulated with Peter Makaroff of Makaroff, Cater, Sherstobitoff & Hrabinsky of Saskatoon. Mr. Woloshyn continued to practice in Saskatoon until 1971 when he became a partner in the Sallows, Osborn, Noble, Wilhelm & Woloshyn firm in North Battleford and later became a partner in the Woloshyn and Cawood Law Firm. In 1985, Mr. Woloshyn moved to Montreal where he studied International Law at McGill University and he received his LL.M. in 1986. Upon his return to Saskatchewan, he joined the Mitchell Taylor Romanow Ching Law Office, which later became known as Woloshyn Mattison.

Mr. Woloshyn served as director of the Saskatchewan Law Foundation from October 1989 to December 1995 which included his position of Chair from 1993 to 1995. He was a founding member of the Saskatoon Community Clinic and participated in many farm, co-operative and community organizations.

## Plea Bargaining and Obstructing Justice

(Allan T. Snell, Q.C.)

Section 139(3) of *The Criminal Code* states:

"Without restricting the generality of subsection (2), everyone shall be deemed willfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

- a dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;
- b influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or
- c accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror".

Section 141 of *The Criminal Code* states:

"(1) everyone who asks for or obtains or agrees to receive or obtain for valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years

(2) No offence is committed under subsection (1) where valuable consideration is received or obtained or is to be received or obtained under an agreement for compensation or restitution for personal services that is

- a Entered into with the consent of the Attorney General; or
- b Made as part of a program, approved by the Attorney General, to divert persons charged within indictable offences from criminal proceedings."

It is the responsibility and duty of criminal defence counsel to obtain the best results for his or her client whether it is through trial or through other lawful methods of resolution of the charge against the client. Particularly, in less serious cases, the Department of Justice has over the past several years expressed a desire to deal with these matters by way of less traditional means such as mediation and diversion. As the decision to reroute the charges by the Crown occurs at an early stage often times defence counsel must, in order to make a case for such rerouting, deal with the Docket Court Prosecutor who is almost by definition busy and may not have a great deal of time to discuss possible alternatives to proceeding with the charges laid. Often it appears that if the Complainant and/or the police can be satisfied with alternative measures, the Crown will be inclined to agree. Therefore there is a temptation to deal directly with these people and present the proposal to the Crown Prosecutor as a matter of agreement amongst the parties.

The motivation to obtain the best possible result for a client is just as strong where there has not been a charge laid but there is an indication that allegations, which may be criminal, may be brought to the police. Whether or not the client is guilty, settlement with the complainant by means of some kind of monetary compensation often seems the most expedient method of resolving the matter.

The above two sections of *The Criminal Code* are reprinted in order to underline the danger that is inherent in acting for clients in these sorts of circumstances.

The case law referring to these sections is illustrative. In *R. v. Kotch* 61 C.C.C. (3<sup>rd</sup>) 132 (Alta. C.A.) the accused was a friend of a lawyer who had been charged with shop lifting. Mr. Kotch went to the Loss Prevention Officer in Superstore and advised the officer that his friend had been suffering from depression and was on medication at the time of the incident and that there was danger to his health and career if the prosecution were continued. Mr. Kotch offered the Loss Prevention Officer the amount of \$20,000.00 to withdraw the charge. He stated repeatedly that it was not an intent to bribe the officer and that the money could be used as a "promotion". In upholding his conviction the Alberta Court of Appeal stated:

"Any attempt to pay compensation in any form to a witness that has as its purpose a direct tendency to influence the witness not to give evidence in a judicial proceeding – irrespective of the motive for doing so, is a corrupt attempt to obstruct justice . . . I see no distinction arising from the fact that the person who was approached may not be a witness or potential witness like Burton in the traditional sense if he is the complainant or the perceived voice of the complainant and is seen as the one who commenced the prosecution. The object is the same in either case. The frustration of lawful prosecution by a bleak means."

Similarly in *R v. Targon* (1988) 61 C.C.C. (2<sup>nd</sup>) 554 (Ont. County Court). Defence counsel who had been retained in a pending indecent assault prosecution contacted the complainant with an offer of \$2,000.00 in return for ending all proceedings civil and criminal. The \$2,000.00 would be paid by means of a "settlement" of a civil action, which the lawyer himself proposed to commence on behalf of the complainant against his client. The lawyer, Targon, advised the Crown Prosecutor of what he was doing, however the Crown Prosecutor refused to go along with it and Targon's client was tried and acquitted. Targon however was charged under Section 139 and convicted.

Finally in the case of *R. v. Waylen* (1974) 17 C.C.C. (2<sup>nd</sup>) 217 (Ont. County Court) Honsberger, J. states:

"I am persuaded that in our form of society where the individual has the right to conduct his affairs independently of his neighbor within the confines of the law that where someone attempts to dissuade him from reporting an incident that may constitute an obstruction of justice. Justice after all is not confined to the Courts of Law, Parliament or the Legislatures. It is not to be found constrained within legalistic frameworks of formal police investigations or arrests and charge. Justice must be alive and allowed to live with in the community and to thrive without molestation or interference and if someone attempts to interfere with one concept of that justice this to me constitutes that section of the criminal law that has been described as real crime one that each of us when we some molest or interfere can and should respect the intervention of the law and such intervention may take the form of a charge of attempting to obstruct justice."

One suspects that Mr. Targon's efforts to save his client from charge and trial (where he was ultimately acquitted) are imitated in some form or other by many lawyers. Often times it is simply a matter of offering compensation to a complainant which might be sufficient to end the matter as far as the complainant is concerned. Sometimes lawyers attempt to provide some insurance that this will be the case by providing that in the event the matter is disclosed to the police contrary to the agreements, liquidated damages in the exact amount of the compensation become payable. Without wishing to provide a legal opinion, one might question whether such liquidated damages would be enforceable from a policy prospective and perhaps more importantly, whether the mere inclusion of such a clause in an agreement might be on the basis of the case law an example of "other corrupt means". As Defence Counsel you are obliged to obtain the best possible result for your client within the law. You are not however obliged to put yourself in a position of potential civil or criminal liability.

In fact the Law Society has recently had to deal with a couple of instances where members have faced potential criminal charges as a result of attempting to bargain directly with complainants. In one case where the member came

very close to being charged he attempted to resolve an allegation of sexual assault by means of payment of cash to the complainant. The member believed the allegation to be without foundation and like the *Targon* case was simply trying to assist his client in avoiding the embarrassment of criminal investigation and perhaps charges. Throughout he urged the complainant to seek independent legal advice, which she did not do. The Crown determined not to lay a charge on the basis that there was no intent to obstruct justice and that the member was acting in ignorance of the relevant criminal code sections. Nonetheless, it was by no means certain that charges against him would not be laid.

**Be careful out there.**

## QUEEN'S BENCH RULES OF COURT COMMITTEE

### *NOTICE TO THE PROFESSION*

The joint committee of the Law Society and the Canadian Bar Association on the Queen's Bench Rules of Court intend to propose to the Court certain amendments to the Rules of Court as outlined herein. Please review the same and provide any comments you have to the Law Society or the Canadian Bar Association no later than July 31, 1999. Please note that these are proposals from the committee and have not been reviewed or approved by the Court. Such review and possible approval will only take place after the committee has gathered the views of the profession and determined whether the proposal should be put forward to the Court. Please provide us with your comments.

#### **1. Proposal for post-pleadings conference**

The Committee proposes that Rule 191(10) and 191(10)A be added to the Rules to provide for a post-pleadings conference. This will satisfy the identified need for parties to have access to the Queen's Bench Judge for the purposes of settlement discussion and/or management of the case earlier than presently allowed under the pre-trial conference system. Because the post-pleadings conference will take place very early in the legal proceedings and there are no onerous requirements in terms of briefs and expert notices, the cost will be significantly reduced. The proposed Rule is as follows:

191(10) Notwithstanding subrule (2), all of the parties may, on the close of pleadings, file a joint written request with the Local Registrar that a post-pleadings conference be held, and on such request the following rules shall apply:

- (a) the Local Registrar shall fix a time, not to exceed one-half day, for the holding of the post-pleadings conference;
- (b) the parties may, not later than three (3) days prior to the date fixed for the conference, file and provide to the opposite party a Brief setting out matters which the party feels may be of assistance to the presiding Judge, including identification of issues, quantification of damages, proposals for settlement, and proposed timetables with respect to exchange of documents and examinations for discovery, such Brief not to exceed five (5) pages;
- (c) unless otherwise ordered, all parties shall appear with their counsel, if any, at a conference held pursuant to this subrule. Parties outside the Province of Saskatchewan shall be allowed to participate by way of telephone conference call, the cost of the call to be paid by the party participating in that fashion. Unless otherwise ordered, a corporation shall have a representative present, in addition to its counsel;
- (d) A post-pleadings conference held pursuant to this subrule shall be for the purpose of attempting to settle the proceeding, and if that is not possible to consider other matters to facilitate the proceedings, including the identification and simplification of issues, fixing dates for the exchange of Statements as to Documents and completing examinations for discovery, identification and designation of proper officers and, at the discretion of the presiding Judge,

the assignment of a case management Judge;

(e) all communications in the course of a post-pleadings conference held pursuant to this subrule, including any Brief filed pursuant to subrule 10(b) hereof, are privileged and shall not be admitted as evidence in any proceeding. Following the completion of a post-pleadings conference held in accordance with this subrule, any Briefs filed may be removed from the Court file and returned to the party filing same;

(f) at a conference held pursuant to this subrule the presiding Judge may make any order by the consent of the parties, including an order pursuant to s. 5(1) of The Queen's Bench Act (Civil Mediation) Regulations exempting the parties from the mediation provisions of *The Queen's Bench Act*.

191(10)A If a party refuses to complete a joint request pursuant to Rule 191(10) an opposing party may apply to a Judge for an Order directing that a post-pleadings conference be held. The Judge, upon being satisfied that a post-pleadings conference would either assist in settling the proceedings and/or assist in the conduct of the proceedings, may direct that a post-pleadings conference be held.

## 2. Proposal to amend Rule 284C and 284D

There have been numerous discussions among members of the Rules Committee regarding timely disclosure to expert witnesses. Initially, the disclosure requirements were followed quite closely by counsel but have significantly eroded over time. Accordingly, we are exploring whether it is necessary to put some teeth into Rule 284D and 284C for the purpose of ensuring timely disclosure of expert reports and the other reports required by 284C. For example, we propose an amendment to 284D as follows:

### Rule 284D

(1) A party who intends to call an expert witness at trial shall, not less than 10 days before the date fixed for a pre-trial conference, serve on every other party to the action a report setting out the name, address and qualifications of the expert, the substance of the proposed testimony and a copy of any written report intended to be used in evidence.

(2) No expert witness may testify, except with leave of the trial judge, unless Subrule (1) or Subrule (3), as the case may be, has been complied with.

(3) A party who has been served with a report as provided in Subrule (1), and who intends to call an expert witness at trial in rebuttal, shall, within 15 days of the assignment of a trial date, serve on every other party to the action a report setting out the name, address and qualifications of the rebuttal expert, the substance of the proposed testimony and a copy of any written report intended to be used in evidence.

### Proposed Amendment:

(4) *A party who does not comply with the time for service of an expert notice as set out in (1) or (3) shall, unless otherwise directed by the pre-trial judge or trial judge:*

*(a) be denied all taxable costs and disbursements related to the expert witness's testimony where the trial judge grants leave under (2) in any event of the cause; and*

*(b) pay to the opposing party the one day of counsel*

*fee under Column 4 of the Tariff of Costs in any event of the cause.*

**Proposal to amend the current statement as to documents in the Court of Queen's Bench to provide for a list of individuals having material facts relating to the lawsuit**

The Committee reviewed and rejected the suggestion that the Court of Queen's Bench should be asked to adopt a rule which would require parties to provide the party opposite with the names of any witnesses they have and a "will say" statement. However, the Committee does see the benefit in early disclosure of the names of individuals having material facts in their possession, which relate to the matters in issue. The Committee therefore proposes to recommend to the Court that the current statement as to documents in the Queen's Bench general division be amended to allow for a statement listing all of the individuals that the party tendering the statement is aware of who have, or are believed to have, knowledge of facts material to the matters which are the subject of litigation. The Committee is soliciting response from the litigation bar as to whether they have any comments on this proposal either positive or negative.

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