

# BENCHERS' DIGEST



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## *Profile of the President W. Brent Gough, Q.C.*



The Benchers of the Law Society of Saskatchewan elected W. Brent Gough, Q.C. as President and Michael Fisher as Vice-President of the Law Society at their December Convocation held in Regina. They will hold these offices for 2004.

W. Brent Gough was born and raised in Saskatchewan and attended the University of Saskatchewan where he received his Bachelor of

Arts degree through St. Thomas More College in 1973, and his Bachelor of Laws degree in 1976. He received his Queen's Counsel in 2003.

Mr. Gough articulated to the firm of Hnatyshyn Sandstrom and was admitted to the Law Society of Saskatchewan in 1977. He has practiced with that firm continuously since his articles, becoming a partner in 1983. The firm is now known as Hnatyshyn Gough, and Mr. Gough carries on a general practice with emphasis in the areas of construction law and immigration.

Mr. Gough has been a sessional lecturer in the College of Law in the area of real property law and in the College of Commerce in the area of business law. He has been a co-ordinator and presenter at the Continuing Legal Education seminars for SKLESI and the Canadian Bar Association. Mr. Gough is past president of the Saskatoon Bar Association and past council member

with the Saskatchewan Branch of the Canadian Bar Association. He was elected a Bencher of the Law Society of Saskatchewan in November, 2000 and has served on a number of committees since that time.

Mr. Gough has been active in a number of community activities, including: past Chair for the St. Thomas More College Board of Governors, and present member of the St. Thomas More College Corporation and Alumni Association; Vice Chair of the Bielby/Teale Foundation Inc.; director at large of the Canadian Paraplegic Association, National Board, and Chair of the Canadian Paraplegic Association Audit Committee. Brent has also coached girls basketball, and volunteered with the Kidney Foundation.

Brent and Rhonda have been married for 28 years and have four daughters, Rachel, 21, Gillian, 19, Hilary, 16 and Margot, 16.

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## President's Report

I want to begin by expressing my gratitude for the privilege of serving as your President for 2004. One of the true pleasures for me in practicing law in Saskatchewan has been my association with other members of our profession. I have very seldom been associated with a group of people who are more enjoyable, imaginative, and interesting. The opportunity to serve as a Benchers has afforded me another layer of this fascinating relationship. It has allowed me an opportunity to look at our profession from an entirely different perspective. Very often in our day-to-day lives as lawyers, we do not have an opportunity to think about the profession as an organization that needs to be governed and managed in a way that maintains its professional integrity, and the confidence of the public whom it serves. The role of the Benchers is just that. Section 6 of *The Legal Profession Act* states that the Benchers ... :

- (a) are responsible for the governance of the society in the legal profession;
- (b) shall manage and conduct the business and affairs of the society ....

I would like to thank all members of the profession who have served our profession in the position of Benchers and, in particular, I would like to thank the Benchers who have concluded their term as of the end of December, 2003. I would, in particular, like to thank Mr. Robert Gibbings, Q.C. for his outstanding work as our President for 2003. I would also like to personally thank Mr. Gibbings for the support and encouragement he has given me at this time of transition.

There are also a group of Benchers who we as lawyers are less familiar with in large part because they are not themselves lawyers. We

have, at present, two Lay Benchers and are in anticipation of the appointment of an additional two Lay Benchers. I am sure we have all had the experience of being in a room and feeling like we were the only ones who didn't fit in. I am sure that the Lay Benchers, in particular at the first convocation, feel a certain sense of this alienation. Effie Kusznir, and Ron Barsi are our current Lay Benchers, and have contributed mightily to the work of the Benchers. They have sat on committees and participated in reviews and hearings. In every instance, their contributions have been second to none; their perspective on and concern for our profession should make us all grateful.

It would be difficult to give this report without mentioning Mr. Stuart Eisner. Stuart's begrudging charm and unflinching concern for the underdog served the profession very well in his tenure as a Benchers. All of us will miss him.

I am very pleased to advise you that Michael Fisher of Melville, Saskatchewan, was voted in as Vice President by the Benchers in December, 2003. Mr. Fisher is the chair of the Ethics Committee, and sits on the Executive Committee and the Libraries Committee.

Lastly, but by no means least, I would like to thank the professional and support staff of the Law Society of Saskatchewan. We in Saskatchewan are extremely fortunate to have such a truly competent and efficient professional and support staff. Without wanting to omit anyone, I would like to congratulate Mr. Al Snell, Q.C. who is the current president of the Canadian Legal Information Institute (CANLII). As you are no doubt aware, CANLII is a web based legal information

resource which came about through the impetus of the Federation of Law Societies in Canada, and which has been funded by all lawyers across Canada through their Law Societies. It was designed to create a free Canadian virtual law library, and has been progressing by leaps and bounds towards its goal. I encourage all of you to log on to that resource at [www.canlii.org](http://www.canlii.org)

The business of the Law Society of Saskatchewan encompasses both activities within our borders and in an increasing way, activities beyond our provincial borders. Since the signing of the National Mobility Agreement in 2002, the work which relates us to the other law societies in Canada has been much more structured and focused. It is essential for the Law Society to work to assist its members in being able to use the mobility rights as well as ensuring that lawyers from other jurisdictions who exercise their mobility rights are aware of and are in compliance with our Code of Conduct and other rules which are in place to protect the public in Saskatchewan. To this end, Saskatchewan has participated with Manitoba and Alberta to commence work on the creation of a standardized Code of conduct which will assist our members in carrying on the practice of law outside of their home jurisdiction. Although this is a process which is fraught with difficulties, it is one that I think is necessary.

In keeping with the theme of looking beyond our borders, another change will affect the new lawyers coming into our practice who will see the Bar Admission Course become a Western Canadian Bar Course which will be taken largely by the students on-line. This will be of great assistance to the students who will have the ability to perform

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the majority of the work of the Bar Course on-line sitting at their desk in their offices. Mr. Bruce Wiwchar and Ms. Abena Buahene have done remarkable work in working to present a product which is consistent with the other Western Canadian jurisdictions, as well as effective and efficient for our particular jurisdiction. I have to advise that Abena Buahene has left Saskatchewan Continuing Legal Education Society for a new job with the Law Society of Upper Canada. I want to wish her all the best in her future endeavours, and thank her for her tremendous service to legal education in Saskatchewan.

To turn within our borders for a moment, one of the main issues that must always be in the back of the mind of our profession is to jealously guard our ability to self-govern. To enable us to do this, of course, it is essential that we must be responsive and effective in dealing with our prime objective of protecting the public. To this end, the Law Society has instituted additional steps in our auditing processes to attempt to assist our members with the early

detection of any problems which may occur in their accounting. As you will be aware, this process continues to undergo modification to make it both efficient and as cost-effective as possible, keeping in mind how important this process is in maintaining confidence in our ability to self-govern.

One of the main changes that the practice of law in Saskatchewan has seen in recent years is the implementation of a new land registry system and the creation of the Information Services Corporation. As a result of the difficulties faced with the implementation of that system, the Law Society has taken on a consultative role with ISC in an attempt to bring forth our members' concerns and suggest ways in which ISC may be able to address those concerns. To facilitate this, the Law Society of Saskatchewan has created, in conjunction with the Canadian Bar Association, the ISC Liaison Committee. The co-ordinator of this committee is Ms. Lee Mountain, and Ms. Kirsten Logan, Q.C. is also involved as the co-director of administration of the

Law Society. The committee has taken your suggestions and concerns with regard to the Land system, and have consulted directly with ISC. We are very pleased with the receptiveness of the people from ISC, and significant progress is being made. We would ask that you continue to contact this committee with regard to concerns that surface, and we will continue to notify our members of the steps being taken by ISC.

A number of issues that I have mentioned are ongoing matters that will continue to be monitored by the Law Society. The system of "choice" automobile injury insurance is one that continues to lack clarification for most members of the public in Saskatchewan. The Law Society will continue to monitor this ongoing issue.

All in all, this promises to be an extremely busy and interesting year, and I once again wish to express my gratitude for the privilege of serving you as your President. I would also like to personally thank the members of my firm and my family for their ongoing support and patience.

## *Highlights of the Meeting of Benchers held December 11th and 12th, 2003*

### **Trust Account Forms**

The Benchers approved amendments to the Trust Account Forms TA-3 and TA-5 and the introduction of a new form, TA-5S. In the December edition of the *Benchers' Digest*, Mr. Allen summarized the changes to Form TA-5 (essentially, to reduce the amount of work an accountant must do within a lawyer's office in order to complete the form) and the highlights of the further reduction of tasks required for completion of the short form (TA-5S) which had been reviewed by the Finance Committee in October.

The Finance Committee also discussed how it will be determined that firms receive either TA-5 or TA-5S. The majority of firms will receive form TA-5S. Firms whose previous trust account forms revealed a number of accounting "issues" will receive Form TA-5 as will a random number of firms such that all firms will be required to complete TA-5 at least once every five years.

### **Rule 149A**

As a result of increased mobility of lawyers within Canada, there is a possibility that lawyers may become

the subject of discipline proceedings in host jurisdictions where they may be practising pursuant to the National Mobility Agreement. In addition, there are some members of the Law Society of Saskatchewan that are members of other professional regulatory bodies, such as chartered accountants or engineers.

As a result of some multi-jurisdictional discipline proceedings, it has become apparent that early information about discipline proceedings in another jurisdiction or by another governing body is beneficial. The Benchers therefore approved an amendment to Rule 149A which

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requires members to advise the Law Society of Saskatchewan of any investigations or proceedings by the other bodies.

### **Appointments**

The Benchers approved the appointments of John Will, Bencher for the North East Electoral District, to the Board of Saskatchewan Legal Education Society Inc., replacing

Robert J. Gibbings, Q.C., whose term on the Board expired.

The Benchers also approved the appointment of Robert Kennedy, Q.C. and Daniel Konkin to the Legal Aid Commission, replacing Robert Gibbings, Q.C. and Barry Morgan, Q.C.

### **Farewell**

The Benchers recognized the contributions of Abena Buahene to the

legal profession in Saskatchewan. Ms. Buahene resigned as Executive Director of SKLESI after seven years to take the position of Senior Competence Counsel at the Law Society of Upper Canada. Ms. Buahene has made great strides, along with her staff, in propelling SKLESI into a vital force for the delivery of continuing legal education in Saskatchewan, winning national and international recognition.

## ***Willy Hodgson Award***

The Benchers approved the creation of the Willy Hodgson Award, the criteria for which are:

*The recipient or recipients exemplify integrity, leadership and character, and have made or are making outstanding contributions to advancing equity and diversity in legal education, the legal profession and/or the administration of justice in Saskatchewan or in Canada.*

The inaugural recipient of the award is Professor Roger Carter, O.C., Q.C., of Saskatoon.

Professor Carter is a retired long-time professor of law and former Dean at the College of Law at the University of Saskatchewan. He was co-author of the seminal report leading to the establishment of the legal aid plan in Saskatchewan. While Dean at the College of Law, he founded the Native Law Centre, a program designed to better prepare Aboriginal students for entry into the study of law at Canadian law schools. The program was the first of its kind in Canada, and the majority of Aboriginal lawyers now practicing in Canada participated in the Native Law Centre's summer orientation program.

In recognition of his accomplishments, Professor Carter has received the Award for Excellence in Race Relations by the Government of Canada, has been inducted as Companion of the Order of Gabriel Dumont, has an honorary membership in the Indigenous Bar Association of Canada, and in 1998 received the Saskatchewan Order of Merit. He was also appointed to the Order of Canada in 2000.

The Benchers believe that Professor Carter exemplifies the deep commitment to education, equity, access

to justice, and the advancement of Aboriginal peoples which were the hallmarks of Willy Hodgson's life and work.

Willy Hodgson was a Lay Bencher appointed by the Lieutenant Governor in Council, and served in that capacity from 1996 to 2001, until illness forced her to retire.

Ms. Hodgson was a remarkable woman. She was a Cree elder, born Christine Wilna Pratt, on the Sandy Lake Indian Reserve. At the age of 18 she left Sandy Lake to study nursing in Portage La Prairie, Manitoba. Three years later she graduated from the Manitoba School of Nursing, and married Bill Hodgson, an English immigrant.

She studied human justice and sociology at the University of Regina and earned a certificate of social work. She then was employed as a social worker, and subsequently joined the provincial Public Service Commission. She sat on the Saskatchewan Legal Aid Commission for ten years, and in the 1990s she was appointed to the Moose Jaw Police Commission. In 1996 she was appointed to the Law Society of Saskatchewan as a Lay Bencher.

She was the recipient of both the Saskatchewan Order of Merit and the Order of Canada.

Willy and her husband raised four children. She died of cancer on February 14th, 2003, at the age of 67.

A ceremony marking the presentation of the award will take place in January, with further details to be announced.

## *Pro Bono Volunteers*

Members are reminded that volunteers are being sought to provide pro bono services through the administrative assistance of the Salvation Army. The time commitment is small, the service to the community and the personal satisfaction is great. Please contact the Law Society office in order that we can include you on our list of pro bono lawyers.

Members are reminded that the *Personal Information Protection and Electronic Documents Act (PIPEDA)* is now law. Are you in compliance? Are your clients? see [www.privcom.gc.ca](http://www.privcom.gc.ca).

## *Q.C. Appointments for 2004*

Congratulations are extended to the following members who have been honoured with Queen's Counsel appointments:

**Patrick Bitz** of MacDermind Larmarsh in Saskatoon, admitted to the Bar in 1973

**Clement Chartier** of Saskatoon, admitted to the Bar in 1980

**Brent Gough** of Hnatyshyn Gough in Saskatoon, admitted to the Bar in 1977

**Marilyn Gray** of Department of Justice in Saskatoon, admitted to the Bar in 1981

**Joel Hesje** of McKercher McKercher & Whitmore in Saskatoon, admitted to the Bar in 1984

**John Hobbs** of Department of Justice in Regina, admitted to the Bar in 1977

**Brian Kenny** of MacPherson Leslie & Tyerman in Regina, admitted to the Bar in 1984

**Robert Leurer** of MacPherson Leslie & Tyerman in Regina, admitted to the Bar in 1986

**Patrick McDonald** of MacLean Keith in Regina, admitted to the Bar in 1979

**Barry Morgan** of Morgan Theberge in Saskatoon, admitted to the Bar in 1986

**Neil Robertson** of City Solicitor's Office in Regina, admitted to the Bar in 1984

**Donna Scott** of Human Rights Commission in Saskatoon, admitted to the Bar in 1982

**Marilyn Scott** of Scott & Weber in Humboldt, admitted to the Bar in 1979

**Barry Treacy** of Legal Aid Commission in Melfort, admitted to the Bar in 1972

**Frank Quennell**, Minister of Justice, admitted to the Bar in 1986

Congratulations are to be extended to Mitchell Holash of Harradence Logue Holash, who was named Citizen of the Year for Prince Albert. Mr. Holash was honoured at a dinner held January 16th, 2004 in Prince Albert. Hugh Harradence, Q.C., a local Bencher, brought greetings from the Law Society.



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# Rulings

## **Rulings – September, 2003**

### **Chapter XVI – “Responsibility to Lawyers Individually” – Breach of Undertaking – Implicit Timeliness – September 2003**

#### **Facts:**

Lawyer G requested a ruling from the Ethics Committee. Lawyer G's clients were purchasing property. Lawyer F's vendor client was an elderly woman, who lost capacity to manage her affairs during the transaction. A third lawyer, Lawyer H, became involved as lawyer for the relative of the elderly vendor, who wished to obtain Personal and Property Guardianship status on her behalf. The capacity problem and necessity for personal guardianship caused delay in negotiating settlement and discharge of outstanding Builders' Liens and with respect to Lawyer G's clients obtaining clear title. Lawyer G took the position that Lawyer F undertook to clear title and did not discharge the Builders' Liens promptly and thus, Lawyer F was liable for Lawyer G's client's costs. Lawyer G took the position that Lawyer F could have paid the money into Court and discharged the liens, but instead, delegated the matter to a third lawyer to negotiate settlement and clear the title. Lawyer H, for the vendor's property guardian, asked Lawyer G if he could assume the trust conditions on Lawyer F, and Lawyer G refused. Lawyer G argued that Lawyer F undertook personal liability by undertaking to discharge liens and that such an undertaking carried with it an implicit requirement of timeliness. However, Lawyer G at no time forced the issue

as against Lawyer F, ie.) forcing monies to be paid into Court.

#### **Issues:**

1. Is Lawyer F requesting a legal opinion on liability for costs, which is outside the jurisdiction of the Law Society?
2. In this fact situation, did Lawyer G breach undertakings?

#### **Ruling:**

With respect to issue #1, the Committee was of the opinion that liability for costs was a legal issue.

Lawyer F's letter of October 30th, 2002 undertook to hold back money to either discharge or pay out the liens. The Committee was of the opinion that this put Lawyer F in a position that Lawyer G could have demanded the monies as it was not clear that the monies would be paid into Court, but that the monies would be paid out "at any point".

Lawyer F gave an undertaking, which was a personal undertaking, however, it was satisfied. Lawyer G put no time frame around completion of the undertakings, nor did he provide any evidence that he requested "timely" compliance at any point in the proceedings. In addition, Lawyer G's letters to Lawyer F were considered inappropriate and Lawyer G was advised by the Ethics Committee that the tone of his letters was inappropriate.

## **Rulings – October, 2003**

### **Chapter III – “Advising Clients” – Amending Document Without Client Approval – October - 2003**

#### **Facts:**

Lawyer A's office prepared a transfer and attended upon the vendor client to execute same. The transfer was provided to Lawyer B pursuant

to the uniform trust condition letter. The next communication from Lawyer B was that documentation had been submitted to Information Services Corporation of Saskatchewan (ISC). Lawyer A obtained a copy of the transfer authorization which Lawyer B had submitted to ISC for registration. The transfer document was amended so as to add two additional names to the transfer authorization. The amendment was made without Lawyer A's or his client's knowledge or consent. Lawyer A was concerned about the practice of documents being amended after delivery. Lawyer B responded that closing the transaction on a timely basis was in the interests of both parties so he amended the transfer authorization received from Lawyer A "in the expectation of receiving deferred approval" from Lawyer A's office. Lawyer A was of the view that his office could not approve the amendment to the document as once that document was executed by his client before a witness the original signatory would have to authorize same if not re-sign the document.

#### **Ruling:**

It is inappropriate to alter a document with "an expectation of deferred approval". Lawyer B cannot amend the document without the approval of the person who has provided the approval and/or executed the document (Lawyer A's client). At the very least, there would have to be some record of approval of the amendment, whether that be simply a note of a telephone call authorization prior to re-filing the document as amended. The Committee was of the view that this is certainly not a practice to be encouraged, although notes that with the new Information Services Corporation of

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Saskatchewan system, it could well be occurring in this and other circumstances.

### **Chapter XVI - “Responsibility to Lawyers Individually” – Miscellaneous - Obligation to Protect Another Lawyer’s Fees – October 2003**

#### **Facts:**

Lawyer G acted for a client/wife in a matrimonial property case. The client/wife assigned a portion of her eventual share of matrimonial property to Lawyer G for his fees. The client/wife terminated her relationship with Lawyer G and hired Lawyer H. Lawyer G gave Lawyer H notice of the assignment that the client/wife signed in favour of Lawyer G, assigning proceeds of the matrimonial property to cover his fees. Lawyer G did not attempt to impose trust conditions on Lawyer H with respect to this assignment, but rather asked that the client/wife recognize the accounts owing and the assignment. Lawyer H advised Lawyer G that the client/wife recognized the accounts owing subject to her right of taxation. Funds were forwarded from the husband’s lawyer to the Court and paid out to the client/wife directly, pursuant to an Order of the Court. Lawyer G complained that Lawyer H failed in his duty to the Court by neglecting intentionally or unintentionally to notify the Court of the assignment.

#### **Ruling:**

The Committee was of the opinion that Lawyer H was not bound to enforce Lawyer G’s assignment. A lawyer may have an ethical obligation to tell the client that he/she should pay the prior lawyer, but has no obligation to act as a “collection agent” in this regard. The Committee agreed with Lawyer H’s response to Lawyer G as follows:

“For your reference, our office at no time received any portion

of Client H’s files from Lawyer G. Further, at no time were we put under any trust conditions from Lawyer G’s office and at no time was our office asked to acknowledge or honour the assignment.

It is our position that our knowledge of the assignment did not obligate us to take any steps on Lawyer G’s behalf with respect to monies which did not flow through our office. The money in question was forwarded by the husband’s lawyer directly to the Court at the husband’s lawyer’s request. At no time were we in possession of the said funds. As such, we had no control over where the funds would be paid as the Order was for the funds to be paid to Client H, not to our office.”

### **Chapter IV – “Confidential Information” – Disclosure Where Client’s Conduct in Issue - October 2003**

#### **Facts:**

Lawyer Z was acting for two couples, the Vendors and the Purchasers in a real estate transaction. Title searches indicated there were no encumbrances, Writ searches indicated there were no writs. However, Lawyer Z had used an incorrect spelling of one of the purchasers’ first names. The mortgage company wanted the funds drawn early before interest rates rose, which Lawyer Z did. Transfer documents and mortgage documents were all submitted for registration on the condition that no other encumbrances would be on the title. The package was rejected due to a writ registered against one of the purchasers. Lawyer Z contacted the purchaser wife and the purchaser indicated there was no such judgment and writ against her. The next day the purchaser wife admitted the writ was against her for a sale debt matter.

Upon further research, Lawyer Z discovered that the judgment and writ against the purchaser wife was not for debt, but rather for monies misappropriated by the purchaser in her position as a bookkeeper. Lawyer Z knew that the purchaser was employed by another of his clients as a bookkeeper.

#### **Issues:**

1. When Lawyer Z discovered that the purchaser had misled him about the origin of the judgment against her, should he have ceased acting on this file?
2. When Lawyer Z found out the cause of action that led to that judgment against the purchaser, should he have told the vendors the details of that information?
3. When Lawyer Z found out the cause of action that led to that judgment against the purchaser, should he have told the mortgage company the details of that information?
4. Would it be unethical for Lawyer Z to inform the purchaser’s present employers about the nature of the action against her by her former employer?

#### **Ruling:**

1. The purchaser withdrew from the transaction voluntarily so the question was moot. However, if a client misleads a lawyer, the lawyer “may” withdraw but it is not obligatory. As well, when acting for both sides of a transaction, the member should be advised to utilize a disclosure statement and have it signed by the clients. Such form would indicate that the clients understand that the lawyer is acting for both sides and authorize the lawyer to do so, understanding that if a conflict arose, the lawyer would have to withdraw from all parties as their legal representative.
  2. Lawyer Z should have advised the vendors what he learned about the judgment against the pur-
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chaser. The information was material and full disclosure would avoid further problems down the road.

3. The Ethics Committee was of the view that Lawyer Z had the obligation to advise the mortgage company of the nature of the cause of action against the purchaser as this could potentially effect their security interest.
4. Lawyer Z should not divulge information to the purchaser client's present employers, as he owes a duty of confidentiality to the client. Despite the lawyer feeling a moral obligation to disclose, the duty of confidentiality is clearly owed to the client.

#### **Chapter IV – “Confidential Information” – Obligation After Death of Client – October 2003**

##### **Facts:**

Lawyer S prepared a Change of Beneficiary Designation document which was signed by his client. The client subsequently told Lawyer S to hold the Change of Beneficiary Designation document as he was contemplating further changes. The client died before giving any further instructions. Lawyer S also did a will for the client naming the client's children as executors and beneficiaries of the client's estate. The client's children contacted Lawyer S and he explained to them that the client had made a Change of Beneficiary Designation. The Change of Beneficiary Designation was not communicated to insurance companies prior to the client's death as Lawyer S had been instructed to “hold” same. The children of the client asked Lawyer S for a copy of this document and Lawyer S advised them to see another lawyer as he perceived a conflict with the beneficiary designated under the insurance

policy prior to the change of beneficiary designation document being signed. The children of the client retained Lawyer T, who requested the original change of beneficiary designation document from Lawyer S. Lawyer S refused to release same, claiming the document should not be released as he did not have express or implied authority to release same. Lawyer T agreed to undertake not to use the document if received and to maintain control of the document or return it to Lawyer S.

##### **Issues:**

The lawyers wanted to know if it would be appropriate for Lawyer S to provide Lawyer T with the Change of Beneficiary Designation document on trust condition that Lawyer T undertake to maintain control of the document and not use same.

##### **Ruling:**

The Committee stated that Lawyer S cannot provide the document to the other lawyer without a Court Order. The lawyer is not authorized to disseminate the document to anyone and cannot do so without a Court Order.

#### **Chapter XVI - “Responsibility to Lawyers Individually” Miscellaneous – Payment of Fees Out of Trust in Breach of Court Order – October 2003**

##### **Facts:**

Lawyer L represented the mother, Client L in a child support application against Lawyer M's client, Client M. Lawyer L's client complained that Lawyer M had taken his fees out of monies held in trust, which Lawyer L and the client believed were to be held for the client's benefit pursuant to a Court Order.

The Court Order in question stated in part that “The Respondent (Lawyer M's client) is prohibited and restrained from disposing of any assets registered in his name or in which he has an interest until the issue of the support has been finally determined; unless he has an Order of the Court allowing him to do so or until such time as he deposits with the Court (the specified sum) in order to secure payment of his maintenance obligations”. There were further Court applications, but no fiat was issued amending the prior Order.

Lawyer M's client disposed of items two months after the Court Order and Lawyer M advised Lawyer L that proceeds would be paid into his trust account. A four-way meeting took place to negotiate settlement and agreement in principle was reached with the Minutes of Settlement to follow. Lawyer M took the position that this four-way meeting was a “final determination” of the matter such that the previous Order no longer applied. The Minutes of Settlement were not signed until 2 – 3 months later.

When Lawyer M advised Lawyer L by letter that his client had located assets and same would be liquidated and paid into trust, Lawyer L replied to Lawyer M that he would not take issue with the assets having been liquidated if Lawyer M held the money in trust. Lawyer M concurrently took his fees from the monies held in trust. Lawyer L and his client took the position that the monies were “earmarked” for child support to be paid to Lawyer L's client.

##### **Ruling:**

The Committee agreed that in this particular fact situation, there was no breach of the Court Order as the Order specifically prohibited Lawyer M's client from disposing of

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assets. A solicitor may have money representing proceeds of the assets in trust and maintain a solicitors' lien against that money.

However, the letter from Lawyer M could have been drafted more clearly. He should have told Lawyer L that he expected to maintain a solicitor's lien against monies in trust so that Lawyer L would have had an opportunity to challenge this if he and his client wished to do so. The letter was rather unclear and the Committee would like to remind Lawyer M to be more careful in such situations.

### ***Rulings – December, 2003***

#### ***Chapter XVI – “Responsibility to Lawyers Individually” – Trust Conditions – Cannot Impose Trust Conditions on Trust Conditions – December 2003***

The Ethics Committee considered the following dispute between the two members who were the subject of the previous ruling (Chapter XVI - “Responsibility to Lawyers Individually” Misc. – Payment of Fees Out of Trust in Breach of Court Order – October 2003).

#### ***Facts:***

Approximately six months after the incident occurred, Lawyer M complained about Lawyer L for attempting to impose trust conditions on trust conditions in a real estate transaction. Lawyer M sent the transfer of title to Lawyer L on express trust conditions. Lawyer L's response letter forwarded the purchase price to close on trust conditions.

Lawyer L advised that the local Bar had adopted a practice whereby funds were sent to the vendors' solicitor in trust to be held pending successful registration of title in the purchaser's name. Lawyer L indicat-

ed that although this was the “old way” of real estate practice, the imposition of trust conditions on trust conditions appeared to be “working smoothly”. The lawyers in this transaction were not utilizing the uniform trust conditions recommended by the Law Society of Saskatchewan.

#### ***Ruling:***

The Ethics Committee is of the view that this ongoing dispute between the members amounts to “unseemly wrangling” and the Committee believes it is clearly a veiled attempt to embarrass opposing counsel and thus, is not an appropriate use of the Ethics Committee time and resources.

Despite the Committee's misgivings about the appropriateness of this complaint, the Committee makes the following ruling:

1. A member cannot impose trust conditions on trust conditions.
2. A copy of the uniform trust conditions letter recommended by the Law Society is enclosed and the members are encouraged to use it.
3. If a member does not like the trust conditions imposed or does not wish to accept such conditions, the member should not accept them.

#### ***Chapter XVI – “Responsibility to Lawyers Individually” – Trust Conditions – Imposition of Trust Conditions in Face of Court Order –December 2003***

#### ***Facts:***

This matter arose from a discipline review and this particular issue was referred to the Ethics Committee in October 2003. The file in question was initially handled by Lawyer Q for Client Q. Client Q terminated his relationship with

Lawyer Q and hired Lawyer R. Lawyer Q would not transfer the file. A Court Order was obtained which directed that if Lawyer Q's outstanding fees were paid that the file was to be turned over to Lawyer R and the client.. Lawyer Q then sent the file to Lawyer R on trust conditions.

#### ***Ruling:***

The Committee was unanimous in its decision that Lawyer Q was to turn over the file without trust conditions. Essentially, Lawyer Q, in the face of the Court Order cannot impose trust conditions on the transfer of the file to Lawyer R.

The Ethics Committee again considered the situation during its meeting of December 11th, 2003 as requested by Lawyer Q.

#### ***Facts:***

Lawyer Q asked the Committee to consider the ethical obligations of Lawyer R as opposing counsel in this situation. Lawyer Q had a contingency fee agreement with his client, who fired him and retained Lawyer R. The Court ordered the file to be transferred once outstanding fees were paid. The trust conditions Lawyer Q attempted to impose on transfer of the file were that the contingency fee be split according to the work done. Lawyer R rejected the trust conditions imposed by Lawyer Q. Lawyer Q asked the Committee whether or not Lawyer R has any obligation to him to agree to pay any share of his contingency fee or any fees whatsoever or any obligation to provide Lawyer Q with progress reports on the file.

#### ***Ruling:***

The Committee's view was that Lawyer R owed Lawyer Q no ethical obligation in this situation. If Lawyer Q believes Lawyer R is obligated to him or that there are other issues to be determined, the Committee is of the opinion is that the

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Court would be the appropriate forum to review such issues.

**Chapter XVI –  
“Responsibility to Lawyers  
Individually” – Without  
Prejudice Correspondence –  
Disclosure of Without  
Prejudice Letter –  
December 2003**

**Facts:**

Lawyer A received a demand letter from Lawyer C on behalf of her client, the wife, in a family law matter. In response to that letter, Lawyer A sent a “Without Prejudice” letter on behalf of his husband client. Lawyer A then received service of a Motion and accompanying Affidavit from Lawyer C. The Affidavit exhibited Lawyer A’s response letter which had been marked “Without Prejudice”. Lawyer A took the position that as he was attempting to negotiate settlement, it was inappropriate for Lawyer C to attach his “Without Prejudice” letter to the Affidavit.

Lawyer C took the position that the Rules of Practice and Procedure indicated that there shall be 37 days between the date set for hearing a Motion and the date written notice was given pursuant to Sub-Section 25(1) of the Guidelines. Lawyer C stated that she provided notice in her first letter and Lawyer A did not respond to same in his response letter. Lawyer C argued that she had to provide the Court with Lawyer A’s letter in order to establish that he did not respond to her notice and that the request for variation was refused.

**Ruling:**

The Ethics Committee had some question as to whether Lawyer A’s letter qualified as a “Without Prejudice” communication. However, the Committee was of the view that, in

such circumstances, a lawyer should err on the side of caution and characterize such a letter as “Without Prejudice” and not append same to an affidavit to the Courts. The Ethics Committee was not convinced that Lawyer C’s reasons offered for use of this letter were accurate. Lawyer C wrote to an Officer of the Court and an Officer of the Court wrote back. The Committee was of the view that that it would have been sufficient for Lawyer C to describe the germane contents of the letter before the Court without appending a letter.

**Chapter XVI – “Responsibility to Lawyers Individually” – Miscellaneous – Misleading Correspondence – December 2003**

**Facts:**

Lawyer X complained about Lawyer Y having sent two letters which Lawyer X alleged were deceitful and intended to mislead. Lawyer X acted for a member of a corporate partnership. Lawyer X’s client wished to be bought out of the partnership as the business had been having difficulties.

Lawyer Y’s letter to Lawyer X indicated that his clients, (two business partners), hired a business consultant who indicated that circumstances were dire and that the consultant was within days of recommending the business be shut down. In a letter to the lawyer for a creditor of the business, Lawyer Y stated that the same business consultant reported that he hoped he could resolve the business difficulties in the immediate future.

**Issue:**

Were Lawyer Y’s two letters to the two different parties inappropriate in that they painted different pictures of the status of the business

to obtain two different results (to convince Lawyer X to negotiate a settlement and to convince the creditor’s lawyer to grant them time to pay overdue accounts)?

**Ruling:**

The member was negotiating with two different parties for different results. The statements in the letters were characterized as “belief of his client” or “the consultant” and Lawyer Y was not asserting his own opinion or indicating that these statements were “fact”.

**Chapter I – “Integrity” – Was Land Transfer Fraudulent? – December 2003**

**Facts:**

This is a situation that arose out of a tax enforcement by a town which was represented by Lawyer E. The value of the property in question was less than the tax owing but the Town nonetheless was required, as part of its enforcement proceedings, to file a caveat against the property. They had advised the owner, however, they were going to be proceeding against her in Small Claims Court.

Lawyer F, on the owner’s behalf, transferred the property to the Town without the consent of the Town. There is case law to the authority that once the municipality takes possession of the land, they can no longer pursue any remainder (similar to The Land Contracts (Actions) Act). Lawyer E, acting for the Town, asked the Ethics Committee whether or not this was a fraud, contrary to the Statute of Elizabeth.

**Ruling:**

The Ethics Committee was of the opinion that in these circumstances, Lawyer F’s involvement in the transfer of land was not unethical. If the Town does not want the land it has its remedies.

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## *Rural Members to Receive Desktop Access to WestlawCarswell*

Rural Members to Receive Desktop Access to WestlawCarswell

The Law Society of Saskatchewan Library has negotiated access to LawSource for all rural members in Saskatchewan. Access to LawSource is an attempt to improve access to library resources for the rural members. There are no current subscriptions to law reports, statutes, the Canadian Abridgment or the Canadian Encyclopedic Digest (Western) in print in our rural libraries. Rural members will receive access to this online computer research tool at his/her computer. To enable us to provide rural members with LawSource, we have created two separate user names and passwords to the members' section on the Law Society's website: a rural account and an urban account. Any member living outside of Regina or Saskatoon who is a resident of Saskatchewan should be using the rural member password. The appropriate passwords were mailed with your practice certificate.

LawSource is one of the products offered through the WestlawCarswell interface. The brief description of the content of LawSource includes the Canadian Abridgment, the Canadian Encyclopedic Digest (CED), and the fulltext of cases and legislation. The Canadian Association of Law Libraries (CALL) presented the Award for Excellence in Legal Publishing to Carswell for the WestlawCarswell products in May 2003. Carswell also won the e-

Content Institute award for innovative and creative use of electronic content in 2002 for the suite of products offered through the WestlawCarswell interface. Clearly Carswell's Canadian Abridgment online has improved substantially since its first appearance as an Internet-based product in late 1998.

The tentative date for access for rural members is February 2004. Individual accounts will be issued for LawSource to each rural member. To qualify for an account, you must be a current member of the Law Society of Saskatchewan with your principal place of work within Saskatchewan and outside of Regina and Saskatoon. The link to LawSource will appear in the members' section and rural members must use the rural member user name and password along with his/her LawSource account to gain access to the service.

Each rural member from the current membership list will receive from the library an order form with instructions and a personal license agreement to sign up for this service. Carswell will then forward your LawSource account number. If you are an existing LawSource subscriber, you should contact the Carswell representative, Molly Leung ([molly.leung@thomson.com](mailto:molly.leung@thomson.com)) to arrange for smooth migration of your subscription to avoid any lapse in service.

The Library Committee has decided to continue the rural computer training program that the

library staff began in 2002 with a focus on using LawSource. Training will begin in 2004 as soon as we arrange facilities and contact the local bar associations. Carswell will conduct training on the product for any subscriber, most of which will consist of telephone training. The library will also field calls from members. The library reference staff will be able to provide a combination of telephone training, e-training consultation, and hands-on classroom instruction for the rural members. You must have your LawSource account number in order to receive training. The Library staff will be contacting all rural members to review training needs and classroom training schedules will be distributed as soon as possible. After the 2002 training program, we received requests for training from Nipawin and Weyburn which were not part of the program, and requests from Battleford and Prince Albert to return to conduct further training. If you would like to be included in the training schedule, please email Susan Baer at [sbaer@lawsociety.sk.ca](mailto:sbaer@lawsociety.sk.ca) with your request. All rural members should expect to be contacted in the near future about access and training.

We would like to thank the Law Foundation of Saskatchewan for supporting desktop delivery of LawSource to our rural members for 2004.

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## *Annual Password Change to Members' Section*

This is a reminder that the password and user name for the members' section changes every year with membership renewals. The new user name and password were sent to you with your annual practice certificate. The 2003 user name and password were disabled on January 15, 2004. Changing the user name every year allows for the overlap of the old password and new password during the transition period and over the busy Christmas season. If your computer stores your password, remember to change the user name when you enter the new password. Non-practicing or inactive members may still access the members' section for an annual fee of \$250. Any inquiries regarding access to the members' section should be directed to the library at 1-877-989-4999 or 569-8020.

**Who is Lawyer X??**  
**See the next edition of the Bencher's Digest.**

### *Lawyers Concerned for Lawyers*

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