

# BENCHERS' DIGEST



Volume 21, Issue Number 2

April, 2008

## *Pro Bono Law Saskatchewan Inc.*

*by Pamela Kovacs, Executive Director*



*Pam holds a Bachelor of Commerce degree from McGill University, having completed double concentrations in International Business and Strategic Management. She studied law at the University of Saskatchewan and was called to the Bar in 2006, articling and then practicing with McKercher McKercher & Whitmore LLP in Regina. As a law student, Pam co-directed the Saskatchewan Pro Bono Students Canada (PBSC) program for two years and volunteered for numerous pro bono placements. During her final year of law school, she worked part-time for the Restorative Circles Initiative and currently chairs the CBA Saskatchewan and*

*National Pro Bono Committees as well as several sub-committees. Pam participated in the work of the Saskatchewan Task Force on Unrepresented Litigants and coordinates and volunteers with the Regina Free Legal Clinic. She has published a number of articles on pro bono work and received the CBA Young Lawyers Pro Bono Award in 2006.*

Pro Bono Law Saskatchewan Inc. (PBLs) is a new non-profit charitable organization that was formed in early 2008 at the initiative of the Law Society of Saskatchewan. As the new Executive Director of PBLs, I look forward to participating in this challenging and exciting initiative. PBLs has been established to improve access to justice within the province by creating, facilitating, and promoting opportunities for lawyers to provide high-quality *pro bono* legal services to persons of limited means.

Saskatchewan is the fourth jurisdiction in Canada to recognize the benefits of and adopt a coordinated approach to *pro bono* service delivery. Similar to other umbrella *pro bono* organizations in Ontario, British Columbia, and Alberta, PBLs will operate under several guiding principles:

a. *pro bono* services are meant to complement, not replace, an adequately funded legal aid system;

- b. *pro bono* services should be primarily directed at providing advice and representation to persons who cannot afford to pay for these services; and
- c. *pro bono* service should be endorsed and encouraged within the profession as a professional responsibility shared by all in the profession.

In practical terms, initial efforts will focus on the following areas:

1. developing opportunities for lawyers to engage in organized *pro bono* programs (i.e. free legal clinics, roster programs);
2. improving delivery of *pro bono* legal services by coordinating and integrating existing *pro bono* programs and developing best practices;
3. ensuring province-wide access to high-quality *pro bono* legal services to persons of limited means by:
  - a. supporting and ensuring the quality of existing *pro bono* programs; and
  - b. fostering the development of new *pro bono* programs where needed;
4. enhancing the growth of a *pro bono* culture within the Saskatchewan bar by raising awareness among lawyers of the need for *pro bono* services and

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the benefits of providing the same;

5. supporting the work of *pro bono* lawyers through resources designed to facilitate *pro bono* work; and
6. raising awareness of the availability of *pro bono* legal services for qualifying individuals among the general public thereby

enhancing the reputation of the legal profession.

I am eager and excited to work with Saskatchewan lawyers to design and deliver effective *pro bono* services and to recognize and promote these contributions by the profession. I also look forward to working with law firms and assisting with the development of firm *pro bono*

policies. Suggestions and new ideas are always welcome and I can be reached at the Law Society of Saskatchewan at 569-8242 or [p.kovacs@lawsociety.sk.ca](mailto:p.kovacs@lawsociety.sk.ca). The official launch of PBLs will occur in late Spring 2008 with the introduction of a website and programming. Stay tuned!

## *New Legal Counsel*



The Law Society of Saskatchewan is pleased to announce that Tim Huber has assumed the role of Counsel for the Society.

Tim is a graduate of the College of Law at the University of Saskatchewan. After receiving his LL.B. in 2001, Tim completed his articles at Robertson Stromberg in Regina. He was called to the Bar in 2002 and continued to practice at Robertson Stromberg, and later Robertson Stromberg Pedersen, as an associate with a litigation focus.

As part of his practice, Tim was able to gain prosecutorial experience as a standing agent for the Federal Crown for the purpose of prosecuting drug and tax offences under Federal statute. In his last two years with Robertson Stromberg Pedersen, Tim also became heavily involved in child protection law acting on behalf of the then Department of Community Resources.

Outside the practice of law, Tim sits on the Board of Directors for the Regina Humane Society and the Alzheimer Society of Saskatchewan.

## *Late Filing Penalties*

*by John Allen, CA*

At Convocation held in December 2007 and February 2008, the Benchers approved a number of changes intended to encourage members to meet filing deadlines and reduce the amount of staff time currently required for follow-up. The changes included increasing or implementing penalties for:

### **1. Late Submission of Annual Reports**

This includes the TA-2 (Power of Attorney), TA-3 (Practice Declaration) and TA-5 or TA-5S (Accountant's Report). The Rules have been revised to increase the penalty from \$100 per month per partner, to \$100 per month per partner for the first month, and \$400 per month per partner for each subse-

quent month [please refer to Rule 1205 (2)(a)].

### **2. Late Filing of Commencement or Exemption Report**

This includes the TA-1 (Commencement Report) or TA-7 (Exemption Report) required to be filed within 30 days of commencing practice or ceasing to practice law with a firm covered by an Accountant's Report. The penalty in this area has been increased from a \$50 one-time penalty, to \$100 per month, multiplied by the number of partners.

### **3. Late Filing of Monthly Reports**

Some members/firms are required to file certain financial information

with the Law Society on a monthly basis (please refer to Rule 1220). In many cases, there has been little or no incentive for this information to be filed on time. Rule 1225 now provides for a penalty of \$100 per month per partner for late filing of monthly information.

The Benchers also approved an appeal process to ensure that members experiencing unusual circumstances, for example, hospitalization, can appeal a penalty in writing within 15 days of assessment.

If you have any questions regarding any of the above changes, please contact John Allen at the Law Society office (306) 569-8242.

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## *Highlights of the Meeting of the Benchers held February 7th and 8th, 2008*

### **Open Convocation**

The Benchers officially adopted a policy opening Convocation to the public. The Law Society's mandate is protection of the public. In order to earn and keep public confidence, the Law Society must ensure that the process is open and transparent. The objective is to provide both the public and our members with access to all information, unless doing so would be inconsistent with privacy or administrative fairness. The Open Convocation Policy is located in the "What's New" section of the Law Society website.

### **Model Rule on Client Identification and Verification**

Canada is a member of the Financial Action Task Force, an international body requiring members to compel non-financial intermediaries such as lawyers to comply with client due diligence rules. In furtherance of its commitment, Canada has

enacted the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and regulations. The Federation of Law Societies has challenged the Act because of the potential to violate solicitor-client privilege. The Federation of Law Societies of Canada believes that only the provincial Law Societies have the jurisdiction to regulate the profession.

As an alternative to litigation, the Federation has drafted model rules which would satisfy many of the requirements in the federal regulations, but also satisfy concerns for privilege. The Law Society has approved the Model Rules on Client Identification and will probably be adopting those Rules before December 31, 2008. Many of the requirements of client identification are fairly routine in most law offices. However, there will be an obligation on lawyers to both collect information and store it for a period of years. More information on this matter will follow when the Rule is adopted.

### **Model Code of Conduct**

The Federation of Law Societies of Canada has drafted a Model Code of Professional Conduct. With the national mobility for lawyers, it is important to have a single code of conduct across the country. The Law Society of Saskatchewan has given approval in principal to the Federation's Model Code.

### **Rule Amendments**

Rules 1205, 1220, 1225 and 1230 were amended to increase the penalties for late filing of trust account forms. A small number of lawyers are habitually delinquent in filing forms, and there is a significant administrative cost in enforcing the Rules. The increased penalties are intended to act as a disincentive to late filing.

### **Criminal Justice**

Scott Hopley was appointed to the Round Table on Criminal Justice.

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## **JUDICIAL APPOINTMENTS**

**Geoffrey Dufour** has been appointed a judge of the Saskatchewan Court of Queen's Bench for Saskatoon. Mr. Justice Dufour received a Bachelor of Laws with distinction from the U of S in 1987 and was admitted to the Saskatchewan Bar in 1988. Before his appointment, he had been employed with Dufour Scott Phelps & Mason since 1999. In 1992, Mr. Justice Dufour had been a sessional lecturer for Environmental Law at the College of Law in Saskatoon and continues to lecture at several continuing legal education seminars on environmental law and the media.

**Peter Whitmore, Q.C.**, has been appointed a judge of the Saskatchewan Court of Queen's Bench for Regina. Mr. Justice Whitmore received a Bachelor of Laws in 1974 from the U of S and was admitted to the Saskatchewan Bar in 1975. He also received a Bachelor of Commerce from McGill University in 1971 and a Doctorate of Canon Law in 2004 from the University of Emmanuel College in Saskatoon. Before his appointment, he had practised with McKercher McKercher & Whitmore since 1989. Mr. Justice Whitmore's expertise is in corporate law, commercial law, financing law and real estate law.

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## Lawyers Contacting Clients When Leaving A Firm

by Donna Sigmeth, Deputy Director/Complaints Counsel

We have received complaints and concerns from time to time about departing lawyers contacting clients of the firm to advise that they are leaving/have left and where they are going. I will attempt to set out some guidelines which have been approved by the Ethics Committee of the Law Society of Saskatchewan which may assist in these situations.

Chapter XII of the Saskatchewan *Code of Professional Conduct*, Commentaries 9 through 13 indicate that lawyers should behave civilly and avoid "unseemly rivalry" as it is the client's choice as to the lawyer who will represent them.

The Law Societies of British Columbia, Alberta and Manitoba all have a section in their respective *Codes of Professional Conduct* dealing with lawyers leaving a firm. All three *Codes* indicate that it is the client's decision whether to stay with the law firm or go with the departing lawyer. The *Codes* further seem to indicate that there is a duty on the lawyers in question to inform all clients for whom the departing lawyer was the responsible lawyer, of that client's right to choose who will continue to represent them. It is preferable that a letter to the clients be sent jointly by the departing lawyer and the law firm, however, in the absence of a joint announcement, the announcement or notification should be provided by both.

In the case of *Assie v. Institute of Chartered Accountants of Saskatchewan, 2001/SKQB 396 (CANLII)*, a member of the CA's institute challenged the constitutionality of a bylaw which restricted members in advertising or solicitation. The bylaw was struck down as infringing the member's right of freedom of expression under section 2(b) of the Charter.

Interestingly, at paragraph 28, the applicant argued that other professions such as lawyers "are not prohibited from soliciting clients of fellow lawyers and would not prohibit, per se, a letter to, among others,

clients of other lawyers pointing out that the advertising lawyer is prepared to offer a particular service and the price of that service". The applicant was successful and the bylaws in question were declared invalid as they contravened section 2(b) of the Charter. Thus, the discipline committee of the Chartered Accountants Institute was prohibited from proceeding with the hearing of the complaint against the applicant for breach of that particular bylaw. In paragraphs 39 and 40, Justice Smith stated as follows:

*"Some of these passages and especially those italicized by me, suggest that any competition for clientele among chartered accountants is per se unseemly and unprofessional. This view, in my view, is inconsistent with the decision in Grier and Bratt discussed above, both of which clearly approved, as in the public interest, the publication of price quotes for professional services so long as these are not otherwise in violation of legitimate rules designed to restrain misleading professional advertising."*

*"I do not believe that prohibitions or limitations to marketing by chartered accountants can be justified solely on the basis that they prevent competition among or between chartered accountants for clients. Competition becomes "unseemly" or unprofessional when it is misleading, contravenes good taste, makes unfavourable reflections on the competence or integrity of another member, or includes subjective claims of superiority that cannot be substantiated. All of these evils are amply covered by Bylaw 217.1...Bylaws 214 and 301.2 are clearly intended to go beyond the restrictions in Bylaw 217.1 and, in doing so, are broader than is required to protect the legitimate objectives of maintaining professional standards and to avoid misleading potential clients."*

The American Bar Association Center for Professional Responsibility (*Legal Ethics: The Lawyer's Deskbook on Professional Responsibility, 2006 - 2007*, by Ronald D. Rotunda and John

S. Dzienkowski, Thomson West) at pages 11-12 agrees with this position in that "*Clients are not merchandise; they have the right to follow the lawyer when she changes law firms.*" The American material essentially indicates that a lawyer leaving a law firm may solicit clients on whose matters he/she had previously worked but those arrangements should not be made prior to the lawyer leaving the firm or by using firm resources to solicit clients for the move. [See 1985 Law Society of Saskatchewan Professional Conduct Ruling which raised similar issue about misuse of firm resources or time to solicit clients for an upcoming move]. The material also indicates that the departing lawyer is not prohibited from notifying current clients that she is leaving one firm and joining another. Such conduct is permitted because the departing lawyer has a present professional relationship with these clients. She may similarly inform clients with whom she has a family or close personal relationship. Although much more detailed, the American Bar material indicates that (a) it is the client's choice as to whether to follow the departing lawyer or to stay at the old firm and (b) as long as the departing lawyer does not abuse the resources of the firm or mislead the client, it is acceptable to contact the client to notify them of the move.

The Federation of Law Societies draft *Model Code of Conduct* appears to be identical to Saskatchewan's *Code of Professional Conduct*, in section 2.07 Commentary as follows:

*"When a law firm is dissolved it will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should*

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*act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client.”*

However, the *Model Code* at 3.06 “Offering Professional Services” includes the same section as 7 (d) of the *CBA Code of Professional Conduct* as follows:

*“Lawyers may offer professional services to prospective clients by any means except means: (d) that are intended to influence a person who has retained another lawyer for a particular matter to change that person’s lawyer for that matter unless the changes are initiated by the person or the other lawyer”.*

I would argue that this restriction on soliciting another lawyer’s clients would not apply in cases where a lawyer was leaving a firm and obligated to give notice of his departure to the client for whom he had been working, and that the section was not intended to address such a situation.

In light of the number of times this situation has arisen recently, the Ethics Committee of the Law Society of Saskatchewan has suggested that implementing a lawyer/firm agreement to avoid such unseemly wrangling upon the departure of a lawyer from his firm would be highly advisable. The Law Society of British Columbia website [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca) has a basic precedent for such an agreement. As well, the British Columbia, Alberta and Manitoba Codes may also be of assistance. The Law Society of Saskatchewan will consider adding a section to the *Code*, or, pending the Federation of Law Societies’ *Model Code* potentially being adopted, the Law Society of Saskatchewan may await this event and add further clarification if necessary.

#### ***In Summary:***

1. It is the client’s right to be informed that a lawyer with

whom they are working is leaving a firm and to decide who will represent them.

2. It is advisable for the firm and the departing lawyer to send the clients a joint letter advising of the departure and their choice to stay with the firm or follow the departing lawyer.
3. In the absence of a joint letter, a departing lawyer may contact clients with whom he/she has been working directly after he/she leaves a firm to advise of his/her departure and new contact information.
4. It is advisable for law firms to have lawyer/firm agreements in place to deal with issues which may arise upon a lawyer’s departure.
5. It is advisable for a firm to adopt a protocol ahead of time including things such as joint letters to clients to be sent upon a lawyer announcing his/her departure.

## ***Revised Claim Reporting Form***

*by Stephen McLellan, Insurance Counsel*

Over the last couple of months, I have been busy reviewing claim files. As part of that review, I found that generally speaking, the Reporting Form did not encourage nor allow for much information to be provided by the insured.

For example, the insured’s view on liability is very important and useful

information; however, the only information on the lawyer’s view of liability was a checkbox (unlikely/possible/probable/definite). The revised form allows an entire page upon which to elaborate.

The form has now been revised and will be available on-line on the Law Society website (Members’ Section)

by clicking on SLIA (in green on the right-hand side).

The other change is that we are asking the insured to provide numbered and indexed copies of the relevant documents. This will allow us to access the documents in an orderly fashion and more quickly assess the merits of the claim.

## ***Centennial Essay Contest***

*by Susan Baer, Director of Libraries*

High school students from grades 10 to 12 were challenged to respond to the difficult question “do you believe that open and equal access to justice still exists or is it a thing of the past?” Over 65 students from around the province entered the contest. We would like to thank Jan Cowie for

coordinating and organizing the essay contest, and her fellow judges, the Honourable Mr. Justice C. F. Tallis (retired), Professor Beth Bilson, Q.C., University of Saskatchewan College of Law, and Val MacDonald from Farm Credit Canada.

The winning essay, written by Mitchell Anderson, a Grade 12 student in Meadow Lake, was published in the January Benchers’ Digest.

The second place essay, written by Dylan Hardy who is a Grade 12 student at Bishop James Mahoney High School in Saskatoon, is reproduced in this issue.

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## ***“Do you believe that open and equal access to justice still exists or is it a thing of the past?”***

By Dylan Hardy

Bishop James Mahoney High School – Saskatoon

Justice and the rule of law are essential to the functioning of Canadian society. During the past century there have been sweeping changes in the area of law. Citizens have been witness to the rise of bodies designed to regulate legal professionals, keeping the process honest and open. There has been legislation passed to ensure that all people, regardless of income have the ability to obtain legal services. Perhaps most importantly, the body of law has been developed to such an extent that all persons can rely on an equal and fair distribution of justice. All of these factors speak to a change in Saskatchewan. In the last one hundred years Saskatchewan society has benefited from an evolution in the justice system.

Organizations like the Law Society of Saskatchewan and its counterparts in the other provinces were formed to protect the citizens and their right to use the legal system without obstruction. Over the course of their history lawyers have sometimes been viewed negatively by the public. A few “ambulance chasers” may have damaged the image of an honest and upright lawyer. Despite this, citizens can rest assured knowing that abuses and political intrigue apply far more to shows like *Boston Legal* than to the typical courtroom. Regulatory bodies like the Law Society of Saskatchewan set and enforce standards for legal professionals. By doing so law societies remove barriers to justice like political interference, dishonesty, misuse of power and a lack of competency amongst those administering justice. By upholding integrity within the profession, the system as a whole is more accountable and better able to provide the services needed to the public. In this way, the legal organizations developed in the past one hundred years serve to safeguard the administration of justice to the people.

Throughout the past century the court has been challenged by individuals demanding more rights and protections within the legal system. One of the most notable lessons learned through this process was that many citizens required legal counsel in order to understand the offence they were charged with or to make a claim against another. By necessity, the legal process is a complex one that not every citizen can navigate intuitively. Canada’s laws have evolved to ensure that all individuals have equal access to justice. Section 10 of the *Canadian Charter of Rights and Freedoms* (1982) stipulates that citizens have the right to obtain advice from a legal professional, even if they cannot afford one (Heritage Canada, 2006). Organizations like the Saskatchewan Legal Aid Commission provide services in a number of areas surrounding criminal and civil law to those who cannot afford their own lawyer. They also provide advice and alternatives for those who do not qualify for legal aid (Saskatchewan Legal Aid Commission, 2007). Access to these resources and direct help is invaluable for many people seeking to use the justice system. Legislation and legal counsel have provided the people of Saskatchewan and of Canada better access to justice than in the past.

The legal system of today relies heavily on precedent, past decisions which have set the basis for today’s judgments. Precedent is an important part of the justice system because it allows a fairer administration of justice by creating consistency across geographical and time barriers. One hundred years ago the decisions of the courts in punishing the convicted, or in sentencing generally, were based primarily on the situation at hand and the judge’s personal interpretation of the law. Today, there is a well-developed “body of law” on which to base

decisions. What this means to the average citizen is simple. In a modern Saskatchewan court one can expect to receive generally the same treatment within the courts, similar opportunities for defense and if convicted, a comparable sentence as someone across the country or five years earlier. Precedent maintains a balance between the current events of the trial and the established norms within the justice system. Unfortunately, one hundred years ago society lacked a standard against which to measure the courts’ decisions. Canadians today have benefited from being able to access a system where they will be held to an objective scale rather than the arbitrary decisions of court officials.

Canadians are luckier than most when it comes to the law. Citizens enjoy ample protection of their rights and avenues to register complaints when they have been violated. Legal professionals are held to standards and are accountable to dedicated organizations. The average person doesn’t need to be a law student in order to muddle through the system because of the help they are legally guaranteed. In addition, the justice they obtain will be in keeping with years of legal precedent and so will be consistent and fair. Canada and its provinces are places of constant change. As the nation has shifted and the people began to demand more from the legal system, it has evolved to meet society’s needs. This evolution has been to the benefit of every person who favors even-handed and open justice. It is exciting to think that in only one hundred years law has come so far. Even more exciting is to imagine where it can be one hundred years from now.

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# Member's Responsibility

## Cheque Imaging by Financial Institutions

by John Allen, CA

The May 2007 issue of the Benchers' Digest contained an article by Ron Kruzeniski, Q.C. entitled "Member's Responsibility – Implementation of Cheque Imaging by Financial Institutions" (available on the Law Society website under "Publications"). Since implementation of this system is looming, this article is intended to update the members regarding any changes since the previous article and remind members that it is their responsibility to continue to meet Law Society requirements as the financial system changes.

### Update

Unfortunately, very little has changed since the May 2007 article.

The Federation of Law Societies of Canada continues to lobby for changes to the proposed system, particularly in the areas of quality, retention and access standards for digital images, but results of this effort to date have been negligible. For example, the Canadian Payments Association (CPA) has standards in respect to the capture of digital images (front and back and 120 dpi), but do not have standards with respect to the return of digital images to customers. Therefore, each financial institution is left to determine how digital images will be made available, how long they will be available and how much they will charge.

Although Law Society Rule changes have not been finalized to date:

- Firms will be required to obtain and retain images of both front and back of all cashed cheques for trust and general accounts.
- It would seem that 8 cheque images front and back (4 cheques) is the limit which can be read easily.

- If there are more than 8 images per page, it seems imperative to have the ability to view the cheque image on-line.

### Reminder

1. Keep in mind the issue of cheque imaging applies to cashed cheques for both trust and general bank accounts.
2. Original cancelled cheques must be obtained and retained for all accounts for as long as possible.
3. If/when your financial institution will no longer provide original cashed cheques, immediately ensure that images of both the front and back of each cheque is provided. If your financial institution can/will not provide a copy of both the front and back of each cheque (both general and trust), you will have no alternative but to change financial institutions immediately.
4. Next, determine if the financial institutions will provide cashed cheque information by:
  - (a) on-line internet access to cheque images; or
  - (b) CD-ROMS of cheque images; or
  - (c) photocopies of cheque images included with the bank statement;or some combination of these options.
5. If cheque images are provided by photocopy, check the quality of the copies received immediately. If there are problems, report them to the financial institution immediately and ensure quality copies are received (front and back).
6. If information is provided by on-line internet access or CD-ROMS, the member must

print a paper copy of the cheque image (front and corresponding back) ensuring copies made are of good quality.

7. Since original cheques will be destroyed, it is very important to check cashed cheque information to the bank statement immediately upon receipt or availability, and if any copies are missing, contact the bank and obtain a copy of the cheque immediately (front and back).
8. Copies of cheques (front and back) printed through direct internet access or from CD-ROMs described above or photocopies of cheque images received from the financial institution(s) must be retained by month (or period covered by the bank statement, if different). It is suggested that copies be filed in bank statement order in a binder or file.
9. Paper copies of cheque images received or printed (refer to items 5 and 6 above) must be retained for a minimum of 6 years (please refer to Rule 980).
10. Once cheque image copies are on hand, the bank reconciliation process can be performed in the usual manner.

Please note that each financial institution may differ significantly (particularly during the start-up phase) in services provided and also in charges for those services and your negotiation skills may be required.

Please be assured that we continue to monitor this issue on an ongoing basis through communication with the Federation and contacts in other provincial Law Societies. If you have any questions, please contact John Allen, CA at 569-8242.

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# *Retention, Storage and Disposition of Client Files*

by Rod MacDonald, Q.C., Practice Advisor

## **SEGMENT 2**

[Note the change from use of the word destruction to disposition in the title. Destruction is only one of several possible outcomes.]

Following are groupings of issues for consideration around retention, storage and disposition of client files:

- ? What is missing
- ? Comments

### **Legislative Issues**

- *Code of Professional Conduct*, Chapter VIII Preservation of Clients' property.
- Income Tax Act (Circular IC78-10R4)
- Personal Information Protection and Electronic Documents Act, S 8(8) and Schedule 1 (Canada)
- The Freedom of Information and Protection of Privacy Act (Sask.)
- The Land Titles Act, S. 80, 81, 83.

### **Client Issues**

- Who is responsible to keep the history? ie. mortgage instructions that require the lawyer to maintain the file indefinitely.
- How is ultimate disposition of the file covered in the instruction retainer?

- Is client input necessary as to ultimate disposition?
- What value does the history represented by the file have for the client or for your firm?
- What possible issues of conflict/controversy could arise in the future:
  - a) between client parties to a file;
  - b) between client and lawyer
- What is on the file that could speak to such issues if they arise? (Also see specific time period issues below.)

### **Electronic Data Storage Issues**

- Are you using technology that will allow retrievability of data for the appropriate length of time? ie. will you be able to get at and read this data 10 - 20 - 30 years from now?
- Is your electronic storage secure from intruders?
- What gets e-stored? material e-created? e-received? scanned?
- What is the value-for evidentiary purposes - of the data stored?
- Who can prove storage? Continuity? Accuracy?

### **Office Administration Issues**

- Who bears the cost of retention and disposition?
- Proper closing of a file is a key step toward eventual disposition.
- Identification and storage systems must interface with the open file systems.
- Is the physical storage location suitable to keep files clean, dry and secure?

### **Specific Time Period Issues**

- Can one rule fit all types of files?
- What are possible future dates for error/omission claims against the lawyer?
- When is the last possible date at which an issue from the file could arise and for which the file would be needed to establish facts or justify actions?

I would be glad to hear from you about ways that these issues can be addressed.

Segment 3 will reflect suggested approaches.

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## **Senior Life Members**

The Law Society of Saskatchewan is pleased to announce our 2008 Senior Life Members. Certificates will be presented at our Annual General Meeting in Saskatoon scheduled for the evening of Thursday, June 19th, 2008.

- Thomas Caldwell, Q.C.
- Roy Dickinson, Q.C.
- Duncan MacKenzie
- William Pillipow
- William Purdy
- Dr. Douglas Schmeiser, Q.C.
- Iain Mentiplay, Q.C.
- Leo Morgan



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## *Update from the Regina Library*

*by Susan Baer, Director of Libraries*

### **Neutral Citation**

In late 1999, the Saskatchewan Courts implemented the neutral citation which is used for citing Saskatchewan judgments which appear in any online environment. Saskatchewan was one of the first jurisdictions to fully implement the neutral citation in Canada. The neutral citation is now an integral part of the legal bibliography landscape, especially online.

The neutral citation was given its name because it is independent of any legal publisher's print or online services for citation. The citation is therefore "vendor neutral". The neutral citation is the best choice for citing cases from any jurisdiction, if it is available. The court assigns the neutral citation at the time the judgment is issued. It usually appears on the first page of a judgment. The neutral citation is comprised of three basic elements which appear after the case name in an abbreviated form: the year of the case, the jurisdiction and tribunal identifier, and an ordinal number. For example, Saskatchewan Crop Insurance Corp. v. Deck, 2008 SKCA 21. There is no punctuation surrounding the year.

Some commercial services use their own citation formats when referring to cases. You must be a subscriber to find the judgment using their citation. In your documents, facts, briefs, tribunal decisions, court judgments, the neutral citation should be used to identify clearly a judgment/decision. The library has prepared a citation guide which is located on the Law Society website under the Library Services tab ([http://www.lawsociety.sk.ca/newlook/Library/LegalResearch-Guides/TR\\_LegalResCiteCase.pdf](http://www.lawsociety.sk.ca/newlook/Library/LegalResearch-Guides/TR_LegalResCiteCase.pdf)). The citation guide provides instructions on how to cite a case when a

neutral citation, other printed sources, or a neutral citation are not present.

Some tribunals, such as the Automobile Injury Appeal Commission, have adopted a form of neutral citation for their decisions. The structure is similar to court judgments: 2008 SKAIA 3. If any administrative tribunals are interested in establishing neutral citations, making their decisions available on the Internet, and searchable through the CanLII interface, there are excellent materials available to provide guidance for moving to an online environment. The Canadian Citation Committee is responsible for the creation, maintenance and revision of the neutral citation in Canada. On its website, you can find several other relevant standards for creating decisions to use in an online environment: <http://www.lexum.umontreal.ca/cc-ccr>.

### **Renewal of LawSource**

The Law Society Library will continue providing desktop access to LawSource for rural members as a result of the current two-year agreement with Carswell. The LawSource access for rural members covers all rural members who are not part of Provincial Prosecutions or Legal Aid. The agreement now also allows us to provide access to urban members who have a mobility related disability. While urban members can access the equivalent services on CD-ROM at the Regina and Saskatoon libraries, urban members who are mobility challenged will be able to sign up for LawSource through the library services. Members will be required to follow a specific procedure before the user ID will be assigned.

The next phase in the negotiations with Carswell will be to provide Law-

Source access at the Regina and Saskatoon libraries for members' use. The library staff also continue to provide a research service using a variety of online and printed tools upon request.

### **Saskatchewan Judgments**

The look and feel of Saskatchewan judgments will be changing on the Law Society's website. The organization of the data from the frequently used link **New Judgments** will change in the next few months as the library migrates its fulltext judgment database to the CanLII platform. A listing of cases by each court will continue to be available. Significant judgments or those that receive media attention will still be loaded in the news on the Law Society's home page.

Links to the CanLII fulltext judgment record will be created from the Digest database. The links will open a new window so searchers can return to the Digest database without getting "lost". The library works closely with the Courts and the CanLII team to provide Saskatchewan judgments for all users.

### **Find a Lawyer**

Coming soon to the home page will be a directory of practising members of our Law Society. The directory will list members who are practising in and out of Saskatchewan with active or inactive status. It will be searchable in the same way as other databases on the Law Society's website. Members who are suspended, disqualified, or disbarred will not appear in the directory. The staff propose to update the directory content weekly. Look for an announcement via the Law Society's Email Broadcast Service (EBS).

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# Legal WebCites

By Peta Bates

The Canadian Legal Information Institute (CanLII) website added new features recently that save keystrokes and highlight the relevance of retrieved search results. The “remember my choice” and “most cited” options are reviewed below.

## **Canadian Legal Information Institute (CanLII)**

[www.canlii.org](http://www.canlii.org)

The initial CanLII sign-on screen asks for a choice of English or French interface. A new check-box has been added below these options called “Remember my Choice”. Click in this box once, make your language selection, and CanLII will bypass this

screen on subsequent visits, taking you straight to the search screen page.

More interesting is the new “most cited” feature. A search of Saskatchewan case law for spousal support in the same sentence as lump sum (“*spousal support*” /s “*lump sum*”) retrieves over 35 cases. These are ranked by relevance, that is, the number of times the search terms appear in the case. At the top of the case list are other sort options: by date (most recent first) and the new option “most cited”. This option re-sorts the case list with the most cited cases first.

The search results now include the number of cases across Canada that have cited each case. This number is an active link that will take you to the

list of citing cases. When you open one of these citing cases, the citation for the original case is an automatic search term, making it easy to locate the paragraph of the judgment that discusses the case.

The “most cited” option provides another way to interpret search results and to locate more relevant case law from Saskatchewan and other jurisdictions. The one caveat I would offer is that recent (and perhaps equally relevant) case law will be sorted near the bottom of the list since it has had less time to be cited. A combination of “relevance” and “most cited” searching is recommended.

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## **Rulings – February, 2008**

### **Chapter XIV, “Advertising, Solicitation and Making Legal Services Available” - Use of Firm Name and Trust Account in Fundraising, February 2008**

#### **Facts:**

A lawyer’s client posted the name and address of the lawyer’s law firm on a website and suggested that donations for the client’s legal fees could be made in person or by mail to the law firm. The donations so made were held in the law firm’s trust account and used against the client’s legal fees incurred with the law firm.

#### **Ruling:**

The Ethics Committee held that it may be appropriate to use a lawyer/law

firm’s name and trust account for purely charitable fundraising, that is fundraising that will not provide any direct benefit such as payment of legal fees to the lawyer/law firm. However, if the lawyer/law firm name and trust account are used in such a manner it would be necessary for the lawyer to comply with the applicable Rules of the Law Society of Saskatchewan and Chapters of the *Code of Professional Conduct* related to advertising. As well, it is important that the lawyer or law firm ensures it maintains control of any public communications in relation to the fundraising initiative.

However, it is not appropriate for a lawyer/law firm to permit the use of the law firm name and trust account, or be otherwise involved, in soliciting funds which will be used to pay the lawyer/law firm’s fees.

### **Chapter XII, “Withdrawal” - Advising Clients When Lawyer Leaves Firm, February 2008**

#### **Facts:**

An associate lawyer left a firm (former firm) to join another firm (new firm). The former firm complained that the departing lawyer, on the new firm letterhead, wrote to a client of the former firm indicating:

“I have relocated my practice to firm x and would welcome the opportunity to continue to service your needs...in anticipation of your decision to continue with my representation, I have enclosed a transfer authorization form for your execution together with a stamped, self-addressed envelope for your convenience. My direct number is

xxx-xxxx if you wish to discuss matters further.

I look forward to continuing our relationship.”

The former firm complained about the departing lawyer soliciting former firm clients.

**Ruling:**

The Ethics Committee wished to emphasize that it is always the client's right to choose who will represent him or her; whether to remain with the former firm or to follow the departing lawyer. The Ethics Committee recommends that a joint letter go out to clients from the former firm and the departing lawyer to advise the clients that the departing lawyer is leaving and that it is the client's choice whether to remain or to go with the departing lawyer. If the lawyers cannot come to agreement on a joint letter, the departing lawyer has a right to contact clients for whom he/she did work to advise that he/she has left the firm and where he/she is going. The Ethics Committee was of the view that such communications should be ‘informational’ in character. While the letter in question in this case was largely informational, it did ‘presume’ that the client would retain the departing lawyer. The departing lawyer could have used more advisory language so as not to be seen as soliciting the client.

The Ethics Committee would suggest that lawyers in this situation refer to the Law Society of British Columbia website material. The Law Society of British Columbia makes it manda-

tory for lawyers in this situation to send a joint advisory letter to clients when a lawyer is departing a firm.

**Chapter VI, “Conflict of Interest Between Lawyer and Client” – Obligation to Honor Trust Conditions Despite Being Adverse to Client's Interests, February 2008**

**Facts:**

Lawyer M acted as solicitor for the vendor in the sale of a business in 2004. Lawyer M accepted trust conditions to obtain a number of Clearance Certificates from Canada Revenue Agency (CRA) and Letters of Good Standing from various agencies. Lawyer M maintained a \$14,000.00 holdback. Lawyer M had the authorization of her client to contact CRA on his behalf. The client did not file income tax returns and holdback funds were held in trust for 4 years. Lawyer for the purchaser has now asked Lawyer M to contact CRA to attempt to obtain the purchaser a release with respect to any outstanding issues. Lawyer M is concerned that contacting CRA will trigger an audit on her client and was reluctant to speak to CRA about the client's failure to file income tax returns as it would be adverse to her client's interests.

**Ruling:**

The Ethics Committee notes that in this case the lawyer received written authorization from the client to

deal with CRA on his behalf. The Committee is of the view that as Lawyer M gave an undertaking to provide the clearances that she is bound personally to do so and has no alternative but to attempt to obtain those authorizations herself given her client's failure to do so, despite potentially adverse consequences for the client. The Ethics Committee recommends that Lawyer M contact the client in writing one last time to provide him with final warning that if he does not deal with CRA to attempt to obtain Clearance Certificates by a certain date that she will be bound by her undertakings to contact CRA in an attempt to obtain the Clearance Certificates for the purchaser. This way Lawyer M gives the client the first opportunity to remedy same before being forced to contact CRA herself.

**Chapter V – “Impartiality and Conflict of Interest between Clients” – Acting Against a Former Client in a Related Matter, May/June 2007**

Following this ruling, this matter was considered by Mr. Justice Koch in 2008 SKQB 62. An application for leave to appeal this judgment will be heard in April 2008.

Due to the lengthy content of this ruling, please refer to the members' section of the Law Society website at [www.lawsociety.sk.ca](http://www.lawsociety.sk.ca) for further information.

**E.M. Culliton Scholarship Endowment**

As a tribute to the former Chief Justice E. M. Culliton, an endowment was established by The Law Society of Saskatchewan to provide that in perpetuity a special scholarship is to be awarded for the pursuit of post-graduate studies in criminal law.

The value of the scholarship to be awarded in 2008 has not yet been finally determined, but the maximum amount available is expected to be \$10,000. Up to two scholarships may be awarded in any one year. **The deadline date for receipt of applications is May 12th, 2008.**

Application forms are available on our website at [www.lawsociety.sk.ca](http://www.lawsociety.sk.ca).

## *In Memory of*

**James Doak, Q.C.** of Victoria passed away on January 26, 2008. He is survived by his wife of 62 years, Shirley and his children, Russell and Graeme. He graduated from the University of Manitoba Law School in 1942, enlisted in the army after graduation and was appointed Lieutenant in the Royal Canadian Army Service Corp in Victoria. In 1944 he was dispatched to Holland to join the 5th Infantry Brigade. He received 9 military, civilian and foreign medals. Between 1945 – 1922 he practised law in three provinces.

**Patrick J. Bitz, Q.C.** of Saskatoon passed away on December 26, 2007. He is survived by his wife, Colleen and his children, Shane and Erin. Patrick attended the Royal Roads Military College in Victoria, B.C. but returned to Saskatchewan to the U of S to graduate from the College of Law. He practiced for 36 years and enjoyed litigation above everything else, however, he eventually changed his focus and practiced Family Law exclusively. Patrick was appointed Queen's Council in 2003.

**Derril McLeod, Q.C.** of Regina passed away December 12, 2007. He is survived by his wife of 57 years, Margaret and his children, Malcolm, Heather and Betty. Derril received his law degree in 1946 and was admitted to the bar in 1947. He received Queen's Counsel designation in 1962. His legal career spanned more than half a century and he was an avid supporter of the U of S and the U of R. Derril served on the U of S board of governors as Vice-Chairman from 1971 to 1974 and then became Chairman of the board of the new University of Regina. In 1983, he was elected the university's Chancellor and from his work at the U of R, he received an honorary Doctor of Laws degree in 1990.

## *Equity Ombudsperson*

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

If you are support staff, an articling student or a 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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Published by:  
The Law Society of Saskatchewan  
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