LEGAL INSIGHTS & PRACTICE TRENDS L'ÉCLAIRAGE NOVATEUR ET PRATIQUE

January/February 2006 Janvier/Février
Volume 15, No. 1

NATIONAL

The Canadian Bar Association

L'Association du Barreau canadien

Docketing tips · Instant messaging · Trouver le bon expert · The spy who judged me

The GIANT awakes

CHINA is exploding onto the global stage, and Canadian lawyers on the scene are playing key roles.

Knowledge management

La techno au tribunal

New lawyers call the shots

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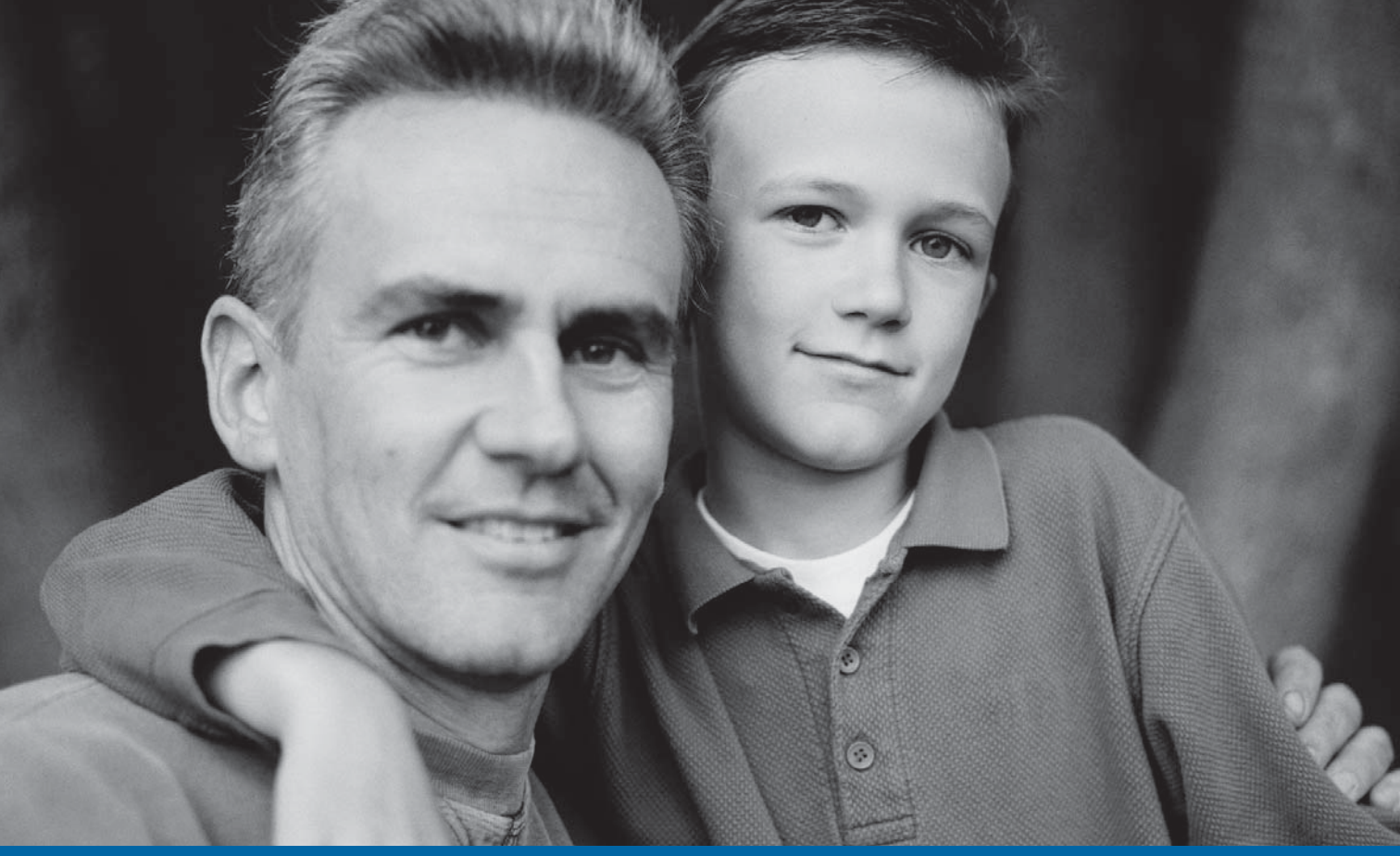

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THE CANADIAN BAR INSURANCE ASSOCIATION

NATIONAL

January/February 2006 Janvier/Février
Volume 15, No. 1

COVER · DE LA UNE

18

The giant awakes

China is exploding onto the global economic scene as a powerhouse investor and purchaser, and Canadian lawyers and the CBA are playing critical roles.

By Sheldon Gordon

FEATURES · ARTICLES DE FOND

DEPARTMENTS · CHRONIQUES

China syndrome

These are just the first tremors before The Big One.

By Jordan Furlong

Our cover story looks at how Canadian lawyers are helping to shape the rule of law in China. But in truth, it's China that's shaping the world we live in — along with India, Wal-Mart, Google, RSS, Wikipedia, wireless, and the World Wide Web 2.0. It's not just manufacturing jobs moving to Asia that we hear so much about in the media; white-collar professional work is moving, too. And that's just the start of it.

It seems like we're poised on the edge of great upheaval: the world in 2016 won't be simply the world in 2006, aged ten years. It's going to be a whole new construct, difficult for us to navigate and completely foreign to many. All the usual safety nets are being removed.

As Thomas Friedman argues persuasively in *The World Is Flat*, we're looking at an economic and power shift away from North America and Western Europe and towards Asia — from Russia down through China and on into India. Services and skills previously believed to be safe from foreign competition are being commoditized and relocated at an astounding rate.

Competition is now global, and that includes lawyers. The General Agreement on Trade in Services will eventually get around to dealing with legal services. When it does, then some of the largest and most powerful law firms in the world are going to draw a bead on our legal community.

The Internet continues to change everything. Information — accurate and otherwise — circulates around the globe at epidemic rates. You can't sell simple knowledge anymore — not unless it's specifically tailored for a client's individual use and comes bundled with wisdom and good judgment. And even then, it'll be a crowded marketplace.

This isn't meant to be fear-mongering — but it is meant to focus attention very sharply on the need for lawyers to be ready for anything. The best advice I've gleaned, from the analysts watching these events unfold, can be summarized by these priorities:

- **Innovate.** Don't wait for your competitors to make the first move, because they're numerous and they move fast. Use technology to gain an advantage.
- **Learn.** Add new skills constantly. Increase your CLE intake, especially online and eventually in Podcast form.
- **Collaborate.** Network like crazy. Get involved in joint ventures. Share ideas and efforts over the Net. This applies especially to solos.
- **Specialize.** Non-lawyer providers of legal services are multiplying. Upgrade your offerings beyond their reach.
- **Stand out.** Distinguish yourself through your services, your client relations, your service delivery, and your personal touch. And don't try to compete on price. That ship was the first to sail. N

Send your comments to national@cba.org.

Le syndrome chinois

Nous ne pouvons ignorer les signes avant-coureurs

Ce mois-ci, nous vous présentons un article sur la Chine. Plusieurs juristes canadiens en connaissent déjà bien les rouages.

La Chine semble peut-être éloignée d'un point de vue géographique mais elle aura bientôt un effet majeur sur le quotidien des juristes canadiens. Tout comme l'Inde, Wal-Mart, Google, Internet et Wikipedia, elle est la force motrice derrière un nouvel ordre mondial. L'an 2016 n'aura rien à voir avec l'an 2006.

La balance du pouvoir se déplace petit à petit vers l'Asie et l'Inde, nous explique Thomas Friedman dans son livre *The World is Flat*. La concurrence est désormais planétaire et les services juridiques n'y échapperont pas. Tôt ou tard, les grands cabinets internationaux viendront jouer dans nos plates-bandes.

Les analystes nous préviennent que nous devons nous y faire dès maintenant. Voici ce qu'ils suggèrent :

- **Innover** : il faut se différencier de nos concurrents et avoir recours à la technologie;
- **Apprendre** : il faut constamment développer de nouvelles habiletés grâce aux FJP, à l'Internet et à la balladodiffusion;
- **Collaborer** : nous devons réseauter, collaborer, nous impliquer dans de nouvelles actions concertées, faire valoir nos idées sur la toile;
- **Se spécialiser** : les services juridiques sont de plus en plus souvent offerts par des non-juristes. Il faut élargir notre offre;
- **Se démarquer** : Nous devons nous distinguer des autres en raison de la qualité de nos services, nos relations avec notre clientèle, notre façon de prodiguer nos conseils et notre petit je-ne-sais-quoi. On ne gagnera rien à faire la guerre des prix. N

Des commentaires? Écrivez-nous à national@cba.org.

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One rule

The rule of law begins at home.

By Brian Tabor

When I'm at home, a little infrequently of late, one of the things my two boys and I like to do at breakfast is watch TSN, The Sports Network. It's a great opportunity to do a little male bonding and to catch up on what's important in their lives.

The good news from my son Stuart (Grade 3) is that his school got a new playground. The (so-called) bad news is that it comes with a whole lot of new rules, to make it safe. And so we talked about the rules and the reasons for them, and by the end of the discussion on this very important issue, I had teased out of him the admission that the rules were fair.

I tell you this story as an introduction and context for what is happening on the world stage. There is an increasing realization, led by the global legal community, that advancing the rule of law is the unifying force for addressing poverty, combating terrorism, eliminating corruption and responding to global pandemics. The unifying theme is governance by the rule of law, so that countries can respond effectively to these challenges.

We've all heard about the rule of law and its characteristics: an independent bar and judiciary, free speech, access to information, transparency, equal rights for women and minorities, and the list goes on. Distilled to its essence, the rule of law is a benchmark against which all things are measured in a society increasingly governed by a complex set of rules. Good governance embraces the rule of law.

Increasingly, I am proud to say, other nations look to Canada as the country that seems to be "getting it right." Our lawyers, led by the CBA, have advanced the rule of law as the "line in the sand" between the state and the individual — in particular, to protect those whom some would call the "losers" in our society. Someone must be prepared to stand up and vindicate those rights. The CBA does that, on behalf of all Canadians.

We haven't stopped at our own borders, either. CBA lawyers are making a significant difference around the world in advancing the rule of law. Our reasoning is simple: it's incumbent upon those of us in mature bars to take the lead and advance the rule of law. Not only is it the right thing to do, but if the rule of law is not strengthened everywhere, then it is at risk everywhere.

We are in this for the long haul. The rule of law cannot be imported into a society overnight — in many cases, it takes a generation to instil and to build the framework for a just society. It all begins at home. N

Send your comments to cbapres@cba.org.

La règle est simple

Savoir prêcher par l'exemple

L'école de mon fils Stuart, qui est en troisième année du primaire, s'est dotée d'un tout nouveau terrain de jeu. Au départ, Stuart était loin de se réjouir de la nouvelle. « Une foule de nouvelles règles s'appliquent », déplorait-il. Pourtant, après une longue conversation sur la question, il a finalement reconnu que ces dernières avaient du bon.

Cet exemple, tout à fait banal, est un microcosme de ce qui se déroule à l'échelle internationale. On constate que l'éradication de la pauvreté, la lutte contre le terrorisme et l'élimination de la corruption ne peuvent se réaliser sans qu'on insiste fortement sur l'importance de la primauté du droit.

Nous en connaissons tous les tenants et aboutissants : une magistrature et un barreau indépendant, la liberté d'expression, la transparence, l'accès à l'information et l'égalité. La primauté du droit est l'étalon de mesure du bon fonctionnement d'une société gouvernée par des règles de plus en plus complexes. Elle ne fait qu'un avec la bonne gouvernance.

En ce qui concerne le respect de la primauté du droit, le Canada est un modèle pour les autres nations.

Les bons gestes ne s'arrêtent pas à nos frontières. Partout dans le monde, les juristes de l'ABC contribuent à l'avancement de la primauté du droit. L'équation est simple : c'est aux barreaux les plus solides de paver la voie. Si la primauté du droit n'est pas respectée à l'échelle internationale, nous sommes tous perdants.

Il s'agit d'un travail de longue haleine qui nécessitera les efforts de plusieurs générations. Et dire que tout cela commence à la maison. N

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About diversity

The cover of the October/November 2005 issue of *National* intrigued me: "Law and Diversity." After reading the article (p. 18), I was rather dismayed. Perhaps it should have been titled "Cultural, Ethnic, and Racial Diversity in the Profession," or even, "Recruiting Minorities in the Legal Profession." The article leaves out "life experience" as an important consideration for recruiters.

I especially like the quote by recruiter Susan Sangha, member of the recruiting committee of Alexander Holburn Beaudin & Lang LLP: "Without consciously trying to, we have hired a diverse group of students, and I like that idea. ... Without turning our minds to diversity specifically, and without forcing it, we've chosen from a variety of ethnic backgrounds because they're the best candidates."

She equates diversity with ethnicity, and leaves out (perhaps unintentionally) other minorities, such as those with disabilities, gay or lesbian people, and perhaps women (I note that women are not underrepresented in law schools). I am curious as to how much one's life experience plays a role in the recruiting process, how much weight is given to it, and if one's life experience makes him or her the "best candidate."

I would hope that I would not be hired simply because a recruiter needs to fill a quota because I am a minority.

Most articling students do not bring any practical legal experience to the profession. The skills and abilities they bring to the table are acquired through life experience, not legal experience. It is their life experience that makes them good lawyers, not their identity as minorities. Law schools and the legal profession need to focus more on selecting people with a broad array of life experiences, and less on one's minority status.

Life experience is the most vital component of diversity, since it is our experience that shapes our character, quality, thoughts and decisions, how we view ourselves, and how our decisions affect others. How can we relate to our clients if we have not walked a mile in their shoes?

Joseph A. Nagy
Journeyman Carpenter
Barrister & Solicitor
Edmonton

Role models

I am writing in response to the editorial titled "Take the lead" (October/November 2005, p. 4). I cannot stress how important it is for law firms to prize and reward the lawyers who are leaders and role models in their firms.

I spent my first four years working for a 50-lawyer firm in Vancouver. Throughout these years, I found that the associates at my firm were constantly belittled for being "greedy" and "overpaid." I also found myself subject to numerous lectures and shots at how I wasn't "dedicated" enough to practise.

Given the time and effort that my colleagues and I put in to learning how to practise and how to manage stress, I found these comments offensive and unnecessary. I have never been motivated by money — what motivates me are individuals with character, strength and generosity. I saw none of these features in the people above. In fact, most appeared to be overworked, tired and unhappy.

I left the firm at the end of my fourth year. I have never been so happy since doing that. Although I am not paid as much, I now have role models who I look up to. It makes a very big difference.

It is too bad that many mid-size and large firms do not understand how fundamentally important it is for associates to believe in and respect the profession and to have role models to look up to. Until they do, they will continue to lose associates in droves.

Name Withheld
British Columbia

Will you still need me?

Law firms grapple with mandatory retirement.

Government officials and newspaper columnists alike held forth last fall on whether retirement should be mandatory at 65 — a live issue for many law firms, especially those heavy with Boomer-aged and older partners. How would younger lawyers and partners move up the partnership ladder without forced retirement? Conversely, why would firms want to ship out their most experienced and wisest lawyers simply because they've reached a certain birthday?

At Winnipeg firm Thompson Dorfman Sweatman LLP, whose antecedents date back to 1878, early retirement is not in the gene pool. Alan Sweatman, who is currently 83, is an active partner. The late D.A. Thompson maintained his practice until he was 89. And Irwin Dorfman, at 86, took a file with him to the hospital at 4:00 p.m. and died at 6:00 p.m.

Today, the firm does have a mandatory retirement age of 71 — after that age, lawyers can continue to practise on an *ad hoc* basis by agreement of the firm, says Michael Sinclair, the firm's current managing partner. No partner has yet asked to stay on past 71, but there are provisions in the partnership to deal with it.

"Our lawyers must certify each year that not only has a contribution been made to their RRSP, but also that they haven't withdrawn funds from it," says Sinclair. "We want to have confidence that, although it hasn't happened, if we decide not to have a lawyer continue past retirement age, he or she will be adequately provided for."

The remuneration agreement of a "partner *emeritus*" does not change. "Our compensation agreement is always related to productivity and remains based on that criteria, no matter the lawyer's age," Sinclair says. "There's no real cost to [the younger lawyers], except the office space the older lawyer occupies."

Atlantic Canadian firm Stewart McKelvey Stirling Scales has a mandatory retirement age of 65, notes Rodney Gould, managing partner of the firm's Saint John office. There is a provision for lawyers to remain as "active counsel" in the firm, however. "The compensation package for counsel does change," he notes. "There's a bit of a bell curve."

Stewart McKelvey's lawyers enjoy "a retiring allowance, a steady income which applies to each lawyer on retirement, whether or not he or she continues any affiliation with the firm. So, in some cases, there's less of an incentive to stay on," says Gould. "Many lawyers have a lot of other interests they want to pursue at that stage of their lives." N — *Bev Cline*

DOCKET *science*

Dockets are the basis of many lawyers' revenue, yet few practitioners take a strict and scientific approach to docketing. Dan Pinnington, Director of PracticePRO in Toronto, addressed these concerns in *"Docketing do's and don'ts"* in the September 2005 issue of LawPRO Magazine (www.lawpro.ca/LawPRO/Tech_Tip4_2.pdf). Here is an excerpt of top docketing tips:

1. Electronic dockets are a must. Throw out your time sheets and go electronic. When you enter your own dockets, you save time by eliminating the double entry by your staff person and, more importantly, the opportunity for transcription errors. Today, there are many excellent time/billing and accounting software products that make it dead-easy for you to directly enter time dockets on your own computer.

2. Docket throughout the day. It's universally recognized that lawyers who create dockets contemporaneously with completing the task end up capturing a significantly greater portion of the work they have done — some studies suggest a gain of 20 percent or more. Docket your work as you go. Most lawyers grossly underestimate the time they spend on individual tasks.

3. Docket in detail. A detailed docket looks something like this: "Telephone conference with client re details of weekend access problems." Or, "Drafting of correspondence to client confirming instructions to skip zoning search." It will take you mere seconds to add a bit of extra detail to your docket entries. The ROI on those few seconds will be massive.

4. Docket every minute you spend on a file. Don't pre-judge and write off time spent on a file as unnecessary by not docketing it on the day it was done. Docket everything and wait until you final- or interim-bill the file, at which time you can properly judge all the factors that determine what should be billed on the matter.

5. Docket all non-billable time. There are loads of non-billable tasks that you must spend time on: marketing, administration, CLE and so on. To assess your performance and understand where your time is going, it's essential that you understand how much time you're spending on these non-billable tasks, and what they are. You can't do this without a complete record of your time. Docket everything.

6. Slice and dice your numbers. Lastly, with a more complete record of your billable and non-billable time, your have a rich set of data with which to review where you're spending your time and to understand how you can realign your tasks to increase your billable hours. N

THOMAS DANNENBERG

Intelligent life

How your law firm can benefit from business intelligence.

Many law firms have no shortage of data on market and billing trends — but analyzing that information is another matter entirely. Drawing meaningful conclusions out of raw data can be a tedious and time-consuming endeavour, and hiring accountants to enter mountains of numbers into spreadsheets is costly and prone to human error.

Now there's business intelligence software — a staple in many corporate circles that's quickly making inroads in the legal industry.

Business intelligence software can help law firms uncover market potential and new business, while keeping close tabs on billing, finances and overall efficiency. The technology amasses marketing, financial and even staffing data and allows law firm decision-makers to analyze it any number of ways.

For example, a law firm pondering entry into a new market could pull up numbers on how many current clients have a presence in or other ties to the location in question. The technology can also perform a whole host of financial and billing functions, including detecting unusual patterns or aberrations in client payment trends.

Another, more controversial potential of business intelligence software is to measure and assess individual lawyer performance and profitability against existing targets. Some firms even incorporate business intelligence into their compensation decisions.

Detractors of this method to assign individual value argue that it relies too heavily on the bottom line, without taking into consideration less tangible factors such as institutional knowledge, client relations, or community and association involvement.

The price of implementing a business intelligence solution can be quite steep and varies dramatically, depending on the features purchased, ranging from the tens to the hundreds of thousands of dollars. But if you weigh that against the many human hours spent entering and processing data, it might not be such a huge investment.

More law firms are taking advantage of business intelligence, as vendors continue to increase their services and customize features for the legal industry. Large firms currently implementing these types of systems include Borden Ladner Gervais LLP, Cassels Brock & Blackwell LLP and Macleod Dixon LLP.

For those looking at the viability of bringing business intelligence software on board, some key vendors serving the legal industry include Thomson Elite, Aderant, RainMaker Software, Redwood Analytics and Satori Group. For more information on this subject, see "Business intelligence, used intelligently," by Bruce MacEwen (*www.bmacewen.com/blog/archives/2005/10/business_intell.html*).

— Mark Kuiack

Le bon expert

On dit souvent qu'il faut bien préparer son témoin-expert, mais encore faut-il qu'il soit crédible.

Le témoin expert peut faire la différence entre une cause gagnée et une cause perdue. Mais son expertise dans un champ bien défini n'en fait pas nécessairement un champion de la communication.

Comment choisit-on le bon témoin expert? « Ce n'est pas toujours facile », laisse entendre Me Donald Béchard du cabinet Tremblay Bois Mignault & Lemay à Québec.

La rigueur, l'impartialité, l'esprit de synthèse et des talents de vulgarisateur constituent, selon lui, les principales qualités recherchées chez un témoin-expert.

« De plus en plus, les tribunaux n'hésitent pas à écarter le témoignage de certains experts qui viennent soutenir l'insoutenable et qui ne sont pas assez objectifs », affirme Me Béchard. « Il faut quelqu'un qui sera capable de résister au contre-interrogatoire et qui appuiera bien ce qu'il avance ».

Pour ce faire, il est préférable que l'expert jouisse d'une certaine expérience pratique. « Les qualifications académiques sont importantes », reconnaît Me Béchard. « Le titre, c'est une chose, mais l'expérience pratique aura une influence sur la valeur probante ».

Il faut aussi s'assurer qu'au-delà de ses qualités professionnelles, l'expert accomplira correctement son travail, tel que requis par le dossier. « Il ne peut pas se fier seulement à sa grande expérience, soutient Me Béchard. L'expert doit effectuer les démarches nécessaires pour tirer ses conclusions. La jurisprudence le reconnaît de plus en plus ».

Se fier uniquement au curriculum vitae est également un jeu dangereux. Avant de confier un mandat, il est souhaitable de rencontrer le candidat potentiel pour s'assurer non seulement de sa compétence, mais aussi de sa crédibilité. « On a déjà vu en contre-interrogatoire un expert affirmer le contraire de ce qu'il avait prononcé lors d'une conférence », explique Me Béchard. Il vaudrait mieux le savoir avant l'audition ». Au minimum, il serait approprié de demander à l'expert de vous faire parvenir ses écrits.

Il y a lieu également d'évaluer les possibilités de conflits d'intérêts et de vérifier si, dans une cause antérieure, l'expert a été sévèrement blâmé par un juge pour manque d'objectivité.

L'expert aura beau être compétent et intègre, mais s'il n'est pas capable de se faire comprendre, le tribunal accordera peu de valeur probante à son témoignage. « Le bon expert est celui qui sait vulgariser sa science auprès d'un juge et bien répondre aux questions de la cour », précise Me Béchard. L'expert devra également faire preuve de respect envers ses pairs, particulièrement lorsqu'il exprime son désaccord avec celui de la partie adverse.

Trouver la personne qualifiée demeure la démarche la plus difficile selon Me Béchard. Les publications spécialisées et la jurisprudence constituent un bon point de départ pour trouver la perle rare. On peut également enquêter auprès des universités, des corporations professionnelles ou encore auprès de ses confrères et consoeurs. N

— Yves Faguy

SUZANNE MOGENSEN

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IM talking to you

How to deal with Instant Messaging in the workplace.

Instant Messaging (IM) is all the rage these days among younger employees.

With IM, two parties chat back and forth on their computers pretty much instantaneously; a pop-up window lets them know a fellow user is trying to communicate with them. It's the next evolution of e-mail — basically, it's two-way radio for your computer (see "5 sites" on opposite page).

"IM is a fun and useful tool," says Christine Carron, a corporate/commercial litigator who specializes in privacy and technology matters. "It's a speedy method of communication that lets the user know if the recipient is actually around and available to communicate with them. It's not like an e-mail that someone sends and, really, has no idea when the intended recipient will read or respond to their question."

It's a safe bet that if you have any employees in your office under the age of 35, they're probably using IM during the workday. So the question becomes whether your firm should validate employees' access to IM, and further, how you should advise your clients about their employees using this new medium.

There are legitimate concerns, says Carron, a senior partner at Ogilvy Renault LLP in Montreal and Chair of the firm's Privacy and Access to Information Team. A host of security, privacy and legal issues can arise because, unlike e-mail, where the message resides on a server, saving an IM conversation requires a conscious effort on the part of employees, unless the business invests in software that provides for IM archiving.

Otherwise, she says, once the user clicks off IM, no record of the conversation exists. "So how do you prove that your company did complain about a product's quality, or that you did order a certain number of shares of a particular stock?" She suggests assessing the different responsibilities of individual employees to determine whether the person's job requires a written record of what is said to customers, suppliers or clients.

Carron doesn't believe that a standard e-communications policy is the answer to getting a handle on IM usage or potential liability issues surrounding its use. Given the nature of IM — instant communication conducted at a fast and furious pace — the better safeguard is to be cautious when allowing its use, treat it as e-mail, and consider keeping a written record of the conversations at all times. N

— Bev Cline

Le bon bus

Misez sur le port USB

Un acronyme intrigant a la cote depuis un certain temps. Imprimantes, numériseurs, souris, claviers, disques externes et caméras numériques sont tous tombés sous le joug de l'USB.

L'*Universal Serial Bus* ou, si vous préférez le bus USB, a été conçu au milieu des années 90 afin de remédier aux graves problèmes de connectivité des ordinateurs PC. Utilisant principalement des ports série ou parallèles qui n'étaient pas « intelligents », les PC de l'époque ne pouvaient détecter eux-mêmes les nouveaux appareils qu'on leur branchait. L'ajout d'accessoires se transformait souvent en exercice périlleux.

Il fallait trouver autre chose. Le nouveau port devrait être facile à utiliser pour tout type de matériel, offrir une grande rapidité de connexion et de communication et permettre le rattachement de multiples accessoires. Il devait par ailleurs supporter le protocole prêt à tourner (*plug-and-play*) soit permettre à l'ordinateur de communiquer avec un nouveau périphérique lors de sa connexion, de détecter de quel type d'appareil il s'agit et d'installer lui-même les pilotes nécessaires à son bon fonctionnement. Ce sont essentiellement les caractéristiques du port USB.

Les versions successives de ce port ont augmenté sensiblement sa vitesse, tout en assurant sa facilité d'utilisation. Un usager peut aujourd'hui brancher toute une gamme d'appareils à son PC, sans avoir à le redémarrer à chaque occasion, et les regarder s'installer et se configurer d'eux-mêmes. En fait, les moniteurs et autres appareils multimédias requérant un flux de données trop important sont essentiellement les seuls à se brancher autrement que par USB.

Tous les ordinateurs disposent de plusieurs ports USB, six ou huit généralement. Il est possible de décupler ces possibilités de connexion puisque selon la spécification USB 2.0, un ordinateur peut supporter simultanément jusqu'à 127 appareils. L'ajout d'un concentrateur (*hub*) permet de brancher plusieurs appareils à partir d'un seul port USB et de multiplier les branchements.

C'est fou comme une innovation technique, symbolisée par trois petites lettres, peut révolutionner une industrie. En à peine dix ans, le port USB aura facilité la vie de tous les propriétaires d'ordinateurs en leur faisant oublier les affres de l'installation d'un périphérique, favorisé la création d'une multitude d'accessoires, et même entraîné la quasi-disparition de la bonne vieille disquette. Et ce n'est pas fini puisque les nouvelles moutures permettent la communication directe entre les périphériques USB. Votre caméra numérique pourra dorénavant imprimer ses photos toute seule, sans passer par votre ordinateur. Voilà pourquoi tout le monde n'en a que pour l'USB! N

— Bertrand Salvas

STEPHEN MacEACHERN

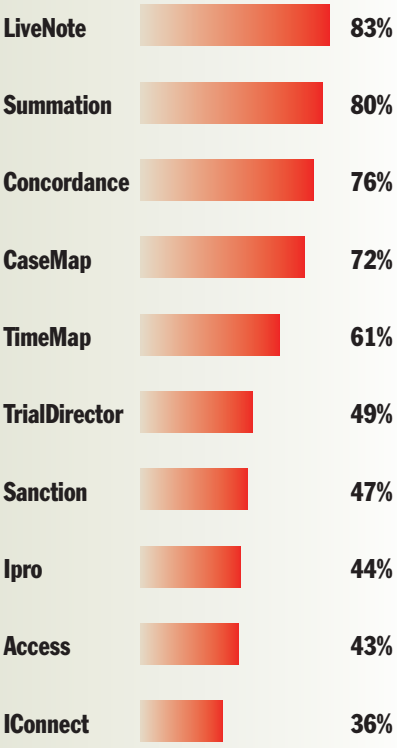
StatSHOT

Litigation software showdown

Few sectors of the legal software marketplace are as competitive as trial technology, as the following results from AmLaw Tech's 2005 Legal Technology Survey (*http://tinyurl.com/9juvk*) demonstrate.

See also the article "E-Justice for all" on p. 45.

Q. What software does the firm use to handle litigation?
(Multiple choices allowed)



THOMAS DANNENBERG

Open season

Open-source can be an option for those looking for low-cost software solutions.

Open-source software, once exclusive to the world of programmers and über-techies, is becoming an increasingly viable alternative for some law firms.

Based on the notion that thousands of heads are better than one, open-source encourages programmers from around the world to read, redistribute, and modify the source code for a piece of software. As a result, the software is constantly improved and made more stable. Oh, and it's 100% free.

The quality and quantity of open-source software freely available from the Internet is constantly on the rise. In fact, many lawyers may already be using open-source software without even knowing it. The increasingly popular Firefox Web browser (*www.mozilla.org/products/firefox*), which has taken an impressive chunk out of Internet Explorer's market dominance, is developed by a community of open-source developers and testers.

Other products are gaining steam more quietly. Open Office.org (*www.openoffice.org*), an open-source community project founded

by Sun Microsystems, boasts a full-featured office productivity suite that is strikingly similar to competing proprietary products like Microsoft Office. The main differences are that it runs on a numbers of platforms (not just Windows and Mac) and that it's absolutely free.

This can be an appealing proposition for small firms and sole practitioners looking for alternatives to the rising price of commercial software packages and upgrades. Linux-powered servers (*www.linux.org*) are also running a surprising number of law firms' network operations.

There are caveats, however. According to Sunny Handa, a partner at Blake, Cassels & Graydon LLP and co-chair of the firm's national Information Technology Group in Montreal, cost isn't usually a major consideration when it comes to legal software purchases, especially at large firms. Instead, he says, compatibility and stability are the driving factors.

"As lawyers, we just can't risk having more compatibility issues with clients or other firms," says Handa. He believes that while open-source software may find a niche in areas where compatibility isn't as much of an issue, its future in the broader legal market may be limited because of the way lawyers typically use software. "Lawyers aren't generally sophisticated software users — we're word processors."

For more information on open-source software for lawyers, see "Best Legal Practices for Open-Source Software," by Dennis Kennedy (*www.llrx.com/features/opensource.htm*). N

— *Mark Kuiack*

5 Sites WWW

Instant messaging is here to stay, and it's probably going on right now in your law firm or department. Here are five sets of IM links to fill you in.

www.i-dep.com/news/natlawjrnl_ 5-7-01.asp:
A primer on IM fundamentals for lawyers.

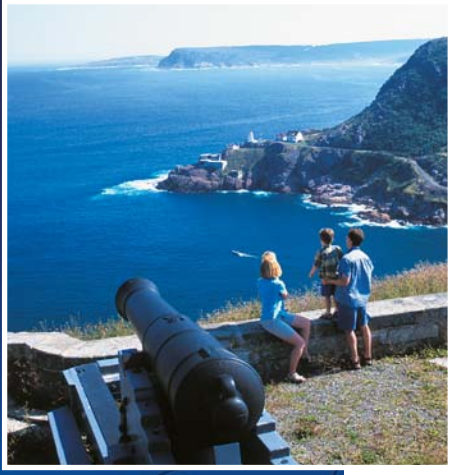
www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1132144715767:
Exploring the hazards of IM usage in law firms.

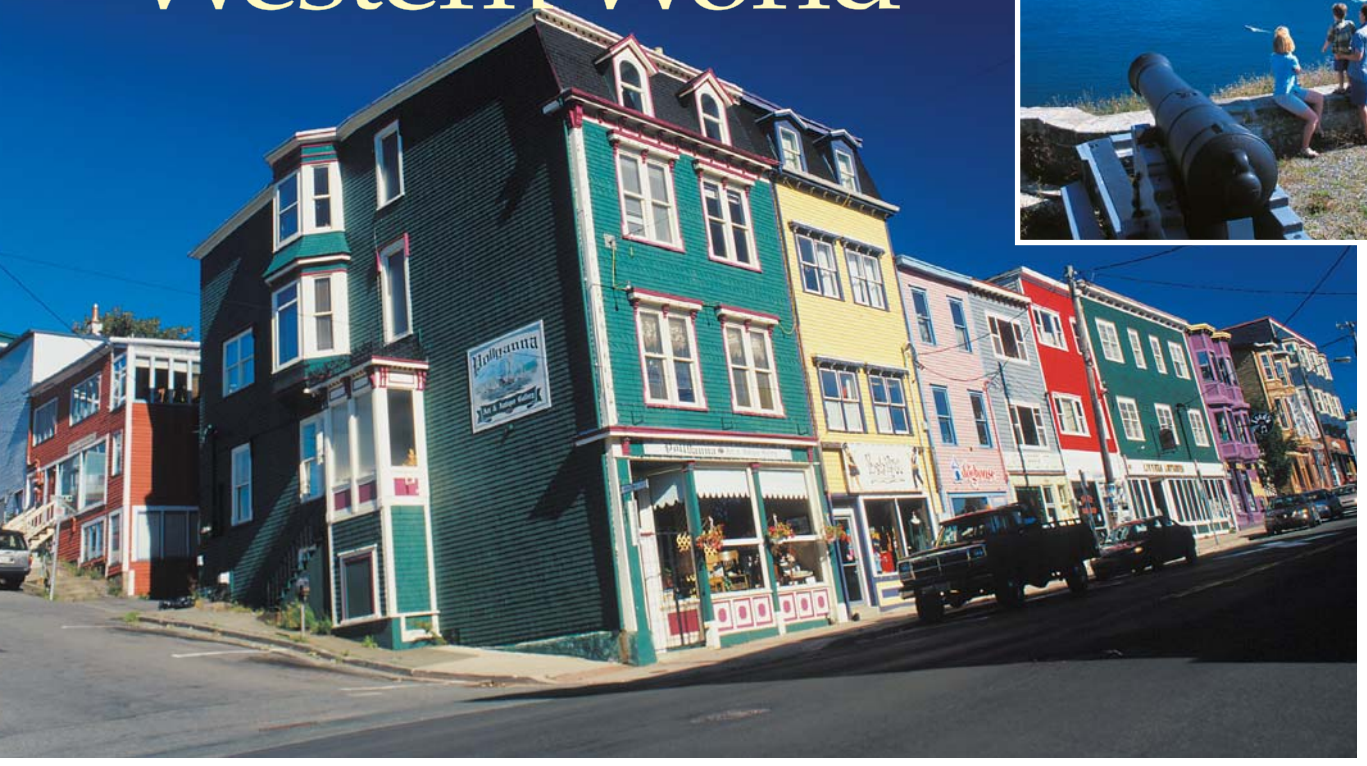
www.ernietheattorney.net/ernie_the_attorney/2004/04/instant_messagi.html:
Instant messaging in the corporate legal department.

www.law.com/jsp/ltn/pubArticleLTN.jsp?id=1130844017179:
Addressing the security problems of IM.

www.abanet.org/lpm/lpt/articles/slc09051.html:
A glossary of IM terms for those over 35.

The Far East of the Western World





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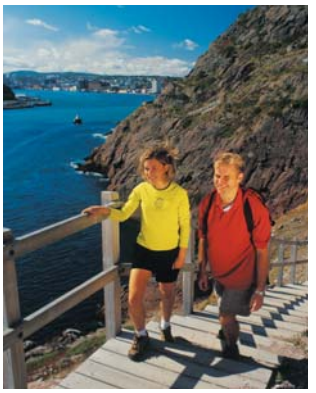
- **Golf in dazzling parks like Salmonier River and Terra Nova**



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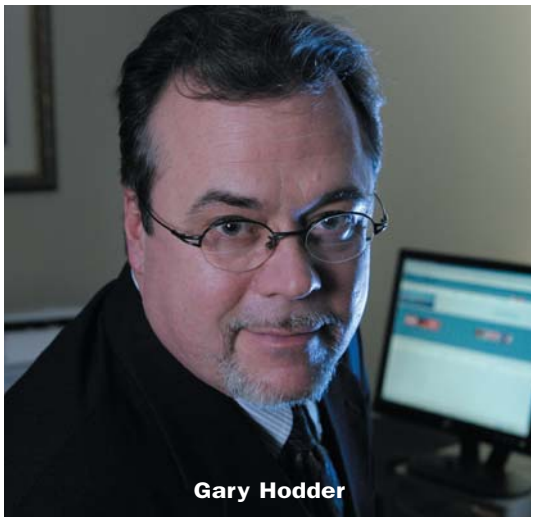
THE CANADIAN BAR ASSOCIATION / L'ASSOCIATION DU BARREAU CANADIEN

Empowerment.com

One law firm's Website gives clients the steering wheel.

Polten & Hodder is a small Toronto law firm that specializes in litigation. But its Website is anything but ordinary: it provides clients with much more information than the average firm cares to make available to the public.

For example, the firm lists the hourly rate for each of its lawyers, legal assistants and law clerks (*www.poltenhodder.com/Firmpol.html*), along with a 14-point policy covering all retainer agreements with clients and setting out expectations on both sides. The site also provides a list of ten ways to save on legal fees (*www.poltenhodder.com/topten.htm*) — something about which few lawyers advise their clients.


Gary Hodder

And in light of Ontario's recent decision to permit lawyers to charge contingency fees, the site's detailed advisory on such fees (*www.poltenhodder.com/continfee.htm*) — including the pros and cons for litigants of taking this approach — also helps empower clients.

"A happy client is a client who knows what he or she is getting into and is fully informed up front," Hodder says. "My Website recognizes that we, as lawyers, are in a service industry, and that any failure to disclose information impairs the services being rendered."

The contingency page, for example, walks clients through a series of steps that detail exactly what "contingency" means and lists the potential problems they could encounter by following this route. "Be wary of the 'straight percentage,'" the contingency page warns. "Your claim may settle early on. This sometimes happens, even in circumstances where you and your lawyer anticipate a long, hard battle."

"You need to remember that oftentimes, there's an inequality of bargaining power between a lawyer and prospective client," Hodder says. "So the agreement has to reflect some degree of predictability for the client. For example, prior to the new regulations, some lawyers would include cost awards as part of the total recovery, for purposes of calculating the total contingency fee. I think the [new Ontario] regulations strike a blow for the legal consumer."

It's an approach that has won the firm plaudits with clients. "Gary is an original," enthuses Gerald McGrath, a Toronto-based entrepreneur whose litigation case is currently being handled by Hodder on contingency. "He's got real integrity. He's very honest and upfront about how he feels lawyers should be paid. He's quite willing to caution people about fees and encourages them to ask a lot of questions about fees.

"We met five or six times before Gary took on my case," McGrath adds. "I feel my case is a winner, but he had to make sure he feels it's a winner. He gets paid a percentage of the recovery; he only gets paid by achieving success." N

— Bev Cline

Associate Marketing Checklist

Leading legal marketing expert **Larry Bodine** has a new blog titled "Associate Marketing Mentor," devoted to marketing issues for new lawyers (***http://pm.typepad.com/associatemarketing***). The following checklist of marketing activities, broken down according to years of experience, is excerpted from the blog.

Year 1

- Create a mailing list and keep it updated. Who goes on it? Your law school classmates, college friends, etc.
- Take at least one person out to lunch or to an event every quarter. Write a follow-up note on note cards.
- Participate in firm client functions. Encourage senior lawyers to introduce you to clients you don't know, or go ahead and introduce yourself and thank them for being our guest.

Year 2

- Get involved in your community through committee or volunteer work. People you serve on a committee with should be added to your mailing list.
- Volunteer for a bar association committee.
- Write an article for your area or practice group.

Years 3, 4 & 5

- Offer to host a committee meeting at the firm for a volunteer group you're in.
- More lunches, sports, or cultural events. You should be entertaining a peer once a month.
- Join the professional trade associations or organizations in which your clients are members — the firm should help you research local chapters and events.
- Write articles on topics of interest to professionals in your industry — post them in the firm newsletter and place them in trade publications and general business magazines.
- Present a speech to professionals in your industry — if you wrote an article, well, hey, that's sort of a speech ready to go, isn't it? Shake the paper a little, and voila!
- Increase your direct contact with clients.
- Offer to be the editor of your section or area's newsletter.
- Help senior lawyers and partners at firm seminars. Offer to present a topic.

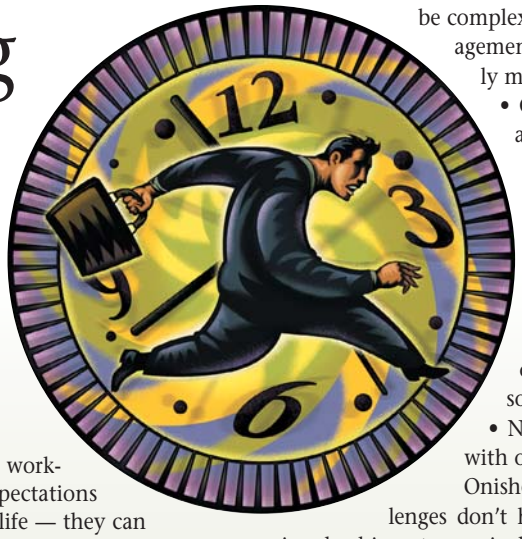
Years 6, 7 & 8

- Set annual business goals.
- Take on leadership positions in bar and trade association groups.
- Have two lunches or events with prospects, clients and referrers per month.
- Keep up the community involvement — run for board positions in organizations you've joined. Make certain the firm is financially supporting at least one fundraiser a year that you're directly involved in. N

ALENA GEDEONOVA

The young and the timeless

For many new lawyers, time management is an on-the-job learning ordeal.



Billable hour targets, 12-hour workdays, demanding partner expectations and other realities of law firm life — they can make any new lawyer long for the good old days of juggling a full course load and pulling all-nighters. No matter how hectic law school life was, the pressures of starting out as a lawyer are, by comparison, overwhelming.

But "Time Management 301" isn't yet offered by any law faculty, so new associates need to learn time management skills on the job if they hope to avoid drowning in deadlines and workload. It's a steep learning curve.

"When you're starting out, you have no idea what a lawyer does and have no idea how to manage your time," says Curtis Onishenko of McKercher McKercher Whitmore in Saskatoon. "You just try to keep your head above water and do the best you can."

But Onishenko, the Past Chair of CBA Young Lawyers in Saskatchewan, believes that time management solutions need not be complex or high-tech. Here are a few time management tips from someone's who's successfully made the transition:

- Create a weekly task list (paper is fine), and re-prioritize your work as the week progresses.
- Learn how to effectively work with and delegate duties to your assistant — new associates' most valuable resource is also their most underused.
- Take advantage of time-saving technology when appropriate, but be aware of the firm's policies and practices (*e.g.*, some firms prefer paper-based research).
- Network and share ideas and techniques with other new lawyers.

Onishenko says that time management challenges don't have to keep new lawyers from getting involved in extra-curricular activities, whether it be CBA involvement or a lunchtime CLE session. He says the experience and like-minded connections can help associates overcome the myriad new challenges of life as a lawyer, including time management.

Perhaps the most important aspect of time management is an ability to prioritize what really matters, and to learn to say "No" or "Not now" to what doesn't. The reality is, not everything is an urgent priority.

For more information on time management for lawyers, check out these articles on CBA PracticeLink: "Time Management for New Lawyers" (*www.cba.org/cba/PracticeLink/CS/timemgmt.aspx*) and "Hour Power: How to Manage Your Time" (*www.cba.org/cba/PracticeLink/tips/timemgmt.aspx*).

— Mark Kuiack

Les eaux troubles

La prudence s'impose lorsqu'on affronte une partie non représentée.

Les justiciables sont de plus en plus nombreux à se représenter seuls devant les tribunaux. Selon une étude informelle réalisée au Québec en 2001, 42% des dossiers en chambre de la famille comptaient au moins une partie non représentée.

Les explications sont multiples, selon Marie-Chantal Thouin, coordonnatrice au Service de prévention du Fonds d'assurance responsabilité professionnelle du Barreau du Québec. Elle cite, entre autres, l'imprévisibilité des honoraires et une certaine méfiance du public envers les avocats. « L'information juridique est également plus facilement disponible, ce qui fait en sorte que les gens ont l'impression qu'ils peuvent s'improviser avocat », soutient-elle. Il s'agit d'un sujet de plus en plus préoccupant.

Peu importe les raisons, les avocats doivent composer avec cette tendance. Les règles de déontologie interdisent, sans le consentement du conseiller juridique, la communication directe avec la partie adverse lorsque cette dernière est représentée. Mais l'avocat ne peut pour autant ignorer l'adversaire non représenté. Forcément, il devra y avoir communication. Le tout prend alors des allures de véritable champ de mines.

Comment doit-on s'y prendre pour éviter tout malentendu?

« L'avocat doit d'abord recommander fermement à l'adversaire de consulter un procureur indépendant », affirme Me Thouin, en ajoutant que celui-ci doit se garder de franchir le seuil où il fournirait des conseils juridiques. L'avocat doit spécifier clairement qu'il représente uniquement les intérêts de son client, sinon il pourrait être tenu à un devoir de conseil et voir sa responsabilité engagée à l'égard de la partie adverse.

Surtout, il devra s'assurer de corriger immédiatement tout malentendu pour éviter les dérapages. La prudence exige également que l'avocat documente bien son dossier et ses communications, surtout verbales, avec l'adversaire.

Mais la prudence va au-delà de considérations carrément déontologiques. Une grave erreur consiste à sous-estimer son adversaire. « Le plus gros piège pour les avocats est d'oublier que la personne qui se représente seule connaît toujours mieux son dossier et les faits de sa cause », affirme Me Thouin.

En tout temps, l'avocat serait bien avisé de conserver son calme face aux écarts de la partie qui se représente seule, une tâche pas toujours facile. « La partie non représentée qui est prise émotivement n'est pas toujours objective », prévient Me Thouin. « À court d'argument, le ton peu devenir cinglant ». Évitez la tentation de remettre l'adversaire à sa place ou de rétorquer à ses insultes. Il est préférable de réserver l'éloquence pour le tribunal. La règle à ne pas oublier, selon Me Thouin : « Le silence est d'or ». N

— Yves Faguy

ROBERT JOHANNSEN

The giant awakes

China is exploding onto the global economic scene as a powerhouse investor and purchaser, while its more than one billion citizens are gradually being introduced to a worldwide market economy. No one can foresee all the ramifications, but Canadian lawyers and the CBA are on the scene to help facilitate how those ripple effects will spread.

By Sheldon Gordon

"There lies a sleeping giant. Let her sleep, for when she wakes, she will shake the world."

– Napoleon Bonaparte

Two centuries after Bonaparte issued this prediction about China, the nation has indeed awakened, and the world is feeling the impact. In a mere 25 years, China has morphed from an inward-looking have-not nation into an economic dynamo.

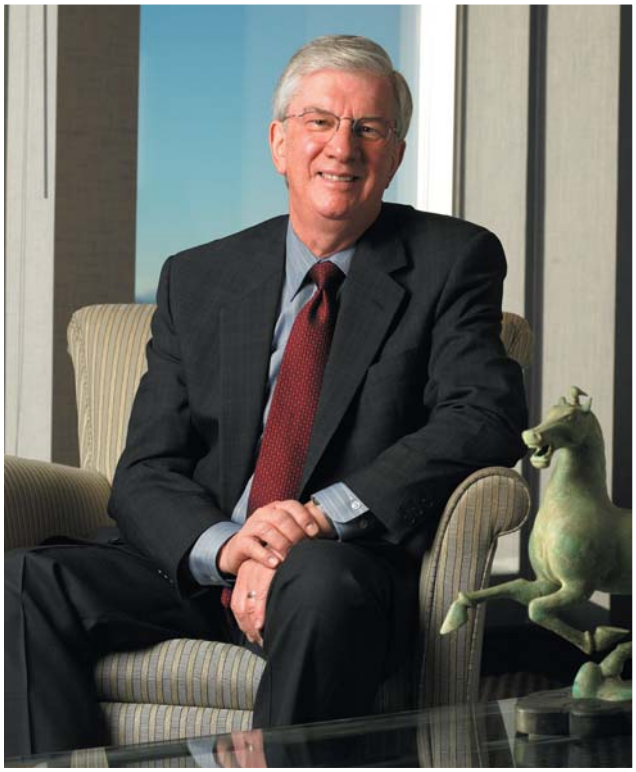
Its GNP is growing by 9% annually, such that sometime in the next two decades or so, China is expected to overtake the United States as the world's largest economy. It is already the world's largest consumer of agricultural and industrial staples such as grain, meat, coal and steel. Its growing demand for oil has helped send world energy prices soaring.

The fact that this rising economic superpower remains a Communist dictatorship also provokes concerns in the West. These become particularly acute when China's state-owned firms go shopping for North American companies. Chinese companies' takeover bids for Noranda and Unocal both collapsed, but Chinese computer maker Lenovo did recently acquire IBM's PC business.

Melissa Thomas,
Freshfields LLP, Shanghai

"The legal environment is changing so quickly. Almost nothing is routine."

« Le droit et le milieu juridique changent si rapidement. Rien n'est routinier. »



Gerry Deyell
Blake, Cassels & Graydon LLP, Calgary

"We thought the PRC was a possible opportunity. The target market would be Canadians looking to invest or establish business relations in China."

« La RPC semblait prometteuse. Nous avons visé le marché des Canadiens qui souhaitent investir en Chine ou y établir des relations d'affaires. »

Despite the unease, the West's business ties with China are intensifying — and Western law firms are making sure they don't miss the boat. Numerous firms are establishing or expanding offices in the region to facilitate trade and investment, advising North American and European companies on joint ventures or minority stakes in Chinese firms, and advising Chinese business clients how to negotiate with, or acquire, these corporations.

Currently, only one Canadian law firm, Blake, Cassels & Graydon LLP, maintains offices in China, although other firms have operated there recently and more are expected to follow in future. Meanwhile, individual Canadian lawyers with Chinese-language skills are finding opportunities to practise with large multinational law firms already established in Beijing, Shanghai or Hong Kong.

But the Canada-China legal relationship is not confined to commercial practice. The Canadian Bar Association, with funding from the Canadian International Development Agency (CIDA), has launched ambitious projects to upgrade the skills of China's lawyers and help them play a more significant role in the country's evolving legal system.

Rapid economic expansion and the dramatic social changes taking place in China today have fuelled significant growth in the Chinese Bar. In 1989, China had only 33,000 lawyers; by the end of 1997, the number had climbed to 170,000 lawyers in more than 8,000 law firms. Private practices have developed, allowing Chinese clients to obtain more assertive counsel than they could expect from state lawyers.

In short, China isn't just an emerging economic giant; it's a growing legal powerhouse, too. And Canadian lawyers are on the front lines of this new trend, bringing their skills and perspectives to a giant awakening from a long slumber.

ONE LAWYER'S STORY

Melissa Thomas is a Canadian lawyer practising in Shanghai with the European law firm Freshfields. Born in Montreal, she's a Sinophile who studied Chinese at McGill in the late 1970s, then attended Beijing University for two years on a Quebec-China student exchange program.

When Thomas came home, she began to consider a career path that would enable her to return to China. The first step was to earn a law degree at McGill. Then came a seven-year stint with Torys. In 1997, she got her wish when she was sent to the firm's small office in Hong Kong to help with project financing in the power sector.

"That was just before the Asian currency crisis," recalls Thomas. "Torys decided to close their office, and I helped with that. But I looked around to see which were the international firms with the best China practices." She joined Freshfields' Beijing office in 1997, made partner in 1999, and in September 2005 switched to their Shanghai office. Along the way, she married a Chinese writer and translator — today, they have a twelve-year-old daughter and a one-year-old son.

Thomas has handled a diversity of files during her China tenure. Most recently, she's been helping foreign financial institutions gain a foothold in China, usually by making strategic

JAZHART STUDIOS

L'éveil du géant

Au moment où la Chine transcende la scène économique mondiale, son milliard d'habitants se familiarisent avec les subtilités de l'économie de marché. Personne n'en connaît encore exactement les conséquences, mais plusieurs juristes canadiens sont déjà sur le pied d'alerte.

« Lorsque la Chine s'éveillera, la Terre tremblera ». Deux siècles après la prédiction de Napoléon Bonaparte, la nation chinoise s'est en effet éveillée. Et la planète entière en subit les contrecoups.

Au cours des 25 dernières années, la Chine est passée d'une nation indigente et centrée sur elle-même à un centre de production à l'échelle planétaire. Avec un taux de croissance annuel de 9 %, on s'attend à ce qu'elle surpasse les États-Unis en tant que première puissance économique au cours des prochaines décennies.

Or, le fait qu'elle demeure à ce jour une dictature économique n'est pas pour rassurer les Occidentaux. Au-delà du malaise, cependant, les liens entre l'Occident et la Chine s'intensifient — et les études légales occidentales s'assurent de ne pas manquer le bateau.

Du côté canadien, Blake Cassels & Graydon LLP est, à l'heure actuelle, le seul cabinet à avoir pignon sur rue dans le pays. On s'attend à ce que d'autres suivent son exemple. Entre-temps, des juristes solo trouvent le moyen de se faire embaucher sur les lieux, au sein de larges études multinationales.

De son côté, l'ABC a démarré d'ambitieux projets au fil des ans, visant à développer les habiletés des juristes chinois au sein d'un système juridique en pleine émergence.

Ces juristes canadiens se tiennent en toute première ligne, prêts à prêter main forte au géant qui s'éveille.

De l'initiative personnelle…

Mélissa Thomas est une avocate canadienne qui travaille à Shanghai avec la firme européenne Freshfields. Amoureuse de la Chine depuis fort longtemps, elle a pu réaliser son rêve d'y travailler en 1997, après sept années en pratique privée au Canada.

« C'était tout juste avant la crise de la monnaie asiatique, se souvient-elle. Tory avait décidé de fermer son cabinet à Hong-Kong. J'ai aidé à le faire. En même temps, j'ai jeté un coup d'œil pour connaître les meilleurs cabinets chinois. » Depuis son arrivée en Chine, Me Thomas s'est mariée et a eu des enfants. Côté professionnel, elle a œuvré dans différents dossiers, impliquant notamment l'aide aux banques internationales qui souhaitent investir au pays.

Me Thomas estime que le contrôle exercé par l'état sur différentes transactions, de même que sur le statut souvent embryonnaire du droit, sont les plus grandes difficultés rencontrées par le juriste et les entreprises en terrain chinois. Le droit civil devrait régir les pratiques commerciales du pays, mais aucun code n'existe encore à ce jour. Certains principes généraux datant de 1980 sont en vigueur, « mais sont d'une aide limitée quand vient le temps d'opérer une transaction commerciale plus complexe », juge-t-elle.

Pour le reste, le droit de propriété manque de clarté dans ce système traditionnellement communiste, et les domaines tels que la concurrence ou la faillite sont inexistants. Les lois, de leur côté, changent rapidement et diffèrent souvent d'un territoire à un autre. « Ça ressemble à un système de droit en construction », constate l'avocate.

… À la firme multinationale

Blakes Cassels & Graydon, seul cabinet canadien à avoir des bureaux en Chine, possède une étude à Beijing depuis 1998, où travaillent deux avocats canadiens et quatre chinois. Blakes a aussi partagé des bureaux à Shanghai avec d'autres études américaines au cours des trois dernières années.

C'est après avoir étudié le marché asiatique que les associés de l'étude ont choisi de démarrer un cabinet en Chine, pays jugé moins saturé en matière de services juridiques. Bob Kwauk, un avocat sino-canadien du cabinet de Calgary, a hérité de la tâche.

Depuis le début de son aventure chinoise, ce dernier a assisté au départ de la Chine d'au moins cinq autres cabinets canadiens. « Ils n'avaient pas le soutien du bureau chef », explique-t-il, indiquant que la situation est bien différente pour lui.

En Chine, Blakes concentre ses activités sur le développement du secteur de l'énergie et des mines. Ses clients incluent des entreprises canadiennes, de même que des compagnies locales souhaitant acquérir des intérêts financiers canadiens. Ce fut le cas pour la transaction manquée de 7 milliards $, l'an dernier, impliquant China Minmetals Corp. et Noranda inc.

Bien qu'il souhaite agrandir ses cabinets, le bureau-chef ne veut cependant pas dépasser une certaine limite de croissance, de manière à ne pas perdre de vue sa mission de simple observateur sur le territoire.

Les organismes font leur part

Le secteur privé ne monopolise pas l'ensemble des contributions canadiennes à la Chine. Le Comité de développement international de l'ABC y est actif depuis déjà fort longtemps.

En collaboration avec l'ACDI et conjointement avec la *All China Lawyers Association* (ACLA), l'ABC y a développé des programmes d'échange et de formation. Au cours des 11 dernières années, l'ABC a mis sur pied un ensemble d'activités visant à renforcir l'ACLA et à améliorer les compétences de ses membres.

Son projet le plus important, le *Criminal Justice Reform and Advocacy Projet*, inclut des ateliers portant sur différents aspects de la pratique, notamment la conduite d'interrogatoire ou la présentation de la preuve. S'il est vrai que l'état actuel du système judiciaire chinois ne permet souvent pas aux avocats de mettre leurs nouvelles connaissances en pratique, le projet donne néanmoins un coup de main au Comité de droit criminel de l'ACLA, pour que celui-ci fasse campagne en faveur de nouvelles réformes.

« Nos partenaires ont pu capter l'attention du gouvernement pour la première fois », raconte Andrea Redway, directrice de programme à l'ABC à propos d'une vaste consultation menée par des membres du comité sur l'amendement de la procédure pénale à survenir en 2006.

Une autre initiative importante, le *Canada-China Legal Aid and Community Legal Services Project* tente de favoriser l'accès à un avocat pour les Chinois moins fortunés. Une entreprise conjointe de l'ABC, l'Aide juridique de l'Ontario, le Ministère de la Justice chinois et le Centre national d'aide juridique de Chine, le projet tente d'améliorer le sort des quelque 3 000 centres d'aide juridique du pays. L'apport inclut du financement ainsi que le développement de quatre centres modèles, dans quatre des provinces les plus pauvres de la Chine.

Alors que la Chine devient petit à petit une superpuissance, son système légal devra évoluer pour accomoder les changements économiques et politiques. Alors que plusieurs juristes canadiens participent déjà au développement des institutions juridiques chinoises du 21e siècle, les cabinets juridiques devront apprendre à faire face aux nouvelles règles du jeu imposées par ce géant. **N**

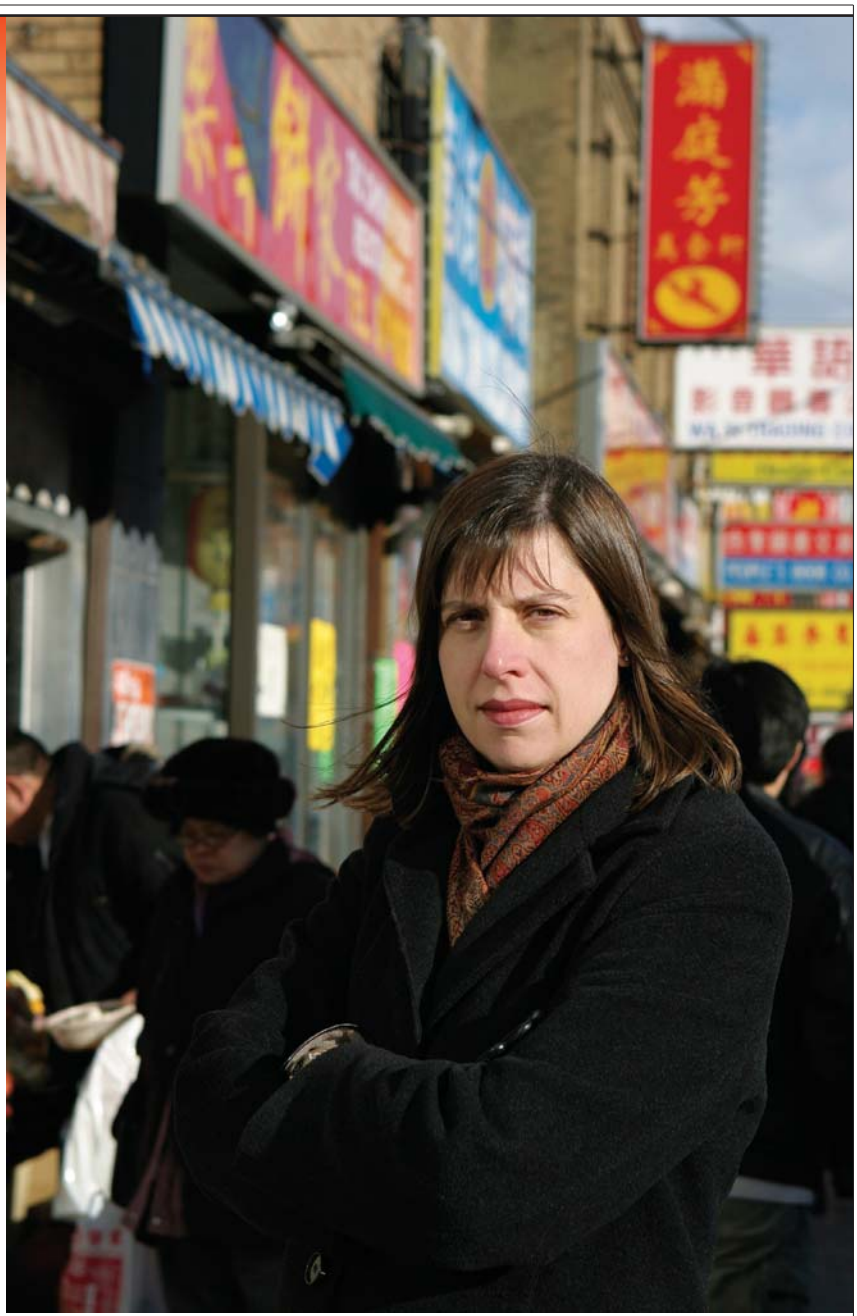
— Hugo de Grandpré

Andrea Redway

CBA-ACLA Criminal Law Reform and Advocacy Project, Toronto

"China is not a democratic country and has no intention of becoming one anytime soon. We're there to share our experience, not to direct them to follow our model."

« La Chine n'est pas une démocratie et n'a pas l'intention de le devenir. Nous permettons aux Chinois de profiter de notre expérience mais nous ne les obligeons pas à suivre notre modèle. »



ALENA GEDEONOVA

investments, as Deutsche Bank did in Huaxia Bank. She advised BNP Paribas and International Finance Corporation on their proposed investments in one of the first joint venture fund management companies established in the country.

For foreign firms, "the main thing that's different is the degree and kind of regulation — of foreign investment, of foreign currency transactions, of any of the things that a foreign investor would want to do here. It's a mindset of wanting to control everything that foreign investors do in China."

Many of the approvals are routine, but cannot be obtained before investing in the country. "So you always have this degree of uncertainty," she notes. For example, if a foreign firm obtains approval at the outset for a certain amount of equity investment, then later wishes to invest more, it has to obtain the consent of its Chinese partner (if it's a joint venture) and then the government.

The legal framework regulating commerce is supposed to be a civil law system, but China doesn't yet have a civil code. There are general principles of civil law dating back to the 1980s, "but it's relatively short and difficult to work with when you're trying to do economic transactions of any complexity," says Thomas.

A contract law has been passed, but there is no property law in this Communist country, so many *ad hoc* regulations cover land, real property tenure and security over property. "There are many issues relating to basic underlying principles of property for which there is not a clear legal basis yet."

Similarly, there is no competition law or bankruptcy law. Also, because the economy is changing so quickly, existing legislation becomes dated very easily. "It's very much like a legal system still under construction, but a billion people are using it all the time," she says.

Thomas further notes that the operation of the legal system is not uniform. "The conditions you have in Shanghai or Beijing for economic transactions are very different from the conditions if you go 100 kilometres outside the city to a poor, rural area," she says. "The legal system in different places develops at different paces."

Judicial training in the major centres is coming along, says Thomas. "They're aware of the necessity of deciding the cases on their merits." In judgments involving foreigners, the higher levels of the judiciary exercise special scrutiny to give foreigners confidence that they will receive equitable treatment. If there is lingering concern over the courts' impartiality, it centres on corruption, not political influence.

"The really interesting thing about working here is that the legal environment is changing so quickly," says Thomas. "Almost nothing is routine. I feel like every file is different from the one before."

Look before you leap

Four issues Canadian companies must address before setting up shop in China.

By Michael Lam

Lawyers advising companies on China need to counsel "judicious caution." China can mean a wonderful opportunity for Canadians, but thanks to the different financial systems, business cultures and expectations of the two countries, it can also be a place where financial returns come slow and losses come fast.

A full exploration of this topic is a book-length endeavour, but here are some of the most important issues lawyers need to know.

FINANCING

It won't be sufficient to use financial figures prepared by a China-based professional firm, or even statements prepared by the China office of a Western-based accounting firm, when seeking funding from North American investors. You'll likely need financials prepared by North American-based service providers, compliant with prevailing Canadian standards.

It's also important to assess the quality of the financials presented. If there is a revenue projection, and if so, how much of it is based on firm contracts? Are the receivables actually collectable?

CHINESE PARTNERS

Many foreign companies operating in China can do so only as a joint venture, generally in a 50-50 arrangement. Often, a Chinese company will provide the local expertise and *guanxi* (connections or relationships), while the foreign corporation will put up the capital, global expertise and international contacts.

When choosing a local partner, conduct appropriate due diligence and investigative work. This is a task best carried out by a China-based division of an international investigative organization, or by other advisors with proven Chinese experience. Look for the partner's track record in previous joint ventures, its strength in connections (particularly at the municipal and state level), and its general honesty.

The Chinese partner likely will provide the real estate for the joint venture. Land cannot be owned in China, but long-term land use agreements are available. Make sure to check the terms of the agreement, however — they can restrict the uses possible for the land.

FRAUD CONCERNS

Too many Western companies have been burned by a Chinese partner who appropriated their equipment, money, materials, and designs or other intellectual property. This kind of "soft fraud" can include a "supplier" who turns out to be the Chinese partner in a different guise, or one in collusion with the partner. Many of these problems occurred because of inadequate upfront due diligence.

Set up accounting controls to detect fraud and theft by one's employees or partners, or by outsiders. You should also create a proper corporate structure and require counter-signatures for major investments, contracts, and control over the Board of Directors. Foreign investors should ensure that their contract contains provisions for adequate financial control over the joint venture, including an independent external audit of the enterprise's accounts.

LEGAL PROTECTIONS

Protect your company's intellectual property to the extent possible. Oftentimes, the Chinese perception of IP rights differs from the Western concept, so take steps like local patent and trademark filings to safeguard yourself.

Also, be prepared to spend the time and money to actually establish a legal entity. Even when a business license has been approved, there are still several government bodies (depending on locations and the business) with which the entity must register. They all must be completed in a specified order, and they all require separate applications and approvals.

You also need to schedule adequate time to develop relationships. Many Chinese people like to establish a relationship based on commonality before doing business, and that can take time. They find it disconcerting when a Westerner wants to rush into the business matter right away.

Business in China can be highly rewarding — access to a pool of reliable labour and a rapidly growing market. But good preparation is required to make a China venture a good experience. N

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ONE FIRM'S ACHIEVEMENT

Blake, Cassels & Graydon LLP is currently the only Canadian law firm with offices in China. Blakes has been operating in Beijing since 1998, with two Canadian and four Chinese lawyers in place today, and the firm plans to add another Canadian lawyer in 2006. It has also shared a Shanghai office with three U.S. law firms for the past three years.

"In the early 1990s, Blakes decided to look at markets outside Canada, especially in Asia," says Gerald Deyell, who oversees Blakes' China practice from its Calgary office. "We quickly concluded that Hong Kong, Singapore and other Asian centres were already well-served by foreign law firms, but we thought the PRC [People's Republic of China] was a possible opportunity. The target market for us would be Canadians looking to invest in China or establish business relations with Chinese counterparts."

To open and run the practice in Beijing, Blakes tapped Bob Kwauk, a Chinese-Canadian who had graduated from the University of Alberta with a joint LL.B./MBA and joined Blakes in 1996. Kwauk had taught economics and finance in 1990 at a university in Xian, the 3,000-year old "eternal city" in China's Shaanxi province, and in 1993, he had been seconded for six months to Taipei while articling with Bennett Jones in Calgary.

During Blakes' time in China, Kwauk has seen several other Canadian law firms depart, including national firms such as Goodman Philips & Vineberg, Davies Ward & Beck (two firms that later merged), Torys, and Stikeman Elliott, as well as Vancouver firms Bull Houser Tupper and Boughton.

"They couldn't get enough business going, and they didn't have head office support," says Kwauk of the departed firms. "I don't say we have it completely figured out, but we do have participation and support from each office and from each practice area in the firm."

Blakes has capitalized on the development of the energy and mining sectors in China, with about 150 Canadian companies, including a number of junior mining firms doing exploration, among its clientele. Non-Canadian clients include Indian

pharmaceutical and Korean construction companies. The firm also has served local Chinese firms seeking European or U.S. partners and needing advice on foreign law.

Blakes has also represented Chinese acquisitors targeting Canadian interests, such as China Minmetals Corp., which made an aborted $7-billion takeover bid for Noranda Inc., and China Petrochemical Corp. (SINOPEC), which paid $105 million to Synenco Energy for a 40% stake in its Northern Lights oil sands project in Alberta.

For the Noranda takeover bid, China Minmetals "looked at a number of Canadian firms," says Kwauk, "but having an office here gave us an advantage." In the oil sands investment, "SINOPEC hired us to assist in negotiations with the Canadian party, to obtain approvals from the Alberta and Canadian governments, and to document the transaction," he says.

Although Blakes intends to add a few more lawyers to its offices in China, the firm doesn't want to "have a substantial number on the ground," says Deyell. "They function as our eyes and ears in China, but they work in close collaboration with the Canadian office." To extend the Blakes culture to its China outpost, the firm rotates associates from Canada through its Beijing practice.

Meshing the China offices with the Canadian operation has enabled Blakes to use the huge time difference to its advantage. "We can turn things around very quickly," says Kwauk. "If I've worked on a file during the day, I can fire a request back home just before I leave the office for the evening, and someone there will pick up the baton. The research or the memo will be waiting for me when I come to the office the next morning."

Kwauk is enjoying his "front-row seat" as the Chinese juggernaut gains momentum on the world stage. "I would love to stay," he says. "I'm practically a local native." He met his future wife, a Chinese national who teaches ballet, five years ago, and they now have two young children.

"I would be crazy to pull a Klinger," Kwauk adds, referring to the *M*A*S*H* corporal who schemed relentlessly to leave Korea. In the last episode, of course, Klinger elected to stay behind in Asia.

ONE PROJECT'S IMPACT

Canada's contributions to China's growing legal structure have not been exclusively in the private sector. Indeed, the CBA's International Development Committee (IDC) has been active in China longer than any law firm, and having trained more than 3,000 Chinese lawyers, has had a great impact on the evolution of law in this ancient country.

In May 1994, an IDC delegation travelled to China to meet with the All China Lawyers Association (ACLA), a group composed largely of lawyers in private practice. The meeting led to ACLA's first cooperative agreement with a foreign legal body. With funding from CIDA, the two organizations have jointly developed a training and exchange program.

Over the past 11 years, the CBA has provided assistance intended to strengthen ACLA as an organization and to upgrade the skills of its members. The two groups have arranged training sessions in China (attended by more than 1,000 Chinese lawyers) and study tours to Canada (in which 40 Chinese lawyers have participated).

"In the last decade, Chinese lawyers have been allowed to form private law firms with a minimum of three lawyers," says Andrea Redway, the Toronto-based Project Director of the CBA-ACLA Criminal Law Reform and Advocacy Project, under the auspices of the International Development Committee. "They're very interested in practice management, ethical standards, and business development."

Bob Kwauk
Blake, Cassels & Graydon LLP, Beijing

"Having an office here gives us an advantage."

« Le fait d'avoir un bureau sur place nous donne un sérieux coup de pouce. »

The largest CBA/ACLA initiative to date is the Criminal Justice Reform and Advocacy Project. Its broad objective is to strengthen ACLA's Criminal Law Committee (CLC) and help train its criminal defence members.

The project aims to upgrade the professional skills of the Chinese defence bar, give the CLC a stronger voice in advocating criminal law reforms, and raise public awareness in China of the role of defence lawyers and the criminal justice system. These would be ambitious goals in any developing country, let alone one ruled by an authoritarian Communist leadership.

"There is no question that China is not a democratic country and has no intention of becoming one anytime soon," says Redway, a lawyer who previously spent 3 1/2 years in China with Blake Cassels. "However, the fundamental purpose of the co-operation is to support the Chinese as they determine what direction they should go. We're there to share our experience, not to direct them to follow our model."

The professional training focuses on practical skills such as interviewing clients and witnesses, fact-finding and evidence gathering, drafting arguments, and conducting direct and cross-examination. "It's the first time many of the Chinese lawyers have done role-playing exercises," says Redway. "Many formed their conception of the Western legal system on cases they saw on television, such as the O.J. Simpson trial."

While the Chinese lawyers are eager to learn about criminal law procedure in the West, Redway acknowledges that they aren't about to stride into China's courtrooms and deploy their new skills. For one thing, legal counsel is generally not available to an accused. Even if a defendant's family does hire a lawyer, the accused may not have pre-trial access to the lawyer, who must depend on the family as an intermediary.

At trial, witnesses rarely are called to testify, and defence lawyers usually have only documentary evidence to examine and challenge. "What they're able to do on behalf of clients is very limited," says Redway. "But the training they receive helps them understand that reforms are possible."

With that in mind, the project is helping the CLC upgrade its capacity to campaign for such reforms. "Our partners have been able to get the ear of the government in a more substantial way for the first time," says Redway. The CLC has gathered the views of defence lawyers across China on the criminal procedure law, which is to be amended this year.

The CLC has also buttonholed the Ministry of Justice, the Supreme People's Court, the Supreme People's Procuratorate and the National People's Congress to press for reforms. The project has recently brought representatives from these institutions to Canada to study the Canadian criminal law system in more depth.

Also afoot are efforts to boost public awareness and disseminate legal information. In October 2005, CLC affiliates at the national, provincial and local levels held their second annual National Criminal Law Promotion Day, based upon the CBA's long-running Law Day celebrations to mark the passage of the *Charter of Rights and Freedoms*.

In communities throughout the country, defence lawyers set up tables and large banners in the public square, handed out brochures and dispensed free advice. The IDC has also helped the CLC develop a Website and produce quarterly newsletters to bolster its influence.

Continued on page 53

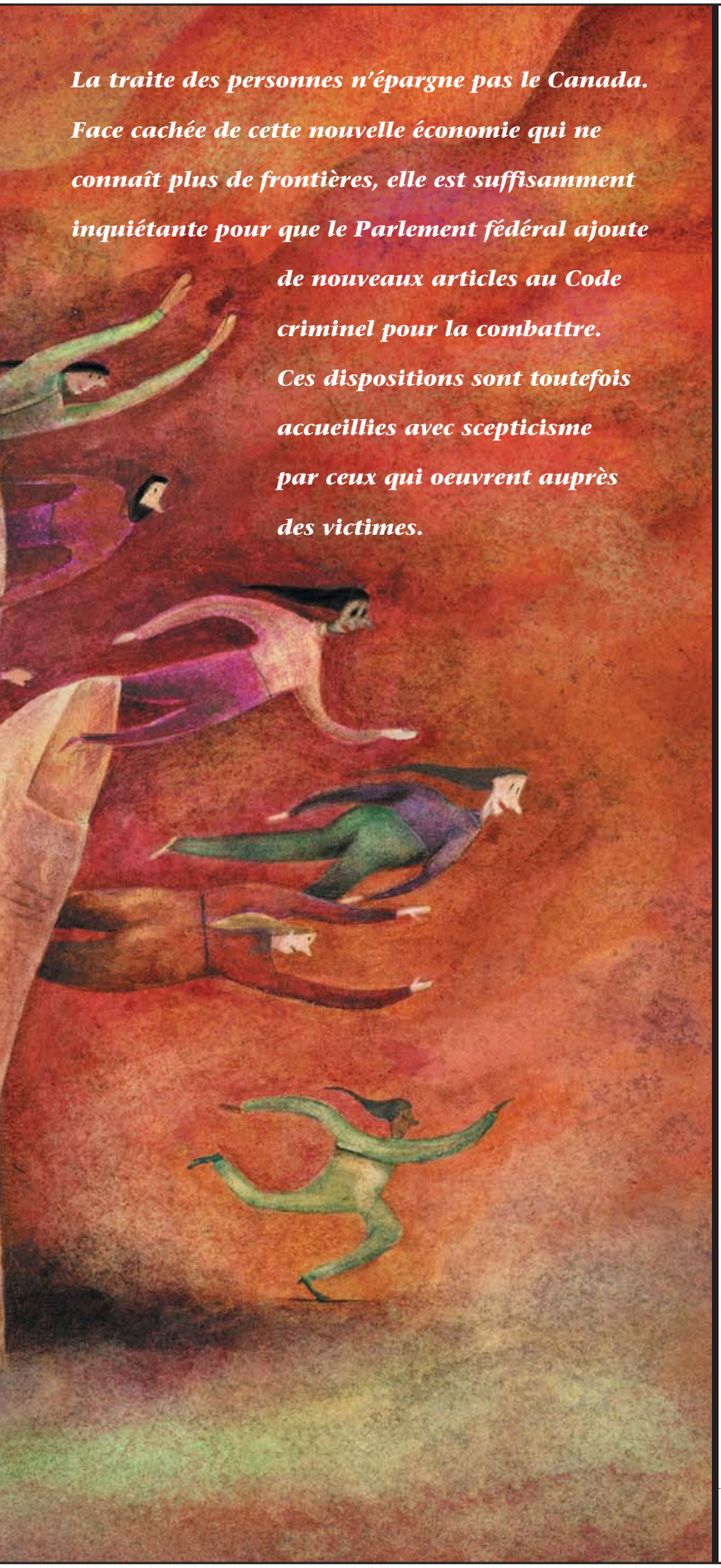
La Revue du Barreau canadien — la plus importante publication savante bilingue du Canada destinée aux professionnels du droit – est à présent archivée et accessible, en ligne, à tous les membres de l'ABC à titre d'avantage de l'adhésion ou par abonnement annuel. Branchez-vous instantanément à plus de 80 ans de judicieux renseignements et d'analyses éclairées, à partir de 1923.

Voici l'occasion de consulter des articles et opinions d'un intérêt immuable, émanant des esprits juridiques les plus brillants au pays, qui ont valu à la Revue du Barreau canadien d'être la plus fréquemment citée devant la Cour suprême du Canada et d'acquérir une réputation d'excellence dans le monde entier.

Des outils pratiques pour faciliter l'exercice de ma profession et favoriser mon bien-être personnel. Voilà pourquoi ***je suis membre.***

Consultez la Revue du Barreau canadien à **cba.org/cbr**

Le guet-apens



La traite des personnes n'épargne pas le Canada. Face cachée de cette nouvelle économie qui ne connaît plus de frontières, elle est suffisamment inquiétante pour que le Parlement fédéral ajoute de nouveaux articles au Code criminel pour la combattre. Ces dispositions sont toutefois accueillies avec scepticisme par ceux qui oeuvrent auprès des victimes.

Quelque part dans un pays d'Europe de l'Est, Olga rêve d'une vie meilleure. Un recruteur lui promet un travail de serveuse au Canada. Elle devra bien sûr rembourser certains frais, mais en échange, elle gagnera suffisamment d'argent pour vivre et pour envoyer à sa famille. Son intuition lui dit que tout ça n'est peut-être pas très net mais que ça vaut tout de même le coût.

Olga vient de mettre le doigt dans l'engrenage. Ce n'est pas un travail de serveuse qui l'attend de l'autre côté de l'Atlantique. C'est plutôt la prostitution forcée dans un bar de Toronto. On lui a confisqué ses documents de voyage et on lui réclame des frais astronomiques pour pouvoir s'affranchir. Déplacée d'un taudis à l'autre, d'une ville à l'autre, sans ressource et victime de violence physique et psychologique, elle n'est pas en mesure de dénoncer la situation. Sans compter qu'elle a peur d'être déportée chez-elle avec la honte pour seul bagage.

Olga n'existe pas vraiment, mais elle incarne malheureusement un phénomène bien réel. Selon l'ONU, la traite des personnes ferait environ 700 000 victimes par année dans le monde. Elle n'épargne pas le Canada.

« Une étude que nous avons réalisée en 2004, avance qu'entre 1999 et 2003, 600 à 800 personnes par année ont été l'objet de trafic au Canada », affirme le Caporal Sylvain St-Jean, du Centre national de coordination de la traite des personnes de la Gendarmerie Royale du Canada. Selon la même étude, 1500 à 2200 personnes par année auraient été l'objet de trafic du Canada vers les États-Unis.

De l'aveu même de la GRC, ces chiffres sont bien en deçà de la réalité. La traite des personnes ne peut être répertoriée de façon exacte puisqu'elle se déroule dans la clandestinité et que peu de victimes osent la dénoncer. Elle est aussi difficile à combattre car elle exige la coordination de plusieurs autorités situées dans différents pays.

« La traite des personnes n'est pas le problème d'une seule agence ou d'un seul gouvernement, il s'agit d'une situation internationale, constate Amélie Morin, porte-parole de l'Agence des services frontaliers à Ottawa. Lorsqu'on a affaire au crime organisé, il s'agit rarement d'un problème unique, ajoute-elle. Il est aussi souvent question de trafic de drogues ou d'autres produits. »

Par Mélanie Raymond

Illustration par Marc Mongeau

Hellish trade

Human trafficking is the dark side of the new borderless economy, and Canada is not immune. Parliament has amended the Criminal Code to fight it, but those who work with victims are still worried.

Somewhere in Eastern Europe, Olga dreams of a better life. Someone has promised her work as a waitress in Canada. But the job actually awaiting her is prostitution in a Toronto bar. The "recruiter" has confiscated her travel documents and is demanding astronomical fees for her freedom. She's trapped — moved from town to town and subjected to physical and sexual abuse. Fear and shame prevent her from reporting her situation.

Olga isn't a real person, but she represents a real phenomenon. According to the United Nations, approximately 700,000 people worldwide are victims of human trafficking each year. Canada is not exempt. A 2004 RCMP study estimated that, from 1999 to 2003, between 600 and 800 people per year were involved in trafficking in this country. Another 1,500 to 2,200 people are smuggled across the Canada-U.S. border annually.

What's worse, these estimates likely fall short of the real figures. Human trafficking can't be tracked accurately, because it's carried out in secret and few victims dare speak out. It's also difficult to fight because it requires the coordination of several authorities in different countries.

In Canada, victims of human trafficking are usually found in urban centres like Toronto, Vancouver and Montreal. They are generally women and children destined for the sex industry, but "individuals are also brought to Canada for forced labour," says Corporal Sylvain St-Jean of the RCMP's national Human Trafficking Coordination Centre in Ottawa.

Last November, Parliament adopted Bill C-49, which added three new paragraphs (279.01 to 279.03) to the *Criminal Code* aimed directly at human trafficking.

Paragraph 279.01 prohibits the recruitment, transport, harbouring or control of a person's movements in order to exploit her or to facilitate her exploitation.

"It is a very serious infraction, since it has a maximum penalty of 14 years' imprisonment," says Heather Perkins-McVey, an Ottawa criminal lawyer and Past Chair of the CBA National Criminal Law Section.

Paragraphs 279.02 and 279.03 prohibit anyone from knowingly gaining financial or any other advantage from human trafficking and from keeping or destroying a person's identification, immigration, or travel papers in order to facilitate trafficking. They have a maximum penalty of ten and five years' imprisonment, respectively.

While these amendments are certainly positive developments, many experts in human trafficking doubt their effectiveness. "It is important to pursue those responsible, but there's an imbalance if you don't address victim protection," says Janet Dench, Director of the Canadian Council for Refugees, which would like a revision of Canada's immigration policies.

Perkins-McVey also feels the definition of exploitation provided in paragraph 279.04 is vague and could result in a person who tries to help another being targeted.

Before the introduction of these paragraphs, the *Criminal Code* did provide recourse to punish human trafficking, since the paragraphs on abduction, extortion, or living off the profits of prostitution could apply in specific circumstances.

The *Immigration and Refugee Protection Act* also allows the prosecution of anyone who knowingly organizes the entry into Canada of one or several people by fraud, trickery, abduction, threats, or the use of force or other forms of coercion. However, the new paragraphs also allow the pursuit of cases that don't cross borders, Corporal St-Jean points out.

Numerous challenges

Still, obstacles remain. Police continue to face a sizable problem when they investigate these crimes: the difficulty in placing charges. "The victims often have illegal status in Canada and are treated like that by immigration authorities," says Dench. "They are arrested, detained, and deported."

The Canadian Council for Refugees advocates that specific protection must be put in place for victims without status. Not only will victims be more inclined to speak out and seek help, they could also help police investigations. "If the witnesses are deported, the case is lost," she says.

"We know that some of the people who attempt to cross our borders are searching for a better life," says Amélie Morin, spokesperson for the Canada Border Services Agency in Ottawa. She adds, however, that these people could claim refugee status.

As far as Dench is concerned, that's not an effective solution. "There must be arrangements that would grant temporary protection to those who find themselves in this situation," she says. "Many victims will return to their country of origin, but they must be able to do so under good conditions and with the benefit of some support."

Human trafficking is also tied to illegal immigration — classifying a person as a traffickee or illegal immigrant depends on whether she's held captive at her destination. But the line is blurry: illegal immigrants also have to endure intolerable living conditions, and often coercion, to survive.

"With globalization, we have opened the borders to trade while closing them to humans," says Marie-Neige St-Jean, coordinator of the Stella Intervention Team in Montreal, an organization that helps sex workers. She advocates opening the borders, saying that illegal immigration strikes a blow to human rights, since it forces people underground and makes them vulnerable.

Open borders are difficult to imagine in today's political climate, however. "After September 11, more technology and programs were put in place to ensure the adequate protection of our territory," says Morin. "It is important to find equilibrium.... You can't totally prevent access; you can't permit entry to everyone either."

The biggest obstacle for those fighting human trafficking, however, is Canadians' lack of knowledge about this ugly reality. "People don't believe this is happening in Canada," says Dench. "That is a challenge." N

— Alison Arnot

Conscient du problème et soucieux de respecter ses obligations internationales, le Parlement canadien créait, en novembre dernier, trois nouvelles infractions visant spécifiquement la traite des personnes. Les nouveaux articles 279.01 à 279.03 du Code criminel viendront bonifier les moyens d'action à la disposition des forces policières. « Ces nouvelles infractions complètent les infractions de trafic que l'on retrouve déjà à la *Loi sur l'immigration et la protection des réfugiés* et dans le Code criminel », soutient le Caporal St-Jean.

La plupart des intervenants interviewés voient d'un bon œil l'adoption de ces nouveaux articles. « Ces dispositions sont intéressantes puisqu'elles s'attaquent à la coercition qui est tout à fait inacceptable », déclare Marie-Neige St-Jean, de Stella, un organisme montréalais de soutien aux travailleurs du sexe.

Cependant, beaucoup doutent de leur efficacité. « Il est important de poursuivre les responsables mais il y a un manque d'équilibre si on ne touche pas à la protection de la victime », déplore Janet Dench, directrice du Conseil canadien pour les réfugiés. Elle aurait souhaité que le Canada en profite pour revoir ses politiques en matière d'immigration.

Un marché lucratif

La traite des personnes est une « industrie » florissante au niveau international. Selon l'ONU, il s'agirait de la forme de crime organisé transnational qui connaît la croissance la plus rapide. « Les groupes internationaux criminalisés s'intéressent à la traite des personnes de façon croissante, explique le Caporal St-Jean. Il s'agit d'une source de profit importante pour eux. »

Cependant, ils ne sont pas les seuls à cibler ce marché puisque des groupes plus restreints tenteraient aussi de tirer leur épingle du jeu. « De plus petits réseaux décentralisés s'intéressent aussi à la traite des personnes et peuvent se spécialiser dans le recrutement, le transport ou l'hébergement de victimes, précise le Caporal St-Jean. De petits clans familiaux peuvent contrôler toute l'opération et des individus qui travaillent de façon indépendante tirer profit de la traite des personnes. »

Les victimes sont généralement des femmes et des enfants destinés à l'industrie du sexe, mais ce n'est pas toujours le cas.

Au Canada, les victimes de la traite se retrouvent habituellement dans les centres urbains que sont Toronto, Vancouver, Montréal et Winnipeg. Les victimes sont généralement des femmes et des enfants destinés à l'industrie du sexe, mais ce n'est pas toujours le cas. « Quoique cela soit moins fréquent, des personnes sont aussi entraînées au Canada pour effectuer du travail forcé, soutient le Caporal St-Jean. Nous avons eu vent de quelques incidents où l'agriculture et l'industrie du textile étaient en cause ainsi que le trafic de drogue. »

Il y aurait aussi le cas de domestiques entrées au Canada en vertu d'un programme spécial de l'immigration leur permettant de demander la résidence permanente après 24 mois de travail au sein d'une famille, nous explique Nancy Célestin, présidente du conseil d'administration et porte-parole de l'Association des aides familiales du Québec. Certaines personnes se retrouvent dans des situations horribles une fois arrivées au pays. « Elles arrivent par l'entremise d'agences qui font parfois de fausses promesses », constate-elle.

Un crime spécifique

Tout juste avant le déclenchement des élections, le Parlement fédéral adopte, le 25 novembre dernier, le projet de loi C-49 ajoutant trois nouvelles infractions au Code criminel. Le projet reçoit la sanction royale le même jour.

Les nouveaux articles 279.01 à 279.04 du Code criminel visent directement la traite de personnes. L'article 279.01 interdit le recrutement, le transport, l'hébergement ou le contrôle des déplacements d'une personne afin de l'exploiter ou d'en faciliter l'exploitation. « C'est une infraction très sérieuse puisqu'elle prévoit une peine maximale de quatorze ans d'emprisonnement », commente Heather Perkins-McVey, avocate en droit pénal à Ottawa et membre de la Section nationale de droit pénal de l'Association du Barreau canadien.

Les articles 279.02 et 279.03 interdisent à quiconque de tirer sciemment un avantage financier ou tout autre avantage de la perpétration d'une infraction de traite des personnes et de conserver ou de détruire des documents comme les pièces d'identité, les documents d'immigration et de voyage d'une personne pour en faire et en faciliter la traite. Ils entraînent respectivement une peine maximale de dix et de cinq ans d'emprisonnement.

L'exploitation, définie à l'article 279.04, est le concept central de ces nouvelles infractions. Une notion « vague », selon Me Perkins-McVey, qui « pourrait faire en sorte qu'une personne soit amenée à être accusée d'un crime sans savoir que les gestes qu'elle posait étaient illégaux ».

On y précise qu'une personne en exploite une autre lorsqu'elle l'amène à fournir ses services, par des agissements dont il est raisonnable de croire qu'un refus de sa part mettrait en danger sa sécurité ou celle d'une personne qu'elle connaît, ou lorsqu'elle l'amène, par la tromperie à se faire prélever un organe.

Me Perkins-McVey croit que des expressions telles que « amener à fournir » et « amener à se faire prélever » en disent peu sur les circonstances entourant la commission d'un tel geste et « qu'une personne qui tente d'en aider une autre pourrait être visée. »

Ces dispositions ne sont pas nées dans l'urgence d'agir. Avant leur introduction, il était tout de même possible de punir la traite des personnes en ayant recours au Code criminel. Les articles portant sur l'enlèvement, l'extorsion, le complot, le contrôle ou le fait de vivre des produits de la prostitution, pouvaient être utilisés dans des circonstances spécifiques.

La *Loi sur l'immigration et la protection des réfugiés* (LIPR) de 2002 permet aussi, grâce à son article 118, de poursuivre quiconque sciemment organise l'entrée au Canada d'une ou de plusieurs personnes par fraude, tromperie, enlèvement ou menace ou usage de la force ou de toute autre forme de coercition.

Ses effets tardent toutefois à se faire sentir. À ce jour, une seule accusation aurait été portée en vertu de l'article 118 de la LIPR, soit contre Micheal Ng, un tenancier de salon de massage de Vancouver.

L'inclusion des nouvelles mesures dans le Code criminel lance un message plus sérieux, croit Me Perkins McVey. « Une accusation en vertu du Code criminel a une plus grande signification, déclare-t-elle. De plus, du point de vue de la poursuite, elle procure d'autres avantages comme le prélèvement d'ADN, les ordonnances de non-publication et des mesures facilitant le témoignage des mineurs. »

Selon le Caporal St-Jean, les nouvelles infractions permettront aussi de s'attaquer aux dossiers qui n'ont pas d'aspect transfrontalier. « La traite de personnes se déroule parfois uniquement au Canada, précise-t-il. Qu'elles aient recours à la LIPR ou aux nouvelles infractions, les autorités policières seront mieux en mesure de s'assurer que l'infraction reprochée soit celle qui correspond le mieux aux faits précis en cause. »

Sans-papier

Il reste toutefois bien des obstacles. Aux dires de certains organismes qui œuvrent auprès des victimes, les autorités policières continueront de faire face à un problème de taille lorsqu'ils

enquêteront sur de tels crimes : la difficulté d'en obtenir la dénonciation.

« Les femmes ont peur de dénoncer car elles craignent par dessus tout de retourner dans leur pays », soulève Nancy Célestin. Elle note que même si les aides familiales sont arrivées ici légalement, leur statut peut avoir changé en cours de route. « La dénonciation aux autorités de l'immigration est la menace numéro un lorsque les choses vont mal », poursuit-elle. Souvent seul soutien de leur famille restée à l'étranger, ces domestiques seraient alors prêtes à tolérer bien des abus.

« Les victimes ont souvent un statut illégal au Canada et sont traitées comme telles par les autorités de l'immigration, s'insurge Janet Dench. Elles sont arrêtées, détenues et déportées. »

Le Conseil canadien pour les réfugiés prétend qu'une protection spécifique devrait être mise en place pour les victimes sans statut. Non seulement seraient-elles plus enclines à dénoncer et à chercher l'aide nécessaire mais de plus, elles pourraient faciliter le travail des équipes policières. « Si les témoins sont déportés, la cause est alors perdue faute de preuve », déplore Mme Dench.

« Nous reconnaissons que certaines circonstances sont dramatiques, répond Amélie Morin. Nous savons que certains des gens qui tentent de traverser nos frontières sont à la recherche d'une vie meilleure. » Elle ajoute toutefois qu'il existe des programmes pour venir en aide aux personnes en difficulté dont le mécanisme de demande de statut de réfugié.

Pour Mme Dench, les programmes existants ne sont pas une solution efficace puisque leurs paramètres sont trop restreints. « Il faudrait des dispositions qui feraient en sorte d'accorder une protection temporaire à ceux qui se trouvent dans cette situation et qui pourraient mener ultérieurement à la régularisation de leur statut, plaide Mme Dench. Beaucoup de victimes accepteront de retourner dans leur pays d'origine mais doivent pouvoir le faire dans de bonnes conditions et en bénéficiant d'un certain soutien. »

« Si les luttes anti-trafic ne remettent pas en question la fermeture des frontières, notamment aux femmes, on lutte alors contre les personnes sans statut et contre la prostitution. »

Repenser les frontières?

Lorsque l'on aborde la question de la traite des personnes, les glissements vers les difficultés liées à la migration illégale sont fréquents. En théorie, c'est le fait d'être captif ou non à destination qui fait la différence entre une personne trafiquée et un immigrant illégal. Dans le discours, un certain flou s'installe. On en profite pour mettre en relief les problèmes des migrants illégaux qui, pour survivre, doivent accepter des conditions de vies intolérables presque équivalentes à de la coercition.

En entrevue donnée l'été dernier, le ministre fédéral de la Justice, Irwin Cotler, soulignait la nécessité d'adopter une stratégie globale contre la traite des personnes. « La lutte contre la traite des personnes ne peut se faire que par un seul projet de loi, on doit faire de la prévention à l'échelle nationale et internationale, on doit protéger les victimes et on doit faire en sorte de poursuivre les responsables », avait-il déclaré.

Marie-Neige St-Jean prône une solution plus radicale. « Avec la mondialisation, nous avons ouvert nos frontières aux denrées et aux transactions alors que nous les avons fermées aux êtres humains, insiste-t-elle. Or, c'est la notion même d'immigration illégale qui porte atteinte aux droits humains puisqu'elle pousse les gens dans la clandestinité et les rend vulnérables. »

« C'est évident qu'après le 11 septembre 2001, plusieurs technologies et programmes ont été mis en place pour s'assurer de protéger adéquatement notre territoire », rétorque Amélie Morin. « Il importe de trouver l'équilibre et de s'assurer qu'il y ait une circulation fluide à la frontière tout en sécurisant notre territoire, ajoute-elle. On ne peut empêcher totalement l'accès, on ne peut non plus permettre à tous d'entrer. »

Reste qu'on doit s'assurer de viser au bon endroit. « Si les luttes anti-trafic ne remettent pas en question la fermeture des frontières, notamment aux femmes, s'insurge Mme St-Jean, on lutte alors contre les personnes sans statut et contre la prostitution. »

Au-delà de ces questions fondamentales, le plus gros obstacle qui accable ceux qui luttent contre la traite des personnes est la méconnaissance du phénomène par les Canadiens. « Les gens ne croient pas que cela se passe au Canada, regrette Janet Dench. Or, il faut d'abord être sensibilisé pour voir les indices. C'est l'un des défis. » N

Mélanie Raymond **est la rédactrice principale du *National*. Avocate, elle détient aussi une maîtrise en communication internationale portant sur le tourisme sexuel.**

OFFICIAL NOTICE/AVIS OFFICIEL

Notice to designated and elected voting members of CBA Council

Election of candidate to the position of Second Vice-President for the term beginning August 2006

Pursuant to CBA By-Law 1, an election will be held beginning the week of February 20 until April 18, 2006, for the position of Second Vice-President.

The candidates who are running for election are:

- J. Guy Joubert, Winnipeg, MB
- James L. Lebo, Q.C., Calgary, AB.

Ballots for the election will be mailed during the week of **February 20-24, 2006**.

Ballots must be returned to the CBA National Office on or before **April 18, 2006**.

Avis aux membres élus et désignés du Conseil de l'ABC

Élection à la deuxième vice-présidence pour l'exercice commençant en août 2006

Conformément au règlement numéro 1 de l'ABC, une élection aura lieu pour désigner un second vice-président et le scrutin se tiendra à partir de la semaine du 20 février jusqu'au 18 avril 2006.

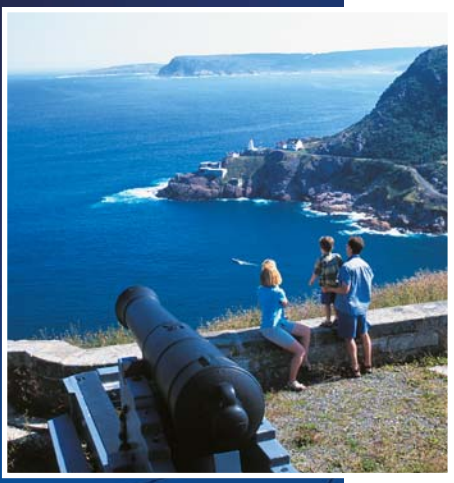
Les candidats sont :

- J. Guy Joubert, Winnipeg, Man.
- James L. Lebo, Q.C., Calgary, Alb.

Les bulletins de vote seront postés dans la semaine du **20 février 2006**.

Ils doivent être retournés au bureau national de l'ABC au plus tard le **18 avril 2006**.

Cap vers l'Est !



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Conférence juridique canadienne & Expo

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du 17 au 21 août, 2006

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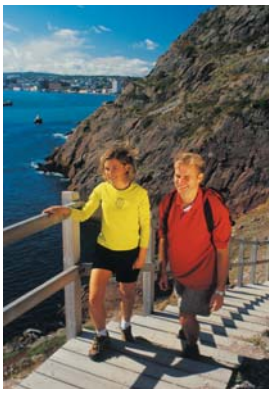

- **Arpentez les parcs nationaux Signal Hill et Cape Spear**
- **Pratiquez l'écotourisme ou le kayak de mer dans l'océan Atlantique**
- **Jouez au golf sur les terrains des parcs Salmonier River et Terra Nova**

Comme toujours, vous pourrez assister à des FJP de haut calibre, profiter d'une myriade d'occasions de réseautage, assister à la réunion annuelle de l'ACCJE et visiter la foire des exposants.

Consultez le www.cba.org pour plus de renseignements.

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Knowledge uprising

Knowledge management is in ascendance at law firms again, and this time, there's no holding it back. Recovering quickly from early setbacks, KM is catching on at many large firms and a growing number of boutiques. Just what is KM, and how can it add to your firm's efficiency, profitability and quality of practice? The sooner you know, the less likely you'll be left behind.

By Patti Ryan

LURENDA MASTROMONACO

Steven Matthews
Knowledge Services Director, Clark Wilson, Vancouver

"KM is an obvious way for law firms to better serve their clients and gain competitive advantage from an asset they already have: their knowledge."

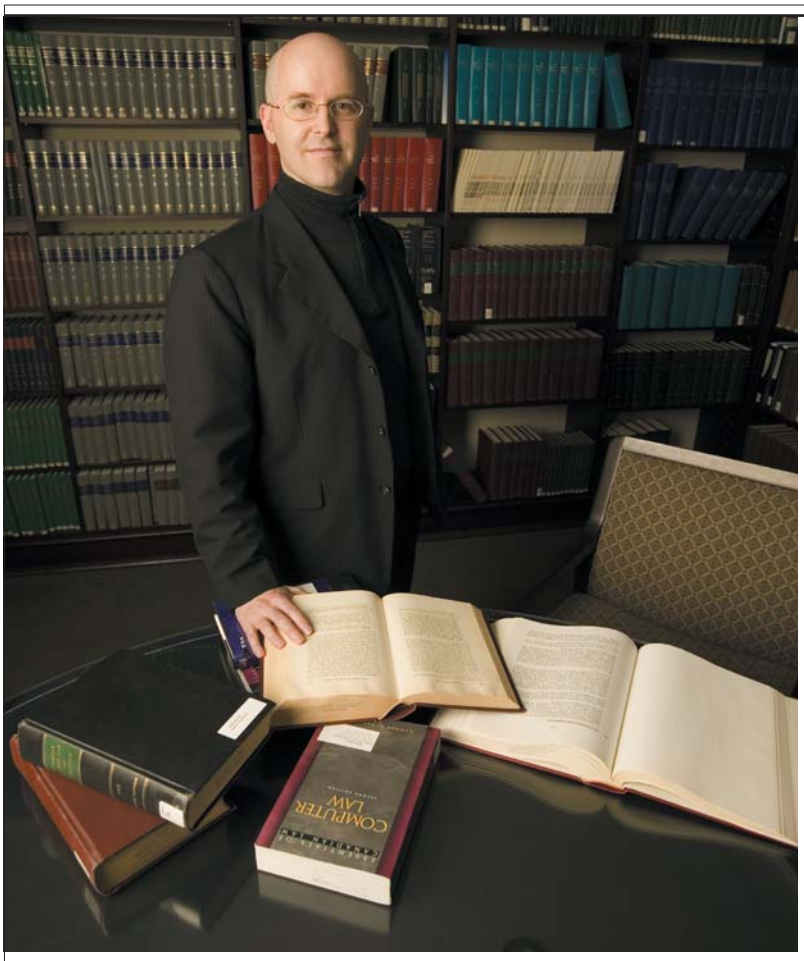
« La gestion du savoir permet aux cabinets d'offrir un meilleur service aux clients et de se démarquer de la concurrence à partir d'un bien dont ils disposent déjà soit leur savoir. »

Like kindergarteners, they don't always share well. Like journalists, their work environment is not conducive to collaboration. Like husbands, they don't always put an object back where it belongs, making it hard for the next person to know where to find it. And like Luddites, they can be deeply skeptical of the power of new technology to do, well, anything useful.

So what's a law firm to do with a collection of possessive, competitive, disorganized, technology-leery lawyers if it wants them to buy into the power of knowledge management? That question is now being pondered at some of the biggest law firms in Canada.

Since the dawn of the profession, of course, lawyers have always engaged in some form of knowledge management (KM). Even if it was just a matter of simple verbal exchanges at small firms, or archived precedents and research, they've always had to share and manage their knowledge. In that sense, there's nothing new about it.

But KM as it's understood today has come to mean the formal, technology-based process by which knowledge can be shared and leveraged among colleagues, sometimes across great geographic distances. It usually calls for the creation of



PIERRE-LOUIS MONGEAU

Peter Nagy

Director of Knowledge Management Practices, Fasken Martineau DuMoulin LLP, Montreal

"The person who creates the knowledge should also be the person who manages it."

« Celui ou celle qui produit la connaissance devrait être en charge de la gérer. »

a system of some kind — often involving new software — and it depends heavily on input from lawyers, who are the firms' gatherers and keepers of knowledge.

Thanks to that last point, the implementation of modern KM, while reliant on technology, is really more about law firm culture, encompassing how lawyers relate to each other, how they relate to clients, how they bill, and whether or not it will be possible — or even, in some cases, necessary — to motivate them to spend extra, unbillable hours contributing to KM at their firms.

The trend towards KM at law firms first became apparent in the late 1990s, when firms began to realize that with dozens or even hundreds of lawyers working on similar cases at any given time, the firm was probably answering the same questions repeatedly and inefficiently.

In order to cut down on wasted time, spend clients' money more responsibly, and increase consistency in the way they responded to similar cases, firms began to think it might be smart to gather all of their knowledge in one place, then make it accessible to everyone else at the firm.

But, perhaps ironically for a profession in which knowledge is the main currency, the road to KM has been fraught with barriers, detours and speed bumps. Possibly that's because lawyers have so far seen just the tip of the KM iceberg, and sense the potentially massive change in the culture of modern law firms that it implies.

The second wave

"KM had the unfortunate timing to come out during the late 1990s, and was lumped in with a number of management consulting 'trends' such as Total Quality Management or Business Process Engineering," explains Steven Matthews, Knowledge Services Director at Clark Wilson LLP in Vancouver.

"In addition, many short-lived technology companies jumped on the term 'KM' just long enough to go bankrupt and muddy the KM name," he adds. "So it's easy to see why KM was initially greeted with suspicion."

Ron Friedmann, President of Prism Legal Consulting Ltd. in Arlington, Virginia, agrees. "Many lawyers have seen KM efforts that failed," he says of the 1990s boom. "And lawyers have very long memories, so even failures from ten or more years ago loom large in their minds."

During KM's first wave of popularity, lawyers often expressed dislike for the extra work it created, such as labelling, categorizing and cross-referencing their work. Some firms didn't do a good job of explaining the value of building up a knowledge bank. In a billable-hours environment, some lawyers resented spending their time contributing to a resource that didn't seem to benefit them in any tangible way.

Thanks to practical and cultural setbacks like these, KM was saddled, for some time, with a reputation for being too pricey, obscure, bothersome and ultimately ineffective to be worth doing.

"However, I believe KM is here to stay," says Matthews. "While we are still in the early days, KM is an obvious way for law firms to better serve their clients and gain competitive advantage from an asset they already have: their knowledge."

Origins and definitions

According to Peter Nagy, firm-wide Director of Knowledge Management Practices at Fasken Martineau DuMoulin LLP in Montreal, the roots of KM arguably go back to Hungarian scientist and philosopher Michael Polanyi in the 1960s. Polanyi explained that "tacit" knowledge is inexpressible: it consists of information you can know, but never tell. "Implicit" knowledge, on the other hand, can be written down explicitly if necessary.

A concrete example of Polanyi's understanding of tacit knowledge would be riding a bike — something you know how to do, but would have a hard time explaining in words. "Implicit knowledge is the kind of knowledge you could put down on paper if you wanted to, but which we usually don't," Nagy says.

Le retour

La gestion de la connaissance revient courtiser les juristes.

Depuis l'aube de leur profession, les juristes ont toujours transmis leur savoir individuel et collectif par quelques échanges verbaux entre collègues ou par l'archivage de précédents et de recherches. Mais cela a peu de choses à voir avec la gestion de la connaissance (ou GC) telle qu'on la connaît aujourd'hui. Cette dernière s'appuie désormais sur des procédés technologiques permettant de partager le savoir instantanément entre juristes situés dans des endroits différents.

Cette nouvelle façon de gérer la connaissance, de plus en plus en vogue dans les grands cabinets comme dans les boutiques juridiques, repose habituellement sur un système accompagné de nouveaux logiciels, mais dont l'application dépend largement de l'apport des membres du cabinet. Ce sont eux, après tout, qui amassent et conservent le savoir.

En raison de cette contribution humaine, la mise en œuvre de la GC moderne reflète davantage la culture d'un cabinet. Elle implique la gestion des rapports entre avocats, des relations avec leurs clients, des méthodes de facturation et même, dans certains cas, de la possibilité, voire la nécessité, d'inciter des juristes à consacrer des heures additionnelles et non facturables à la gestion de la connaissance dans leur cabinet.

Selon Peter Nagy, directeur de la Gestion du savoir et des meilleures pratiques au cabinet Fasken Martineau à Montréal, la GC remonte au scientifique et philosophe Michael Polanyi, dans les années 1960. Ce dernier avait fait la distinction entre la connaissance tacite, connue sans être exprimée, et la connaissance implicite qui peut être écrite explicitement au besoin. Savoir conduire un vélo, par exemple, relève de la connaissance tacite. C'est un savoir qu'on possède, mais qu'on aurait de la difficulté à expliquer.

La gestion de la connaissance implicite peut être réalisée avec une plus grande efficacité en s'attaquant à la culture du cabinet, estime Me Nagy. « Par contre, les obstacles au partage de la connaissance tacite sont généralement surmontés en modifiant le modèle traditionnel des stagiaires ou en offrant aux avocats un meilleur mentorat », précise-t-il.

« La plupart des outils de GC sur le marché sont conçus en fonction de la gestion de l'information explicite dans un cabinet, ce qui n'aide en rien la gestion de la connaissance tacite ou implicite. »

Le problème, ajoute Me Nagy, c'est que la plupart des outils de GC sur le marché sont conçus en fonction de la gestion de l'information explicite dans un cabinet, ce qui n'aide en rien la gestion de la connaissance tacite ou implicite.

La première vague de GC a déferlé dans les années 1990 quand des cabinets se sont rendu compte que des dizaines, parfois même des centaines d'avocats, travaillaient en même temps sur des causes similaires, et que le cabinet répondait probablement aux mêmes questions à répétition de manière fort inefficace. Il serait sans doute plus intelligent, se sont-ils dits, de regrouper tout le savoir à un endroit et de le rendre disponible à tous.

Ce premier assaut de la GC « a cependant eu le malheur de survenir à la fin des années 1990, et d'être associé à certaines "tendances" en gestion telles que la qualité totale ou la configuration de processus », confie Steven Matthews, directeur du Service de gestion de la connaissance au cabinet Clark Wilson, à Vancouver. Au même moment, de nombreuses entreprises technologiques éphémères ont exploité la gestion de la connaissance « juste assez longtemps pour faire faillite et salir le nom de la GC », déplore-t-il.

Plusieurs avocats se rappellent amèrement de cet échec de la GC. Même au sommet de la première vague, de nombreux juristes s'étaient plaints du fardeau additionnel de travail non facturable occasionné par la GC sans que cela ne semble rapporter quoique ce soit de tangible. Par ailleurs, certains cabinets ont mal expliqué la valeur d'une banque de savoir. Malgré ces échecs, la gestion de la connaissance effectue une solide remontée et semble désormais bien s'implanter au sein des cabinets juridiques.

Les motifs invoqués en faveur de la GC sont variés. Selon Ron Friedmann, président de Prism Legal Consulting Ltd., à Arlington (Virginie), une gestion efficace du savoir permet d'offrir aux clients des cabinets juridiques des coûts réduits, des conseils plus constants, un temps de réaction plus rapide et de meilleures réponses. Pour le cabinet, un service amélioré qui aide à recruter et à fidéliser des clients et une meilleure qualité de vie pour les juristes grâce à une efficacité accrue constituent des avantages indéniables.

Pour assurer le succès de la GC, un cabinet doit, selon Me Nagy, encourager une culture de partage du savoir, de réseautage et de confiance, tout en favorisant un style de leadership marqué par la délégation et l'autonomisation. **N**

— Pierre Allard

Managing implicit knowledge can be done most effectively by tinkering with firm culture, says Nagy. "On the other hand, barriers to sharing tacit knowledge are generally best overcome by tweaking the traditional articling student model, and by providing lawyers with better mentoring and document assembly tools."

Confounding the whole situation, says Nagy, is the fact that most KM tools on the market right now are designed to manage *explicit* information at a law firm, which will not help manage either tacit or implicit knowledge. At Clark Wilson, for example, precedents and research management is known as PRM, and it's viewed as just one (albeit important) aspect of KM.

Karen Bell, a Toronto-based legal business consultant and former Knowledge Management Director at Gowling Lafleur Henderson LLP in Toronto, defines KM as a process rather than a goal in itself. "It's an engine, a means to an end," she says. "It's a way to be more effective in your business and more responsive to clients. It's a response to a push in the industry to be more innovative and proactive."

Matthews further emphasizes what KM is *not*: technology. "Nothing could be further from the truth," he says about the idea that KM *is* technology. "KM would be much better described as a paradigm or a management approach, rather than a technology solution."

Motives and models

Why should law firms bother with knowledge management? "Many clients demand that their outside counsel 'do KM,'" says Friedmann, and in an increasingly sophisticated and pushy client marketplace, that factor shouldn't be overlooked. "Yet I

don't think that is the primary motivator," he adds: a growing number of law firms are simply recognizing that KM improves efficiency and profitability.

"Firms doing KM have a range of motivations," Friedmann says, "from believing it's the right thing to do, to managing risk — for example, by avoiding inconsistent advice — to improving the realization rate." Done properly, he says, KM offers clients lower costs, more consistent advice, faster turnaround and better answers.

From the firms' perspective, improved client service can help a firm maintain or gain clients, while lawyers can benefit from a better quality of life thanks to increased efficiency. To that list, Matthews would add a greater degree of independence for lawyers, as well as improved communication and collaboration throughout the firm.

How you go about implementing KM depends on the size and structure of your firm. Friedmann says most large U.S. firms are doing "at least some" KM now, while many large Canadian firms are actively developing KM initiatives. Large firms are hiring KM specialists and teams, while small and mid-size firms are taking more measured steps by relying on in-house expertise, such as their librarians.

Some big U.K. law firms have developed an interesting, if expensive, model, says Nagy: they employ professional support lawyers who work exclusively on KM. A very large firm might have as many as 75 or 100 of these professionals, whose job is to reconstruct the research background of a file, write it up, and bank it. "It's reverse engineering," explains Nagy, adding: "This is extremely costly."

It's a model that would never fly in North America, he says. "Here, law firms find it hard to digest the idea of having a lawyer that doesn't bill. The 'big-city' firms in the U.K. operate on a completely different scale."

Costs and benefits

The potential cost of building a KM program can vary tremendously, depending on what you want KM to do for you. "If all the lawyers in a firm used existing document management systems to provide proper titles, document types and other metadata, KM would not cost that much," says Friedmann. "But that's a huge 'if.' In fact, we have to compensate for the fact that lawyers won't do this. So most firms end up spending for automation and/or staff to help."

Matthews says it's difficult to speculate about potential costs because, essentially, the sky's the limit. "On the high end, law firms can integrate their software systems, build portal integrations, and build staffing to respond to KM needs on demand," he says.

"On a smaller scale, a basic KM system may simply be a working collection maintained in a Word document by a lawyer or staff member. Is this optimal? Not by a long shot, but with everyone on the same page and a very small group, it can work."

The potential price tag for KM is a function not only of firm size, but also of the type of knowledge the firm is hoping to manage. "For a long time, firms focused on precedents and forms; that is, vetted and clearly reusable documents," says Friedmann.

"That is quite expensive, because it requires lawyer review. Many firms are now evaluating automated work product retrieval systems — that is, using software that finds useful work product without lawyers doing anything extra."

Recently, however, Friedmann says he's seen a shift in emphasis from documents to "experience location." Finding a lawyer with experience in a particular matter can be more valuable than finding a document, because the lawyer can explain the context, which is critical.

Karen Bell

Knowledge management consultant, Toronto

"Lawyers are concerned about sharing clients. There are quality issues, billing issues and issues around control of the client."

« Les juristes ont peur de partager leur clientèle. La qualité du travail, la facturation et le contrôle de tout ce qui concerne le client les préoccupent plus particulièrement. »

Methodology

To choose the right KM method, says Karen Bell, a firm should ask itself two questions: What are we trying to do, and what knowledge do we need in order to do that? For example, a firm might want better management of documents, client information, contact information, expertise monitoring, all of the above, or something else entirely.

"For big firms, I suggest they get everyone aligned so that we all know, okay, cross-selling is big for us this year," says Bell. "Or maybe it's raising our profile in this practice area — all with a view, of course, to profitability and more revenue. Then, parsing

ALENA GEDEONOVA

NUTS AND BOLTS

Okay, we know how significant knowledge management can be, but what does it actually look like? We asked Peter Nagy, Director of KM Practices at Fasken Martineau DuMoulin, to take us beyond KM theory and give us the nitty-gritty on how it works in real life.

How a lawyer actually uses and contributes to KM will depend in large part on which tools and software packages (if any) the firm uses, and to which of the following business needs the firm has decided to apply KM.

1. PRECEDENTS AND RESEARCH MANAGEMENT (PRM)

"PRM is about designing tools and processes that allow lawyers to collaborate in their day-to-day work of researching and drafting transactional and advice-giving documents — such as contracts, memos and opinions — and storing them as in-house legal authorities and contextualized expertise, whether in the form of precedents, examples or expert location," says Nagy. PRM uses tools like memo and contract assembly software, or project collaboration tools.

2. DOCUMENT MANAGEMENT (DM) AND DOCUMENT RETENTION

Designing the firm's client intake process and the surface information architecture of all documents generated in a law firm can give lawyers ready access to work in progress, to historical documents, and to a secondary source of in-house legal authorities and expertise, Nagy says.

3. COMMUNITIES OF INTEREST

Firms can create virtual communication spaces by means of an Intranet or portal, where each of the firm's communities (such as practice and industry groups) has its own unique forum for exchanging ideas, says Nagy. Some firms use an Intranet to create a single firm-wide forum for events and news, or to provide an integrated platform for PRM tools and for searches in targeted or multiple knowledge repositories.

4. CLIENT RELATIONS MANAGEMENT

CRM applications and practices make it easier for lawyers to strategically share client contacts and business information, with a view to improving client support and cross-selling.

KM will be more effective if the firm's various information systems can "piggyback" on each other, regardless of where they're located, says Nagy. "For example, databases used by the firm's accounting and library service groups should seamlessly feed into the firm's PRM system." N

it down, it's just a matter of what knowledge or experience you need in order to accomplish those goals most effectively."

The most cost-effective KM strategy, says Nagy, involves connecting lawyers to each other and giving them the tools to capture their exchanges easily for future reference. Lawyers will be more likely to participate in KM if the system enables simultaneous connectivity and capture, and ensures that the content creators are also the content managers, he says.

Ideally, especially for North American firms, Nagy says, the person doing the research should be capturing the knowledge at the same time, so that — as opposed to the way things work in firms with professional services lawyers — the work doesn't have to be done twice. "The person who creates the knowledge should also be the one who manages it," he says.

In the North American context, research lawyers are in the best position to do this, he adds. "Call them a research lawyer, a knowledge manager — a duck is a duck," he says. "It still quacks."

Lawyer motivation

Bell thinks lawyers will get onboard if they can be convinced that gaining access to knowledge and information will make them more productive. But she believes compensation is also important.

"It's having a compensation system that recognizes people's contributions in a variety of ways — like by putting some value on the fact that you serve as a mentor, or that at lunch-and-learns you share your experiences and approaches on files, or that you write papers and speeches and go out to do presentations," she says. "There are so many ways to add to KM. I think too much of the discussion focuses on contributing to a database."

David Hambourger, a technology partner and KM expert with Winston & Strawn in Chicago, stresses the importance of meeting the needs of specific groups, rather than trying to sell the concept firm-wide. "If you treat your lawyers as monolithic, it isn't going to work, because they're anything but," he points out.

Still, Hambourger's approach may be less conciliatory than some. His firm is going ahead with KM whether its lawyers love the idea or not. "Can KM be effective without getting everyone onside? Clearly it can," he says.

"I wish lawyers had one opinion on this, but some agree with it and some don't. If you had to pick one of the hills, it's certainly more uphill than downhill. In some ways, we've taken a different tack — not asking whether they agree or not, but just doing it, in ways that don't really require their active participation."

Return on investment?

Like everything else about KM, the notion of measuring its return on investment (ROI) seems to stir up strong feelings. Despite the fact that the cost of implementing KM can range from pocket change to multiple millions of dollars, pretty much everyone seems to agree that trying to measure ROI is essentially fruitless.

"Skip the ROI analysis," says Friedmann. "If you don't believe KM is worth doing, then just don't do it. Why bother trying to roll rocks uphill?" Hambourger says the same thing: "The folks who have gone down that road have found it very difficult," he says.

"I'm much more focused on the soft-side benefits than on the quantity," Hambourger notes. "KM gets answers for clients more quickly; it can help integrate lateral people into the firm more quickly. One could argue whether those are quantity or quality. I think they're quality until you put numbers on them, and that's the hard part."

For her part, Bell points out that most law firms don't measure ROI on anything else — so why single out KM?

"This whole focus on ROI of KM, I think, is very misplaced," she says. "I don't believe anyone's come up with a proper way to measure it, and if they have, we can always pull it apart.

"Law firms spend big bucks on fancy phone systems, on computers with new flat screens, on sponsorships and charitable activities, and I don't think anyone ever sits down and says,

'What's our ROI on that?' Maybe they should, but they don't. It's an easy out to say, 'There's no return with KM, so it's not worth doing.' Of course it's worth doing. It's the only way you're going to become more efficient."

21st-century KM

While the biggest barrier to KM in the recent past might have been the technology associated with it — "too hard to use and too hard to manage on the back end," says Friedmann — today, the barriers are more likely to be cultural and behavioural. Lawyers must move past their inbred reluctance to share information and understand the perks KM can offer, says Bell.

"It's not that I think, as soon as you go to law school, some disease happens and you don't want to share anymore," she says. "But lawyers *are* concerned about sharing clients. There are quality issues, billing issues and issues around control of the client."

For KM to succeed, a law firm should foster a culture of knowledge sharing, networking and trust, says Nagy, along with a leadership style marked by delegation and empowerment. In a firm that encourages the opposite kind of culture — one of knowledge hoarding, hierarchy and status, with a command-and-control leadership style — KM has a considerable chance of failing.

Does that mean KM has the potential to change the culture of a law firm? Hambourger says, "What I don't know is if that's the tail wagging the dog. I actually think the chances are greater that the culture can affect the success of KM activities, rather than putting KM in, and all of a sudden, people are more collaborative because of it.

"Law firms are sort of famous for glacial evolution," he adds, "and it will take a long time for a tool or approach to actually affect the culture. It's a lot faster the other way around." N

Patti Ryan **is a freelance writer based in Ottawa. Her previous article for *National*, on financial planning for lawyers, appeared in our December 2005 issue.**

More KM resources

"Benchmarking Knowledge Management in U.S. and UK Law Firms," *by Stuart Kay*
http://www.llrx.com/features/benchmarkingkm.htm

"Effective Knowledge Management for Law Firms" *by Matthew Parsons*
http://www.ils.ca/sydneyplus/pdf/MatthewParsons.pdf

"Legal Research Roundtable," *National*, October/November 2005, p.31
http://cba.org/CBA/National/main/previous.aspx

"Making Law Firm KM Smaller," *by Steven Matthews*
http://vancouverlawlib.blogspot.com/2005/04/making-law-firm-km-smaller.html

"Strategies for Successful Knowledge Management in Large Law Firms," *by Ron Friedmann and Dennis Kennedy*
http://www.abanet.org/lpm/lpt/articles/ftr06042.html

Mind the gap

It really is a new generation — lawyers 35 and younger have a very different view of work, life and the law than do their Boomer-generation predecessors. Smart law firms are already responding by taking the steps outlined below.

By Ann Macaulay

Sameera Sereda, The Counsel Network, Calgary

"Not everyone wants to bill 2,200 hours a year and make money and be a partner."

« Ce ne sont pas tous les juristes qui ont pour but de facturer 2 200 heures par an, de gagner beaucoup d'argent et de devenir associés. »

JAZHART STUDIOS

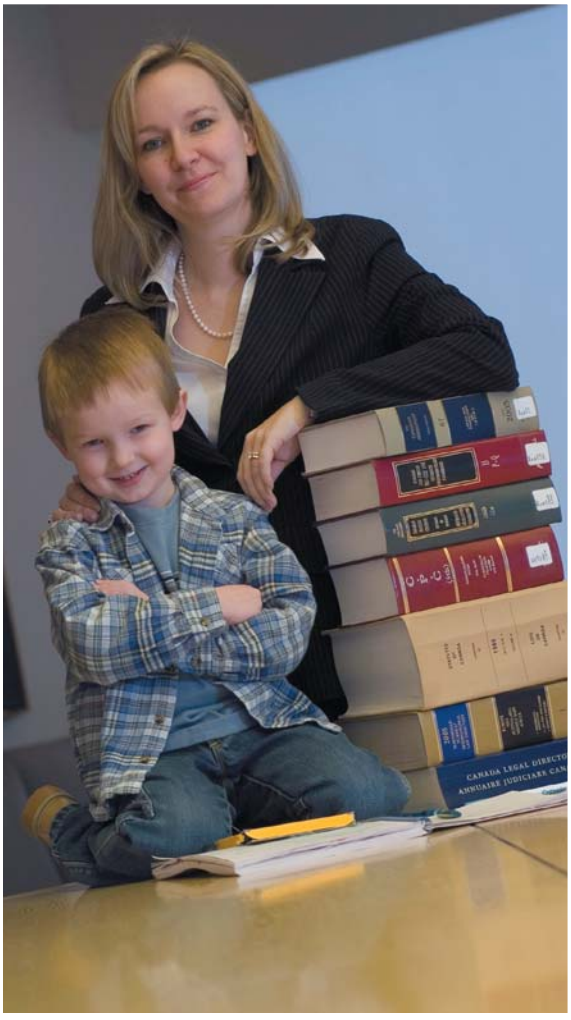
Traditionally, law firms haven't been known to give their associates a lot of flexibility — it's been their way or the highway. But that's changing, because the demands of the newest generation of lawyers are rising and it's more difficult to retain the best legal talent.

Many members of the younger generation are simply not as willing to put in the kind of hours their predecessors did. While senior partners might consider billing more than 2,000 hours a year as the norm, newer associates are expecting to put in less time and maintain a better "quality of life" — which usually translates into fewer billable hours and more perks.

"There are new challenges in managing this generation," says Sameera Sereda, a recruitment specialist and Managing Director for the Prairies at The Counsel Network in Calgary. Younger workers, she says, are primarily motivated by personal development and "work/life balance."

The corporate world has long since recognized the generation gap in expectations between Baby Boomers — most law firm partners are among their ranks — and members of Generations X and Y. While businesses have been dealing with this new demographic reality for several years, law firms have been much slower to react.

Now, however, real signs of change are apparent. Aided by new surveys that show the mounting financial and strategic



Jennifer Burnelle, Aikins, MacAulay & Thorvaldson, Winnipeg, with son Ethan

She's been practising at 80% of her normal workload since returning from maternity leave. She says the key is flexibility on both sides.

Elle exerce le droit à 80% de sa charge normale de travail depuis qu'elle est revenue de son congé de maternité. Elle croit que tous doivent faire preuve de flexibilité.

cost of lost talent, a growing number of law firms are taking real steps to show this new generation of lawyers that they're serious about buzzwords like "flexibility" and "balance."

The generation canyon

To say that Boomers and X-Yers have difficulty understanding each other is to understate the problem. Bookstore shelves are loaded down with treatises on how to bridge the gap between the two generations, but it's much easier said than done. Both are stubborn and strong-willed, and neither feels any need to back down from its demands.

Law firms with generation-spanning talent need a shift in mindset to succeed these days, says Sereda. "You've got these traditionalists, the partners, who are thinking about retirement. These young 24-year-olds who are coming out of law school have a very different value system and a very different mindset, as compared to the partners when they first started articles," she says.

"So what I think firms are starting to do, first of all, is understand that this [conflict] exists. You've got to accept that there is a generational difference or diversity within the firm, and that what motivates and attracts and retains lawyers from each of these groups is very different.

"Not everyone wants to bill 2,200 hours a year and make money and be a partner," adds Sereda. "Some men and women — not just women — want to spend more time with their families, and they're willing to work a reduced workload." In turn, some firms are offering a lighter schedule and reduced billing targets at a lower salary, with the understanding that these lawyers are still valuable members of the team.

New lawyers also have very different views on communication. "I know partners who say to me, 'When I was practising, no one talked to me — I was expected to do my work and bill,'" Sereda says. "But newer lawyers want people to talk to them and give them feedback. The young lawyers are being vocal by walking out. That's how they're making that statement. They're leaving if they're not getting what they want."

"You've got to treat them like real people, not like worker bees," adds Duncan Jessiman, a partner at Aikins, MacAulay & Thorvaldson LLP in Winnipeg. "It's a matter of trying to develop good, interesting work that keeps them challenged. They have a life beyond the firm. Recognize that it can assist the firm, because it brings different ideas and thought processes from wherever they interplay outside of it."

Here are four ways in which law firms can make real inroads with the new generation of lawyers.

1. Balanced demands

Good work and competitive pay are the minimum standards to attract talented young lawyers. To stand out from the pack, "you need to create an atmosphere and a culture within the firm that associates want to be a part of," says Joanne Poljanowski, a partner at Borden Ladner Gervais LLP in Toronto and a member of the firm's Management Committee.

"All of us are faced with the challenge of how you find some balance, or at least how you can accommodate the demands on your professional time versus the demands of your personal life, whether they be children or parents or whatever," Poljanowski says. Borden Ladner has launched several programs to communicate its commitment to these principles.

ROBERT TINKER

Perspectives divergentes

Les juristes de la nouvelle génération ne partagent pas les mêmes valeurs que leurs aînés. Les cabinets juridiques devront rapidement s'y faire s'ils veulent demeurer dans le coup.

Les cabinets juridiques n'ont pas la réputation d'accorder une grande flexibilité à leurs juristes. Cette situation est toutefois en train d'évoluer pour répondre aux exigences croissantes de la génération montante et réaliser l'objectif de plus en plus important qui est de conserver les éléments les plus compétents du cabinet. Entre-temps, les jeunes juristes sont de plus en plus nombreux à rechercher ces « petits avantages » qui vont au-delà de la simple rétribution monétaire.

« De nouveaux défis se posent pour transiger avec la nouvelle génération », estime Sameera Sereda, spécialiste en recrutement chez Counsel Network à Calgary. Les plus jeunes avocats seraient motivés par leur évolution personnelle et par la conciliation travail/vie personnelle plutôt que par l'argent.

Duncan Jessiman, associé chez Aikins, MacAulay & Thorvaldson LLP, à Winnipeg, est de cet avis. « Ces jeunes ont une vie en dehors du bureau et ils sont conscients que cette vie peut alimenter celle du cabinet parce que cette expérience acquise à l'extérieur apporte au cabinet des idées et procédures inédites», observe-t-il.

Les cabinets progressistes commencent à reconnaître que certains avocats ne tiennent pas à sacrifier leur vie personnelle dans l'espoir de devenir un jour associé. Dans cette optique, ces cabinets offrent à leurs avocats salariés une charge de travail réduite et des heures facturables plus raisonnables pour un salaire moindre, sachant que ces juristes continuent d'être de précieux membres de l'équipe et qu'ils suivent simplement une voie différente.

Un plaidoyer pour la flexibilité

« J'avais toujours évité les cabinets juridiques parce que la plupart d'entre eux laissent à désirer pour ce qui est de la conciliation travail/vie personnelle et je refusais de sacrifier ma vie privée en travaillant pour un cabinet juridique », raconte Diana Woodhead, avocate principale chez Blake, Cassels & Graydon LLP, à Toronto.

Par chance, Blakes lui a offert un taux d'heures facturables correspondant aux cibles qu'elle s'était fixées, soit 1400 heures par année pour qu'elle puisse s'acquitter de ses obligations maternelles. « Je ne voulais pas grimper à 2500 heures facturables au détriment de tout ce qui compte par ailleurs dans ma vie. »

Jennifer Burnelle, avocate en litige civil chez Aikins MacAulay & Thorvaldson LLP, exerce à 80% de sa charge normale de travail depuis qu'elle est revenue de son congé de maternité. Elle croit que la clé est la flexibilité des deux côtés. Par exemple, son cabinet lui a offert de conserver un statut d'employé pour lui permettre de bénéficier des prestations d'assurance-emploi lorsqu'elle adoptera son deuxième bébé cette année.

Certains cabinets déploient des efforts considérables pour accommoder les parents qui travaillent. « Nous ne pouvons nous permettre d'avoir des gens malheureux chez nous », explique Donald MacKenzie, du cabinet Foster Hennessey MacKenzie, à Charlottetown. « Ce principe s'applique également aux employés, poursuit-il. Bien sûr, le travail doit être fait, mais il faut aussi réserver du temps pour les choses importantes. »

Une nouvelle culture

Pour attirer et conserver les jeunes juristes, les cabinets doivent s'efforcer d'offrir un travail intéressant et un salaire concurrentiel. Mais plus encore, « il faut créer une atmosphère et une culture au sein du cabinet auxquelles les juristes veulent adhérer », soutient Joanne Poljanowski, associée chez Borden Ladner Gervais.

« Nous avons tous dû, à un moment donné, relever le défi de trouver l'équilibre », reconnaît-elle. C'est pourquoi, BLG offre plusieurs types de services dont le Programme des parents au travail. Ce dernier, organisé par une entreprise privée, permet aux juristes de se réunir ensemble lors de déjeuners-causeries pour discuter des problèmes et défis qui sont leur lot à toutes et tous.

Une fois par mois, Paul Perell et John McKellar, de chez WierFoulds LLP, à Toronto, se réunissent dans une salle de conférences avec une vingtaine de juristes juniors et de stagiaires. Ils commandent un déjeuner, ferment les téléphones et s'asseyent pour discuter ensemble d'un vaste éventail de sujets, aussi divers que les méthodes de fidélisation de la clientèle ou l'art de diriger une réunion.

« À cette occasion, on leur dispense les trucs du métier — des conseils pratiques tirés de l'expérience sur une foule de choses », explique McKellar, ancien président du cabinet qui affirme que les gens font l'impossible pour ne pas manquer ces sessions.

Une vie de famille

Les jeunes juristes sont de plus en plus nombreux à vouloir s'écarter du chemin menant au statut d'associé pour consacrer davantage de temps à leurs jeunes familles.

Simon Coley, conseiller juridique pour le cabinet du ministère du Procureur général de la Colombie-Britannique, a pris un congé parental de huit mois à la naissance de son fils. Il avait bien pesé le risque lié au fait de prendre un congé d'une aussi longue durée lorsqu'il a accepté cet emploi. Les autres facteurs qu'il avait pris en considération étaient ce qu'il appelle « les avantages d'une qualité de vie », soit le régime de retraite et des congés payés de cinq semaines aussi bien que la possibilité de concilier vie personnelle et vie professionnelle en prenant la plupart des fins de semaine de congé.

« Au ministère, on ne vit pas les mêmes pressions liées aux heures facturables que dans les cabinets privés », rappelle-t-il. « Selon moi, cela fait partie d'un ensemble de bénéfices. Mon salaire n'est pas aussi élevé qu'il le serait si je travaillais dans le secteur privé, mais en revanche je bénéficie d'avantages qui ne sont pas négligeables non plus. »

Bon nombre d'avocats ont décidé de quitter la pratique privée pour travailler plutôt au service du gouvernement ou à titre de conseiller juridique d'entreprise. Certains juristes ne supportent pas la pression excessive ou les longues heures de travail et renoncent complètement au droit.

Ce que les cabinets juridiques ne doivent jamais occulter, c'est que leurs employés et membres constituent leur principale ressource — et que s'ils veulent les retenir, il faut les aider à s'épanouir dans leur milieu de travail. N

For example, the firm's Professional Excellence Program focuses on education and training at all lawyer levels. Some sessions are geared towards specific practice areas, while others focus on business topics such as how to manage time and clients. At a multi-city firm like Borden Ladner, "it's [also] an opportunity for associates to meet their counterparts from our other offices," Poljanowski says. "They think it's invaluable."

Sereda advises senior partners to give younger lawyers opportunities "where they can have work/life balance, where they can grow personally. Allow them to go off and take different types of courses, or develop themselves in other ways that aren't necessarily related to the law. Those kinds of things are important to them."

2. Flexible hours

Diana Woodhead, a senior associate at Blake, Cassels & Graydon LLP in Toronto who was hired from a professional services firm, "had always avoided a law firm because most of them aren't traditionally very good at work/life balance. I never wanted to lose control of my life so completely by working in a law firm environment."

Fortunately, Blakes offered to make her billing targets 1,400 hours a year, to accommodate the demands of motherhood. Echoing the feelings of many lawyers, she says, "I didn't want to be billing up to 2,500 hours a year at the expense of everything else in my life."

Jennifer Burnelle, an associate in civil litigation at Aikins MacAulay in Winnipeg, has been practising at 80 percent of her normal workload since she came back from maternity leave. She says the key is flexibility on both sides.

One perk the firm offered was to allow her to remain an employee, so that she can qualify for employment insurance when she adopts another baby later this year. At some other firms, "you become an independent contractor after a year or two, and then you don't qualify for benefits. This takes a lot of stress off for people, if they know they're going to have some income."

"You have to be creative and work outside the usual nine-to-five hours," says Mary Lynn Gleason, a partner at Borden Ladner in Toronto, who has a 1,400 billable-hour target. She realized, after the birth of her twins in 1996, that she couldn't continue to work at her previous billing rate. Gleason says she has never experienced the "mommy ghetto" that some other women describe: "I get the same quality of work that any other partner in the group gets."

Smaller firms are also making efforts to accommodate working parents. "We can't afford to have unhappy people," says Donald MacKenzie, a partner at three-lawyer Foster Hennessey MacKenzie in Charlottetown. "That applies to the staff as well. It's about getting the job done, but also taking time for the important stuff."

3. Professional training

Associates are often intimidated and put off by firm demands to bring in new business and generate client billings, when these same firms fail to provide any instructions or assistance on how to achieve these goals. Business training for new lawyers is

Simon Coley, Ministry of the Attorney General, Victoria, with children Jack and Elena

"There aren't the same kind of billable-hour pressures here that there are in private law firms."

« Au ministère, on ne vit pas les même pressions liées aux heures facturables que dans les cabinets privés. »

TONY BOUNSALL

The gap widens

New survey results on balance in the law show growing dissatisfaction

In November 2005, consulting firm Catalyst Canada released the results of the second of its three legal profession reports, titled "Beyond a Reasonable Doubt: Creating Opportunities for Better Balance." The survey of more than 1,400 lawyers in Canadian law firms found that nearly two-thirds of them face difficulties managing work and personal responsibilities.

These challenges "are not exclusive to women lawyers and working mothers," says Susan Black, president of Catalyst in Toronto. "Men lawyers, too, face work/life balance trade-offs and pressures. Work/life conflict is common to men and women lawyers, a fact critical to those law firms committed to managing their talent — all talent — effectively.

"It's a generational issue," she adds. "We see men associates less satisfied now and pushing back. I think there are limits to how hard and unrelenting you can be in pushing people, and I think we're starting to see some of those limits."

In analyzing how different groups in law firms perceive and experience the work environment, "we see very clearly that male partners differ dramatically from women partners, women associates and men associates," says Black. "Women really do feel the burdens of work/life balance disproportionately across the board."

One of the survey questions was: "Do you feel that in order to advance in your law firm, you need to put your career before your family responsibilities?" Women associates "were much more likely to agree with that statement than men associates, and women partners were more likely to agree with it than men partners," says Black.

When it comes to informal flexibility — including the ability to leave in the middle of the day for such things as doctors' appointments, or to adjust the time and place they work — 63 percent of male partners were satisfied. But only 18 percent of female associates said the same.

"You've got groups in the firm who occupy very different realities," says Black. "Since male partners tend to dominate the firm and make decisions about how resources and work gets allocated, their actions really have a big impact on the culture.

"The way leadership in a firm acts and the messages they send have a very direct influence on how satisfied people are," she says. If the survey participants "saw partners pushing back against clients who made unreasonable time demands or at least challenging them, they tended to be more satisfied, irrespective of the hours they're working. These are things that can be done that don't have to impact the bottom-line business of the firm."

Many associates are "not impressed by partners who work enormous numbers of hours and don't have a life outside of work. That's not an attractive role model anymore; that's not inspiring anyone," says Black. "It's going to be hard to get them in and it's going to be hard to keep them. And not only will people leave, they won't recommend you as a place to work, so you get into a cycle."

Black says law firms should build a business case for flexibility and communicate it to all their lawyers, "not because it's a nice thing to do," but because "if they don't do it, there's going to be a cost — they're going to lose people and they're going to find people not as engaged or productive." N

poised to become one of the most important factors in keeping good young lawyers through the coming decade.

Duncan Jessiman recognized that many new lawyers arrive at firms with little knowledge of what's required to become a good professional and how to provide clients with top-notch service. So, in conjunction with BDC and Deloitte & Touche, he created a seminar and workbook for younger Aikins associates titled *Your Personal Professional Development Plan*.

The program "creates a roadmap for the rest of their lives as to what they should be achieving as professionals to grow," Jessiman says, "making sure they balance their personal success with their involvement in community and family."

At WeirFoulds LLP in Toronto, senior lawyers Paul Perell and John McKellar host monthly meetings with a couple of dozen junior lawyers and students. They order lunch, turn off the phones, and sit down to talk about everything from how to keep clients to how to chair a meeting.

"We're giving them our tricks of the trade — hands-on, practical advice on everything," says McKellar, a former chair of the firm who's now semi-retired. Sometimes the firms will bring in a professional to discuss topics like insurance coverage. The younger lawyers are encouraged to suggest topics and participate in each session.

> "We applaud their interest in *pro bono* work, because we think if you're 100 percent a lawyer, you're a very boring person."
>
> – John McKellar –

McKellar also notices the interest many new lawyers show in *pro bono* work. "And we applaud that," he says, "because we think if you're 100 percent a lawyer, you're a very boring person."

4. Family matters

Simon Coley, legal counsel with the B.C. Ministry of the Attorney General in Victoria, took an eight-month paternity leave when his son was born. The fact that the AG's office offered this perk was one of the factors he considered when he took the job in 1999, along with a pension and five weeks' paid vacation. He also gets most weekends off and enjoys the resulting personal time.

"There aren't the same kind of billable-hour pressures [here] that there are in private law firms," Coley says. "My pay isn't as good as what it could be if I worked in the private sector, but then there are these other benefits that you have to consider, too.

Award nominations

Each year, the CBA advises its members of numerous opportunities to nominate colleagues for CBA awards. Accordingly, *National* is pleased to provide notice of the following nomination deadlines, along with contact information for the designated liaison persons at the national office.

More information can be obtained by phoning the national office at (613) 237-2925 or 1-800-267-8860 and inquiring about the award in question, or by visiting *www.cba.org/CBA/Awards/Main.*

Louis St-Laurent
Deadline: April 29, 2006
Contact: Senior Director of Communications Stephen Hanson (*stephenh@cba.org*)

Public Sector Lawyer John Tait
Deadline: May 12, 2006
Contact: Public Sector Lawyers Conference Liaison Jennifer Lalonde (*jennifer@cba.org*)

Ramon Hnatyshyn
Deadline: April 30, 2006
Contact: Senior Director of Communications Stephen Hanson (*stephenh@cba.org*)

SOGIC Ally & Hero
Deadline: June 2, 2006
Contact: SOGIC Liaison Corinna Robitaille (*corinnar@cba.org*)

Touchstone
Deadline: April 14, 2006
Contact: Standing Committee on Equity Liaison Jennifer Lalonde (*jennifer@cba.org*)

Walter S. Tarnopolsky Human Rights
Deadline: April 29, 2006
Contact: International Commission of Jurists Executive Secretary Patricia Whiting (*patw@cba.org*)

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Au début de chaque année, l'ABC informe ses membres des possibilités de mettre leurs collègues en candidature pour l'un des nombreux prix et récompenses qu'elle remet annuellement.

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Prix Bertha-Wilson « Les Assises »
Date limite : 14 avril 2006
Personne-ressource : Jennifer Lalonde pour le Comité permanent sur l'égalité, (*jennifer@cba.org*)

Prix Louis St-Laurent
Date limite : 29 avril 2006
Personne-ressource : Stephen Hanson, Directeur principal des communications, (*stephenh@cba.org*)

Prix Walter S. Tarnopolsky
Date limite : 29 avril 2006
Personne-ressource : Pat Whiting, administratrice de la Commission internationale de juristes, (*patw@cba.org*)

Prix Ramon John Hnatyshyn
Date limite : 30 avril 2006
Personne-ressource : Stephen Hanson, Directeur principal des communications, (*stephenh@cba.org*)

Prix d'excellence John-Tait
Date limite : 12 mai 2006
Personne-ressource : Jennifer Lalonde pour la Conférence des juristes du secteur public, (*jennifer@cba.org*)

Prix de l'allié et du héros de la COIS
Date limite : 2 juin 2006
Personne-ressource : Jennifer Lalonde pour la Conférence sur l'orientation et l'identité sexuelles, (*jennifer@cba.org*)

"One of the major benefits of doing a parental leave with the provincial government is that you get your salary topped up to 75 percent of your regular pay," he adds. "I don't believe that there are very many, if any, law firms out there that do that."

Make no mistake, these features of the job are a real competitive advantage in the current marketplace. "There are a lot of talented lawyers that I work with who could be making a heck of a lot more money in the private sector, but choose to stay with the Ministry of the Attorney General because they get more time with their families," says Coley. "They can have a more predictable work schedule that doesn't intrude upon evenings and weekends."

Playing for keeps

Sereda says that in this workplace, younger workers will leave if they perceive they're not being treated well. "It's not all about money," she insists. "The biggest thing is promoting a workplace that provides them with a balanced lifestyle, [and to show them] that their employer values that flexibility. They don't want to have to face the 4:00 emergency on a Friday and have their entire weekend shot.

"Whereas that was normal 20 years ago — you expected that — the new lawyers are just not willing to do that." The smart firms are the ones that recognize and accept these facts, and welcome good lawyers who might be unwilling to sacrifice their personal time in the increasingly unpopular goal of one day becoming partner.

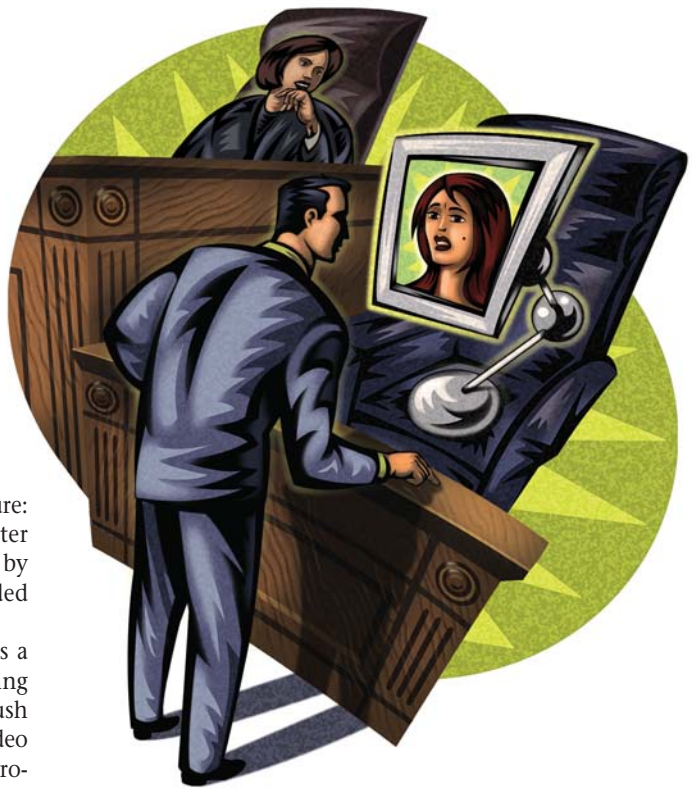
Above all, firms must keep in mind that their people truly are their chief resource — and keeping them at the firm means keeping them happy. As Poljanowski at Borden Ladner says, "the associate who joins us after being a student is not only hopefully a future partner, but also a future leader of the firm." N

Ann Macaulay **is a freelance writer based in Toronto.**
A version of this article first appeared at CBA PracticeLink last year (*www.cba.org/practicelink*).

E-justice for all

Technology continues to transform the Canadian courtroom. Here's what you need to know about the steady growth in electronic trials.

By Amy Jo Ehman



ROBERT JOHANNSEN

Imagine the courtroom drama of the future: lawyers present evidence on computer screens, long-distance witnesses testify by hologram, and transcripts are uploaded immediately to the World Wide Web.

Back in the office, an astute investigator e-mails a key question to the prosecution team. The "smoking gun" arrives in court just in time — not in a great rush through the polished oak doors, but in real-time video beamed across the Net. Meanwhile, a hacker has broken into the judge's database.

The verdict? Guilty of an overactive imagination. But while this futuristic vision is pure fantasy, it is not entirely fiction.

New technologies are revolutionizing courtrooms across the country, while around the world, legal minds are grappling with a vital question: how can we make the most of this new technology without compromising the security, privacy and integrity of the judicial process in a "wired" world?

"Let's not be mesmerized by the pyrotechnics of this new technology," says litigator and courtroom technology expert Andrew Sims of The Sims Group in Edmonton. "Think of it as a tool to enable us to do well what we're supposed to do. This is not 'Hollywood comes to Courtroom 5.'"

Across Canada, courts are feeling their way into the high-tech world, drawn by the potential savings in time, money and storage and responding to demands for greater access to legal proceedings and court records.

Leading the high-tech evolution is the Vancouver Law Courts' $7-million "wired" courtroom, constructed for the Air India trial, with plasma monitors, voice-activated cameras, Internet access and a state-of-the-art computer system that allows huge volumes of evidence to be displayed electronically.

At the other end of the spectrum is the familiar courtroom, where counsel arrives with bulging briefcases or overflowing boxes, and judges still pen their notes in longhand. The future of most court proceedings lies somewhere between the dusty past and high-tech heaven.

"Some people have the misconception that a paperless trial has to involve a million-dollar courtroom and a lot of expensive high-tech equipment," says Martin Felsky, CEO of Commonwealth Legal, an e-document management company based in Toronto. "The truth is much more interesting than that. A really effective, efficient, paperless trial can happen in any courtroom with about $1,500 worth of hardware."

A high-tech example

Justice Thomas Granger's courtroom in Ottawa is a prime example. At the request of counsel, he recently

QUOI DE NEUF... *en matière de technologie dans les salles d'audience?*

Imaginez le scénario. Des avocats présentent leur preuve sur des écrans d'ordinateur, des témoins comparaissent par hologramme et les retranscriptions sont téléchargées simultanément sur Internet. Pendant ce temps, un pirate informatique s'infiltre dans les bases de données du juge.

Coupable d'imagination fertile, dites-vous? Cette vision a beau être fantaisiste, elle n'est pas si loin de la réalité. Les nouvelles technologies révolutionnent les salles d'audience à travers le pays au même moment où, à l'échelle mondiale, des penseurs du droit se questionnent. Comment, dans un monde « branché », profiter de cette technologie, sans pour autant compromettre la sécurité, la confidentialité et l'intégrité du processus judiciaire?

« Nous devons éviter d'être hypnotisés par son côté spectaculaire, croit Andrew Sims, avocat et consultant en technologie de salles d'audience pour la firme The Sims Group, à Edmonton. On doit plutôt la voir comme un outil qui nous permet de mieux faire notre travail. »

À l'échelle canadienne, les économies potentielles de temps, d'argent et d'espace poussent les tribunaux à regarder du côté de la haute technologie. La salle d'audience de Vancouver, branchée au coût de 7 millions $ pour l'affaire Air India, mène la révolution avec ses écrans plasma et son système informatique permettant l'affichage d'une quantité phénoménale d'éléments de preuve. À l'autre extrême, la salle d'audience traditionnelle et ses avocats aux valises débordantes, où ses juges prennent des notes au stylo, perdure. L'avenir des procédures judiciaires repose quelque part entre ces deux modèles.

Un procès entièrement informatisé et sans support papier n'implique pas nécessairement des investissements de plusieurs millions de dollars, insiste le PDG de la firme de gestion de documents électroniques Commonwealth Legal, Martin Felsky. « Un procès sans support papier pourrait se tenir avec seulement environ 1 500 $ de matériel », ajoute-t-il.

Le juge Thomas Granger, d'Ottawa, est bien placé pour le savoir. Ce dernier a récemment accepté d'entendre un dossier commercial complexe, se déroulant entièrement sans support papier. Il évalue à environ 62 000 $ les économies engendrées, simplement en coûts de photocopies des quelque 50 000 à 60 000 pages de documents en cause. À cela s'ajoute le temps économisé par le simple clic de la souris, efficace et rapide, par opposition aux minutes perdues chaque fois que quelqu'un cherche un document. « Lorsque je voyage chez moi la fin de semaine, ajoute le magistrat, je peux même consulter toutes les pièces, que ce soit dans l'avion ou à la maison. »

Si tous les juges ne sont pas prêts à entreprendre le virage technologique, Thomas Granger estime que leurs appréhensions ne pourront empêcher l'électronique d'infiltrer l'univers judiciaire. « Si vous pouvez créer une salle d'audience plus efficace et économique, et qu'en bout de ligne, il est démontré que le public épargne de l'argent, je crois que les juges doivent l'accepter », soutient-il.

Des gens comme Benjamin Gianni, de l'Institut national de la magistrature, à Ottawa, aident déjà les juges à opérer la transition, d'un point de vue à la fois technique et éthique. Le virage technologique est devenu inévitable, juge le coordonateur de l'Éducation informatique. « La manière de travailler des avocats a changé et le fait que ceux-ci organisent leurs dossiers, cherchent et compilent leur information de façon électronique aura une incidence sur les demandes faites aux juges dans l'avenir. »

Dans les faits, des changements ont déjà commencé à se faire sentir en coulisse. À la Cour d'appel de la Colombie-Britannique, la plupart des informations, tels que les horaires des juges, le dépôt de documents ou les dates d'audiences sont conservés dans des registres informatisés.

« À mon avis, ce sont les clients qui vont commencer à demander que leurs avocats utilisent des documents électroniques, conclut le juge Granger. Si ces documents existent en format électronique, et qu'ils peuvent tous vous les envoyer sur un CD ou par courriel, comment pouvez-vous leur demander de tous les imprimer? Je ne crois plus que cela soit justifiable. » N

— Hugo de Grandpré

agreed to hear a complex commercial case as a "paperless" trial.

"Although I had never judged a case in an electronic environment, it seemed reasonable," he says. "There are more than 4,000 documents, for a total of 50,000-60,000 pages. The estimated cost for five copies of each disclosed document would have been approximately $62,000."

The judge also saved time. If it takes approximately two minutes to find a document in a binder, and there are 25 exhibits a day, multiplied by more than 275 days, well, the minutes add up.

"That would be 50 minutes per trial day in which you're doing nothing but looking," Justice Granger says. "If you do it electronically, it takes about five seconds each. My estimate is we would spend an additional 50 days if we were working in hard copy."

The trial is being heard in a standard courtroom augmented with some low-tech purchases: four monitors, a video-splitting box, and connecting cables, for a total cost of about $1,500. The high-tech features can be set up or dismantled in about half an hour.

Evidence is presented from laptop computers and is displayed on the monitors. As documents are accepted into evidence, Justice Granger saves them to a disk, where he can index, organize by witness, search for keywords and add his personal notes.

"When I travel home [to London, Ontario] on the weekends, in the airport and at home, I can look at all of the exhibits and all of the transcripts, so there's no paper to cart around," he says. "I have a better command of the evidence than I've ever had."

Many judges are not as ready for this high-tech revolution. Their reluctance may be based on a lack of computer skills or a lack of technical support in court offices. But Justice Granger says that won't stop electronic progress. "If you can create a more efficient and cost-effective courtroom, and you can show that it's going to save the client's money and save the public's money, I think judges have to accept that," he says. "They have to be prepared to make changes."

Making the leap

At the National Judicial Institute in Ottawa, Benjamin Gianni is helping judges make the transition. As Coordinator of Computer Education, he not only teaches judges computer skills, but also assists judges who are grappling with the dilemmas this new technology will bring to their jobs.

"There are many judges who basically say, 'I'm not comfortable with technology, I don't want to participate in this

discussion,'" says Gianni. "But it's better to know what's coming and have some part in the discussion than to have something imposed on you.

"We're seeing that the way lawyers work has changed, and the fact that the lawyers are organizing and searching and compiling their documents in electronic format is going to have an impact on the requests that they're going to be making to the judges in the future."

In fact, most of the real changes in technology have so far occurred behind the scenes, such as at the British Columbia Court of Appeal in Vancouver, where all filings, judge scheduling, court appearances and case information are kept in a computerized tracking system.

"It's a convenience, putting everything at your fingertips," says Court Registrar Jennifer Jordan, adding: "We have not yet reduced the amount of paper, because it's still a paper-based system." Visitors to the court's Website can search a case by file number and, for a fee, request documents be faxed or mailed. Eventually, Jordan plans to convert to electronic filing.

"Electronic filing is the wave of the future, and once we work out all of the various bugs that exist, it should be very easy for people to go online and file a document with the court," she says. "That is our aim: to make it easier for the litigant to access the court."

Tips and pointers

How can lawyers capitalize on the new technology and even lead the vanguard? Here are a few points to consider before setting out on the electronic path:

1. Begin compiling e-files at the start of a case. E-files include not just Word and PDF documents, but also e-mails, photographs, voicemail messages, videos, and other relevant "non-physical" supporting material. (Watch for a special report on electronic discovery in the next issue of *National*.)

2. Request "paperless" proceedings during the very first meeting with a judge. Don't wait until the trial stage to broach the subject. If an electronic trial would be in everyone's best interests, but the judge is not prepared to conduct one, consider requesting that an amenable judge be assigned to the case.

3. Follow the lead of the "techie" lawyer in your firm, someone who stays current on courtroom technology around the world and understands its potential. Stay up to speed on legal technology developments with a free one-year subscription to the TechnoLawyer archive, available to CBA members through CBA PracticeLink (*www.technolawyer.com/cba.asp*).

4. Don't let the ease of electronic filing give you a case of e-verbosity, especially when citing caselaw. "I don't think it's good advocacy to pile on more bits and bytes without editing out what's really important," says Sims. "When you file it in a paper form, there's a certain economy that just comes from looking at it and saying, 'That's too much.' If you file it on a CD, don't throw in everything but the kitchen sink because it's so easy."

The last word goes to Justice Granger: "My view is that the clients are going to start demanding that their counsel use electronic documents. If the documents exist in electronic form, and they can send them all to you on a CD or by e-mail, how can you ask them to print it all? I don't think you can justify that anymore." N

LITIGATION AND COURTROOM TECHNOLOGY

Here are five articles providing more insight and information about litigation and courtroom technology, along with a selection of eight major litigation and courtroom technology providers.

CaseMap (www.casesoft.com)

Concordance (www.dataflight.com)

Courtroom ADIIS (www.caci.com/adiis/courtroom.shtml)

LiveNote (www.livenote.com)

Sanction (www.verdictsystems.com)

Summation (www.summation.com)

Trial Director Suite (www.trialdirector.com)

Trial Pro II (www.ideaview.com)

Courtroom Technology SCAN:
www.cfcj-fcjc.org/issue_4/n4-SCAN.htm

Lightening Litigation:
www.legalweek.net/ViewItem.asp?id=11748

Presenting Evidence with Courtroom Technology:
www.bosglazier.com/courttech.shtml

Effective Use of Courtroom Technology — *A Judge's Guide:*
www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf

The Dawn of Digital Litigation — *Media Tools in the Courtroom:*
http://practice.findlaw.com/feature-1104.html

***Amy Jo Ehman* is a Saskatoon-based freelance writer. Her previous article for *National*, "Border crossers," appeared in our June 2005 issue.**

Credit where it's due

Lawyers should proceed with caution when accepting payment by credit card.

The use of credit has become so commonplace in our culture that lawyers might not worry about ethical issues that lurk behind this form of payment. But before you agree to accept payment by credit or debit cards, check with your law society's rules first. The rules do vary across the country.

"Lawyers need to be fully aware of their jurisdiction's trust account regulations and their duty to ensure that in offering this method of payment, they're operating in line with the rules and regulations of their law society," says Victoria Rees, Director of Professional Responsibility for the Nova Scotia Barristers' Society in Halifax.

In particular, says Rees, the timing of deposits and the handling of charges can be important. In Nova Scotia, if a lawyer deposits a credit card payment to the trust account, he must "make sure that this deposit is occurring within the time frames that are required for deposit of trust funds."

The fees that credit card companies charge can't come out of the trust account — they must come out of the general account. "Lawyers have to make appropriate arrangements to ensure that any charges of the financial institution are not being withdrawn from the trust account," says Rees.

In Newfoundland, "it's okay to take a retainer by credit card or debit card, as long as the credit card is attached to the general account," says Pamela Bursey, Professional Responsibility Administrator for the Law Society of Newfoundland in St. John's. "Therefore, the service charges go into the general account for that transaction. Then the funds are transferred from general into trust within one banking day following receipt."

Be careful.
Credit card fraud is not uncommon.

Over in Ontario, the Law Society of Upper Canada's *Bookkeeping Guide* specifies that "you cannot deposit both retainers and payments into one account, then immediately transfer the funds that do not belong in that account to your other account." In order to accept payment by credit or debit card, therefore, lawyers must arrange to have retainers for future fees and disbursements paid directly into the trust account, while payments for bills to clients are paid directly into the general account.

The Guide adds: "With credit cards, you could use an imprint machine and deposit the vouchers through your deposit book to the appropriate bank account. If you accept both types of payment by debit card, you will have to use two machines, one for your trust account and one for your general account."

And on the west coast, the Law Society of British Columbia's Website stresses that lawyers who plan to accept retainers by credit or debit card "must take some precautions." The separate account "must be designated as a trust account, since according to Law Society Rule 3-51(2), 'Except as permitted under section 62(5) of the Act, a lawyer must deposit all trust funds to a pooled trust account.'

"Having this special account designated as a general account and withdrawing the funds in order to deposit them into a trust account," the LSBC adds, "is not sufficient compliance with the Rules."

Accepting credit or debit cards from clients can be an excellent payment option, but Rees advises lawyers to be careful. Credit card fraud is not uncommon, and lawyers could open themselves up to potential problems "if the credit limit is exceeded or somehow they're not going to get paid.

"It's obviously more secure than a personal cheque," she adds, "but in offering that credit, it's important that lawyers know their clients and are comfortable that this is an effective method of payment." N

— Ann Macaulay

Le plastique pas si fantastique

L'acquittement des honoraires par carte de crédit n'est pas si simple.

De nos jours, l'utilisation des cartes de crédit est si répandue que bien des juristes ignorent les obligations déontologiques qui en découle. Pourtant, certaines restrictions s'appliquent et elles varient selon les juridictions.

« Les avocats doivent bien connaître les règles imposées par leur barreau au sujet des comptes en fidéicommis et il est de leur devoir de s'assurer qu'ils respectent ces dernières lorsqu'ils offrent à leurs clients de se prévaloir des avantages du paiement par carte de crédit », déclare Victoria Rees, directrice de la responsabilité professionnelle à la Nova Scotia Barristers' Society d'Halifax.

Même s'ils ont recours au plastique, les juristes doivent s'assurer de respecter les délais durant lesquels les sommes doivent être versées au compte en fidéicommis, explique Me Rees. De plus, les frais demandés par les compagnies de cartes de crédit ne peuvent être tirés du compte en fidéicommis.

À Terre-Neuve, « il est possible de prélever un acompte sur une carte de crédit ou de débit à condition que les sommes soient déposées au compte général du cabinet », soutient Pamela Bursey, de la Law Society of Newfoundland. Il s'agira de transférer les sommes au compte en fidéicommis par la suite.

En Ontario, ce transfert d'un compte à l'autre dans un court laps de temps est impossible. Les juristes ontariens devront donc utiliser deux systèmes de paiement par carte de crédit, l'un qui permet de verser les acomptes pour honoraires et déboursés directement dans le compte en fidéicommis et l'autre qui permet de verser les honoraires directement dans le compte général.

En plus de respecter toutes les règles édictées par leur ordre professionnel, les juristes ayant recours au paiement par carte de crédit devront aussi s'assurer de bien se prémunir contre la fraude. Le paiement par carte de crédit est plus certain qu'un chèque personnel, mais plus exigeant. N

— Mélanie Raymond

Privileged access

The CBA intervenes at the Supreme Court of Canada in a potentially landmark solicitor-client privilege case.

In December 2005, the CBA intervened in the Supreme Court of Canada's hearing of the appeal in *Canadian Bearings v. Celanese Canada*, a case that could have a huge impact on the legal profession across the country.

Mahmud Jamal, a civil and regulatory litigator with Osler Hoskin Harcourt LLP in Toronto who represented the CBA as intervener, explains that the case involves the protection of solicitor-client privilege in the execution of Anton Piller orders, private or commercial search warrants that allow a party to seize the documents of another party.

"It raises the issue whether the party who seized the documents should be removed from acting as a result of having access to the privileged communications of an adversary," he says.

The CBA intervened, Jamal says, "to assist the court in forging the appropriate balance between two fundamental rights essential to the integrity of the administration of justice — the client's right to solicitor-client privilege, weighed against an adversary's right to counsel of choice."

In *Canadian Bearings,* says Jamal, a "garden-variety" Anton Piller order was executed, but things went awry when the applicant took and reviewed privileged documents. The CBA didn't take a position on the merits of the case; rather, the Association was focused on the test for removal of lawyers in such a situation.

"It is fundamentally important to the legal profession across Canada, and therefore the CBA had a significant interest in intervening," he says. "We expect the court to establish guidelines for protections that should be in place for Anton Piller orders and are making submissions on this point, urging the court to look for guidance to the model in the United Kingdom.

JARED ADAMS

Mahmud Jamal, Torys, Toronto

"This ruling will apply far beyond Anton Piller, throughout legal practice."

« La portée de cet arrêt ira bien au-delà de l'ordonnance Anton Piller »

"There is no model Anton Piller order in Canada," Jamal continues. "It is *ad hoc* from province to province, with lawyers left to their own devices to draft the order from scratch. There should be some standardization."

The Supreme Court's eventual judgment should clarify a lawyer's obligations when coming into possession of inadvertently disclosed privileged information. Such a decision, stresses Jamal, applies in all areas of practice, including criminal and civil litigation, negotiations, or "anytime there are two sides to an issue."

Secret professionnel

L'ABC intervient dans un dossier crucial devant la Cour suprême.

Malgré une activité législative qui tourne au ralentit sur la scène fédérale, l'Association du Barreau canadien ne chôme pas. Le 12 décembre dernier, elle intervenait dans l'affaire *Canadian Bearings Ltd. c. Celanese Canada Inc* où le plus haut tribunal du pays se penchait sur la portée du secret professionnel lors de l'exécution d'une ordonnance Anton Piller.

« Nous avons discuté des critères requis pour empêcher un cabinet juridique de représenter un client lorsque ce cabinet reçoit par inadvertance des documents électroniques appartenant à la partie adverse et protégés par le privilège du secret professionnel », explique Me Mahmud Jamal, du cabinet Osler Hoskin Harcourt de Toronto. Ce dernier représentait l'ABC à titre gracieux.

Le but premier de l'Association était de mettre en relief deux droits conflictuels. « Nous souhaitions aider le tribunal à déterminer l'équilibre adéquat entre le droit du client au secret professionnel et le droit d'une partie adverse de retenir les services du conseiller juridique de son choix », précise Me Jamal.

Les faits de cette affaire démontrent les difficultés découlant de l'exécution d'une ordonnance Anton Piller. Les avocats des demandeurs avaient obtenu l'autorisation de fouiller les bureaux d'affaires du défendeur et de saisir certains documents. À la suite d'erreurs commises par les deux parties, des documents électroniques protégés par le secret professionnel se sont retrouvés entre les mains de l'avocat des demandeurs. Une requête visant à disqualifier les cabinets juridiques a été présentée par le défendeur.

L'ABC souhaite une certaine standardisation de l'exécution des ordonnances Anton Piller à travers le pays. « La pratique

The CBA encouraged the court to adopt the approach taken in the law society codes of conduct of British Columbia and Nova Scotia, "requiring that the lawyer return the privileged information, delete all copies, and specifically advise the adversary of the extent of review that has been made."

Canadian Bearings represents the third time the Supreme Court has addressed the duties of lawyers, according to Jamal. "In *Macdonald Estate*, the court dealt with lawyers moving between firms. In *R. v. Neil*, it dealt with the duty of loyalty. Now this third case deals with a lawyer's ethical and legal obligations in the context of inadvertently disclosed privileged information.

"This will apply far beyond this case," says Jamal, "far beyond Anton Piller, throughout legal practice. And it is the first time the court has addressed this issue." N

— Michelle Mann

> "It is fundamentally important to the legal profession across Canada, and therefore the CBA had a significant interest in intervening."

différe de province en province et les avocats qui rédigent ces requêtes sont laissés à eux-même, souligne Me Jamal. Nous espérons que la Cour énoncera les principes directeurs gouvernant l'octroi de telles ordonnances. »

L'arrêt *Canadian Bearings* complétera les grands énoncés de la Cour suprême sur la question du secret professionnel. « L'arrêt *Macdonald Estate* traitait de la mobilité des avocats et l'arrêt *R.c. Neil* analysait le concept de loyauté, affirme Me Jamal. Le présent dossier aura un grand impact sur les obligations déontologiques et juridiques qui incombent à celui qui tombe sur de l'information privilégiée par inadvertance. » N

— Mélanie Raymond

Environmental scan

An update on the CBA's National Environmental, Energy and Resources Law Section.

"It is one of the busiest, if not the busiest, of CBA Sections," says Corbin Devlin, an environmental lawyer with McLennan Ross in Edmonton, speaking about the National Environmental, Energy and Resources Law Section (NEERLS) of the Association. The Section, which Devlin chairs, has seen rapid growth the last two years due to a new mandate that expanded it beyond its previous status as simply the Environmental Law Section.

"There was no real home for energy and natural resources law at the national level," he says, "and it was a natural fit, because they are so closely tied with environmental issues." Joining the three areas "close to

"We are going to need energy, environmental and resource lawyers for a long time."

Corbin Devlin, McLennan Ross, Edmonton

CURTIS TRENT

Plein *d'énergie*

La Section nationale du droit de l'environnement, de l'énergie et des ressources déborde d'enthousiasme.

« Si nous ne sommes pas la section la plus active de l'ABC, nous sommes l'une des plus actives », clame Corbin Devlin, avocat en droit environnemental chez McLennan Ross d'Edmonton et président de la Section nationale du droit de l'environnement, de l'énergie et des ressources de l'ABC.

C'est que les effectifs de la Section ont presque doublé depuis qu'elle a élargit son mandat pour couvrir le droit de l'énergie et des ressources naturelles. « C'était une combinaison gagnante puisque ces sujets sont intimement liés au droit de l'environnement », déclare Me Devlin.

En ces domaines, beaucoup doit être

« Les juristes spécialisés en droit de l'environnement, de l'énergie et des ressources ne manqueront pas de boulot. »

doubled membership," he adds, as approximately 1,300 lawyers across the country now call NEERLS home. "Each is a distinct area, and we see a lot more lawyers in those fields, but we also see lawyers dabbling in or changing their focus to environmental."

On the activities front, "climate change is near and dear to the hearts of many members, though it hasn't really come down in terms of recognition," Devlin says. "There are not many regulations, so in terms of law reform, it is still very much at the policy stage." NEERLS is also involved in the five-year review of the *Canadian Environmental Protection Act* currently underway, presenting members' opinions to Parliament.

"Another one of our key initiatives," he adds, "is building liaisons with other corresponding Sections, such as forging closer ties with the ABA, which is bringing their annual CLE program to the second National Environmental, Energy and Resources Law Conference in Toronto in spring 2006." NEERLS also liaises within the CBA, and in September, it created a mini-conference in association with the federal Department of Justice.

In a bid to give back to law schools, the section devised the David Estrin Law School Essay Contest, "to develop budding environmental, energy, resource lawyers and to develop substantive content for the Section's EcoBulletin newsletter," explains Devlin. "We named the essay contest after a pioneer in environmental law, and we are just now publicizing it across law schools, with a winner to be selected over the winter."

"Looking back 20 to 25 years, there was very little in terms of regulation and common law in environmental, energy and resources areas."

Environmental and energy law is on the rise, Devlin predicts. "Looking back 20 to 25 years, there was very little in terms of regulation and common law in environmental, energy and resources. Looking forward, we have nothing but new environmental issues cropping up. Climate change, in terms of technical legal application, is at the very early stages, and we are only at the policy stage on greenhouse gases.

"These developing issues are gaining prominence and attention, which follows through to policy and then to the complexity of law," he concludes. "We are going to need environmental, energy and resource lawyers for a long time." N

— Michelle Mann

fait au niveau législatif. La Section aimerait s'attaquer à la question des changements climatiques et participe déjà à la révision quinquennale de la *Loi canadienne sur la protection de l'environnement*.

« Un autre de nos projets est de réseauter avec nos vis-à-vis de *l'American Bar Association* », explique Me Devlin en annonçant que les collègues américains présenteront leur programme de FJP lors de la Conférence annuelle de la Section qui se tiendra à Toronto au printemps 2006.

Il y a 20 ou 25 ans, on entendait peu parler de législation concernant l'environnement, constate-il. Maintenant, cela fait les manchettes.

L'avenir du droit de l'environnement et de l'énergie s'annonce prometteur, croit Me Devlin. « Il y a 20 ou 25 ans, on entendait peu parler de législation concernant l'environnement, constate-il. Maintenant, cela fait les manchettes. » La Section du droit de l'environnement, de l'énergie et des ressources a décidément beaucoup de pain sur la planche. N

— Mélanie Raymond

Calendrier *Formation juridique permanente*

Droit des autochtones : Peuples autochtones et ressources naturelles

Hôtel Fairmont Palliser, Calgary
10 et 11 mars

Le domaine des ressources naturelles touche les peuples autochtones. On discutera du projet de pipeline de la vallée de la MacKenzie, des retombés de l'affaire Mikisew et des méthodes pour gérer les litiges complexes en droit autochtone devant la Cour fédérale.
Renseignements : Carole Roussel au 1-800-267-8860 ou *caroler@cba.org*

Planification du 3ième âge, Partie II : enjeux juridiques, financiers et sociaux

Centre des arts et Hôtel Lord Elgin, Ottawa
24 et 25 mars

Étude de cas, trucs pratiques, solutions juridiques et de marketing concernant la planification fiscale de la retraite, la protection des avoirs, les impôts transfrontaliers, les directives de fin de vie et d'autres sujets d'importance capitale pour les retraités. Est-il possible de bien gagner sa vie en droit des aînés?
Renseignements : Ann-Marie Suurland au 1-800-267-8860 ou *ann-maries@cba.org*

Gestion de la pratique du droit : les stratégies de réussite

Fairmont Reine Elizabeth, Montréal
7 avril

Des solutions concrètes pour avoir une pratique du droit plus efficace. Apprenez les techniques pour attirer une plus grande clientèle, pour recruter et garder les bons joueurs, pour maîtriser les technologies maintenant disponibles et pour vous démarquer dans un marché fortement concurrentiel.
Renseignements : Carole Roussel au 1-800-267-8860 ou *caroler@cba.org*

Sujets de l'heure en litige civil

Centre de conférence de l'ABO, Toronto
28 et 29 avril

Divers thèmes seront abordés dont la gestion des méga-causes, les présomptions naissant de la destruction de la preuve, les polices d'assurance-invalidité à long terme, de même que les techniques de plaidoirie.
Renseignements : Ann-Marie Suurland au 1-800-267-8860 ou *ann-maries@cba.org*

Sommet annuel national du droit de l'environnement, de l'énergie et des ressources

Toronto
28 et 29 avril 2006
Renseignements : Heather Nowlan au 1-800-267-8860 ou *heathern@cba.org*

Announcement

Canadian Bar Review has a new editor


Dr. Beth Bilson

Supreme Court of Canada Justice Ian Binnie, Chair of the *Canadian Bar Review* Editorial Board, is pleased to announce the appointment of **Dr. Beth Bilson** of the University of Saskatchewan College of Law in Saskatoon as Editor of the *Bar Review* as of January 1, 2006.

Dr. Bilson, who received her Ph.D. from the University College London Faculty of Laws in 1982, has taught at the College of Law for 26 years, serving two terms as Assistant Dean and serving as Dean of the Faculty from 1999 to 2002. Her wide-ranging curriculum includes Personal Injuries Compensation, Labour Relations, Canadian Legal History, Administrative Law and Legal Research & Writing. She has written numerous book reviews and delivered many lectures and presentations.

The *Canadian Bar Review*, the most frequently referenced learned journal at the Supreme Court of Canada, is available online at *www.cba.org/CBA/Canadian_Bar_Review/Main* — access is free for all CBA members and is available by subscription to non-members. CBA members can request a printed hard-bound version of each year's issues at the conclusion of the publishing year. N

Annonce

La nouvelle rédactrice de la Revue du Barreau canadien

Ian Binnie, juge à la Cour suprême du Canada et président du Comité de rédaction de la Revue du Barreau canadien, est fier d'annoncer la nomination de Beth Bilson, du *College of Law* de l'Université de la Saskatchewan à Saskatoon, au poste de Rédactrice de la publication à compter du 1er janvier 2006.

Détentrice depuis 1982 d'un doctorat du *University College London Faculty of Laws*, Mme Bilson enseigne le droit au *College of Law* depuis 26 ans. Elle y fut doyenne de 1999 à 2002 et vice-doyenne à deux reprises. Au cours de sa riche carrière, elle a publié de nombreux ouvrages et présenté plusieurs allocutions. Les relations de travail, l'indemnisation du préjudice corporel, l'histoire juridique canadienne, le droit administratif et la recherche et la rédaction juridique sont ses thèmes de prédilection.

La Revue du Barreau canadien, la revue savante la plus fréquemment citée par la Cour suprême du Canada, est disponible en ligne au *http://www.cba.org/ABC/revue_du_barreau/Mainf/*. Les membres de l'ABC y ont accès gratuitement alors que les non-membres peuvent s'y abonner. Des livres à couverture souple sont publiés à la fin de chaque année civile et mis à la disposition des membres de l'ABC sur demande. N

Correction

In the December 2005 edition of "The CBA & You," two photographs on pp. 54-55 were incorrectly captioned. The lawyer in the photos is **Marc-André Blanchard**, Managing Partner of McCarthy Tétrault in Montreal. *National* regrets the error.

KASDORF PHOTOGRAPHICS

CLE Calendar *Upcoming events*

Aboriginal Law: Indigenous Peoples and Natural Resources

Fairmont Palliser Hotel, Calgary
March 10-11

The resource development sector interacts with Aboriginal peoples. Updates on the MacKenzie Valley Pipeline project, the Mikisew Cree decision, and managing complex aboriginal litigation in the Federal Court.
Information: Carole Roussel at 1-800-267-8860 or *caroler@cba.org*

Planning for Later Life, Part II: Legal, Financial and Marketing Solutions

National Arts Centre and Lord Elgin Hotel, Ottawa
March 24-25

Case studies, practice tips, financial and marketing solutions for retirement financing, preservation of assets, cross-border tax and wills/powers of attorney recognition issues affecting roaming retirees, and more. Can you make a living in elder law?
Information: Ann-Marie Suurland at 1-800-267-8860 or *ann-maries@cba.org*

Your Bottom Line – Strategies for Success

Fairmont Queen Elizabeth, Montreal
April 7

Create a successful practice. Learn how to attract and retain happy clients, to hire and keep the best talent, to review your management and finances, to master available technologies, and to take the lead in a competitive market.
Information: Carole Roussel at 1-800-267-8860 or *caroler@cba.org*

Hot Topics in Litigation & Advocacy

OBA Conference Center, Toronto
April 28-29

The Second Annual National Civil Litigation CLE Conference includes sessions on mega-case management, spoliation of evidence, long-term disability policies and advocacy skills.
Information: Ann-Marie Suurland at 1-800-267-8860 or *ann-maries@cba.org*

2nd Annual National Environmental, Energy and Resources Law Summit

Toronto
April 28-29
Information: Heather Nowlan at 1-800-267-8860 or *heathern@cba.org*

Continued from page 24

The giant awakes

In a separate initiative, Canadian legal experts are trying to increase the prospects that economically marginalized Chinese will have access to counsel. The Canada-China Legal Aid and Community Legal Services Project, a joint collaboration of the CBA, Legal Aid Ontario, China's Ministry of Justice and China's National Legal Aid Centre, aims to upgrade the 3,000 legal aid centres across China. The project, also funded by CIDA, has been underway since July 2004.

Legal aid in China is only ten years old, but already there are about 11,000 permanent legal aid lawyers and paralegals, says Diane Elkas, the CBA's Project Director. "They handle 200,000 cases a year, a much higher caseload than in Canada," says Elkas, who is based in Montreal.

Legal aid access is far from universal. The legal aid centres themselves decide which lawyers will represent which clients, and only criminal defendants in capital cases are automatically entitled to a legal aid lawyer. In addition to criminal cases, the legal aid centres also tackle family law and administrative law cases.

The Legal Aid Project is funding efforts by the centres to protect the interests of the most vulnerable citizens — women, youth, the elderly and migrant workers. The project also is trying to develop model centres in four of China's poorest provinces. When a dozen directors of China's legal aid centres participated in a study tour of legal aid programs in Ontario and Quebec last year, the organizers were careful to include representatives from those four Chinese provinces.

Canadian legal aid experts have also visited the model centres in the four designated provinces. The project advisors tried to improve the environment for client confidentiality by encouraging the centres to set up separate rooms on their premises where lawyers could meet privately with clients. Money has also been provided for the purchase of computers and for skills training.

As China seeks to fulfil its superpower destiny, its legal system will have to change to accommodate economic progress and, perhaps, political evolution. Canadian lawyers can take pride in helping 21st-century China develop its legal institutions, while Canada's law firms will face the challenge of how to compete for clients in the emerging legal marketplace. China's wake-up call is going out around the world. N

***Sheldon Gordon* is a freelance legal and business writer in Toronto.**

OFFICIAL NOTICE

Call for Nominations for Standing Committees

The CBA is currently seeking candidates for its National Standing Committees for 2006-2007. All CBA members are eligible to apply for positions on the following committees:

- Awards
- Communications
- Continuing Legal Education
- Equity
- Ethics and Professional Issues
- International Development
- Judicial Compensation & Benefits
- Legal Aid Liaison
- Legislation and Law Reform
- *Pro Bono*
- Resolutions, Constitution and Bylaws
- Supreme Court of Canada Liaison

For information and an application form, contact your local Branch. The deadline for applications is noon on **April 17, 2006**.

AVIS OFFICIEL

Appel de candidatures pour siéger sur un comité permanent

L'ABC est à la recherche de candidats et de candidates pour ses comités permanents nationaux pour l'exercice 2006-2007. Tous les membres sont habilités à poser leur candidature pour occuper des fonctions au sein des comités suivants :

- Prix et récompenses
- Communications
- Formation juridique permanente
- Égalité
- Déontologie et questions professionnelles
- Développement international
- Rémunération des juges
- Aide juridique
- Législation et réforme du droit
- *Pro Bono*
- Résolutions, constitution et règlements
- Liaison avec la Cour suprême du Canada

Pour obtenir de plus amples renseignements et un formulaire de candidature, veuillez communiquer avec votre division. La date limite pour poser votre candidature est le **17 avril 2006**, à midi.

OFFICIAL NOTICE/AVIS OFFICIEL

Conférence des juristes d'expression française de common law

Élection d'un ou d'une vice-président(e) et d'un ou d'une secrétaire-trésorier(ière)

Veuillez noter qu'une élection au poste de secrétaire-trésorier et de vice-président se déroulera lors de l'Assemblée annuelle de l'ABC à St. John's, Terre-Neuve, le 14 août 2006.

Les membres intéressés doivent soumettre leur nom au Comité des candidatures de la Conférence des juristes d'expression française de common law, à l'attention de Marie-Claude Noël à *marieclauden@cba.org*, avant le **19 mai 2006**.

Bond. Justice Bond.

Of 007 and judicial appointments.

By Douglas Mah

As of December 25, there was a vacancy on the Supreme Court of Canada. Much has been made about the process of selection, and speculation abounds as to potential candidates. It's important to Canadians that the right person is selected.

Another influential position was recently filled, the importance of which cannot be understated. The fate of the free world depends on the right individual taking this office. The vetting process and rumours of possible candidates also fuelled much discussion. What am I talking about? Finally, after an exhaustive search, Sony Pictures announced that actor Daniel Craig will be the next James Bond.

Who the heck is Daniel Craig? Well, he was the guy who played Paul Newman's psycho son in 2002's *The Road To Perdition*, opposite Tom Hanks. That's pretty much all I know about him. But he beat out a vaunted field consisting of no less than the likes of Ewan McGregor, Eric Bana, Clive Owen, Hugh Jackman and Jude Law. That means he bested Obi-Wan Kenobi, The Incredible Hulk, King Arthur, Wolverine from the X-Men, and Alfie. Quite an accomplishment, I'd say.

Although the producers have promised more realism with Craig in *Casino Royale*, the 21st Bond epic, I think a real casting opportunity was missed. How is it possible to make a statement today with James Bond? How could 007 still be relevant? The moviemakers could have staked out new ground in modernism, and at the same time, made a diversity statement with one of these choices:

- Hugh Grant as the first stammering James Bond;
- Rupert Everett as the first gay James Bond;
- Peter Dinklage as the first James Bond who is a dwarf;
- Chris Rock as the first potty-mouthed African-American stand-up comedian James Bond.

Those who were passed over for the role of Bond feel the pain of my lawyer colleagues who have applied for the judiciary but did not make the grade. There is, I am told, a list of persons who have been approved by a vetting committee, from which the names of judicial appointments are drawn.

I have several acquaintances on that list. Some have languished there for years, still awaiting the golden moment. As each new judicial appointee is announced, anguished cries are audible throughout the neighbourhoods of Glenora in Edmonton, Mount Royal in Calgary, Rosedale in Toronto and Point Grey in Vancouver.

There are various approaches to candidacy. One method is to mount a concerted and aggressive campaign. Applicants call upon people of influence and thought leaders in the community to make telephone calls and write letters to those who might have a say. Under this approach, a judicial appointment is a prize to be pursued with relentless vigour and single-minded determination.

Another method is to sit at one's desk or chair and emit high-voltage thought waves. As soon as the judicial vacancy appears imminent, the candidate exerts great telepathic energy. *Earth to Justice Minister. My thoughts are your thoughts. You will appoint me to the Superior Court. Repeat, you will appoint me to the Superior Court.* Apparently, more than one head has exploded using this method, resulting in quite a mess for the cleaning staff.

A third gambit, I am told, is to rely on merit, but some see this as leaving a hell of a lot to chance.

The desperation reaches its zenith when I am asked to write a reference letter. Talk about your last resort. In agreeing to write such a letter, I give fair warning about my "record." I am giving Jacques Plante a run for his money. So far, I have a perfect shutout going. I should use the words *Kiss Of Death* as a watermark.

My life is sometimes boring, so I try to amuse myself. Occasionally I will write a "joke" letter of recommendation and send that to the candidate before I send the real letter.

The candidate is not the worst lawyer I have ever met, and I have met many. It is said that he is very photogenic. He believes that most accused are guilty of something and regrets that flogging is no longer a sentencing option.

I hope they haven't been getting these letters mixed up.

Sometimes I'm asked if my name is on the list. Now that my mother is deceased, I don't think I could find six people to write the endorsement letters. Besides, I'm like Wayne and Garth when it comes to this, *i.e.*, "I'm not worthy!"

And I'm certainly not concerned about the Supreme Court of Canada. As one lawyer once described another's stated aspiration to ascend to that court: "He's got about ten times the chance that I have of being appointed. But ten times zero is still zero."

Nor do I think I'll be considered for the James Bond role the next time it comes up. Apart from the fact that I'm not an actor and only slightly taller than Peter Dinklage, I don't like guns, I'm uncomfortable in a tuxedo, and I always drive sensibly. I'd be the only guy driving an Astin Martin and observing the speed limit. N

***Douglas Mah* is an Edmonton lawyer and writer.**

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