

# Benchers' Notes

January 2004

Volume 10, Number 1

*These Benchers' Notes cover the Summer Term Convocation of June 6, 2003; the Adjourned Summer Term Convocation of June 17, Call to Bar; the Fall Term Convocation of October 6, 2003; the Adjourned Fall Term Convocation of October 15, 2003, Call to Bar; and the Special Term Convocation of December 1, 2003. The Notes provide discussion of selected topics considered by the Benchers and other items of interest to the Bar. This and previous editions of Benchers' Notes, beginning December, 1999, are available at [www.lawsociety.nf.ca](http://www.lawsociety.nf.ca)*

## Special Term Convocation December 1, 2003

Two significant decisions taken by Benchers at the Special Term Convocation of December 1 will impact upon members during 2004. First, there is the elimination of the annual Form A Accountant's Report and the introduction of a Trust Account Random Audit program. Second, difficult insurance markets required changes in the 2004 LawPRO Errors and Omissions Insurance Program, including the introduction of Transaction Fees later this year.

### TRUST ACCOUNT RULES CHANGES

Benchers eliminate annual Form A Accountant's Report

Trust Account Random Audit Program approved, audits to be billed to members

Year-end for Trust Account reporting is changed to September 30

### INSURANCE PROGRAM CHANGES

Continuing difficulties in re-insurance markets require Benchers to approve Transaction Fees beginning mid-2004

Law Society increasing share of self-insured risk in 2004 Policy

## Elimination of the Form A Accountant's Report & Introduction of Random Audits

Benchers ended the long-standing requirement that each firm annually by March 31 provide the Law Society with a Form A Accountant's Report. In its place, Benchers asked the Practice Rules Compliance Committee, Chaired by Terry Rowe, to develop a Random Audit Program. The Program was recommended to Benchers in a policy document developed by the Committee and provided for discussion. In order to have the Random Audit Program in place for autumn 2004, the Committee recommended, and Benchers agreed, immediately to remove the requirement of the Form A Accountant's Report normally to be filed March 31.

The Law Society of Newfoundland has been the only law society in Canada without a random audit program. The Practice Rules Compliance Committee believes random audits are necessary as a public interest protection measure and because of the pending consolidation of Trust Account Rules in Atlantic Canada.

Because of the change, firms will not be required to file a Form A Accountant's Report for fiscal 2003 or future years. Instead, and beginning autumn 2004, a law firm will complete and file one self-reporting form annually. The form will not require the assistance of an accountant to complete. Approximately every two years each firm will be audited by Law Society trained and appointed accountants. To avoid conflicts, the Law Society will not engage a law firm's accountants to conduct the firm's audit. A firm will be billed for its random audit costs, but the change to random audits will provide members with cost-savings year-over-year since, in most instances, the audit will be



**The Law Society of Newfoundland**

196-198 Water Street  
PO Box 1028

St John's, Newfoundland  
Canada A1C 5M3

Tel (709) 722-4740 Fax (709) 722-8902

conducted only every 24 – 30 months instead of the current annual cost. Firms to be audited will be given approximately two weeks advance notice and will be permitted, within reason, to negotiate a convenient date with the auditor.

The random audit program will use only those accountants specifically trained by the Law Society. Terry Rowe, Chair of the Practice Rules Compliance Committee, said: "For several reasons, the annual Form A Accountant's Report model did not work as well as intended, even following substantial changes to the questionnaire a few years ago. For some years now the Law Society has been aware of the need to better train

the accountants who complete the Reports. With a random audit model, the Society will specifically train any accountant licensed under the *Public Accountancy Act* and who wishes to be on a list of those approved to conduct random audits. Given the public interest importance of good trust review procedures, the Committee believes the new program will strengthen reporting to the Society and assist members in maintaining better trust account operating procedures."

Because members practicing in smaller communities may need to be audited by accountants outside the area, travel and accommodation costs for random audits will not be billed.

Instead, it is likely that all members will be charged a small additional fee beginning in 2005 to cover such expenses. The 2004 Budget contains an allocation for these travel expenses during start-up. Benchers requested the Committee examine specifically how best to apportion travel costs for random audit accountants without imposing economic prejudice on members in smaller communities.

Under the new program, every law firm's reporting year-end for trust accounts is changed from the current December 31 to September 30 in each year, beginning immediately. This change in reporting year-end is permanent and conforms to requirements of the Atlantic consolidation.

### The 2004 Insurance Program

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Continuing difficulties in world reinsurance markets delayed finalization on the 2004 insurance program until December 23, 2003, the latest such date in recent memory. As a result, invoices to members were delayed in preparation until the week of January 5, with an extension granted on the first payment to January 30 for those members paying by cheque. The per member cost of insurance under the 2004 program is \$4,900, an increase from \$4,200 in 2003.

Beginning mid-November with a meeting at Law Society offices between LawPRO's President, Michelle Strom, and its Vice-President, Underwriting, Duncan Gosnell, the Insurance Committee met regularly until mid-December. Among the topics discussed were pricing options in current reinsurance markets, claims history of the program, reserves for the 2003 insurance year and projections for 2004, and whether and to what percentage the Law Society should retain a portion of its members' insurance risk to reduce the premium paid re-insurers.

Fiscal 2002 and 2003 are years with heavy losses in the Law Society's insurance program, each of these policy years carrying reserves greater than the premiums paid and greater than the reserves in any previous

year on record. Two years like these back-to-back posed difficulties in selling members' risk in the reinsurance market without the Law Society retaining a portion of that risk itself. For this reason, and at the recommendation of LawPRO, the Committee determined it was best for the Law Society to retain 10% of the risk, with LawPRO retaining 10% of our risk also. In addition to this retained risk, the policy finally negotiated includes a \$300,000 loss corridor above \$1.45 million (estimated) in totalled losses. From \$1.45 million to about \$1.75 million, losses are paid by the Law Society. For amounts totalling above the \$1.75 million, the re-insurers again provide cover. By retaining 10% of the risk, and providing a \$300,000 layer of cover above \$1.45 million, the Insurance Committee was able, with the considerable and helpful assistance of LawPRO, to negotiate a per member levy of \$4,900 for 2004. Of this amount, the base premium paid is \$4,500; the remaining \$400 is retained by the Law Society to cover, in part, the possibility of a supplemental premium being charged to cover the \$300,000 loss corridor. Full coverage of that corridor would require a payment of approximately \$675 per member; the Committee recommended, and the President, Stephanie L Newell, auth-

orized, a \$400 charge over the base premium. The Society's other insurance reserves will, if necessary, cover the remaining exposure.

The difficulties experienced in negotiating and finalizing the 2004 program, and the extensive discussions necessary to obtain cover on satisfactory terms, underscored for the Insurance Committee and for LawPRO the need for the Law Society to accumulate a capital pool of money exceeding the \$3,000,000 currently held for insurance. This capital pool could then be used to stabilize insurance premiums in the future. By increasing the capital pool, more cost-saving options become available to the profession. Among these options, the pool could be used to self-insure a larger portion of the risk, improve the marketability of the program, and reduce the premium. Or further, interest revenues from the pool could be used to subsidize the premium. Further still, and in the event insurance cover becomes unavailable on reasonable terms, the pool could be used entirely to fund a self-insurance program. In all these scenarios, a significant capital pool will be necessary. Given uncertainty and volatility in reinsurance markets, a large pool could be required on very short notice. The Insurance Committee

addressed this concern and John Roil, QC, Chair, conveyed to Benchers the Committee's view that decisive action was immediately necessary.

Roil, QC, led Benchers in a lengthy discussion about the need for a larger capital pool for the insurance program, possibly amounting to an additional \$2 million. Central to the discussion was how best the money might be accumulated. Drawing upon the extensive experience of the Law Society of Upper Canada, and LawPRO in that province, the Insurance Committee recommended, and Benchers agreed in principle, that beginning mid-2004 a Transaction Fee will be levied against certain transactions such as real estate transactions not title insured by TitlePLUS or others, and litigation once a Statement of Claim or Defence is issued. In Ontario, the Transaction Fee is \$50. Some transactions will be exempted, such as those on behalf of a municipality, or the provincial government, or transactions related to family law matters. And some transactions will levy only one Fee, as, for

example, a real estate transaction not title insured where the member acts for both sides.

Under a Transaction Fee levy system, a member will charge and collect the levy, then submit it two or three times a year on a schedule determined by the Law Society. Collecting and reporting will rely upon the honour system, but a member's compliance will be one of the checks included in the random audit program review to commence in the autumn. Benchers also directed the Committee to examine the paperwork necessary for member compliance, and directed that such paperwork be kept to a minimum.

While the specifics of the levy, and the dollar amount, have not been determined, Benchers requested the Insurance Committee continue work toward implementation of the levy with a deadline for roll-out in the Spring, 2004.

Since the importance of the levy and its introduction will pose many questions for members, the President,

Stephanie L Newell, requested there be a meeting of the Advisory Council on February 16. Council members will be formally notified shortly. The Law Society's Advisory Council comprises all former Treasurers and Presidents and represents a divergent cross-section of the membership. At the meeting, Council will first be briefed by LawPRO representatives and by the Insurance Committee Chair, John Roil, QC, about the insurance program and reinsurance markets. Next they will be asked to consider how best to implement the levy, or in the alternative, how best to generate a large cash pool by other means on a priority basis. The advice and guidance of the Council will then strengthen discussion at Benchers before final decisions are taken.

Members will be kept informed. A special edition of Benchers' Notes, or some other information bulletin, will follow a few weeks after the Council meeting and before the Spring Term Convocation of April 5 when final decisions will be taken.

## Summer Term Convocation

### June 6, 2003

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The President, William H N Goodridge, QC, tabled Rules necessary to implement fully the National Mobility Agreement, earlier approved by the Benchers. Following discussion, Benchers approved the Rules. Some Forms made necessary out of the Rules remain to be developed. Goodridge, QC, stated that the Agreement will come into effect on July 1, 2003, and, while considerable effort will be needed across Canada by law society staff, the Federation was hopeful that implementation will be smooth.

Goodridge, QC, next introduced Sherron Dickson, QC, President of the Federation of Law Societies of Canada. Dickson, QC, was attending Convocation as a guest. She began her brief presentation by reminding Benchers of the importance of the National Mobility Agreement and the role it will play in encouraging inter-

provincial practice. She stated she was pleased to be present when Benchers voted to approve the Rules; these same Rules, with small local adaptations, will be consistent across the signatory jurisdictions.

Turning to national litigation, Dickson, QC, spoke to Benchers about the litigation initiated by law societies to challenge the Government of Canada's money laundering legislation. The litigation was motivated by the need to protect the sanctity of the solicitor-client relationship and the independence of the bar from government. As a result, the federal government has withdrawn the reporting requirements imposed on lawyers and agreed to further negotiations. The court action taken by the Federation and its member law societies against the federal government has garnered international attention. Money laundering legislation is an

international trend by governments, and in most countries the legal communities have cooperated with their home governments. The Federation's initiative in challenging the government, and the favourable response of the courts, has prompted a considerable degree of international interest in the Canadian experience from law societies world-wide. The American Bar Association held a Spotlight Presentation about the initiative at its national conference.

### Did you know . . .

Law Society members Frances Knickle and Jonathan Hale, and lay Bencher Bert Riggs, were elected to the Board of Directors of the Resource Centre for the Arts, operator of the LSPU Hall, at the RCA's annual general meeting November 30, 2003.

## Fall Term Convocation October 6, 2003

The President, Stephanie L Newell, reported that this autumn marked the first recent occasion in which there was an official Opening of Court for the fall term sitting of the Supreme Court of Newfoundland and Labrador, Trial Division. The President stated that she attended the Opening of the Trial Division, and then of the Family Division, and for each occasion spoke on behalf of the Law Society. She expressed the desire to see the Opening become a more formalized event in future years, a distinctive mark in the year's calendar. To this end, the Executive Director has offered to the Court the administrative facilities of the Law Society.

One feature of the Fall Term Convocation was the attendance and an address to Benchers by the Chief Justice of Newfoundland and Labrador, the Honourable Clyde K Wells, and the Chief Justice of the Trial Division of the Supreme Court of Newfoundland and Labrador, the Honourable J Derek Green. Introducing the two Chiefs Justice, the President reminded Benchers of the *Law Society Act, 1999*, s.4 right of judges of the Supreme Court to attend at Benchers as visitors to the Law Society. Until 1995, at least once a year the Benchers would arrange a noon luncheon with judges of the Supreme Court. The tradition ended with the move to a smaller Convocation room in Atlantic Place. The move to new offices, and the availability of a dining room adjoining Convocation Hall, made reinstating this tradition opportune and historically appropriate.

The tradition of dining together has British origins from the early days of the Inns of Court when judges played an active role at Convocations. It was the judiciary, after all, who admitted Solicitors to practice and who held



**Above:** The Honourable Clyde Wells addresses Convocation

**Right:** Barbara Barrowman, recipient of the Hunt Award, and Mrs Betty Hunt

the authority of discipline. The Inns of Court were left to admit and discipline Barristers but even that authority was not absent the eye and comment of the attending bench at Convocations and who were there as a matter of right. Indeed, there is sensible argument that many powers now exercised by Benchers are powers delegated from the judiciary.

The President noted also in her welcoming address that by special invitation she included the Chief Provincial Court Judge for Newfoundland and Labrador, the Honourable M R Reid. Following her introduction, the two Chiefs Justice and the Chief Judge addressed Convocation. When Convocation adjourned for luncheon, other justices of the Supreme Court joined Benchers in the dining hall.

Other topics discussed at Convocation included: remarks by the Executive Director that 2003 Budget projections are on target and a small surplus is indicated; the Education Committee requested a policy direction from Benchers arising out of the National Mobility Agreement as it pertains to members transferring in from other signatory jurisdictions; Francis O'Brien, the Director of Legal Education, addressed Benchers about funding options under national con-



sideration for CanLII; discussion of a policy paper prepared by Mark Pike concerning law office searches, the paper prepared partly in response to the search of Bob Buckingham's offices and in an effort to develop future policy for these searches.

There was discussion also at the Convocation whether, and how, the Law Society might beneficially assist the Judicial Council of the Provincial Court of Newfoundland and Labrador in fulfilling the Council's role in the appointment process. The Council currently engages a review process different from the one used for the federal judicial appointments process. Applicants for federal appointments permit the Law Society to answer a number of questions about the applicant's membership history with the Law Society, this history including discipline and insurance claims. These enquiries are answered in writing by the



Dining with Judges at Fall Convocation

Executive Director. In contrast, the Judicial Council of the Provincial Court does not make such enquiries and relies instead upon a letter of application from interested members and then an interview.

Following discussion, and acknowledging the work of the Council and government in the very fine appointments to the Provincial Court bench, Benchers concluded the Council would, for consistency, be well-served by the same information required for the section 96 application process. At a subsequent meeting of the Judicial Council of the Provincial Court, and attending in the absence of the President, the Executive Director spoke of Benchers' interest to cooperate and provide the Council information consistent with the section 96 applications. The

Council agreed to examine the proposal, and the Executive Director will during February prepare an information package for their consideration.

At the Fall Term Convocation, Benchers reappointed William H N Goodridge, QC, as this Society's representative on the Council of the Federation of Law Societies. In accepting the reappointment, Goodridge, QC, thanked Benchers and remarked about the important work of the Federation in representing the interests of the legal community on the national stage. In particular, he mentioned the court actions across Canada to protect solicitor-client privilege associated with Money Laundering legislation, and recent interventions concerning law office searches. Additionally, there is the work of the Federation in estab-

lishing CanLII, a no-charge virtual Law Library for research use by lawyers and the public. In matters such as these, remarked Goodridge, QC, the Federation provides an important service to the legal community and the public interest.

### Practice Note

Registry delays, and the Registry's policy of not contacting members when a document for registry is rejected, both combine to increase the possibility of an insurance claim for members. The Law Society's claims adjuster, Raymond Walsh, FCIP, encourages members to maintain a register of the flow of documents to and from the Registry; to check the register frequently to track the return of time-sensitive documents; and to maintain a register of the flow of all documents to and from your offices by courier or registered mail, this register to include waybills and coding data as appropriate.

### Call to Bar

June 17, 2003

Alexander Harrold and  
John Taylor-Hood



October 15, 2003

Michael Fox and  
Rhoda Aylward



## Gordon M Stirling, QC, Distinguished Service Awards

On October 9, 2003, in Convocation Hall there assembled an audience of family, friends, colleagues and Benchers to witness the granting of two Gordon M Stirling, QC,

Distinguished Service Awards. The President, Stephanie L Newell, spoke about the Awards and read a citation for each recipient, James R Chalker, QC, and John P Byrne, QC.

Following the presentations, there was a reception hosted by the Law Society.



Stephanie L Newell, *President* and James R Chalker, QC



John P Byrne, QC and Stephanie L Newell, *President*

## Canadian Legal Information Institute (CanLII): A "virtual law library" for lawyers

Many lawyers in Newfoundland and Labrador have noticed that there is a new kid on the block for computerized legal research. The new player is CanLII, the acronym for the Canadian Legal Information Institute.

CanLII is a "virtual law library" containing caselaw and statutory materials from across Canada. It was created by the Federation of Law Societies of Canada in 2001 as a non-profit organization, in partnership with the University of Montreal (the same people who created and maintain the Supreme Court of Canada website). The Federation of Law Societies initiated CanLII partly to protect the legal profession from the rapidly increasing costs of obtaining commercial legal information. Since 2001, CanLII has increased its collection and presently contains federal and provincial statutes and over one hundred fifty thousand (150,000) judgments from the Supreme Court of Canada, federal courts, courts of appeal, trial courts and administrative tribunals throughout Canada. This core offering is constantly expanding, with over 1,000 new decisions added every week.

A significant feature of CanLII is its

cost. CanLII can be accessed, free of charge, by any lawyer who has internet access. As a result, CanLII has become the leading source of free access to Canadian caselaw and legislation. If a lawyer has access to the internet, then the lawyer also has automatic access to CanLII.

In a recent article on electronic legal research, Professor Michael Geist, Professor of Internet and e-Commerce Law at the University of Ottawa, indicated that CanLII is leading the way in providing free, internet based legal research.

As a practical matter, Professor Geist also referred to a British Columbia decision dealing with the taxation of legal costs. In that decision the taxing officer cautioned against using fee-based legal research services where cheaper alternatives exist. In particular the taxing officer noted that the lawyer in that case needed to prove the necessity and reasonableness of the cost of using a fee based research tool, by addressing whether the caselaw was also available on a free website. As a result, lawyers might wish to consider whether cases are available free of charge, as with CanLII, before expending costs on

fee-based electronic research, especially if these costs are passed along to a client.

If you haven't already tried CanLII, go to [www.canlii.org](http://www.canlii.org) and explore. You don't need a password to connect to CanLII and the database is constantly being updated with new cases. Any lawyer in Newfoundland and Labrador who has used CanLII should feel free to pass along comments, questions or suggestions with respect to the CanLII site. To do so, lawyers may contact the CanLII Board Member for Newfoundland and Labrador, Mr. Francis O'Brien, at the Law Society.

### Judgement Interest Order

Members are advised that Newfoundland and Labrador Labour Regulation 140/03 provides, effective from January 1, 2004, that the pre-judgement and post-judgement interest rate shall be 2%

## Educational Notes

### Bar Admission Course

The Bar Admission Course for Newfoundland and Labrador began on October 7, 2003, and continued until November 21, 2003. This year, 27 students took the Course. The Bar Course is a seven week, intensive educational experience covering areas of provincial and federal law. The 2003 Bar Course was held in the Law Society Building for the first time.

This year's Bar Admission Course covered the following topics:

#### *Week 1 - Family Law*

Topics included divorce proceedings, custody and access, child and spousal support, matrimonial property, provincial family legislation, pensions, Unified Family Court procedure, child protection and support enforcement.

#### *Week 2 - Corporate/Commercial Law*

Topics included incorporation and organizing a business, corporate procedures, corporate finance, the *Personal Property Security Act*, security opinions, purchase and sale of a business/shares and commercial insolvency.

#### *Week 3 - Civil Procedure*

Topics included limitations of actions, commencing proceedings, service, defences, counterclaims and 3<sup>rd</sup> party proceedings, summary trial, expedited trial, discovery and disclosure of evidence, setting down for trial, the *Judgment Enforcement Act*, civil appeals, costs and alternative dispute resolution.

#### *Week 4 - Skills Training*

The Course presented "lawyering-skills" workshops where students received instruction in direct examination, cross-examination, negotiating settlements, interviewing clients, examination for discovery, risk management and how to avoid professional negligence claims. As well there was

a session on maintaining a balance between professional and personal responsibilities and a separate section on ethics and the Code of Professional Conduct, for which students completed a written assignment.

#### *Week 5 - Criminal Law & Procedure*

Topics included the court structure, presumptions and burdens, classification of offences, pre-arrest, arrest, charge, first appearances, judicial interim release, disclosure, elections and re-elections, solicitor/client matters, preliminary inquiries, pre-trial matters, Charter applications, trials by judge alone, jury trials, the sentencing process, types of sentences, criminal appeals, young offenders, evidentiary matters, *voir dices*, search and seizure and defences. As well, in this section, students received instruction on advocacy skills, there was a panel discussion among judges with respect to advocacy and students prepared for and participated in a mock trial.

#### *Week 6 - Administrative Law*

Topics included the Labour Relations Board, Labour and Commercial Arbitration, Municipal Law, the Human Rights Commission, the Workplace Health, Safety and Compensation Commission, administrative law in the Federal Court, the Law Society discipline process, statutory appeals, judicial review of arbitration and prerogative orders.

#### *Week 7 - Real Estate and Wills*

Topics included the registry system and land tenure, the real estate transaction, the mortgage, title insurance, survey/location certificates, taxation issues, crown lands, quieting of titles, possessory title, landlord/tenant, title searches, a real estate transaction workshop and a separate section on wills, estates and probate.

To pass the Bar Admission Course, students must pass examinations in Family Law, Commercial Law, Civil Procedure, Criminal Law, Administrative Law and Real Estate/Wills.

Each exam is 3½ hours long and focuses on the lecture presentations, the Bar Admission Course materials and the approximately 80 provincial and federal statutes and regulations covered in the Course. The Bar Admission Course materials consist of 11 volumes.

The goal of the Course is to provide new lawyers a comprehensive overview of Newfoundland and Labrador and Federal law and procedure and to transfer information to ensure entry level competence in the profession. The Course is intensive, practical and relevant to what a new lawyer will see in practice. The Bar Admission Course is meant to be an informative and interesting experience for the students and the judges, lawyers and other professionals, whose contributions as Bar Course Instructors make the Course successful.

The Bar Admission Course Committee and the Law Society is grateful to the generous contributions made by members of the profession in ensuring the Course remains vibrant and beneficial to our new lawyers.

### **BBB Volunteer**

The Better Business Bureau is now establishing a panel of Volunteer Arbitrators and Mediators. From this panel, volunteers will be selected on rotation to resolve disputes. Most disputes will concern the sale of goods or the provision of services, and most will be resolved with about two hours work by the volunteer. Members interested in participating in this volunteer work can contact Lisa Riggs at the Bureau, 364-2222.

## Continuing Legal Education

The Joint Committee on Continuing Legal Education offered a number of programs throughout the Spring and Fall 2003. These seminars included:

### 1. *What's New in Damages? New Trends and Developments in Calculating Damages for Personal Injury and Other Economic Losses.*

On May 26, 2003 Ms Cara Brown of Brown Economic Assessments, Calgary, Alberta presented a seminar on economic issues in personal injury and other economic loss cases. The seminar dealt with the effective use of economic evidence to adequately assess and prove damages. This seminar also dealt with online internet calculators which allow lawyers to calculate non-pecuniary awards and the present value of an annual economic stream of income. The Committee thanks Ms Cara Brown for her informative presentation.

### 2. *Effective Law Practice Management: Are you running your practice or is your practice running you? Tips and systems to increase lawyer effectiveness and career satisfaction.*

On June 5, 2003 local lawyers were treated to a practical and interesting presentation by Mr Jay Foonberg, a California lawyer, author and lecturer in law practice management. Mr Foonberg has written best-selling books on Law Practice Management and deliv-



Frank O'Brien and Jay Foonberg



Frank O'Brien, Ches Crosbie, Ian Wallace and Ian Kelly, QC

ered seminars worldwide on the topic. Mr Foonberg's seminar dealt with client relations and the effective management of a legal practice. The Committee thanks Mr Foonberg for coming to Newfoundland to discuss this important topic.

### 3. *Civil Procedure Update: Focus on Expert Evidence and Civil Jury Trials.*

On June 13, 2003 we presented a seminar at Terra Nova Park Lodge on Expert Evidence and Civil Jury Trials. This seminar was presented again in St. John's on November 28, 2003. The presentations and materials dealt with the theory and practical aspects of using experts and expert evidence in the litigation process, and also dealt with issues involved in proceeding by way of a jury trial in a civil action. In both topics recent case law, both reported and unreported, was reviewed and discussed. Thank you very much to our presenters The Honourable Mr Justice Leo Barry, Mr. Chesley Crosbie, Mr. Ian Kelly, QC and Mr Ian Wallace for their insightful contributions.

### 4. *Advocacy in Mediation (A Workshop presented by the Advocates' Society, Toronto, Ontario).*

On October 27, 2003 there was a presentation by the Advocates' Society, a group whose objective is to improve the quality of advocacy by delivering skills-training programs developed by lawyers, for

lawyers. On this occasion Mr Ron Caza and Mr. Tim Ray conducted the workshops, which involved lawyers participating in a simulated mediation exercise based on a personal injury fact scenario. Thanks to Mr Ray and Mr Caza for their skills in leading this workshop. While in St John's, Mr Ray and Mr Caza also participated in workshops on Examination in Chief and Cross Examination with the 2003 Bar Admission Course students.

### 5. *A Demonstration of Electronic Disclosure in Criminal Law.*

On December 5, 2003, this presentation involved representatives of the RCMP explaining the new, electronic disclosure program in criminal law cases. The lawyers and judges present were interested in the impact this new development would have in practice. Thank you to The Hon Judge Joseph Woodrow, Provincial Court of Newfoundland and Labrador; Sgt Wayne Hebb and Mr Ed Newhook of the Royal Canadian Mounted Police for their contributions to this seminar.

### 6. *Using WestlawCarswell for Legal Research: Electronic Legal Research Training Sessions.*

From November 24 - December 18, 2003 Law Librarians Gail Hogan and Harriet Mercer offered training sessions on WestlawCarswell, an electronic research tool which is





2003 Bar Admission Course

available free of charge at the Law Society Library and which has replaced many of the print report series. These training sessions have been well received and, based on the response, further electronic research training sessions will be offered in 2004.

As this *Benchers' Notes* begins a new year, it is appropriate to thank members who assisted during 2003. The Joint Committee on Continuing Legal Education would like to thank sincerely our seminar presenters and acknowledge their contributions to the ongoing education of lawyers in this province. We also thank those

lawyers who support our programs by their attendance at seminars. Hope to see you at our 2004 Seminars.

# Alternative Dispute Resolution

## 4-Day Mediation Skills Workshop in St. John's on February 17-20

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FACULTY OF LAW

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*"Absolutely excellent. Light years ahead of any other program. The facilitators knew their subjects and were able to convey interest, enthusiasm and encouragement to try. Excellent communicators."*  
Grant Inglis, Little, Parker & Inglis, Waterloo

*"This was the best workshop I have ever attended. Fun, informative and interesting."*  
Gregory Pittman, Mills, Husey and Pittman Law Firm, Clarnville

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## Professional Responsibility Notes

### Discipline Committee

The role of the Discipline Committee is separate entirely from the Complaints Authorization Committee. This Committee's Chair is responsible to ensure that Complaints referred from the CAC are heard before panels comprised as required under the *Law Society Act, 1999*. An Adjudication Panel must include three members of the Discipline Committee; that is, two Law Society members and one lay member. The *Act* prescribes that the panel may make findings and impose sanctions.

#### Adjudication Panel Decision re Donald L Rankin

An Adjudication Panel of the Discipline Committee, in a Decision dated August 19, 2003, and pursuant to the *Law Society Act, 1999*, subsection 46(3), found Donald L. Rankin guilty of conduct deserving of sanction.

The matter proceeded by way of an Agreed Statement of Facts. Mr Rankin

entered a guilty plea to the following violations of the Code of Professional Conduct:

- (i) failed to serve a client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation contrary to the Rule contained in chapter II; and
- (ii) failed to provide notice appropriate in the circumstances of his withdrawal of services to a client contrary to the Rule contained in chapter XII.

The Adjudication Panel ordered that the member be reprimanded; that the member pay the expenses incurred by the Law Society in the investigation and hearing of the Complaint; and that publication of the disposition of the Complaint be made in accordance with Law Society Rule 9.28.

#### Adjudication Panel Decision re David R Power

An Adjudication Panel of the Discipline Committee, in a Decision dated October 8, 2003, and pursuant to the *Law Society Act, 1999*, subsection 46(3), found David R Power guilty of conduct deserving of sanction.

The matter proceeded by way of an Agreed Statement of Facts. Mr Power entered a guilty plea to the following violations of the Code of Professional Conduct:

- (i) failed to provide a proper quality of service contrary to Rule (b) contained in chapter II; and
- (ii) failed to act with impartiality and to avoid a conflict of interest between clients contrary to the Rule contained in chapter V.

The Adjudication Panel ordered that the member be reprimanded; that the member pay the expenses incurred by the Law Society in the investigation and hearing of the Complaint; and that publication of the disposition of the Complaint be made in accordance with Law Society Rule 9.28.

### Discipline Administrators' Meeting

On October 17<sup>th</sup> and 18<sup>th</sup>, 2003, the Law Society of Newfoundland hosted the Annual Meeting of the Discipline Administrators. Representatives from the Complaint and Discipline Departments of all governing bodies and the Executive Director of the Federation of Law Societies met in St John's. The National Mobility Protocol, Disciplinary Hearings, Lawyers and the Media, Custodial Issues and Searches of

Law Offices were among the topics discussed. Although the disciplinary process is not uniform throughout the country, the meeting does provide an excellent opportunity to discuss issues relative to the governance of the profession.

Attendance at this year's meeting was high because St John's had been the location of choice for several years. In addition to a productive meeting, the Discipline Admin-

istrators enjoyed a sightseeing tour of Cape Spear and Petty Harbour. Delegates were not disappointed as indicated by the following, typical, feedback.

*"We all had a fabulous time, the food was awesome, the meeting was great and the sightseeing was a blast. Special thanks to Justin for his fiddling. That was tremendous!"*

*(Justin Donovan is a nephew of Legal Director, Phyllis Weir)*



Luncheon hosted by the Law Society of Newfoundland.



Discipline Administrators enroute to Petty Harbour.

## Complaints Authorization Committee

The Complaints Authorization Committee (CAC) is a statutory committee of Benchers mandated to address the first phase of the regulatory process as prescribed by Part II of the *Law Society Act, 1999* (the *Act*). The process commences with an "allegation" filed with the Vice-President (s. 43). An allegation is a statutorily defined term meaning "a written document alleging that a respondent has engaged in conduct deserving of sanction" (s.41(a)). "Conduct deserving of sanction" is also a defined term which includes professional misconduct, conduct unbecoming, violation of the *Act* or the Law Society Rules, and failure to adhere to the Code of Professional Conduct (s.41(c)).

The Vice-President may either refer the allegation to consensual mediation or conduct an investigation (s.44(1)). If mediation is unsuccessful, the Vice-President will conduct an investigation and will submit the allegation to the CAC upon completion of the investigation (s.44(3)).

Once the allegation has been submitted to it, the CAC may require further investigation or require the respondent to appear before it (s.45(1)(b), (c) and (d)). It may make recommendations to the Executive Committee concerning a respondent's practice (s.45 (1)(e), (f) and (g)). It may dismiss an allegation (s.45(1)(a)), counsel or caution a respondent (s.45(2)(a)), or instruct the Vice-President to file the Complaint and refer it to the Discipline Committee for hearing (s.45(2)(b)). There is no appeal from the CAC's decision (s.45(3)).

A Complaint comes into being only after the CAC has considered the allegation and has formed "the opinion that there are reasonable grounds to believe that a respondent has engaged in conduct deserving of sanction". The CAC's role with respect to a Complaint lends meaning to the word "authorization" in the CAC's name. As the Complaints

"Authorization" Committee, the CAC's role is to determine when an allegation constitutes a Complaint. Then the CAC may authorize the filing of the Complaint and its referral to the Discipline Committee. Or, it may choose to proceed by way of counsel or caution, thereby not authorizing the filing of the Complaint.

The decision of the CAC to issue a letter of counsel or caution is not a disciplinary action. There is no finding of guilt from which discipline can flow. Counsel is advice; caution is a warning. Both are intended to assist the member in his or her future conduct.

**The following information is provided to inform members as required under Law Society Rule 9.06(5).**

**Letters of Counsel** were issued by the CAC because of the following Complaints.

Complaint of failing to provide a quality of service in compliance with the standard contemplated by the Code. - (*Code of Professional Conduct, chapter II, rule b, commentary 7*)

Complaint of poor management of an Estate file and a 10 month delay in obtaining Letters of Probate. (*Code of Professional Conduct, chapter II, Rule (b), commentaries 7 and 8*)

Complaint of failing to follow the client's instructions. (*Code of Professional Conduct, chapter II, Rule (b), commentary 7 and chapter III, Rule (b), commentary 4*)

Complaint of an alleged conflict by placing personal interests before the client's interests. (*Code of Professional Conduct, chapter V, commentary 1 and chapter VI, Rule (c)*)

**Letters of Caution** were issued by the CAC because of the following Complaints.

Complaint of placing a security to the benefit of the solicitor and in the name of the client but without the client's knowledge. (*Code of Professional Conduct, chapter I, commentaries 1, 2 and*

*3; chapter V, commentaries 1, 2 and 13; chapter VI, commentaries 1, 2, 4, 5, and 6; chapter VII, commentary 4; and chapter XIX, commentaries 1, 2 and 10*)

Complaint of failing to provide a quality of service in compliance with the standard contemplated by the Code. (*Code of Professional Conduct, chapter II, rule b, commentary 7*)

Complaint of divulging confidential information. (*Code of Professional Conduct, chapter IV, commentary 4*)

Complaint of failing to return a client file, for a period of three months in circumstances which may have caused prejudice to the client. (*Code of Professional Conduct, chapter XII, commentaries 2, 8 and 11*)

### Proposed Changes to Registration of Deeds Act

The Real Estate Committee, chaired by Tom Fraize, met with the Steering Committee for the Registry of Deeds concerning the *Registration of Deeds Act*. The *Act* is now under review with the intention it be modernized. In order to provide the Steering Committee with advice and opinion about changes needed in the *Act*, the Real Estate Committee agreed to inform members about the review and to solicit assistance. One subject area in the current legislation under consideration for review is the powers of the Registrar. The Steering Committee holds the view that these powers need to be expanded; the Real Estate Committee agrees. The opinions of members about these powers, and how they might be expanded or clarified, would be especially helpful to the consultation process. Members are also encouraged to comment generally about desirable changes to the *Act*. Comments can be made by contacting Tom Fraize by telephone at 726-7978, by facsimile at 726-8201, or by email at [tfraize@fraizelawoffices.nf.net](mailto:tfraize@fraizelawoffices.nf.net). Comments should be provided by end of February.

**Archival Notes:**

**Let the Records Speak**

*by Bert Riggs*

*Lay Bencher and Chair of the Archives and Records Committee*

The Archives and Records Committee has been gathering information related to the long and distinguished history of the Law Society of Newfoundland and the individuals whose names have appeared on the Society's Barristers' Roll. Many of these lawyers played prominent roles in the legal, political and social life of Newfoundland and Labrador, but a few have disappeared into the oblivion of time. It is our intention to create a dossier on each member of the Society, documenting their practice of law and their contribution to the legal profession in this province.

One of the best known and most colourful members of the Bar in the latter half of the nineteenth century was Daniel Woodley Prowse (Roll # 42). He was called to the Bar on December 15, 1858. He served as MHA for Fortune Bay (1861-1865) and Burgeo & LaPoile (1865-1869) before being appointed a judge of the Circuit Court and later the Central District Court. This following testimonial appeared in the St. John's newspaper, *The Daily News*, on February 2, 1898, on the occasion of his retirement from the Bench.



Daniel Woodley Prowse (Roll #42)

**Address To Daniel Woodley Prowse, Esquire, Q.C., D.C.L., LL.D.**

*We, the undersigned members of the Newfoundland Bar and Solicitors of the Supreme Court, having learned of your recent retirement from the Bench of the Central District Court in St. John's, desire to express our regret at the severance of those ties which, for some of us, have existed for over a quarter of a century.*

*As Judge and chief Magistrate of the principal city of this Island, you have had a difficult task to perform, and it must now be a gratification to you to know that those whose profession afforded them the best opportunity to judge, appreciate the manner in which those duties have been performed.*

*We are not unmindful that during your tenure of office you have been called upon from time to time to serve the public in capacities outside those pertaining to your official position, and we bear testimony to the energy which*

*you have displayed in every public service which you have undertaken.*

*It is the ambition of every lawyer to add something to enrich the profession of which he is a member. It is the ambition of every public man to do some lasting good for the country he has served. In your Manual for Magistrates you have done much to assist those who administer the magisterial law, and your History of Newfoundland evidences continuous labour in the collection of a large amount of documentary material relative to the land of your nativity.*

*In bidding you farewell, we trust that a long and pleasant evening of life is before you, and that sometimes, as the shadows flit in the gloaming, you may look back with pleasure to the days as well as those which you spent at the Bar as those when you presided as Judge of the Central District Court, and that your ret-*

*rospect and varied experience may suggest not only pleasant memories but also material which your facile pen may further employ to aid Newfoundland in taking her proper place in the Empire of Greater Britain.*

*Saint John's, Newfoundland.  
January, A.D., 1898.*

*W. V. Whiteway, A. O. Hayward, J. S. Winter, D. Jos. Greene, P. J. Scott, G. M. Johnson, D. Morison, W. H. Horwood, E. P. Morris, R. J. Parsons, M. H. Carty, J. Augustus Cliff, Edward Shea, F. D. Lilly, T. J. Murphy, Frank Morris, D. M. Browning, Wm. Clapp, J. J. Pittman, A. LeC. Berteau, Charles H. Emerson, W. E. Wood, Charles H. Hutchings, W. O'D. Kelly, James M. Kent, Jos. Shea, Francis J. Connolly, Arthur W. Knight, Sydney D. Blandford, George T. Carty, C. Wearing Hayward, Wm. R. Howley, T. P. Sullivan.*

The names subscribed to this testimonial do not constitute a complete list of those individuals who were practising law in Newfoundland at that time. Several members of the Bar ran afoul of Judge Prowse's temper from time to time. Noticeably absent from the list is the name of Alfred B. Morine (#99), whom Prowse once ordered to leave his Courtroom. When Morine refused, Prowse instructed the attending Constable to

forcibly eject his learned colleague.

Of note is the fact that only two of those appearing in the list were senior to Prowse in the practice of law: William V. Whiteway (#35) was called to the Bar on April 10, 1852, while Augustus O. Hayward (#41) was called at the same time as Prowse, December 15, 1858. Five of the subscribers – Sydney D. Blandford, George T. Carty, C. Wearing Hayward, William R. Howley and

Thomas P. Sullivan – were not members of the Bar at the time, although they had been enrolled as Solicitors of the Supreme Court. Howley (#107) was called shortly after the address appeared in the newspaper, on February 8, 1898. Blandford (#138) and Carty (#139) continued to act as solicitors for another 13 years before being called to the Bar on June 28, 1916. Hayward and Sullivan were never members of the Newfoundland Bar.