the SOCIETY RECORD

VOLUME 23 | NO. 6 | DECEMBER 05

NOVA SCOTIA BARRISTERS' SOCIETY

www.nsbs.ns.ca

THE NEXT GENERATION:

where practice is heading

Sean Foreman, Wickwire Holm; Cheryl Canning, Burchell Hayman Parish;
Kendrick Douglas, Stewart McKelvey Stirling Scales; Sarah MacIntosh, Sampson McDougall

Photo by Ted Power/NSBS

Forensic Engineering Services for Civil Litigation Lawyers

Geotechnology Ltd. is a consulting engineering firm that provides forensic civil engineering, geotechnical, foundation and environmental engineering services to civil litigation lawyers and insurance personnel.

Forensic Engineering Experience

Geotechnology has 36 years engineering investigative experience in Atlantic Canada, western and northern Canada, offshore, and overseas in the UK, Australia and the Caribbean.

We have investigated and determined the cause, and assisted in establishing fault, for the six main types of problems and damage experienced by buildings, civil engineering structures, and property: **1.** Structural Collapse and Failure; **2.** Architectural Finish; **3.** Functional and Serviceability; **4.** Hidden Damage; **5.** Monetary Losses, Construction Delays and Cost Overruns; and, **6.** Environmental Contamination.

Engineering and environmental investigations have been completed for most types of civil engineering structures: Buildings; Bridges; Wharves and Harbour Works; Towers, Storage Tanks; Dams; Pipelines; Drainage Works; Embankments and Earthworks; Tunnels; Highways; and Motor Vehicle and Industrial Accidents.

Professional Qualifications

Eric Jorden, M.Sc., P.Eng., president of Geotechnology Ltd., has a Master's degree in geotechnical and foundation engineering from the University of Birmingham, England. He has a first degree in civil engineering from the University of New Brunswick, and a diploma in land surveying from the College of Geographic Sciences, NS.

Mr. Jorden writes impartial, unbiased reports and opinions based on the facts. His reports are clear, concise and easily understood by non-technical readers. He has published a number of engineering papers and co-authored a book on soils, groundwater and foundation investigation. Mr. Jorden has been qualified by the courts as an expert witness. He is credible and composed when giving expert testimony, and under cross-examination.

Forensic Engineering Services

(Case management follows project management principles to ensure thorough, cost effective forensic engineering investigations).

1. Preliminary Forensic Engineering Services

- *Assess the technical strengths, weaknesses and merits of a claim for damages based on existing data and information. Outline the scope of a thorough investigation of the problem, if justified by the initial assessment.*

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- *Carry out field work and laboratory testing to investigate the cause of the problem, the damage to a building or civil engineering structure, or the reason for the contaminated soil and groundwater. Review engineering drawings, and applicable engineering and environmental regulations, codes and standards of good practice.*
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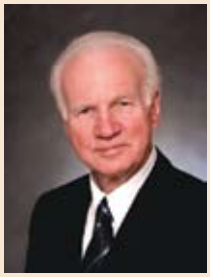
3. Additional Forensic Engineering Services

- *Assist counsel finalize evaluation of the strengths and weaknesses of the damage claim based on the findings of the forensic engineering investigation.*
- *Help develop litigation strategy for discovery and trial; litigation support.*
- *Develop lines of questioning for testimony and cross-examination, including questions not to ask.*
- *Attend discovery and trial, assist counsel by listening to opposing witnesses and experts, identify flaws and errors, and the strengths and weaknesses of opposing testimony, develop additional lines of questioning.*
- *Testify as an expert witness at discovery and trial*
- *Review and audit engineering investigations and environmental assessments and reports by others; dispute resolution.*

More Information

Contact Eric Jorden, M.Sc., P.Eng. at Geotechnology Ltd. for more information: Curriculum vitae; fees; publications and major reports; list of forensic engineering and major investigations; typical engineering investigations for design and construction, and environmental assessments for site remediation; professional activities; technical associations.



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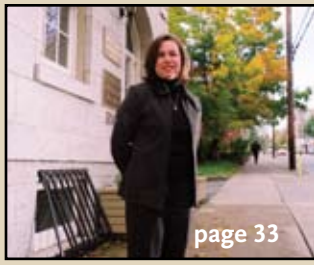
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Well, two issues under my belt, and a world of legal know-how still to learn. With this magazine we wrap up 2005. It's a good time to wish everyone well, and thank all those contributors for digging down deep and producing the interesting pieces which keep coming across my desk.

This issue, an enthusiastic response to Justice Saunders' article on courthouse security meant we needed to clear some space for your comments; hence the new *In Response* section. We'd like to continue to hear your voices and welcome your feedback on what's published. Whether you agree or strongly disagree, please feel free to let us know.

On behalf of myself , the magazine's designer, Lisa Neily, and our photographer, Ted Power, I'd like to wish everyone a very special holiday season and best wishes for the coming year.

A LETTER TO THE EXECUTIVE DIRECTOR

Dear Darrel,

I read with interest your column in October's *Society Record*, in which you talked about working with law societies in East Africa. Much of our work here at UNODC is directed at establishing and promoting the rule of law in developing countries, and we are quite active in East Africa in areas of anti-corruption, countering money laundering and criminal justice reform. Naturally an important part of that is promoting good practice, and building capacity, among members of the Bar and the judiciary. If you had the time, I would be interested in getting some more information from you on your experiences there, and indeed in other regions. We are always looking to reach out to civil society with a view to sharing experiences and perhaps partnering in joint efforts. It seems to me that the law societies, particularly in Canada, have an important contribution to make in this regard. It would be a pleasure to hear from you.

With best regards,

Timothy Lemay
Chief, Rule of Law Section
Human Security Branch, Division for Operations
United Nations Office on Drugs and Crime
Vienna, Austria

The President's View

Photo by Ted Power/NSBS

How do you define a great lawyer? What makes a lawyer the type of person that other lawyers wish to emulate?

You may wonder why I raise these questions when the theme for this Society Record is how the practice of law and the expectations surrounding it are changing. Faced with this, I think it is important that as lawyers we continually self-evaluate to ensure that we never lose perspective on the most basic question: "What does it mean to be a great lawyer?"

In the February 1990 forward to our Legal Ethics Handbook, the late and greatly respected Ted Wickwire, Q.C., then Chairman of the Legal Ethics Handbook Committee, wrote that "practice in Nova Scotia, on the eve of publication of this handbook, is facing rapid change..." He talked about how such change would intensify as the 21st Century approached. Fifteen years later, we see that his vision was correct. However, he ended his comments with this single sentence paragraph, "These changes must not come at the expense of our ethics and standards."

Surely then, the hallmark of a great lawyer is one of high ethical standards. But years of practice tell us there is more. Such a lawyer is one devoted not only to the service of his or her clients, but also to his or her community. We are fortunate to have a membership which readily embraces this concept – the proof of which is seen in our annual Volunteer issue. A great lawyer must also be one who is pleasant, cooperative, easily approached, and a hallmark of civility. These are but a few of the characteristics one would expect to see; objectivity, intelligence, and hard work are some others which jump to mind.

The real point though, is not being able to name every characteristic of such a lawyer, but to remind ourselves that in spite of great change in our practices, both technological and otherwise, these characteristics will remain the same. Yes, it is important today to have computer skills, but dealing appropriately with real people will always be more important.

Change in the profession and in society in general is good. As lawyers we should never stop questioning, should never stop seeking answers to problems facing our communities. However, our traditions are equally as important. It's important to remember that we ought not throw away the past for change sake, but instead respect what we have learned from our collective history. Indeed, I would suggest that the only changes we should strive for are those which respect the secure foundations of our profession's strong ethical and service-oriented nature.

In this way, the question "What is a great lawyer" will have the same answer whether it describes a lawyer typing out briefs on his manual typewriter forty years ago, or one presenting his case to court via Blackberry over the Internet: strong ethics, service-oriented, civil and approachable.

On another note, as this is the December Issue, we've now reached the halfway point of my Presidency. It has been busy! Not only have we completed several of the tasks set out in our Annual Plan, we've also added new ones, including a task force to re-examine the composition of council, and one to re-examine how we run our annual meetings. I'm surrounded with volunteers and staff who are continually wishing to try to improve your Society. They're working hard, with the only problem being that they're perhaps trying to do a little too much. I look forward to working with all of them for the remainder of the year.

BRIEFS

DALHOUSIE LEGAL AID SOCIETY
ACCESS TO JUSTICE LUNCHEON

Gordon Proudfoot, Q.C., Josh Santimaw, Rebecca Hiltz-Leblanc, and Victoria Mainprize of Boyne Clarke

Archie Kaiser presents Rollie Thompson with the Justice Pothier Award

Denise LeVangie, Shawna Hoyte and Erin Hoult

Justice Warner, Justice Levy and William Fenrick

Justice Nancy Bateman and Chief Justice Michael MacDonald

BRIEFS

Staff at the Nova Scotia Barristers' Society were very busy fundraising for breast cancer charities in October.

by Barbara Campbell and Marie Paturel

RUN FOR THE CURE: The staff of the Nova Scotia Barristers' Society recently won the *Cox Hanson O'Reilly Business 101 Award* at the *CIBC 2005 Run for the Cure* held October 2, 2005. Businesses and companies across Atlantic Canada with less than 101 employees are eligible for this award. Presented at each of the seven Atlantic Run Sites, the award goes to the team that deposits the most donation dollars by the Friday prior to the event.

This is the third year that Society staff have participated in this event. This year, the team participated under the name "Raise the Bar". Those staff members who formed the team are listed below, however, all Society staff contributed to the effort in some way.

The team members were: *Janine Abbott, Heather Antonsen, Rubina Ayub, Margo Beveridge, Barbara Campbell (captain), Elaine Cumming, Jennifer Haimes (co-captain), Susan Jones, Christal Marchant, Jackie Mullenger, Patricia Neild, Dianne Paquet, Marie Paturel, Gerri O'Shea, Lisa Woo Shue, and Victoria Rees.*

Thanks to all who supported the team. Congratulations on a job well done!

STRIKING FOR CHARITY: A Day of Recreational Soccer for Women and Law took place on October 1, 2005 at the Soccer Nova Scotia Indoor Facility in Clayton Park.

The tournament was a great opportunity for women involved with the legal profession to get together, have some fun, network, and raise some money for charity. Five teams comprising over 50 women took part and everyone, regardless of skill level, had a great time. All told, over $775 was raised for breast cancer's "On the Front Line Fund".

Teams from *Boyne Clarke*, *Cox Hanson O'Reilly Matheson*, the *Nova Scotia Barristers' Society*, the *Nova Scotia Department of Justice* and *Stewart McKelvey Stirling Scales* faced off for the honour of being the winning team of the tournament. The SMSS Wave faced off against the NSBS team in the Championship game with SMSS coming out on top. I'm sure that next year's tournament will have even more teams as the SMSS Wave defend their title.

A BIG thank you goes to the Soccer Nova Scotia Indoor Facility for donating all the field time (thereby greatly increasing the amount raised for charity). Other thank yous go to the Nova Scotia Barristers' Society for donating water to the event, and to the Society's graphic designer, Lisa Neily, for designing the certificates.

The NSBS Run for the Cure team, "Raise the Bar"

Striking for Charity tournament winners, SMSS Wave

Dianne Paquet *(left)* and Marie Paturel *(right)* present Christina Fisher, chair of "Titz n' Glitz" *(centre)*, with a cheque for $776.14

IN RESPONSE

The following three letters were written in response to an article on courthouse security — by Justice Jamie Saunders — which appeared in the October 2005 issue of the *Society Record*.


YOU BE THE JUDGE

Q: Should anyone who enters a courthouse have to go through security?

A:

A REPLY FROM THE DEPARTMENT OF JUSTICE (NS)

This letter is in response to Justice Jamie Saunders' recent article in which he expresses concern about the safety of visitors to the courthouse who, in his view, are entitled to expect that reasonable care will be taken to keep them safe whenever they enter a courthouse facility.

The safety of all persons working in and accessing a court facility is of paramount importance to the Department of Justice. Every day Sheriff Officers are successful in assessing the risk related to the day's activities and assigning and applying security measures commensurate with that risk.

It is important to maintain perspective. Justice Saunders describes three incidents in his opening paragraph. The bomb threat occurred in the 1980s. No bomb was found. It has been almost ten years since police searched the Law Courts for an armed litigant. The person was not located at the Law Courts.

Justice Saunders has identified airport style security (metal detection) as the resolution to these concerns. However, metal detection will not defend against a bomb threat, or prevent a Crown Attorney from being punched by a defendant (Judges have the final decision on the use of restraint systems, including handcuffs, in the courtrooms.)

Metal detection is one of the security measures currently employed by Sheriff Services throughout the Province when the Sheriff has determined that the risk justifies its use. The Department of Justice has two state of the art portable walk-through metal detectors which are transported from location to location, as required, in a Sheriff's vehicle. The equipment referred to in footnote 3 of Justice Saunders' article is no longer used in any court facility.

In addition, there are, on-site, at all Justice Centres, a sufficient number of professional grade, hand-held metal detectors (wands) to meet a security requirement should a portable walk-through metal detector not be available immediately.

In May 2005, the Chief Justice of Nova Scotia, the Honourable Michael MacDonald, requested that the Department consider airport style security. In a letter to the Honourable Michael G. Baker, Q.C., Minister of Justice, the Chief Justice has highlighted the positive relationship with the Department, within the parameters of an independent judiciary, and expressed confidence in our ability to work together towards a resolution.

In response to the Chief Justice's request, the Department is embarking on a security review which will involve consultations with the Bench and members of the Bar.

It is important to underscore that additional security measures, including increased use of metal detection, will be implemented in Nova Scotia if the risk justifies it, not because specific measures are employed in other jurisdictions or in response to unfortunate incidents in the United States.

In summary, the Department of Justice agrees that the security of those who visit our Justice Centres is of critical importance. To that end, security measures are applied successfully every day. As a result of a request from the Chief Justice of Nova Scotia to implement additional measures, the Department is undertaking a security audit. Auditors will be seeking the views of members of the Judiciary and the Bar.

Chris Mosher, Executive Director
Court Services Division, Department of Justice

COURTHOUSE SECURITY — ANOTHER PERSPECTIVE

The security of our courts has been a recent topic of discussion. In the last issue of this magazine Justice Jamie Saunders offered his views on the issue. He recommended the installation of airport-type screening for all persons entering courthouses, as well as the x-ray screening of briefcases and packages carried into courthouses. This of course, as he suggested, requires more sheriff's staffing at the designated entry to each of these buildings, and significant commitment of public funds for the acquisition of this equipment. Justice Saunders recommended that these measures be taken in the five busiest courthouses in the province, which he then identified.

With great respect I do not share his views on these measures. To generate further discussion, I offer my own perspective.

Along with Justice Saunders I sit on the Courthouse Standards Committee, where security issues come to the fore as we advise on new courthouse design and wrestle with the challenges that historic structures present.

More than any other institution, the judiciary must stand for the

presumption of innocence and the protection of individual freedoms. Upon entering our courts people should not be given the message that this is a place of dangerous people or, where without special cause, they'll have their individual freedoms curtailed.

Each day, hundreds of Nova Scotians enter the Law Courts. They are lawyers, litigants, witnesses, the accused, police officers, sheriffs, interested members of the public, and our staff. For many, the experience is new. They see busy lawyers, observe uniformed sheriffs monitoring the hallways, and finally, see a judge sitting high upon the dias. It is a quiet, somber place where they await decisions which may dramatically affect the balance of their lives. It is also a safe place.

We do not live in dangerous times, particularly here in Atlantic Canada. But we do live in a society which has embraced a culture of fear. More than any other institution the judiciary must stand against such fear. In the past twenty years at the Law Courts there have been fewer than a handful of incidents that required the intervention of sheriff's staff or the police. Only one incident, that of a distraught man in a family law dispute, involved a weapon. This occurred more than ten years ago. A vigilant lawyer called the courthouse to warn of his threatened arrival and the man was immediately found and arrested at a local drinking establishment.

I am not so naive as to believe that the accused, witnesses, lawyers, staff, judges, or members of the public face no risk. But I do believe that the risk is well managed in our court facilities today without introducing intrusive search procedures as a matter of course.

Security may largely be achieved in less obtrusive ways than subjecting members of the legal profession and the public to an electronic search of their persons or a physical search of their briefcase or bag. In particular, lawyers, as officers of the court, should never be subjected to such procedures. It is with their vital assistance that we monitor and anticipate situations of risk. We need to show the public we respect lawyers enough to allow them to enter our courthouses and courtrooms without invasive search.

Proper security is achieved in many ways: by effective courthouse design, by control of public movement, by vigilant observation, and above all, by anticipation of trouble. This involves a constant assessment of risk, a continuum of risk that our sheriffs and police monitor daily as we go about our business unaware and unafraid. Indeed, before the court opens each morning, dockets have been screened and assessments of risk already made. Security is often enhanced by calling up more sheriffs or by the presence of plain clothed police officers. We do not see these measures and that is as it should be.

Of course, there are circumstances where enhanced security is required. This may be because a particular trial is deemed to be one of high risk or because the court facility itself, usually an older building, poses inherent risk by its design. The courthouse on Spring Garden Road, because of the nature of its dockets, has throngs of people entering the building, and an aggressive press anxious to photograph the accused inside the courthouse. These courthouse sheriffs work in challenging conditions. More sheriff's staff — who do already use electronic scanning equipment — are therefore required. Remarkably, even in this building, there have been few incidents and the ones that did occur were dealt with quickly and efficiently. The only cure for this situation is a new metro court facility which we hope will open within the next decade.

Walk-through electronic scanners are now used in other courthouses where I believe their permanent use is an unnecessary expense and an unwarranted intrusion on the privacy of Nova Scotians. Public money is better spent on ensuring we have the right complement of full-time sheriffs and on the required training to allow them to better do their jobs. Technology can assist, but usually by less intrusive means, such as the use of more cameras to monitor public areas and more silent security alert buttons in administrative areas.

Yes, it is true that some western Canadian courts have initiated heavy security measures. One court has installed heavy rings in the concrete floor of criminal courts so that "dangerous accused" persons can be chained there. Here in Nova Scotia we do not want to instill fear in our jury members; we promote the presumption of innocence, and merely place additional sheriffs in the court room.

Yes, it is also true that courthouses provide a charged environment where affected individuals express frustration and anger. Our courthouse staff and our sheriffs stave off these incidents before they escalate. Their human relations skills, their keen observation and swift action keep our courthouses safe. Let's continue to enjoy the secure and dignified climate we have achieved in a long and proud two hundred and fifty-one year history of administering justice in this province.

Author's Note: *Unlike Justices Saunders and Fichaud, Justice Robertson does not have a black belt in karate. She does however know some techniques for using her wheelchair defensively.*

Justice Heather Robertson

COURTHOUSE SECURITY — A LAWYER'S PERSPECTIVE

Mr. Justice Saunders — in the last *Society Record* — argued in favour of airport-type security for some courthouses. That security would include permanently installed metal detectors and mandatory searches of briefcases and other bags. It would apply to all who enter the courthouses. In fact, Mr. Justice Saunders referred to some courthouse security measures in which lawyers are "scrutinized" by security officers and can be asked to produce identification. Perhaps we should look to security measures which are not so intrusive.

In this issue, Madame Justice Robertson takes a different tone. She argues that courthouses should not signal — by their security measures — that they are "place[s] of dangerous people", and suggests that courthouses are inherently safe; that sense of safety implicit in the "sombre" atmosphere of a courthouse. Madame Justice Robertson does concede some security risks, but these are sloughed off as well-managed and not seen as

indicative of a need for more stringent security measures. Madame Justice Robertson might be naive. I hope Her Ladyship is not throwing caution to the wind.

Gowned lawyers provide little protection. Sheriff's deputies cannot be everywhere and are rarely present in non-criminal courtrooms. Judges sitting where they traditionally sit have been easy targets. While Madame Justice Robertson wants us to maintain perspective, the old adage is that "those who fail to learn from history are doomed to repeat it."

Mr. Justice Saunders views us as living "in dangerous times", arguing that we all take more safety precautions now than we did a few years ago. Also argued is the idea that those precautions should somehow translate into how we build, equip and manage our courthouses.

Madame Justice Robertson suggests that we have all "embraced a culture of fear", unnecessarily. Argued is that "[t]he judiciary must stand against that fear." This sentiment doesn't speak to security; whether it is needed or how to provide it. It instead seems say "that we have nothing to fear but fear itself."

My own feeling is that even stripped of hyperbole, neither Justice's perspective is quite right. Only some of the comments dovetail with discussions which are on-going within the Courthouse Standards Committee (on which I sit and represent the Society) and elsewhere within government.

Courthouse security is a serious issue. It requires serious, realistic and insightful appraisal. In addressing this issue I propose the following:

First, we do not live in dangerous times. We are safe in our workplaces, our public buildings and when we walk the streets. There are rough places in our community, but we should remember that those attacked on the Commons after midnight are the victims of circumstance; not of who they are or what they do. Proof enough of that might be found in the investigation into the November 12 beating of Mr. Justice Pierre Delphond of the Quebec Court of Appeal. As reported in *The Montreal Gazette*, police have concluded that the Old Montreal attack on Mr. Justice Delphond was random. His Lordship had just been in the wrong place at the wrong time.

Second, I have been practising within our courts for over twenty years, and have never been attacked. Once, when I was opposing a publication ban, an accused jumped at me. He was wrestled to the floor by a sheriff's deputy. On some occasions, sheriff's deputies have been on hand to handle problems. On others, I have been able to persuade my protagonists as to their folly.

Third, I have presided for over a decade as an adjudicator of the Small Claims Court. My hearings have mostly been at night, where I've often found myself alone in the building [where the hearing occurred] with a clerk and the litigants. Many Small Claims Court litigants are frightened by the formal surroundings. They are concerned about what they have lost or what they might be ordered to pay. Those in taxations are potentially liable for amounts far in excess of $15,000. Those with residential tenancy appeals have their homes hanging in the balance. While Small Claims Court litigants are rarely "desperate", in my experience they are often highly emotional.

I've attended thousands of presidings. On the odd occasion where a problem did arise, I was able to successfully remind an aggressor that his or her demeanour would not advance their case. In one post-hearing incident at my car, no amount of "courthouse security" would have protected me. All of us, at one time or another, will just be on our own. So it was for Mr. Justice Delphond.

Fourth, as a lawyer, I am an "Officer of the Court". I do not want to be viewed, however nominally, as someone whose actions could undermine that system. I do not want to be the subject of surveillance. I do not want to have to surrender my documents and notes to search. As an Officer of the Court, I should not be called upon to explain what I have and why I have it. For me, entering a courthouse in not like boarding a plane. The former is where I carry out a profession which is said to be noble. The latter is an option which I can take or leave.

Fifth, the current government has done much to enhance our justice facilities. There are new courtrooms. There are also new courthouses in Port Hawkesbury and in the advanced planning stages for both Bridgewater and Yarmouth. There are preliminary designs for a new justice centre in the HRM. All of these projects are resource-sensitive. Adding expenses for contextually unnecessary security systems could reduce the number of new facilities. What a shame that would be.

Sixth, those of us who function within courthouses also function within a broader community. Courthouse risks cannot be controlled beyond secure walls. Justices, judges, crown prosecutors and lawyers cannot live in bubbles. They, and others around them, will always be at risk of attack by those bent on causing harm. Again, Mr. Justice Delphond's recent misfortune proves that point.

As such, I view courthouse security as a concept which affords the justices and judges with private, enclosed and out-of-view parking, private elevators, limited access private offices and meeting spaces, limited private access to courtrooms and limited traffic floors and corridors. Where required and because of "intelligence", I would endorse the limited use of airport-type security in the manner suggested by Christine Mosher. I would expect lawyers to be exempted from such security in all but the clearest of circumstances.

I would also expect an approach to the design of any new facilities which could seamlessly accommodate more aggressive forms of security — not currently required but which might be necessary in the future.

Finally, while I admit to many worries when I go to court, assault and the threat of violence are not amongst them. My concerns are instead rooted in how long it takes to get into court and how proceedings are regulated en route. I care less about the security of my physical surroundings while in court than I do about my ability to appear before a bright, patient and attentive justice, judge or panel who will give me a fulsome hearing and render a fair decision my client can understand and accept.

Gavin Giles, QC, McInnes Cooper

Firefighter Sam Meehan and Kim Vance, with children Marcus and Patty, strike a pose with lawyer Sean Foreman (of the Halifax firm Wickwire Holm) at Halifax's West Street fire station. Sam and Kim, who were married in Ontario in June 2004 (following that province's Court of Appeals decision), upon returning to Nova Scotia, quickly realized the provincial government was refusing to formally recognize their legal marriage from Ontario. In September 2004, they, along with two other male couples, were succesful in a constitutional challenge which resulted in an order from Justice Heather Robertson of the Supreme Court, declaring the opposite-sex common law definition of marriage in Nova Scotia to be unconstitutional pursuant to the equality provisions of s.15 of the Charter.

20 years young

Louise Poirier, Q.C.
Department of Justice (NS)

This year marks the 20th Anniversary of s.15 of the *Canadian Charter of Rights and Freedoms*, the anti-discrimination clause of the Constitution. I have been asked to comment on how s.15 has changed the practice of law, and continues to change it.

Section 15 came into force on April 17, 1985, delayed three years by the terms of the *Charter* itself, to give governments across the country time to review laws for s.15 compliance. I recall the review of laws undertaken by Nova Scotia. There was no road-map: no definitive s.15 test, no indication how the Supreme Court of Canada might interpret and apply the nine "enumerated" grounds of prohibited discrimination in s.15, and no judicial guidance on the approach to "analogous" grounds of prohibited discrimination including what they might be, or how to identify them.

It was no easier for Plaintiffs in the early days of s.15, who routinely argued almost any distinction in the law or disadvantage under it violated the constitutional right. It was not until 1989 that the floodgates on open-ended interpretation of s.15 were closed by the seminal decision of the Supreme Court of Canada in *Andrews*. *Andrews* confirmed s.15 "discrimination" is disadvantage imposed by reason of one of the listed or analogous characteristics in s.15. In 1999, in *Law*, the Supreme Court of Canada introduced "human dignity" (an arguably vague construct) as a centrepiece of the s.15 right.

Has s.15 changed the practice of law? Unequivocally, it has. Section 15 has surprised many in its significant impact on the law: invalidating laws found to be discriminatory based on citizenship, sex, marital status and physical disability, and even invalidating provisions in a human rights code which failed to prohibit discrimination based on sexual orientation. Compare this, by contrast, to pre-s.15 *Charter* decisions, for example, under the Canadian Bill of Rights, where courts upheld problematic laws in *Lavell* (an Indian woman who married a non-Indian man lost her status, but not so the Indian man who married a non-Indian woman) and *Bliss* (denial of UIC benefits to pregnant women).

As for how s.15 has changed the practice of law, one can first state that the *Charter*, including s.15, has changed the face of constitutional law practice. The federal Minister of Justice, the Honourable Irwin Cotler, at a recent constitutional conference, made the apt observation that before the *Charter*, constitutional law was powers-based, and that after the *Charter*, it is significantly rights-based. He was referring to the division of powers provisions of the Constitution (ss.91, 92) — under the doctrine of parliamentary sovereignty, Parliament and legislatures are Supreme lawmakers within their spheres of jurisdiction under ss.91 and 92. Since the *Charter*, however, entrenched rights and freedoms like s.15 now also check Parliament, the Legislatures, the Executive, and even those administering laws. Section 15 has given counsel a whole new frontier to consider in advising clients.

Section 15 of the *Charter* also provides a new arsenal of remedies for counsel to be aware of in advising clients on human rights. Section 15 eclipses human rights codes (quasi-constitutional laws governing private relationships in matters of employment, accommodation, and provision of services) and provides other remedies, where government action is found to be unconstitutional: a court may declare a law invalid and of no force or effect (s.52 of the Constitution), or may grant whatever remedy it feels appropriate to an aggrieved person (s.24 (1)).

"Section 15 Charter rights now focus on human dignity. They are highly contextual, and embedded in the social, economical, political and historical conditions in society."

Lawyers must also now look at the social, economic, political, and historical context of laws and bring evidence of that forward to the Court; a multi-faceted approach to legal argument not contemplated in traditional legal analysis. This is because s.15 is a "contextual" right.

And because s.1 of the *Charter* allows governments to limit s.15 rights (for a pressing and substantial objective, provided the limit is reasonable and demonstrably justified in a free and democratic society), counsel must also enter into comparative analyses of how social and moral issues addressed by a challenged law are addressed in other free and democratic countries. This is nowhere more readily seen than in the Supreme Court of Canada's recent decision in *Chaouilli* (private health care). It is not that unusual, either, that counsel would present to the Court competing, evolving scientific or medical theories, such as in the *Auton* case (effective treatment of autism), and *Martin* and *Laseur* (chronic pain). Judges have also stated they are interested in counsel addressing international rights documents and approaches taken to rights in other democracies; human rights is an issue evolving around the world.

As for the future, the Constitution is a "living tree" (an interpretive approach to the Constitution, interestingly enough, iterated by the Privy Council in the 1930 *"Persons"* case, by which women were finally allowed to sit in the Senate with men). Section 15 *Charter* rights now focus on human dignity. They are highly contextual, and embedded in the social, economical, political and historical conditions in society. The existence of s.15 and the pressures of preserving human rights, as social values change, pushes our understanding of human rights forward. Not only will s.15 continue to impact counsel, but counsel will in turn impact s.15. Constitutionalization of s.15 anti-discrimination rights and the interplay of ss.15 and 1 of the *Charter* have engaged legislators, the Executive, Courts and, of course, lawyers representing clients, in a dynamic way, in the evolution of human rights. It is an exciting time to be a lawyer.

Views expressed are those of the author, not the Department of Justice.

Peter M. Rogers, McInnes Cooper
with Nick Robichaud, Articled Clerk

This year marks the 20th anniversary of section 15 of the *Canadian Charter of Rights and Freedoms* coming into force. It guarantees that every individual in Canada has equality before and under the law, as well as equal protection and equal benefit of the law without discrimination. Upon becoming entrenched in our constitution, this new vision of equality has forced those involved in the legal system to rethink their concept of equal rights - from a notion of formal equal treatment, to a more flexible, responsive ideal of substantive equality. This shift marked a clear departure from the jurisprudence under section 1(b) of the *Canadian Bill of Rights*, and continues to change the landscape of legal practice to this day.

DEVELOPMENT & INFLUENCE OF SECTION 15 JURISPRUDENCE

Since its inception on April 17, 1985, the lower courts across Canada, including in Nova Scotia, have grappled with the application of section 15. However, it was not until four years later that the Supreme Court of Canada articulated an interpretive framework for use in future equality rights cases. In *Andrews v. Law Society of British Columbia*, the plaintiff made a successful challenge to the statutory citizenship requirement for entry into the legal profession in British Columbia. The Court rejected a formal equality analysis, which required similarly situated persons to be treated similarly and differently situated persons to be treated differently, in favor of a "substantive equality" approach to section 15 analysis, recognizing that not all differential treatment will result in inequality, and conversely, that equality in form can mask systemic discrimination. In other words, the section 15 equality guarantee is mainly concerned with the impact of the law on the individual or group concerned, not on formally equal treatment.

As political, economic and societal climates and values change, likewise the use and scope of section 15 continues to evolve. For example, the list of prohibited grounds of discrimination continues to expand, allowing for the creation of new "analogous" grounds such as sexual orientation, marital status, aboriginal members living off-reserve, and citizenship. In 1999, a unanimous Supreme Court of Canada decision in *Law v. Canada (Minister of Employment and Immigration)* held that a successful Section 15 equality claim requires (i) differential treatment (ii) on the basis of an enumerated or analogous prohibited ground of discrimination (iii) that amounts to substantive discrimination. What is unique about the Court's approach in *Law* was the framework it provided for future courts to deal with discrimination claims, as it described several contextual factors which were to be regarded as guidelines only, not a rigid formula. *Law* is further recognition that a meaningful analysis of whether a claimant's dignity has been violated in a discriminatory fashion must be contextual, is dependant upon the particular facts of each case, and needs room to grow and adapt as society's mores evolve.

Equality jurisprudence from section 15 of the *Charter* has had a profound impact beyond the public sector purview of the *Charter* by influencing Human Rights tribunals in their consideration of discrimination in the private sector.

THE FUTURE OF SECTION 15: CLASS ACTION LITIGATION?

As our wealth of section 15 jurisprudence grows, we continue to observe evolving application of the equality provisions. One interesting trend which appears to be emerging is the potential use of *Charter* equality rights as the foundation for class action litigation.

"Individuals and groups across the country have relied on this provision to protect their right to equality in numerous situations, from pension benefits to employment and from medical services to immigration..."

Class actions allow effective access to justice for claims involving large numbers of people for whom individual actions may be uneconomic.

In one well-publicized example, a $400 million national class action lawsuit on behalf of surviving lesbian and gay spouses for the denial of survivor benefits under the Canada Pension Plan was launched against the Federal Government on November 27, 2001. The lawsuit alleges that the Federal Government discriminates against same sex couples by denying surviving partners a survivor pension under the Canada Pension Plan unless their partners died on or after January 1, 1998, a restriction which does not apply to opposite sex couples.

The claim was successful at trial and substantially successful in the Court of Appeal (with some limits on the remedial relief) in a decision that extended pensions to over 1,000 gays and lesbians in Canada. However, the Government of Canada has recently appealed the ruling to the Supreme Court of Canada.

The financial implications of a benefits-related class action lawsuit can be enormous, and will force our courts to examine the role of financial or budgetary issues in discrimination claims, or at least in assessing appropriate remedies for section 15 violations. The Supreme Court of Canada has indicated that "budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective" for section 1 justification purposes, but could qualify as sufficiently important in exceptional cases where they are "wrapped up with other public policy considerations." Where such "exceptional" circumstances will arise remains to be seen. Numerous mass claims (whether framed as class actions or otherwise) for private sector discrimination can be expected under provincial and federal Human Rights legislation as well. We should expect to see a continuing and interesting dialogue between discrimination jurisprudence under the *Charter* and *Human Rights Acts.*

CONCLUSION

Over the past twenty years, section 15 of the *Charter* has developed into an effective tool in the fight against inequality and discrimination in Canada. Individuals and groups across the country have relied on this provision to protect their right to equality in numerous situations, from pension benefits to employment and from medical services to immigration, with the main restriction on the scope of section 15 being the limited applicability of the *Charter* to the private sector, where the Charter's influence is nonetheless experienced through moral suasion on Human Rights tribunals. For many lawyers, pursuing a section 15 claim will be a rare occurrence. Nonetheless, as lawyers we must all be alert to possible discrimination and equality issues in our clients' lives and be prepared to ensure that they have the opportunity to pursue a remedy.

Changing Times:

how law schools are keeping up with changes in legal practice

The Faculty of Law of the Université de Moncton is the youngest and smallest of Canada's faculties of law. Its teaching complement includes twelve full-time professors. Each year, 115 to 125 students are enrolled in its programs. Founded in 1978 to meet the needs of Francophones from provinces other than Quebec, and more particularly those of the Acadian community, it offers French-only programs in common law. This gave rise to the creation of a legal translation and terminology centre, the Centre de traduction et de terminologie juridiques, whose mission was to translate and develop the legal terminology which until then was practically non-existent in French.

Marie-France Albert
Dean of Law, Université de Moncton

From its very beginnings, the Faculty has been dedicated to preparing not only practising lawyers, but also men and women planning a career in the civil service, industry, journalism, or education, and looking to a legal education as an undeniable asset. The Faculty's mission is to provide Francophone communities outside the province of Quebec with professionals able to hold executive positions in various fields and to assume leadership roles in their community.

Indeed, this mission is what makes the Faculty of Law of the Université de Moncton unique in Canada, if not the world. For over a quarter of a century, its graduates have gone on to become judges, lawyers, journalists, civil servants, industry leaders and more. They have not only contributed to the advancement of linguistic rights in Canada but also advanced the law in other fields. It might even be said that with the creation of the Faculty of Law of the Université de Moncton, no longer can the common law be identified solely with the English culture. However, it distinguishes itself by more than its promotion of linguistic rights and the uniqueness of the education it provides.

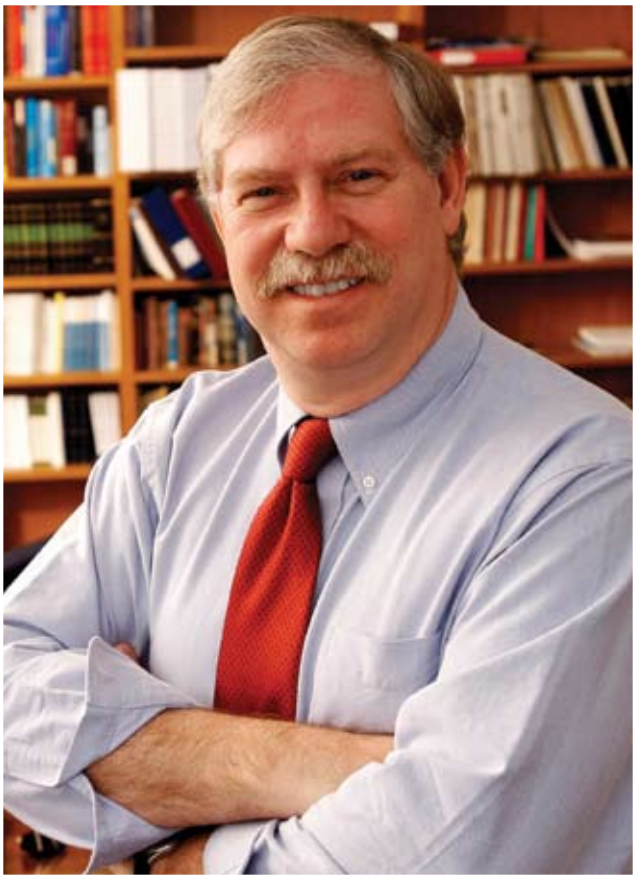
Since its creation, and in spite of its small size, the Faculty was able to expand on its basic legal training programs with courses tailored to meet the needs of a constantly evolving profession. Under the heading Contemporary Law Issues, it offers new courses in response to student demand. The contents of these courses vary, as do the changing needs of the profession. The courses are usually taught by a team of professors or guest lecturers. Courses in Immigration Law and Cyberlaw were offered under this heading. Moreover, the Faculty gives its third year students the opportunity to choose their own field of research for their dissertations. The dissertations are supervised by professors, individually or in collaboration with colleagues of the Faculty, of other faculties of law, or of other faculties at the Université de Moncton. These courses are instrumental in acquainting the students with new fields such as intellectual property law, entertainment law and others.

Furthermore, through lectures and especially through conferences — national as well as international — which it organizes either singly or in collaboration with its centres or other faculties of the Université de Moncton, the Faculty provides opportunities for its students not only to explore new fields, but also to benefit from contacts with researchers from all over the world, whether they be civilian or common lawyers.

In addition to its core program as well as its Bachelor of Law program for students who hold a degree in civil law, the faculty of law also offers a Common Law Diploma program and interdisciplinary programs. Through its international centre for common law in French — the Centre international de common law en français — the faculty also participates in the delivery of courses leading to the Multidroit Common Law for Business diploma awarded by the Université Jean Moulin Lyon 3. Multidroit's e-campus offers an Internet-based university education program using interactive teaching methods based on the mastery of new technologies. The Centre international de la common law en français is a member of the Consortium Multidroit coordinated by the Université Jean Moulin Lyon 3. Finally, the Faculty has added to its line-up an online short law program aimed at students not enrolled in its regular university education programs. The delivery of courses within the framework of the latter two programs demonstrates the ability of the Faculty to adapt to new methods of teaching law in response to the needs of students living in remote areas and in other countries.

There is little doubt that the practice of law has changed significantly in the twenty years that I have been teaching at Canadian law schools. Advances in information technology alone have had an enormous impact on practice, as well as on other aspects of our daily lives. When I began teaching law at the University of British Columbia in 1985 we were just beginning to enter the era of personal computing. Things that we now take for granted - like e-mail and electronic legal research, to say nothing of the ubiquitous Blackberry and PowerPoint presentations -- were beyond my admittedly limited imagination of how technology could change the way lawyers (and law professors) do their work.

Philip Bryden
Dean of Law, University of New Brunswick



Moreover, technology is not the only factor changing the way law is practiced. Nobody is particularly surprised to find that the legal rules we used today are different than the ones that were in place twenty years ago. What is more remarkable is the way in which whole areas of the law that were relatively undeveloped in 1985 have become an essential part of the knowledge base of today's lawyers. To use just one example, it's no longer enough for criminal lawyers to just keep up to date with changes in the Criminal Code and the law of evidence; they also need to have to have a reasonable working knowledge of the Charter. In addition, significant changes have occurred in the demographic characteristics of the student population in law schools (and correspondingly in the profession itself) as well as in the organizational structure of legal practice. The national and regional law firms my current students take for granted could not have existed prior to the Supreme Court of Canada's decision invalidating legal restrictions on the establishment of interprovincial law firms in Black v. Law Society of Alberta in 1989.

How then, can law schools possibly prepare our students to keep up with this pace of change? One way for us is to take a deep breath and remind ourselves of some of the constants in the way law is practiced. Lawyers who communicate effectively, both orally and in writing, are as much in demand in the electronic information age as they were twenty years ago. The methods of doing legal research may have changed in recent years, but the ability to find relevant legal materials and use them to develop effective arguments or give good advice was just as important for lawyers when I started law teaching as it is today. And clients continue to want lawyers who behave in an ethical manner and are able to offer practical solutions to real world problems.

From the time they were established, Canadian law schools played a vital role in helping our students to develop the skills in research, analysis and communication they need to be effective lawyers, and I do not believe that the pace of change in the way law is practiced alters that core element of our mission. At UNB we think that a relatively broad base of substantive legal knowledge is an important foundation for whatever type of legal career a student may eventually embark upon, and that is why we continue to insist on a fairly extensive compulsory curriculum. We also tend to believe that law schools play an important role in shaping the professional attitudes of students, so we try to encourage our students to think about the law and justice in a larger compass and to be conscious of the responsibilities that come along with the opportunities afforded by the practice of law.

Nevertheless, it is not enough to continue to do what we have always tried to do well. It is typically easy to find faculty support for adding new courses that allow our students to explore new areas of the law. For a small law school like UNB, however, the challenge is to do this without compromising our commitment to a curriculum that offers our students a broad and solid foundation. We will probably have to be more selective in the areas in which we choose to expand than some other law schools, and we will have to be more imaginative in finding new ways to enrich our offerings. We have been experimenting with video-conferencing and other distance education techniques to be able to offer our students access to expertise that is not available here in Fredericton, and we will have to show more flexibility along these lines in the future. Law schools are not always leaders in embracing new information technologies, but I think we have to find ways to keep reasonably up to date on technological developments and take advantage of the opportunities that they afford us to communicate more effectively with our students and the rest of the world.

We also have to be willing to consider the way in which changes in the way law is practiced affect what we consider to be the core of our curriculum. My own view, for example, is that the use of non-litigation dispute resolution techniques has become a sufficiently important part of the way lawyers practice that we need to find ways to integrate an understanding of these techniques into the set of core competencies we expect of our students. Finally, I think we have to be much more willing than we have been in the past to address the ways in which the economics of professional practice affects both the demands placed on lawyers and the types of services they can afford to provide to their clients.

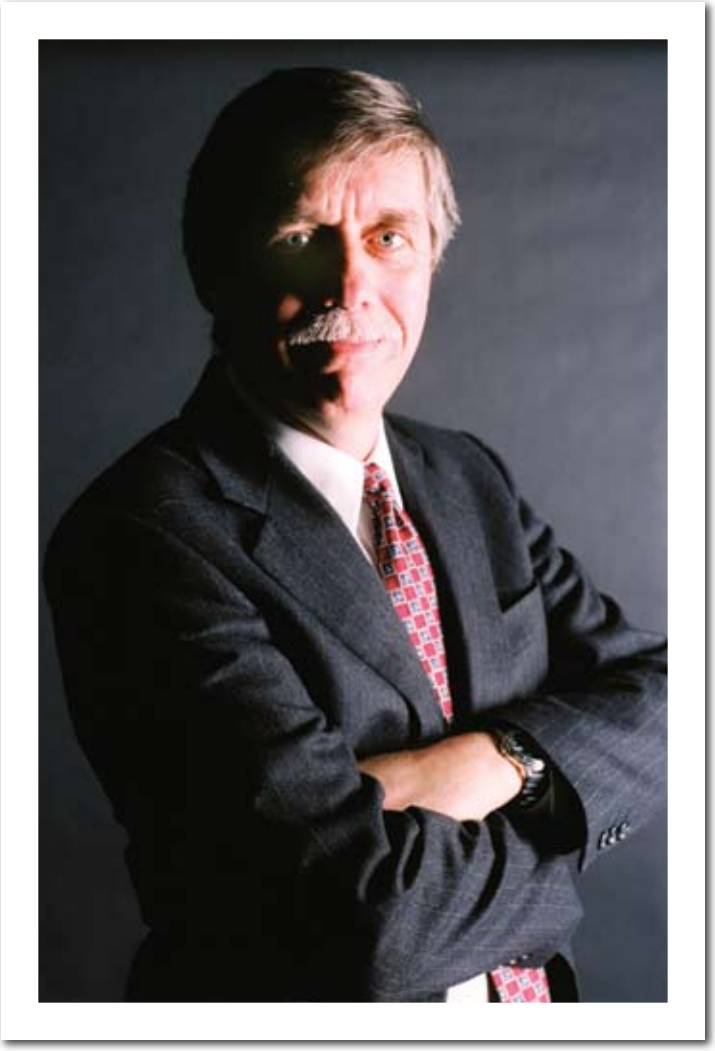


Photo by Ted Power/NSBS

Phillip Saunders
Dean of Law, Dalhousie University

Just as the bar is constantly adapting to changes brought about by new technology, and by new (or newly significant) areas of practice, law schools respond to these same pressures across the entire range of our work, but particularly in the areas of curriculum development, the research program and aspects of skills training.

Our curriculum is continually renewed and revised, responding to new specialty areas while maintaining strong offerings in the traditional core. In some cases this can be accomplished by additions to existing courses, as with the inclusion of "new media" issues as part of intellectual property. Some developments, however, are sufficiently discrete that they require the development of new courses, or even new clusters of courses. At Dalhousie, for example, the creation of environmental law as a specialty area in the late 1970s resulted in a range of courses which are now considered standard offerings. More recently, we have added courses in the area of health law, as that concentration has become more important to practitioners and government policymakers. Similarly, we have responded to the specific legal issues raised by new technologies in areas such as the Internet and electronic commerce.

The mandate of law schools, of course, extends to research as well as teaching. At Dalhousie, our research program has been critical to the identification and advancement of new issues on the legal horizon, whether based in technological change or arising from other sources. In the areas noted above: health law, marine and environmental law and law and technology, we have active research institutes, all of which contribute to academic research, but which also participate in law reform and the progressive development of new approaches in both law and policy. The prospect for innovation, for providing answers to new problems, is at the heart of many of our successful research projects.

If one looks back to earlier eras in the law school, one of the most noticeable changes has been the extent to which we have integrated technological advances in the skills training aspect of legal education, particularly in training for legal research and writing. The explosion of computer-assisted legal research in the past 10 to 15 years has necessitated major investments in technology for law libraries, as well as a revamping of courses to ensure the introduction of new methods. It is important to remember, however, that a focus on the new must come without sacrificing the traditional skills of legal analysis and writing; the tools cannot become more important than the substantive abilities of those who use them.

There are some broader issues raised by the impact of new technologies and areas of practice that should be highlighted. First, the incorporation of such developments into our teaching and research has created a new impetus for interdisciplinary work, as it becomes less feasible to maintain rigidly defended silos of knowledge. Our programs in health law, law and technology, and marine and environmental law, have all been active in seeking partnerships with academics and professionals from other disciplines, and this has made their work more timely and relevant. This has extended beyond the research component to include degree programs which cross traditional lines, such as the masters in electronic commerce, which involves Law, Management and Computer Science.

Second, the introduction of new areas of teaching and research inevitably involves a balancing exercise as we allocate our scarce resources between existing areas and new demands. The greater availability of external funding for subjects perceived as current or exciting could potentially skew a faculty's concentration away from areas of law that are equally important, but more familiar. In developing the new we cannot neglect the old, and I believe that Dalhousie has, to date, been successful in maintaining an excellent record of teaching and research in traditional areas of strength such as public law, business law and international law.

Finally, it is important to remember that neither the Bar nor law schools can possibly anticipate in detail the changes that our students will face over the course of their careers. The new areas of practice that we see today are being developed by lawyers and academics who deal with novel questions by applying the fundamental legal principles, and the methods of legal reasoning, that are the essence of legal education, and which have been taught at Dalhousie since 1883. The fundamental challenge for the law school, now as then, is to equip students to identify, analyze and respond to whatever legal issues they may confront in the future.

Lawyers' Insurance Association of Nova Scotia

LIANS

Lawyer's Insurance Association of Nova Scotia (LIANS) introduces a new Risk and Practice Management Program and Advisor

As your new Risk and Practice Management Advisor, I'd first like to take a moment to introduce myself. I come to this position with twenty-six years experience in private practice in small and mid-size firms in Halifax and Bedford, most recently Gillis & Associates in Bedford. I am a 1974 Business Administrative graduate from St. Francis Xavier University in Antigonish and a 1978 graduate of Dalhousie University. I was admitted to the Nova Scotia Bar in 1979 and was appointed Queen's Counsel in 2002. I have extensive litigation and trial experience. My practice included a large component of both Real Estate and Family Law.

Photo by Ted Power/NSBS

In the June 2005 issue of the Society Record, we announced that upon proclamation of the Legal Profession Act, the Nova Scotia Barristers' Liability Claims Fund would be renamed the Lawyers' Insurance Association of Nova Scotia (LIANS). We also mentioned that a Risk and Practice Management Program — a new initiative for LIANS — would be developed.

OUR PROGRAM GOALS

To provide you with law practice management and loss prevention resources and tools that will help you manage your practice more effectively and minimize exposure to claims.

For the practitioner, there are many benefits to effective risk and practice management. The improved client service which results from effective risk and practice management produces happier clients, fewer mistakes and greater efficiency. This should help make the practice of law more satisfying and rewarding to the individual lawyer and his or her staff. Better practice management should also result in greater productivity and increased profitability.

CONFIDENTIALITY

In developing the Risk and Management (RPM) program, one of our objectives is to create an environment in which members will take advantage of risk and practice management assistance without the fear of recrimination. Information received by LIANS, and in particular, the RPM program, is confidential. We do not disclose information to the Nova Scotia Barristers' Society unless required by law or requested to do so by the member to whom the information pertains.

An underlying principle of risk management is that prevention is better than cure.

WHERE WE'RE HEADED

In addition to a regular feature in the Society Record, we will also be providing practice support through a series of articles, newsletters, precedents and checklists, as well as links to information and tools already in existence on other sites.

Take some time to visit our website at **www.lians.ca** to familiarize yourself with the site and to check out the valuable information and tools already there, including the publication "Safe & Effective Practice" — a publication of the Canadian Lawyers Insurance Association (CLIA).

INITIATIVES IN THE WORKS

Our initial program will focus on:

- Practice tips and protocols
- Real Estate resources
- Family Law resources
- Participation in educational programs relating to risk and practice management issues
- Technology — how it can be integrated into your law practice
- Maintaining a healthy work environment and lifestyle

I also hope to travel throughout the province to meet with the County Bars to provide more information about our program and to receive your feedback.

Deborah E. Gillis, Q.C.

PEOPLE GETTING THE JOB DONE

Solving difficult financial situations requires people with a principled, experienced approach – people who understand finances from the inside out. People who get to the bottom of personal and corporate financial health.

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Nova Scotia
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Are you struggling with addiction? Alcohol, drugs, gambling? Depressed? Having financial, marital or family difficulties?

Consider whether the Nova Scotia Lawyers' Assistance Program can help. Assistance on a strictly confidential basis — 24 hours a day.

HELP IS AVAILABLE. CALL 1-866-299-1299

NEW LAP ADVISOR

The Nova Scotia Lawyers' Assistance Program is pleased to announce that Blanche Keats has accepted the position of LAP Advisor for the program.

As of November 1, Blanche Keats will respond to members' calls to LAP's 1-866-299-1299 Help Line.

As the LAP Advisor, Blanche Keats will:

- provide members with information on the services available through LAP,
- provide appropriate referrals to professional counselors and therapists,
- when desired, put members in touch with peer volunteers in the legal community whose experience and training enables them to provide support to members in need, and
- provide information about other community services.

Blanche Keats comes to the position with many years of professional experience as a therapist and community healthcare worker and has volunteered with both the Society and the LAP. In 1990 she was appointed as a lay member to Council, and has served on various Society committees. She has been a volunteer member of LAP since its inception, and in 2005 was awarded the LAP Volunteer Award in recognition of her significant volunteer contribution to the program.

Members can be assured that when they call the LAP Help Line:

- they will receive qualified professional assistance,
- they will speak with a person who is knowledgeable about the program and our members, and
- their right to confidentiality will be strictly observed.

Information disclosed to the LAP Advisor is absolutely confidential. Neither names, nor practice particulars of those accessing LAP services, are shared with the Society, LIANS, or LAP staff or volunteers.

(L-R) **Darrel Pink, NSBS Executive Director; Judge Anne Derrick; and Josh Arnold, Arnold Pizzo McKiggan**

Photo by Ted Power/NSBS

Photo by Ted Power/NSBS

INTERNATIONAL *in scope*

In 1990, the Canadian Bar Association (CBA), with funding from the Canadian Development Agency (CIDA) and Foreign Affairs Canada, began an International Development Program which focused on promoting the role of law in Democratizing countries and countries in Transition. Its work today continues in 10 countries in Asia and Africa, with the majority of its funding continuing to come from CIDA. The following articles serve to illustrate the results of that impressive international commitment.

ANNE DERRICK *in* ZIMBABWE

Pam Sullivan
Editor, *Society Record*

Anne Derrick's recent trip to Zimbabwe is one she won't soon forget. Warned by police not to chat with others in a public park and treated with suspicion by armed soldiers when gazing at the city's parliament buildings, she experienced, first hand, what people in that country live with on a regular basis.

A criminal lawyer and public interest litigator, Derrick was in Africa to participate in a conference on public interest litigation developed and organized by the CBA and the Law Society of Zimbabwe. The two-day conference, which took place this past July, was to have occurred earlier in the year, but political conditions in the country, already unstable, worsened, says Derrick, as their March general elections approached. Derrick says she was unsure that the conference would actually take place, but in late May, received confirmation that it was going ahead.

Contacted in December 2004 by CBA's Project Director of International Development, Ian Morrison, Anne said her initial reaction was immediate. "Ian Morrison called me up and said 'Would you be interested in going to Zimbabwe' and I said 'yes, I sure would be.' "

Anne, Morrison and Sean Dewart — a civil litigator from Toronto — comprised the Canadian group attending the conference, which took place in the capital, Harare. The conference's other participating lawyers were all from Zimbabwe. The CBA has worked with the Law Society of Zimbabwe for some time, and has been following closely the difficult situation there, says Derrick.

The conference, or workshop, as Derrick also refers to it, was part of the broader work being done by the CBA to assist the Law Society of Zimbabwe; she refers to a CBA resolution from 2001 that speaks to the Association's concerns about human rights conditions and the decline of the rule of law in Zimbabwe as an example of the organization's concern about conditions in the beleaguered southern African state.

Photo by Ted Schwalbe, SUNY College at Fredonia / Used with permission

Many conference participants were both members of the Law Society, as well as members of Zimbabwe Lawyers for Human Rights. Derrick, who along with Morrison and Dewart, presented at several panel discussions, says the workshop was very much about the issues of human rights and provided a "relatively safe environment" for the Zimbabwean lawyers to talk with each other. The conference also attracted a lot of attention in the Zimbabwe Bar, says Derrick, with 90 lawyers from around the country applying to register for the 40 spots. The participants, she says, were enthusiastic and interested in everything being discussed, receiving the Canadians with "open arms".

The importance of Canadian lawyers taking part in workshops of this nature, she says, is in what it represents to those fighting the good fight in a very repressive political climate. She used the example of a correspondence in 2002 between the then president of the CBA and the Minister of Foreign Affairs, in which the president talked about how the release of detained Zimbabwean lawyers was hastened by the involvement of the CBA and the international attention which it brought to the situation.

"We have to recognize that while our own legal system needs work, and should not be complacent about human rights in Canada, we do still occupy a very privileged position as lawyers and judges," says Derrick (who was recently appointed to the Nova Scotia Provincial Court).

That privileged position obviously includes not working or living in conditions, such as those in Zimbabwe, which Derrick refers to as "horrendous".

And beyond that, Derrick, as well as the people at the CBA, hope Canadian participation will bring about real change in countries like Zimbabwe.

"There's the hope that there can be a cross-pollination and that we can contribute some encouragement and actual support – material and otherwise," she says.

Derrick also adds that although she and the others brought a strictly "Canadian perspective and experience" to the conference, she felt their presence there was still important.

"It's an intolerable situation in Zimbabwe; lawyers are beaten, judges

have been hounded from office. In November 2000, the Supreme Court was literally occupied by a mob in an incident which drew no official condemnation by the government of Zimbabwe. It's clearly a very different climate than we're used to working in, but I nonetheless feel it was valuable that we went," she says. International awareness and concern are two things Derrick identifies as crucial to helping change what's happening in Zimbabwe and other repressive regimes like it around the world.

"They want not to be forgotten, to not have their struggle slip below the radar."

And minor police harassment aside, Derrick's recent trip appears to have sparked a deepened interest in the country and the larger continent.

"It was my first experience going to Africa and I had the same experience that other people talk about, which is that I'd love to go back."

JOSH ARNOLD *in* CHINA

Riding a pony through the grasslands of Mongolia sounds more like something Genghis Khan would have been up to than a Canadian lawyer from Halifax, but don't let that throw you. Defense lawyer, Josh Arnold, who participated in a whirlwind visit to China last summer, courtesy of the CBA and the All China Lawyers Association, certainly did ride a pony, and, more than that, enjoyed it very much.

This unexpected but welcome trip to China, says Arnold, came about as a result of answering an ad in a CBA newsletter last winter.

"I'd always wanted to visit China, and have an interest in martial arts, which was what, more than a legal curiousity, made it appealing."

That being said, Arnold, who went to China this past August with three other lawyers (one other defense lawyer, a prosecutor and the organizer of the project), says he had the experience of a lifetime — from the point of view of experiencing a new and exciting culture, but also from having done something which he sees as extremely valuable. That "something" included lecturing to approximately 100 lawyers in the Inner Mongolia Autonomous Region, and another 100 in Gansu Province, where he and his fellow Canadians were asked to lecture about the Canadian Judicial System. The three also conducted advocacy training sessions, where the hundred or so Chinese lawyers [attending each of the two conferences] were given a series of lectures covering the Canadian criminal justice system, the advocacy system in general, demonstrations of direct and cross examinations, and closing arguments. They were then given study materials, including hypothetical fact patterns, and a chance to do mock direct examinations, cross examinations and closing arguments in front of their class.

Arnold, when speaking about the cultural oddities which made his visit so much more than your average work-related trip, gets more serious when discussing why he feels this kind of international work is so important.

"…if their government is giving them a chance to advocate for change (by having us over there) within their system, then by us (and others) showing them that there are alternatives to putting up with the system they have, then it may help them to create a more just Criminal Justice system," he says.

Photo supplied by Josh Arnold

And what Chinese lawyers are indeed putting up with, says Arnold, is almost incomprehensible to Canadians. He described a system where accused persons have very little in the way of bail or pre-trial release; if you're charged with an offence, you're basically in custody immediately; where it's difficult for regular lawyers (not the more well-know, nationally prominent ones) to get full access to their clients in jail; where 90-95 per cent of criminal cases proceed from the prosecution side without the necessity of calling actual witnesses; and perhaps most shockingly, the fact that defense lawyers who call witnesses who are not believed, are themselves subject to being charged.

"In China, they don't have to produce witnesses, and don't have a subpoena process. They can just introduce statements that people gave or allegedly gave. It's terrible for the defense," says Arnold. Beyond that, China is a country which has 60-70 death penalty crimes in its criminal code, including: corruption, theft, fraud and possession of drugs for the purpose of trafficking; so as an obvious result, uses the death penalty on a regular basis.

So all of this, says Arnold, resulted in him feeling that the work he and the other Canadian lawyers were doing – no matter how removed it might have been from China's current system – was worth every moment of his hectic travel schedule.

"All you can do is work at this a little bit at a time, in different places [around China] each time, so that nationally, the criminal lawyers are exposed to these new ideas."

DARREL PINK *in* UGANDA *and* ETHIOPIA

The CBA, over the last year, has been working to develop the capacity of the law societies in East Africa. Capacity, in this context, referring to a capacity to govern effectively, says Darrel Pink, Nova Scotia Barristers' Society's (NSBS) Executive Director.

Pink, along with four other Canadian lawyers, was approached by the CBA earlier this year, to visit and lecture to law societies

in both Uganda and Ethiopia. The law societies in attendance [in both instances] were from Kenya, Uganda, Tanzania, Ethiopia and Zimbabwe.

The idea behind the conferences, entitled East African Governance, says Pink, was to teach law societies how to effectively govern lawyers and to preserve the independence of the Bar; both vital to supporting an independent judiciary.

Photo supplied by Darrel Pink

"In many countries they don't truly have an independent judiciary, though they might say they do. They're working very hard to support an independent Bar, the end result being that the government can't tell the Bar what to do," he says.

Pink first visited Uganda in May, where he and two others discussed self-governance, including the admissions and discipline processes, and the setting of standards. In Ethiopia, where the program was continued, he says he was able to build on what they had started in Uganda and do real skills development.

"They don't have a code of conduct or legal ethics code similar to ours, so we worked with them on drafting some provisions that might be included in an Ethics Code," he says

The workshop style, which included breaking people into small working groups, was effective, says Pink, as the learning was happening amongst other lawyers — which extended to include he and the other lecturers; a situation which he says, "greatly enhanced" their credibility.

"We weren't consultants who came in but don't actually do this work. We're talking about things we do everyday," he says.

The importance of this kind of CBA initiative, says Pink, lay in the positive outcomes of supporting the work of a law society (which ultimately has a huge role in helping to support and strengthen democratic reform). He used the example of the work the CBA did with the International Development Committee in the 90s when Eastern Europe was opening up. The result of that work, whereby the NSBS was paired up with the Law Society of Slovakia, is apparent today, he says, with many Bars in Eastern Europe now thriving and in many ways proving the importance of an independent Bar – in supporting both Democratic reform and economic development.

And ultimately, says Pink, the democracy in many of these countries is tenuous at best, but the recognition is that without a functioning legal system, they can't have economic growth. The understanding is that people won't invest in a country where they don't think their disputes will be resolved fairly.

Towards the end of the discussion, Pink drew what some might see as an odd comparison between Canada and East Africa, suggesting that small Canadian law societies of 40 years ago were not so different from those struggling to take hold in Africa today.

"They don't have policies or good procedures, but they want to do the right thing. The fundamental difference is that in Canada we have a much stronger Democratic government which isn't under constant threat," he says.

And, as was the case with both Anne Derrick and Josh Arnold, Pink's recent trips to East Africa have left him much more consciously aware of just how lucky we, as Canadians, are, to have the Justice System we have. And again, similar to Derrick and Arnold, he leaves his experiences in awe of the strength and sheer determination of the people he encountered while there.

"I worked with and met, was touched by, just incredibly committed individuals; people who often put their own lives at risk to do this work."

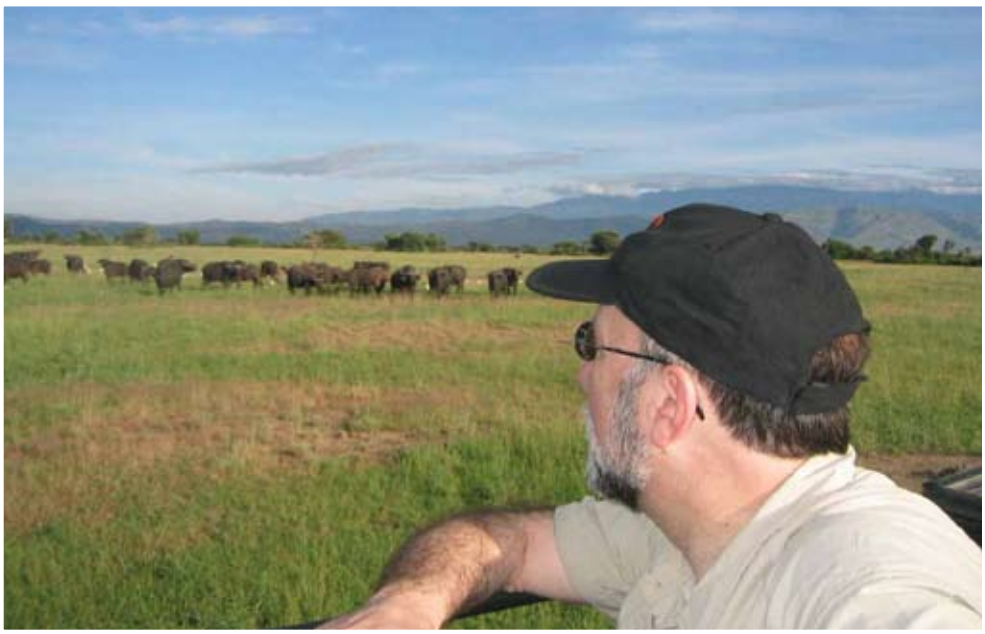


Photo supplied by Darrel Pink

Michael Tripp and a few "high-powered" friends

Photo by Ted Power/NSBS
Courtesy of Dalhousie University's Computer Science department

New kids on the block

We recently asked three lawyers practicing in relatively new fields of law to give us a little insight into what they do and where things are headed.

TECHNOLOGY LAW

Michael Tripp
Stewart McKelvey Stirling Scales

From a cell phone which also serves as your debit card to a genetically modified goat that produces spider silk for use in bulletproof vests, advances in technology (both regular and information) have the ability to radically change the world as we know it. Indeed, we have witnessed the effect of the Information Technology (IT) revolution on business, in academics, and in our own offices.

Many people will comment that the notion of 'technology law' is a somewhat ambiguous concept. Is it practised by those who spent their adolescence staring glassy-eyed into a computer screen and are privy to the secret lingo of computer programmers? Is it nothing more than the result of a marketing department seeking to promote the intellectual property group? Or is it something more?

Practising technology law essentially means servicing a client operating in a high-tech industry which might mean a software company, a pharmaceutical company, or a telecommunications company. Advising any of these clients would, of course, require knowledge of any relevant legislation, industry practices and their business. As the activities of clients in the technology sector can be diverse, a lawyer may be called upon as counsel on an array of legal matters, including those relating to transactional, operational or developmental activities.

Where I believe a lawyer has the opportunity to engage in particularly exciting and interesting work is during the 'commercialization' of a new invention. Technology commercialization, sometimes referred to as technology transfer, essentially refers to the process of developing an idea into a product. Of course, when we speak of 'technology' commercialization, we are referring to ideas which would be considered innovative or cutting-edge in nature. Perhaps a brief overview of this process, describing the parties involved as well as some of the legal advice that may be required, will help to illustrate the nature of this practice.

At the initial disclosure of the technology, clients may be seeking advice on intellectual property issues, such as ownership and protection. Following the disclosure, and providing that the technology does not infringe anyone else's intellectual property rights, the client will typically move to either market or further develop the technology in order to prepare it for the market. The marketing and/or development of the technology can actually be done in concert, with legal advice being required on both fronts. A lawyer may be charged with incorporating the entity for the purposes of the commercialization effort or negotiating the terms of a licensing agreement. During this stage, the client will usually require non-disclosure agreements, and, not uncommonly, periodic counsel on intellectual property issues as the technology continues to evolve. And, of course, there are financial matters. Financing a start-up is, more often than not, quite a challenge. Usually some funding is secured from government agencies, but private equity plays a vital role as well. Lawyers acting for the start-up will act to negotiate the least onerous financing terms; while those acting for venture capitalists will often engage in exhaustive due diligence, and will, of course, seek the most favourable terms possible. And hopefully these efforts will result in the introduction of a new revolutionary (and lucrative) technology into the homes of millions of North Americans.

Working with high-tech clients can certainly be interesting, not only for the ideas and products themselves, but for the challenges that new technologies can present to existing laws.

Working with high-tech clients can certainly be interesting, not only for the ideas and products themselves, but for the challenges that new technologies can present to existing laws. Nonetheless, the values which guide any tech law practitioner are the same guiding the legal profession as a whole – know your client and their industry, be responsive, and know the law.

The "glamour" on my desk is usually a full load of contractual fine print, with a challenging array of IP, defamation and privacy issues — though there is the (usually) pleasant diversion of a stack of scripts and tapes for review.

"That's entertainment!"
Rob Aske at Halifax's Oxford Theatre

Photo by Ted Power/NSBS

ENTERTAINMENT LAW

Rob Aske
Stewart McKelvey Stirling Scales

My entertainment law practice is mostly parties and paparazzi.

No, not quite. The "glamour" on my desk is usually a full load of contractual fine print, with a challenging array of IP, defamation and privacy issues - though there is the (usually) pleasant diversion of a stack of scripts and tapes for review.

Here is a short preview of my roles on a typical film project:

A producer client loves a book and wants to buy the film rights. We negotiate an option agreement, giving them the exclusive right, for a year or more, to pitch the film to distributors and other buyers. The producer makes a small payment for the option (typically less than 10K), but if the option is exercised and the film is made, then usually a much larger price is paid and/or the author of the book gets a significant role (ie. she wants to be the star or director).

After the option agreement is in place, I may not hear much more about the project until (and if) the producer finds a very keen distributor (or broadcaster). We then negotiate the distribution agreement, as well as the territories and rights that will be offered in exchange for the funds needed to make the film. The distributor will sell the film to theatres, but that still leaves for discussion whether the distributor also controls the sale of the film on dvds, and the rights to show the film on tv, in planes and schools, and on mobile phones; add to this the merchandising of toys and you've got one potentially long, drawn out discussion.

While the distributor funds the production, we still need the talent. We settle agreements with the stars, the director, the producer(s), editors, composers and others. This takes us into the fine print of the collective agreements of various guilds (e.g. ACTRA for the actors and Writer's Guild for the writers), which include detailed formulas for future "residual" payments based on uses and revenues, and establish working conditions for those on set: their meals breaks, limits on overtime, restrictions on nude scenes and stunts, tutoring for child actors, etc.

So now we have the distributor agreeing to pay for the film and the talent agreeing to make it, but we have a cash crunch. The distributor pays only upon delivery of the film, but the producer needs the funds much sooner to pay the enormous bills that arise in production. We find a bank to offer an interim loan, secured by the distributor agreeing to pay its funds to the bank instead of the producer, upon delivery of the film. This is papered with security agreements and copyright mortgages, legal opinions, and more, but we're not done yet.

The bank and the distributor also require the producer to have a specialized liability insurance covering any claims for copyright or trademark infringement, defamation, or invasion of privacy. My job is to satisfy the insurer's lawyer that the producer has clear rights to make the film, and that any such claims are unlikely. If the film is "based on a true story", or is a "tell all" documentary, then the insurer will be nervous and the fact checking and discussions may run until the insurer accepts the risk on terms the producer can afford.

Now finally the producer has a distributor to buy the film, talent to make it, a bank to cashflow production, and insurance in case someone claims it is defamatory or was stolen from their script. The producer is done with me for a while – just a copyright registration for the film to finish off, and hopefully a couple of tickets to the premiere.

INTELLECTUAL PROPERTY LAW

Teresa Scassa
Director, Law and Technology Institute
Dalhousie Law School

For many lawyers intellectual property is a distinct legal specialization focused on patents and trademarks, and largely the domain of those with science and technology backgrounds. While traditional IP practices such as these still prosper, intellectual property issues are no longer so easily compartmentalized. In an information economy, the most valuable commercial assets are IP, and lawyers cannot afford to be ignorant of the nature, scope and boundaries of this new property.

Intellectual property is much more than copyright, patents and trademark law. While these areas remain dominant, many other forms of intellectual property do exist. Federal legislation protects semi-conductor chip design, industrial designs and plant breeders' rights. The common law offers protection for misappropriation of personality, trade secrets and confidential information. Commercial law torts such as passing off an injurious falsehood also serve to protect aspects of intellectual property. The field is broad and continues to expand. For example, Internet domain names may have trademark dimensions, and trademark law may overlap with emerging dispute settlement mechanisms for the protection of domain names.

Information technology is a pillar of the knowledge economy, and IT has had a dramatic impact on the relevance of various intellectual property issues. It is now common knowledge that digitization and the Internet have created significant new challenges for businesses in the entertainment and publishing fields. The ability of consumers to reproduce and disseminate copyright protected works has profoundly shaken the music and film industries. These new technologies have also reshaped the market for entertainment products and are driving industry to respond. Twenty years ago one had to check the television listings to watch a movie at home. Ten years ago, a wide range of material was available in video stores. Today, consumers are recording content from a vast array of television networks and searching for content over the Internet. Movie consumption is now portable: movies can be watched on computer screens, on portable DVD players, and in vehicles. Similar shifts in audio technology have produced a generation of consumers who demand unbundled music, greater choice, lower prices, and the ability to listen to music in a broad range of settings. The book industry is on the cusp of facing a similar transformation through the forces of digitization and the Internet. These technological changes place enormous stress on and reshape traditional industries. Because copyright law defines the boundaries for ownership and licensing of entertainment products, it has been at the forefront of legal battles, and is key in reshaping industry business models. The federal government has proposed major reforms to Canadian copyright law, and these proposals, in turn, will have consequences for libraries, universities, and schools, just to name a few.

> **In an information economy, the most valuable commercial assets are IP and lawyers cannot afford to be ignorant of the nature, scope and boundaries of this new property.**

Photo by Ted Power/NSBS

Digitization and the Internet have also brought new interests and claims to the forefront, such that intellectual property issues may arise with increasing frequency in small to medium size practices. Ordinary individuals are creating intellectual property, and are being sued for intellectual property rights violations to a much greater extent than has ever been the case before. New technologies facilitate self-publishing, and the dissemination of one's own work over the Internet. Musicians and other creators are finding less need for intermediaries in recording, promoting and disseminating their work. Individuals are also seeking to modify and transform existing works in both creative and potentially parasitic ways. Ordinary individuals have been the target of intellectual property infringement suits at the hands of the recording and film industries in the United States; a similar attempt in Canada has become bogged down in litigation over the disclosure by ISPs of the identities of subscribers. Individuals have also been targeted with trademark and copyright infringement claims based on websites they have created, even where these websites contain critical, rather than commercial content.

The dramatic changes have not all been in the area of copyright law. For businesses small and large, websites offer a tremendous opportunity for the promotion of a business or product, and in some cases serve as a venue for electronic commerce. Yet the use of a website can raise important copyright and trademark issues. In some cases, particularly where trans-border transactions take place, patent issues may also arise.

What does this mean for legal practice in Nova Scotia? Certainly lawyers need to be aware of the importance of intellectual property issues. All businesses, in all sectors of the economy must receive proper advice on how to secure and protect their intellectual property assets. The increasing importance of brands requires more attention to be given to choosing business and product names and to securing trademark protection, where appropriate. Websites are a useful business tool, but their design and implementation must both respect intellectual property law and be carried out with a view to protecting the company's intellectual property in the site design and domain name. Businesses, schools and universities must also devote greater attention to intellectual property issues, as they are more likely than ever to be pursued for infringing upon the activities of their employees, or for their own reprographic practices. In recent years, even the field of labour law has proven fertile ground for IP disputes, particularly with respect to the use of corporate trademarks in union pickets and informational websites.

Dalhousie Law School has recognized the growing importance of these issues for some years now. Members of the Law and Technology Institute actively research and write on these issues, and the Dalhousie Law School has been gaining national recognition for its work in the law and technology area. My colleague, Michael Deturbide, and I recently published the treatise Electronic Commerce and Internet Law in Canada (CCH Canadian Ltd., 2004) which deals with a range of Internet-related legal issues, including intellectual property. We are also co-editors of the Canadian Journal of Law and Technology. In addition to the basic course in intellectual property law, the law school now offers an advanced Intellectual Property seminar, and IP issues are addressed in courses such as Internet and Media Law and Law and Technology. These courses are enthusiastically received by a generation of law students with increasingly sophisticated technological skills and an eye to bringing a basic understanding of IP and IT to a range of practice issues.

Buyer's market:

Getting smart about recruiting

Photo by Ted Power/NSBS

Susan Hayes
Talentworks Inc.

The times, they are a changin'… and recruitment practices need to keep pace. In October of this year, Canada experienced its lowest unemployment rate since 1975. The legal profession is not insulated from the reality facing every other organization: a looming labour shortage. As a result, law firms need to begin thinking about ways to position themselves as an employer of choice in order to win the race for the top legal talent in this market. An obvious place to start is with the firm's recruitment practices.

Historically, law firms have hired associates through their articling programs. Articling interviews are very labour intensive given the number of applicants and, in most cases, the set timeline. The challenge for every firm has always been trying to decide whether a candidate, armed with only slightly over a year of law school, possesses the traits that will make him or her thrive in the private practice environment the firm offers. Candidates come with no relevant job experience and, quite often, false expectations. Your "top prospect" clerk may not turn out to be the superstar associate you hoped. There is, inevitably, an attrition of associates who discover, after having given it a try, that private practice is simply not for them, leaving firms to grapple with the lateral hire to fill the gap.

The best advice for articling interviews, given the tightly controlled process, is to treat every candidate with respect. Although this should go without saying, the reality is that it is often difficult to feign interest in a candidate you have no interest in, when there are 19 others coming along behind during the "Super Saturday" of on-campus interviews. However, in an increasingly competitive market for legal talent, candidates can have long memories and that same candidate may come round for reconsideration as a lateral hire only a few short years down the road.

Hiring through the articling program and hiring laterally are two entirely different beasts and, therefore, should be approached very differently. The hiring process for clerks is, as noted, highly structured and both firms and candidates understand the process and know what to expect from it. The process, therefore, has little impact on the results. In a lateral hire, the process can have a dramatic impact on results.

With lateral hires, firms are dealing with candidates who not only now have a track record but also some insight into what they want out of private practice. They will have a heightened sense of confidentiality if moving within the same market, but if coming from outside the jurisdiction, they will likely meet with several firms before making any decisions.

In either case, candidates engaged in the process of making a career change expect a timely resolution once they begin a conversation with a firm. Hence the importance of delegating the task to someone who has the capacity to make it a priority but also the authority to make the decision on whether a candidate will move forward. Decision by committee in the early stages of the process does not serve either party particularly well, especially given the scheduling difficulties faced by most busy practitioners.

Keeping candidates advised on timelines regarding next steps will keep them engaged in the process and interested in the firm. If there are delays in the process, make sure the candidate is informed. Otherwise, candidates tend to presume the delay is something negative related to their candidacy and, if left unaddressed, they begin to disengage from the process or shift their focus to another firm.

The biggest change law firms must come to grips with in their recruitment practices, is the shift from a sellers' to a buyers' market. Legal professionals have far more career choices than ever before and there are far fewer of them. Law firms need to become more adept at assessing what makes them different as an employer from their competitors. They need to continually market that difference to potential candidates, not just during the lead up to the articling recruitment process. They need to understand the environment in which they expect the associate to work. For example, recruiting strictly on the basis of academic accomplishment may bring you an associate who graduated at or near the top of their class. However if that feat was achieved by someone who never left their library cubicle during three years of law school, they may be ill-equipped to deal with a client who demands an answer without the luxury of researching the issue to death. They may be entirely uncomfortable with the business development role expected of young associates at your firm. The relationship is doomed to fail because the "fit" was wrong.

Recruitment has become much more complicated than it was a generation ago. It requires strategic focus, constant attention, and long-term planning. Those firms best situated to deal with recruitment and retention issues will be those who prioritize them as part of a "best employer" strategy long before they force themselves to the top of the firms' agenda.

Are they ready?

A principal's impression on the preparedness of articled clerks

Gary Corsano
Sampson McDougall

Gary Corsano, courtesy of Sampson MacDougall

In my 19 years of practice, I've had the opportunity to work with a number of articled clerks; 13 to be exact. Some I've seen progress from articling to very prominent legal careers; others I've seen become sadly disillusioned with the legal profession, moving on to different careers altogether. My experience is that articled clerks who have a broad (yet balanced) program of study are better equipped to take on the challenges of the practice.

A law school should not be a facility for training students to carry out the technical functions and procedures that take place in a law office. And as more and more discrete areas of law practice emerge, it's becoming increasingly impossible to provide detailed instruction in these fields within a three-year period. Accordingly, we, as a profession, should not expect articled clerks to be experts in any particular field. We should, however, expect that by the end of their formal law school training, these students will have internalized an ability to interpret, analyze and apply legal principles and modes of thought. Clerking will give them an opportunity to develop their ability to apply and express these ideas, both verbally and in writing.

The transition from law school to practice is demanding. We expect articled clerks to deal with clients and their issues. They learn that answers to very similar questions will vary significantly, depending upon the nature and disposition of the client's circumstances. They are moving from a structured world, where they have a clear idea of what the issues are, into the real world, where they have to apply learned principles and analytical skills to identify problems and solutions for clients.

Over the past 20 years, the world has seen some of the most revolutionary technology imaginable. With the emergence of the Internet and computer databases, we have become a "world at your fingertips" society. The legal profession has embraced this new technology. We now have case law reporting systems, legal journals and publications on searchable databases, and text books with searchable CDs. Emerging from law school, articled clerks, in my opinion, are fully versed in database searching, and their technological ability is commendable.

However, the ready availability of computer-based information which provides "quick, narrow search results" gives me the impression that classical texts, which discuss or examine legal principles, are not studied or examined as much now as they have been in the past. As a consequence, the general principles of a legal issue may be lost. Technology has put us so in touch with such a multitude of case law decisions that there is almost always one to support our position, with little recourse to discussion about the principle and whether it is in fact well settled.

Those of us (in the legal profession) towards whom articled clerks turn for guidance, should try not to promote a reliance upon technology to the extent that we unwittingly repress the actual act of thinking and problem solving without that technology.

Specialization and technology have moved the profession away from a broad-based focus to more discrete areas of practice. Consequently, in more recent years, there appears to be a desire (in the article clerks I'm encountering) to specialize immediately after law school. The difficulty with specialization is that things are viewed outside the context of the whole. In my opinion, the profession should discourage pigeon-holing inexperienced articled clerks or young lawyers too soon. In addition to the "Articling Checklist" there should be a genuine sense that articled clerks are given an opportunity to be exposed to various areas of practice, and to transfer their basic knowledge from one area to another, recognizing the relationships between all practice areas.

YOU BE THE JUDGE

A look at the challenges facing today's law graduate vs. the graduate of thirty years ago.

Janet Conrad
Blackburn English

Q: What was your debt load like when you graduated and how did it (or not) affect the career path you chose (or not)?

A: My debt was not as significant as others at the time of graduation from law school. I grew up in Halifax and had the financial benefit of living at home during my undergraduate degree. When I graduated from Law School, my student loan debt was almost $5,000, which certainly seemed quite large to me. It took me nine years to pay off the debt.

My debt load did not affect my career path — which was the private practice of law. However, the level of my debt load certainly put pressure on me to obtain an articling position upon graduation, to enable me to have the financial means to pay back my debt.

Q: What were your career aspirations upon graduating from law school, and did you manage to fulfill them?

A: When I graduated from law school my aspirations were to work hard in the practice of law and to ensure that I served my clients well. For me, law school had been a long and arduous journey. What also made it more difficult was the fact that at the time I really didn't know if law school and the practice of law were what I really wanted for a career.

The experience that really made up my mind about the practice of law occurred in my third year of law school and my three months at Dalhousie Legal Aid. This work experience helped put into context what I was learning at Dalhousie. I discovered first hand how a lawyer could positively affect people's everyday lives. This experience made me realize that I was on the right track. I really enjoyed working with the public, and realized that I was able to help people through what I had learned in school.

More than 28 years after graduating from law school, I have primarily a solicitor's practice. Over the years, I have developed a significant client base which requires me to interact with many clients in the course of a day. I find this direct contact with my clients to be very rewarding.

Q: What were your expectations around a family life/work balance (if any) when you started your career?

A: My expectations of the balance between work and family were unrealistic. I underestimated what it would be like to care for a family and try and practice law. I failed to take into consideration that work and family commitments would grow and compete with each other for my time.

Q: How difficult or easy was it to acquire an articling, and following that, an associate position, after law school?

A: Fortunately, at the time I graduated, finding an articling position was not very difficult for me. I moved to Calgary, Alberta following law school graduation. It was 1977, and the boom was on in Alberta. Being a graduate of Dalhousie Law School helped open doors in Calgary. However, when I returned to Nova Scotia in 1979 I had to find articles again. I was fortunate to find a position

working for Ken Crawford Q.C. and The Honourable Justice Allan Boudreau. Following my Nova Scotia articles, I knew I wanted to start my family. Because of this plan, I felt I could not apply for a job and then advise that I was expecting a child. For that reason, I decided to open a sole practice and work from my home.

Q: What were your long-term plans when you began working? Were you looking for something permanent and secure, or something with change and variety?

A: My initial intention was to keep practicing and once my family was established, to obtain a position with a firm. But as my family grew [to consist of four children], I found more and more reasons why I should keep my practice in my home. I actually maintained my practice in an office located in my home for nineteen years (which was about fifteen years longer than my first plan). In 1999, I joined Blackburn English, where I remain to this day. I always liked, and continue to enjoy, providing legal service to individuals (as opposed to corporations). I very much enjoy being the "family's lawyer".

Q: What was your debt load like when you graduated and how did it (or not) affect the career path you chose (or not)?

A: A recent study published by the Law Foundation of Ontario found that while 20 per cent of law students graduated without any debt, 27 per cent had debt between $40,000 and $70,000, and 13 per cent were in excess of $70,000. I knew of students who were over 90,000. I knew of classmates who silently went hungry when textbooks took priority over Kraft Dinner. I knew of those who had to be dissuaded from tossing in the towel and leaving law school in order to alleviate financial pressures. These are very real and struggling friends who refuse to complain about their mixed blessings.

I was fortunate that I was able to follow my chosen career path, despite the cost. Unlike many, I had the benefit of having parents who were able to assist me with financing my studies. With three sisters, all seeking professional careers at the same time, I am no stranger to student debt. But I'm fortunate compared to many students who didn't have that financial support from family. I feel qualified to speak and obligated to advocate, on their behalf.

To obtain an undergraduate and law degree, students today are faced with cumulative costs well in excess of $100,000. This ever-increasing debt load means the illusion of financial stability is more distant than ever. Many students are left with no choice but to seek out the highest paying jobs, not the socially challenging jobs, in order to repay debt. For many, it is no longer affordable to consider a career with Legal Aid or within the smaller practices that are a fading part of the legal makeup of the Nova Scotia Bar. The intimidating cost which hangs over the exit door of every law school is a very real barrier to access. It discourages a whole segment of society from even considering a career in law.

Q: What were your career aspirations upon graduating from law school, and did you manage to fulfill them?

A: Having watched my grandfather, father and sister go before me, I knew what I was getting into when I made the decision to enter the legal profession. I knew what to dread, and what to look forward to, before I started. Perhaps the allure of this potentially noble profession immunized me from its darker side, where long hours and the bruises of learning can wear upon even the most self-confident of people.

Sarah MacIntosh
Sampson McDougall

When I think of career aspirations, I envision the bright, articulate and successful young lawyer that all of us recent grads are certain is hiding within. Well…she hasn't quite shown herself yet. I am still at the stage where every day is like the first day of a new job. To be honest, most days, the adjectives inefficient, awkward, and disoriented would seem a better fit. There are days when I question my decision to go through the boot camp of general practice. I sometimes envy classmates who are already focusing on nuanced areas of practice, and who claim they 'know' their jobs already. I'm still waiting for the time that a file lands on my desk and I know what to do without having to sift through my dog-eared copy of the Rules, or seek guidance elsewhere. I still have a lot to learn, and career aspirations are still on the horizon.

That said, I am confident that I'm on the right track, as my short-term goals have all been met. My objective was to join a mid-sized firm, where I would receive training in all areas of the law, and where mentors would have the time and commitment to provide guidance, whether with soft words of advice or a more forthright kick in the proverbial pants. I have found both, initially during my articles at Landry, McGillivray in Dartmouth, and presently as an associate at Sampson McDougall in Sydney. Both firms maintain some old-fashioned notions about how to mold a good lawyer, and I'm becoming a better lawyer for it.

Q: What were your expectations around a family life/work balance (if any) when you started your career?

A: Work/life balance. Buzz words which have idealistic young lawyers like myself thinking we really can have it all. In truth, this new enlightenment grates against the attitudes of many senior lawyers who did it the old way, and who presume that the old way is the right way.

Statistics show that our profession is eating its young. The drop-out rate of those who wanted to become lawyers, until they became lawyers, tells us that there is a fundamental failure to communicate somewhere in our assembly line. It's tragic for those who conclude that 7+ years of expensive education have led them down a dead end street. This very real sense of disillusionment, especially amongst young female lawyers, should be a wake-up call for all those concerned about preserving the traditional notions of service in the legal profession.

I came into this profession with my eyes wide open. I shopped strategically when choosing where to practice. Lifestyle balance was a primary consideration. The challenges of finding that work/life balance remain very real to me. I haven't yet dodged the bullet; sometimes because of the attitudes of those counting on me, and at least as frequently, because of my own contradictory drive to prove that I can step up to the plate and be relied upon.

I do still think I can have it all. I will work hard. I will not have my humor or spark bludgeoned from me. When I look carefully, I am able to find both male and female role models who are making it work much of the time. While old attitudes change slowly, I remain an optimist.

Q: How difficult or easy was it to acquire an articling, and following that, an associate position, after law school?

A: I initially landed at Landry, McGillivray, where the two founding partners still look upon clerkship the old fashioned way. They promised to expose me to all areas of the law, to impart what they had learned the hard way, over more than thirty years of practice. They were true to their word. I received both the nuts and bolts of practice, and occasional words of wisdom on the side, all of which I know will hold me in good stead as I learn the art of lawyering.

So how did I end up at Sampson McDougall in Sydney? As cliché as it sounds, it was the usual suspect: a man in my life. Despite an appreciated offer to stay on at Landry, McGillivray, I chose lifestyle over perpetual weekends on the road between Dartmouth and Sydney. Sampson McDougall was so determined to keep their articled clerk (who happened to be my better half, Mark) that they offered him the option to include me in the package. At least that's Mark's version of the story. We "hmmed" and "hawed", we looked at issues of work/lifestyle balance, of mentoring opportunities and practice growth potential. We considered student debts and the benefits of a busy practice that can afford to pay us almost as much as we think we are worth. My decision to move was made easier by the graciousness of Landry, McGillivray in allowing me to leave their practice without guilt for the lost investment they had made in me.

I have been blessed with an abundance of good luck in the professional choices I have made to date. Every day, I see real people with real problems who remind me what lawyering is supposed to be about. I know I have landed amongst an extraordinary group of lawyers whose standards of practice and professionalism remind me why I chose to practice law in the first place.

I know that I am amongst the lucky. Not all of my contemporaries have been so fortunate. Many bright and articulate students struggled to secure positions, and I know of several classmates who applied to firms, only to be told to check back in two years (once someone else had made the financial and personal investment of training them). Some left for other provinces in search of employment, when it was their preference to remain in Nova Scotia. Fewer and fewer lawyers and law firms are willing or able to invest the time and effort it takes to produce a lawyer. I wonder what impact this will have on the demographics of our profession 20 years from now.

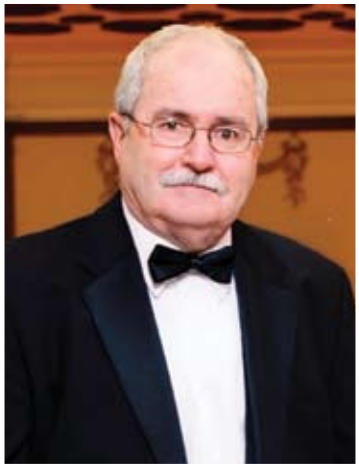
Q: What were your long-term plans when you began working? Were you looking for something permanent and secure, or something with change and variety?

A: Long-term plans? Permanent and secure? Questions that only someone from another generation might ask of ours.

We are accustomed change. We are strangers to security. Whether we stay where we are, get pushed out the door, or pursue the green fields that are always just on the other side, there will remain one constant in the practice of our profession: the ever evolving presence of change.

As in practice, and as in life…there's never a dull day. How fortunate we are.

This is not Los Angeles, eh!



Chief Justice Joseph Kennedy
Supreme Court of Nova Scotia

I was in Texas a while back, at a time when that State was in the midst of judicial election campaigns.

I became concerned about the job future of one state judge who was in a struggle to retain his seat against a legal firebrand. "Don't vote for "Softy Jim" Cameron. He's too liberal for Texas... He lets drug dealers walk and gives probation to perverts."

I worried for "Softy Jim".

I checked with my daughter, in Dallas, on election night, only to discover the worst. "Softy Jim" had fared badly. He had freed his last felon. I wouldn't want to be a pervert in Texas.

More recently, you may have noted the embarrassing debacle Texas is facing in trying to find a judge to try former house majority leader, Republican Tom Delay, who's been charged with criminal offences in a climate of partisan politics.

The judge scheduled to deal with Delay was not only an active Democrat, but has contributed to a website that sold t-shirts with Delay's "mug shot" on them. He seemed unsure if these were grounds for recusal, referring the issue to his Chief Judge who is "examining the t-shirt" as I write.

I was more recently in another State at a trial lawyers' dinner and heard justices of that jurisdiction's Supreme Court, who were present, congratulated for being "plaintiff friendly". They didn't seem the least troubled by that suggestion.

We may wonder how these American judicial systems function, and yet clearly they do.

Texas is one of the most dynamic places I have ever been. They build things in Texas, accomplish grand schemes, take risks. It's clear that people must think that you can sue there, that they can access the courts of Texas and get some sort of justice.

Likewise, those "plaintiff friendly" judges function in one of the most prosperous and seemingly progressive cities I've ever visited. But none of this is us. This is not the way we do things in Canada.

It's important that Canadian lawyers know and remember how different we are. Lawyers are as susceptible to the American cultural monster as any other citizens of this Country. We were raised on *Perry Mason* and *L.A. Law.* We became familiar with *Roe v. Wade* and *Brown v. Board of Education* before we ever read a Canadian citation. We knew of Clarence Darrow and Melvin Belli and Johnnie Cochran before we ever heard of J. J. Robinette, H.P. McKeen, or Eddie Greenspan.

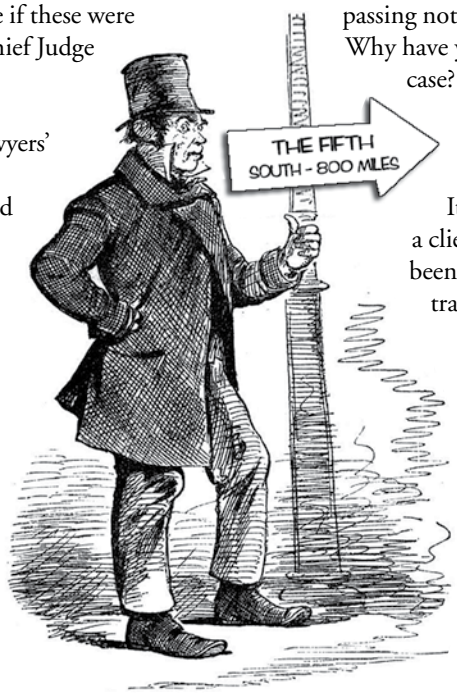
It should come as no surprise then, that we might occasionally be confused with respect to our own identity.

In my years on the bench in this Province I have experienced lawyers who:

- ask to "approach the bench" ("if you take a step towards this bench I'll have the sheriff mace you")
- suggest that a client will "take the fifth" ("the fifth, counsel, is 800 miles south of here")
- address the court without standing, (more then just a mistake — a discourtesy)

(I've never been asked to conduct a "sidebar" but I am ready with a response should it happen.)

But these are simply anecdotes, not serious problems. Of more significance is the now common wish of counsel to have their clients sit next to them in court. I think this relatively recent phenomena has American roots. It's distracting and rarely helpful; clients passing notes, pulling on gown sleeves during argument. Why have your client next to you? Don't you know your case? These seats, inside the Bar, belong to barristers.



And certainly do not place your client up there without asking permission of the court. It infuriates a judge to enter a courtroom and see a client sitting at the counsel table without having been granted permission. This is not in the Canadian tradition and often serves no good purpose.

A mistake sometimes made by new counsel is the expectation that a client, once sentenced, will have some time to go home and arrange their affairs before incarceration — á la Martha Stewart. The convicted go directly to jail in Canada. Do not embarrass yourself by advising a client otherwise.

What is most problematic is behaviour [by lawyers] that I attribute, at least partially, to American influence. The lack of civility

between counsel (which judges now too commonly observe in our courtrooms) is likely to have been influenced by the aggressiveness that we see depicted, and glorified, by the American media. If acting in this behaviour is client-driven, resist, as it's in your client's best interest to do so.

How long do you think a Greta Van Suskirk or a Nancy Grace would be allowed their irresponsible behaviour in a Nova Scotia Court? Don't imitate those people.

Do not question the integrity of opposing counsel without understanding the ramifications involved. Do not attempt to communicate meanness and toughness. Think about what you are saying before you open your mouth in imitation of some "prime time piranha".

Do not attempt to try your case in the media. Judges watch television too. They also occasionally read newspapers. There are few things that will annoy a Canadian judge as surely as a lawyer who makes a public statement about an ongoing trial outside the courtroom (unless of course you wish to compliment the judge — which is permissible, even encouraged). Recently, a justice of the Alberta Court of Appeal asked counsel "Do you wish to add anything to what you told the CBC this morning?" Don't be that counsel.

Watch the senior litigators in this Province. Watch how "the best" behave in the court setting; the courtesy they extend to one another and to the bench. They're fiercely competitive, yet civil. Watch the results they get.

You'll remember that two of our respective countries' most notorious criminal trials took place simultaneously — the O.J. Simpson trial and the Paul Bernado murder case: as nice a study in contrast as one could ask for. On the one hand was Judge Ito, who presided over a "run away court room" and on the other, Judge Pat LeSage, who conducted a criminal trial as well as could be imagined; maybe these courtrooom situations were more the product of the judges than the systems, but telling nevertheless. It made me proud to be a Canadian judge.

The American Justice System, as incomprehensible as it often seems to us, works for them. It has produced Holmes and Hand and Brandeis and O'Connor. It has allowed that country to prosper. They are the richest, most powerful country in the history of the planet. That being said, it would not work for us. We are two very different societies.

Do not, inadvertently or otherwise, bring that American process, that American litigant behaviour, into our courtrooms. You'll not benefit from doing so, or serve your clients' best interests.

This is not Los Angeles, eh!

HELP CRACK

THE CSI EFFECT

Popular U.S.-based television programs such as *CSI: Crime Scene Investigation* and *Law and Order* are topping TV viewing ratings in Canada and the US. Evidence suggests that these programs are causing law-related biases among the general public, which in turn are influencing legal proceedings. Researchers have demonstrated that news coverage can influence verdicts in both civil and criminal cases. The "CSI effect", as characterized by attorneys and judges (and by the news media), occurs when people are exposed to information presented in television crime dramas. By altering people's expectations and distorting their understanding of police practices and our justice system, these television crime dramas may bias legally-relevant decisions. For instance, people may acquire a sense for what constitutes good advocacy from television and feel disappointment when their lawyer's behaviours at a hearing or at trial don't coincide with their expectations. Jurors' expectations of what constitutes good police investigations may affect their evaluations of the strength of the Crown's case. A recent study in the U.S. showed that over 50 per cent of prosecutors in Maricopa County, Arizona engaged in plea negotiations because they believed the CSI Effect compromised their case.

There is little scientific research on this issue, but research emerging from our laboratories reveals that television viewing of crime dramas significantly predicted judgments of the reliability of various types of evidence. We (Marc Patry, Steve Smith, and Veronica Stinson, psychology professors at Saint Mary's University) are working diligently to gather input from legal professionals in Nova Scotia on their opinions of how U.S.-based television crime dramas affect the practice of law in Canada. Our current survey of N.S. criminal defense lawyers will be followed up with one of N.S. Crown attorneys, judges, and police officers. We hope you'll take a moment to share your views with us. If you'd like additional information on our project or would like to participate, please feel free to contact us at veronica.stinson@smu.ca or at 420-5861.

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