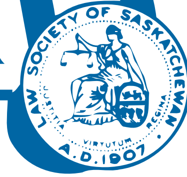
BENCHERS' DIGEST



Volume 18, Issue Number 6 November, 2005

Highlights of the Meeting of the Benchers held October 27th and 28th, 2005

2006 BUDGET

The Benchers approved the Budget for 2006 which set the Annual Fee at $1,315, the same level as the fees for 2005. The Administration fund appears headed for a break-even position or a small surplus for the end of the year as opposed to a projected deficit. This is largely due to excellent returns on investments, higher enrollment, as well as lower expenses on some line items. The Special Fund is currently at a deficit for 2005 but the Law Society is looking at a special project with some other Law Societies in Canada for catastrophe insurance which may be put into place in 2006. The Special Fund stood at approximately $2,000,000 as at September 30, 2005.

DEFALCATIONS

The Benchers approved payments from the Special Fund in the amount of $921 relating to the suspension of Herbert M.L. Robertson.

RULE AMENDMENT

The Benchers approved an amendment to Rule 149A which was required as a result of a typographical error. Rule 149A requires students-at-law and members to advise the Society of guilty pleas or findings of guilt regarding certain offences which result in incarceration; or of investigations or proceedings by any other professional or regulatory body.

THE LEGAL PROFESSION ACT, 1990

The amendments to *The Legal Profession Act, 1990* are to be put forward to the Legislature for the fall session. The amendments deal with the issues put forward in the May 2005 edition of the Benchers' Digest, with the exception of the amendment to s14 of the *Act* which would have allowed for payment by the Law Society of unclaimed trust money after 10 years to the Law Foundation rather than to the Department of Finance.

LIBRARY SPACE

The ad hoc Building Committee continues to look at options for the Regina Library due to the slated renovations at the Court House which will result in a large portion of the Library collection being moved to the basement.

The Evolution of the Student-at-Law

By Cris Shirritt, Law Student

My experience as a law student, simply stated, has been the most enjoyable time of my life. A growing family, fascinating new friends and a stimulating field of study; all this and a year of law school left to go. Spending the last two summers researching the histories of the College of Law and the Law Society of Saskatchewan has played an important role in making this time so enjoyable.

Throughout my research, as the stories unfolded about the student experience in earlier days, I often wondered whether I could have made it under those circumstances. Legal education certainly has changed since the first students were admitted…

Under *The Legal Profession Act* in 1907 to be eligible for admission as a student-at-law:

- A person had to be at least 16 years old and be a graduate in Arts or Law from a recognized University in the United Kingdom or in Canada or be a graduate of the Royal Military College of Canada; or

- Have passed a matriculation examination required by some University empowered by law to grant the degree of Bachelor of Arts in the United Kingdom or Canada; or
- Have passed a satisfactory examination in subjects prescribed by the Department of Education of Saskatchewan for junior matriculation.

Graduates in arts, law or the RMC were required to serve as a clerk under articles of clerkship for three years. Non-graduates were required to article for five years. Simply put, a sixteen year-old high school graduate could become a lawyer after spending five years articling in a law firm.

Prior to 1911, there was no requirement for students-at-law to attend lectures in legal subjects as part of their training as articling students. This was due to the absence of a law school in Saskatchewan offering such a course of lectures. For a number of years, articling students in Regina had previously participated in informal meetings and lectures.

From 1907 in Regina, and 1910 in Saskatoon, informal lectures were offered to students-at-law by senior practitioners on a voluntary basis.

In 1911, the Benchers formally recognized the importance of those lectures. When it was established to their satisfaction that a course of lectures was to be delivered at any judicial centre, students in offices at those judicial centres would be required to attend at least 60 per cent of the lectures for their respective years before being allowed to write their examination.

Following representations made to the Benchers by the Law Students Society of Regina, a resolution was passed at a meeting of the Benchers on December 14, 1912 that the time had arrived for the establishment of a law school in Regina for the education of students in the province and that they immediately take all necessary steps to organize it.

Wetmore Hall, named in honour of the Honourable Edward L. Wetmore, former Chief Justice of Saskatchewan, was opened on October 1, 1913 with 49 students attending. About the same time, a decision was made to establish the College of Law at the University of Saskatchewan in Saskatoon. The College opened in the fall term of 1913 and was the first in Western Canada.

Saskatchewan had officially joined Eastern Canada and the U.S. in the debate about whether an academic education could, or should, replace the centuries old tradition of a practical legal education.

In a 1998 article in the Saskatchewan Law Review, College of Law Professor Beth Bilson wrote:

> "It is certainly the case that this history has been marked by episodes of struggle between professional bodies and universities over the mode and content of legal education. The journey, which eventually ended at a national norm of a three-year university-based law degree followed by a period of articles and professional examinations prior to admission to the bar, was not accomplished without some friction and a few missteps."

Professor Bilson cites Walter Murray, the first president of the University of Saskatchewan, for an example of the struggle between the University and the Law Society:

> Murray went on to describe the dependence of law firms on the assistance of articling students as one of the major impediments to the development of a suitable system of legal training, and pointed out that other professions had acknowledged the necessity of providing opportunity for concentrated study as well as practical experience in preparing students for professional careers. In the memo, Murray alluded to two different models of legal training:
>
> > The latter or Harvard type of Law School not only claims all the energy and time of the student during term time, but it adopts a laboratory system of study, the case system. The other type, which we may call the Osgood [sic] Hall system, is content to supplement the office work of the student, and it relies on the lecture method. The struggle between the two types in the U.S. is practically over. The Harvard system has won. In Canada the Dalhousie and, I believe, the McGill School follow in large measure the Harvard method.
> >
> > The Harvard method does not necessarily involve the abolition of the office training. It simply demands that the students shall not do two things at the same time.

Murray proposed a program of study at a university law school following a period of articles. Chief Justice of Saskatchewan and University Chancellor Wetmore suggested that Murray's proposal should be reversed with the articling period following university. A joint committee of representatives from the Faculty of Law, University of Saskatchewan, the Law School and the Benchers approved a joint curriculum.

Students of the Law Society law school attended Wetmore Hall for a three-year program of law studies, and wrote the intermediate and final examinations prescribed by the Law Society for admission. They did not receive a degree, nor was their training recognized by the College of Law as being equivalent to that given in the LL.B. program. In contrast, students who attended the College of Law in Saskatoon did receive an LL.B. degree, but were also required to pass the Society's professional examinations.

Following the outbreak of war, all students who were engaged in active military service were excused from attendance at the law school. The time for service under articles for all law students in the province was allowed to them and they were given credit for such intermediate law examinations required of them, as they would have been entitled to write had they not enlisted. They were, however, required to pass the final examination prescribed by the *Rules of the Society* before enrollment.

In 1919, a reciprocal agreement was entered into between the University of Saskatchewan and the Law Society. The University agreed to admit to the third year of the LL.B. course duly articled students who were certified as having passed the first and second intermediate examinations of the Society and attended all the classes required by the Law Society's Law School for preparing for the said examinations. University law students who had successfully completed their course and obtained their LL.B.

degree were exempted from writing the first and second intermediate examinations at the completion of their articles.

From 1913 to 1922, when the University of Saskatchewan and the Law Society both offered law school training, classes were held in the early morning and evening in order to allow the students to spend a full day working in law offices. At the University, first year law classes were relocated to the campus in 1916 in an effort to move towards a more conventional education experience. Second and third year classes remained in various downtown offices until the college moved into the College Building on campus in 1922. By 1920, of the 14 first year students, only 4 were serving under articles.

At a special meeting on April 15, 1922, the Benchers decided that the time had arrived when attendance at a law school by law students should be compulsory. The students were no longer required to work in law offices during the day while attending classes in the early morning and late evening. The College of Law had also just moved from its temporary quarters in downtown Saskatoon offices to the University campus, which would have made the previous system impractical.

Legal education in Saskatchewan remained virtually unchanged for the next thirty years. However, in 1951, the articling period was shortened from three years for graduates to one year. Prior to this change, and perhaps precipitating it, was the significant increase in enrolment at the College of Law following the end of World War II. In 1944, the graduating class was two people strong, as compared with 1948 (the first completely post-war graduating class), which graduated 31 students. It became extremely difficult for all of the graduates to find articling positions. A section of the Saskatchewan Bar Review (as it was then) became a virtual classified ad as Dean Cronkite pleaded with the local bars to find spaces in their offices for all of the recent grads.

Prior to the 1950's, the curriculum at the College of Law was entirely compulsory. Even when the first electives were offered to third year students, there were few and initially they were available by invitation only. By the end of the 1960's, there was a wide range of electives in both the second and third years.

Another innovation in legal education was the introduction of the Bar Admission Course. The course was officially adopted by the Benchers on March 24, 1960. It was put into operation in the summer of 1961. The course was designed to last six weeks. The first two weeks were devoted to chamber practice and the preparation of cases for trial, the second two weeks to surrogate practice and estate procedure, and the third two weeks to conveyancing, company and office procedure. The course was initially under the direction of Dean F.C. Cronkite, Q.C., and the lecturers were Hon. H.F. Thomson, Q.C., J.M. Goldenberg, Q.C. and D.E. Gauley, Q.C. The Bar Admission Course is now under the control of the Saskatchewan Legal Education Society Inc. (SKLESI).

Aside from changes in class offerings, the final major change in legal education came with the introduction of the Law School Admission Test (LSAT) in 1971-72. The LSAT, combined with the pre-law school marks and experience, was used to rank an applicant's abilities in relation to other applicant's abilities. The LSAT replaced the law school's tradition of failing half of the first and second year students as the means of controlling over-population and maintaining the highest standards in the profession.

As for the future of legal education in Saskatchewan, can we look back on the previous 98 years and say that we have finally developed the most effective method of training would-be lawyers? I don't know. I am not sure if any newly minted lawyer has ever felt totally qualified for the responsibilities bestowed upon them. In my opinion, the best thing about being a lawyer is that everyday we learn something new and in that sense, until we hang up our gowns, we will always be students-at-law.

Acknowledgements

The sources used include Professor Beth Bilson's article "Prudence Rather than Valor": Legal Education in Saskatchewan 1908 – 1923, 61(2) Sask. Law Review, 341; Iain Mentiplay's book on the History of the Law Society; the Saskatchewan Archives Board, Law Society papers; and the University of Saskatchewan Archives, College of Law fonds.

(Cris Shirritt is presently a third year law student at the University of Saskatchewan, College of Law. Cris recently completed his summer student term which involved conducting background research for the Centennial Subcommittee.)

Legal Web Cites

Internationally, there are several legal information institutes providing free access to case law and legislation. These sources are very useful for researching international legal issues. One of the most established of these resources is AustLII (Australasian Legal Information Institute).

AustLII (Australasian Legal Information Institute)

http://www.austlii.edu.au/

AustLII was established in 1995, and it has had time to develop its collections extensively and add many technical capabilities. A comprehensive commercial online service, like Quicklaw, for research in Australian or New Zealand law did not exist in Australia, thus explaining the significance of AustLII's development. The universities and other stakeholders in AustLII collaborated on its development to fill this need.

AustLII provides access to federal, state and territorial consolidated statutes and regulations from all jurisdictions in Australia. These materials are updated regularly, with many updated weekly. AustLII also includes current decisions from the superior courts from every Australian jurisdiction, Norfolk Island and New Zealand. The date ranges available in AustLII's case law collections vary widely. The High Court of Australia's collection dates from 1903 to the present, but the majority of case law available has coverage from the mid to late nineties to present.

The decisions from many administrative tribunals are included in AustLII, with especially strong collections in intellectual property, human rights, labour and commercial law. In order to assess the currency of any of these collections, from the homepage, scroll down to the box called "Special Features and Tools" on the right side of the screen and follow the links called "Update Status for Case Law" or "Update Status for Legislation."

AustLII has started including secondary materials in their collections, such as law journals, websites, treaties and other documents such as law reform reports and conference proceedings. They also have subject-based collections, such as the "Indigenous Law Resources" collection, which includes publications from parliament, independent academic organizations and royal commissions. These are linked under the heading of "Projects" half way down the left side of the AustLII homepage.

AustLII has a wider breadth of collections than CanLII and in some cases a longer date range. The breadth of AustLII's collections may have made the organization of the home page a bit more confusing to use than CanLII, however with regular use, it becomes easier to navigate. While AustLII has been in existence longer and had more time to develop than CanLII, CanLII has been able to acquire an impressive amount of material in a very short time. One important area where AustLII does have more material than CanLII is in family law and other cases that are privacy-sensitive. AustLII has a policy for preparation of cases including initialization and withdrawal of cases at the request of the courts and tribunals, which allows them to include many cases CanLII would exclude under its present policy structure. These cases include cases involving information pertaining to young offenders, personal financial information, incest and similar issues.

One of the areas in which AustLII has been most innovative and influential is in development of the SINO search engine. SINO was developed by the AustLII staff to fill their needs, and they provide it free to any organization offering free legal information over the Internet. Some of the organizations that use SINO are BAILII (British and Irish Legal Information Institute), Droit Francophone, HKLII (Hong Kong Legal Information Institute) and others. CanLII was among the organizations using SINO, until it developed its own search engine called ELIISA.

AustLII has continued to develop SINO by adding more functionality. The most recent addition is point-in-time access to legislation. At this time, this feature is available for New South Wales acts, Queensland acts and South Australian acts. It has coverage for dates ranging from 2002 to 2004. The point-in-time system is still experimental and under development, but it is likely to become a very useful feature. To access the point-in-time legislation, follow the link on the left side of the screen under "Projects." If you have any problems using the point-in-time legislation, or any of AustLII's features, the Help pages are linked from every page, which provide useful instructions.

Like CanLII, AustLII promotes the use of the neutral citation standard. The concept of the neutral citation is important to all the legal information institutes, as a way to access case law without relying on a specific publisher or fee-based service.

AustLII's projects are ambitious, and new functions and content are being added regularly. Two of the biggest projects are WorldLII: World Legal Information Institute and Com-

monLII: Commonwealth Legal Information Institute, both of which will be discussed in future articles. These databases contain legislation and case law from around the world and around the Commonwealth respectively. They represent valuable tools for accessing a wide range of international law, which was previously very difficult to find.

AustLII has been an important player in developing free online legal research in Australia and the world. One of its biggest effects has been on the other legal information institutes, including CanLII. AustLII's technical innovations and experience have been instrumental in developing the ability to present large amounts of legal material freely over the Internet.

Rulings – October 2005

Chapter V, "Impartiality and Conflict of Interest between Clients" - Acting as Lawyer for Wife after having acted for Couple, June and October 2005

Facts:

Lawyer S acted for a couple in their 60's who were getting married two years ago. The couple attended with Lawyer S to give instructions for joint wills. He prepared same and they both came back, together, to sign before Lawyer S. The wills left everything to each other as spouse and, in the event the spouse predeceased, the assets were to be split between the respective spouse's children from prior relationships. Lawyer S is now representing the wife in a divorce from the husband. The husband was extremely uncomfortable with this as he believed Lawyer S was acting on his behalf when they did the wills. At that time, they discussed assets brought into the marriage and assets which were part of the marriage and now Lawyer S is acting against him with respect to a division of these assets.

Ruling:

In a situation of joint wills representation, it could be conflict of interest for a lawyer to then later act against one of the parties in a situation where the division of those assets was at issue, such as in a divorce matter. Financial disclosure would be provided in the course of the family law matter and confidential information would not likely be disclosed that was not already disclosed in the family law matter. However, *The Code of Professional Conduct* states that a lawyer cannot act against a former client in the same or related matter and these matters were arguably related.

The Committee found Lawyer S to be in a conflict of interest as he acted for both the husband and the wife and now purports to act against the husband on a "related matter." The related matter is the division of assets which were previously the subject of the wills attendance when Lawyer S attended with the husband and wife together.

OCTOBER ADDENDUM TO RULING:

Following the above ruling, given in June, Lawyer S indicated to the Law Society that he wished to have the matter reviewed by the Courts. The Ethics Committee was in agreement that the opinion of the Court would override the opinion of the Committee, however, the Committee was concerned that its rulings are not to be simply ignored, as this could result in a referral to the Discipline Committee. Counsel for Lawyer S was prepared to bring the matter for the Court but the estranged husband engaged new counsel and agreed to waive the conflict in order to work on a settlement.

Chapter VI "Conflict of Interest Between Lawyer and Client" – Preferring Own Interests over those of Client – October 2005

Facts:

A lawyer was retained by a purchaser with respect to the purchase of a business. Another lawyer was retained by the vendor with respect to the sale. The purchaser's lawyer had previously acted for the vendor on an entirely unrelated matter and was still owed monies in relation to this work.

The purchaser's lawyer imposed a series of trust conditions upon the vendor's lawyer in relation to the purchase and sale of the business including some terms not included in the original agreement between the vendor and the purchaser. One of the trust conditions required the vendor's lawyer to withhold a portion of the sale proceeds until certain liabilities had been addressed including confirmation that any of the vendor's obligations to Canada Customs & Revenue Agency (CCRA) had been satisfied. The purchaser's lawyer insisted that this required the vendor's lawyer to provide a "Clearance Certificate" from CCRA. The vendor's lawyer provided a letter from CCRA that partially satisfied the purchaser's lawyer with respect to the trust condition, and the purchaser's lawyer advised the vendor's lawyer (by registered mail) that the holdback could be released.

Coincident with this activity, the purchaser's lawyer had issued a Statement of Claim with respect to the legal fees previously owed by the vendor on the unrelated matter. On the day that he sent the registered letter removing the holdback on the business proceeds, the lawyer also sent (by registered mail) a Garnishee Summons seeking to garnishee the holdback funds and have them applied to the outstanding legal fees owed to him by the vendor.

Ruling:

The issue of the purchaser's lawyer requiring the vendor's lawyer to maintain monies from the sale proceeds in trust regarding outstanding liabilities is a common practice. However, the Ethics Committee observes that lawyers need be cautious in imposing or accepting trust conditions which should have been contained in the Agreement for Sale. This is particularly problematic for the lawyer who accepts such conditions. Accepting trust conditions creates a personal obligation on the lawyer to ensure that matters are concluded, even though the Agreement itself did not contain those terms.

Secondly, the Committee expressed some concern where a lawyer obligates another lawyer to hold monies in trust in circumstances where the lawyer imposing the trust conditions is also owed money by the ultimate beneficiary. The Committee's discomfort arises from the potential conflict of interest and the use of client information by the lawyer attempting to collect an account. The lawyer would only know of these monies being held in trust by virtue of acting for the purchaser and by being privy to confidential client information. As well, the imposition and removal of the trust conditions must be handled with unqualified attention to the client's interests. In circumstances like this, a lawyer may be tempted to align his/her client's interests with the lawyer's own interests, or even prefer his/her own interests to that of the client. Where the lawyer's release of trust conditions related to money being held in trust so closely coincides with the service of a garnishee summons seeking to attach those monies for the lawyer's benefit, a suspicion arises that the lawyer's interests may have come into conflict with and been preferred over those of the client.

In such situations, lawyers should use extreme caution when pursing the recovery of their outstanding accounts so as to i) avoid using confidential information from other clients in doing so; and ii) avoid potential conflicts between their client's interests and their own interests.

Chapter XI – Fees – "Charging contingency fee on matrimonial property division" – October 2005

Facts:

Lawyer Z and his client, client Y, had an agreement that Lawyer Z would charge a flat fee on a matrimonial property matter. Lawyer Z's original retainer letter calculated a flat fee indicating that it would be less than 35% of the predicted settlement amount they were looking at. Lawyer Z indicated in that letter that if the amount was less than the predicted settlement amount he would reduce his fees. The matter was settled at Pre-Trial and discussed with the client and Lawyer Z's bill of August 2005 stated "Our fee: 40% of settlement, as per agreement -- ". Lawyer Z advised that at Pre-Trial he spoke to his client about the offer and what legal fees and disbursements would be. Lawyer Z indicates that the statement "40% of settlement as per agreement" on his bill of August 2005 appeared in error. Lawyer Z argued that his fee was based, in part, on a percentage of settlement but yet he advised his client he could not enter into a contingency fee agreement with the client. Lawyer Z wished to argue that Rule 1502 of the Law Society of Saskatchewan Rules provided that the member shall not enter into a contingency fee agreement in matrimonial property matters but that it does not prohibit charging a contingency fee.

Ruling:

The Committee reviewed Rule 1502 which states as follows:

> **"Prohibited agreements**
>
> **1502** A member shall not enter into a contingent fee agreement:
>
> (a) for services which relate to a child custody or access matter, or
>
> (b) for services which relate to a matrimonial dispute, unless the form and content of the agreement have been approved by the Court."

It is the opinion of the Committee that Rule 1502 prohibits a lawyer from "entering into" a contingency fee agreement for services which relate to a matrimonial dispute OR CHARGING a contingency fee with respect to such services.

The Committee was of the opinion that the statement "40% of settlement as per agreement" in Lawyer Z's bill of August 2005 gave a clear impression that he was charging a contingency fee. The client could see that and complained to the Law Society. Not only is a contingency fee not to be charged on a matrimonial property matter, a contingency fee agreement must be in writing and signed by the parties. Lawyer Z cannot charge a contingency on a matrimonial property matter. The reason behind this prohibition is that the presumption for matrimonial property is equal division so there is little "risk factor" for a lawyer which would justify a contingency fee arrangement. It appears that Lawyer Z, at some point, made a decision to reduce his bill because of the lower settlement amount, however, Lawyer Z was not entitled to charge on a contingency or percentage basis or to state that in his bill. A lawyer may calculate a bill how he/she sees fit as long as he/she complies with *The Code of Professional Conduct* Chapter XI "Fees" in that the fee is fair and reasonable. A "flat fee" is fine and an engagement letter and retainer agreement is a good idea. The Committee wishes to caution the member in this case that charging a percentage fee on a matrimonial property matter is prohibited.

Chapter V – Impartiality and Conflict of Interest Between Clients – "Acting for one client on a related matter" – October 2005

Facts:

Lawyer M acted on behalf of the vendor and purchaser of a business. Lawyer M acted for both parties in approximately 2003 and prepared an Agreement for Sale and various security documents. In 2005 the vendor

has asked Lawyer M to act on her behalf in enforcing the agreement as against the purchaser who is now in default. The vendor was to receive monthly payments for the balance of the purchase price over time and payments were to be secured by way of demand promissory note and a general security agreement which was to be registered at the Personal Property Registry. Lawyer M argued that he had no information about the purchaser which would prejudice her in the present matters and that he had simply acted on her behalf to carry out the sale/purchase transaction. The Committee reviewed Chapter V of *The Code of Professional Conduct* and the decision of the Supreme Court of Canada in *R. v. Neil* [2002]3 S.C.R. 631, 2002 SCC 70.

Ruling:

The Committee did not agree with Lawyer M's interpretation of the mortgage commentary in Chapter V that a lawyer could represent a bank and the party signing the mortgage and later act for the bank in foreclosure proceedings in certain instances. The Committee was of the opinion that this is simply too close, that Lawyer M is acting against a former client in a related matter and should not be acting to collect against one party in the same matter he acted for both in the first instance. The Committee concluded that they disagreed with Lawyer M's analogy to the mortgage situation, believed that he was in a conflict of interest in this situation as per the *R. v. Neil* case and that enforcement under the Agreement for Sale was, indeed, a related matter as per *The Code of Professional Conduct*.

In Memory Of

Wilbert Robinson Orr (1925 – 2005) of Swift Current passed away on October 20, 2005.

He is survived by his wife of 56 years, Doreen, his 3 children, Robert, Janet and Gerry, 7 grandchildren and 2 great-grandchildren.

In 1999, Mr. Orr was awarded a Senior Lifetime Membership from the Law Society of Saskatchewan, commemorating 50 years of dedicated service to his profession.

Justice Russell Brownridge of Regina passed away on November 3, 2005 at the age of 90.

Justice Brownridge is survived by his sons Bob and Jim.

He was appointed Justice of the Court of Queen's Bench in Regina in 1959 then in 1961 was appointed to the Court of Appeal. After serving 27 years on the Court of Appeal, Justice Brownridge retired at age 74.

Members' section passwords

Just a reminder about the members' section access: the new passwords for the members' section are being sent with your practice certificates. The new passwords are effective December 1, 2005 and the 2005 accounts will be de-activated on January 18, 2006. If you have any questions about the password, please contact the Library staff in Regina directly at 1-877-989-4999 or 569-8020.

You are cordially invited
to join the library
in celebrating the holiday season
at our annual Christmas reception
to be held
Thursday, December 1, 2005
from 3:00 to 6:00 pm.

Refreshments will be served

Law Society Library
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Regina

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