

BENCHERS' DIGEST



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Canadian Lawyers Insurance Association re: Special Fund by Thomas Schonhoffer, Q.C.



The Law Society of Saskatchewan is implementing an innovative new program to fund claims for misappropriation from trust accounts. As of March 31st, 2006, Canadian Lawyers Insurance Association (CLIA) will be providing fidelity coverage to the Law Society.

CLIA is a reciprocal insurer which now includes the lawyers of seven provinces and three territories. It was established in 1988 to provide errors and omissions insurance for lawyers. Over the past 18 years, it has evolved into a model of professional liability coverage. Because it is an organization run by lawyers for the benefit of lawyers, it provides wide coverage at an affordable price. The central prin-

ciple is that, over the long run, lawyers in each Province pay only for the costs of their own claims.

Last year, five Provinces (Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia) conducted a feasibility study to determine if the same principles could be applied to compensation funds. All of the Provinces had the common problem of trying to fund volatile claims with small memberships.

By volatile claims, I mean that the frequency and value of claims fluctuates significantly over the years. In most years, there are no payments or very low payments. Occasionally, there are significant payments such as the Lamontagne claims which cost the Law Society approximately \$750,000.00 in 2000. There is always the possibility of a major defalcation such as the Wirick claim in British Columbia which may cost the Province more than twenty million dollars.

The problem with small memberships is simply that no Province had sufficient numbers to spread the risk or to negotiate favorable reinsurance terms and rates.

The obvious solution was to pool both our resources and our risk in another insurance exchange. It was determined that a separate underwrit-

ing group within CLIA would be established, apart from errors and omissions coverage. The objective was to:

1. Stabilize costs.
2. Obtain the coverage that is required.
3. Insure uniformity among provinces and enhance national mobility.

The new coverage is as follows:

We want to keep most of the risk in Saskatchewan and also to have predictable yearly maximum losses. Therefore:

1. The Law Society of Saskatchewan will retain the first \$100,000.00 loss on any claim. Any loss in excess of \$100,000.00 per claim will be transferred to CLIA.
2. The Law Society of Saskatchewan's maximum loss in any year will be \$500,000.00. Losses in excess will be transferred to CLIA.
3. The Law Society of Saskatchewan will have \$10,000,000.00 aggregate coverage in any given year.

We want a pooling arrangement with the other Law Societies to pro-

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tect against large claims. This provides protection without the necessity of retaining large amounts in the Special Fund. The CLIA risk segment is as follows:

1. CLIA will be responsible for the risk segment between \$100,000.00 and \$1,000,000.00 on each claim.
2. CLIA will incur maximum losses of \$3,000,000.00 each year.

CLIA cannot afford to retain sufficient reserves to self insure against catastrophes and so CLIA will totally

reinsure the risk with commercial insurers as follows:

1. Reinsurers will be responsible for losses on any claim between \$1,000,000.00 and \$10,000,000.00.
2. Reinsurers will be responsible for any losses in the CLIA layer which exceed \$3,000,000.00 in any year.
3. Reinsurers will have an aggregate loss limit of \$25,000,000.00 in any year.

In conclusion, although payments under the Special Fund are discretionary, the Benchers have adopted the view that compensation is an important part of the Law Society's commitment to protect the public. The new insurance plan promises to honour our commitment to the public in a manner which is stable and affordable to our members.

Law Society Library

by Susan Baer

Library service fee schedule

Implementation of the new fee schedule for library services approved by the Benchers in 2005 began on March 1, 2006 and not on January 1, 2006 as originally planned. Changing over to the new system took longer than anticipated. The rates were published in the September 2005 issue of the *Benchers' Digest* (vol. 18, no. 5). You can also find the rate chart on the Law Society's website under **Library Services**. Select **Library Services Fee Schedule** from the list of links on the middle of the page. Library services include photocopying, faxing, computer searches, interlibrary loans, and research.

Desktop Services

Canadian Human Rights Reporter

Desktop access for rural members to the *Canadian Human Rights*

Reporter continues for 2006. The CHRR is the largest online collection of human rights tribunal reports and court decisions in Canada. In 2006, the CHRR will also be available for all members at the public computer stations in Regina and Saskatoon. You may need staff assistance in Regina and Saskatoon to initially access the service.

Also available online in 2006 to rural members is the *Human Rights Digest*. The *Human Rights Digest* is a newsletter published 8 times per year that contains summaries and digests of recent tribunal and court human rights decisions from all jurisdictions in Canada. The *Human Rights Digest* in PDF will be available in the rural members' section with links to the cases that appear in the CHRR. The first issue will be available in April 2006. Print copies of the *Human*

Rights Digest are available in the Regina and Saskatoon libraries.

LawSource

The original two-year contract for *LawSource* for rural members expired January 2006. Implementation of the new two-year contract should have been seamless for our rural members.

The library staff are able to provide computer searches for your client files using *LawSource* on a charge-back basis. The staff will also support any pro bono work in which you may be involved. You must identify your request as pro bono work at the outset of your request in order to receive the computer search at no charge.

Please contact the library's reference staff for assistance using any of the online resources.

In Memory Of

Edwin Robinson, who passed away suddenly in Regina on December 27th, 2005 at the age of 72. Mr. Robinson attended the University of Saskatchewan in Saskatoon and was admitted to the Bar in 1958. After University he moved to Lethbridge and was a newscaster, and later as a sportscaster on CJME in Regina and was known as "The Voice" of LIT, announcing the Luther Invitational Tournament for 51 of its 53 years. In 1973 he opened a successful real estate law practice until his retirement in May of 1991. Mr. Robinson enjoyed flying, model railroads, boating and fishing.

Mr. Robinson is survived by his sister, Norma Jean Cook, and numerous nieces and nephews.

Centennial 2007

by Susan Baer, Director of Libraries

A History of Presidents

The president of the Law Society provides leadership during a one-year term. Since our Centennial is almost upon us, there have been almost one hundred presidents in our history. In a series of entries in the Benchers' Digest, we will acquaint you with the names of our presidents of the Law Society of Saskatchewan. You may discover a past president in your family lineage! Part of the important information compiled by Iain Men-

19, 1907. For most of 1907, Norman D. Beck, president of the North-West Territories Law Society would have presided over meetings until the elections. For the few weeks remaining in 1907, Edward Elwood, formerly the vice-president of the North-West Territories Law Society, became the first elected president and served for the first full year in 1908.

The text *Pioneers and Prominent People of Saskatchewan* published in 1924 is a collection of biographical sketches of individuals who con-

was in partnership with Sir Frederick Haultain under the firm name of Haultain & Wood. He also held the position of Deputy Attorney General from 1904 – 1906. His father was in the military being a graduate of West-point. His uncle was the Surgeon General in the US Army and his family is related to Jefferson Davies, who was president of the US Confederacy. In his career, he also joined the NWMP and was drafted to Fort Macleod. He founded the third newspaper to be published in the NWT

1908	Edward L. Elwood	Moosomin	1919	Norman Mackenzie, K.C.	Regina
1909	Norman Mackenzie, K.C.	Regina	1920	J.F. Frame, K.C.	Regina
1910	Hon. W.B. Willoughby, K.C.	Moose Jaw	1921	William Grayson, K.C.	Moose Jaw
1911	John A.M. Patrick, K.C.	Yorkton	1922	W.W. Livingstone, K.C.	Battleford
1912	C.E.D. Wood	Regina	1923	E.B. Jonah, K.C.	Regina
1913	Herbert Acheson	Saskatoon	1924	Henry L. Jordan, K.C.	Saskatoon
1914	Oliver S. Black, K.C.	Weyburn	1925	Daniel Buckles, K.C.	Swift Current
1915	James Balfour, K.C.	Regina	1926	L.T. McKim, K.C.	Melville
1916	P.E. Mackenzie, K.C.	Saskatoon	1927	F.C. Wilson, K.C.	Yorkton
1917	R.R. Earle, K.C.	Battleford	1928	H.J. Schull, K.C.	Moose Jaw
1918	A.L. Gordon, K.C.	Regina	1929	A.E. Bence, K.C.	Saskatoon

tiplay, Q.C. in the *History of the Law Society of Saskatchewan* currently being edited is a list of presidents of our Society from 1908 to the present.

The chart derived from the appendix of the *History* begins in 1908 which requires a brief explanation. The enabling legislation which created the Law Society was The *Legal Profession Act*, S.S. 1907, c. 19. The Act was passed in April 1907 and proclaimed in force September 16, 1907. The first benchers elections occurred in November 1907, with the first benchers meeting held on December

tributed to the development of Saskatchewan. The selection of lawyers includes some of the presidents listed above. The standard format of full name, date of birth, parentage, family, positions held and personal interests occupies approximately half a page for most entries. It is enough information to satisfy the curious and pique the interest of researchers.

For example, our fifth president, Charles Edward Dudley Wood, also became a judge of the judicial district of Weyburn in 1913. Prior to that, he

called the *Macleod Gazette* which was published from 1882 to 1903. This brief insight into C.E.D. Wood's background paints a life of varied interests and talents.

The textbook can be borrowed from the Regina library. Ask for call no. FC 3505 .P66 1924 R. Or, from your desktop, the entire text can now be found at www.rootsweb.com/~cansk/P-PP-SK/. An array of biographical sketches of our members will also be included in the *History* book which will be published during our Centennial year.

Law Society Libraries

by Sarah Sutherland, Saskatoon Librarian

Legal WebCites

The Legal Information Institute (LII), a project of Cornell Law School, was the first organization providing free access to the law online. It was founded in 1992 with a grant from the National Center for Automated Information Research.

LII (Legal Information Institute, Cornell University Law School) www.law.cornell.edu

The LII has been very influential, creating the first web browser for use with Microsoft Windows called Cello; creating standards for presentation and functionality of electronic legal documents; starting the first legal current awareness service distributed by email; and establishing an audience comprised of legal professionals, educators, and the public both within the United States and internationally. When Australian researchers wanted to establish the organization that became AustLII in 1995, they asked to use the name "Legal Information Institute" as it was already so well-regarded.

The LII has extensive collections in US federal and state legislation. In order to access them, follow the **Constitutions & codes** link on the left side of the homepage. Materials are available under the following headings:

- US Code
- US Constitution
- Code of Federal Regulations
- Federal Rules of Civil Procedure
- Federal Rules of Criminal Procedure
- Federal Rules of Evidence
- Federal Rules of Bankruptcy Procedure
- Uniform Commercial Code
- Other Uniform Laws

· State Constitutions & Codes

The US Code is easy to access: it is arranged according to title, subtitle, and section. The update information is a particularly nice feature: it is posted on every page of the displayed Code on the upper right. This date is the date the Code was forwarded from the House of Representatives. It is also possible to update sections of the Code to the current version. This is done by clicking on the link called **Updates** on the right side of the page displaying the section. This synchronizes the LII's servers with servers at the House of Representatives and Library of Congress to check for newer versions.

State legislation is also available and is organized by jurisdiction. The statutes, regulations, bills, and constitution of each state are available with links to other free legal sources for that jurisdiction, such as attorneys' general sites. Materials are also included for territories and affiliated jurisdictions including Guam, Northern Mariana Islands, Puerto Rico, and the US Virgin Islands.

The LII has a very strong collection of US Supreme Court Decisions. Coverage for this collection is exhaustive going back to 1990, and 300 of the most important historical decisions are included from dates prior to 1990. This collection also includes information on cases before the Court, the Court's schedule, and Court rules. Federally the LII also includes decisions from the Court of Appeals, but the coverage differs among the circuits. For example, the First Circuit has coverage since 2000 to the present, while the Fifth and the Seventh Circuits have coverage since

1992 to the present. Where they are available, alternate sites are linked, which sometimes provide wider coverage. The LII also includes decisions from district and bankruptcy courts and courts of special jurisdiction, including the US Tax Court, US Court of Federal Claims, US Court of Appeals for Armed Forces, US Court of Appeals for Veterans Claims, and US Court of International Trade.

Decisions from state courts are also available, but they vary in coverage and scope. Judgments from all the state supreme courts are included, as are judgments from many courts of appeals. Many jurisdictions also include court rules and information on the judiciary. Dates available vary, but the coverage information is posted beside the link.

The LII also includes topical collections. One of its strongest is on legal ethics. To access this collection go to the link called **LII Topical Libraries** and choose **American Legal Ethics Library**. This collection includes rules and codes of conduct for all the states; materials from the American Bar Association; and narratives of the law, prepared by academics and practitioners, that discuss actual application of ethical principles for most of the major jurisdictions. The LII's other major topical collection is on the subject of social security. This collection compiles *Martin on Social Security*, a leading text on the subject; a glossary; statutes; bills; regulations; judgments; and links to other web-based sources.

The LII also produces several current awareness services. The "liibulletin," a free email based current awareness service, provides

information about decisions from the US Supreme Court within hours of their release. The other service is "Supreme Court previews" which explores cases currently before the US Supreme Court and provides background information and editorial commentary. Both of these services are linked from the LII's homepage on the left side under "liibulletin," with instructions on how to subscribe. The LII homepage also includes current awareness legal news stories, with

links to relevant legislation, previous decisions, and editorial commentary.

Like all the LII's, the LII endorses the neutral citation standard and provides guidance on its application in an American context. The guide is linked from their homepage on the left under the link **Introduction to Basic Legal Citation**.

The LII continues to develop new capabilities and projects. One exciting current project is *Wex*, an online dictionary and encyclopaedia using wiki

technology and written by volunteer legal experts. This is linked from the homepage under the heading of **Law about . . .** and the subheading **Lexicon**. *Wex* includes both articles about legal concepts and definitions.

After fourteen years, the LII is still developing. It is expanding its subject collections, developing its site to make research easier, and increasing international content. The LII is an excellent resource for American primary law online.

Rulings

Chapter IX - "The Lawyer as Advocate" – Communicating with an Excluded Witness, February 2006

Facts:

Lawyer A, representing one party before a tribunal, asked for a ruling from the Law Society of Saskatchewan Ethics Committee to consider "the nature, extent and circumstances of permissible contact between a solicitor and a witness who has been excluded by Order of a tribunal or Court".

Lawyer A indicated that opposing counsel, Lawyer B, spoke with two excluded witnesses that were his witnesses about matters which had occurred in the Courtroom. Lawyer A had cross-examined one of Lawyer B's witnesses and during a break, Lawyer B spoke with two excluded witnesses. Lawyer A suggested that Lawyer B was coaching the witnesses to avoid the pitfalls of cross-examination questions the prior witness had faced.

The Ethics Committee is asked to decide whether or not Lawyer B's contact with his excluded witnesses after cross-examination by Lawyer A of the preceding witness was appropriate.

Ruling:

A lawyer can pursue in his/her next witness a direct line of question in an attempt to minimize damage which

may have been caused by a line of cross-examination earlier without ever having had a conversation with that witness. The prohibition is on the lawyer discussing, expressly or impliedly, with an excluded witness any evidence which was given in Court while they were excluded. The Ethics Committee, in particular, would cite Gavin MacKenzie, *Lawyers & Ethics Professional Responsibility and Discipline*, Carswell, 4.15, page 4-42:

"Lawyers must not discuss with witnesses who have been excluded, evidence that has been introduced in their absence. In a 1983 Ontario case, Justice Reid emphasized that Courts must rely heavily on counsel as officers of the Court to ensure that orders excluding witnesses are carried out. Lawyers must inform witnesses who are not present when the order was made of the order's existence and meaning. They should also instruct witnesses not to allow themselves to become familiar, directly or indirectly, with testimony already given.

A lawyer may nevertheless question a witness who has been excluded and who has not yet testified, about facts in evidence and the contents of documents that have been marked as exhibits, as long as the lawyer does not disclose what was said in Court. In other words, the lawyer is precluded only

from divulging evidence already introduced, not from preparing witnesses to testify."

Chapter IV – "Confidential Information" - Contacting Doctor Without Specific Authorization, February 2006

Facts:

The complainant was in an employment dispute with his employer and complained about the employer's counsel. The employer's counsel, along with counsel for the employee, sent a joint letter to the employee's doctor for a report about the employee's fitness to return to work. Counsel for the employer, then wrote 4 or 5 more letters to the doctor directly without further consent of the employee or the employee's counsel.

The Ethics Committee was asked to decide whether or not counsel for the employer, should have obtained further consent of the employee/employee's counsel before writing letters to the doctor directly.

Ruling:

The Committee was satisfied that the employer's counsel did not do anything to gain any advantage speaking directly to the Doctor without consent of the employee/employee's counsel. However, the Committee was

of the opinion that it would have been prudent, in this situation, for the employer's counsel to notify the employee's counsel that he wished to obtain further clarification from the doctor.

Chapter V - "Impartiality and Conflict of Interest Between Clients" – Acting Against Former Client in Related Matter, February 2006

Facts:

The husband, in a family law matter, complained that his former lawyer was in a conflict of interest. The husband indicated that he had the lawyer represent him in his divorce and now his ex-wife was represented by the same lawyer. The lawyer responded that he was not in a conflict of interest in acting to collect payments on a settlement agreement for the wife despite the fact that his firm acted for the husband on the original settlement.

The issue for the Ethics Committee was whether or not the lawyer was in a conflict of interest in acting for the wife in the family law matter to collect matrimonial property payout amounts when his law firm previously acted for the husband in negotiating the original agreement.

A December 2000 Professional Conduct ruling in Chapter V of the Rulings section of the Law Society of Saskatchewan Handbook, indicated that a lawyer should not act in a cost collections matter where he was pre-

viously acting in the matter on which costs arose.

Ruling:

Enforcement of a settlement agreement against the party for which the lawyer's firm previously acted is not an "unrelated matter" as per The Code of Professional Conduct and the Committee was of the opinion that the lawyer in this situation was in a conflict in attempting to enforce that agreement as against the former client.

Acting Against Former Client

8. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person.⁸ (emphasis added).

Chapter IX - "Lawyer as Advocate" – Lawyer to Ensure Accuracy in Affidavits, February 2006

Facts:

A prosecutor brought forward a complaint about defence counsel indicating that he "acted unprofessionally

in representing his client during the course of a proceeding before the Court of Queen's Bench". The prosecutor indicated that defence counsel swore a false affidavit that he had not received full disclosure when it was the prosecutor's position that defence counsel had, indeed, received full disclosure. Defence counsel applied to Court for further disclosure and the Court denied the request. Defence counsel denies misleading the Court or filing an affidavit which was untrue. The matter was referred to the Ethics Committee to rule on the question of whether or not defence counsel's client provided a false affidavit which was designed to mislead the Court into believing that the Crown had not provided full disclosure when, in fact, it had.

Ruling:

The Ethics Committee would like to remind defence counsel to be scrupulously accurate in drafting affidavits to be signed by him or his clients. The affidavit in question, paragraph 5 and the letter of June 2nd, 2003 from defence counsel to the office of the crown do not correspond exactly. This discrepancy was corrected by the Crown's affidavit in the same matter before the Courts. It does seem that the paragraph was poorly drafted, however, the Ethics Committee is of the opinion that there is no conduct meriting any sanction by the Law Society, particularly as the matter was before the Court and was dealt with formally by the Court three years previously.



BENCHER ELECTIONS

2006 is an election year for Benchers of the Law Society of Saskatchewan.

Members are encouraged to put their names forward or
convince good candidates to stand for election.

Female and Aboriginal lawyers are under-represented as Benchers.

Equity Ombudsperson

The Office of the Equity Ombudsperson is committed to eliminating both discrimination and harassment in the legal profession.

If you are a support staff, articling student or lawyer within a law firm, you can contact the Equity Ombudsperson, Judy Anderson, for advice, information and assistance. All information is confidential.

This office is not a lawyer referral service and cannot provide legal advice. Call **toll free: 1-866-444-4885**.

This office is funded by The Law Society of Saskatchewan.

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The Law Society of Saskatchewan
1100, 2500 Victoria Avenue
Regina, Saskatchewan
Canada S4P 3X2
Telephone (306) 569-8242
Fax (306) 352-2989
e-mail: reception@lawsociety.sk.ca
