



Benchers' Notes

December 1999

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These Benchers' Notes cover the Adjourned Fall Term Convocation of Benchers, Call to Bar, held on October 19, 1999, and the Special Term Convocation of Benchers held on December 6, 1999. The Notes provide discussion of selected topics considered by the Benchers and other items of interest to the Bar.

Call to Bar - October 19, 1999



Three new members were Called to Bar on October 19, 1999.
They are: (l-r) Susan E Norman, Paul J Tobin, Jennifer D Blackmore

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Special Term Convocation

Use of the titles Treasurer and Honorary Secretary

At the Special Term Convocation, and on a motion from J David B Eaton, Benchers decided to discontinue use of the titles Treasurer and Honorary Secretary and replace them with the titles President and Vice-President. Mr Eaton argued, and Benchers agreed, that the traditional terms led to confusion amongst the public and that the modern titles, always permitted as an alternative under s.22 of the *Law Society Act*, would provide easier and more contemporary recognition of Law Society executive officers. While the change in titles will not become formally effective until January 1, 2000, for the purposes of these *Benchers' Notes* the new titles are used.

President's Report

The President, Dennis MacKay, reminded Benchers that every autumn the Atlantic Canada law societies meet to discuss a broad agenda of common interest. On Saturday, November 27, the Law Society of Newfoundland for the first time hosted the three other Atlantic law societies at meetings in St John's. In all, twelve representatives attended the meeting for a full day. Topics of discussion ranged widely from multi-disciplinary partnerships, trust account spot-audit programs, Bar Admission Courses and entrance requirements, the desirability of uniformity in Certificates of Standing issued for a member by a law society, inter-jurisdictional practice, and law libraries. The President stated that the meeting prompted vigorous discussion on a number of points and was very worthwhile.

The President noted that the recent collapse of the Seattle round of trade talks at the WTO meetings will not delay continuing WTO negotiations concerning trade in professional services, these including legal services.

In offering the congratulations of Convocation to Elizabeth Heneghan on her appointment to the Federal Court, the President indicated that Miss Heneghan's place at Benchers must be filled promptly under s.17 of the *Law Society Act*. Following discussion, Benchers voted to replace Elizabeth Heneghan with Marina Whitten, a member associated with the law firm Aylward, Chislett, Whitten in St John's. Ms Whitten ran in the last election for Benchers. Ms Whitten will serve the balance of Miss Heneghan's term of office.

Notice of Motion:

Amendments to Rule 6.01

The Executive Director, Peter Ringrose, provided background information to Benchers concerning the passing marks required on individual Bar Admission Examinations across Canada and also the Course passing average required in all other Canadian jurisdictions. He recommended to Benchers that the individual examination pass mark be increased from 50% to 60% and that the overall passing average be increased from 60% to 65%. He informed Benchers that these changes would bring the Newfoundland Bar Admission Course standards more into line with the Canadian experience generally. Benchers approved these recommendations, the changes to take effect for the 2001 Course.

The 2000 Budget: Certificate Fee Reduction, Insurance Fees Remain the Same. A Small Surplus is Projected for 2000.

In approving the 2000 Budget, Benchers reviewed a number of Budget items summarized in the following paragraphs.

Last year, Benchers approved a \$200 Certificate Fee increase to restore cash reserves to the level prior to the Glube Jewell Custodianship and to ensure that emergency reserves are equal to approximately one-half the annual Budget of the Law Society. For 2000, this Fee will be reduced by \$100, resulting in a Certificate Fee reduction from \$1,195 to \$1,095. At the end of 2000, cash reserves should be restored. The reduced Certificate Fee for 2000 places Newfoundland in the mid-range of law society membership fees across Canada.

Benchers were pleased to note that Insurance Fees will stay the same for 2000, now the third year in a row that fees have remained at \$3,800, this amount a substantial reduction from the \$4,893.00 paid by members in 1997. More information about the insurance program and about excess coverage is contained with the *LPIC Newfoundland News* included with this edition of *Benchers' Notes*.

Continuing with revenues, for 2000 Benchers eliminated the Inter-jurisdictional Law Firm Fee of \$750 per firm. Originally established in 1990 when added administrative burdens were anticipated to accommodate inter-jurisdictional law firms, the need for the fee has gradually reduced in recent years.



Increasing costs of administering the Bar Admission Course, added Course content and increased duration of the Course with attendant room rental costs persuaded Benchers that the Course should more closely reflect the expense to the Society for its operation. For 2000, Benchers approved a tuition fee increase for the Bar Admission Course from \$1,215 in 1999 to \$1,400 in 2000. This increased tuition fee still places the Newfoundland Course among the bottom half of all such tuition fees in Canada.

Concerning Budget expenses, Benchers were pleased to note that in many expenditure categories, such as telephone, printing, committee expenses, photocopier rentals, courier costs, and travel, projected costs are the same as, or lower than, for 1999. Taken together, Revenues and Expenses result in a modest projected surplus for 2000.

Changes in Status

Benchers approved the following applications for changes in status:

Applications to Elect Non-Practising Status

Joanne Budden

Cynthia Janes

Claude Sheppard, QC

Law Foundation Funding

This year, the Law Foundation was generous again in providing operating grants to several law libraries in the province. At the meeting of the Foundation held on December 13, the Board of Governors agreed to fund in part the acquisition budget of the Law Society Library with a grant of \$110,000 for 2000, and to provide grants of \$20,000 to the Law Library in Corner Brook and \$9,000 for the Law Library in Gander.

In addition to these funding grants, the Board agreed to provide funding of \$8,500 to Project Daisy to assist in the Project's ongoing work. The Foundation grant will be allocated to the purchase of recording equipment that will meet archival standards for recording; the balance of monies granted will be allocated to transcription costs for taped interviews and, as well, to preparing an index and cross-reference of taped interviews already transcribed.

Leviathan Unbound

Currie v MacDonald Dramatization

Project Daisy actors James Greene, QC, James Halley, and Mr Justice Kevin Barry re-enacted the famous case *Currie v MacDonald* to a packed house at the LSPU Hall on Tuesday evening, December 13. The actors portrayed, respectively, Mr Justice Sir Brian Dunfield, Robert S Furlong, KC, and James Power. John Joy wrote the scripts and read the part of the court crier, Bickford Codner. The sold-out house was delighted by the dramatization and then traded anecdotes and insights after the performance and over drinks in the LSPU gallery. The performance was preceded by drinks and hors d'oeuvres.

The case *Currie v MacDonald* served as a flashpoint in the Confederation debate. In it, members of the last Parliament of Newfoundland sued the Governor and the Commissioners to prevent them from proceeding with Confederation with Canada. The Plaintiffs in the case asked the Court to have the referendum, which supported the Confederation option with a narrow 52% majority, declared void. The argument before the Court, like the debate surrounding the issue itself, was animated. At the end of the day, Mr Justice Sir Brian Dunfield ordered that the Plaintiff's case be struck out and the action dismissed on the ground that the action was frivolous and vexatious and disclosed no reasonable cause of action.

Full text of the *Currie v MacDonald* decision is available in the 1947-1949 Newfoundland Law Reports, this volume reprinted by *Project Daisy* and the Law Society of Newfoundland in 1997 as part of the 500th Anniversary celebrations. The 1947-1949 Volume of the Law Reports was long considered by scholars to be lost because the printing press burned before the volume was printed; only one copy survived and was rediscovered in the early 1990's. This copy was photographed and reprinted from new plates.

Copies of the 1947-1949 Law Reports are available from the Law Society at cost, \$90.00 + HST.



New Law Society Act Passed

A new *Law Society Act* was passed by the House of Assembly on December 15, 1999. The new *Act* streamlines the discipline process, increases the number of elected and appointed Benchers, and makes a number of administrative improvements for the operation of the Law Society and to ensure compliance with inter-jurisdictional practices across Canada. One change will be immediately obvious to members: In 2000, members will no longer receive the Annual Practising Certificate; about \$3,000 will be saved in printing and administration costs. Members who require proof of practising status will still be able to obtain, when required, a Certificate of Standing from the Law Society at no cost.

The new *Act* is expected to be proclaimed early in 2000.

Advertising by Members

Several weeks ago the President struck an *ad hoc* Advertising Committee to respond to the view amongst many in the society that some members are not adhering to the Advertising Rules of the Law Society, specifically, Rule 8:01 and following, which addresses advertising standards directly.

Concerns have arisen because of claims of Experience in the practice of law, these claims being made on Web sites, and in print. In view of the 1990 Supreme Court of Canada decision in *Rocket v Royal College of Dental Surgeons of Ontario*, and in which the Court stated that a professional governing society has authority to regulate advertising to protect the public interest, the Committee has met twice and is reviewing the advertising Rules. The Committee will consider whether existing Rules should remain the same or be changed to accommodate current practice and the recent use of Web sites.

Correction of Last Benchers' Notes

The last *Benchers' Notes* stated that V Randell J Earle, QC, was the first member of the Law Society of Newfoundland to become President of the Federation of Law Societies. This statement was incorrect; Donald J Mercer, QC, was the first Newfoundland President of the Federation. Mr Mercer served in office during 1981-1982.

In Memoriam

Leslie R Thoms

Roll #266

Called to Bar February 23, 1966

Les Thoms, the High Sheriff of Newfoundland, died on December 5, 1999. Mr Thoms was a graduate of Dalhousie Law School and worked in private practice and served as the MHA for Grand Bank for several years before taking employment with the Department of Justice. He was appointed High Sheriff in 1988. Benchers and members extend their condolences to his wife, Andrée, also a member of the Law Society, and to their children, Michelle, Marc, Stephan and Eric.

Dennis G Browne

Roll #616

Called to Bar April 9, 1984

Dennis Browne died on November 20, 1999. Mr Browne was a graduate of University of New Brunswick Law School and until his death practiced with the law firm Patterson, Palmer, Hunt & Murphy. Benchers and members extend their condolences to his family and his surviving son, Mitchell, age 14 years.

*The Professionals' Assistance Program,
a support group for Lawyers,
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For further discussion or consultation, contact:

Rosemary Lahey, M.S.W., R.S.W.

Clinical Co-ordinator

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Educational Notes

Bar Admission Course

The Bar Admission Course will commence on Monday, January 17, 2000. Approximately 30 students from across Newfoundland and Labrador are registered to participate in the 2000 Course. The Bar Admission Committee and approximately 70 volunteer instructors are committed once again to making the Course a useful and instructive learning experience. The Course offers a unique opportunity for law students to come together and learn substantive and procedural information about Newfoundland law and practice from members of the Bar, the Judiciary and other professionals. The Bar Course is also an intensive learning experience. Students will receive substantive/procedural instruction in the areas of Family Law, Corporate/Commercial Law, Civil Procedure, Administrative Law, Real Estate and Wills, and Criminal Law and will write six examinations based on the Bar Admission Lectures, the Bar Admission Course Materials and Newfoundland statutes.

Along with the instruction on substantive topics, students will also receive presentations in areas such as risk management, the discipline process, trust accounts, and professional development. The Course is also strengthening its skills component, and this year students will receive presentations in advocacy skills, interviewing, negotiating and alternative dispute resolution, among other topics. As well, students will complete a written assignment in Ethics, the assignment to be discussed in the Ethics component of the Course.

From time-to-time the Law Society receives inquiries from members wishing to audit certain presentations in the Course. Should any member wish to audit a presentation, the member should contact Frank O'Brien at the Law Society to receive information on scheduling and the logistics of attendance.

Continuing Legal Education

On November 8 and 9, 1999, a seminar was held entitled *Mediation and Interest Based Negotiation for Lawyers*. This seminar was led by Sally Wells DiCarlo and Michael Keating, two lawyers from New Brunswick with expertise in mediation and negotiation training. The seminar was very well received, and responses from this sold-out seminar indicate a high level of

interest in mediation and negotiation programmes for lawyers. It is hoped that further education in these areas can be provided in future.

On December 13, 1999, a seminar was held entitled *New Legislation for the New Millennium*. Thank you to Pauline Butler, Christopher Curran, Peter Fitzgerald, Sandy Hounsell, Robert LeGrow, John Moore, Dianne Smith and Donna Strong who presented at this seminar, which was well attended and provided an excellent overview of significant legislative developments. It is hoped that such a legislative update can be offered on a regular basis.

The Joint Committee on Continuing Legal Education is continuing to develop programming for Winter and Spring, 2000. In the coming months, the Joint Committee on Continuing Legal Education has several seminars planned in various practice areas. These include:

1. On January 21, 2000, there will be a seminar involving prominent Toronto lawyer, Alan Gold. Mr Gold will be speaking on a number of topics of interest to practitioners, including the issue of experts in the litigation process and the effective use of technology for lawyers. This seminar will be of interest to both criminal and civil litigators.
2. On February 11, 2000, in conjunction with the CBA Mid-Winter Meeting, there will be a seminar in the area of Practice Before Appellate Courts. More details on this seminar will follow.
3. In late February/early March, a seminar is being scheduled on Advocacy Skills Training, led by presenters from the Advocates' Society of Ontario. More details will be provided in the coming weeks on this seminar.

Other seminars being planned for later in the Winter and early Spring 2000 include topics in Civil Litigation/Personal Injury, Administrative Law, Real Estate Practice and Computer Technology in the practice of law.

As always, the Joint Committee on Continuing Legal Education welcomes comments and seminar suggestions from members of the Bar. Members of the Joint Committee are: Maureen Ryan, Janis Byrne, Gerlinde van Driel, Brock Myles, William English, and Jeffrey Keefe.



Copyright Notice

December 14, 1999

FEDERATION OF LAW SOCIETIES OF CANADA COPYRIGHT NOTICE TO THE PROFESSION

As many members of the profession are aware, on November 9 1999, Mr. Justice Gibson of the Federal Court of Canada delivered reasons for judgment in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*. In this case, three of Canada's legal publishers (CCH Canadian Ltd., Canada Law Book Inc., and Carswell Thomson Professional Publishing) sought an injunction to restrain the Law Society from continuing to provide its custom photocopying service, whereby it makes copies of extracts of certain legal materials available to members of the profession and judiciary.

While the decision of the Federal Court dealt only with the Law Society's custom photocopying service, the Court's findings have important implications for all members of the legal profession. The Federation is issuing this Notice to summarize the Court's findings, with a view to clearing up some confusion that may have arisen because of conflicting press releases and reports concerning the decision. This notice also takes the opportunity to review new provisions in the *Copyright Act* and regulations relating to libraries, which came into force on September 1, 1999.

Part 1

FINDINGS OF FEDERAL COURT IN LAW SOCIETY OF UPPER CANADA ACTION

The key findings of the Court are as follows:

1. The Court found that there was no copyright in certain individual reported decisions as they appeared in law reporting services, nor was there a separate copyright in the headnotes for those decisions. While both findings were limited to the specific decisions at issue, the Court reached this decision based on an analysis of the requirement of originality in the context of the process of creating law reports of judicial decisions. The Court found that editorial enhancements and additions made by legal publishers, including headnotes, do not reflect a sufficient degree of creativity or originality as to provide copyright protection to such materials. Citing the U.S. Second Circuit Court of

Appeals decision in *Matthew Bender v. West Publishing*, the Court noted that creativity in the task of creating a useful case report can only proceed in a narrow groove because faithfulness to the original judicial decisions is the dominant editorial value.

Mr. Justice Gibson found that edited and enhanced versions of reasons for judgment are akin to compilations of data which the Federal Court of Appeal found in another case are not likely to exhibit indicia of the author's personal style or manner of expression. Applying this test in respect of the three decisions in issue, Mr. Justice Gibson found that the process of preparing reported judicial decisions lacks the "imagination" or "creative spark" that was essential to a finding of originality. Applying the same test, he also found that there was no separate copyright in the headnotes of the three cases in issue, nor in a case summary or a topical case index. At the same time, there was sufficient originality, creativity and ingenuity involved in creating an annotated statutory instrument and a textbook and legal monograph to find that such works were protected by copyright.

2. The Court reviewed various examples of copying of materials that were adduced in evidence and found two instances that represented the copying of substantial parts of protected works. The first example involved the copying of a 32-page monograph representing an entire chapter within a 713-page textbook. The second example involved the copying of 69 pages amounting to 93% of one chapter or 21% of the total pages of a 306-page textbook. Counsel for the Law Society had acknowledged at trial that the latter example was a mistake and should not have been copied in accordance with the Law Society's policy.
3. The Court found that there was no overriding public interest in the administration of justice or any basic constitutional values that would be impaired through recognition and enforcement of any copyright interests of the plaintiffs. The Court noted that there was no evidence before the Court to the effect that licenses would not be reasonably available to the Law Society or that the license fees would be prohibitive.



4. The Court found that the Law Society was not entitled to rely on the fair dealing defence with respect to any copies made available to members of the profession on the grounds that the copies made by the Great Library were for use by other persons. The Court noted that the newly enacted library exemption in the *Copyright Act* now sets out the intentions of Parliament with respect to the circumstances in which a library may make a copy of a work for another person.
5. The Court refused to exercise its discretion to grant an injunction to restrain the defendants from continuing to engage in its custom copying service. The Court noted in this regard that:

“the greater part of the plaintiffs’ claim against the defendant for copyright infringement has not been successful. Further, the success that the plaintiffs have achieved is of such a limited nature that I am simply not satisfied that it would be appropriate for me to exercise my discretion to grant any form of injunction to the plaintiffs as against the custom photocopy service of the defendant.”
6. The question of whether copyright subsists in a volume or series of law reports was not put in issue in this case. The judge also did not find it necessary to determine whether there is any Crown copyright in judgments in the form in which they are issued by a court (i.e., before any enhancements or additions are made by the publishers to include the judgments in a law reporting service).

The legal publishers have indicated that they will be appealing the decision of Mr. Justice Gibson.

Part 2

NEW LIBRARY EXEMPTIONS IN COPYRIGHT ACT

The following is an outline of the key provisions of sections 30.2 and 30.3 of the *Copyright Act*, and the related regulations, which set out the circumstances in which a library may provide copies of certain materials to patrons and other persons. This summary is only intended to highlight these provisions and libraries and other interested persons should review the actual provisions to understand their application.

First, the exemptions apply only to an institution that is not conducted for profit or is not part of or controlled by a body conducted for profit, and that maintains a collection of materials that is open to the public or to researchers. Such an institution would not include a library operated by or for a law firm.

Second, the exemptions allow a library (or anyone acting under its authority) to do anything on behalf of any person that the person may do personally under the provisions of the *Copyright Act* permitting fair dealing for the purpose of research or research study, or fair dealing for the purpose of criticism or review (which latter exemption applies only if certain information is mentioned).

Third, the exemptions permit a library (or anyone acting under its authority) to make, for any person requesting the same for research or private study, a copy by reprographic reproduction of a work consisting of or contained in an article published in:

- (a) a scholarly, scientific or technical periodical; or
- (b) a newspaper or periodical, other than as described in (a) above, that was published more than one year before the copy is made.

However, this exemption does not apply to a work of fiction, poetry, or dramatic or musical work.

Fourth, the person for whom any copy referred to in the third item above was made must satisfy the library that the person will not use the copy for a purpose other than research or private study, and the person must be provided with only a single copy of the work. Pursuant to this requirement, the regulations state that a library must insert on any copy provided to any person a text or stamp indicating that the copy is to be used solely for the purpose of research or private study and that any other use may require the authorization of the copyright owner.

Fifth, any copy permitted to be made under the exemptions referred to above may be provided by a library for the patron of another library, but the copy given to the patron must not be in digital form, and any intermediate copies must be destroyed once the copy is given to the patron.

Sixth, the regulations made under the *Act* prescribe in detail the information that is to be kept in respect of the copies made by a library under the exemptions



referred to in the second and third items above. This information includes the name of the library (and where a copy is made for the patron of another library, the name of that library), the date of the request, information sufficient to identify the work, the name and the date or volume and number of the newspaper or periodical in which the work was found (if applicable), and the number of pages copied. This information need not be kept in respect of copies made under the exemption referred to in the second item above after December 31, 2003. The information must be kept for at least three years, and it must be open for inspection once a year on request by certain persons, namely, the copyright owner or the owner's representative, or a collective society authorized by the copyright owner to grant licenses to the work.

Seventh, the *Copyright Act* provides for a library to be exempt from copyright infringement where a copy of a work is made using a photocopying machine located on the premises for use by patrons, provided that a prescribed form of warning is affixed on or in proximity to the machine; however, this exemption applies only where the library has an agreement with a collective society or tariffs have been approved by or filed with the Copyright Board.

Part 3**CONCLUSIONS**

The National Copyright Committee of the Federation of Law Societies is pleased that the decision of the Federal Court provides guidance to members of the legal profession in determining the types of works that are protected by copyright, and the circumstances in which copying activities may require the consent of copyright holders. The decision should be read with the library exemptions now set out in the *Copyright Act* and regulations. Any law library should review these provisions carefully to ensure that they meet the various conditions and restrictions applicable to the exemptions.

The Copyright Committee of the Federation has recently reaffirmed to CANCOPY its willingness to continue discussions with respect to possible blanket licenses for certain copying activities by members of the legal profession. The Committee believes that in carrying out any such discussions, the decision of the Federal Court would provide a useful guide in determining the proper scope of any licenses. Similarly, the National Copyright Committee believes that CANCOPY should take into account the decision of the Federal Court in any dealings that it may have with respect to the possible issuance of direct licenses for law firms, law societies or law libraries.

Seasons Greetings
to all members and their families
and Best Wishes
for a happy and prosperous New Year