



Meet Trusted Counsel

« Nigel P. Kent, partner at Clark Wilson LLP, and chair of the firm's Insurance Group

A partner at Clark Wilson LLP since 1991, Nigel Kent heads up the firm's Insurance Litigation practice group. With decades of experience, he spoke to *Canadian Insurance* about his career and what he loves about this industry.

Q If you had three minutes to describe what you do (the elevator pitch) how would you describe your position?

I specialize in legal issues related to the insurance industry. I act for insurance companies defending casualty claims against their insureds or enforcing denials of coverage and defending bad faith claims. I help insurers draft policy wording. I represent brokers defending professional disciplinary matters before the Insurance Council and also giving general legal advice on coverage interpretations, contract issues and other business transactions. I also represent insureds in (carefully selected) coverage enforcement claims against insurers who have, in my opinion, wrongly denied coverage under policies.

In addition to all the legal work, I do quite a bit of teaching, conduct five or six seminars a year for various brokers, adjusters,

lawyers, and organizations, and publish articles on insurance law issues.

Q How did you get involved in the P&C industry?

When lawyers start out they don't know anything and most don't even know what they want to do. They join law firms with vague ideas. After graduating from law school at Dalhousie in Nova Scotia I joined a firm, now called Parlee McLaws, in Alberta. The firm just happened to be one of the premier insurance law firms in that province. So it was more by coincidence than design that I was introduced to insurance litigation. Right away I really liked it... Still do, after almost 30 years.

Q How has the business of insurance in Canada changed?

The need for insurance hasn't changed much. Personal injury, property damage, professional E&O,



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business disputes all happen today just as they did back when I started in 1980, although perhaps with more frequency and complexity.

What has changed for me personally is that at this stage of my career I tend to handle much more sophisticated and complex problems, often involving a lot of money. But when I started I was like every other junior—no clients of my own, handling a \$5,000 whipper case here and there, and assigned to assist other lawyers' files.

The more senior and more experienced I became, the larger the case files.

What has not changed is the importance relationships have in this business.

Commercial litigation tends to be a one-off. But working for insurance companies, who are institutional consumers of litigation services, you begin to do repeat business. And through repeat business you develop relationships. Agents will call lawyers looking for assistance; you begin to know the claims examiners and often the two of you will grow

[in your respective careers] together. I've had files with some people for more than 25 years.

Within the insurance industry itself, lots of things have changed, such as:

- a great deal of consolidation in underwriters, brokers and adjusters
- much more competition at every level
- many more specialists and niche areas
- increased regulatory scrutiny and much more protocol, transparency and disclosure

« But technology also comes with a cost: these days we are bombarded with endless amounts of information, much of it unimportant.

- infinitely more professional these days (i.e., no more boozy lunches, “deals cut on the back of a coaster,” etc.)
- amazing changes in technology in relation to operations and communication.

Q How have these changes impacted you?

Technology can do amazing things for you, especially in

relation to research, administration and communication. But technology also comes with a cost: These days we are bombarded with endless amounts of information, much of it unimportant. BlackBerrys, e-mail and other forms of instantaneous communication mean you are always accessible, always on the job. Everyone in the business is now prone to electronic ADD. You often see speedy responses instead of thoughtful ones.

Relationships, which in my opinion are what the insurance business is all about, whether it's between brokers and underwriters, or lawyers and claims folk, have become depersonalized. People now send e-mails even though the target of their communication is just down the hallway or down the street. Corporate managers with MBAs treat

the people who are crucial to their success as commoditized service providers instead of trusted advisors and business partners.

Q Do global trends impact the practice of insurance law? How?

There will always be a need for insurance and where there is insurance there will always be insurance claims.

The recent economic meltdown sees many formerly high-flying M&A or corporate finance lawyers sitting idle while insurance practitioners keep chugging along, albeit perhaps at lower rates.

The meltdown also spawns all sorts of litigation and claims on insurance—not so good if you're an underwriter, but not so bad if you're an insurance litigator.

Q How will the recent Ontario case, *Staebler*,

Insurance Geek

On a more personal note: what attribute or interesting detail about yourself do you think people would find intriguing?

I don't think there is much about me that people would find particularly intriguing. I have an accent which folks can't place because I'm half English and half Newfie and have lived all over the place. The eyebrows go up sometimes when people learn that even though I'm in my 50's I still play rugby every weekend—it's pretty pathetic “old boys” rugby but we still try to kick the crap out of each other from time to time. The guys on the team who see me quaffing beer and cussing a blue streak after the game probably don't realize that by day I am a real insurance coverage geek.



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impact the industry?

The *Staebler* case is really nothing new and is now, perhaps, eclipsed by the very recent judgement of the Supreme Court of Canada in *Shafron v. KRG Insurance Brokers* dealing with the "reach" and enforceability of restrictive covenants in the insurance brokerage industry. Our firm actually argued the case on behalf of the successful appellant. The Supreme Court had last issued a judgment on restrictive covenants in employment agreements over 30 years ago (another insurance case, *Elsley v. J.G. Collins Insurance*) when it ruled that

restrictive covenants will only be enforceable if they are reasonable. *Staebler* emphasised the important distinction between what are called "non-solicitation" and "non-competition" clauses: so long as non-solicitation clauses are properly framed in terms of reasonable time periods and geographical limitations, they will usually be enforceable. Non-competition clauses, on the other hand, will only be enforceable in exceptional circumstances. In *Staebler*, and also in *Shafron*, one of the major problems was that the clauses were too broad and contained inadequate geo-

graphical limitation, making them unenforceable. Brokers obviously have legitimate business interests to protect. This might sound like a plug for some legal work, but I can't emphasize enough that brokers must get proper legal advice from experienced employment lawyers to ensure the restrictive covenants in their employment agreements are actually enforceable as a matter of law.

Q Can you offer on the insurance-to-value debate?
Insuring to value came to the forefront of the industry in B.C. as a result of major Okanagan fire losses a few

years ago. Insureds, brokers and underwriters all came to realize that stated values and policy limits were often 20%, 30% or even 40% below the actual cost of repairs. Also, B.C. has an enormous amount of condominium complexes and in this province the *Strata Property Act* makes it mandatory for the complex to be insured on a full replacement cost basis. Strata council members who don't comply run the risk of significant liability and, what's more—although 95% of them don't know this—their E&O coverage under the standard strata policy expressly excludes coverage



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Proedge Seminar – Directors' and Officers' Liability Insurance March 6

Proedge Seminar – Occupiers' Liability April 16

Proedge Seminar – Third Party Downtime Claims May 21

Southwestern Ontario

Windsor – London Knights vs Windsor Spitfires March 8

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Toronto Maple Leafs vs Buffalo Sabres – bus trip to Buffalo March 27

Detroit Red Wings vs Chicago Blackhawks – bus trip to Detroit April 11

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Rowan Saunders
PRESIDENT & CEO
RSA CANADA

The Board of Directors of Insurance Bureau of Canada (IBC) is pleased to announce the appointment of Rowan Saunders as Chair of the Board.

Rowan Saunders was appointed to the position of President & CEO of RSA Canada on September 1, 2003 and is a member of the Canadian Board of Directors.

Prior to his current role, he was Vice President, Personal Insurance for RSA, and also held the position of Vice President, Western Assurance Co., an Ontario-focused niche insurer.

Mr. Saunders was previously President, Agilon Financial, an affiliated company of RSA Canada. In this role, he was responsible for the company's strategic development, operations, and overall financial performance.

Since joining RSA in 1987, Mr. Saunders has held progressive leadership positions in the areas of underwriting, marketing, sales and financial planning.

He is a chair of IBC's Governance Improvement Committee, a member of the National Auto Insurance Strategic Committee and sits on the board of Codan, a Scandinavian insurance group. He also serves on the Board of Directors of the Institute for Catastrophic Loss Reduction. He is also a member of the Young Presidents' Organization.

A native of South Africa, Mr. Saunders has a Bachelor of Arts degree from York University, Fellowship from the Insurance Institute of Canada, and a Canadian Risk Management designation.

Insurance Bureau of Canada is the national industry association representing Canada's private home, car and business insurers. Its member companies represent nearly 95% of the property and casualty (P&C) insurance market in Canada. The P&C insurance industry employs over 110,000 Canadians, pays more than \$6 billion in taxes to the federal, provincial and municipal governments, and has a total premium base of \$38 billion.



for failure to obtain proper insurance. Insurers can protect themselves by way of policy limits, margins clauses, co-insurance provisions and the like but brokers and particularly insureds need to be much more diligent about obtaining annual appraisals and accurate valuations.

Q What case stands out for you—and why?

I love doing insurance law because of the wide variety of interesting claims. I love getting into a courtroom to argue a case but I also really enjoy difficult and intellectually challenging coverage problems. I guess I've become known as a bit of a coverage specialist and I do both coverage enforcement work for insureds as well as coverage analyses for insurers. [Yet,] there is no one case that I consider to be a crowning achievement. Sure, I can boast about how I recently defended a \$300 million intellectual property theft case against a university, which was dismissed with my client being awarded \$1 million dollars in solicitor-client costs, but I get just as much enjoyment teaching my insurance law class at Capilano University, or putting on a seminar, or answering the day-to-day queries from a broker client about a potential liability issue or some arcane coverage interpretation point.

Q What one aspect of your profession would you change?

I really dislike the commoditization of professional services which has occurred at many insurance companies. I understand the need for reporting protocols and

efficiencies but I hate to think of myself as a "service provider" contracted by some "procurement department" whose bills will be scrutinized for fraud by some external auditing company called (insultingly) "legalgard"—all of which is unilaterally imposed but dressed up in terms such as "partnership." This is a relationship-based industry. Thoughtful analysis and experienced counsel are coming to be seriously undervalued in a quest for perceived competitiveness.

Q What suggestion would you offer to an aspiring insurance lawyer?

There are two separate elements to being a successful insurance lawyer, neither taught in law school. First, you have to develop real expertise. Quite apart from learning your trade (drafting pleadings, conducting cross-examinations, etc.) you have to have complete mastery of the legal (and business) issues related to your niche. Reading, writing and teaching, in addition to all that legal work, are essential. Second, you must understand this is relationship business. Don't work for people you don't like—it's not worth the grief. Get to know your clients. Know their business and understand their concerns. Listen, don't talk. You must genuinely care and be interested—clients know when you are genuine. If you can pull both of these elements together, and add a bit of personality, you won't be a service provider but rather a trusted advisor whose counsel is actively sought out and greatly valued. ☺