

The New Brunswick Law Foundation: Ten Years and Beyond

In 1980 I was asked to serve on the board of directors of the New Brunswick Law Foundation. As a non-lawyer, I found it difficult initially to understand what purpose the Foundation was supposed to serve. The only information available was the portion of the then *Barristers' Society Act* which established the Foundation. Over the years I discovered that I was not alone in my ignorance. Neither the public nor even the legal community had much understanding of the purpose and operation of the Foundation. By 1985 the board was very concerned over this general lack of awareness and the consequent paucity of funding applications from organizations outside the legal fraternity. In addition I had a personal concern that when the public (non-lawyer) appointees to the board were replaced, the new members would have as little information available to them as I had in 1980. In late 1985 I proposed that a document be prepared explaining the development of law foundations in general and our Foundation in particular, and highlighting some of the policy issues facing law foundations. The board asked me to prepare that study. This is the result.

This document was, then, prepared as part of the volunteer contribution of a Foundation board member — a person outside the legal community per se, but inside the Foundation for a substantial portion of its existence. Its purpose is to provide historical context and to summarize issues and arguments. It is not a critical evaluation of Foundation policies and procedures but a starting point for further discussion and study. The document has been reviewed by the board and the secretary-treasurer, but the views expressed are the author's alone.

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Lawyers, by the very nature of their work, often hold large sums of money in trust on behalf of clients. Sometimes the amount of money involved combined with the length of time it is to be held warrants establishment of a separate bank account in which interest can accrue to the client. Often, however, the cost of establishing such an account exceeds the potential income. When this is the case, the lawyer deposits the money in a mixed (or general) trust account, containing all moneys held in trust for which no separate account has been established. A fundamental principle of the practice of law has always been that lawyers should receive no personal benefit from the operation of trust accounts. Yet at one time the retention of interest earned on mixed trust accounts was a common practice, since there was no specific prohibition against it.¹ By the early 1960s law societies were banning such retention of interest as "conduct unbecoming" a lawyer. This was confirmed by the decision of the House

¹L.D. Hyndman, *Report to the President and Benchers of the Law Society of Alberta concerning "Interest on Solicitors Trust Accounts"* (Alberta: The Law Society of Alberta, 1969) at 1.

of Lords in *Brown v. Inland Revenue Commissioners*.²

Since lawyers are not permitted to retain interest on these accounts, financial institutions held these moneys interest free. The benefit thus accrued only to the shareholders of the banks or trust companies in which the moneys were kept. This situation could not be expected to continue. Discussions of how this money could be used without going directly to individual lawyers ranged from a lawyers' assurance fund, which was the primary use in the Australian state of Victoria,³ to subsidization of the rate schedules of provincially-funded legal aid services.⁴

In 1969 British Columbia, using the Australian example, created a provincial law foundation to receive interest on these accounts and disburse it for legal research, legal aid, law reform and the establishment, operation and maintenance of law libraries. This departed somewhat from the Australian state of New South Wales' scheme, in which interest moneys were used for legal aid, a "Solicitor's Fidelity Fund" and the law foundation.⁵ At first participation by British Columbia lawyers was voluntary. In 1973, after the precedent set in 1972 by the establishment of Alberta's compulsory program, participation became obligatory for all lawyers with mixed trust accounts. Participating lawyers had two initial concerns with the scheme. One centred on potential taxation consequences. In this regard the British Columbia Law Society obtained a ruling from the Department of National Revenue that the interest would not be taxed as part of a lawyer's income.⁶ As well, it may be that some lawyers initially resisted the law foundation concept through fear of losing the indirect benefits sometimes extended to them by the financial institutions where their often large and formerly non-interest bearing mixed trust accounts were maintained.⁷

New Brunswick

The example set by British Columbia soon spread east and on 14 September 1973 the council of the Barristers' Society (now Law Society) of New Brunswick established a "Committee on Interest on Trust Accounts" to examine the possible formation of a law foundation in New Brunswick. George Bingham QC was appointed chairman. John Palmer QC, president of the Barristers' Society, proposed H. Ruben Cohen QC, Mark Yeoman QC and Arthur W. Whelley QC as committee members. Horace Hanson QC was added to the committee at the request of the Minister of Justice. This proved to be a valuable intervention as Hanson made a considerable contribution not only to

²[1964] 3 All E.R. 119. See also G.P. Reilly & D.T. Rogers, "Interest on Solicitors Trust Accounts" (1965) 23 *Advocate* 167.

³D. Chappell, "Law Foundations on the Pacific Rim: A Comparison of the British Columbia and New South Wales Experience" (Victoria: Law Foundation of British Columbia, 1982) at 8.

⁴"Solicitors Trust Accounts", *supra*, note 2 at 167.

⁵"Law Foundations on the Pacific Rim," *supra*, note 3 at 8.

⁶A. Robertson, "The Law Foundation" (1969) 27 *Advocate* 264.

⁷Interview with B. Stapleton, Secretary-Treasurer, New Brunswick Law Foundation, Fredericton (5 November 1986).

establishment of the Foundation but also to its subsequent development. Information was collected regarding foundations in other provinces and in January 1975 Bingham presented his report to the council, which approved it in principle. The report included draught legislation which closely resembled the acts in effect in Alberta and British Columbia. In 1975 a bill giving effect to the proposal received legislative enactment.⁸ The legislative process altered the proposed bill in three respects:

- legal aid was moved from object (a)(iii) to (a)(i);
- bursaries and scholarships for the study of law were added as object (a)(vi); and,
- governmental (Minister of Justice) appointments to the board of directors were increased from two to three members and Law Society appointments were reduced from five to four.⁹

The legislation was not immediately proclaimed because it was necessary to inform and instruct both financial institutions and lawyers and to establish machinery and regulations governing the Foundation's operation.

The Act set out the objects of the Foundation as follows:

- 44(1)(a) to receive moneys and property and to maintain and manage funds, the interest and capital of which are to be used from time to time as the Board sees fit for
- (i) legal aid,
 - (ii) legal research,
 - (iii) legal education,
 - (iv) law reform,
 - (v) establishing, maintaining and operating law libraries, and
 - (vi) bursaries and scholarships for the study of law;
- and
- (b) to do all other things that are, in the opinion of the Board, incidental or conducive to the attainment of the objects set forth in clause (a).¹⁰

In 1983 the legislature amended clause (a) to include a seventh object: "such other purposes related to the law as are, in the opinion of the Board, for the benefit of the public".¹¹ As well, subsection (2) was added to section 46 as follows:

The Board may establish or cause to be established such trusts, foundations or other bodies as it deems appropriate for the purpose of exercising the powers and carrying out the duties of the Foundation and the Board, and may delegate to and vest in such trusts, foundations and other bodies full power and authority to act for or in the place of the Foundation and the Board in such matters.¹²

These changes were made for two reasons. One was the concern of the board that an insufficient number of grant applications were being received from

⁸Minutes of the meeting of the Council of the Barristers' Society of New Brunswick, September 1973 to March 1985.

⁹*Barristers' Society Act*, S.N.B. 1973, c.80 as am. S.N.B. 1975, c.67, S.N.B. 1983, c.103.

¹⁰*Barristers' Society Act*, S.N.B. 1973, c.80 as am. S.N.B. 1975, c.67, S.N.B. 1983, c.103.

¹¹*Barristers' Society Act*, S.N.B. 1973, c.80 as am. S.N.B. 1975, c.67, S.N.B. 1983, c.103.

¹²*Barristers' Society Act*, S.N.B. 1973, c.80 as am. S.N.B. 1975, c.67, S.N.B. 1983, c.103.

organizations and individuals other than those connected with the Law Society or the law schools. The second reason was to allow establishment of specialized bodies to achieve specific objects, thereby relieving the board of matters of a continuing nature where special information is needed to facilitate decision-making.¹³

Management of the Foundation was vested in a seven-member board of directors which included the Minister of Justice or his designate, two persons appointed by the minister who did not have to be members of the Law Society (and never have been) and four members of the society appointed by its council. These individuals are appointed for two-year terms and can be reappointed. Most directors have served more than one term. One of the directors appointed by the Law Society council is designated by the appointment as chair of the board. The vice-chair is elected by the board and has always been one of the non-lawyers. The directors receive no remuneration, although the Corporations Committee of the Legislature had suggested amendments providing the possibility of remuneration for directors who are not members of the Law Society. These suggestions were withdrawn because of concern that this provision might jeopardize the charitable nature of the Foundation and its right to tax exemption.¹⁴ This concern became irrelevant when the tax department rejected the application for charitable status because "law reform" was included as an object.

The legislation requires that Law Society members holding funds in a mixed trust account must maintain an interest bearing trust account in an authorized depository. Members must instruct the depository to remit interest earned to the Foundation.¹⁵ Members who fail to comply with these requirements are subject to disciplinary action by the society.

The first meeting of the Foundation was held on 6 August 1975. George Bingham was the chairman and the other society-appointed directors included Horace Hanson, Neil McKelvey and George Chiasson. Gordon Gregory represented the Minister of Justice. The two ministerial appointments were Nellie Balch and Paul LePage. Appendix A sets out all Foundation directors and their terms. At this meeting a committee was established to negotiate with the banks and other duties were assigned. General discussion on the direction of the Foundation included Horace Hanson's concern with the condition of the Law Society libraries throughout the province. Justice Minister Paul Creaghan, attending as observer, stated that his colleagues in the Legislature were in favour of the Foundation supporting projects of direct public benefit. It was decided that the secretary-treasurer of the Law Society, Basil Stapleton, would be secretary-treasurer of the Foundation, an office he continues to hold. At a second board meeting procedures, regulations and by-laws were reviewed and it was decided that the Lieutenant-Governor in Council would be

¹³Stapleton, *supra*, note 7.

¹⁴*Synoptic Report*, Bill 58, Committee of the Whole, Legislature of New Brunswick, 13 June 1975.

¹⁵*Barristers' Society Act*, S.N.B. 1973, c.80, as am. S.N.B. 1975, c.67, s.50(1)(b).

asked to proclaim into force the provisions of the then *Barristers' Society Act* respecting the Law Foundation as of 1 November 1975.¹⁶

The first annual report of the Foundation observed that, "Because of the care and planning which preceded proclamation of the legislation, the Law Foundation commenced operations on November 1, 1975 without any significant difficulties".¹⁷ Although 199 mixed trust accounts earning interest ranging from 3 to 3½% netted almost \$44,000, no grants were made by the Foundation before 31 May 1976, the end of its first fiscal year. The board decided to wait until there was some indication of what the revenue would be. The board continues to use the disposable revenue (revenue minus administration costs) of the previous year as a guide for the current year's grants. The committee established to negotiate with the banks ultimately secured agreement on the same terms applying to law foundations elsewhere in the country — the interest rate applicable to chequeable savings accounts calculated on the minimum monthly balance.

From its beginning until 30 April 1986 the Law Foundation received almost three million dollars in revenue from trust funds. It disbursed 2.1 million in direct grants, placed .5 million in a scholarship trust and incurred less than .2 million in administrative costs. As will be noted from the "Revenue From Trust Funds" section of Appendix B, revenue was volatile, susceptible to swings in interest rates and other economic factors affecting the level of trust fund accounts. As well, negotiation with the banks brought periodic improvements in the terms offered to the Foundation.

Negotiations with Depositories

The prime lending rate of large banks throughout the country averaged about 6% for the ten years prior to 1969, but as interest rates increased in the 1970s law foundations suffered in two ways.¹⁸ First, high interest rates discouraged real estate purchases, causing a significant decline in the funds flowing through trust accounts. Second, the fixed rate of approximately 3% on chequeable savings accounts meant that there was no increased rate on even these funds. The Foundation's 1979-80 annual report indicates that rates were renegotiated late in that year. The most significant new rates received by the Foundation were i) the rate on 30-59 day investments minus 3%, and ii) the prime rate minus 5%, all payable on the minimum monthly balance. With the prime rate exceeding 22% in 1981 the impact on revenues was dramatic, as indicated in Appendix B. These two new formulas remained relatively unchanged for a number of years. During the 1985-86 year further negotiations with banking institutions resulted in a dramatic change in the way interest was calculated. Instead of a minimum monthly balance, interest would be

¹⁶Minutes of the meeting of the Board of Directors of the New Brunswick Law Foundation, 1975.

¹⁷New Brunswick Law Foundation, "Annual Report", 1976 at 5.

¹⁸The prime rate is the rate which banks charge for short-term loans to their customers with the strongest credit standing. It varies somewhat from bank to bank. Thus two banks offering the Foundation prime minus 5% could be paying different net rates. The prime rate is closely tied to the bank rate which is set each Thursday and tends to vary with it. (The Continental Bank in their July 1986 newsletter, for example, reported the bank rate at the end of June at 8.84% while their prime rate was 10.25%).

calculated on the more favourable basis of the average daily closing balance less normal service charges.¹⁹

The ability to renegotiate with the banks was facilitated by the exchange of information among Canadian law foundation representatives which began informally in 1976 at the annual Canadian Bar Association meeting. It was formalized in 1981 into an annual event through the formation of the Association of Canadian Law Foundations. This exchange of information enabled the New Brunswick Law Foundation to pressure financial institutions within the jurisdiction to give the same improved terms already negotiated in the larger provinces. For example, the most recent improvement of banking terms in New Brunswick followed the association's 1982 meeting, where it was learned that Saskatchewan was receiving interest on a daily basis and that the Quebec Chamber of Notaries was receiving interest calculated on the basis of the average monthly balance rather than the minimum monthly balance.²⁰

Grants Evolution

Policies for awarding grants evolved over the years and by the 1981-82 annual report the Foundation was able to delineate "certain guidelines and principles normally observed".²¹

- Priority is given to projects and programs which offer benefits directly or indirectly to the residents of New Brunswick.
- Grants are normally made on a seed-money or one-time basis with long-term commitments being avoided.
- The grants budget in any year is to be based on the revenues realized in the preceding year.
- Any formula for the allocation of funds on a percentage basis among the several statutory objects must be flexible enough to allow for unusual fluctuations in revenues realized from year to year.
- Grants are normally given for a one-year period subject to an extension of time at the request of the grantee.
- Grantees are normally required to account for the expenditure of funds upon completion of the program or project or on an interim basis, at the end of one year where the relevant time period exceeds one year.²²

It was not until the Foundation's 1979-80 annual report that denial of a grant application was first reported. The 1980-81 annual report showed eight of fifteen applications as denied, and that of 1981-82 showed eight of thirty-one applications denied.²³ Thus, as applications became more numerous and varied, general guide-lines emerged.

¹⁹New Brunswick Law Foundation, "Annual Reports", 1976-86.

²⁰Minutes of the meetings of the Association of Canadian Law Foundations, 1976-86.

²¹New Brunswick Law Foundation, "Annual Report", 1981-82.

²²*Ibid.*

²³*Ibid.* 1979-80, 1980-81, 1981-82.

The 1982-83 annual report qualified the grants policy by noting:

that certain successful, continuing projects and programs such as support for the law library system and the scholarships and bursaries plan may warrant or require commitments and planning over a longer term than one year at a time. Such projects may, indeed, warrant the setting up of separate funds by the Foundation.²⁴

In addition a "Grants Conditions" section was added to the report in that year, including the following:

- The term of a grant is one year. Any funds remaining unexpended at the end of the year lapse. If the project extends beyond a year, the approval of the Foundation must be obtained to continue the approved funding into the following year.
- Funds are to be expended in accordance with the budget submitted with the application. Any proposed significant digression from the budget must be approved in advance by the Foundation.
- Any publicity or publication in connection with, or arising out of, the project is to indicate the Foundation's participation.
- Upon completion of the project, a final report and accounting must be provided. If the project is to extend beyond a year, then a progress report must be submitted on the expiration of the first year.
- The grant is not to be regarded as representing a continuing commitment of the support by the Law Foundation.²⁵

The Foundation's 1985-86 report added a further refinement to the grants policy section. The directors were concerned that they were being presented with large submissions on the day of their meeting and had insufficient time to review the material properly. They were also concerned that applicants were sometimes unnecessarily appearing in person before the board. Thus the board announced that:

Grant applications are required to be submitted by January 1st, April 1st, June 1st and October 1st in order to be considered at the next following meeting. Appearances of applicants before the Board are at the discretion of the Chairman.²⁶

Major Initiatives

LAW LIBRARIES The major beneficiaries of Law Foundation largesse have been the libraries connected with the New Brunswick Law Society (see Appendix C). At its December 1975 meeting the Foundation was informed that the provincial government would terminate direct assistance to law libraries at the end of its fiscal year and that the Foundation would be called on to assist these libraries. Law libraries were an important *raison d'être* in the establishment of the former Barristers' Society in New Brunswick. In three of the five sections of the 1846 *Act to incorporate the Barristers' Society of New Brunswick*, the "Library" is mentioned. Since 1846 Law Society libraries have been housed, free of charge, in provincial court houses.²⁷ Law Foundation assistance to the

²⁴*Ibid.* 1982-83.

²⁵*Ibid.*

²⁶*Ibid.* 1985-86.

²⁷Interview with D. Hanson, New Brunswick Law Society Librarian, Fredericton (20 August 1986).

libraries began in the 1976-77 year and continued annually. Although the Law Society asked the Foundation in 1977 to commit itself in principle to ongoing financial support for the law libraries, the board rejected the request. The basis of the rejection was reluctance to make decisions significantly reducing the flexibility of future boards.²⁸

The Foundation's main goal with respect to the nine law libraries (three of which were started with Foundation grants) was to bring those outside Fredericton up to a minimum acceptable standard, at which time the level of Foundation assistance would decrease to a maintenance level adjusted for inflation. This goal was first specifically identified in the 1981-82 Law Society request, which was nearly double that of the previous year.²⁹ In response the board became actively concerned that the province's lawyers themselves contribute a reasonable share towards the library operation. The Foundation concerns were exemplified by the commissioning in 1983 of a report on the New Brunswick law library system by L.K. Rees-Potter, Research Director of the Canadian Law Information Council, and by a discussion paper prepared by Basil Stapleton on behalf of the Foundation later the same year.³⁰ These papers explored such questions as whether a separate body should be established to administer the library system with funding from the Foundation and Law Society and whether there should be more integration of the library services of the bar, the judiciary, the two provincial law schools and the Department of Justice. As the library system and the Foundation itself matured, improvements in communication and decision-making were realized through annual discussions between the Foundation and the Law Society's Law Library Committee.

SCHOLARSHIPS AND BURSARIES Scholarships and bursaries were one of the Foundation's earliest concerns. It was not, however, until a study of the matter by the present writer and the resultant proposal presented to the board at its January 1982 meeting that specific action was taken. A program was developed consisting of:

- Scholarships of \$15,000 to each New Brunswick law school to be awarded to New Brunswick residents based on academic achievement. Awards are made by the Foundation on the recommendation of the law school scholarship committee.
- Bursaries of \$9,000 to each New Brunswick law school to be awarded to New Brunswick residents on the basis of need and subject to an acceptable academic record. The awarding committees were initially to consist of a representative of the law school, a representative of the Foundation, and the awards officer for each university.
- A dean's discretionary fund of \$1,000 to each law school dean to be used at his discretion in cases of dire need of particular students. The dean is required to report annually on use of the funds.³¹

²⁸Minutes of the Board of Directors of the New Brunswick Law Foundation, October 1977.

²⁹Barristers' Society of New Brunswick, "Submission to the New Brunswick Law Foundation for Funds for Law Libraries", 1981.

³⁰L.K. Rees & R.P. Potter, "New Brunswick Law Library System: Consultant Report", April 1983.

³¹Minutes of the meeting of the Board of Directors, New Brunswick Law Foundation, January 1982.

The first awards were made in the 1982-83 academic year.

The Foundation did not consider the question of graduate scholarships until an application was received from a student. Such a program was subsequently established, and the first scholarship was awarded in the 1985-86 fiscal year. The terms of the graduate scholarship program, as restructured in the October 1985, are as follows:

- The maximum total of such awards in any year is to be \$20,000.
- The maximum individual award is to be \$10,000.
- Applications for such awards are to be made to the Directors of the Law Foundation by a designated deadline date.
- Applications are to be accompanied by a letter from the Dean of the Law School from which the applicant graduated with the letter to confirm the Dean's assessment of the applicant's qualifications to undertake the proposed course of studies.
- The granting of awards is to be entirely discretionary in the Directors, with particular weight being given to the likelihood of benefit to New Brunswick from the applicant's proposed program of studies.
- Preference in the granting of awards is to be given to New Brunswick residents.³²

Board members were of the opinion that the scholarship and bursary program was a project for which continuance should be assured. Preparatory to final determination of the nature of a funding structure, the board began designating funds in 1982-83 with a goal of having at least \$500,000 ultimately available for the program. After consultation with the law schools and legal counsel, the board obtained amendments to what is now the *Law Society Act* to give general authority to establish a separate trust. A scholarship trust was established in 1986, with the directors of the Foundation serving as the trustees. The Scholarship Trust, unlike the Foundation itself, is a registered charitable organization. No graduate scholarship has yet to be paid from the trust revenue, although the terms of the trust do allow for it.³³

Issues Facing the Foundation³⁴

PUBLIC VERSUS LAWYER BENEFIT One of the major issues facing all law foundations since they were first discussed is the question of benefit to the public.

³²*Ibid.* October 1985.

³³*Ibid.* 1982-86.

³⁴The issues here are a synthesis of information and comments gleaned from the following sources:

Focus Group Interview with the Faculty of the University of New Brunswick Law School, Fredericton (17 December 1985).

Focus Group Interview with the Faculty of Université de Moncton Law School, Moncton (28 November 1985).

Interview with D. Hanson, Law Society Librarian, Fredericton (20 August 1986).

Interview with M. McGuire, Reference Librarian, University of New Brunswick, Fredericton (20 August 1986).

Interviews with various provincial lawyers and grant recipients, 1985-86.

Participation by author as a member of the Board of Directors, New Brunswick Law Foundation, 1980-86.

Many lawyers still think of the income generated by the mixed trust accounts as "their money". Although it is clear that it is unethical for lawyers to collect interest on trust accounts for direct personal benefit, it has been argued successfully that projects which result in lawyers being better trained or which enable lawyers to provide better service benefit the public. Thus the funding of Law Society libraries, it is argued, means that lawyers can do better research and prepare cases more thoroughly than if they had to depend on their own limited in-house libraries. Thereby benefit indirectly accrues to those using the services of a lawyer. It can be argued that providing well-equipped and accessible libraries to lawyers is not much different from providing the facilities in hospitals to doctors. The other side of the argument is that professionals are expected to finance the equipment and other materials necessary to carry on their profession through fees earned, not through what may be viewed as being public money. Similar arguments regarding public versus lawyer benefit can be applied to projects such as continuing legal education and other direct bar-related projects. As the 1982 report to the board of governors of the Law Foundation of British Columbia on "Future Priorities and Procedures" notes:

When lawyers, who prize fairness and accountability in matters affecting the interests of their clients, appear to be benefitting unduly from a much more internalized system involving large amounts of publicly-generated funds, then there is understandably a heavy onus on everyone involved to meet the standards demanded of others in similar positions of trust and power.³⁵

The report goes on to express concern that the British Columbia foundation had become a treasury for projects that had been the financial responsibility of the legal profession. In 1969 Alex Robertson wrote in *The Advocate* on just this issue:

The legislation expressly removes the solicitor's duty to account to clients for interest earned and remitted under the plan, but it does not remove the moral obligation to account to the public at large for the disposition of interest earned on their funds. If the Foundation pursues programs that primarily benefit lawyers as a class, then we will be open to criticism and public confidence in the trust account as an institution will be shaken. But if programs can be initiated that are of real value to those who need or avail themselves of our services, we will be assured of public confidence and support and the plan might thus accomplish a great deal more for the profession than would any number of public relations programs.³⁶

The New Brunswick Law Foundation has for many years been concerned with the low number of applications from individuals and bodies not directly associated with law societies and the two law schools. The 1983 clarification of the Foundation's mandate to include any law-related object beneficial to the public produced no new applications. The Foundation is in the process of enhancing its public profile in various ways which it is hoped will generate applications for projects of a more visibly direct public benefit.

LEGAL AID The question of public benefit versus lawyer benefit is related to a second issue facing the Foundation — funding legal aid. The first object of the Foundation as listed in the Act is legal aid. The Act does not, however,

³⁵F.M. Fraser & W.A.W. Neilson, *A Report to the Board of Governors of the Law Foundation of British Columbia on Future Priorities and Procedures* (Victoria: Law Foundation of British Columbia, 1982) at 35.

³⁶"The Law Foundation", *supra*, note 6 at 265.

require the Foundation to spend anything on any one of its seven objects, and in fact the New Brunswick Law Foundation has never allocated any funding to the provincial legal aid fund. The 1985 annual meeting of the Law Society passed a motion "expressing its support that the New Brunswick Law Foundation consider contributions to the Legal Aid Fund of such portions of its annual income as the Board of Directors may, from time to time, determine to be appropriate". This was a far cry from the original motion, presented by Thomas R. Evans, which would have required the Foundation to contribute three-quarters of its income to legal aid.³⁷ Ontario is the only province currently which contributes three-quarters of foundation income to legal aid, and it does so by legislative direction. The corresponding figure for Manitoba is 50%, and for Newfoundland 33 1/3%. The British Columbia legislation gives varying amounts to legal aid. In Saskatchewan, like New Brunswick, no foundation funding has ever been devoted to legal aid. The law foundation statutes of Nova Scotia and Alberta do not even set out legal aid as a discretionary object.

It would be difficult to oppose the simple principle of Foundation funding for legal aid. Criticism of any such proposal tends to be indirect: that funding legal aid would benefit chiefly lawyers, that it is a government responsibility, and that any Foundation contribution to legal aid would simply prompt the province to reduce its funding by the same amount. It could, however, be said that by decreasing government expenditures on legal aid every taxpayer in the province would benefit by decreased taxes.

The New Brunswick Law Foundation continues to move very slowly on the issue of legal aid, waiting for a government review of the legal aid system in the province. The issue may soon become irrelevant if the government legislates the amount to be allocated by the Foundation to legal aid; yet it is to be expected that the province, in making its decision, would take into account any reasonable direction the Foundation might suggest regarding the amount to be allocated and the use of allocated funds. Appendix D shows the implications that payments to legal aid of the magnitude suggested (75% of receipts, defined as including only interest on trust accounts) for the years 1983-85 would have had on the Foundation. Foundation funding would have represented 17% of the provincial disbursement (net of federal recoveries) for legal aid. The amount remaining, even if all used for libraries, would have funded only 52% of what was actually paid in the period. If the amount remaining were instead used for non-library projects (i.e., no funding to the libraries) it would have covered only 51% of what was actually paid. Since the libraries are used by judges, prosecutors and other justice department staff, as well as lawyers in private practice, the diversion of money to legal aid could hurt the administration of justice as well.

GOVERNMENT RESPONSIBILITY VERSUS FOUNDATION RESPONSIBILITY Although not as perennial an issue as that of benefit to lawyers versus benefit to the public, the issue of government responsibility versus Foundation responsibility has been of concern even beyond the context of legal aid. For example, the Foundation devoted over \$200,000 to the project to provide

³⁷New Brunswick Law Society, minutes of Annual Meeting, 1985.

the province with new Rules of Court, rules which have the status of a statutory regulation. Although this was undoubtedly an important project, the Foundation was criticized for funding it on the ground that it was a government responsibility. Such criticism, if heeded, would raise the question whether any law reform project could properly be supported by the Foundation.

LAW LIBRARIES The question of what, if anything, the Foundation should give the law libraries continues to plague both the Foundation and the Law Society. This is the area of Foundation funding which is best known within the legal community and to which the maximum amount of money has been funnelled. No doubt many lawyers believe that the principal, if not sole, reason for establishing the Foundation was to provide a source of public support for law libraries. From its inception until the end of April 1986, the Foundation paid 1.1 million dollars to the Law Society libraries, with an additional .16 million committed for the 1986-87 year. During that period the cost of materials for law libraries increased as much as twenty percent in one year, and continues to increase at a rate exceeding inflation. When this is combined with the proliferation of law materials, the expected cost maintenance level has eluded the library system. The average age of a member of the New Brunswick bar in 1984 was only 39, with 59% of the membership at less than nine years' standing.³⁸ Massive book costs force these younger lawyers to rely on Law Society libraries extensively. Whatever funding is not provided by the Law Foundation must be provided by society members themselves. In the 1986-87 year the Foundation funded 54% of the total budget of the eight regional libraries and the central library in Fredericton.³⁹

Terence Purcell, executive director of the Law Foundation of New South Wales, opposes funding law libraries in traditional ways and argues that his foundation should instead take leadership in computerizing the information sources of libraries.⁴⁰ Alex Robertson in a 1969 article considers the funding of law libraries by the British Columbia foundation as a "questionable" proposition since law libraries are perceived to benefit mainly lawyers themselves.⁴¹ There are definitely risks incurred by both the Law Society and the Foundation if the society continues to be massively dependent on the Foundation for library funding. The Foundation risks being perceived primarily as a source of funding for lawyers rather than an instrument for public good; the Law Society risks being dependent on a volatile and uncertain source of funding.

NATIONAL ASSOCIATION The lack of an active national law foundation association in Canada has produced some problems. The annual meeting of law foundation presidents and executive directors has been ineffective in producing information in a format and to an extent that it is useful to individual provincial directors. At the August 1986 meeting only seven foundations were

³⁸L.A. Dyer & E. Veitch, *A Study on the Practice of Law in New Brunswick*, May 1984 at 32.

³⁹Barristers' Society of New Brunswick, "Submission to the New Brunswick Law Foundation for Funds for Law Libraries", 1986-87, 1 April 1986.

⁴⁰"Law Foundations on the Pacific Rim," *supra*, note 3 at 15.

⁴¹"The Law Foundation", *supra*, note 6 at 265.

represented.⁴² There is no centralized analysis and comparison from province to province, such as that provided by the IOLTA Clearing House in the U.S. (see Appendix E). Thus directors do not have a data base readily available if they wish to compare their granting policies with those of other provinces. In addition, organizations such as the Canadian Law Information Council, which annually apply for funding from all Canadian law foundations, must do so foundation by foundation, duplicating much time and effort.

At the 1986 meeting of the Association of Canadian Law Foundations, Saskatchewan recommended by written proposal that:

- national organizations should send applications to a central clearinghouse
- grants should not be made conditional on other Foundations participation, and
- a national committee with representatives from each Foundation should be formed to view applications.⁴³

Although this proposal was not adopted per se, it was agreed that national proposals would go through the Alberta Foundation on a trial basis and that Alberta would forward the application to other foundations to review and report back.⁴⁴

COMPUTERIZATION British Columbia's 1980 annual report stated that "it is not feasible, as a practical economic matter, to allocate the interest accrued among the clients whose monies are in such account".⁴⁵ With the advent of computerized banking it is now feasible to determine precisely how much interest belongs to each client with money in a mixed trust account. With increased computerization in law offices it may become easier (and thus cheaper) to credit each client with the interest, to the point where the threshold of interest earned exceeding costs becomes much lower. Indeed, an innovative proposal made by a savings and trust company to a provincial law society in 1986 allows for daily interest at competitive rates to be paid on separate trust accounts of any size with very little administrative work on the part of the lawyer.⁴⁶ Although legislation now requires that the interest on mixed trust accounts be paid to the law foundations, there is a question whether this is proper where interest earned exceeds the cost of crediting it to the client.

Computerization can also be expected to have a major impact on the cost of operating law libraries. Students at the law schools are being trained in computer searches and will, as lawyers, expect to have this facility available to them. Computer facilities will ultimately be desirable in all nine Law Society libraries in New Brunswick. The quality of legal data bases is improving and the extent of the material covered is increasing. When this is combined with improved information transfer, the very nature of law libraries and legal

⁴²Minutes of the meeting of the Canadian Law Foundation Association, Edmonton, Alberta, 20 August 1986, at xvi.

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵*The Law Foundation of British Columbia, 1980.*

⁴⁶G.E. Aboussaly, General Manager, Principal Savings and Trust Company, Edmonton, Alberta, to L. Collins, Executive Director, Newfoundland Law Society, 25 June 1986.

research can be expected to change dramatically.⁴⁷

INTEREST CALCULATION The recent change by the banks in the method of calculating interest (from minimum monthly balance to average monthly balance) is expected to be as much as double the Law Foundation's revenues. This could produce revenues which far exceed the current level of granting. One cannot, however, ignore the current rather low level of interest rates. Since the interest rate to the foundations is now prime minus 5%, every drop in rate correspondingly reduces the rate received by the Foundation. It is, therefore, difficult to anticipate future revenues with exactitude, and a significant degree of volatility seems inevitable. Hence the wisdom as well as the practical necessity of New Brunswick's policy of spending only the previous year's net revenue plus any accumulated surplus.⁴⁸ When this interest volatility is combined with changes in the banking system which may limit the amounts held in mixed trust accounts, it becomes important for foundations to avoid establishing dependent or long-term relationships from which disengagement would be ruinous or disruptive for the beneficiaries.

INCREASED DEMAND As governments cut back and attempt to balance budgets, law foundations may see increased demand both from government agencies and from those who have traditionally received funding from government. In British Columbia, where the provincial government began seriously wrestling with its deficit several years ago, the foundation in its 1984 report noted an increase in grants as a result of "a greater need experienced by many organizations whose alternative funding has been reduced or eliminated since 1980".⁴⁹

COMPOSITION AND STRUCTURE OF THE BOARD The board of the N.B. Law Foundation has always consisted of two non-lawyers and five lawyers. In addition, the secretary-treasurer has also been a lawyer. There has been criticism of this heavy weighting in favour of the legal profession, although it does not differ significantly from the example of other provinces. As well, some board members have repeatedly been reappointed. Although it can be argued, especially in the developmental years and with only part-time support staff, that continuity on the board was essential, both of these matters should be re-examined with a view to the "public" good.

Concluding Observations

Canada was a pioneer in law foundation development and is used as an example in the United States, where law foundations were established only in the 1980s (see Appendix E). Foundations have developed into established participants in the legal culture of their provinces. The New Brunswick Law Foundation, like law foundations around the common law world, has made a major

⁴⁷Interview with M. McGuire, Reference Librarian, University of New Brunswick Law School, Fredericton (31 July 1986).

⁴⁸*Supra*, note 42, at vi.

⁴⁹*The Law Foundation of British Columbia Thirteenth Annual Report for the Year ended Thirty First of December Nineteen Hundred and Eighty Four* at 1.

contribution toward improving the quality of legal services and legal information available to the citizens of the province. No doubt as policies and procedures evolved errors of both commission and omission occurred. However, as the secretary of the Laidlaw Foundation said when reviewing her thirty years' experience in administering that foundation, "It takes a long time to learn how to give away money".⁵⁰

CAROL E. A. LOUGHREY*

⁵⁰"Future Priorities and Procedures", *supra*, note 35 at 6.

*Of the Faculty of Administration, University of New Brunswick; Vice-Chair, New Brunswick Law Foundation

Appendix A

New Brunswick Law Foundation Board Members
1975-1987

Bingham, George J.	1975-1981	Chair, 1975-1981
Chiasson, J. George	1975-1979	
Gregory, Gordon F. ¹	1975-Jan. 1983	
Hanson, Horace A.	1975-1983	
LePage, Paul ²	1975-1977	
McKelvey, E. Neil	1975-1978	
Balch, Nellie ²	1975-1980	Vice-Chair, 1975-80
Vincent, Albert ²	1977-1979	
Whitcomb, J. Ian	1979-	Chair, 1981-
Bell, Robert ²	1979-	Vice-Chair, 1980-81
Savoie, Roger	1979-1981	
Loughrey, Carol ²	1980-	Vice-Chair, 1981-
Tremblay, Pierre	1981-	
Michaud, Joseph	1981-1983	
Athey, Barry ¹	Jan. 1983-	
Graser, Weldon	1983-	
McLellan, Hugh	1983-1985	
Lockyer, James	1985-	

¹Representing the Minister of Justice

²Appointments by the Minister of Justice (all non-lawyers)

Appendix B
New Brunswick Law Foundation
Summary of Activities
1 November 1975 to 30 April 1986

Period	Grants Paid	Funds Designated for Scholarship Trust	Administration Costs	Revenue from Trust Funds	Interest Earned
1 Nov. 1975 to 31 May 1976	none		\$ 7,588	\$ 43,888	\$ 330
To 31 May 1977	\$ 98,893		10,973	115,986	4,743
31 May 1977 to 30 April 1978*	74,600		11,507	157,186	3,832
To 30 April 1979	67,176		11,688	168,169	12,066
1980	190,046		16,557	164,663	21,285
1981	253,503		21,956	415,577	26,414
1982	223,031		25,939	512,199	80,808
1983	377,370	\$250,000	24,456	360,653	85,504
1984	243,941	150,000	17,917	273,559	55,260
1985	312,901		18,337	330,946	74,647
1986	261,754	100,000	23,234	407,280	54,511
Totals	\$2,103,215	\$500,000	\$190,152	\$2,950,106	\$419,400

*Note change of year end

Source: Annual Reports, New Brunswick Law Foundation

Appendix C
New Brunswick Law Foundation
Schedule of Grants
November 1976 to April 1986

	30 April 1986	30 April 1985	30 April 1984	30 April 1983	30 April 1982	30 April 1981	30 April 1980	30 April 1979	30 April 1978	31 May 1977	Total
The Law Society of N.B.	\$137,372	\$162,528	\$129,550	\$167,379	\$131,050	\$114,800	\$90,700	\$60,000	\$53,000	\$96,000	\$1,142,379
—Law Libraries			2,000	1,037							\$3,037
—Revision of Materials				21,967							\$21,967
—Bar Admission Course		1,500	2,000								\$3,500
—Survey of the Profession		44,500	13,000								\$70,000
—Limitations and Time Period Manual	12,500										\$12,500
—Continuing Legal Education											
—Rules Committee											
—Rules Revision				5,030	15,744	93,143	65,646				\$174,533
—Project follow-up					22,637						\$22,637
—Bicentennial Committee		10,000									\$10,000
—Future of Legal Education and Practice of Law		6,220									\$6,220
Public Legal Information Service, Inc.			4,500	23,000	20,000	4,800	15,000	5,000	15,100		\$87,400
—Services		4,500									\$4,500
—Needs Assessment Project	1,803	4,599									\$6,402
—N.B. Legal History Project											
University of New Brunswick											
—Law Library											
—Material Acquisitions			10,000	15,000							\$40,000
—Computer Service Centre			4,246	13,287	10,000						\$27,533
—Law Journal			4,600	4,000	4,000						\$33,050
—Faculty of Administration	4,000	3,450		15,999		6,000	3,500		3,500		\$15,999
—Moot Court	3,883	4,320	575	2,300	1,600						\$12,678
—Scholarships	15,000	14,500	15,000	15,000							\$59,500
—Bursaries	9,000	9,500	9,000	9,000							\$36,500
—Dean's Emergency Fund	2,000			1,000							\$3,000
—Travel Grant - Dean Veitch				3,000							\$3,000
—Law School Advisory Committee			1,069								\$1,069
—Faculty of Law											
—Lecture Series		1,014					7,200				\$7,200

Appendix C (continued)

	30 April 1986	30 April 1985	30 April 1984	30 April 1983	30 April 1982	30 April 1981	30 April 1980	30 April 1979	30 April 1978	31 May 1977	Total
International Law Association				2,000							\$2,000
Legal Education Program								176			\$176
Legal Interpretation for the Deaf —Workshop Travel Grant		742									\$742
Liens and Priorities Manual	1,400										\$1,400
National Association of Women and the Law	300										\$300
Postgraduate Scholarship - D.F.E. Banks	7,500										\$7,500
Public Legal Education Centre Radio & Television News Directors Assoc.	13,334										\$13,334
—Media and the Law Seminar				979							\$979
Saint John Regional Hospital —Carl Trask Library	1,695	1,590	1,401	1,844							\$6,530
Special Committee on Law Libraries				1,123						433	\$1,123 \$433
Young Lawyers Section											
Total for the Period	\$261,754	\$312,901	\$243,941	\$377,370	\$223,031	\$253,503	\$190,046	\$67,176	\$74,600	\$98,893	\$2,103,215
Number of Organizations Assisted	22	21	21	29	10	7	9	4	5	3	57

Source: Annual audited financial statements of the New Brunswick Law Foundation

Appendix D
Implications of Supporting Legal Aid at the
Rate of 75% of Revenue

	A	B	C	D	E	F
	Legal Aid Disbursements ¹ Net of Expected Recoveries From the Federal Government ¹	Interest on Trust Accounts ²	75% of Interest on Trust Accounts (75% of B)	Remaining Available for Distribution (B-C)	Paid to Law Society Libraries ³	Paid to Non-Library ²
1983	\$1,730,163	\$360,653	\$270,490	\$ 90,163	\$167,379	\$209,991
1984	1,428,688	273,559	205,169	68,390	129,550	114,391
1985	1,102,923	330,946	248,210	82,736	162,528	150,373
Totals	\$4,261,774		\$723,869	\$241,289	\$459,457	\$474,755

¹Legal Aid New Brunswick annual reports

²New Brunswick Law Foundation financial statements

Appendix E

Iolta

The Law Foundation organizations in the U.S. are called IOLTA which is the acronym for "Interest on Lawyers Trust Accounts", although individual state programs may use the term "Foundation" in their names: *Iolta Update*, Winter 1985 and Summer 1986 (Miami, FL: National Iolta Clearinghouse). The first U.S. foundation began in 1981 in Florida. By the summer of 1986 the National Iolta Clearinghouse was reporting forty-two approved Iolta programs with thirty-three of them operational (see accompanying table). Only five of the states had mandatory programs. Mandatory Iolta programs have been challenged in the courts in the U.S. but the challenge has been unsuccessful.

The Florida Justice Institute Inc. has established an information service called the "National Iolta Clearinghouse". It prepares a quarterly newsletter called *Iolta Update* which reports on happenings related to Iolta programs throughout the country. No similar organization or publication is available in Canada. In 1986 the American Bar Association's president announced formation of an ABA Iolta Commission, which is expected to assume the duties of the Clearinghouse. This commission will provide technical assistance and information dissemination for a nationally co-ordinated effort. Because such a large proportion of the American Iolta programs are voluntary, major effort is expended to recruit attorneys. This is not a problem in Canada, which has mandatory programs.

Appendix E (continued)
Status of Operational Iolta Programs
(15 June 1986)

Jurisdiction/ Implementation Date	Type Program/ Eligible Attorney Participation	Interest Income Received	Amount Distributed for Legal Services to Poor
FLORIDA 1981	Voluntary 4,161 (21%)	\$10,386,000 to date 3,093,529 last fiscal year 278,000 monthly	\$ 6,027,800 to date 2,275,000 in 1985
NEW HAMPSHIRE 1983	Voluntary 820 (49%)	751,300 to date 277,304 last fiscal year 47,882 monthly	606,759 to date 158,437 in 1985
CALIFORNIA 1983	Mandatory 50,000	30,300,000 to date 12,900,000 in 1985 1.1 million monthly	17,400,000 to date 10,500,000 in 1985
MARYLAND 1983	Voluntary 2,561 (46%)	1,921,000 to date 743,181 last fiscal year 70,000 monthly	1,351,384 to date 1,044,884 last fiscal year
COLORADO 1983	Voluntary 2,220 (25%)	700,000 to date 345,000 in 1985 36,000 monthly	382,500 to date 175,000 in 1985
DELAWARE 1983	Voluntary (Opt-Out) 660 (65%)	1,000,000 to date 400,000 last fiscal year 36,000 monthly	653,000 to date 350,000 last fiscal year
MINNESOTA 1983	Mandatory 12,000	3,793,000 to date 1,425,830 last fiscal year 110,700 monthly	2,151,935 to date 1,221,550 last grant year
OREGON 1983	Voluntary 1,780 (34%)	714,196 to date 355,787 in 1985 38,500 monthly	308,000 to date 200,000 in 1985
VIRGINIA 1983	Voluntary 1,752 (20%)	1,504,827 to date 663,834 last fiscal year 75,000 monthly	564,000 to date 432,000 last grant year
ILLINOIS 1983	Voluntary 4,440 (21%)	896,400 to date 400,119 last fiscal year 49,900 monthly	306,000 to date 206,000 last grant year
IDAHO 1984	Voluntary 308 (16%)	165,000 to date 72,444 last fiscal year 9,000 monthly	81,000 to date 25,000 last grant year
OKLAHOMA 1984	Voluntary 1,100 (24%)	251,077 to date 143,000 last fiscal year 15,500 monthly	75,000 first grant year
NORTH CAROLINA 1984	Voluntary 1,650 (21%)	1,291,703 to date 767,258 in 1985 79,000 monthly	992,587 to date 567,000 last grant year
UTAH 1984	Voluntary (Opt-Out) 150 firms (16%)	180,000 to date 109,607 in 1985 10,000 monthly	50,000 first grant year
VERMONT 1984	Voluntary 230 (17%)	77,262 to date 21,882 last fiscal year 2,000 monthly	20,000 to date
ARIZONA 1984	Mandatory 4,550	1,592,481 to date 988,000 in 1985 103,000 monthly	1,012,604 to date 987,667 for 1986

Appendix E (continued)

Jurisdiction/ Implementation Date	Type Program/ Eligible Attorney Participation	Interest Income Received	Amount Distributed for Legal Services to Poor
KANSAS 1984	Voluntary 413 (15%)	44,800 to date 26,000 last fiscal year 4,000 monthly	25,200 to date 20,800 last fiscal year
NEW YORK 1985	Voluntary 7,500 (12%)	400,000 to date 32,000 monthly	
RHODE ISLAND 1985	Voluntary (Opt-Out) 650 (40%)	430,000 to date 40,000 monthly	185,211 first grant year
WASHINGTON 1985	Mandatory 8,000 +	2,567,000 to date 1,694,697 last fiscal year 185,600 monthly	799,000 first grant year
SOUTH DAKOTA 1985	Voluntary 277 (31%)	55,398 to date 7,452 monthly	2,000 to date
NEBRASKA 1985	Voluntary 1,017 (42%)	55,536 to date 28,400 last fiscal year 10,400 monthly	
NEVADA 1985	Voluntary 335 (15%)	60,000 to date 5,000 monthly	
IOWA 1985	Mandatory 3,800	600,300 first year 58,000 monthly	215,000 first grant year
OHIO 1985	Mandatory 19,306 (91%)	1,779,300 to date 206,000 monthly	
HAWAII 1985	Voluntary 725 (34%)	75,000 to date 15,000 last fiscal year 12,000 monthly	
NEW MEXICO 1985	Voluntary 787 (39%)	52,000 first 9 months 8,000 monthly	
MISSOURI 1985	Voluntary 2,650 (29%)	80,000 to date 10,000 last fiscal year 15,000 monthly	
TEXAS 1985	Voluntary 3,610 (14%)	141,000 first 8 months 22,000 monthly	
MISSISSIPPI 1985	Voluntary 675 (20%)	44,000 first 7 months 8,000 monthly	
GEORGIA 1985	Voluntary 58 (.04%)	20,000 first 7 months 3,500 monthly	
DISTRICT OF COLUMBIA 1986	Voluntary (Opt-Out) (no figures out)	125,000 first 6 months 25,000 monthly	
MONTANA 1986	Voluntary (Opt-Out) 266 (76%)	1,500 first 4 months	
CONNECTICUT 1986	Voluntary 96 (1%)		
TOTALS		\$62,053,080	\$33,133,980

Source: *Iolta Update*, Summer 1986 (Miami, FL: National Iolta Clearinghouse) at 10-11.