BENCHERS' DIGEST

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Should Lawyers In Saskatchewan Adopt The Concept Of "Full Mobility" Within The Western Canadian Provinces?

by Martel Popescul, Q.C.

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The Legal Profession in Saskatchewan has faced many changes over the past number of years. However, none of these changes may be as significant or may have a greater impact than the mobility initiative currently being considered by the Benchers of your Law Society.

Currently, each province's legal profession is governed by its own Law Society. Each provincial Law Society is primarily responsible for the regulation and administration of the lawyers within its boundaries. If a lawyer wants to practice law in Saskatchewan, the lawyer must become a member of the Law Society of Saskatchewan. The Law Society determines the criteria that a prospective member must meet and the fee that must be paid before that person can be admitted as a member.

Sometimes members of another province would request, and were granted, "Occasional Practicing Certificates" which would permit the visiting lawyer to enter Saskatchewan to practice law for a finite period of time respecting a specific matter.

Lawyers who wished to practice in several jurisdictions were normally required to hold "dual membership" both in their home jurisdiction as well as the visiting jurisdiction in which they intended to regularly practice.

This is the way it has been for decades. All of this, however, is changing.

It has been suggested that lawyers may have constitutional rights relating to the ability to practice law interprovincially. Consequently, there is pressure to relax and perhaps even eliminate the jurisdictional boundaries. Furthermore, there was little useful purpose in maintaining the occasional practice registration system because there was little that could be done other than to "register" the visiting member. Practically speaking, lawyers from out of province who wished to be granted an "Occasional Practice Certificate" were routinely granted them upon providing proof that they were permitted to practice in their home jurisdiction and upon paying the prescribed nominal fee. It was the experience of our Law Society that, by and large, these incoming "temporary" members did not cause significant problems for us whether in discipline or insurance. Similarly, our lawyers seeking, and obtaining occasional practice certificates in other jurisdictions, did so without difficulty and without causing, for the most part, discipline or insurance issues for the host jurisdiction.

For some, there was the opinion that the occasional practice registration was a formality without purpose. For example, we take it for granted that our Saskatchewan

driver's licence permits us to drive our automobile on Alberta highways. Would any useful purpose be accomplished by requiring a prospective traveller to obtain prior approval from the Alberta Highway Traffic Board before motoring from Saskatchewan to Alberta?

The Law Societies of the western Canadian provinces discussed this situation in detail and determined that this anomalous condition should not be allowed to continue. Ultimately, an "Intra-Jurisdictional Protocol" (IJP) was established in February of 1994. Despite the fact that the IJP was established a number of years ago, Law Societies in western Canada had not passed rules to adopt the IJP until relatively recently. The IJP essentially permits lawyers to "practice occasionally" in another jurisdiction, within certain perameters. These parameters include,

- allows the temporary mobility of lawyers within Canada to practice, at a maximum, on 10 matters and for not more than 20 days in total during a year, unless permitted otherwise (the "10-20-12 rule")"
- the lawyer can not hold herself out as able to practice the law of the host jurisdiction.
- The lawyer can not be the subject of criminal or disciplinary proceedings or have a criminal or disciplinary record.
- The lawyer must be competent to practice the law, specific to the host jurisdiction that the lawyer intends to practice while in the host jurisdiction.

The Law Societies of British Columbia and Manitoba passed the rules necessary to allow the implementation of the IJP in November of 1999. Manitoba requires the visiting lawyer to check in with another Manitoba lawyer so that the visiting lawyer has a resource person in the host jurisdiction with whom she may confer on specific practices should the need arise. Alberta passed the rule change in April of 2000. Last, but not least, Saskatchewan's Benchers passed the rule change that implements the 10-20-12 protocol at the convocation in May of 2000.

Consequently, at this time, lawyers of the four western Canadian provinces are permitted to "occasionally practice" in the other jurisdictions without prior notification to the host Law Society and without paying a fee.

During the recent Federation of Law Societies meetings held in Halifax, each of the four western Law Societies met to consider task force reports and recommendations relating to education and mobility. The task force recommended that the existing "10-20-12 rule" be changed to six months. A lawyer exceeding the time limit, for example, by maintaining a residence or principal office in a jurisdiction for more than six months in a calendar year would be required to become a member of the Society where that residence or principal office is located. Any member called to the bar in a new jurisdiction would be followed by their discipline and insurance history because mobility was not designed to provide a fresh start for a lawyer eager to escape past conduct. It was proposed by the task force that this expansion of the 10-20-12 rule to six months be implemented as of January 1, 2001. Benchers in Saskatchewan have not taken any position with respect to the recommendation of the task force but will be considering this recommendation at the upcoming convocations.

However, the potential changes do not end here. Recently, there has been a move by our sister jurisdictions to expand the occasional practice even further. The thinking was that a lawyer admitted into any western province under a common education program should be entitled to practice anywhere in western Canada. Competency would be assumed as a result of common training. Jurisdiction specific legislation, once thought to be a theoretical impediment to jurisdictional mobility, would not be a concern because a competently trained lawyer would be expected to be proficient in lawyer's chosen field and place of practice. Once we have gone so far as to expand the rule to "10-20-12", what harm, it is argued, is it to remove the "occasional" nature of the restriction and move from "temporary mobility" to "full mobility"?

It is assumed that provincial Law Societies would continue to exist and operate. Full and unrestricted mobility would allow any member of one Society to practice temporarily or permanently, in another western provincial jurisdiction. To facilitate such mobility, the lawyer would be exempted from financial or bureaucratic obligations that the host jurisdiction would otherwise impose on its own members.

Essentially, a full mobility scheme would permit "licenced" lawyers to practice in any one of the four jurisdictions once admitted in any one of the jurisdictions. If, for example, a lawyer chose to move from Saskatchewan to British Columbia, the lawyer would simply do so. Upon taking up permanent residency in British Columbia, she would have to, within a prescribed period of time, register with the British Columbia Law Society. The situation would not be, in theory, much different than the system in

place right now respecting driver's licenses.

In order to implement such a full mobility system, it would be necessary to seek and obtain uniformity among participating provinces in areas such as:

- Discipline standards and penalties
- Coverage and levels of insurance
- Coverage and levels of fidelity funds
- Competency requirements and practice restrictions
- Admission by students-at-law to the Law Society

Should the Law Societies of the western Canadian provinces decide to implement "full mobility", there would be many technical issues which will need to be addressed and solved. The issue confronting the Benchers at this time, however, is whether or not full mobility is the direction that we should be going.

There are many arguments in favour of "full mobility". Most of these arguments are rooted in the assumption that full mobility is in the best interest of the public. These arguments include:

- Lawyers may have a constitutional right to practice interprovincially
- Lawyers would be better able to practice in this age of electronic commerce, globalization and a highly mobile workforce
- There is no logical reason to restrict practice within arbitrary boundaries
- Lawyers can better serve their clients who often have interests that cross provincial borders
- Lawyers are free to go where the work is
- Harmonization of efforts (i.e. bar course) would result in more efficiencies
- There may be advantages to permitting Saskatchewan lawyers to compete in a larger forum.

On the other hand, however, there are many arguments against "full mobility" including:

- Will this step lead to one common "Western Canada Law Society", which would have the effect of preventing the lawyers in Saskatchewan from having a direct say in the way the profession is governed in this province?
- Will elimination of the boundaries permit lawyers in neighbouring provinces to pluck away some of the most lucrative work currently being done by Saskatchewan lawyers? (Saskatchewan has only approximately 1466 practicing lawyers; whereas Manitoba has 1678, Alberta has 6228 and B.C. has 8858)
- Will the problems associated with harmonization outweigh the benefits?
- Will Saskatchewan firms be training lawyers for the benefits of firms in other jurisdictions because of the less attractive economic environment in our Province?
- Will lawyers feel at threat from Calgary and Winnipeg lawyers who could encroach on traditional areas of work, particularly local agency work?

The push for greater mobility has quickly descended upon us. Decisions must be made soon. Should we expand the 10-20-12 rule to a six month rule? Should we accept the general principal that full mobility is in the best interests of lawyers and the general public? These are decision that could drastically affect the direction of the legal profession in Saskatchewan. In order to make the correct decision, it is necessary to have as much input from the various unique perspectives of the lawyers throughout the province. Please give this concept some thought. Thereafter, please contact either myself, the Law Society Administration, or your local Bencher with your views, concerns and opinions. We take our responsibility seriously. We will endeavor to make the right decision.

The Benchers are pleased to inform the membership that Iain Mentiplay, former Senior Counsel for the Society, has agreed to write a book about the evolution and history of the Society, from its inception to the present including the social, economic, political and cultural roles of the Society and the legal profession in Saskatchewan.

Since it is intended that the work will be extensively illustrated, all members are invited to submit articles and photographs depicting themselves or their past or present associates. Original documents will be returned on request.

All materials should be sent to:

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Regina, Saskatchewan
S4S 4J6
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imentiplay@accesscomm.ca

Highlights Of The Meeting Of The Benchers Held September 13, 14 And 15, 2000 Cypress Hills, Saskatchewan

Virtual Libraries

The National Virtual Law Library is now under construction on the Web. The Canadian Legal Information Institute is up and running at www.canlii.org. At the Federation of Law Societies of Canada meeting held in August, the Law Societies of Canada agreed to continue with the National Virtual Library Project. Funding is needed to continue the development of the Virtual Library until December 31, 2001. At the September convocation, the Benchers agreed to provide funding this year to the Project at the rate of $7.40 per full-time equivalent member, which translates to approximately $12,000.

The National Virtual Library Project is awaiting approval of each individual Law Society. The reporting date is later in October.

Through this site, lawyers and the public will eventually have access to judicial decisions from all Canadian jurisdictions, hyper-text linked to relevant statutes. Full text and digested versions of judgments will be available. It is hoped that through this site lawyers (and the public) will be able to access all primary legal materials in Canada. We anticipate that this investment now will ultimately lower members' library costs, both at their own offices and for the library system generally.

Sue Baer, our Director of Libraries, was an instrumental member of the National Virtual Library Project Committee. We invite you to try the site at www.canlii.org and the Law Society website at www.lawsociety.sk.ca.

Lay Benchers

Advertising for a Lay Bencher to replace Mary Ellen Hodgins, whose term will expire at the end of the year, was published by the office of the Deputy Minister of Justice in August. The selection of a short-list will take place shortly. Interviews of short-list candidates will be conducted and recommendations will be forwarded to the Minister as soon as possible. It is hoped that the replacement will be appointed in time for the new year, when the elected Benchers will take office.

Loss Prevention Credits

Rule 605A provides that members who do not obtain 3 loss prevention credits (by attending SKLESI seminars) over 3 years must pay an insurance surcharge of $200. SKLESI presents at least 8 seminars per year. Those seminars are rated to provide between 1 and 3 loss prevention credits each. That means that members have at least 24 opportunities over 3 years to obtain sufficient loss prevention credits to avoid paying the surcharge.

The Insurance Committee periodically receives requests to assign loss prevention credits to seminars presented by organizations other than SKLESI. On few occasions, when the programs are designed in consultation with the Insurance Committee, loss prevention credits have been assigned.

More requests for loss prevention credits were before the Insurance Committee in September. The Committee was prepared to consider a number of options, including amending the Rule to allow other seminars to be accredited or developing a mandatory CLE system.

As we have previously advised, a special Committee has been struck and is studying Competence, which was identified in last year's members' survey as the number one concern. Because education is an element of the study of competence, the Insurance Committee deferred further consideration of loss prevention credits until the Competence Committee presents its report.

During the insurance policy year Rule 605A was introduced, 161 insurance claims were reported. 167 and 133 claims were reported in the two years preceding the introduction of the Rule. The year following its introduction, 104 claims were reported. This downward trend has continued with 90 claims reported to the end of the last policy year. The Committee believes the Rule may have had some affect on the downward trend.

Referral of Legal Work to Benchers Firms

Several years ago, the Insurance Committee adopted a policy that files would not be referred to firms of

which a Bencher was a member. In light of the upcoming election of Benchers, a member had inquired whether the policy remained in place.

The Benchers agreed that the policy should remain in place, with the recognition that it might not be followed in exceptional circumstances. This would include situations where the file had been with the lawyer before he or she became a Bencher; where the issue was extremely narrow; or where the issue was the same as one the lawyer/Bencher had previously handled, in order to reduce the costs needed to familiarize a new lawyer.

Periodic Payments

The Finance Committee has directed the administrative staff to develop a business plan for the possibility of accepting periodic payments of annual fees electronically. This information will be provided to the Committee at the October Convocation. If approved, such a program could be implemented for the collection of the insurance premium for the 2001-2002 policy year.

Competence

Don Thompson, the Deputy Executive Director of The Law Society of Alberta, gave a presentation to the Benchers on the implementation of a Competence program in Alberta. Mr. Thompson was previously the Deputy Secretary of The Law Society of British Columbia and therefore was also able to provide some insight into the process in British Columbia as well. This presentation was timely in that the Special Committee on Competence is holding a planning session on October 14th. Competence was identified in the membership survey (1999) as the issue of greatest concern to the members. The members of the Special Committee are: Daniel Konkin, Barry Morgan, Robert Gibbings, Beth Bilson, Q.C., Judy Bell, William Holliday, Mary Ellen Wellsch, Alma Wiebe, Q.C. and Jane Lancaster, Q.C.

Law Foundation Agreement

An agreement has been reached with the Law Foundation of Saskatchewan with regard to the provision of funding for the Bar Admission Course presented by SKLESI. Each year, SKLESI makes application to the Law Foundation for funding towards the Bar Admission Course. However, for many years, the Law Foundation has had some concern regarding the amount of SKLESI's historical surplus. The Law Foundation's difficulty has resulted in grants less than the amount requested by SKLESI. Because The Law Society of Saskatchewan has an agreement with SKLESI to ensure that the Bar Admission Course is fully funded, this has meant that the Law Society has, in several years, provided additional funding to the Bar Admission Course.

Pursuant to the agreement, SKLESI has agreed to use a certain portion of its surplus over a period of five years. During those five years, the Law Society and the Law Foundation have agreed to fund the balance of the funding requirement for the Bar Admission Course on an equal basis.

The Benchers are extremely pleased that this agreement has been reached which will end the uncertainty with regard to Bar Admission Course funding.

Bar Admission Course Review

The Admissions and Education Committee has been reviewing the design, delivery, content and evaluation process of the Bar Admission Course for the last several months. Many members may have received (and returned – thank you) a survey regarding the delivery of the Bar Admission Course in two segments. The analysis of those results continues.

One issue that is raised periodically is the failure rate at the Bar Admission Course. While the number of students who fail the examinations or other assessments has risen over the past few years, the vast majority have passed the supplementals. We have been told that Aboriginal students are a large proportion of the number of students who do not initially pass the Bar Admission Course. The Admissions and Education Committee does not keep statistics on members' race and therefore cannot determine these percentages.

However, the Admissions and Education Committee seeks input from Aboriginal members regarding the Bar Admission Course on content and evaluation. Please provide written comments to A. Kirsten Logan at The Law Society of Saskatchewan office. The Committee is extremely interested in this issue and any input received will be appreciated.

Joint No-Fault Committee Releases Major Study On No-Fault

On September 8, 2000 the much – anticipated results of a year and a half long independent economic study of Saskatchewan's No-Fault insurance system was released at a Saskatoon news conference.

The study was commissioned by the Joint No Fault Committee of the Canadian Bar Association (Saskatchewan Branch) and the Law Society of Saskatchewan to evaluate, from a financial and economic perspective: (a) the need to bring in No Fault on January 1, 1995; (b) the performance of no-fault since 1995; and (c) the costs of alternatives to the present system that would restore legal rights of innocent victims that were legislated away under no-fault, while providing adequate benefits to all victims, regardless of fault.

Partial funding for the study was obtained from the Law Foundation. One of the conditions of this funding was that the researchers were to be independent and free to arrive at whatever conclusions the data and information suggested.

Prior to the introduction of No Fault, officials of Saskatchewan Government Insurance and the Government maintained that No Fault had to be brought in to avert a sharp increase in automobile insurance premiums because of a trend to higher personal injury claims. This opinion was greeted with skepticism. The commissioning of the study was designed to test those assertions and to cost out alternative methods of auto accident compensation for the consideration of the Saskatchewan public and legislators. A distinguished team of Economists and Accountants from Saskatoon, Calgary and Vancouver conducted the study. The study team was composed of Kroll Lindquist Avey, Kalesnikoff Martens and Associated Economic Consultants Ltd.

Some the key findings of the study are as follows:

- SGI denied the study team access to information on the automobile related operations of SGI Canada and other possibly key areas
- Contrary to what was communicated publicly prior to and at the introduction of No-Fault in 1995, the business and financial problems of AutoFund did not result solely from increasing costs of bodily injury claims.
- Other viable solutions to the business problems did not appear to be afforded unbiased, complete or fair consideration.
- The threat of significant premium increases was used as part of a strategy to sell No-Fault.
- Between 1984 and 1994, at least six significant events and decisions impacted the apparent financial crisis in AutoFund. They are as follows:
  - removal of extension insurance to SGI Canada;
  - rollback of the Rate Stablization Reserve (RSR) by Public Utilities Review Commission in 1984;
  - failure to follow through with a plan whereby AutoFund would benefit from a 40% interest in SGI Canada in 1988;
  - policy of avoiding necessary premium increases in the face of inflationary, demographic and other cost increases;
  - increase in cost of vehicle damage claims; and,
  - increase in cost of bodily injury claims.
- The study team estimated that, had the RSR not been rolled back and had AutoFund received a 40% interest in SGI Canada, a proposed action that was reversed for undisclosed reasons, the RSR position would have improved in 1994 from a deficit of $109 million to a more manageable deficit of $16 million. Such an organizational change could have provided a continuing contribution to the AutoFund reserves, assisting it to meet its obligations.
- It was the study team's view that at the time of introduction on No-Fault in January 1995, there were viable alternatives available within the existing premium base.
- The study team found that to the extent that claims costs were affected by underlying economic factors very high rates of cost increase were unlikely to have persisted after 1994. It was also likely that the effects of legal precedents originating in the period 1990 – 1991 had worked their way through tort system by 1993 and would not, in the absence of new precedents, have caused continued cost growth.
- Support for the study team's view that rapid claims cost increases, which in Saskatchewan were concentrated in a few years of change, would not have persisted, is also provided by the experience of the Insurance Corporation of British Columbia.
- Assuming tort and accident benefit claims would have grown with the level of inflation in Saskatchewan from 1994 to 1998, the study team estimated that total claims incurred, under a tort system like the pre-1995 one, would have been about $387.3 million in 1998. Savings in a modified tort system, achieved through deductibles on pain and suffering, a levy on at-fault drivers, and other measures described in the body of the report are estimated to be about $47 million. After factoring in costs of enhancements to pre-1995 No-Fault

benefits, the study team estimated that costs of a modified tort system under what is called the Premier Option could be $2.3 million less than the 1998 No-Fault system.

- The study team's conclusion is that claims costs incurred under a modified tort system would have been similar to the claims costs incurred under the current no-fault system in 1998 and would not have reached the extreme numbers considered before the introduction of No-Fault.

The study is over 300 pages in length and the full text thereof is available at the Law Society website.

Joint No-Fault Committee Backs the "Premier Option"

Yes there is an alternative to No-Fault which restores access to the courts, returns to the victim the right to choose their health care provider and has lower premiums than No-Fault and its called – The Premier Option.

Commencing January 1, 1995 Saskatchewan residents lost significant legal rights. These rights were taken away with no public consultation or education. The rights that were taken away included the ability of persons injured by automobiles to access the Courts to determine adequate compensation. Instead an elaborate, bureaucratic and costly system was established to limit payments to accident victims.

The heart of the Premier Option is to restore access to the Courts and to bring fairness and accountability back to the system. The Premier Option will also restore to the victim the right to choose both the treatment and treatment provider.

Since 1946 Saskatchewan has had certain benefits available on a no-fault basis. Through inflation, the passage of time and the failure of SGI to increase these benefits they became of little value. The Premier Option advocates a return to these benefits only now set at a realistic and fair level.

Proposed benefits available on a no-fault basis include:

1. Weekly Indemnity Benefits – Payments regardless of fault would be $150 per week for partial disability and $300 per week for total disability (double the coverage allowed in 1995).
2. Extended Weekly Benefits – Payments regardless of fault would be increased by 50% from $200 per week to $300 per week.
3. Permanent Impairment Benefits – Payments regardless of fault would be $10,000 except for cases involving catastrophic injuries for which a benefit of up to $130,000 would be available.
4. Medical Benefits – Payments regardless of fault up to $20,000 (double the 1995 level), with up to $150,000 being available in cases involving catastrophic injuries.
5. Death Benefits –
   a. 45% of the deceased's net income for the survivor's life expectancy
   b. 5% of the deceased's net income per dependent child to age 21
   c. minimum benefit of $45,000 to a spouse or $10,000 to an estate if no dependents
   d. $5,000 for funeral costs

Persons injured in automobile accidents who are not at fault would be allowed access to the court to seek compensation at the level deemed appropriate by the Court. No fault benefits received would be deducted from any award.

Legislation would be amended to allow the Court to impose structured settlements, greatly reducing insurance costs.

The time limitation for commencing an action would be increased for the current 12 months to 2 years to allow a reasonable time for the parties to resolve the matters without going to Court.

Judgments received in Court will be reduced by the amount received by the injured party through other public insurance plans such as EI, CPP Disability, worker's compensation etc. thereby eliminating double recovery and saving insurance costs.

Loss of earning capacity will be based on after tax income rather than gross income saving further insurance dollars.

A deductible of $5,000.00 would apply to awards of damages for pain and suffering. The purpose of this is to eliminate minor claims from the system.

The Premier Option has been costed out by a major independent accounting group Kroll Lindquist Avey, Kalesnikoff Martens, and Associated Economic Consultants Ltd. Implementing the Premier Option will save several million dollars a year over the current No-Fault system. The Premier Option also calls for a number of safety initiatives to be undertaken to reduce injuries and save lives.

The entire text of the Premier Option is available on the Law Society website.

Professional Conduct Rulings

Contacting Jurors- September 2000

Facts:

The Law Society received a call from Lawyer X involved in a civil jury trial. The jury was discharged by the Judge after hearing evidence but before entering into deliberations. The trial was to be reheard before a new jury and Lawyer X wished to know whether or not he may contact members of the old jury to find out how they perceived the evidence that was called.

Ruling:

The Ethics Committee ruled that such action by the member is fraught with potential risks/danger for apparently very little utility. The Committee strongly recommended to the member that the former jurors not be contacted.

Client Instructions Potentially Unlawful - September 2000

Facts:

Client B received a settlement from SGI and the money was held in trust at the office of Lawyer A. Client B did not want the money, as she was afraid that if she received it, she would be cut off of Social Services funding. Client B indicated to Lawyer A that she wanted the money to go to charity. Lawyer A was concerned that he could not follow the client's instructions as it could potentially defraud Social Services, but was not sure he could contact Social Services on Client A's behalf directly, and requested a Ruling on this matter.

Ruling:

The Ethics Committee ruled that the lawyer should contact Social Services or a civil justice lawyer advising Social Services, on a non-identifying basis, in order to ascertain the policy and the law with respect to Social Services' position on:

(a) a client receiving settlement monies in a civil action ie) Residential School claims or personal injury benefits;

(b) inquire as to whether or not a client receiving such settlement monies would be able to donate money to charity.

Lawyer A should then advise Client B what her rights and obligations are and follow her lawful instructions at that point.

Breach of Undertaking - September 2000

Facts:

Firm B was acting for a debtor company that was selling its business in order to pay creditors. The sale was anticipated on November 15. Lawyer Y was retained by one of the creditors and contacted Lawyer A of Firm B by telephone on November 15. By letter dated November 15, Lawyer A gave the following undertaking "Firm B hereby undertakes not to disburse the sale proceeds during the next few days, without providing you with prior notice of our intention to do so. If necessary, we can negotiate an extension of this undertaking." Lawyer Y advised his clients not to go to Court for an Order protecting their security or to petition the debtor into bankruptcy, instead relying on the "undertaking" to protect them. On December 1, Firm B requested and received approval from Lawyer Y to pay small accounts. On December 15 and

2001 Convocation Dates

The following are the 2001 Convocation dates of the Benchers of The Law Society of Saskatchewan:

January 25 and 26 – Saskatoon

April 5 and 6 – Regina

June 6 and 7 – Regina

Annual Meeting June 7, 8 and 9 – Regina

September 13 and 14 – Nipawin

October 25 and 26 – Prince Albert

December 6 and 7 - Saskatoon

January 11, larger accounts were paid to secured creditors without seeking Lawyer Y's approval. As a corollary issue, Lawyer A gave her undertaking on behalf of Firm B, however, when Lawyer Y complained about the actions of Firm B, Lawyer A took the position that only lawyers could be subject of complaints to the Law Society and firms could not.

Ruling:

The Ethics Committee ruled that an undertaking is the undertaking of the lawyer, not of the law firm. The lawyer should not give an undertaking that he or she cannot control. All lawyers in the firm are to honour an undertaking given by one of their lawyers. The Committee had no hesitation in ruling that whether or not there was a technical breach of an undertaking, the actions taken by members of Firm B were "sharp practice" and thus unethical.

Duty to Unrepresented- September 2000

Facts:

Ms. X was an unrepresented judgment debtor in a claim and Lawyer Y was acting on behalf of the judgment creditor financial institution. Lawyer Y obtained a Default Judgment and was instructed to garnishee Ms. X's wages. Ms. X was employed with a government department and Lawyer Y served the Minister of that department formally with Notice of Intention to Garnishee and later, the Garnishee Summons, pursuant to the provisions of *Attachment of Debts Act*. Lawyer Y also served a copy of the Notice of Intention to Garnishee and later, a copy of the Garnishee Summons on the specific government department employing Ms. X, even though this is not specifically required under the *Attachment of Debts Act*. The copies sent to Ms. X's office were addressed "Dear Sirs" and arrived with the department's general mail.

Lawyer Y states that he has implemented this practice for many years as he believes in alerting the specific department that employs the judgment debtor that a Garnishee Summons is likely going to be issued and that this assists in facilitating an appropriate response to the Garnishee Summons in a timely fashion in the event that one is ultimately served.

Ms. X complained to the Law Society about Lawyer Y and was extremely upset that these copies went through her office in general mail, addressed "Dear Sirs" and not marked confidential. Ms. X complained that this practice is not required by statute and the copies were not specifically addressed to her or anyone in her department.

Ruling:

The Ethics Committee was of the opinion that the documents were public documents and were readily available on the Court file. The Committee ruled that Lawyer Y was attending to enforcement of a legal judgment. Ms. X had not paid the judgment of the Court, therefore, Lawyer Y had the right to publish this information when enforcing a judgment of the Court. The Committee ruled that there was no evidence that Lawyer Y provided a copy to Ms. X's specific government department in order to humiliate or pressure her. The Committee was of the opinion that Lawyer Y was attempting to facilitate enforcement and that the copies were not forwarded in bad faith. The Committee was of the opinion that Ms. X had options in order to avoid this situation by arranging payments and avoiding enforcement of the judgment of the Court against her. The Committee ruled that Lawyer Y's action in sending the extra copy to Ms. X's employer at the specific government department, was not unethical.

Breach of Undertaking - September 2000

Facts:

Lawyer A requested a Discharge of Mortgage from Lawyer Y. Lawyer Y wrote to Lawyer A forwarding a Discharge of Mortgage on trust conditions which included payment of his client's account. Lawyer A faxed Lawyer Y to request particulars of the account, but Lawyer Y was out of town. Lawyer Z from Lawyer Y's firm telephoned to indicate that the particulars would be provided when Lawyer Y returned. Lawyer A registered the discharge of mortgage at the Land Titles Office by mail prior to 3:00 p.m. Lawyer Y faxed Lawyer A with particulars of the account the same day at 4:16 p.m. Lawyer A forwarded funds for payout of mortgage to Lawyer Y requested taxation or settlement of the account on the basis that Lawyer Y's account was exorbitant. Lawyer Y faxed Lawyer A returning funds for payout of the mortgage. Lawyer A asked that the Ethics Committee consider the following questions:

1. Even though trust conditions are accepted, does a client not retain the right to taxation of costs claimed?
2. Was the account, in this instance, proper?

Ruling:

The Ethics Committee ruled that clearly Lawyer A accepted Lawyer Y's trust conditions when he registered the Discharge document and was obligated to pay the account as he was bound by the trust

conditions as per Chapter XVI, commentary 10 of the Code of Professional Conduct. With respect to issue #1, the Committee indicated that whether or not the client has a right to tax a bill which has been previously paid under trust conditions was a legal issue not an ethical issue, and declined to rule. With respect to issue #2, the Ethics Committee declined to rule on whether or not the account was proper, as that is a matter for taxation, and not the Ethics Committee.

Unauthorized Practice – Wills/Estates - September 2000

Facts:

Mr. W, an employee of a financial institution, had previously been in some trouble with the Law Society for unauthorized practice, in the area of Wills and Estates. The XYZ firm proposed to the Law Society a "division of labour" between the financial institution and their firm on Wills and Estates files, to prevent "unauthorized practice" by Mr. W and the financial institution.

Ruling:

Wills - The Ethics Committee was of the opinion that the potential problem with the Wills was fee splitting. The Committee suggested that the bill for the financial institution clearly state what is a legal bill and what is Estate planning. A copy of the lawyer's bill should go directly to the client and may be marked "paid" to avoid any confusion in this regard. The concern of the Committee was that there would be a potential problem with fee splitting or secret commission. The bill may be sent to the financial institution, but must be addressed to the client. The client could send their copy to the financial institution for payment or deal with whatever arrangement they would like with the financial institution simply to ensure that there is no perception of "fee splitting"

Probate Work - The executor is the client of the financial institution and the financial institution can assist in getting the documents together that are necessary to obtain probate. The matter should then be referred to the lawyer to obtain probate. The financial institution may charge to assemble the data necessary and the lawyer may charge the tariff, less the work already completed by the financial institution. The Committee ruled that there is nothing unethical or improper about what is being proposed.

Gifts and Bequests to Lawyers

As the result of a recent discipline decision and several queries from the membership, the Benchers reviewed The Code of Professional Conduct, Chapter VI, which prohibits a lawyer from drafting a will where he or she is the beneficiary. The Benchers remain of the view that the Rule is appropriate but felt that some re-wording of the Commentary would be of assistance to members in interpreting their position. The following is a proposed rule change. The Law Society of Saskatchewan requests and welcomes any comments or suggestions from the membership.

Present Wording:

Commentary 2

A conflict of interest between lawyer and client may exist in cases where the lawyer gives property to or acquires it from the client by way of purchase, gift, testamentary disposition or otherwise. Where such conflicts are contemplated the prudent course is to insist that the client either be independently represented or have independent legal advice.

Suggested revision:

Commentary 2

A conflict of interest between lawyer and client may exist in cases where the lawyer gives property to or acquires it from the client by way of purchase, gift, testamentary disposition or otherwise. In cases of inter vivos gifts or purchases, it may be sufficient to ensure that the client has independent legal advice before proceeding with the transaction. However, in cases of testamentary dispositions or where there is any indication that the client is in a weakened state or is not able for any reason to understand the consequences of a purchase or gift or there is a perception of undue influence, the lawyer must not prepare the instrument in question and the client must be independently represented. Independent representation and preparation of the instrument will not be required where the gift, purchase or testamentary disposition is insubstantial or of a minor nature having regard to all of the circumstances, including the size of the testator's estate.

In Memorium

William M. Elliott passed away on August 9, 2000 at Regina at the age of 78. Mr. Elliott was an associate and partner with the law firm of MacPherson Leslie & Tyerman for 38 years. Mr. Elliott was born in Preeceville and moved to Rosetown where he completed his high school education. He trained as a cadet in the Officers Training Corps at the University of Saskatchewan prior to enlisting in the Royal Canadian Air Force during the Second World War. In 1946 he returned to Saskatchewan and in 1949 graduated from the University of Saskatchewan College of Law and articled with M.A. MacPherson Sr. of MacPherson Leslie & Tyerman. He would remain with the Regina law firm until his retirement as senior partner in 1987, where he continued his association by acting as senior counsel to the firm. Mr. Elliott has a long-standing association with a number of community and charitable organizations. Mr. Elliott was presented in April of this year with a Senior Life Membership in The Law Society of Saskatchewan, representing 50 years' membership.

Mr. Elliott leaves surviving his wife, Margaret and their two children.

In Memorium

Morris Thomas Cherneskey, Q.C. passed away on September 26, 2000 in Saskatoon, Saskatchewan at the age of 74. Mr. Cherneskey was a graduate of St. Joseph's College in Yorkton and the College of Arts and Science and the College of Law at the University of Saskatchewan. He articled with Emmett Hall who later became Supreme Court Justice. He was a practicing solicitor in Saskatoon for over 40 years and was a retired reserve Naval office with the rank of Lieutenant Commander and served as Executive Officer of HMCS Unicorn in 1966 and 1967. At the time of his death, Mr. Cherneskey was involved in the United Services Institute. Mr. Cherneskey served as a City Councillor for nearly 25 years where he represented Ward One and the City of Saskatoon with commitment and distinction. He also served as a council member on the Saskatoon Library Board, was active in the Canadian Federation of Municipalities and in the Saskatchewan Urban Municipalities Association. Mr. Cherneskey was rewarded for his dedicated commitment to community and urban government with a SUMA Life Membership Award in 1997.

He leaves surviving his wife, Mary, and their three daughters.

In Memorium

Robert Andrew Heggie passed away on July 23, 2000 in Abbotsford, British Columbia at the age of 85. Mr. Heggie's first career in Saskatchewan was as a teacher at country schools of Punnichy and Raymore. He served overseas with the RCAF (attached to the RAF) as a radar technical for 4.5 years during World War II, mostly in Africa. Upon his return to civilian life, he attended the University of Saskatchewan, graduating in 1949 with degrees in Arts and Law. He practiced law in Saskatoon and served on Saskatoon City Council for many years prior to his appointment as a Judge of the Magistrates Court. His keen interest in politics drew him off the bench to become a Liberal candidate. He served as a member of the Saskatchewan Legislative Assembly for the constituency of Hanley. Mr. and Mrs. Heggie retired in 1979 and moved to the Fraser Valley where Mr. Heggie once again took on part time judicial duties as a Disciplinary Court judge in the federal penitentiary system.

He leaves surviving his wife, Evelyn (nee Rutherford) and their three children.

FOR IMMEDIATE RELEASE:
September 19, 2000
Federation of Law Societies of Canada Elects New Board For 2000-2001

Montreal, September 19, 2000 — The Federation of Law Societies of Canada has elected a distinguished new Board of Directors for the year 2000–2001. The Federation is the national umbrella organization for 13 of the 14 Canadian law societies, the regulators of the legal profession in Canada.

Abraham Feinstein, Q.C., to head Federation in 2000-2001

The Federation recently elected Abraham Feinstein, Q.C., a lawyer with the law firm of Soloway Wright in Ottawa, Ontario, to the position of President for the year running from August 2000 to August 2001. As President, Mr. Feinstein will be the Federation's Chief Executive Officer.

Educated at Carleton University and the University of Ottawa, Mr. Feinstein joined Soloway Wright upon becoming a member of the Law Society of Upper Canada in 1965. He was appointed Queen's Counsel in 1983. A recipient of the Carleton Medal, he has played an active role in numerous legal, quasi-legal, charitable and not-for-profit organizations. Mr. Feinstein is also the Founding Director and Honorary Life Member of Centretown Citizens Ottawa Corporation, one of the largest non-governmental, non-profit housing corporations in Canada. In addition, he has served on the community boards of the City of Ottawa, in the County of Carleton Law Association and in the County and District Law Presidents' Association of Ontario.

As a practising lawyer, Mr. Feinstein has extensive experience in real estate financing, acquisitions and land development, and has acted for many financial institutions, major property owners and land developers. He is considered by many of his colleagues to be an expert in his field.

Mr. Feinstein has been an elected Bencher of the Law Society of Upper Canada since 1991. Since then, he has served as Chairman of the Governance Restructuring Committee and as chair and member of various working groups and committees of the Law Society of Upper Canada .

Technology: The Top Priority for the New President

Upon joining the Federation's Board in August 1997, Mr. Feinstein's main objective was to ensure that Canadian law societies would provide their members with the tools they need to provide legal services competently, safely and securely over the Internet. A National Technology Committee was therefore established in August 1999 and Mr. Feinstein was appointed Chair. The Federation's Technology Committee identified several tools that lawyers need to practice law securely and competently online.

Technology: The Virtual Library

Canadian lawyers should have an online virtual law library that will give them safe and easy access to all court decisions, legislation and legal materials at all times, regardless of their geographical location. The National Virtual Law Library Group was therefore established and is now moving towards implementing its business plan, which might in turn lead to the creation of the CANLII (Canadian Legal Information Institute), a not-for-profit institute to be funded by Canadian law societies and managed by a Board of Directors composed of representatives from these societies. CANLII's main purpose will be to create a new, original web resource, offering free access to all primary sources of Canadian law.

Technology - The Lawyer's Identity

Canadian lawyers should be able to provide legal services over the Internet in a secure environment. Their identity should be certified by their law society to assure members of the public, financial institutions, and others that any business conducted with a lawyer over the Internet is secure. The Federation therefore established the National PKI Group, which has worked towards this goal. Since then, the Law Society of British Columbia has launched Juricert Services Inc., expressly designed to allow Canadian lawyers, their staff and clients to exchange electronic information and documents within a Public Key Infrastructure system that will authenticate the lawyer's identity and professional credentials.

Technology - Ethics

Canadian lawyers need guidance concerning the ethical use of technology in the practice of law. The National Ethics Group was then formed and circulated the Guidelines on Ethics and the New Technology to all law societies, encouraging them to incorporate its principles into their ethical codes.

Mr. Feinstein has been the key player on the National Technology Committee and in its working groups.

Mr. Feinstein also sits as Chair of the National Copyright Committee, and acts as the Federation's liaison with the Canadian Bar Association, International Bar Association and Union internationale des avocats.

For more information on this news release of from the Federation, please visit our website or contact

Diane Bourque or
Patricia-Ann Foley
Federation of Law Societies of Canada
(514) 875-6350
pafoley@flsc.ca
http://www.flsc.ca

Ex-Parte Applications

The Queen's Bench Judges Rules of Court Committee has recently approved amendment to Rule 441A which requires that the applicant in an ex parte application advise the Court in the application whether or not there is counsel on the other side of the file and if so, why it is necessary that the application be made ex parte.

By their nature, ex parte applications are contrary to the fair play concept of common law. They preclude the other side from presenting its position and argument. Therefore, from an ethical point of view they should only be undertaken in exceptional circumstances where there is a real danger that the rights and/or safety of a party will be threatened if notice of the application is given. Rule 441 allows orders ex parte if delay "might entail an irreparable or serious mischief".

The Ethics Committee is concerned that on occasion, ex parte applications appear to have been used as a tactical maneuver. There has perhaps been some justification in the past for the view that if it is allowed by the Court, it must necessarily be lawful and, being both lawful and in the interest of the client, it must be ethically acceptable as well. However, what is lawful and good for your client may also be ethically improper. Furthermore, an application in an ex parte application must proceed with utmost good faith and present all material facts to the Court (Skoretz v. Skoretz (1963) 38 D.L.R. (2d) 510 Sask. Q.B.).

Thus, there is an additional responsibility placed on counsel considering moving ex parte, not only to act in the best interests of his or her own client, but to ensure that the other side is treated fairly.

In Murray v. Boyk (1989), 77 Sask. R. 287, McIntyre J., after having been advised that counsel in an ex parte application were aware that the other party was represented, stated:

> "This leads me to wonder what is happening in the practice of law at this time because I am firmly of the belief that if a party is represented by counsel then it would have to be a highly unusual situation for opposing counsel knowing this to apply for any order on an ex parte basis and I am satisfied that this was not what might be a highly unusual situation".

The Amended Rule 441A states as follows:

> **441A** *Ex parte* applications shall be by memorandum setting forth:
> (a) the special provision authorizing the ex parte application;
> (b) the relief sought;
> (c) a statement that none of the opposite parties is, to the knowledge of the applicant, represented by legal counsel; or, setting out the name of legal counsel representing any opposite parties; and
> (d) citations of the authorities relied upon, namely;
> (i) chapters and section numbers of statutes;
> (ii) rules numbers; and
> (iii) complete citations of cases with designation of relevant passages.

Notes From The Library

Figure 1: New organization of home page

http://www.lawsociety.sk.ca

If you thought the Law Society's web site was informative and useful already, check out the changes to the home page that were made in October 2000. Figure 1 shows the new home page with new current awareness categories at the right of the screen. When you load up the Law Society's home page, you will get the news items as the page loads. Assorted news items involving legal issues are placed daily in the **What's new** section. Selected judgments, proclamations and legislation information will appear in the centre section and will ultimately be transferred to the appropriate current awareness category.

To make it easier for you to browse new judgments, we have added a **New judgments** section. Under the **New judgments** section, judgments are loaded according to the court and then arranged by date order, with the most current listed on top. The judgments are in PDF format, meaning you can load them using Adobe Acrobat © and have the judgment look as close to the printed original as possible. The Library still edits all judgments, including those in PDF format, so they are not official versions. The listings under the **New judgments** section complement the searchable fulltext judgment database and the digest database that are updated by the library. The judgments are also loaded into the fulltext judgment database as they are received so there are two ways to find relevant case law. You can use the databases in the **Members' section** for researching Saskatchewan case law.

There are new current awareness categories that should make it easier for you to browse for new judgments, find Saskatchewan and federal proclamations, and keep on top of Saskatchewan legislation. The **New books** and **New articles** sections have been relocated to the home page to make it easier to find this useful information.

Practicing members have access to the **Members' section** on the web site, the main page of which is located in Figure 2. The **Members' section** requires a password to enter. Once in, members have access to all of the library's databases, other links, documents, and services prepared

especially for our members. Case Mail is available for all practicing members. Case Mail can act like the "soft-cover law report parts" that used to come across your desk. Case Mail is issued twice per month and contains digests of judgments in a variety of arrangements with links to the fulltext judgment. You can view Case Mail as you visit the site, or you can request to receive Case Mail directly to your email as it is issued. You can search all Saskatchewan case law and digests in the **Members' section**.

Figure 2: Search Saskatchewan case law in the Members' section

The Practice Checklists have recently been added to the **Members' section** in the Documents area. The Rules of the Law Society are also now on the web site under the **Publications section**.

The password for the **Members' section** will be changing in January 2001. The notice that will contain the new password will be sent with each member's Annual Certificate. The Law Society office will be issuing the new passwords.

The Libraries Committee decided at the last meeting to allow non-practicing members access to the members' section for an annual fee of $250. This information will be included on the Law Society membership renewal invoices.

Set our web site as your home page on your browser. If you have Internet Explorer, you can simply click on the icon on the home page that says "Set this page your home page". That's all you have to do. Next time you load your browser, you will get the latest legal news and information in Saskatchewan. This feature does not display if you use Netscape as your browser. If you need help setting the Law Society page as your home page, please contact the library staff at our toll free numbers. In Saskatoon, call 1-888-989-7499. In Regina, call 1-877-989-4999.

Important Notice For Lawyers Outside Saskatoon

New Keys to Saskatoon Court House

New keys will be issued in October 2000 for the northeast door of the Queen's Bench Court House in Saskatoon. This door provides access after normal business hours to the Law Society Library and the Barristers' Lounge. The lock will be changed on Monday, October 16, 2000.

The Law Society Library will distribute the new keys to Saskatoon law firms in accordance with the guidelines as set out by the Saskatchewan Property Management Corporation (SPMC). Saskatoon firms have already been contacted about the guidelines for issuing keys. SPMC wants to restrict the distribution of keys to Saskatoon firms only. The library has been given extra keys which can be issued on short-term loan to law firms outside of Saskatoon. Comments on this change in policy should be directed to:

SPMC
François Ansell, Building Manager
Saskatoon Court House
(306) 933-5112

New keys can be picked up from the Law Society Library in Saskatoon starting on Monday, October 2, 2000.

BENCHERS' DIGEST

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