

BENCHERS' DIGEST



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The Western Law Societies Conveyancing Protocol

by Thomas J. Schonhoffer



Lawyers in Saskatchewan can improve the service they provide to clients in residential real estate sales and financing by following new practices introduced to the profession at a televised SKLESI seminar on February 16, 2001.

The Western Law Societies Conveyancing Protocol began with an initiative from the Federation of Law Societies in 1997 when it was recognized that the legal profession had to develop strategies to remain competitive in residential real estate.

A committee of experienced real estate practitioners was formed to discuss issues with financial institutions. It soon became clear that financial institutions wanted faster closings and simplified solicitor's opinions.

Faster closings

The delay in closing is inevitably caused by two factors, being,

registration delays at the land registry system and the need for compliance with the lender's survey and zoning requirements.

With respect to Land Titles delay, the strategy developed allows lawyers who follow the protocol procedure to release funds on the closing date even if the mortgage registration at Land Titles is not complete. It therefore completely eliminates all delays caused by the registration system.

With respect to the necessity of a real property report, the committee considered three issues. First, the survey fabric in Western Canada is sound and presents minimal risk. Second, many survey issues can be rectified at reasonable cost. Third, lenders have equity requirements that insulate them from the survey risk. The committee recommended that in most circumstances a lawyer can give an opinion, to a lender, that it is safe to close without a real property report.

Simplified Reporting

The committee also designed a simple one page solicitor's opinion which it recommends issuing to a financial institution. Although there is space for a qualified opinion, the purpose of the certificate is to provide either a yes or no answer to the question of whether a loan can be funded according to the financial institution's instructions.

Insurance Coverage

Canadian Lawyer's Insurance Association (CLIA) has also considered and approved the changes in practise introduced with The Western Law Societies Conveyancing Protocol. In the event that an error occurs through following the protocol procedure, the insurer will respond to defend and indemnify any claim against an insured without requiring the insured to contribute the usual deductible of \$7500. The insurer has also agreed to attempt to provide an expedited resolution of these claims.

In conclusion, you may be receiving instructions from a client in the near future to close a real estate sale by following the Western Law Societies Conveyancing Protocol. This program will be successful if we can both improve service to our clients and reduce the risk of loss from insurance claims. To meet this objective, it is imperative that you completely understand all the requirements of the protocol before attempting such a closing.

If you were unable to attend the SKLESI seminar on February 16, 2001, both written materials and videotapes are available from SKLESI. These materials provide an explanation and an essential checklist of all steps which must be taken by a lawyer to complete a protocol closing.

www.lawsociety.sk.ca

Highlights Of The Meeting Of The Benchers Held January 25 and 26, 2001

Rule and Code Amendments

Approval of Principals (Rule 152)

Several times over the last few years, there have been situations where students have had a less than satisfactory articling experience due to inappropriate conduct on the part of their principals. Working with the Professional Standards Committee, the Admissions & Education Committee developed amendments to Rule 152. Now, the Rule requires that principals must, **prior to taking a student**, notify the Secretary who will review the member's history with the Law Society, including Discipline Committee investigations and rulings, Professional Standards investigations, Professional Liability Insurance claims, Special Fund claims, failure to pay monies owing to the Society, complaints against the member and general dealings with the Administration Office. Members with an unfavourable history will be referred to the Admissions & Education Committee, who may direct that the member show cause why he or she be allowed to take a student.

Advertising Rules (Rule 1601 and Rule 1618)

The Benchers approved amendments to Rules 1601(2)(d) to better define the process of how to deal with advertising or marketing activities which may be undignified, in bad taste or offensive. Previously, the Benchers as a whole had had to make a determination whether or not an ad or marketing activity was acceptable, which short-circuited

the discipline process. It is hoped the amendment will remove the uncertainty of the process.

Rule 1618 requires that advertisements be kept for one year after broadcast or publication. The Rule was amended to include other marketing activities and to specify delivery of marketing materials as a trigger for the one year retention period.

Electronic Quarterly Payment of Fees (Rule 800 and Rule 1100)

Rules 800 and 1100 were amended to allow members to pay the annual fee on a quarterly basis by electronic debit only, subject to the approval of the Executive Director. This payment arrangement will be subject to a \$100.00 administration fee to cover increased office operations and bank fees. The payments will be due December 1st, March 1st, June 1st and September 1st. If a quarterly payment is missed, the member will be immediately suspended and will no longer be allowed future electronic payment privileges should he or she be reinstated. Quarterly payments of the Insurance Assessment remain under review.

Code of Professional Conduct (Chapter VI, Commentary 2)

This Chapter, which deals with conflict of interest between lawyer and client, was amended to clarify lawyers' obligations when drafting wills in which lawyers receive testamentary gifts. The Commentary now provides that lawyers must not prepare the will, and testators must receive independent representation unless the testamentary gift is insubstantial.

CBA Annual Meeting

The Benchers agreed to contribute \$20,000 to the CBA Saskatchewan Branch to support the CBA National Annual Meeting in hosting in Saskatoon this August. This is the first time the National Annual Meeting has been held in Saskatchewan.

LAND Project

The Benchers approved a position paper stating that lawyers (along with select government officials) should be the sole "authorized users" for on-line registration of transfers and "interests" in the new automated Land Titles system. The paper has been formally delivered to the Minister of Justice, Chris Axworthy, and to Information Services Corporation officials. This has always been the Law Society's position and has been communicated at meetings to Cabinet, various Ministers, LAND Project staff and members of the opposition. The Law Society's concerns relate to the protection of the public by insuring adequate legal advice and maintaining the integrity of the electronic registry.

In addition, the Insurance, Admissions & Education and Professional Standards Committees are co-ordinating efforts to ensure that lawyers will be adequately trained and certified to be authorized users.

Special Fund Claims

The Benchers approved payment of a claim in the amount of \$2,500 on the Special Fund relating to the disbarment of John Hampton in February, 1999. This makes the total of the claims relating to Mr. Hampton to be \$34,215.64.

Federation of Law Societies

Virtual Libraries

Just prior to Convocation, Jeannine Miller, the Librarian from the Law Society of Upper Canada, and Project Director for the National Virtual Library, made a presentation in Regina of the Virtual Library Website, www.canlii.org. The site makes case

law from most Canadian jurisdictions available through one search engine, hypertext linked to relevant statutes, related cases, etc. Sue Baer has been, and continues to be, very active in the Canlii project.

Western Mobility

The Federation of Law Societies Mid-Winter meeting was held in Montreal February 24 and 25, 2001. At that time, Western delegates met to discuss the expansion of the

Western Mobility concept. At Convocation, the Benchers agreed in principle to expanding the 10-20-12 Rule (occasional practice without a certificate) to go beyond 10 matters, taking less than 20 days of the year, to six months in one year. This will be further discussed at the April Convocation.

In Memory of

DOUGLAS JOHN BRITTON passed away peacefully on February 13, 2001 at the age of 55. Mr. Britton practiced law as a Senior Crown Prosecutor for the Province of Saskatchewan and was recently awarded Queen's Counsel. He was a committed volunteer with Sask Sport and an avid golfer. Mr. Britton will be remembered for his determination, fairness and honesty. He was a loving and caring person, blessed with many friends. Mr. Britton was an inspiration with his positive attitude to getting well.

Mr. Britton is survived by his wife, Jill.

Appointment of New Judge for Prince Albert

Gerald M. Morin of Prince Albert has been appointed a judge of the Provincial Court of Prince Albert.

Judge Morin received his Bachelor of Laws from the University of Saskatchewan in 1987. Since 1988, he has practiced law with the Pandila, Morin, Nahachewsky Law Office in Prince Albert. After receiving his Bachelor of Laws, Judge Morin was a sessional lecturer at the Gabriel Dumon Institute Native Justice Program.

Prior to attending law school, Judge Morin worked as a probation officer, receiving his Certificate of Social Work in 1978. As an assistant professor at the University of Manitoba School of Social Work, Judge Morin was the Director of the Indian Child and Family Services Training Program from 1982 to 1984.

Appointment of New Judge for Saskatoon/Kindersley

Robert Jackson, Q.C. has been appointed a judge of the Provincial Court for Saskatoon/Kindersley.

Judge Jackson received his Bachelor of Laws from the University of Saskatchewan in 1978. Since then, he has practiced law with the firm of Goldstein Jackson Scharfstein Gibbings in Saskatoon, becoming a partner in 1984. Judge Jackson received his Queen's Counsel appointment in 1996.

Judge Jackson has been a sessional lecturer at the Colleges of Commerce and Agriculture, University of Saskatchewan since 1978, as well as conducting a number of seminars in the area of business and farm law.

Professional Conduct Rulings

Solicitors' Lien vs. Transfer of File- January 2001

Facts:

Lawyer A's client, Client B, owed Lawyer A over \$20,000 in fees. Client B was the defendant in an ongoing matter and the plaintiff filed a motion requesting summary judgment against Client B. Lawyer A advised Client B that the plaintiff was trying to obtain summary judgment, forwarded the Notice of Motion, and reminded him of his overdue account. Lawyer A never heard back from his client and wrote again to advise his client that Court granted the summary judgment and the implications of said judgment. Lawyer A received a letter from Lawyer C, new lawyer for Client B, requesting transfer of the file. Lawyer A indicated that he was not prepared to release his file and would maintain a Solicitors' Lien until some effort was made to pay his account or guarantee payment of same. Lawyer C wrote to Lawyer A several times and indicated that he thought Lawyer A could have contacted Client B in a more timely fashion and may have well avoided the summary judgment against Client B. Lawyer A made a proposal for settlement with his former client to reduce the fees to the amount of \$5,000. Lawyer C attempted to have the summary judgment opened up and was unsuccessful, and accused Lawyer A that his failure to provide this file may have hurt Client B's application to reopen the summary judgment. Lawyer A requested the Committee's guidance with respect to his rights to protecting his Solicitors' Lien vs. his obligation to forward his former client's file to the new lawyer.

Ruling:

The Committee suggested that transfer of file on trust conditions would have been advisable in this

situation. The Committee accepts that it is reasonable to look to the new lawyer for cooperation in establishing some type of protection of the former lawyer's outstanding fees. The *Code* indicates that a lawyer is not to maintain a solicitors lien if the result would be to "materially prejudice" the client. The Committee was of the opinion that "material prejudice" may be caused to the client if, for example, he or she were unable to defend a particular Court action without his or her file.

The Committee advised that the whole issue of solicitors liens v. file transfers is being reviewed by Law Society staff and the Ethics Committee in an attempt to come up with some guidelines to assist lawyers in these situations.

Will Coupon Advertisement - January 2001

Facts:

The Committee reviewed a copy of an advertisement by Lawyer B which advertised "gift certificates for a tax planned Will". The Committee reviewed previous Rulings in Chapter XIV dealing with Wills being donated to charity auctions and the use of gift certificates or coupons as a method of advertisement. In January of 1995, the Ethics Committee indicated that the requirement to present a coupon for legal services was similar to the concept behind donating Wills to charity auctions, which is prohibited. The Committee in the 1992 Ruling dealing with charity auctions indicated that:

"The subject of the gift certificate, coupon or donation (for example a Will) is not a palpable object, but rather the time and expertise of the lawyer involved. What is being offered is essentially the solicitor/client relationship circumscribed by an artificial limit and in no way

based on the needs of the potential client. The Ethics Committee was of the opinion that such practice demeans and trivializes the solicitor/client relationship and is, therefore, unacceptable."

Ruling:

The Ethics Committee, in 2001, wishes to confirm the Chapter XIV 1992, June 1995, and October 1995 Rulings. The Committee indicated that "prepaid legal services" have been allowed by the Law Society and there are Rules in place to provide such services. The Committee advises that Lawyer B stay away from the "gift certificate", "donation" or "coupon" advertising in order to comply with Chapter XIV of the *Code*.

Interpretation of Rule 1601(4) Regarding Contingency Fee Agreements - January 2001

Facts:

The Law Society of Saskatchewan Rule 1601(4) requires a meeting between a lawyer and client before a fee agreement may be entered into. Lawyer A asked for an interpretation of "meeting" as the costs of a face-to-face meeting with geographically isolated clients is prohibitive in many cases.

Ruling:

The Ethics Committee is of the opinion that this Rule does not require a "face-to-face" meeting in situations where the cost and time required to travel to meet with geographically isolated clients is prohibitive. The Ethics Committee was of the opinion that the purpose of the Rule is to ensure that full an accurate description or explanation of the retainer agreement and what exactly it entails, is provided to

the client prior to the client signing same. The client must be provided the opportunity to ask questions and fully understand the agreement prior to signing same. The onus is on the lawyer to ensure that this explanation is provided to all clients by way of face-to-face meeting, telephone meeting, or a

series of correspondence. A general blanket mailout of retainer agreement contracts with little or no explanation may be extremely misleading and is not acceptable. A “meeting” as contemplated by the Rule would mean communications in person, via telephone, or in writing where a personal meeting is

not possible. The meeting and communications must have the effect of clearly explaining the nature of the agreement to the client and allowing the client to ask all necessary questions to ensure they understood same prior to signing.

The CanLII project

Many jurisdictions have case law, statutes, and regulations available for use on the Internet at no charge. Peta Bates has been featuring many of these sites in her column *Legal Web Cites*.

Providing the statutes, regulations and case law on the Internet has brought the primary legal materials to the lawyer's desktop. The Supreme Court of Canada, Federal Court, and Tax Court plus eight out of thirteen provinces/territories have case law on the Internet at no charge. All but one jurisdiction has statutes available on the Internet at no charge. Saskatchewan may not have all of its statutes free on the Internet, but there are several individual statutes on a variety of web sites that are free. (See the Law Society's web site Useful Links page).

The challenge for accessing primary materials at present is to remember how to search the various sites, if it is possible to search on the site. The user must know the correct search logic to produce reliable results. On one site, you will need to use quotation marks to search for words beside each other, as in “child care”. On another web site, you only need to enter the words beside each other to perform the same search. There is far too much to remember for the occasional searcher.

The CanLII or Canadian Legal Information Institute project may change the way you will search for statutes and case law across the country. The CanLII project's goal is to provide one search interface

for all statutes, regulations, and case law in Canada at one web site. It will be one stop for all Canadian primary legal materials.

Similar sites already exist on the Internet for Australia and Great Britain. The Australian site has been under development for over a decade. It can be found at www.austlii.edu.au. The British site was developed by the Australian technicians and is located at www.bailii.org. Certainly we have a lot to learn from the Australians. The search software that CanLII is using was donated by the Australian team, with the condition that the site be available free of charge.

A prototype web site was created in the summer of 2000 by LexUM at the University of Montreal, to demonstrate how a Canadian site might function. The site can be found at www.canlii.org. The site contains samples of data from various jurisdictions, including Saskatchewan case law, which was provided by the Law Society library. The Federation of Law Societies funds the CanLII project. Each law society in the country has agreed to fund the project until the end of December 2001. The project needs stable funding for at least five years to make the project a complete success.

There are some interesting searching and display features on the site.

- It is possible to search one database, or all databases or groupings of databases at one

time. You do not need to know any database codes and understanding what is available is as easy as glancing at the pages.

- Cases or statutes judicially considered contain hypertext links allowing you to link directly to the text of that judgment or statute. In a seamless way, you can move from case to case to statute, depending on your searching needs.
- Noting up a case can be done by clicking on the “note up” link beside the style of cause. You are presented with a list of cases immediately.
- It is possible to easily locate all regulations pursuant to a particular statute simply by locating the statute in an alphabetical list.

The neutral citation is a key element in the success of the project for case law. The Canadian Judicial Council adopted the neutral citation standard in late 1999 in order to give each judgment a unique identifier. The neutral citation has three elements: 1) the year of the decision, 2) the jurisdiction and the court, and 3) a sequential number. So the neutral citation of 2000 SKQB 356 means that the judgment was issued in the year 2000, from the Saskatchewan Queen's Bench, and it was the 356th judgment released from that court. (case name: *Stan v. Schmidt* also reported at [2000] 9 W.W.R. 432, 195 Sask. R. 131.) Using the neutral citation and paragraph

numbering allows an easy way to cite an electronic judgment, regardless of the electronic database from which it was acquired. All Saskatchewan Queen's Bench and Court of Appeal decisions from 2000 to the present contain the neutral citation.

For case law, Saskatchewan is further ahead than other provincial jurisdictions because of our fulltext judgment database. There are judgments from the 1980's in the database, with the bulk of the judgments starting in 1994 to the present. The CanLII project would

in fact duplicate that service. It is not cost-effective for the library to maintain a fulltext judgment database when CanLII can provide a seamless search interface. The library intends to cooperate with the Saskatchewan courts and CanLII to produce one location for searching Saskatchewan case law. The library will try to make it as easy as possible for Saskatchewan lawyers to research Saskatchewan case law.

The library will still be able to link from the digest of the judgment to the fulltext database.

Instead of linking to the library's fulltext judgment database, you will link to the CanLII version of the judgment, which will be a much better format than what is possible from our database.

CanLII is an exciting project that will improve the delivery of statutes and case law from all jurisdictions to the Saskatchewan legal community and the public. The project is in its infancy this year. It will be interesting to watch the developments over the next year.

Susan Baer

SKLESI News

Ken Koshgarian will be leaving SKLESI at the end of March as Bar Admission Course (BAC) Director to return to private practice. We thank Ken for his commitment and dedication to the BAC during the three years he has been its Director.

We are pleased to announce that commencing March 19 Bruce Wiwchar will be the new Bar Admission Course Director. Bruce will be a familiar face to many of you. Bruce joined our SKLESI team in February 1997 as a CLE Lawyer and BAC Skills Instructor. Bruce was in private practice prior to SKLESI and he was a teacher in a life before law school. He is currently pursuing a Certificate in Adult Continuing Education offered through the University of Saskatchewan

Lynn Loewen has accepted our offer to fill the vacant position left by Bruce. Lynn has been in general private practice since 1995 and she was a teacher for ten years prior to obtaining her LL.B. We officially welcome Lynn on board on April 17.

Mark your calendars now! SKLESI's third Trial Advocacy Skills Workshop will be held November 8 through 10, 2001 in Saskatoon. The planning committee consists of co-chairs Karen Prisciak (Robertson

Stromberg, Saskatoon), and Diana K. Lee (Kanuka Thuringer, Regina), as well as The Honourable Chief Justice W.F. Gerein and Robert J. Gibbings (Scharfstein & Company, Saskatoon.)

As a litigator, you must develop and maintain courtroom skills that are "on the cutting edge." However, all too often, you don't have the time or the opportunity to develop those crucial advocacy skills. Plan to attend the *Trial Advocacy Skills Workshop* where you will have the time, and the mentorship, to learn and practice the skills you need to be positive, powerful, and professional in the courtroom.

All lawyers with limited trial experience will want to take advantage of this unique opportunity to learn by doing in an intensive workshop setting. Features of this successful workshop include:

- *Working in small groups* – the faculty to student ratio is 12 instructors to 24 students.
- *"Learn without the burn"* – develop skills in a risk-free environment without compromising your client's case.
- *Faculty of experienced trial judges and lawyers* – access the skills and knowledge of some of Saskatchewan's finest courtroom practitioners.

- *Curriculum* – exercises will be drawn from two case files, one civil and one criminal. The exercises will develop your skills in direct and cross examination, use of exhibits and demonstrative evidence, witness impeachment, and opening and closing statements.

- *Faculty critique and constructive suggestions* – after all skills performances, you will receive constructive feedback from your instructors. Learn from your own performance and those of other participants. Demonstrations by instructors will provide you with the opportunity to observe effective advocacy skills.

- *Videotaping* – review your videotaped performances with instructors for additional feedback.

Watch for the brochure to be mailed early in the fall.

As well, in order to meet the needs of more experienced litigators, SKLESI is developing intensive advanced skills workshops in direct and cross examination and examination of expert witnesses. Watch for further announcements in the winter of 2001.

Abena Buahene
Executive Director
www.sklesi.org

Legal Web Cites

By Peta Bates

Tax practitioners will have subscriptions to comprehensive online tax products such as Carswell's taxnet.pro, CCH's Canadian Tax Library series or CICA's TaxCast. Some of the legislation, case law, background documents and commentary available in these subscription services are also available at no charge on the Internet.

Tax Court of Canada

http://www.tcc-cci.gc.ca/main_e.htm

This official court site provides copies of the Tax Court of Canada Act, Rules and Practice Notes as well as instructions on how to appeal. The fulltext of judgments from 1997 to date are accessible by year, style of cause, docket number and statute considered. The "search in judgments" link provides a query box for keyword searches in all or a subset of the judgments. On behalf of the Tax Court, LexUM at the University of Montreal operates a current awareness service which will notify you by email of new judgments from the Court. The service is free and instructions on how to subscribe are located at <http://decision.tcc-cci.gc.ca/en/liste.html>

Canada Customs and Revenue Agency

<http://www.ccr-aadrc.gc.ca/menu-e.html>

This government web site provides access to the income tax Interpretation Bulletins and Information Circulars under the "Tax-Technical Information" link. From that page there is a link to the GST/HST Technical Information Bulletins, memoranda series, notices and policy papers. The forms are available in a variety of formats including HTML, .PDF and PostScript for viewing, printing and downloading to a file.

Federal Department of Finance

<http://www.fin.gc.ca/fin-eng.html>

The "publications" link on the home page leads to a list of Finance Canada publications arranged by year. These include draft legislation, explanatory notes, legislative proposals, and ways and means motions. Budget documents from 1995 to date are available through the "budget info" link. There is also a link to news releases and speeches and you can sign up for email notification of Department of Finance news releases.

The search button on the home page provides a keyword search which can be targeted to specific finance documents.

Saskatchewan Finance

<http://www.gov.sk.ca/finance/>

On the Saskatchewan Finance site there are links to the provincial budget documents from the last two years and to documents related to the latest tax reform. Informational tax bulletins on a number of programs are available in .PDF format.

Canadian Tax Foundation

<http://www.ctf.ca>

The Canadian Tax Foundation publishes a monthly newsletter called Canadian Tax Highlights. All the issues from January 1996 to date are available on their web site along with a simple search engine which allows you to search by subject, author or date.

Current Awareness

The Big Five offer a variety of tax current awareness services. Deloitte & Touche Canada (<http://www.deloitte.ca/en/>) has a "Daily Tax Highlights" button on their home page; PriceWaterhouseCoopers Canada (<http://www.pwcglobal.com/ca/eng/main/home/>) has a "What's New" column on the home page which includes a link to the latest issue of their Tax Memo newsletter; KPMG Canada (<http://www.kpmg.ca/english/services/tax/publications/>) provides the latest issue of each of their tax newsletters.

International Tax Sites

There are many web sites which offer directories of tax information for countries around the world. One example is *taxsites.com* (<http://www.taxsites.com/international.html>), a directory of international tax and accounting sites arranged by country and by subject.

Personal Tax Freedom Day Calculator

http://www.fraserinstitute.ca/ptfd_disclaimer.html

Finally, you may wish to calculate your "personal tax freedom day" using the calculator on The Fraser Institute web site.

Mortgage Form Notice

For the information of members, the Law Society has received a letter from the Head Office of the Royal Bank of Canada advising that the Bank would prefer that lawyers use the mortgage form sent to them by the Bank. The Bank apparently has had experience with lawyers scanning the form into their system and then simply filling in the blanks electronically. The trouble with this is that the Bank occasionally changes its forms and these changes are sometimes not caught by the lawyer. The Royal Bank has indicated that in some instances, it has suffered a loss as a result of failure to use revised mortgage documents.

NOTICE

The Estey Centre for Law and Economics in International Trade (www.esteycentre.ca) will be hosting a conference on the impact of NAFTA on Aboriginal business in North America in Saskatoon on May 27 – 29, 2001. It promises to be a very relevant and timely conference. For more information, please contact James Leach, Executive Director, Estey Centre for Law and Economics in International Trade, 410, 22nd Street East, Suite 820, Saskatoon, Saskatchewan, S7K 5T6. Telephone (306) 244-4800 Facsimile (306) 244-7839.

SKLESI WEBSITE

Want to register for a SKLESI seminar, buy a set of BAC materials, or find out who sits on our Board of Directors? We're now only a click away at www.sklesi.org.

Feel free to contact us anytime from anywhere.

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