

The Advisory



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Our Mission
To serve the public interest by promoting a high standard of legal services and professional conduct through the governance and regulation of an independent legal profession.



Doug McGillivray, QC, President, Law Society of Alberta

Scams, schemes and skullduggery – your comments

I was delighted to see so many lawyers and stakeholder organizations email, write, and phone me about the article I wrote

in the last issue of *The Advisory* titled *Scams, schemes and skullduggery*. Many thoughts were conveyed on a number of points I made, and many new ideas were expressed on how the LSA can better protect the public and prevent the profession from getting involved in fraudulent investment schemes and other scams.

Fraudulent investment schemes, mortgage fraud and other unconscionable transactions have always been with us. Our concern, and the concern of the profession is when lawyers are willing participants, willfully blind or just should have “known better” than to be involved with such schemes. Involvement in such circumstances is unethical and unprofessional conduct. When even just one of us is involved, the involvement and resulting consequences not only negatively affects the lawyer involved and that lawyer’s client, it also negatively affects the reputation of the entire profession.

The LSA runs public protection programs through our assurance fund and insurance programs (Alberta Lawyers Insurance Association). Clients are compensated for actual financial loss that may result from lawyer involvement in a fraudulent scheme. Remember, however, that Alberta lawyers pay for these programs. If the assurance fund is depleted, or if the amount of insurance claims is high, the LSA has no choice but to increase the levies. This is something we do not want to do – especially for something that is largely preventable. Also remember, that a cost cannot be placed on the reputation of the profession and the trust placed in and on us by our clients. It is much more difficult to

keep and regain the trust of the public and our clients once it is lost by the unethical conduct of one of our own. Please see the article *Investment schemes and mortgage fraud – Red Flags*, on page four for more information.

In reading and responding to your letters, some of which are reprinted in this issue, there are two matters of concern that were prominent in your comments.

Dual Signatures on Cheques

A recent article in the *Edmonton Journal*, *Calgary Herald* and *National Post* made reference to my comment about the LSA, in the future, requiring two signatures on trust account cheques. The marketplace, financial transactions and technology are increasingly becoming more complex and evolving at a remarkable pace. The LSA is experiencing this trend through the nature and extent of the claims that it handles through the assurance and insurance programs. The LSA wants to ensure that we are doing our best to protect the public and the clients we serve in this evolving environment. To do so, we are considering implementing further safety mechanisms. One of these mechanisms being discussed, among others, is requiring two signatures on trust account cheques. The discussion about safety mechanisms is in its infancy and no decisions have been made. Since this would have significant impact on the administration of a law practice, the LSA will be talking to the membership to get their views on this and other policies that would hopefully prevent lawyers from being involved in scams and fraud related matters.

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It was interesting to see that a number of lawyers commented on the sanctions imposed on lawyers who are found guilty in a discipline hearing. Some found certain sanctions to be weak, citing that lawyers would think twice about getting involved in fraud or scams if the penalties were more severe.

It would be improper, and impossible, to justify or comment on individual sanctions or specific hearing decisions that have been made. Generally speaking, each hearing is weighed on its individual and unique merits. Even though some hearings may sound similar, they all have different facts and evidence. Once a lawyer is found guilty, the hearing panel hears arguments for sanction, both from the law society counsel and the lawyer's counsel. Each is considered, as well as any precedent hearings of similar facts.

Thank you for your comments. Below are some of the letters, reprinted with permission from the writers. **A**



Doug, I finally read your article the other day. If I understand the facts of the B.C. \$50 million case, the lawyer involved was "simply" bored, tired, burnt out and should probably have quit practicing law a lot sooner. Idiomatic perhaps but apparently not a crook. I do not know anything about the other B.C. \$20 million claim but that does sound a bit larcenous. [Ponzi scams never thrive without greedy naive people to build on and arguably/hopefully the membership would not have to cover their losses on a dollar for dollar basis.] Sorry for the drivel, the point of my note is to offer a thought on the options being considered:

- ✦ **Education** – can't hurt
- ✦ **Banking institutions to notify for any deficiencies or unusual activity** – the problem is that they are only going to be aware of a deficiency if I actually overdraw my trust account. I can easily overdraw a client's trust account and so long as I have other clients' funds in trust no one will know except my bookkeeper and I may be that bookkeeper.
- ✦ **Conveyancing protocols** – the discharge of prior encumbrances requires two basic steps: the payment of the money and the issuance/registration of the discharge of the security. I do think that the banks have to bear some responsibility for inordinate delays. If I pay a bank out and have to wait up to six months for a discharge and that is the norm, no protocol will be able to assist. What harm would result if I had to carbon copy the purchaser's solicitor with my payout correspondence?
- ✦ **No cash** – should not offend any honest person.
- ✦ **No ATM privileges** – the Homer Simpsons amongst us would probably not like such a rule, which speaks volumes about its appropriateness.
- ✦ **Due diligence obligation to ensure no participation in a fraudulent scheme** – the problem with the "smell test" is that some people have very small noses that never did work right. Running across a mortgage fraud file is like hitting a skunk on the highway. You can't avoid the smell by looking the other way. But you can't pretend.

- ✦ **Mandatory self-reporting** – should be no problem with that amongst any member.
- ✦ **Investment money in trust** – at first blush this makes sense although I have had occasion to hold such funds for clients. But never where I was a participant in the investment, in which case it would only be prudent to require me to place those funds in the trust account of an independent solicitor.
- ✦ **Enhanced spot audits and enforcement.** I think this is the best suggestion. What if that were coupled with a requirement for each firm to file its trust account reconciliation on a monthly basis with the Society's auditors? Forensic accounting software could easily be set up to monitor irregular trust account activity on a batch basis. The reports are already there. I fax in my reconciliation and if there is any activity there that flags something for an auditor in Edmonton (or better yet Calgary) an inquiry can easily be made. If I refuse to answer a request for an explanation in an extremely timely fashion then perhaps I need a visit from someone who cares. [I remember being told about a banker in Calgary who was said to be able to see through the keyhole with both eyes. While he is long gone there has to be some people with a thirst for forensics that would leap at the chance to take on such an assignment.]

Since I practice alone I hate to ask how often the more serious defalcations arise with sole practitioners? I expect it would be tougher for you to get your hand in the till up there even if you were so inclined than it would be for me in my till. You have to wonder why the \$50 million man in B.C. did not simply pick up the phone and call the Law Society as soon as he realized with the first file that imploded that he had a wreck. I have had occasion (unfortunately) to call ALIA and, while I've never had reason to rejoice about the call, I have never been made to feel that I was all alone on a hot seat somewhere. Rather, that "we" and not "me" had a problem and "we" would work it out and always have. Sometimes a call is all it takes to resolve something. Perhaps a bit of advertising by ALIA would make the first call an easier one for someone waffling. Thanks for taking the time to write the article.
Laurie Gordon
L.M. Gordon LAW Office
Nanton



The article *Scams schemes and skullduggery (Advisory May 2005)*, which dealt with the cost to the insurance program when lawyers abuse trust funds, was excellent. I think lawyers need to be reminded of this on a constant basis.

The one question is, do the benchers have to take some of the blame for the increase in the number of claims as well as the amount of the claims? We often hear stories of other lawyers who were found guilty by the benchers for abusing trust funds, and cringe when we hear that the lawyers were only suspended for a set period as opposed to being disbarred. Do you think a stronger message from the benchers, such as disbarment for abusing trust funds, would help decrease the number and amount of claims? I appreciate every situation must be dealt with on its own facts, and you run the risk that if a lawyer knows he or she will be disbarred for abusing trust funds, he or she is less likely to come forward if they were involved in a minor abuse (if there is such a thing). Even so, the current trend is, in the words of Doug McGillivray, "simply unacceptable", so maybe a combination of the changes you proposed in your article along with stiffer penalties may help.

David J. Lewis
Manager of Litigation
The City of Calgary Law Department



I am writing to you in regard to an article that appeared in the Edmonton Journal on June 25, 2005 and in particular the proposed changes that may require two signatories with respect to withdrawing funds from trust. My concern is with the "new measures" that may require two signatories to withdraw funds from trust. As you are aware, the practice of real estate is one of tight time lines and requires a great deal of organization and procedure to ensure timely closings. To require a sole practitioner such as myself to have another "person" sign my cheque would make my practice impossible. Deadlines could not be met and transactions could not close on a timely basis. In essence, the client suffers due to delays in possession and interest charges for late closings. As a sole practitioner, I would have to make arrangements with another firm to sign my trust cheques, involving

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delivering the cheques to them (along with my file for their review and to ensure no impropriety) and then have the same returned to me once that other signatory was satisfied that all was in order.

Will that other signatory, whether someone from another firm, or indeed a member of the same firm where we are not dealing with a sole practitioner, even review the file? Will that person ensure that all is in order before signing the cheque? Requiring some third party to sign the cheques will put that person in a "guarantor" situation and make it impossible for a sole practitioner to make signing arrangements. I seriously quare whether the requirement of two signatures will have any effect to reduce defalcations.

It absolutely will have the effect of putting sole practitioners who have a busy real estate practice "out of business".

If the proposal is to have a secretary be a second signatory, that may alleviate my concerns as it would not require the delay of closings. Cheques made payable to the lawyer, cash or to a non-file payee would in most situations be caught by a paralegal working on the file. I would suggest that to impose that type of requirement

on all lawyers is patently unfair and will not do anything to deal with the concerns raised. For me, it would act as a restraint of trade and prevent me from effectively closing transactions. The requirement would be prejudicial to me personally and I would suggest patently unfair in light of my personal history relative to trust accounting.

Perhaps increased audits and reviews would be a preferable way of dealing with defalcations. As well, perhaps new members who are commencing a practice on their own should be the subject of "probational" trust requirements.

I would appreciate the opportunity to address any committee that is considering rule changes with respect to trust accounting.

I thank you for taking the time to review my comments and would ask that the same be passed on to any committee reviewing trust accounting changes.

Rod Neil
Neil Law
Edmonton, Alberta



Lawyers don't deserve cheap shots

I am extremely disappointed that *The Journal's* headline writers chose to malign lawyers "*Lawyers stealing record amounts: Bad apples give black mark to Alberta profession,*" June 25.

Instead of focusing on the real issues in the story, being the Law Society of Alberta's vigilant efforts to maintain the excellent integrity of the profession or the fact that all client losses are reimbursed one hundred per cent, *The Journal* chose to be sensational.

Why doesn't *The Journal* report on all the good lawyers do for our communities and society?

How about an article on the thousands of volunteer hours that lawyers give to charitable organizations, a story on the lawyers who established the Edmonton Centre for Equal Justice or a feature on how studies have consistently proven that the economic success of a society is directly tied to the functionality of the legal system, of which lawyers are an integral part?

Let's end the cheap shots at lawyers and give them and their profession the credit they are due.

Walter Pavlic
President, Canadian Bar Association Alberta



2005 BENCHER ELECTION

The 2005 bencher election is coming up and now is your chance to make a significant contribution to the regulation of the legal profession.

If you are committed to

- Enhancing the integrity of an independent legal profession
- Ensuring the protection of the public with respects to legal services

Consider running for bencher

A nomination package will be mailed by the end of August to each active practising member of the Law Society of Alberta.

September 12 is the deadline for nominations to be returned, which includes the nomination form, biographical sketch and photo.

The voting package will be mailed by October 17 and ballots must be returned to the LSA Calgary office for counting, by November 21, at 4:30 p.m.

Winners will be announced on the LSA website on November 22.



by Dale Spackman, QC,
Bencher and Chair, Corporate and
Commercial Advisory Committee

Corporate law reform lawyers should know

The Corporate and Commercial Advisory committee has been working with the Alberta government and Alberta lawyers, seeking reforms to the *Alberta Business Corporations Act* in order to bring this statute current with other business corporation legislation in Canada.

In conjunction with this effort, the committee has been encouraging the government to introduce legislation providing for unlimited liability corporations (ULCs) in Alberta. These types of corporations, which were previously only available in Nova Scotia, provide tax advantages to U.S. businesses operating in Canada.

On May 17, the *Business Corporations Amendment Act* was proclaimed in force. This Act

includes wide sweeping amendments to the *Business Corporations Act* relating to such matters as corporate names, directors residency requirements, obligations and liabilities, and electronic filings. Of significant importance is the introduction of unlimited liability corporations. The committee will continue to monitor trends in corporate legislation and pursue amendments to the Act as the need arises. There have been some concerns raised with regard to certain amendments (including those relating to ULCs), and the committee is working with Alberta Government Services to resolve these. The committee encourages Alberta lawyers to notify us of any issues of a corporate or commercial nature which impact lawyers in Alberta. **A**

Pro Bono clinic planned for Red Deer



Suzanne Alexander Smith



Donna Purcell

Red Deer will soon be home to Alberta's newest pro bono legal services clinic. The Central Alberta Legal Clinic Foundation's vision became a reality when the Alberta Law Foundation agreed to fund the launch of the clinic, which will provide free legal services to people who otherwise may not be able to obtain these services.

"I am really excited to see to see the clinic become a reality in our community," says Central Alberta Legal Clinic Foundation board chair Suzanne Alexander Smith, a lawyer with Chapman Riebeek in Red Deer. "I'm proud to be able to say that various service providers in our community are rallying behind this initiative and we look forward to working together to best serve those who need assistance."

The Alberta Law Foundation will fund this pilot project with \$162,500, which includes grants of \$145,500 for the first year of operations and \$17,000 for set-up costs. Prospective funding agencies and foundations from Central Alberta will be asked to provide resources for the purpose of securing full-time legal counsel and paralegal staff to serve the clinic.

The clinic will be modeled on Calgary Legal Guidance and the Edmonton Centre for Equal Justice, but will be tailored to suit the needs of Central Alberta community members. In addition to the staff lawyer, paralegal and administrative staff, local lawyers will volunteer their time to provide advice during an evening or daytime clinic.

"We've been overwhelmed by the support received from the local bar and judiciary who have given unselfishly of both their time and resources," said Donna Purcell, president of the Central Alberta Bar Association, whose organization provided the first block of funding to the Foundation. Donna is also vice chair of the board.

Other board members include: John Holmes, QC, Gregg Johnson, Kim Pasula, Davine Keown, Vita Houlihan, Devon Wald, and Simone Shumacher.

The Central Alberta Legal Clinic will be opening its doors later this year, once the office location has been determined and the executive director and support staff are hired. **A**

Investment schemes and mortgage fraud – Red Flags

by Susan Billington,
Policy and Programs Counsel,
Law Society of Alberta

and

Kerrie Breit,
Senior Claims Examiner,
Alberta Lawyers
Insurance Association

Be on guard for fraud indicators in what might seem to be standard transactions. Lawyers may be targeted to assist in fraudulent transactions and may be the tool or dupe of an unscrupulous client. A lawyer who is a willing participant, or willfully blind, in the fraudulent scheme could be personally exposed for losses arising from the transaction, in addition to facing disciplinary hearings with the LSA. As well, a claim in negligence against a lawyer may arise when a lawyer fails to detect and protect their client from a fraudulent transaction. Lawyers can unwittingly lend credibility to a fraudulent investment or mortgage scheme. Lawyers may be asked to serve as trustees or to allow investors to use the lawyers' trust accounts as a conduit between the promoter and investors, in exchange for fees or a small percentage of money directed to the lawyers' trust account. The investor is provided with a degree of comfort knowing that

a lawyer is involved and may believe that the lawyer is endorsing the scheme. In fraudulent investment schemes, the lawyer is asked to make representations assuring the public that they are protected under the lawyers' insurance coverage or for losses arising from misappropriation of investment funds by the lawyer.

Red flags – Investment Schemes

Lawyers should be wary and watch for warning signs of a fraudulent investment scheme and ask themselves questions regarding suspicious transactions such as:

- ♦ Is my client an unfamiliar individual (or corporation)?
- ♦ Does this scheme offer opportunities that provide above average returns with no risk, or minimal risk, on capital? – Returns that are too good to be true!!

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NOTICE TO THE PROFESSION

The Court of Queen's Bench has issued a Notice regarding the addition of a third judge to hear Judicial Dispute Resolutions in Edmonton and Calgary. The Notice outlines booking procedures.

View it at
www.albertacourts.ab.ca

Investment schemes and mortgage fraud – Red Flags

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- ✦ Is the client, promoter or investor seeking to use my trust account without requiring substantial legal services in connection with trust matters? Am I being asked to merely be a conduit between the promoter and investor?
- ✦ Is this a transaction that is within normal business practice?
- ✦ Although one circumstance of the transaction may seem insignificant, do several factors of the transaction when seen together raise suspicion?
- ✦ When the promoter or client is asked questions are the answers evasive?
- ✦ What basis are fees paid? If at an hourly rate, for what services? Or on a percentage of money transferred through your trust account?

The placement of mortgage security on behalf of lender clients may expose lawyer and their lender clients to fraudulent mortgage schemes. Fraud can take place at any stage and can involve any aspect or individuals involved in the mortgage lending process. Alistair Taylor of the Calgary law firm Warren Tettensor LLP presented a paper for the Legal Education Society in November 2002 on mortgage fraud. This paper is an excellent resource for real estate practitioners of the potential warning signs of the types of fraudulent mortgage schemes, the warning signs mortgage fraud that lawyers should be aware of, as well as lawyers ethical and legal obligations to their clients in real estate transactions. Alistair's paper is available on the LSA website at www.lawsocietyalberta.com.

Red Flags – Mortgage Fraud

Indicators that the real estate transaction may be fraudulent include:

- ✦ Title searches show recent transfers of the property or a pattern of mortgages being registered and discharged shortly thereafter;
- ✦ The Statement of Adjustments does not reflect the real estate purchase contract;
- ✦ There are large or unusual adjustments in the Statement of Adjustments;
- ✦ There is a surplus of mortgage proceeds after closing that are to be paid to the borrower or third party.
- ✦ The real estate purchase contract raises suspicions such as: the witness for both the

buyer and seller resembles the signature of one of the parties to the transaction; non-arm's length relationship between the seller and buyer; the deposit is paid directly to the seller; the entire down payment is paid by way of deposit; falsified down payments such as repairs, decorator or appliance allowances;

- ✦ The execution of documents raises suspicions such as; the documents are taken out of the office for execution by the borrower and witnessed by a party to the transaction; photocopied or altered identity documents; lack of picture I.D.; I.D. presented on behalf of absent party; buyer has little or no knowledge of the loan terms or property details and is evasive when asked questions;
- ✦ Multiple transactions with similar characteristics such as the same realtor, appraiser and mortgage representative;
- ✦ Multiple offers for the same property at a significant price increase;
- ✦ Transfer of Land shows intervening transferee with transfer price significantly different from value shown in the Affidavit of Transferee;
- ✦ Lender's Instruction have different details of the transaction from the actual details of the transaction such as purchase price, owner occupancy, down payment;
- ✦ Inordinate delays from seller's lawyer in providing evidence of compliance with undertakings, in particular discharges of previous mortgage encumbrance.
- ✦ In new home construction, the completion certificate, possession certificate and insurance documents are not available prior to the closing of the transaction.

Fraudulent schemes can be very costly to the public, lawyers and the profession as a whole. Lawyers should become familiar with indicators of fraud to avoid becoming the tool or dupe of unscrupulous clients and fraudsters. These red flags are hints to watch for and as fraudsters can be very creative in their approaches, be on guard for all suspicious circumstances that may come across your desk. The LSA's practice advisors, Nancy Carruthers and Ross McLeod, are always available to answer your questions on a confidential basis. If you require information from the Alberta Lawyers Insurance Association regarding fraudulent transactions please contact Kerrie Breit, senior claims examiner at 403-229-4743 or toll free at 1-800-661-9003. **A**

Keep your evening open for The Honourable Peter Cory

(Retired Supreme Court of Canada Justice)

&

Renee Pomerance

(Crown Counsel, Ontario Justice)

As they speak on *Obstacles to*

Peace: Investigating State Collusion in Northern Ireland



A charitable fundraising dinner to benefit

Student Legal Assistance

For more information contact:

Maureen Mallett
(403) 220-8088

Monday, November 14, 2005

6:00 pm

The Westin Hotel
320 - 4th Avenue SW
Calgary, Alberta



by Ross McLeod,
Practice Advisor,
Law Society of Alberta

Be wary of conflicting duties

The British House of Lords has shed light on the duties owed by lawyers who act for more than one party to a transaction. In *Hilton v. Barker Booth & Eastwood*, [2005] UKHL 8, liability was created because the firm continued to act knowing one client was a rogue.

The firm acted for Hilton, a small builder lacking funds to develop a property. It had also acted for Bromage (the rogue) in his bankruptcy and related fraud charges for which he had recently been released from prison. Bromage agreed to buy the

completed development and Hilton would build it. The firm acted for both parties. The firm also arranged financing in addition to advancing a further cash deposit required by the lender. The stage was set for tragedy.

The trial court held that the knowledge of Bromage's past was public information. Although the firm did not have to disclose information about Bromage to Hilton, it still acted in conflict of interest. Damages would not be awarded because even if Hilton changed lawyers, the loss would have occurred in any event. The Court of Appeal dismissed the appeal.

The House of Lords reversed the lower courts, holding that liability resulted from continuing to act in the face of the conflict. The duty owed to Hilton was "both contractual and fiduciary" and the lawyers had a personal financial interest. Liability was created because the firm proceeded in the face of the conflicting duties. The firm was in an impossible position.

Since he (the lawyer) may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. (Paragraph 44)
House of Lords Judgement

This duty may be different in Canada. If *Hilton* means a lawyer should maintain confidentiality and decline to act, Canadian law suggests that if a lawyer acts in conflict, disclosure must be made. In *Martin v. Goldfarb*, [1997] O.J. 1886 the Ontario trial court dealt with very similar issues. Martin was a well funded developer who shared the same lawyer, Goldfarb, with a disbarred lawyer who had been convicted of fraud. Goldfarb knew all but did not tell. Lederman, J. sums up an apparently tougher Canadian standard (at paragraph 42), saying that, "...a solicitor cannot refrain from keeping material information from one client merely because disclosure would be harmful to the other..." and (at paragraph 48) "...by not sharing what he knew about Axton with Martin, he deprived Martin of the opportunity of making his own business judgment about becoming involved with Axton in the transactions.

FREE SEMINARS

TRUST ACCOUNTING SEMINARS

The Audit Department is pleased to present our 11th Annual Trust Accounting Seminars. These seminars are intended to educate lawyers and staff on the Rules of the LSA (Part 5) relating to financial records, accounts and trust money. The seminars are presented by LSA auditors and have been especially beneficial for sole practitioners, small firms, new members and their staff.

TOPICS INCLUDE

- Books and records required and tips for maintaining them
- Trust Reconciliations and how to recognize problems
- Rules on handling trust funds
- Common audit exceptions and how to avoid them
 - Special Topics:
 - ✦ Credit Card Accounts – How do I set them up?
 - ✦ Future Trends (Electronic Banking, Cheque Imaging, etc)
- Question and answer period

CALGARY

THE METROPOLITAN CONFERENCE CENTRE
333 - 4TH AVENUE SW
THURSDAY, OCTOBER 20, 2005

TRUST ACCOUNTING SEMINAR: 9:00 TO 11:30 A.M.

PRACTICE REVIEW SEMINAR: 1:00 TO 3:30 P.M.

PRACTICE REVIEW SEMINARS

The Practice Review committee is pleased to present our 2nd annual information seminars, open to all Alberta lawyers. The seminar is designed to provide a brief overview of the focus of the committee and practical information of the benefits of involvement.

TOPICS INCLUDE

- What is the Practice Review committee?
- What to do if we contact you
 - Special Topics:
 - ✦ Client Service Tips
 - ✦ Your Office
 - ✦ Your Practice Snapshot
- Resources you can access
- Question and answer period

EDMONTON

SUTTON PLACE HOTEL
10235 - 101ST STREET

FRIDAY, OCTOBER 14, 2005

To register, visit www.lawsocietyalberta.com or contact Sue Amyotte at (780) 412-2308 or 1-800-272-8839 or susan.amyotte@lawsocietyalberta.com.



by Peter Michalyszyn, OC,
Benchler

Access to justice issues continue to attract the attention of stakeholders in Alberta's civil justice system

At the June benchers' meeting Minister of Justice Ron Stevens emphasized the importance of ensuring access to justice in maintaining public confidence in the justice system. Stevens identified the court-annexed civil mediation pilot project currently underway in Edmonton and Lethbridge, as absolutely essential to the government's mandate in this area.

Over the last six months, the mediation pilot project has been a work in progress, with about 22 interest-based mediations held and an additional 22 booked. Project staff report about an 80 per cent settlement rate. Notably, all are voluntary mediations in the sense that few were mandated by Request to Mediate provisions in the Court of Queen's Bench mediation practice note¹.

Mediations set up pursuant to a Request to Mediate are restricted to actions commenced on or after September 1, 2004, and where affidavits of records have been served. Thus, while at this stage the 44 voluntary mediations are being facilitated by the mediation pilot project, they do not unfold under the court's practice note as such.

Minister Stevens also identified expansion of Provincial Court civil mediation to Medicine Hat and Lethbridge as a further example of the government's moves in this area.

On the Court of Queen's Bench side, related initiatives include the Early Neutral Evaluation pilot

project by which certain justices can be booked by parties attempting to narrow or resolve issues at the early stages of what would otherwise promise to become prolonged, expensive litigation. This pilot project is only offered in Edmonton.

The Court of Queen's Bench Judicial Dispute Resolution program continues and this fall, the complement of JDR Justices in Edmonton and Calgary will increase to three each week in recognition of the fact that at times it can be easier to book a short trial than a JDR.

The Alberta Law Reform Institute (ALRI) is at the drafting stage of the rewrite of the Rules of Court project. The new draft set of rules is expected to be completed by the end of 2005. Although much remains to be seen, it is hoped by ALRI that access to justice will be enhanced through new, simpler rules.

ALRI's most recent work in Consultation Memorandum 12.18 considers the impact of self represented litigants on Rules of Court changes.² While few rule changes as such are recommended, the consultation notes:

- ✦ Self represented litigants are an increasing presence in the justice system most notably the superior courts and at times pose challenges to judges, lawyers, opposing parties and court staff;
- ✦ With rare exceptions self represented parties should abide by the same rules imposed on parties represented by counsel;
- ✦ Rule 5.4 – which gives the court discretion to allow a party to have a 'right of audience'³ in court by a non-lawyer agent (e.g., a paralegal) – should remain unchanged;
- ✦ Options to promote access to justice for self represented litigants may include (i) changing the Rules or possibly the *Legal Profession Act* to relax the boundary between providing legal information and legal advice; (ii) expanding the role of paralegal service providers – those supervised by lawyers and those acting independently of lawyers; and (iii) encouraging provision of unbundled legal services – in effect a 'limited retainer'.

The Rt. Hon. Beverley McLachlin, Honourary Patron, and Randall Block, Douglas Goss, Peggy Gouin, Barry Heck, Frank Layton, and Marcella Szel, Law Campaign 2008 Co-chairs, cordially invite all alumni and friends to attend

Law Campaign 2008 Kickoff Celebrations

for the Faculty of Law,
University of Alberta

With special guest:

Dr. Indira Samarasekera

Newly appointed President of the University of Alberta



EDMONTON

Monday, September 19, 2005
Winspear Centre
9720 - 102 Ave

CALGARY

Tuesday, September 27, 2005
The Ranchmen's Club
710 - 13 Ave SW

5:00 p.m. – drinks and hors d'oeuvres
5:45 to 6:30 p.m. – formal presentation
Reception to follow

RSVP to Catherine Miller by September 12, 2005
cmiller@lawu.alberta.ca
p. (780) 492-5953 f. (780) 492-4924

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Be wary of conflicting duties

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Goldfarb should have informed Martin the moment he accepted a retainer to act for any of the Martin companies... (and) thereby violated his duty of loyalty to Martin and is in breach of his fiduciary duty."

Commenting on *Martin* and paraphrasing the commentary to the Code of Professional Conduct, former Practice Advisor Barry Vogel put it this way (*Loss Prevention Bulletin #91*): "a lawyer must be able to demonstrate after the fact that each client received representation equal to that which would have been rendered by independent counsel."

Plus ça change... **A**

Access to justice issues continue to attract the attention of stakeholders in Alberta's civil justice system

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At the end of the day many self represented litigants may be content to proceed without legal counsel. In other cases, parties may be self represented because they cannot afford a lawyer, and as such for stakeholders including the LSA, there is a convergence of topics such as pro bono legal services, legal aid, and the availability of competent paralegals or legal agents.

On a final note, some may find it ironic that access to justice is high on Alberta Justice's agenda while at the same time parties in motor vehicle litigation

may find their access to justice barred by the Minor Injury Regulations under Bill 53. Of note then is a challenge to the Minor Injury Regulation scheduled to proceed September 28, 2005 before Queen's Bench Associate Chief Justice Neil Wittman. It will be argued the new rules are beyond the authority of the government, in that they were brought into force as regulations as distinct from an Act of the legislature. A separate challenge to the Bill 53 regime under the Charter of Rights and Freedoms is also expected to unfold in due course. **A**

¹ Practice Note #11 issued September 1, 2004

² Similarly, the Canadian Forum on Civil Justice, located at the Law Centre in Edmonton, is in the midst of a multi-year research project Civil Justice System and the Public studying amongst other things self-represented litigants.

³ *Pacer Enterprises Ltd. v. Cummings* (2004) 346 A.R. 161 in which the Court identifies some of the boundaries between the "privilege of audience" and the right to practice law.

2005 PACIFIC LEGAL TECHNOLOGY CONFERENCE

Friday, October 14

Vancouver Convention and Exhibition Centre

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