

## MINUTES OF CONVOCATION

Friday, 28<sup>th</sup> May, 2004  
9:00 a.m.

## PRESENT:

The Treasurer (Frank N. Marrocco, Q.C.), Alexander, Backhouse, Banack, Bobesich, Bourque, Boyd, Carpenter-Gunn, Caskey, Chahbar (by telephone), Cherniak, Copeland, Curtis, Dickson, Doyle, Dray, Eber, Elliott, Filion, Feinstein, Finkelstein, Finlayson, Gold (by telephone), Gotlib, Gottlieb, Harris, Heintzman, Hunter, Krishna, Lawrence, Legge, MacKenzie, Manes, Millar, Murphy, O'Brien, O'Donnell, Pattillo, Pawlitza, Porter, Potter, Robins, Ross, Ruby, Sandler, Silverstein, Simpson, Swaye, Topp, Wardlaw, Warkentin and Wright.

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Secretary: Katherine Corrick

The reporter was sworn.

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IN PUBLIC

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DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of April 22, 2004 were confirmed.

MOTION – ELECTION OF BENCHER

WHEREAS Todd Ducharme, who was elected from the Province of Ontario “A” Electoral Region (City of Toronto) on the basis of votes cast by electors residing in that electoral region, has been appointed a judge of the Superior Court of Justice; and

WHEREAS upon being appointed a judge of the Superior Court of Justice, Todd Ducharme became unable to continue in office as a bencher, thereby creating a vacancy in the office of bencher elected from the Province of Ontario “A” Electoral Region (City of Toronto) on the basis of votes cast by electors residing in that electoral region;

It was moved by Gavin MacKenzie, seconded by Heather Ross that under the authority contained in By-Law 5, Earl A. Cherniak, Q.C. having satisfied the requirements contained in subsections 49 (2), 49 (3) and 52 (1) of the By-Law, and having consented to the election in accordance with subsection 52 (2) of the By-Law, be elected by Convocation to fill the vacancy in the office of bencher elected from the Province of Ontario “A” Electoral Region (City of Toronto) on the basis of votes cast by electors residing in that electoral region.

Carried

WHEREAS Earl A. Cherniak, Q.C. who was elected from the Province of Ontario “A” Electoral Region (City of Toronto) on the basis of the votes cast by all electors, has been elected by Convocation to fill a vacancy in

the office of benchers elected from the Province of Ontario "A" Electoral Region (City of Toronto) on the basis of votes cast by electors residing in that electoral region; and

WHEREAS Earl A. Cherniak's election has created a vacancy in the number of benchers elected from the Province of Ontario "A" Electoral Region (City of Toronto) on the basis of the votes cast by all electors;

It was moved by Gavin MacKenzie, seconded by Heather Ross that under the authority contained in By-Law 5, Mark J. Sandler, having satisfied the requirements contained in subsections 50 (1), 50 (2) and 52 (1) of the By-Law and having consented to the election in accordance with subsection 52 (2) of the By-Law, be elected by Convocation as benchers to fill the vacancy in the number of benchers elected from the Province of Ontario "A" Electoral Region (City of Toronto) on the basis of the votes cast by all electors.

Carried

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REPORT OF THE EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES

Re: Model Policy on Sexual Orientation and Gender Identity

Equity and Aboriginal Issues Committee/  
Comité sur l'équité et les affaires autochtones  
May 28, 2004

Report to Convocation

Purpose of Report:      Decision  
   Information

Prepared by the Equity Initiatives Department  
(Josée Bouchard: 416-947-3984)

SEXUAL ORIENTATION AND GENDER IDENTITY:  
CREATING AN INCLUSIVE WORK ENVIRONMENT  
A MODEL POLICY FOR LAW FIRMS AND  
OTHER ORGANIZATIONS

Request to Convocation

9. That Convocation approve the document entitled *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment – A Model Policy for Law Firms and Other Organizations* (Appendix 3).

Summary of the Issue

10. Recommendation 5 of the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* states that the Law Society should “develop and maintain the tools to function as a resource to the profession on the issue of diversity and equity.” In the last decade, the Law Society has effectively implemented this recommendation by developing a number of programs and initiatives to promote equity and diversity. Amongst those initiatives, the Law Society has adopted a number of model policies to promote equality within the legal profession.
11. The model policy for law firms and other organizations entitled *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment* (the Model Policy) has been developed to complement other Law Society model policies, including the *Guide to Developing a Policy Regarding Workplace Equity in Law Firms*, the *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*, the *Guide to Developing a Policy Regarding Flexible Work Arrangements* and the *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms*.
12. The legal recognition of equality rights for gay, lesbian, bisexual, transgender and Two-Spirited individuals has provided the impetus to develop a Model Policy for law firms and other organizations. The Model Policy aims to ensure that equality rights for those individuals are recognized and applied in the workplace by the provision of employment and pension benefits and in the social culture of the firm.

13. In drafting the Model Policy, the Law Society consulted with a number of individuals and organizations with the expertise and knowledge of gay, lesbian, bisexual, transgender and Two-Spirited communities. The Model Policy has been revised to integrate the constructive feedback provided by communities and stakeholders.

## THE REPORT

### Terms of Reference/Committee Process

14. The Committee met on May 14, 2004. Committee members participating were Joanne St. Lewis (Chair), Derry Millar (Vice-Chair), Marion Boyd, Mary Louise Dickson and Dr. Sy Eber. Invited members participating were Senka Dukovich (Chair of the Equity Advisory Group (EAG)), Katherine Hensel (Co-Chair of Rotiio> taties), Milé Komlen (member of EAG) and Sonia Ouellet (Executive Director of Association des juristes d'expression française de l'Ontario (AJEFO)). Staff members in attendance were Malcolm Heins (Chief Executive Officer), Josée Bouchard and AK Dionne.
15. The Committee is reporting on the following matters:

#### Policy - For Decision

- Notice to the Profession – Complaints about CanLaw Lawyer Referral Service
- Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment – A Model Policy for Law Firms and Other Organizations

#### Information

- Disability Working Group – Proposed Consultation
- Progress Report – Mentoring Program
- Upcoming Public Education Events

### SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT A MODEL POLICY FOR LAW FIRMS AND OTHER ORGANIZATIONS

### Background

37. Recommendation 5 of the *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*<sup>1</sup> states that the Law Society should “develop and maintain the tools to function as a resource to the profession on the issue of diversity and equity.” In the last decade, the Law Society has effectively implemented this recommendation by developing a number of programs and initiatives to promote equity and diversity. Amongst those initiatives, the Law Society has adopted a number of model policies to promote equality within the legal profession.
38. The model policy for law firms and other organizations entitled *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment* (the Model Policy), presented at Appendix 3, has been developed to complement other Law Society model policies, including the *Guide to Developing a Policy Regarding Workplace Equity in Law Firms*<sup>2</sup>, the *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*<sup>3</sup>, the *Guide to Developing a Policy Regarding Flexible Work Arrangements*<sup>4</sup> and the *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms*.<sup>5</sup>

<sup>1</sup> (Toronto: Law Society of Upper Canada, 1997).

<sup>2</sup> (Toronto: Law Society of Upper Canada, updated March 2003).

<sup>3</sup> (Toronto: Law Society of Upper Canada, 2001).

<sup>4</sup> (Toronto: Law Society of Upper Canada, updated March 2003).

<sup>5</sup> (Toronto: Law Society of Upper Canada, March 2002).

39. The Model Policy is designed to assist law firms in ensuring that employment and pension benefits are offered equally to those working at the firm without discrimination based on sexual orientation or gender identity. It is also meant to ensure that participation in the social culture of the firm is a viable option for all individuals working there and that the firm culture is inclusive of the gay, lesbian, bisexual, transgender and Two-Spirited cultures. It is hoped that the Model Policy will encourage law firms to become places where an individual's choice to keep confidential or to disclose information about his or her sexual orientation or gender identity neither results in discrimination or harassment nor detracts from either the individual's dignity and self-worth or value to the firm.

#### Legal Development

40. The realization of equality rights of gay, lesbian, bisexual, Two-Spirited and transgender individuals has been gradual, from the recognition of sexual orientation as a prohibited ground of discrimination in the Ontario *Human Rights Code* in 1986 to the legalization of same-sex marriages by the Court of Appeal for Ontario in 2003.
41. In 2002 and 2003 the Courts of Appeal for Ontario, British Columbia and Québec declared same-sex marriages valid. The Court of Appeal decisions recognized the substantive equality rights of gay and lesbian individuals in Canada and acknowledged that same-sex couples, whether married or living in common law relationships are worth of the same dignity, respect and legal recognition as that granted to their opposite-sex counterparts. This places a positive duty on employers to confer employment benefits in a non-discriminatory manner.
42. Recognition of rights for people whose gender identity differs from that assigned at birth is a relatively recent development in Canadian society. In the employment context in Ontario, the *Code* provides that every person has the right to equal treatment without discrimination because of sex, which includes gender identity. The Model Policy aims to increase the legal profession's understanding of the rights of transgender persons and recognizing the right to equality for transgender persons.
43. The legal recognition of equality rights for gay, lesbian, bisexual, transgender and Two-Spirited individuals has provided the impetus to develop a Model Policy for law firms and other organizations. The Model Policy aims to ensure that equality rights for those individuals are recognized and applied in the workplace by the provision of employment and pension benefits and in the social culture of the firm.

#### Consultation process

44. The Equity Advisory Group and the Equity Initiatives Department requested comments on the draft Model Policy from a number of organizations and individuals that have expertise in this area. Comments on the draft Model Policy were received from the following individuals:
- a. Cynthia Petersen, Discrimination and Harassment Counsel.
  - b. Chris Ellis, Co-Chair- Sexual Orientation and Gender Identity Committee (SOGIC) of the Ontario Bar Association (OBA).
  - c. Kyle Scanlon, 519 Church Street Community Centre.
  - d. Brad Berg, Blake, Cassells & Graydon LLP.
  - e. Andrew Pinto, Eberts Symes Street Pinto & Jull.
  - f. Laurie Arron, Director of Advocacy, Equality for Gays and Lesbians Everywhere (EGALE) Canada.
  - g. Professor Diana Majury, Carleton University, Department of Law.
45. The Equity Advisory Group and the Equity Initiatives Department made changes proposed by the Rotiio>taties Aboriginal Advisory Group to include Two-Spirited persons along with gay, lesbian, bisexual and transgender individuals. An employment law firm reviewed the model policy for its legal accuracy. The Model Policy was modified to reflect comments provided by stakeholders.
46. The Committee approved the Model Policy on May 13, 2004. It requests that Convocation consider and approve the Model Policy.

## Request to Convocation

47. That Convocation approve the document entitled *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment – A Model Policy for Law Firms and Other Organizations* (Appendix 3).

INFORMATION  
DISABILITY WORKING GROUP –  
PROPOSED CONSULTATION

48. In September 2004, Joanne St. Lewis, Chair of the Committee, created the Disability Working Group (the Working Group) to develop strategies to:
- a. Address barriers faced by law students and members of the profession with disabilities in accessing and being successful in the legal profession;
  - b. Increase the quality of legal services offered to clients with disabilities;
  - c. Ensure that the Law Society takes on a leadership role in providing high quality services to lawyers and clients with disabilities and in ensuring that its workplace accommodates the needs of persons with disabilities.
49. The following individuals are members of the Disability Working Group:
- a. Joanne St. Lewis (Chair, Bencher)
  - b. Thomas Heintzman (Interim Chair, Bencher)
  - c. Laurie Pattillo (Bencher)
  - d. Mojisola Akpata (member of EAG)
  - e. Martin Anderson (Barrister and Solicitor, Department of Justice)
  - f. Margherita Braccio (Barrister and Solicitor, Department of Justice)
  - g. Ena Chadha (Counsel, Legal Resource Centre for Persons with Disabilities -ARCH)
  - h. David Crocker (Barrister and Solicitor, Davis & Company)
  - i. Phyllis Gordon (Executive Director of ARCH and member of the Equity Advisory Group (EAG))
  - j. Milé Komlen (Employment Equity consultant at the CIBC and member of EAG)
  - k. Stefanie Marinich (Policy Advisor, Accessibility Advisory Council of Ontario)
  - l. Chris Montague (Senior Vice-President, Toronto Dominion Bank)
50. Josée Bouchard (Equity Advisor) provides staff support for the Working Group.
51. The Working Group met on January 12, 2004, March 11, 2004 and May 12, 2004.
52. On January 12, 2004, the Working Group identified that its priority would be to develop strategies to assist student members and recent calls to the bar in accessing and remaining in the legal profession.
53. Staff of the Law Society prepared a Working Document outlining:
- a. Available statistics about law students and lawyers with disabilities;
  - b. Law Society's initiatives in this area;
  - c. Relevant research and publications; and
  - d. Proposed strategies and best practices.
54. On March 11, 2004, the Working Group considered the Working Document and noted that there is little information about the demographics of the legal profession and the needs of members with disabilities.
55. The Working Group discussed strategies that could be developed by the Law Society, such as:
- a. Offer a mentoring program for students and members with disabilities;
  - b. Provide information to members with disabilities and employers about financial resources available in this area;
  - c. Provide practical advice to law firms on how to accommodate;

- d. Develop education programs for law firms;
  - e. Educate the Law Society about disability and accommodations;
  - f. Provide resources to law firms to assist in accommodation practices;
  - g. Provide the tools to assist students and members with disabilities in the recruitment process.
56. The Working Group decided that:
- a. The Equity and Diversity Mentorship Initiative of the Law Society should be reviewed and adapted to include a focus on mentoring for students and members with disabilities.
  - b. The Law Society should undertake a consultation with members with disabilities to determine what programs and initiatives could be developed to address barriers faced by members with disabilities.

#### PROGRESS REPORT – MENTORING PROGRAM

##### Background

57. The Equity and Diversity Mentorship Initiative reflects the Law Society's mandate to govern the legal profession in the public interest. The initiative is designed to help make the legal profession more representative of the communities it serves, and to promote access to justice.
58. The initiative encourages students, many from diverse backgrounds - including Aboriginal and Francophone students and students from equity-seeking communities - to consider law as a career. In addition, the initiative offers mentoring support to law school students, students-at-law and new calls to the bar to help them advance in the profession.

##### Mentor – Mentee Matching

59. The Law Society mentorship coordinator matches mentors with high school, university and law school students, students-at-law, and lawyers recently called to the bar. The mentors help their mentees gain a better understanding of the profession by:
- a. Offering academic and career advice;
  - b. Providing job-shadowing and co-op opportunities;
  - c. Giving advice and guidance on matters ranging from bar admissions and articling, a particular area of law, to career development;
  - d. Sharing their experiences and insights into the legal profession.
60. Since January 2004, 20 matches (established mentoring relationships) have been made. The following is a summary of the matches:

Mentee Background	Mentoring Advice Offered	Location
BAC student	Advice on BAC exam	Trenton
University graduate	Career in immigration law	Toronto
Lawyer (2003)	Career planning	Kitchener
Lawyer (2003)	Running a small practice	Lindsay
Lawyer (1991)	Advice on municipal law	Bancroft
High school student	Becoming a lawyer	Toronto
Lawyer (2002)	Statutory interpretation	Ottawa
Lawyer (2004)	Insight in criminal, immigration laws	Toronto
Lawyer (2002)	Family law	Oakville
University student	Becoming a lawyer	Sudbury
Lawyer (2003)	Corporate, real estate law	Oakville
High school student	Academic advice, career in law	Toronto
Lawyer (2002)	Career planning	Toronto
Foreign law graduate	Networking	Toronto
Lawyer (2000)	Career planning, networking	Toronto

61. The matches listed above are established mentoring relationships that are ongoing. There are currently five mentees who are waiting for a response from their mentors to have a first meeting.

#### Mentor Recruiting

62. Mentors are recruited through various avenues including advertising in the Ontario Reports, articles in the Ontario Lawyers Gazette, Law Society website promotion, and outreach with various sections of the bar and law firms. Mentors come from various backgrounds, different areas of practice, and numerous firms and organizations.
63. Currently, there are over 80 volunteer mentors who are officially registered as Law Society mentors. Ten lawyers have joined the program in 2004.
64. Mentors come from small and large firms, and from provincial and federal governments. Some are employed as in-house counsel in organizations and companies, and a handful are sole practitioners.
65. Mentors have indicated their experiences in the following areas of practice:
- a. Aboriginal law
  - b. Administrative law
  - c. Civil litigation
  - d. Constitutional law
  - e. Corporate/commercial law
  - f. Criminal law
  - g. Employment law
  - h. Family law
  - i. Human rights
  - j. Real estate law
  - k. Securities law
  - l. Tax law
66. Approximately one-third have self-identified as members of equity-seeking communities and members of lawyers' associations that promote equity and diversity in the legal profession.

#### UPCOMING PUBLIC EDUCATION EVENTS

67. The following are upcoming public education events:

TUESDAY, JUNE 1, 2004 – A DISABILITY LAW PRIMER

Celebration of National Access Awareness Week  
12:30 - 4:00 P.M. - CLE

Legal Education Program presented in Ottawa, at Reach Canada.

Presented in partnership with ARCH, Pro Bono Law Ontario, The Law Foundation Of Ontario and Reach Canada.

JUNE 3 – 5, 2004 – ANNUAL AJEFO CONVENTION

Hilton Hotel, Niagara Falls

Keynote speakers: The Honourable Michael J. Bryant, Attorney General, Minister Responsible for Native Affairs and Minister Responsible for Democratic Renewal.

The Honourable Madeleine Meilleur, Minister of Culture.

Treasurer Frank Marrocco, Law Society of Upper Canada.

Organized by AJEFO in partnership with the Law Society of Upper Canada and the University of Ottawa, Common Law, French Program.

WEDNESDAY, JUNE 9, 2004 – ABORIGINAL RIGHTS AND THE ROLE OF PUBLIC INQUIRIES

National Aboriginal Day Events

4:00 P.M. - Panel Discussion  
Convocation Hall

6:00 P.M. – Reception  
Convocation Hall

Presented in partnership with Aboriginal Legal Services of Toronto, the City of Toronto, the Association for Native Development in the Performing Arts, and Rotiio> taties Aboriginal Advisory Group.

THURSDAY, JUNE 24, 2004 – LEGAL ISSUES AFFECTING THE TRANSGENDER COMMUNITY

Pride Week Events

4:00 P.M. - Panel Discussion  
Lamont Lecture Hall

6:00 P.M. – Reception  
Convocation Hall  
Annual Reception to Celebrate Toronto Pride Week

Presented in partnership with SOGIC.

APPENDIX 3

THE LAW SOCIETY OF UPPER CANADA

SEXUAL ORIENTATION AND GENDER IDENTITY:  
CREATING AN INCLUSIVE WORK ENVIRONMENT

A MODEL POLICY FOR LAW FIRMS AND OTHER ORGANIZATIONS

May 28, 2004

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## INTRODUCTION

Law firms<sup>1</sup> recognize their responsibility under the *Ontario Human Rights Code* (the Code)<sup>2</sup> and the *Rules of Professional Conduct* (the Rules)<sup>3</sup> to provide a discrimination and harassment-free workplace. While overt acts of differential treatment may be less frequent than before the inclusion of protections in the *Code* and the *Rules*, lawyers who are gay, lesbian, bisexual, Two-Spirited or transgender continue to be apprehensive that deeply personal characteristics such as sexual orientation or gender identity may have serious consequences if expressed in the realm of their professional lives. Firm culture, which is often reflective of broader societal norms, typically assumes heterosexuality and birth-assigned sex to be the norm. Yet for gay, lesbian, bisexual, Two-Spirited and

<sup>1</sup> References to ‘law firms’ in this document also encompass other organizations such as legal clinics and non-profit organizations.

<sup>2</sup> *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>3</sup> *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

transgender individuals, expression of their sexual orientation or transgender status may not only be detrimental to their professional relationships with colleagues, but may also jeopardize their position and advancement within a firm. An individual's choice to openly express his or her own sexual orientation or gender identity is a statutorily protected right. Under the *Code* and the *Rules*, law firms have a positive obligation to develop a work environment that promotes respect for the personal characteristics of all individuals affiliated with the legal profession.

The Law Society of Upper Canada is committed to providing model workplace protocols that promote a discrimination and harassment-free workplace. This model policy is designed to assist law firms in fostering a work environment in which employment and pension benefits are conferred in a non-discriminatory manner and in which participation in the social culture of the firm is a viable option for all individuals working there. The Law Society of Upper Canada envisions that adoption and implementation of this policy will contribute to law firms becoming a place in which an individual's choice to keep confidential or to disclose information about his or her sexual orientation or gender identity neither results in discrimination or harassment nor detracts from either the individual's dignity and self-worth or value to the firm.

The document is divided into the following four parts:

- Part I – Background information including why law firms need written policies and information about the legal profession.
- Part II – How to effectively implement and review a policy.
- Part III – The model policy: a precedent for a policy that firms may adapt for their own use.
- Part IV – Outline of legal developments.

## PART I- BACKGROUND

### WHY LAW FIRMS NEED WRITTEN POLICIES

The Ontario Human Rights Commission has stated that “[t]he best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*.”<sup>4</sup> It is now well established that the adoption of effective policies and procedures to promote equity and diversity and the design and delivery of education programs for individuals working in law firms have the potential of limiting harm and consequently reducing liability of employers.<sup>5</sup>

It is advantageous to adopt written policies for a number of reasons:

1. Written policies encourage respect for the dignity of all individuals working at the law firm.
2. Written policies show that the law firm's management takes seriously its legal and professional obligations. They also minimize the risk of workplace harassment or discrimination and of harm to individuals working at the firm
3. Many firms provide benefits over and above those mandated by law but do so on an *ad hoc* basis. Relying on a discretionary system often causes concern among individuals working at the firm about whether decisions are being made on an even-handed, consistent basis. A written policy is indicative of a firm's commitment to transparency in the provision of employment and social benefits.
4. A written policy reflects the tenor of a firm's culture. It can signal to those working at the firm that inquiries about its policies and benefits are encouraged and may be made without risk of embarrassment.
5. Written policies on equity issues encourage respect for and acceptance of individuals from diverse groups, such as those protected under the *Code* and the *Rules*. In the context of employment, both the *Code* and the *Rules* protect against harassment and discrimination because of race, ancestry, place of origin, colour,

<sup>4</sup> *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41.

<sup>5</sup> For example, see *Ferguson v. Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B.C.H.R.T.).

ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, same-sex partnership status or disability.<sup>6</sup> The *Code* and the *Rules* also impose a duty to accommodate.

6. The existence of written policies allows the law firm to communicate its commitment to equity principles to people outside of the law firm, such as prospective recruits and clients. Written policies may also have value as a recruitment tool that serves to signal the firm's commitment to a discrimination and harassment-free workplace.
7. A carefully drafted written policy may reduce the necessity of an individual seeking external legal remedies, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.
8. Written policies may provide the necessary focus for education programs on preventing and responding to subtle or systemic workplace harassment and discrimination.

### THE LEGAL PROFESSION

In most professions, there is evidence that gay, lesbian, bisexual, Two-Spirited and transgender individuals experience barriers to equality. The legal profession is no exception. Studies undertaken by the Law Society of Upper Canada and other organizations have indicated that there is discrimination on the basis of sexual orientation and gender identity within the community and profession:

1. In 2000, as a result of a 1996 community consultation undertaken to review the social climate as related to gay, lesbian and bisexual individuals, the Ontario Human Rights Commission drafted a policy on discrimination and harassment because of sexual orientation.<sup>7</sup> The policy recognizes that the inclusion of sexual orientation as a prohibited ground in the *Code* does not guarantee equality. In spite of statutory protections, gay, lesbian, bisexual and Two-Spirited individuals continue to have their dignity and self-worth challenged by being subjected to discrimination and harassment on the basis of sexual orientation.
2. In 2001, the Law Society conducted a survey of students who had undergone articling recruitment for 2001-2002 to evaluate the frequency that firms asked inappropriate or discriminatory questions. Thirty percent of the students indicated a belief that their membership or association with a group influenced the questions asked during interviews. One-fifth of the respondents reported that they were asked questions and subjected to offensive remarks that constituted sexual harassment or discrimination on the basis of sex, marital status, socio-economic status and political affiliation among others.
3. The Discrimination and Harassment Counsel (DHC) Program was established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer. In her report to Convocation for the period of July 1 to December 31, 2003, the DHC noted that members of the profession used the service not only to report discrimination but also to make general inquiries about discrimination and harassment. Information was sought concerning a variety of employment rights and obligations, including those surrounding sex-reassignment surgery.<sup>8</sup> In 2003, approximately 5% of the complaints of discrimination within the mandate of the *DHC* were based on sexual orientation.<sup>9</sup>

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<sup>6</sup> While the *Code* does not specifically prohibit harassment on the ground of sexual orientation, the Ontario Human Rights Commission accepts such complaints as discrimination because of sexual orientation. See *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, January 11, 2000) at 9.

<sup>7</sup> *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, January 11, 2000).

<sup>8</sup> C. Peterson, *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada for the Period of July 1 to December 31, 2003* (Toronto: Law Society of Upper Canada, 2003) at 4.

<sup>9</sup> *Ibid.* at 15

4. In 2004, the Law Society of Alberta released the results of a study on bias and equity in Alberta's legal profession.<sup>10</sup> Eighty-eight percent of the gay, lesbian or bisexual lawyers and sixty-eight percent of the heterosexual lawyers who responded believed that there is discrimination on the basis of sexual orientation in the profession. In the five-year period preceding the survey, 40% of the gay, lesbian and bisexual respondents had experienced discrimination while seeking or during employment. In addition to experiencing bias in the courtroom, gay, lesbian and bisexual lawyers reported being subjected to discrimination in pay, quality of work assignments, rain-making opportunities, performance evaluations and exclusion from social events.
5. The Law Society of Alberta did not locate any Canadian studies on sexual orientation bias in the legal profession for the literature review section of the *Final Report on Equity and Diversity in Alberta's Legal Profession*.<sup>11</sup> However, the authors cited a number of American studies that support the finding of discrimination on the basis of sexual orientation in the profession.<sup>12</sup>

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality for gay, lesbian, bisexual, Two-Spirited and transgender individuals within the legal profession, in accordance with its mandate.

#### MODEL POLICIES DEVELOPED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies to promote equality within the legal profession. These include:

##### Guide to Developing a Policy Regarding Workplace Equity in Law Firms<sup>13</sup>

To assist law firms in meeting their obligation to avoid discrimination in employment practices, this guide outlines a model policy for the promotion of workplace equity. The guide includes reference to employment practice topics in the areas of recruitment, interviewing job candidates, hiring and promotion, the right to equal opportunities at work, professional development, accommodation, evaluation, mentors and compensation.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/policy1\\_fr.pdf](http://www.lsuc.on.ca/equity/pdf/policy1_fr.pdf)

##### Guide to Developing a Law Firm Policy Regarding Accommodation Requirements<sup>14</sup>

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<sup>10</sup> M. Cooper, J. Brockman & I. Hoffart, *Final Report on Equity and Diversity in Alberta's Legal Profession* (Calgary: Law Society of Alberta, 2004).

<sup>11</sup> *Ibid.*

<sup>12</sup> For example, see Judicial Council of California, *Sexual Orientation Fairness in the California Courts. Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Subcommittee* (Orange County, CA: Judicial Council of California, 2001); Lesbian and Gay Law Association of Greater New York, *LeGaL Report on Sexual Orientation Fairness in Second Circuit Courts* (New York: LeGaL, 1997) available at <http://www.le-gal.org>; King County Bar Association, *In Pursuit of Equality. The Final Report of the KCBA Task Force on Lesbian and Gay Issues in the Legal Profession* (Washington, DC: King County Bar Association, 1995), cited in Washington State Bar. "Trends and Issues Affecting Lesbians and Gays in the Legal Profession" (1999) 12 Washington State BarNews Online, available at <http://www.wsba.org/media/publications/barnews/archives/1999/dec-99diversity.htm>; Los Angeles County Bar Association, Committee on Sexual Orientation, *Report of the Committee on Sexual Orientation Bias* (Los Angeles, CA: County Bar Association, 1994).

<sup>13</sup> *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003).

<sup>14</sup> *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001).

The *Code* prohibits discrimination in services and employment on enumerated grounds and mandates employer accommodation of differences to the point of undue hardship. Based in part on the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*<sup>15</sup> and *Policy and Guidelines on Disability and the Duty to Accommodate*,<sup>16</sup> this document sets out legal duty to accommodate employees' creed and religious beliefs, disability, as well as gender and family status. Particularly practical is the section on model procedures for requesting and granting accommodation.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at <http://www.lsuc.on.ca/equity/pdf/policyaccommodation.pdf>

Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practices<sup>17</sup>

This document is a companion piece to the *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*. It includes a summary of best practices and a comprehensive legal analysis of the duty to accommodate.

Available on request from [equity@lsuc.on.ca](mailto:equity@lsuc.on.ca)

Guide to Developing a Policy Regarding Flexible Work Arrangements<sup>18</sup>

One means of fulfilling an employer's legal duty to accommodate employees with family responsibilities or disabilities is through the adoption of flexible work arrangements. This guide outlines various alternate work arrangements for both associates and partners of law firms in addition to outlining responses to the challenges presented by each option.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/policy2\\_fr.PDF](http://www.lsuc.on.ca/equity/pdf/policy2_fr.PDF)

Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms<sup>19</sup>

The Law Society published this document in 2002 to guide law firms in taking a proactive approach and having an effective complaints mechanism in place so that they, as employers, can limit their vicarious liability for discrimination and harassment in the workplace. The guide includes an overview of legal requirements, a discussion of policy and implementation issues, a sample model policy for law firms, and step by step complaints procedures for both medium/large and small law firms. Model forms are provided for convenience.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at [http://www.lsuc.on.ca/equity/pdf/modelharassment3\\_fr.pdf](http://www.lsuc.on.ca/equity/pdf/modelharassment3_fr.pdf)

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<sup>15</sup> *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996).

<sup>16</sup> *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, March 22, 2001).

<sup>17</sup> *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

<sup>18</sup> *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003).

<sup>19</sup> *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms* (Toronto: Law Society of Upper Canada, March 2002).

## PART II- EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY

### ESTABLISHING A DRAFTING COMMITTEE

The starting point is to establish a committee to draft the policy. The membership of the committee should be diverse. To the extent possible, the committee should be composed of partners and employees of both sexes and of differing age, ethnic origin, marital and partnership status, gender identity and sexual orientation. If there are lawyers or individuals in the law firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected individuals of the law firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the law firm. The composition of the committee is critical to the credibility of the process and the policies that are produced.

### DEVELOPING A POLICY

Committee members should educate themselves about the applicable law and become familiar with existing firm practices and policies that may be relevant.

A consultative process should be followed. It is essential that the committee is respectful of gay, lesbian, bisexual, Two-Spirited or transgender individuals' desire to keep confidential these characteristics or to openly express them.

The committee should circulate a draft policy throughout the law firm for comments. This step is important because it generates support and allows for useful insight. It is important to explain the rationale for introducing such a policy, as well as the effect of the proposed policy on existing arrangements.

### IMPLEMENTING THE POLICY

The initial presentation of the policy and a clear statement of management support are critical to its success.

Once the policy is adopted, it should be distributed to all individuals working at the law firm with a covering memorandum emphasizing the strong support of management. The letter should outline that the right to be free from harassment or discrimination on the basis of sexual orientation or gender identity in the workplace is protected by human rights legislation, and is an important value within Canadian society. It is essential that individuals working at the law firm understand the negative impact that harassment and discrimination has on the dignity of gay, lesbian, bisexual, Two-Spirited and transgender individuals within the workplace, as well as on workplace productivity.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw personal relationships between members of the law firm, and create a "chilling" anti-social atmosphere. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace policies.

The initial presentation of the policy combined with a clear statement of senior and managing partners' support are critical to its success.

### COMMUNICATING THE POLICY

If the law firm has a handbook of policies or if policies are available on-line, the law firm's workplace policy on benefits for gay, lesbian, bisexual, Two-Spirited and transgender individuals should be included. If the law firm does not have a handbook of policies, or if it does not make its policies available on-line, the law firm may wish to distribute copies of the policy directly to each individual working at the firm, and/or post copies of the policy in a common area.

The policy should be made available to all individuals who are interviewed for a position at the firm. Such a practice will make a strong statement about the firm's support for the policy and its objectives. Further, the Code

applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions. Firms may also wish to publicize the existence of the policy in their recruitment materials.

#### REVIEWING, EVALUATING AND REVISING THE POLICY

A committee of the law firm should have the responsibility to review and revise the policy on a periodic basis. The committee will also attempt to identify barriers that might affect gay, lesbian, bisexual, Two-Spirited and transgender individuals working at the firm. The first review should take place after there has been sufficient time to evaluate its operation.

The mandate of the committee should include an evaluation of whether the policy has been fairly implemented. The goal of the review process is to ensure that the policy meets the needs of the law firm and of those who work there.

Individuals in the law firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of the review.

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 The pages that follow are a precedent for a policy that firms may adapt for their own use. In some cases, a firm may wish to add details or examples from the footnotes to the actual text of its own policy.

The precedent addresses the most common situation: a firm composed of partners, associates, and other staff who are not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement.

The Sexual Orientation and Gender Identity model policy is simply a precedent. It is intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its particular circumstances.

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#### PART III- MODEL POLICY

##### SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT

##### MODEL POLICY FOR [THE FIRM] <sup>1</sup>

#### APPLICATION

1. This policy applies to everyone working for [the Firm] or who is a partner, director, member or employee of [the Firm], whether part-time, full-time or casual, regardless of their position in [the Firm], including [secretarial, support, professional and administrative staff, articling students, summer students, salaried lawyers, contract lawyers, associates and partners].<sup>2</sup> The policy also applies to others in the work context, such as [volunteers, co-op students, dependent and independent contractors].<sup>3</sup>

#### DEFINITIONS

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<sup>1</sup> When drafting its own policy, a legal organization may wish to substitute “the Organization”, “the Non-Profit Organization”, “the Legal Clinic” or other relevant terminology where the words [the Firm] appear throughout the document.

<sup>2</sup> The terminology used in this paragraph may have to be adopted based on terminology used by the firm or organization. For example, some law firms do not have “directors”.

<sup>3</sup> *Ibid.*

2. The term “spouse” is considered by [the Firm] to include two persons cohabiting in a conjugal relationship, whether or not the persons are legally married to each other, and includes persons who are of the same or opposite sex.<sup>4</sup>
3. [The Firm] defines “transgender person” as a term used to describe individuals who are uncomfortable with, or who reject, in whole or in part, their birth assigned sex.<sup>5</sup> For the purposes of this policy, this includes “transsexual persons”, whether or not they have undergone sex reassignment surgery.<sup>6</sup> It is further acknowledged that “gender identity” refers to those characteristics that are linked to an individual’s intrinsic sense of self, based on attributes reflected in the person’s psychological, behavioural, emotional, and/ or cognitive state. Gender identity may also refer to one’s intrinsic sense of being a man or woman.<sup>7</sup> It is fundamentally different from, and not determinative of, sexual orientation.<sup>8</sup>
4. “Two-Spirited person” is a term derived from interpretations of Aboriginal languages used to describe an individual who has received the gift of having the privilege to house both male and female spirits in their bodies. The concept Two-Spirited person relates to today’s designation of being a gay, lesbian, bisexual and transgender person of Aboriginal origins.
5. A Glossary of Terms can be found at Appendix A of this policy.

#### STATEMENT OF PRINCIPLES

6. Discrimination in employment on the basis of sex, which includes gender identity, sexual orientation, marital status, same-sex partnership status and/or family status is illegal. The *Ontario Human Rights Code* (the *Code*),<sup>9</sup> laws and regulations that govern employment benefits, pension plans and the employer-employee relationship, as well as the *Rules of Professional Conduct* (the *Rules*)<sup>10</sup> prohibit discrimination on enumerated grounds set out in the Code.
7. [The Firm] recognizes that the choice of a spouse and the manner in which one chooses to live with that individual, as well as the expression of one’s intrinsic gender identity are fundamental human rights worthy of respect and non-discriminatory treatment.
8. While others’ knowledge of their sexual orientation may not be of concern to heterosexual individuals, [the Firm] recognizes that gay, lesbian, bisexual individuals and Two-Spirited individuals often experience overt and subtle discrimination because of their sexual orientation. For some individuals, confidentiality of their sexual orientation will be essential, while other individuals will want to exercise his or her right to express it.

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<sup>4</sup> The firm may wish to include a minimum period of conjugal cohabitation in this definition. The length of required periods of conjugal cohabitation vary according to various statutes, such as the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the *ESA, 2000*) or the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Suppl.) (the *ITA*), as well as [the Firm]’s employment benefits providers. If a time period is included, the firm should verify its compliance with the requirements of relevant statutes.

<sup>5</sup> *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

<sup>6</sup> The term “transsexual person” denotes an individual who lives fully as a person of the sex opposite to that which the person was born. “Transgender” is an umbrella term that is ascribed to individuals who live some aspect(s) of their lives as an individual of either sex and includes individuals who are born intersexed, or who cross-dress.

<sup>7</sup> When interacting with transgender individuals, it is appropriate to ask how the person prefers to be identified.

<sup>8</sup> *Supra* note 5.

<sup>9</sup> R.S.O. 1990, c. H. 19.

<sup>10</sup> *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000). See particularly Rule 5.03 (Harassment) and Rule 5.04 (Discrimination).

9. [The Firm] recognizes that discrimination based on gender identity is a form of sex discrimination.<sup>11</sup> Where [the Firm] confers employment and pension benefits, it will do so in a manner that does not discriminate on grounds protected by the *Code* and the *Rules*.
10. Individuals covered by this policy shall not be excluded from participation in [the Firm]'s social culture (such as firm sponsored events held to acknowledge meaningful occasions in the personal lives of individuals who work at [the Firm]) because of sexual orientation, gender identity, marital status or any other ground protected by the *Code* and the *Rules*. [The Firm] shall expand its understanding of "meaningful occasions" in such a way that reflects the values of gay, lesbian, bisexual, Two-Spirited and transgender culture.
11. [The Firm] shall not contract with providers of employment benefits who administer their plans in a discriminatory manner based on sexual orientation or gender identity.

#### DUTY OF CONFIDENTIALITY

12. [The Firm] respects each individual's choice to disclose or to keep confidential information about his or her sexual orientation.
13. [The Firm] is aware that individuals may choose to keep confidential their gender identity and/or experience as a transgender person so as to avoid stigmatization, discrimination and harassment.
14. [The Firm] understands that sensitivity in the administration of employment benefits and pension plans is necessary so as not to expressly or inadvertently reveal the sexual orientation or gender identity of an individual who may wish to keep this information private.<sup>12</sup>
15. To enable an individual to register for, or to collect employment or pension benefits, [the Firm] may be required to record information that directly or indirectly identifies an individual's sexual orientation or gender identity. Subject to reasonable limits, [the Firm] will ensure the confidentiality of the information collected for these purposes. [The Firm] will also request that, as much as may be practical, the benefits and pension plan provider will keep the information confidential.
16. Procedures to limit access to confidential information that may reveal an employee's sexual orientation, spouse or gender identity will be adopted by [the Firm].<sup>13</sup> Pension plan and employment records, including, but not limited to, requests for bereavement and parental leave, medical/dental insurance claims, next-of-kin declarations, beneficiary designations, inquiries about the extension of benefits/pensions to a spouse, as well as resumés, academic transcripts, and letters of reference, shall be kept confidential except where disclosure is required by law.<sup>14</sup>

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<sup>11</sup> This position reflects that of the Ontario Human Rights Commission as set out in the *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

<sup>12</sup> [The Firm] is aware that information which identifies the gender of an individual's spouse, or claims for benefits for certain prescription drugs/medical treatments, can indirectly reveal an individual's sexual orientation or gender identity.

<sup>13</sup> For example, emergency contact lists that include the name of individuals who work at [the Firm] and their next-of-kin will not be posted in public. The list will remain confidential and be used only in emergency situations.

<sup>14</sup> As of January 1, 2004, every Ontario law firm and lawyer in private practice is subject to the federal *Personal Information Protection and Electronic Documents Act*, 2000, c.5 (*PIPEDA*). (See *PIPEDA*, s. 30 (2) and *Order Fixing the Dates of the Coming into Force of Certain Parts of the Act*, SI/2000-29, C. Gaz.2000.II.914). *PIPEDA* applies to the disclosure and use of personal information collected in the course of any commercial activity in a province unless the province has adopted privacy legislation that is substantially similar. Under *PIPEDA*, collection, use and disclosure of an individual's personal information requires either express or implied consent of the individual. *PIPEDA* sets out 10 steps to be followed to achieve compliance with the legislation. For further detail about compliance, please consult [http://www.privcom.gc.ca/legislation/02\\_06\\_01\\_e.asp](http://www.privcom.gc.ca/legislation/02_06_01_e.asp)

17. Personal information disclosed to [the Firm] shall be stored in a manner so as to limit access to this information to those appointed under paragraph 19 of this policy.<sup>15</sup> This may be achieved, for example, by keeping the information in a locked filing cabinet or in a computer system accessed by password.

## PROCEDURES

### I. IMPLEMENTATION

18. [The Firm] has revised all its employment benefits and pension plans to ensure that they comply with the statement of principles and duty of confidentiality outlined in this policy.
19. [The Firm] shall appoint [insert title of position(s) responsible, hereinafter “the Appointed Person”]<sup>16</sup> to review all employment benefits and pension plan policies on a periodic basis and shall ensure that all future policies adopted by [the Firm] are consistent with this policy.<sup>17</sup>
20. The Appointed Person shall also be available to answer, in confidence, any questions an employee or partner may have with regard to this policy or [the Firm]’s employment benefits and pension plan.<sup>18</sup>

### II. APPLICATION

#### A. Employment and Pension Benefits and Employment Practices

21. Typically, the following employment and pension benefits are conferred on individuals who work at [the Firm] and extended to the spouses of those individuals:
- a. Bereavement Leave- a leave granted to an individual, either with or without pay, on the death of a relative or a relative of a spouse.
  - b. Dental Benefits- see Medical Benefits.
  - c. Emergency Leave- a leave granted to an individual,<sup>19</sup> either with or without pay, to attend to a matter, emergency or otherwise, of a family member.<sup>20</sup>

<sup>15</sup> Where practical, [the Firm] will arrange for individuals who work there to register and submit claims directly to the provider with whom [the Firm] has contracted for employment benefits and pension plans. Where that provider is unwilling/unable to consent to the request that individuals who work at [the Firm] submit claims directly to that provider, [insert title of position appointed under paragraph 19] will be responsible for assisting in the registration and collection of benefits. Individuals entrusted with this responsibility will be trained with regard to [the Firm]’s expectation that any information acquired while carrying out related duties is to be kept in strict confidence.

<sup>16</sup> Depending on the size and structure of the organization, the firm may wish to appoint the Director of Human Resources, a Senior Partner, or a committee of individuals to fulfill this role.

<sup>17</sup> The Appointed Person should be provided with a private workspace or office area so as to be able to answer questions about employment benefits in confidence. When completing administrative work related to the registration and collection of benefits, the Appointed Person must ensure that the general public or others who are in the vicinity cannot see the enrollment and claim forms or computer submissions.

<sup>19</sup> The Firm may choose to extend Emergency Leave to all individuals who work at the Firm regardless of its size and regardless if they fall within the ambit of the *ESA, 2000*.

<sup>20</sup> Unlike this policy, the *ESA, 2000* relies on the separate-but-equal distinction between spouse and same-sex partner. Section 50(1) of the *ESA, 2000*, sets out an entitlement to a leave of absence without pay for employees of employers who regularly employ 50 or more employees because of:

2. The death, illness, injury or medical emergency of an individual described in subsection (2) [or] 3. An urgent matter that concerns an individual described in subsection (2).

Section 50(2) states that:

Paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:

1. The employee’s spouse or same-sex partner.

- d. Group Life Insurance- a spouse is recognized to be either of the same or opposite sex and may be designated the beneficiary of group life insurance.<sup>21</sup> The plan provider may require disclosure of the plan members' beneficiary designations.
  - e. Maternity Leave- a leave, either with or without pay, granted to a birth mother to provide time off for pregnancy and childbirth and to provide time to bond with the newly born child.
  - f. Medical Benefits- the employer may claim premiums paid for medical and dental insurance coverage for spouse of individuals who work at [the Firm] as a tax credit.<sup>22</sup>
  - g. Parental Leave- a leave granted, either with or without pay, to an individual following the birth of a child or the coming of a child into the individual's custody, care and control for the first time. Parental leave cannot be denied to qualifying employees on the basis of sexual orientation.<sup>23</sup>
  - h. Pension Plan Survivor Benefits- as of December 19, 2003, the *Canada Pension Plan* survivor benefits available to opposite sex spouses are available to same-sex spouses,<sup>24</sup> retroactive to April 17, 1985. Spouses (common law, opposite-sex or same-sex) who at "relevant times" live separate and apart from the pension plan member lose entitlement to benefits.
  - i. Relocation Allowances- expenses arising from the relocation of an individual who works at [the Firm] and his or her spouse that are reimbursed by [the Firm] shall be reimbursed by [the Firm] regardless of an individual's sexual orientation.
22. The following relationships are considered by [the Firm] to be 'family' in the context of employment benefits:
- Spouse as defined in paragraph 2 of this policy;
  - Parent, step-parent or foster parent, as well as those of the individual's spouse;
  - Child, step-child or foster child, as well as those of the individual's spouse;
  - Grandparent, step-grandparent, grandchild or step-grandchild, as well as those of the individual's spouse;
  - Spouse of a child of the employee, as well as the spouse of the child of the individual's spouse;
  - Brother or sister, or those of the individual's spouse; and
  - A relative of [the Firm] employee or member who is dependent on that individual for care or assistance.
23. Next of Kin Declarations- Human Resources or the Appointed Person shall keep this confidential information on file for use in the event of a medical emergency.
24. The following employment practices may be adopted to ensure that transgender persons are treated equally and with dignity:
- a. Washroom and other Gender-Specific Facilities- [The Firm] will accommodate the needs of transgender persons regarding the use of washrooms and gender-specific facilities as required by the Code.
  - b. Dress Code Policy- [The Firm]'s Dress Code policy will respect the rights of transgender persons.

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2.A parent, step-parent or foster parent of the employee, the employee's spouse or the employee's same-sex partner.  
 3.A child, step-child or foster child of the employee, the employee's spouse or the employee's same-sex partner.  
 4.A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse or same-sex partner.

5.The spouse or same-sex partner of a child of the employee.

6.The employee's brother or sister.

7.A relative of the employee who is dependent on the employee for care or assistance.

<sup>21</sup> While the term 'spouse' in this document has an inclusive meaning, legislation governing group insurance benefits uses either the term same-sex partner or common-law partner.

<sup>22</sup> The Firm should be cognizant that some insurers may discriminate by denying transgender individuals, or their spouses, benefits for sex reassignment surgery, prosthetics, hormone therapy, and electrolysis.

<sup>23</sup> Under s. 48(1) of the *ESA, 2000*, an employer must grant a minimum parental leave to qualifying employees. This section of the Act does not distinguish between same-sex and opposite-sex couples.

<sup>24</sup> The term 'spouse' has been used in this instance to reflect the Firm's understanding of this term. However, the *Canada Pension Plan* uses the term 'common-law partner', which applies equally to opposite and same-sex partners.

## B. Social Benefits

25. Discrimination and harassment on the basis of sexual orientation, marital status and gender identity is often subtle. [The Firm] is committed to creating a work environment in which gay, lesbian, bisexual, Two-Spirited and transgender individuals who work at [the Firm] are treated with respect and are included in all aspects of [the Firm]'s social culture. Milestones in the personal lives of individuals who work at [the Firm] that are celebrated by [the Firm] shall not exclude those covered by this policy because of their sexual orientation or gender identity.
26. Typically, the following events in the personal life of an individual who works at [the Firm] may be either officially or informally observed:
- a. Events to Celebrate the Birth of a Child/ Adoption/ Weddings/ Commitment Ceremonies/ Anniversaries- [The Firm] will encourage the celebration of significant events in the lives of those covered by this policy as it would in equivalent heterosexual and non-transgender contexts.
  - b. Funerals- [The Firm] will extend expressions of sympathy on the death of a spouse or family member of those covered by this policy as it would in equivalent heterosexual and non-transgender contexts.
  - c. Holiday or Firm Parties- [The Firm] will encourage those covered by this policy and their spouses/guests, if they wish, to attend holiday or firm parties as it would for heterosexual and non-transgender individuals who work at [the Firm].

## RECOURSE

27. It is the responsibility of [the Firm] to abide by all legislation that governs employment and pension benefits. Should an individual believe that benefits are being conferred or administered in a discriminatory manner, [the Firm] encourages that individual to report it to [insert the title of the position responsible for handling complaints], who shall do what is necessary to address the situation. All complaints or inquiries made under this section will be confidential.
28. Further recourse may be available under other policies adopted by [the Firm], including [the Firm should list other applicable policies, such as a policy on discrimination and harassment; an accommodation policy, etc...].
29. Nothing in this policy precludes an individual from seeking assistance or filing complaints under other avenues of recourse. [The Firm] undertakes to provide individuals with information on:
- The services offered by the Discrimination and Harassment Counsel;<sup>25</sup>
  - The right to file a complaint with the Ontario Human Rights Commission under the Code;
  - The right to file a complaint with the Law Society of Upper Canada under the Rules.

## EDUCATION AND TRAINING

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<sup>25</sup> The Law Society of Upper Canada's By-Law 36 – Discrimination and Harassment Counsel, provides that Convocation shall appoint a Discrimination and Harassment Counsel whose function is set out in s. 4(1) which reads:

4.(1)It is the function of the Counsel,

- (a)to assist, in a manner that the Counsel deems appropriate, any person who believes that he or she has been discriminated against or harassed by a member or student member;
- (b)to assist the Society, as required, to develop and conduct for members and student members information and education programs relating to discrimination and harassment; and
- (c)to perform such other functions as may be assigned to the Counsel by Convocation.

(2)Despite clause (1) (a), the Counsel has no authority to require an investigation to be conducted or to conduct an investigation under section 49.3 of the Act.

30. As an extension of its commitment to a discrimination and harassment-free workplace, all current and future individuals who work at [the Firm] will be informed of the policy on equal benefits for gay, lesbian, bisexual, Two-Spirited and transgender employees. [The Firm] will make copies of this policy available to all individuals who work at [the Firm].<sup>26</sup>
31. Training on the duty of confidentiality under this policy will be provided for all individuals at [the Firm] who have access to confidential information collected for the purposes of registration and administration of the employment benefits and pension plans.

#### APPENDIX A- GLOSSARY OF TERMS

The definitions in this glossary are adapted from the Ontario Human Right's Commission document *Policy on Discrimination and Harassment because of Gender Identity*<sup>27</sup> and the *National Lesbian and Gay Journalists Association Stylebook Supplement*.<sup>28</sup> The definition of "Two-Spirited person" was developed by the *McGill Project: Two-Spirited People*.<sup>29</sup>

*Biocentric* - the presumption that one's sex and gender matching is universal and/or superior to the experience of being transgender.

*Bisexual* used as a noun describes an individual who may be attracted to either sex. As an adjective of, or relating to, sexual and affectional attraction to either sex.<sup>30</sup>

*Gay* is an adjective that has largely replaced "homosexual" in referring to men who are sexually and affectionally attracted to other men. For women, "lesbian" is preferred. To include both, use "gay men and lesbians."<sup>31</sup>

*Gender identity* refers to those characteristics that are linked to an individual's intrinsic sense of self that is based on attributes reflected in the person's psychological, behavioural, and/or cognitive state. Gender identity may also refer to one's intrinsic sense of being male or female. It is fundamentally different from, and not determinative of, sexual orientation.<sup>32</sup>

*Heterosexism/Heteronormativity* is the presumption that heterosexuality is universal, normative and/or superior to homosexuality. Also: prejudice, bias or discrimination based on such presumptions.<sup>33</sup>

*Homophobia* refers to fear, hatred or dislike of homosexuality, gay men and lesbians.<sup>34</sup>

*Intersexed* means being born with both XX and XY chromosomes, the full or partial sex organs of both genders, or with underdeveloped or ambiguous sex organs, in addition to a hormone balance reflective of both genders. Individuals who are born intersexed may also embody secondary sex characteristics of either gender. This word replaces the inappropriate term 'hermaphrodite'.<sup>35</sup>

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<sup>26</sup> The firm may wish to state in its recruiting materials that where it extends benefits to spouses, it is committed to providing those benefits in a non-discriminatory manner. Also, the firm may assert in its recruiting materials that it is committed to encouraging full participation in the firm's employment and social benefits, regardless of sexual orientation and gender identity.

<sup>27</sup> *Policy on Discrimination and Harassment because of Gender Identity*, *supra* note 5.

<sup>28</sup> Available online April 20, 2004, at <http://www.nlgja.org/pubs/style.html>

<sup>29</sup> Available online, April 20, 2004, at <http://www.mcgill.ca/interaction/mission/twospirit/>

<sup>30</sup> *Supra*, note 28.

<sup>31</sup> *Ibid.*

<sup>32</sup> This definition is a modification of that found in the Ontario Human Rights Commission *Policy on Discrimination and Harassment because of Gender Identity*, *supra*, note 5.

<sup>33</sup> *Supra*, note 2.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra*, note 27.

*Lesbian* is the preferred term, both as a noun and an adjective, for women who are sexually and affectionally attracted to other women.<sup>36</sup>

*Sexual orientation* is more than simply a status that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity, including innate sexual attraction. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations.<sup>37</sup>

*Sex-reassignment surgery* is the medical procedure by which an individual is surgically altered to create the physical appearance of the opposite sex.<sup>38</sup>

*Two-Spirited person* is a term derived from interpretations of Aboriginal languages used to describe a person who has received the gift of having the privilege to house both male and female spirits in their bodies. The concept of Two-Spirited person relates to today's designation of being a gay, lesbian, bisexual and transgender person of Aboriginal origins. Being given the gift of two-spirits means that the individual has the ability to see the world from two perspectives at the same time.

*Transgender person* is a term used to describe individuals who are uncomfortable with, or who reject, in whole or in part, their birth assigned sex. This may include transsexual persons, whether or not they have undergone sex reassignment surgery.<sup>39</sup>

*Transgenderists* self-identify and live as the opposite gender but have decided not to undergo sex reassignment surgery.<sup>40</sup>

*Transition* is the process of changing sex, including hormones, cross living, and surgery. A practical minimum duration for this process is about two years but it is not unusual for it to take longer.<sup>41</sup>

*Transphobia* is the unrealistic or irrational fear and hatred of cross-dressers, transsexuals and transgenderists. Like all prejudices, it is based on negative stereotypes and misconceptions that are then used to justify and support hatred, discrimination, harassment, and violence toward people who are transgender.<sup>42</sup>

*Transsexual* is an individual who identifies himself or herself as a member of the opposite sex and who acquires the physical characteristics of the opposite sex. The individual can be of any sexual orientation.<sup>43</sup>

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<sup>36</sup> *Supra*, note 28.

<sup>37</sup> This definition combines elements of that used by the Ontario Human Rights Commission and that used by the National Lesbian and Gay Journalists Association.

<sup>38</sup> *Supra*, note 27.

<sup>39</sup> This definition is a modification of that found in the *Policy on Discrimination and Harassment because of Gender Identity*, *supra*, note 27.

<sup>40</sup> *Supra*, note 27.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Supra*, note 28.

## PART IV- LEGAL DEVELOPMENTS AND EMPLOYER OBLIGATIONS

### A. LEGAL DEVELOPMENTS

#### I. SAME-SEX BENEFITS

##### (1) Sexual Orientation as Prohibited Ground of Discrimination

1. Sexual orientation has been a prohibited ground of discrimination since its inclusion in the *Ontario Human Rights Code* (the *Code*)<sup>1</sup> in 1986. Although equal treatment in employment contexts was articulated in the *Code*, the protection was not extended to the same-sex partners of gay and lesbian employees. This created a paradox in which equality was granted so long as a fundamental aspect of being gay, lesbian, bisexual or Two-Spirited was not expressed in the workplace; namely, an employee's acknowledgment of an intimate relationship with an individual of the same sex. Gay and lesbian individuals were forced to seek recourse through the Human Rights Tribunal and the courts to achieve recognition that same-sex relationships are fundamentally worthy of the same respect, dignity and equal treatment as the intimate relationships of heterosexual individuals.

##### (2) Protection Extended to Same-Sex Partners

###### (a) *Ontario Human Rights Code*<sup>2</sup>

2. In response to a complaint filed by a Crown Attorney employed by the government of Ontario, the Board of Inquiry (*Board*)<sup>3</sup> held in *Leshner v. Ontario (No.2)*<sup>4</sup> that the denial of employment benefits for an employee's same-sex partner amounted to discrimination on the basis of sexual orientation.<sup>5</sup>

###### (b) *Canadian Human Rights Act*<sup>6</sup>

3. The same year that the *Leshner* decision was released by the *Board*, the Ontario Court of Appeal held in *Haig and Birch*<sup>7</sup> that the absence of sexual orientation in the *Canadian Human Rights Act (CHRA)*

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<sup>1</sup> R.S.O. 1990, c.H.19.

<sup>2</sup> While not a defined term in the *Code*, the definition developed by the Human Rights Commission states that "[s]exual orientation is more than simply a "status" that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations. The protection of the *Code* extends to all individuals who are denied equal treatment because of sexual orientation." *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, 2000).

<sup>3</sup> Currently known as the Ontario Human Rights Tribunal.

<sup>4</sup> (1992), 16 C.H.R.R.D./184 (Ont. Bd of Inq.) [hereinafter *Leshner*].

<sup>5</sup> Before the *Board* reached its conclusion in *Leshner*, the provincial government began extending employment benefits to same-sex partners of employees. However, the *Income Tax Act (ITA)*, R.S.C. 1985, c.1 (5<sup>th</sup> Suppl.) which defined 'spouse' as being a person of the opposite sex prevented the province from extending survivor pension benefits to same-sex partners. The *Board*, recognizing its limited jurisdiction over federal legislation, ordered the employer to set up a separate pension plan to provide survivor benefits, equal to those available under the *ITA*, to the same-sex partners of employees. Although the order was suspended for three years, the Board ordered the province to implement a pension arrangement that would provide persons living in same-sex conjugal relationships with survivor pension benefits and eligibility equivalent to those provided to persons living in heterosexual conjugal relationships.

<sup>6</sup> R.S.C. 1985, c. H-6.

<sup>7</sup> *Haig and Birch v. Canada* (1992), 94 D.L.R. (4<sup>th</sup>) 1 (Ont.C.A.).

contravened s. 15 of the Charter.<sup>8</sup> The section in question was declared invalid and sexual orientation was read into the *CHRA*.<sup>9</sup>

(c) *Canadian Charter of Rights and Freedoms*<sup>10</sup>

4. In 1995, the Supreme Court of Canada (SCC) held in *Egan v. Canada*<sup>11</sup> that sexual orientation is an analogous ground under s. 15(1) of the Charter. The appellant, Egan, had argued that the opposite-sex definition of 'spouse' in the *Old Age Security Act*<sup>12</sup> was discriminatory on the ground of sexual orientation. Although the majority concurred with Mr. Egan, the court held that the distinction was saved under s.1.
  5. *Egan* was not an employment benefits case, however, the SCC recognized the historical disadvantage and the social and political vulnerability experienced by gay and lesbian individuals in Canadian society. Writing for the majority, La Forest J. observed that "[...] whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds."<sup>13</sup>
  6. In *Vriend v. Alberta*<sup>14</sup> the SCC acknowledged that the intentional omission of gay and lesbian individuals from the protections of Alberta's *Individual's Rights Protection Act*<sup>15</sup> was not only an affront to those individuals' dignity but also had the effect of condoning discrimination against the individuals by suggesting that "...all persons are equal in dignity and rights except gay men and lesbians."<sup>16</sup> The SCC, in ordering sexual orientation to be read into the legislation, created a precedent for its inclusion in all provincial human rights legislation.
- (3) 'Spouse' Reflects Same-Sex Common Law Conjugal Relationships

(a) *Income Tax Act*<sup>17</sup>

7. The definition of spouse as exclusive to the domain of heterosexual couples was challenged in *Rosenberg v. Canada (Attorney General)*.<sup>18</sup> Rosenberg was employed by C.U.P.E., which required mandatory enrollment in a private pension plan. Under the plan, surviving opposite-sex spouses of deceased members were entitled to two-thirds of the member's benefits. The C.U.P.E. plan was registered with Revenue Canada (now the Canada Customs and Revenue Agency) in order to take advantage of the tax deferral benefits offered under the ITA. However, s. 252(4) of the ITA limited private pension plans registration to plans which restricted survivor benefits to opposite-sex spouses. Under the ITA, the term 'spouse' was expansive, encompassing opposite-sex couples who were both legally married and those who had been living in common law conjugal relationships for a period of 12 months. The Ontario Court of Appeal held that the definition was discriminatory on the basis of sexual orientation and that the appropriate remedy would be to include same-sex partners into the ITA definition.

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, s.15, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

<sup>9</sup> Birch was a captain in the Armed Forces who, subsequent to informing his superior that he was gay, was advised that he would be subject to a policy in which gay and lesbian individuals were ineligible for promotion and professional development. The Court of Appeal held that sexual orientation is analogous to the enumerated grounds set out in s. 15 (1) of the *Charter* and ordered that it be read into the *CHRA*.

<sup>10</sup> *Supra* note 8.

<sup>11</sup> [1995] 2 S.C.R. 513 (S.C.C.) hereinafter *Egan*].

<sup>12</sup> R.S.C., 1985, c. 0-9.

<sup>13</sup> *Egan*, *supra* note 11 at 5.

<sup>14</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. at 493 [hereinafter *Vriend*].

<sup>15</sup> R.S.A. 1980, c. I-2.

<sup>16</sup> *Vriend*, *supra* note 14 at 104.

<sup>17</sup> *Supra* note 5.

<sup>18</sup> [1998] O.J. No. 1627 (Ont.C.A.) [hereinafter *Rosenberg*].

(b) *M. v. H.*<sup>19</sup>

8. The *M. v. H.* decision released in 1999 by the Supreme Court, held that the opposite-sex definition of spouse in s. 29 of the *Family Law Act (FLA)*<sup>20</sup> was discriminatory under s. 15 of the *Charter*. M and H were lesbians whose relationship had dissolved after many years of cohabitation. M sought spousal support under the *FLA* from her former partner. The *SCC* ordered s. 29 severed in its entirety from the Act and declared of no force and effect. The remedy was suspended for six months to allow the legislature to amend all similar provisions that applied to common law couples while excluding same-sex couples in a discriminatory manner.

(c) Legislated Changes as Response to *M. v. H.*

9. The Ontario legislature's response to *M. v. H.* was to introduce omnibus legislation<sup>21</sup> with the purpose of amending 67 provincial statutes that had the effect of granting rights and obligations to opposite-sex common law partners while denying them to, or placing additional burdens on, same-sex couples. The legislature granted all opposite-sex couples, whether legally married or common law partners, spousal status and created a new, separate class of relationships for same-sex partners. The effect of this legislation was to create a 'separate but equal' category for individuals living in same-sex partnerships. Critics argue that this approach has the effect of reinforcing the inequality of same-sex partners with their opposite-sex counterparts; that is, same-sex couples are incapable of marrying, and by being relegated to a separate category, are therefore inferior to spouses. By extension, same-sex couples are not worthy of equal status and recognition. The *Halpern*<sup>22</sup> decision, however, grants same-sex partners the legal capacity to marry leaving unmarried same-sex partners in the separate but equal category.
10. The *Code* was amended in three ways as a result of the decision in *M. v. H.*: references to 'marital status' were struck out and replaced by 'marital status, same-sex partnership status'; references to 'spouse' were amended to embody the term 'same-sex partner'; and, definitions for same-sex partner and same-sex partnership were added to s. 10 of the *Code*.<sup>23</sup>
11. The federal government's response to *M. v. H.* was significantly different than that of Ontario. The federal government introduced Bill C-23, *An Act to modernize the statutes of Canada in relation to benefits and obligations*,<sup>24</sup> the effect of which was to preserve the traditional definition of spouse (defined as "opposite sex couples who are legally married") and to introduce the term 'common law partner' which included both opposite-sex and same-sex couples. The term 'common law partner' was the government's attempt to encompass all people in common law relationships without creating a separate category of 'same-sex partner'. Prior to its final reading and subsequent enactment in June 2000, Bill C-23 was amended so as to include a provision to the effect that it would not affect the meaning of the word 'marriage', defined as "the lawful union of one man and one woman to the exclusion of all others." That marriage is exclusively available to opposite-sex couples has been negated by the Ontario Court of Appeal's decision in *Halpern*.

## (4) Legal Recognition of Same-Sex Marriage

<sup>19</sup> [1999] 2 S.C.R. 3 [hereinafter *M. v. H.*].

<sup>20</sup> R.S.O. 1990, c. F.3.

<sup>21</sup> Bill 5, "An Act to amend certain statutes because of the Supreme Court of Canada decision in *M. V. H.*." 1<sup>st</sup> Sess., 37<sup>th</sup> Leg., Ontario, 1999, cl. 8 (assented to 22 Dec. 1999, S.O. 1999, c. 15).

<sup>22</sup> [2003] O.J. No. 2268 (Ont.CA) [hereinafter *Halpern*].

<sup>23</sup> Section 10 of the *Code*, *supra* note 1 reads:

"Same-sex partner" means the person with whom a person of the same sex is living in a conjugal relationship outside marriage; same-sex partnership status means the status of living with a person of the same sex in a conjugal relationship outside marriage.

<sup>24</sup> Modernization of Benefits and Obligations Act, 2000, c.12.

12. In June of 2003, the Ontario Court of Appeal unanimously held in *Halpern v. Canada (Attorney General)*<sup>25</sup> that the common law definition of marriage, stated as “the voluntary union for life of one man and one woman, to the exclusion of all others,”<sup>26</sup> infringed the rights of same-sex couples under s. 15(1) of the *Charter* and that the infringement could not be justified under s. 1. The Court declared the definition invalid to the extent that it referred to “one man and one woman” and then reformulated a gender-neutral definition stated as “the voluntary union for life of two persons to the exclusion of all others”.<sup>27</sup> This paved the way for same-sex couples in Ontario to have the right to marry and to have their union legally recognized.
13. The *Halpern* decision was consistent with the British Columbia Court of Appeal’s judgment in *EGALE Canada Inc. v. Canada (Attorney General)*,<sup>28</sup> which was delivered in May 2003, as well as with the Cour Supérieur du Québec 2002 decision in *Hendricks v. Québec (Procureur général)*.<sup>29</sup> In both *EGALE* and *Hendricks*, the orders were initially suspended for 24 months. However, after the *Halpern* decision was delivered in Ontario, an application to amend the British Columbia Court of Appeal’s order was allowed and in July 2003, the suspension was lifted to permit immediate effect. A decision released by the Quebec Court of Appeal on March 19, 2004 concurred with the Ontario and British Columbia judgments, making same-sex marriage valid and available immediately in the province of Quebec.
14. The *Halpern*, *EGALE* and *Hendricks* decisions combine to convey the courts’ commitment to ensuring substantive equality rights for gay and lesbian members of Canadian society. The willingness of the Ontario, British Columbia and Quebec Courts of Appeal to intervene and not defer to the legislatures reflects the Supreme Court’s recognition that laws are simultaneously capable of harming and enhancing human dignity<sup>30</sup> and that courts must undertake to initiate changes where the government might be reluctant to make unpopular choices. In light of the legislative outcome of *M. v. H.* which resulted in same-sex couples being granted separate but equal status in Ontario, the *Halpern* decision signals the Ontario Court of Appeal’s unease entrusting the government with the responsibility of legislating changes that would ensure equality rights for gay men and lesbians.

## II. GENDER IDENTITY

15. Recognition of rights for people whose gender identity differs from that assigned at birth is a relatively recent development in Canadian society. Relatively little jurisprudence dealing with these issues and few human rights cases and arbitration awards have proceeded to judicial review, resulting in a restricted number of legal precedents. It is helpful to consider decisions made at the tribunal level in Ontario and other jurisdictions, in order to understand the employer’s responsibility to respect the rights of transgender individuals.

<sup>25</sup> *Halpern*, *supra* note 22.

<sup>26</sup> *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 (H.L.) at 133.

<sup>27</sup> *Ibid.* at 148.

<sup>28</sup> In *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] BCCA 251 [hereinafter *EGALE*] the court reformulated the definition of marriage to read “the lawful union of two persons to the exclusion of all others” at 159.

<sup>29</sup> In *Hendricks v. Québec (Procureur general)*, [2002] J.Q. no 3816 at 200 [hereinafter *Hendricks*] the complainant sought, among other things, a declaration that there was no legislated or common law bar to same-sex marriage. After finding that limiting marriage to opposite-sex couples is discriminatory under s. 15 of the *Charter*, Lemelin J found that the infringement can be remedied in the following manner: “On pourrait facilement modifier le texte de l’article 5 de la Loi d’harmonisation pour le rendre compatible avec l’article 15 de la *Charte canadienne* en remplaçant les mots “d’un homme et d’une femme” par “deux personnes” [emphasis added].

<sup>30</sup> Writing for the Court in *Law v. Canada {Ministe of Employment and Immigration}*, [1999] 1 S.C.R. 497 at 530, Iacobucci J noted that “[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.”

16. In 2000, the Ontario Human Rights Commission released a policy document addressing discrimination and harassment based on gender identity. Although not enumerated in the *Code*, it is the position of the Commission that a liberal and broad interpretation of the ground “sex” encompasses gender identity and can support complaints of differential treatment that amounts to discrimination and harassment.<sup>31</sup>
17. A Tribunal in Quebec ruled that the term ‘sex’ amounts to more than the state of ‘male’ or ‘female’ but also includes the transformation from one to the other.<sup>32</sup>
18. In Ontario, a person who undergoes sex-reassignment surgery may apply to have the birth-assigned sex noted on his or her birth certificate changed to reflect the person’s sex as a result of the sex-reassignment surgery.<sup>33</sup>
19. In British Columbia, a volunteer at a rape crisis centre was prevented by the organization from leading group counselling sessions when it discovered that the individual became a female as the result of sex-reassignment surgery.<sup>34</sup> Despite the fact that the individual self-identified as a woman, the Supreme Court of British Columbia (*BCSC*) overturned the Human Rights Tribunal’s finding that the rape crisis centre had discriminated against her on the ground of sex.<sup>35</sup>
20. In the employment context in Ontario, the *Code* provides that every person has the right to equal treatment without discrimination because of sex, which includes gender identity. The *Code* aims to protect individuals who may be targeted for discriminatory behaviour because of stereotypes, rather than being judged on their individual merits. An employer is prohibited from limiting employment opportunities for transgender individuals and from discriminating against individuals based on their gender identity.

## B. SUMMARY OF EMPLOYER OBLIGATIONS

### I. PROFESSIONAL RESPONSIBILITY

21. Despite the plethora of terms used to describe the conjugal relationships of opposite- and same-sex couples, the Courts have acknowledged that same-sex couples, whether married or living in common law relationships, are worthy of the same dignity, respect and legal recognition as that granted to their opposite-sex counterparts. This places a positive duty on employers to confer employment benefits in a non-discriminatory manner. The obligation to confer employee benefits in a fair and equal manner is found not only in human rights legislation and case law, but also in legislation that governs employment and pension benefits.
22. Rule 5.04 (Discrimination) of the *Rules*<sup>36</sup> imposes an obligation on all lawyers to refrain from discrimination on enumerated grounds. Under the same rule, lawyers are charged with the responsibility of respecting human rights laws in force in Ontario.
23. A prohibition on sexual harassment is found in Rule 5.03 (Sexual Harassment) of the *Rules*. The commentary to the Rule suggests that behaviours such as making unwanted inquiries or comments about another’s sexual orientation or sex life, making degrading comments about a particular sex, as well as making derogatory comments of a sexual nature toward an individual are unacceptable actions. The Rule imposes a duty on all members of the profession to refrain from such offensive behaviour.

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<sup>31</sup> *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

<sup>32</sup> *M.L. and Commission des droits de la personne et des droits de la jeunesse du Quebec v. Maison des jeunes*, [1998] J.T.D.P.Q. No 31 (Trib. Queb.).

<sup>33</sup> *Vital Statistics Act*, R.S.O. 1990, c. V-4, s. 36.

<sup>34</sup> *Vancouver Rape Crisis Society v. Nixon* [2003], B.C.J. No. 2899 [hereinafter *Nison*], Notice of appeal filed in British Columbia Court of Appeal, January 14, 2004, Court of Appeal File No. 31546.

<sup>35</sup> *Ibid.* at 147-158.

<sup>36</sup> *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

## II. PENSION BENEFITS

24. Pension benefits previously only available to opposite-sex spouses are now extended to same-sex partners of plan members. Of particular note is that a spouse or same-sex partner can receive a pre-retirement benefit where the plan member dies before retirement, or a survivor benefit if the plan member dies after retirement. The *Pension Benefits Act (PBA)*<sup>37</sup> was amended by Bill 5 and the *Pension Benefits Statute Law Amendment Act, 1999*<sup>38</sup> so that ‘spouse or same-sex partner’ replaced any reference to ‘spouse’.
25. The *Modernization of Benefits and Obligations Act* amended the *Canada Pension Plan (CPP)*<sup>39</sup> so that same-sex survivors are entitled to benefits upon the death of their same-sex partner. Although the Act came into force and effect in 2000, the amendment was grandfathered to apply retrospectively to claims made on behalf of same-sex partners who had died after January 1, 1998. This provision was found to be discriminatory in *Hislop v. Attorney General (Canada)*,<sup>40</sup> a December 2003 class action proceeding decision by the Ontario Superior Court of Justice. The Court found that the class members, individuals whose same-sex partners died after s.15 of the Charter came into effect in April 1985 but before January 1, 1998, were discriminated against on the basis of sexual orientation by being unlawfully excluded from survivor pension benefits following the death of their partners.
26. Married spouses, living separate and apart, continue to be eligible for survivor pension benefits as long as the marriage has not ended in divorce or the contributor has not resided in a conjugal relationship with another person for at least one year. However, upon the separation of common law spouses, their right to survivor pension benefits is relinquished. Thus, the common law spouses must be living together at the time of the contributor’s death in order to collect survivor pension benefits.<sup>41</sup>

## III. REGISTRATION OF PENSION PLANS

27. The definition of ‘spouse’ in s. 252(4) of the *Income Tax Act (ITA)* has been amended to include same-sex partners. Pension plans that entitle same-sex partners of the plan members to survivor benefits may be registered under the *ITA*. The amended definition in s. 252(4) has been grandfathered back to April 23, 1998 to accept the registration of pension plan amendments that included same-sex couples.<sup>42</sup>
28. The general definitions section of the *ITA* (s. 248(1)) has also been amended to include a definition of ‘common law partner’ that encompasses same-sex partners.

## IV. PRIVATE HEALTH PLANS

29. In 1998, s.118.2(2) of the *ITA* was amended so that premiums paid for same-sex spousal medical and dental plan coverage can be claimed as a tax credit.<sup>43</sup>

## V. EMPLOYMENT BENEFITS- GENERALLY

30. Benefits granted in addition to those set out in the *Employment Standards Act, 2000 (ESA, 2000)*<sup>44</sup> and its companion, *O.Reg.286/01*, are conferred at the discretion of the employer. Employers have a legal obligation to extend benefits to opposite-sex and same-sex spouses and partners alike.

<sup>37</sup> R.S.O. 1990, c. P.8.

<sup>38</sup> *Pension Benefits Statute Law Amendment Act, 1999*, 1<sup>st</sup>. Sess., 37<sup>th</sup> Leg., Ontario, 1999, S.O. 1999, c.15.

<sup>39</sup> *Canada Pension Plan*, R.S. 1985, c. C-8.

<sup>40</sup> *Hislop v. Attorney General (Canada)*, [2003] O.J. No. 5212 [hereinafter *Hislop*]. Notice of appeal filed January 19, 2004. Case scheduled to be heard June 10, 2004. CA File No. C41224.

<sup>41</sup> See *Hodge v. Canada (Minister of Human Resources Development) (C.A.)*, [2002] S.C.C.A. No. 345, leave to appeal this provision granted by the SCC, November 13, 2003. The SCC heard this case March 18, 2004 but reserved judgment.

<sup>42</sup> See *Rosenberg*, *supra* note 18.

<sup>43</sup> *Canada (AG) v. Moore (T.D.)*, [1998] 4 F.C. 585 Affirming (1997), 97 C.L.L.C. 230-018, (*sub nom. Canada (Attorney General) v. Moore (No. 2)*) 29 C.H.R.R. D/185 (Can. Human Rights Trib.).

## VI. EMPLOYMENT BENEFITS- GROUP INSURANCE PLANS

31. Section 44 of the *ESA, 2000* expressly prohibits discrimination on the basis of same-sex partnership status (and by implication, on the basis of sexual orientation) in the provision of employee benefits.<sup>45</sup> Regulation 286/01 sets out exceptions where distinctions are permitted on the basis of sex, age, disability and marital status. In essence, it is not permissible to differentiate on the grounds of marital status between people with opposite-sex partners and those with same-sex partners. It is permissible, however, to distinguish between employees with partners (either of the opposite or same sex) and those without partners. The legislation mandates that permitted differential treatment must be made on an actuarial basis.

## VII. PREGNANCY<sup>46</sup> AND PARENTAL LEAVE

32. Minimum pregnancy and parental leaves are mandated by the *ESA, 2000* and are available to employees who qualify. In the case of maternity leave, it is available to all qualifying birth mothers.
33. Parental leave is available under the *ESA, 2000* to a qualifying adult who is a parent following the birth of a child or the coming of the child into the individual's custody, care and control for the first time.<sup>47</sup> "Parent" as defined in s. 45 of the *ESA, 2000*, "includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own ..." Because the leaves are a statutory right, employers have no discretion to grant or withhold maternity and parental leave to qualifying individuals.
34. Under the *Employment Insurance Act, 1996 (EIA)* maternity benefits are available to qualifying individuals who can prove their pregnancy.
35. The *EIA* makes parental benefits available to qualifying individuals for the care of one or more new-born children of the claimant or one or more children placed with the claimant for the purposes of adoption under the laws governing adoption in the province in which the claimant resides.
36. An employer may supplement benefits ("top up") received under the *EIA* provided the conditions set out in s. 38 the *Employment Insurance Act Regulations* are met.<sup>48</sup> The conditions are that the combined weekly benefits received under the *EIA* and from the employer do not exceed the employee's weekly earnings and that the amount paid by the employer does not reduce the individual's accumulated sick or vacation leave, severance pay or other accumulated credits from employment.

## VIII. EMERGENCY LEAVE

37. The *ESA, 2000* provides for unpaid leaves for employees whose employer regularly employs 50 or more employees in the event of death, injury or medical emergency of a spouse or same-sex partner or other family members.<sup>49</sup>

## IX. PUBLIC COMMITMENT CEREMONIES

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<sup>44</sup> *Employment Standards Act, 2000*, S.O. 2000, c.41.

<sup>45</sup> *ESA, 2000*, s.44(1) provides:

Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex, marital status or same-sex partnership status of employees:

- 1.employees.
- 2.beneficiaries.
- 3.survivors.
- 4.dependants.

<sup>46</sup> The *Employment Insurance Act, 1996*, c.23 uses the terminology "maternity plans" and "benefits for pregnancy".

<sup>47</sup> *ESA, 2000*, s. 48(1).

<sup>48</sup> SOR/96-332 as amended SOR/2002-274, s. 2; SOR/202-274, s.3.

<sup>49</sup> Section 50(2) provides an exhaustive listing of the particular individuals and their relationship to the employee.

38. In *Boutilier v. Canada (Natural Resources)*<sup>50</sup> the Canadian Human Rights Tribunal held that the Treasury Board's practice of denying leave to employees for the purpose of participating in public same-sex commitment ceremonies was discriminatory. In addition to ordering the employer to cease the discriminatory practice, the Tribunal ordered the Treasury Board to grant leaves for marriage and public commitment ceremonies on the same terms. The employer was further ordered to credit the complainants' annual leave used when marriage leave was denied and to pay \$5,000 for the pain and suffering of each complainant.

It was moved by Mr. Millar, seconded by Dr. Eber that Convocation approve the document entitled Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment – A Model Policy for Law Firms and Other Organizations as set out in Appendix 3.

Carried

*ITEMS FOR INFORMATION*

- Disability Working Group – Proposed Consultation
- Progress Report – Mentoring Program
- Upcoming Public Education Events

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

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ADMINISTRATION

B.1. CALL TO THE BAR AND CERTIFICATE OF FITNESS

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Friday, May 28th, 2004:

Suman Umesh Ahuja	Bar Admission Course
Ingrid Helen Carmichael-Benjamin	Bar Admission Course
Laoura Christodoulides	Bar Admission Course
Asha Pierrette Daniere	Bar Admission Course
Gennady Ferenbok	Bar Admission Course
Nicola Elizabeth Geary	Bar Admission Course
Daniel Albert Hammond	Bar Admission Course

<sup>50</sup> [2003] C.H.R.D. No. 14 (C.H.R.T.).

Marc Samuel Kestenberg	Bar Admission Course
Olujide Oladejo	Bar Admission Course
Kenneth William Osborne	Bar Admission Course
Jeffrey Pearson	Bar Admission Course
Imtyaz Mohammed Sattar	Bar Admission Course
Shawn Peter Somerville	Bar Admission Course
Robert Kenneth Yanch	Bar Admission Course

B.1.3. (b) Transfer from another Province - Section 4

B.1.4. The following candidates have filed the necessary documents, paid the required fee and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Friday, May 28th, 2004:

Jodi Alexandra Sarah Armstrong	Province of British Columbia
Kevin Charles Brosseau	Province of Alberta
Carla Dawn Crozier	Province of British Columbia
Lesley Christine Enta	Province of Newfoundland
Rajan Juneja	Province of Alberta
Erin McEachern Tully	Province of British Columbia
David Scott Worsfold	Province of Newfoundland
Angela Yadav	Province of British Columbia

ALL OF WHICH is respectfully submitted

DATED this the 28th day of May, 2004

It was moved by Mr. Hunter, seconded by Mr. Simpson that the Report of the Director of Professional Development & Competence setting out the candidates for Call to the Bar be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar. Mr. Bourque then presented them to Madam Justice Andromache Karakatsanis to sign the rolls and take the necessary oaths.

Suman Umesh Ahuja	Bar Admission Course
Ingrid Helen Carmichael-Benjamin	Bar Admission Course
Laoura Christodoulides	Bar Admission Course
Asha Pierrette Daniere	Bar Admission Course
Gennady Ferenbok	Bar Admission Course
Nicola Elizabeth Geary	Bar Admission Course
Daniel Albert Hammond	Bar Admission Course
Marc Samuel Kestenberg	Bar Admission Course
Olujide Oladejo	Bar Admission Course
Kenneth William Osborne	Bar Admission Course
Jeffrey Pearson	Bar Admission Course
Imtyaz Mohammed Sattar	Bar Admission Course

Shawn Peter Somerville  
 Robert Kenneth Yanch  
 Jodi Alexandra Sarah Armstrong  
 Kevin Charles Brosseau  
 Carla Dawn Crozier  
 Lesley Christine Enta  
 Rajan Juneja  
 Erin McEachern Tully  
 David Scott Worsfold  
 Angela Yadav

Bar Admission Course  
 Bar Admission Course  
 Transfer, Province of British Columbia  
 Transfer, Province of Alberta  
 Transfer, Province of British Columbia  
 Transfer, Province of Newfoundland  
 Transfer, Province of Alberta  
 Transfer, Province of British Columbia  
 Transfer, Province of Newfoundland  
 Transfer, Province of British Columbia

### ELECTION OF TREASURER

The Secretary, Katherine Corrick, announced that Frank Marrocco, Q.C. was acclaimed as Treasurer of the Law Society of Upper Canada.

### FEINSTEIN/MURRAY MOTION – RULES OF PROCEDURE

The Feinstein/Murray motion on Rules of Procedure was deferred to the June 2004 Convocation.

### REPORT OF THE FINANCE & AUDIT COMMITTEE

Re: Assistance with Unusually Onerous Obligations to the Society

Mr. Ruby presented the Report of the Finance & Audit Committee to Convocation.

Finance and Audit Committee  
 May 13, 2004

Report to Convocation

Purpose of Report:      Decision  
    Information

Prepared by the Finance Department  
 Andrew Cawse (947-3982)

### THE REPORT

1. The Finance and Audit Committee (“the Committee”) met on May 13, 2004. Committee members in attendance were: Clay Ruby (c.), Abdul Chahbar (v.c.), Peter Bourque, Andrew Coffey, Paul Dray, Allan Gotlib, Holly Harris, Allan Lawrence, Ross Murray, Laurie Pawlitza, Alan Silverstein, Gerry Swaye and Beth Symes.

Staff attending were Katherine Corrick, Fred Grady and Andrew Cawse.

2. The Finance and Audit Committee also met on March 11, 2004. Committee members in attendance were: Clayton Ruby (c), Abdul Chahbar (v.c.), Peter Bourque, Andrew Coffey, Holly Harris, Ross Murray, Laurie Pattillo, Laurie Pawlitza, Alan Silverstein, Gerald Swaye, Beth Symes, Bradley Wright.

Staff attending were Katherine Corrick, Fred Grady, Andrew Cawse.

3. The Committee is reporting on the following matters:

For Decision

- Assistance with unusually onerous obligations to the Society.

For Information

- General Fund financial statements for the first quarter
- Lawyers Fund for Client Compensation financial statements for the first quarter
- Investment Compliance Reports.

FOR DECISION:

ASSISTANCE WITH UNUSUALLY ONEROUS OBLIGATIONS TO THE SOCIETY

Request to Convocation

Convocation is requested to approve the following criteria for the payment of Benchers remuneration:

The Treasurer and the Chair of Finance shall determine the need for financial assistance to Benchers in the circumstances described below:

- a) In circumstances where the Bencher has taken on obligations which are or have become significantly more onerous than a Bencher's regular duties and,
- b) such obligations have caused or will result in undue hardship to the Bencher.

When the Treasurer and the Chair of Finance have made such a determination they may, in their discretion, grant such assistance as they consider appropriate to relieve all or part of the undue hardship.

- c) Once annually, the Chair of Finance shall report to Convocation the amount paid to Benchers as assistance and the number of Benchers who received the assistance.
  - d) After three years the Finance & Audit Committee is to review this program and report to Convocation on its efficacy.
4. In January 2003, Convocation approved the principle of Bencher remuneration but did not achieve consensus on the basis on which it would be paid when payment mechanisms were discussed in February 2003. At the meetings in March and May 2004 the Finance and Audit Committee considered a range of payment options for Bencher remuneration. Given the debate in Convocation in January and February 2003, the Committee did not discuss the overall principle of Bencher remuneration.
  5. The payment mechanism recommended in this report is intended to balance the need to provide some form of assistance for extreme or unusual circumstances with the need to treat all Bencher services equally.
  6. The motion intentionally does not set out detailed terms for payment but is intended to provide the Treasurer and the Chair of Finance the discretion to provide assistance as they consider appropriate.
  7. One of the core Bencher roles is sitting on discipline panels. We are about to experience an increase in the number of lengthy discipline hearings because of the complexity of some matters currently being investigated, the trend towards more vigorous defenses, and the consolidation of applications where numerous complaints against a member are heard together. The possibility of compensation for the hardship which may arise from Benchers sitting on a long discipline hearing will greatly facilitate the scheduling and hearing of these matters. We need to provide a representative hearing panel for all cases, including long hearings.

8. The motion is recommended as it provides Convocation with the power and flexibility to meet the most urgent objectives of Bencher remuneration and avoid many of the problems and debates which could be associated with Bencher remuneration. It is the narrowest of all the options, and since it is designed for unusual circumstances only, the cost should not be significant.
  
9. Convocation should know that before the Committee reconsidered the matter and approved the proposal put forward today, the Committee examined and also found merit in two other proposals for Bencher remuneration. More members liked option a) than liked option b) and neither obtained a majority:
  - a) **The Conduct Option**
    - Activity eligible for remuneration would be limited to sitting time on conduct matters, specifically all discipline and competence matters including hearing panels, appeal panels, pre-hearing conferences, hearing management tribunals appeal management tribunals and the Proceedings Authorization Committee.
    - 40 elected Benchers, 8 lay Benchers and say 18 of 28 ex-officio Benchers for a total of 66 Benchers would be eligible for remuneration.
    - Remuneration would be at a per diem rate of \$500. \$375 is the daily rate for the Legal Aid Board of Directors. \$660 is the approximate day's pay for 7.5 hours at the top Legal Aid rate of \$89.74.
    - The first five days would not be remunerated.
    - Travel time (which would be an average of 5.5 hours per return trip), and any other non-sitting time is excluded with the exception of one day per hearing permitted for reason preparation time.
  
  - b) **The Conduct, Committee and Convocation Option**
    - Activity eligible for remuneration would include sitting time on conduct matters but in addition includes sitting time on committee meetings, task forces and working groups and in addition includes sitting time on Convocation and calls to the bar. Includes all discipline and competence matters including hearing panels, appeal panels, prehearing conferences, hearing management tribunals, appeal management tribunals and the Proceedings Authorization Committee.
    - 40 elected Benchers, 8 lay Benchers and say 18 of 28 ex-officio Benchers for a total of 66 Benchers would be eligible for remuneration.
    - Remuneration would be at a per diem rate of \$500. \$375 is the daily rate for the Legal Aid Board of Directors. \$660 is the approximate day's pay for 7.5 hours at the top Legal Aid rate of \$89.74.
    - The first 26 days would not be remunerated (a 26 day deductible). 26 days is based on a commitment of one day a fortnight being sustainable to a law practice.
    - Travel time (which would be an average of 5.5 hours per return trip), post-sitting time (e.g. reason preparation time) and any other non-sitting time is excluded with the exception of one day per hearing permitted for reason preparation time.
  
10. The financial implications of the above two per diem options are summarized below:

	CONDUCT OPTION 5 DAY DEDUCTIBLE	CONDUCT COMMITTEE CONVOCATION OPTION 26 DAY DEDUCTIBLE
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Convocation Days (80% attendance)	-	9
Committee Days (80% attendance)	-	7
Task Force & Working Group Days	-	3
Tribunal/Conduct Days	10	10
Call to the Bar Days (60% attendance)		2
<b>TOTAL DAYS</b>	<b>10</b>	<b>31</b>
Less: DEDUCTIBLE DAYS	5	26
<b>DAYS ELIGIBLE FOR PER DIEM</b>	<b>5</b>	<b>5</b>
Annual Individual Bencher Income Per Diem of \$500	\$2,500	
Annual Individual Bencher Income Per Diem of \$1,000	\$5,000	
Annual Individual Bencher Income Per Diem of \$1,500	\$7,500	
Annual Cost to LSUC Per Diem of \$500, 66 Benchers	\$165,000	
Annual Cost to LSUC Per Diem of \$1,000, 66 Benchers	\$330,000	
Annual Cost to LSUC Per Diem of \$1,500, 66 Benchers	\$495,000	
Total cost per member Per diem rate of \$500, 66 Benchers	\$6	
Total cost per member Per Diem rate of \$1,000, 66 Benchers	\$11	
Total cost per member Per diem rate of \$1,500, 66 Benchers	\$17	

11. Notes and assumptions applicable to all options
- i. The annual time period would be the Bencher, not calendar year.
  - ii. In 2004 there are 40 elected Benchers and 28 ex-officio Benchers (including former Treasurers). It is assumed that 18 of the 28 ex-officio Benchers will be remunerated.
  - iii. The 8 lay Benchers receive a per diem of \$177 from the Ontario government. We would have to investigate whether the Law Society could top up the provincial remuneration so that all Benchers are remunerated equally. Provincial payments to lay Benchers would reduce the costs in the table above by \$7,000.
  - iv. The remuneration is taxable and taxes may be withheld at source.
  - v. The costs of Bencher remuneration would be spread across 29,000 full fee paying equivalent members.
  - vi. Financial implications exclude administration costs for time recording, payment processing and tax documentation. A per diem payment would be less administratively onerous than an hourly rate, but more onerous than an annual honorarium. An additional administrative employee may be required to administer and verify remuneration under a per diem formula.
  - vii. According to the adopted motion at Convocation in January 2003, the payment of Bencher remuneration would be effective from June 2003. No provision for Bencher remuneration has been established in the 2004 budget other than the general contingency.

FOR INFORMATION:

GENERAL FUND INTERIM FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2004

12. The financial statements for the General Fund for the quarter ended March 31, 2004 are attached for information (page 10).

LAWYERS FUND FOR CLIENT COMPENSATION INTERIM FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2004

14. The financial statements for the Compensation Fund for the quarter ended March 31, 2004 are attached for information (page 14).

INVESTMENT COMPLIANCE REPORTS

15. Investment Compliance Reports for the quarter ended March 31, 2004 for the General Fund and the Lawyers Fund for Client Compensation are attached for information (page 16). The Reports confirm there are no breaches in compliance.

Attached to the original Report in Convocation file, copies of:

- (a) Copy of the financial statements for the General Fund for the quarter ended March 31, 2004. (pages 10 – 13)
- (b) Copy of the financial statements for the Compensation Fund for the quarter ended March 31, 2004. (pages 14 – 15)
- (c) Copy of the Investment Compliance Reports for the quarter ended March 31, 2004 for the General Fund and the Lawyers Fund for Client Compensation. (pages 16 – 25)

It was moved by Mr. Ruby, seconded by Mr. Chahbar that Convocation approve the following criteria for the payment of benchers remuneration:

The Treasurer and the Chair of Finance shall determine the need for financial assistance to benchers in the circumstances described below:

- (a) In circumstances where the benchers has taken on obligations which are or have become significantly more onerous than a benchers regular duties and,
- (b) such obligations have caused or will result in undue hardship to the benchers.

When the Treasurer and the Chair of Finance have made such a determination they may, in their discretion, grant such assistance as they consider appropriate to relieve all or part of the undue hardship.

- c) Once annually, the Chair of Finance shall report to Convocation the amount paid to benchers as assistance and the number of benchers who received the assistance.
- d) After three years the Finance & Audit Committee is to review this program and report to Convocation on its efficacy.

Lost

ROLL-CALL VOTE

Alexander	Abstain	Legge	Against
Backhouse	For	MacKenzie	For
Banack	Against	Manes	For
Bobesich	For	Millar	Against
Bourque	For	O'Brien	Against

Carpenter-Gunn	Against	O'Donnell	Against
Caskey	Against	Pattillo	For
Cherniak	Against	Pawlitza	For
Copeland	Against	Porter	Against
Curtis	Against	Potter	Against
Dickson	Against	Robins	Against
Doyle	Against	Ross	For
Dray	Against	Ruby	For
Eber	Against	Sandler	For
Elliott	Against	Silverstein	Against
Feinstein	Against	Simpson	Against
Filion	Abstain	Swaye	Against
Finkelstein	Against	Topp	Against
Finlayson	Against	Warkentin	For
Gold	For	Wright	Against
Gotlib	For		
Gottlieb	For		
Harris	Abstain		
Heintzman	Against		
Hunter	Against		
Krishna	Against		

Vote: 29 Against; 14 For; 3 Abstentions

It was moved by Ms. Curtis, seconded by Ms. Potter that Convocation adopt the remuneration scheme set out at pages 4 and 5 of the Report at paragraph 9 (b) with a friendly amendment that ensures that it is clear that all bench work will be remunerated.

Carried

ROLL-CALL VOTE

Alexander	For	Legge	Against
Backhouse	Against	MacKenzie	Against
Banack	Against	Manes	Against
Bobesich	For	Millar	For
Bourque	For	O'Brien	Against
Carpenter-Gunn	For	O'Donnell	Against
Caskey	For	Pattillo	Against
Cherniak	Against	Pawlitza	Against
Copeland	For	Porter	For
Curtis	For	Potter	For
Dickson	For	Robins	Against
Doyle	For	Ross	For
Dray	For	Ruby	For
Eber	For	Sandler	For
Elliott	For	Silverstein	For
Feinstein	For	Simpson	For
Filion	Abstain	Swaye	Against
Finkelstein	Against	Topp	Against
Finlayson	Against	Warkentin	For
Gold	For	Wright	For
Gotlib	Abstain		
Gottlieb	For		
Harris	Abstain		
Heintzman	Against		
Hunter	Against		



compensation should be paid, if any, (3) the length of any deductible period before compensation would begin to accrue, and (4) any other issues or stakeholders concerning benchers compensation that the independent commission deems appropriate to consider or consult with;

And that Convocation submit to the commission for consideration its non-binding view that a fair system of compensation (1) should feature a modest per diem designed only to lessen the financial sacrifice, not replace lost revenues, (2) should not differentiate among the various types of benchers activity unless there are very compelling reasons to do so, and (3) should feature a substantial deductible period of not less than 26 days or 52 half days per year (i.e., more than five weeks per year) to represent each benchers' financially uncompensated contribution to the public and to the profession.

Mr. Wright amended his motion by deleting the second paragraph.

Not Put

It was moved by Gary Gottlieb, seconded by Bob Aaron that

A Committee composed of the Treasurer, the Chair of the Equity and Aboriginal Issues Committee, and the Chair of the Finance and Audit Committee, and chaired by the Treasurer, receive applications from benchers who suffer from financial hardship as a result of serving as benchers, and grant such financial assistance as the Committee in their discretion deems appropriate to relieve the financial hardship of such benchers.

It was moved by Laurence Pattillo, seconded by Laurie Pawlitz that

There be no compensation paid to benchers.

Not Put

*ITEMS FOR INFORMATION*

- Quarterly Financial Statements
- Investment Compliance Reports

Ms. Elliott withdrew from Convocation.

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IN CAMERA

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**IN CAMERA Content Has Been Removed**

IN CAMERA Content Has Been Removed

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IN PUBLIC

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REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Re: Proposed Amendments to *Rules of Professional Conduct* on Law Firm Names and Letterhead

Ms. Curtis presented the Report of the Professional Regulation Committee.

Professional Regulation Committee  
May 28, 2004

Report to Convocation

Purposes of Report: Decision

Prepared by the Policy Secretariat  
(Jim Varro – 416-947-3434)

OVERVIEW OF POLICY ISSUE

PROPOSED AMENDMENTS TO RULES 3.02 AND 3.03 OF  
THE *RULES OF PROFESSIONAL CONDUCT* ON  
LAW FIRM NAMES AND LETTERHEAD

Request to Convocation

1. Convocation is requested to approve amendments to rules 3.02 and 3.03 of the *Rules of Professional Conduct* that will
  - permit descriptive or trade names and the names of lawyers qualified in non-Canadian jurisdictions in an Ontario law firm name,
  - permit an Ontario lawyer to use a title relating to his or her membership in a non-Canadian bar on letterhead, and
  - add advertising permitted under rule 3.04 as an item that may be included on letterhead.
2. Convocation is also requested to approve criteria that staff will use to provide pre-approval guidance to members on their proposed firm names.
3. The amended rules appear on pages 10 and 15. The criteria appear at page 12.

#### Summary of the Issue

4. The Professional Regulation Committee (“the Committee”) formed a working group to review issues related to the law firm names and letterhead rules. Based on a report from the working group, the Committee is proposing amendments to these rules.
5. The amended firm name rule will permit descriptive and trade names. If lawyers’ names are used in a firm name, the names are now restricted to the names of lawyers
  - qualified to practice law in Ontario or another jurisdiction in Canada or outside of Canada where the firm carries on its practice, and
  - who are current members of the firm, who were members of the firm but are now retired from the practice of law, or who were members of the firm but are deceased.
6. To assist lawyers in complying with the amended rule, the Committee is proposing that Convocation approve criteria for use by Law Society staff who will provide advice to lawyers on whether proposed firm names conform to the amended rule. The availability of this service would be communicated to the profession with notice of the amendments.
7. The amended letterhead rule will permit a lawyer in an Ontario law practice to use his or her designation arising from membership in a non-Canadian bar (e.g. Attorney at Law) as long as he or she also uses the designation for the practice of law in Ontario (e.g. Barrister & Solicitor).
8. Housekeeping amendments to both the firm name and letterhead rules will provide the French language versions of the limited liability partnership and professional corporation designations.
9. The Committee is also proposing that advertising permitted under rule 3.04 be added as an item that may be included on letterhead under rule 3.03. Currently, rule 3.03 only addresses advertising permitted under rule 3.05.
10. The Committee wishes to thank Paul Perell, who assisted the Committee in preparing the proposed amendments in this report.

## THE REPORT

#### Terms of Reference/Committee Process

11. The Committee met on May 13, 2004. Committee members in attendance were Carole Curtis (Acting Chair and Vice Chair), Mary Louise Dickson, Anne Marie Doyle, Sy Eber, George Finlayson, Patrick Furlong, Allan Gotlib, Ross Murray and Laurie Pattillo. Mark Sandler also attended. Staff attending were Bruce Arnott, Naomi Bussin, Leslie Greenfield, Hershel Gross, Terry Knott, Dulce Mitchell, Zeynep Onen, Lisa Osak, Elliot Spears, Jim Varro and Andrea Waltman.

12. The Committee is reporting on the following matters:

For Decision

- Proposed amendments to rules 3.02 and 3.03 of the Rules of Professional Conduct on law firm names and letterhead.

PROPOSED AMENDMENTS TO RULES 3.02 AND 3.03  
OF THE *RULES OF PROFESSIONAL CONDUCT* ON  
LAW FIRM NAMES AND LETTERHEAD

A. *INTRODUCTION AND BACKGROUND*

13. A working group of the Committee<sup>1</sup> was formed in June 2002 to review the firm name and letterhead rules<sup>2</sup>, in light of a number of developments in the profession here and abroad. The working group considered relevant issues, and these issues and related questions were highlighted in material prepared for a call for input from the profession in the spring of 2003. This material appears at Appendix 1.

B. *OVERVIEW OF THE ISSUES*

Law Firm Names

14. The Committee considered a number of issues arising from the working group's review and the results of the call for input.<sup>3</sup> The issues included the following:
- a. Many law firm names only include the names of deceased or retired lawyers. As a result, the names of the lawyers in many firm names are unrelated to the identities of the lawyers who currently work in the firm. Moreover, several large Toronto firms use names that have effectively become trade names. They have market recognition and goodwill attached to them and some have evolved to names commonly used in the legal services marketplace.<sup>4</sup>
  - b. National and international developments are leading to an examination of how lawyers are regulated (see material on this subject included in the call for input material at Appendix 1). As transborder practice increases and rules are formulated around mobility of lawyers and global trade in legal services, the uniformity of a law firm name domestically and internationally is likely to become increasingly important, especially where firms compete for business and seek recognition in the global marketplace. One question is whether permitting an Ontario law firm name to include the names of lawyers who are qualified to practice law in a non-Canadian jurisdiction where the law firm is also located poses any risks to the public.
  - c. The primary risk to the public in not confining a firm name to the names of lawyers appears to be the potential use of misleading or offensive terms, which is also the primary concern with lawyer advertising generally. The manner in which this risk is addressed in less restrictive rules requires careful consideration. It would appear that at a minimum, such rules should prohibit
    - names that are misleading about the identity of who is practicing law,
    - names that create uncertainty around who controls the law practice,
    - names that are misleading about the type of legal services offered by the firm, and

<sup>1</sup> Marilyn Pilkington (chair), Tom Carey, Avvy Go and Stephen Bindman. As a result of the bench election in May 2003, the Committee's working group was effectively disbanded. Policy, Practice Advisory and Professional Regulation staff continued with an examination of the issues following the call for input, discussed the options and, at the direction of the Committee's chair, reported suggested amendments to the Committee.

<sup>2</sup> Rules 3.02 and 3.03. The current rules appear on page 21 and following.

<sup>3</sup> A summary of the respondents' comments without attribution appears at Appendix 2. Fewer than 10 responses were received. The majority of respondents did not support changes to the firm name rule. The minority who supported changes said that trade names should be permitted. A majority of respondents thought that the letterhead rule should be amended, primarily to expand the information that may be included on letterhead.

<sup>4</sup> Examples include Torys LLP, Lerner LLP and Goodmans LLP.

- names that are offensive or negatively impact on the administration of justice.
- d. Other jurisdictions' rules are less restrictive than those of the Law Society. Other Canadian law societies permit descriptive or trade names within a regulatory framework.<sup>5</sup> For example,
  - i. British Columbia's firm name rule in Chapter 14 of its Rules is cast in general principles that relate to a prohibition on misleading or unprofessional advertising:

Content and format of marketing activities

4. Any marketing activity undertaken or authorized by a lawyer must not be:

- (a) false,
- (b) inaccurate,
- (c) unverifiable,
- (d) reasonably capable of misleading the recipient or intended recipient, or
- (e) contrary to the best interests of the public or to the maintenance of a high standard of professionalism.

...

Firm name

9. A lawyer shall not use a firm name which violates Rule 4(e) of this Chapter.

- ii. Alberta gives examples in commentary to its Rules of the type of trade names that would offend its rule:

While the use of a trade name is not improper, it must be carefully selected to avoid any misconception on the part of the public. For example, "University Legal Clinic" would be unacceptable because it implies a connection with another institution. A geographical trade name is improper if it leads a reasonable person to erroneously conclude that the law office is a public agency, or is the only law office available in that area or locality, or if the name misleads the public in another respect.

- iii. In Chapter 14 of its Rules, Manitoba permits both "lawyer" names and "descriptive or trade" names, with an overriding prohibition on misleading names:

Firm Names and Letterhead

9. The lawyer shall not use a firm name or letterhead that could mislead the public.

...

11. The lawyer shall carry on the practice of law only under:

- (a) the lawyer's name;
- (b) the names of existing or former partners or associates;
- (c) the name of the original or founding partner or partners or associates;
- (d) any combination of the foregoing; or
- (e) a descriptive or trade name, provided:
  - (i) the name or a similar descriptive or trade name is not in use elsewhere in Canada;
  - (ii) that by use of the name, the lawyer or firm could not mislead members of the public into believing erroneously that the lawyer or firm is associated or affiliated elsewhere in Canada with other firms or the members thereof; and
  - (iii) the name is authorized by the federal or provincial government by statute or regulation, or the lawyer is the sole member of, a partner in, or an associate or employee of, the firm carrying on the practice of law under that name.

- iv. Nova Scotia's rule in Part 9 of its Legal Ethics and Professional Conduct Handbook uses the phrase "business names":

Firm Names

51C (1) A lawyer may practice under the firm name of the lawyer, present or former members of the firm, or a business name so long as the name is in good taste, dignified and professional.

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<sup>5</sup> See Appendix 1 material at page 24 and following for additional information about rules in these jurisdictions.

#### Letterhead

15. Similar to one of the issues relevant to firm names, the Committee acknowledged that cross-border practice situations will inevitably require a formalized response from the Society as members question what they are permitted to include on their letterhead. Some lawyers have already made these inquiries of the Law Society's Practice Advisory service.
16. For example, where an Ontario member is also called in New York, and wishes to use the phrase "Attorney and Counsellor at Law" on his or her letterhead, the existing rule permits the lawyer to indicate membership in another bar, but does not permit this title.
17. If a title relating to membership in a non-Canadian bar was permitted, the risk of confusing or misleading the public about a lawyer's qualifications to provide advice on domestic law could be addressed by requiring that the Ontario lawyer also indicate a title commonly used by Ontario lawyers. This would provide the necessary transparency for the public.

### C. THE PROPOSALS

#### Law Firm Names

18. The Committee is proposing that amendments be made to the firm name rule that would permit descriptive and trade names and would incorporate the component of international practice. Based on the issues and developments described above, the Committee determined that with appropriate regulation, the prohibition on business or trade names and the names of non-Canadian lawyers in law firm names is unnecessary for protection of the public.
19. The Committee concluded that as long as the law firm is identified as an Ontario law practice, there appears to be no risk to the public, for example, in permitting the name of New York lawyers in the Ontario practice name if the firm has a New York office.
20. The use of non-Canadian lawyers' names is related to foreign legal consultants. Lawyers in Ontario who are also qualified in a non-Canadian jurisdiction (e.g. New York) are now permitted to practice both Ontario law and, as a foreign legal consultant (FLC) in Ontario, the law of the foreign jurisdiction. If the lawyer is carrying on his or her FLC practice under the banner of a New York FLC firm in Ontario (and also maintains a New York office), the current rule requires that the lawyer's Ontario law practice must use a name that conforms to the firm name rule (i.e. restricted to the names of Ontario or Canadian lawyers).
21. The proposed amendment would permit the lawyer to use the New York firm name for both the FLC practice and the Ontario law practice, as long as both practices were identified. By-Law 39 on Foreign Legal Consultants does not appear to require amendment if this change is made to the rule. Section 12 of the By-Law speaks only indirectly to firm names, but acknowledges in s.12 (2) the dual role of a member who is also an FLC:

#### Marketing of Services

12. (1) A person who is licensed as a foreign legal consultant shall, when advertising or otherwise marketing his or her services as a foreign legal consultant, refer to him or herself as a foreign legal consultant, state the jurisdiction in respect of the law of which he or she is qualified to give legal advice in Ontario and state the professional title applicable to him or her in that jurisdiction.

#### Same

(2) A person, other than a member, who is licensed as a foreign legal consultant shall not, when advertising or otherwise marketing his or her services as a foreign legal consultant, use any designation or make any representation from which a person might reasonably conclude that the foreign legal consultant is a member.

22. Housekeeping amendments to add the French language equivalents for limited liability partnership and professional corporation designations are also proposed.
23. The following are the proposed amendments to rule 3.02:

### 3.02 LAW FIRM NAME

#### Permissible Names

- 3.02 (1) A law firm name ~~may include only the~~ shall not include any name that is not
- (a) ~~a names of persons who are~~ a current, a retired from practice, or a deceased member of the firm who is or was qualified to practice law
- (i) ~~in Ontario or in any other province or territory of Canada where the law firm carries on its practice, or~~
- (ii) ~~, if retired or deceased, were qualified to practise law in Ontario or in any other province or territory of Canada where the firm carries on its practice~~ in a jurisdiction outside of Canada where the law firm carries on its practice, or
- (b) ~~\_\_\_\_\_~~ a descriptive or trade name that is in keeping with the dignity, integrity, independence, and role of the legal profession in a free and democratic society and in the administration of justice.
- (2) ~~\_\_\_\_\_ A law firm name may consist of or include the names of lawyers who were members of the firm but who are deceased or retired from the practice of law.~~
- (3) (2) A lawyer who purchases a practice may, for a reasonable length of time, use the words "Successor to \_\_\_\_\_" in small print under the lawyer's own name.

#### Restrictions

- (4) (3) ~~The name of a law firm shall not include a trade name, a commercial name, or a figure of speech. A law firm name shall not include a descriptive or trade name that is misleading about~~
- (a) ~~the identities, responsibilities, or relationships of the lawyers practicing under the firm name,~~  
or
- (b) ~~the association or relationship of the law firm with other lawyers or non-lawyers.~~
- (5) (4) ~~The name of a law firm shall not include the use of phrases such as "John Doe and Associates," "John Doe and Company," or "John Doe and Partners" unless there are in fact, respectively, two or more other lawyers associated with John Doe in practice or two or more partners of John Doe in the firm.~~
- (6) (5) ~~When a lawyer retires from a law firm to take up an appointment as a judge or master or to fill any office incompatible with the practice of law, the lawyer's name shall not be deleted included in from the firm name.~~
- (7) (6) ~~A lawyer or law firm may not acquire and use a firm name unless the name was acquired along with the practice of a deceased or retiring member who conducted a practice under the name.~~

#### Limited Liability Partnership

- (8) (7) ~~If a law firm practices as a limited liability partnership, the phrases "limited liability partnership" "société à responsabilité limitée" or the letters "LLP," "L.L.P." or "s.r.l." shall be included as the last words or letters in the firm name.~~

#### Professional Corporation

- (9) (8) ~~If a lawyer practices law through a professional corporation, the name of the corporation shall include the words "Professional Corporation" or "Société professionnelle".~~

### Criteria for Guidance to Members

24. To assist lawyers in complying with the amended rules, the Committee is proposing that Convocation adopt criteria that Law Society staff may use to provide advice to lawyers on whether proposed firm names conform to the amended rule. The availability of this service would be communicated to the profession with notice of the amendments.
25. In the Committee's view, this will also permit the Society to monitor developments in response to and lawyers' compliance with the rule amendments. Convocation's approval of the criteria is therefore an important aspect of the proposals for amendment.
26. The criteria are as follows:

#### Criteria with respect to misleading names:

1. If a firm name is a trade name, it must conform with rule 3.02 if it includes proper names.
2. A firm name may not include the names of non-lawyers.
3. A firm name may not include language that would imply a connection to a specific geographic location. Legal clinics under the *Legal Aid Service Act, 1998* may continue to use names that indicate a connection with the communities they serve, in keeping with the purpose of the clinic structure.
4. A firm name may not include language that would imply a connection with a government agency or with a public or charitable legal services organization (i.e. legal clinic).
5. A firm name may not include language that would imply a connection with another non-legal corporate entity.
6. A firm name may not include language that would imply a connection with a cultural, racial, ethnic or religious group or organization. Legal clinics under the *Legal Aid Service Act, 1998* may continue to use names that indicate a connection with the communities they serve, in keeping with the purpose of the clinic structure.
7. A firm name may not contain language that would imply a connection with another existing law firm, if such is not the case.
8. A firm name may not contain language that would imply a connection with any other entity or organization not already enumerated (e.g. University Legal Clinic, Osgoode Hall Law Office, etc.).
9. A firm name may not include language that would imply that the firm was the only or the best law firm (e.g. "The" Law Corporation).
10. A firm name may not include language that would imply a comparison between the services performed by that firm and other firms (e.g. Best Law Firm, Greatest Law Firm, etc.).
11. A firm name may not contain language that would be misleading as to the number of lawyers practicing with the firm, or their status in the firm.
12. A firm name may not include language that would imply the existence of a partnership, association or affiliation between lawyers when no such relationship exists (i.e. two sole practitioners who share office space carrying on business under a common firm name).

#### Criteria based on statutory prohibitions:

13. A firm name may not include language that is specifically prohibited by statute (e.g. *Business Names Act, Business Corporations Act, Ontario Human Rights Act, Partnerships Act, Patent Act, Trade-marks Act, Copyright Act*).

#### General criteria:

14. A firm name may not include language that is demeaning, degrading or derogatory.

### Other Considerations

27. An issue related to the proposed amendments is the manner in which lawyers identify themselves to the Law Society for the purpose of the members' database. The correctness of a member's name and the ability to determine the place of and contact information for a member's practice are important to a number of the Society's regulatory processes, including complaints and discipline.

28. The proposed amendments to the firm name rule may require additional internal processes to ensure that the Society can link a lawyer's name as it appears in the members' database to the practice name under which the lawyer offers services to the public.

#### Letterhead

29. Three amendments to the letterhead rule are being proposed.
30. First, the Committee is proposing that amendments be made to the letterhead rule that would permit a lawyer in an Ontario law practice to use his or her designation arising from membership in a non-Canadian bar (e.g. Attorney at Law) as long as he or she also uses the designation for the practice of law in Ontario (e.g. Barrister & Solicitor).
31. Second, similar to the firm name rule, two housekeeping amendments to the letterhead rule are proposed to provide for the French versions of the limited liability partnership and professional corporation designations.
32. A third proposed amendment will add advertising permitted under rule 3.04 as an item that may be included on letterhead. Currently, rule 3.03(1)(n) permits lawyers to include on letterhead "advertising permitted under rule 3.05". Rule 3.05 permits lawyers to advertise general, restricted or multi-discipline practices. The reference to rule 3.05 in rule 3.03 was made explicit in 2001, following distribution of the new Rules in 2000, when the need arose to address some issues raised by the profession once the new Rules were being applied (rules 3.04 and 3.05 appear in Appendix 3).
33. The 2001 amendment, however, did not reference rule 3.04, which permits promotional advertising of services and fees, subject to certain restrictions. The reason for not including the reference to rule 3.04 is unclear, but one possibility is that it was simply an oversight.
34. The Committee concluded that there does not appear to be a policy reason not to reference rule 3.04 in rule 3.03(1)(n). Including rule 3.04 would be in keeping with Convocation's approach to the 2000 rule amendments to remove antiquated restrictions on what may appear on lawyers' letterhead that served no rational purpose, thus permitting lawyers to include anything they would be permitted to include under the rules governing advertising (i.e. rules 3.04 and 3.05).
35. The following are the proposed changes to the letterhead rule:

#### 3.03 LETTERHEAD

3.03 (1) Subject to subrules (2), ~~and (3)~~ and (4), a lawyer's letterhead and the signs identifying the office may only include

- (a) the name of the lawyer or law firm,
- (b) a list of the members of any law firm, including counsel practising with the firm,
- (c) the words "barrister," "barrister at law," "barrister and solicitor," "lawyer," "law office," "solicitor," "solicitor-at-law," or the plural, where applicable,
- (d) the words "notary" or "commissioner for oaths" or both, where applicable,
- (e) the words "patent and trade mark agent," where applicable,
- (f) a statement that a member of the law firm is qualified to practise law in another named jurisdiction, along with his or her title in that jurisdiction, such as "attorney" or "attorney at law",

- (g) a statement that a member of the law firm is certified by the Law Society as a specialist in a specified field,
  - (h) the phrases “limited liability partnership” or “société à responsabilité limitée” or the letters “LLP,” “L.L.P.” or “s.r.l.” where applicable,
  - (i) the words “Professional Corporation”, or “Société professionnelle.” where applicable,
  - (j) the phrase “multi-discipline practice” or “multi-discipline partnership” where applicable,
  - (k) the addresses, telephone numbers, office hours, and the languages in which the lawyer or law firm is competent and capable of conducting a practice,
  - (l) a logo,
  - (m) reference to an affiliation, and
  - (n) advertising permitted under rules 3.04 and 3.05.
- (2) A lawyer or law firm that practises in the industrial property field may show the names of patent and trade-mark agents who are identified as such but who are not lawyers.
- (3) A lawyer or law firm may place after the names on its letterhead degrees from *bona fide* universities and post secondary institutions including honorary degrees, professional qualifications such as the designations of P.Eng., C.A., and M.D., and recognized civil and military decorations and awards, and, where the firm is a multi-discipline practice, a list of partners and associates who are non-lawyers identified as such and their designations, if any.
- (4) Where a lawyer's letterhead or office signs includes a statement under subrule (1), paragraph (f) that a member of the law firm is qualified to practise law in another named jurisdiction, it shall also include the words “barrister,” “barrister at law,” “barrister and solicitor,” “lawyer,” “law office,” “solicitor,” “solicitor-at-law,” or the plural, where applicable.

## APPENDIX 1

Professional Regulation Committee  
Working Group on Firm Name and Letterhead  
Rules of Professional Conduct  
March 2003

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Information for Call for Input

Prepared by the Policy Secretariat

## I. INTRODUCTION

The Law Society’s Professional Regulation Committee, through a working group, is reviewing the *Rules of Professional Conduct* governing law firm names and letterhead to determine if they should be made less restrictive and if so, what form the revised rules should take. The Committee is seeking input from the profession through a series of questions that appear at the end of this paper.

Subrules 3.02(1) and (4) confine the firm name to the name of a person (i.e. lawyer, deceased lawyer, etc). Other parts of rule 3.02 deal with the form of the firm name. The rule in its entirety appears at Appendix 1. Rule 3.03, at

Appendix 2, contains an exclusive but extensive list of what may appear on a lawyer's letterhead. Some items (e.g. "LLP" and "Professional Corporation") are required by the relevant legislation.

In effort to compare the Society's firm name rule with other Canadian regulators, excerpts from five other law society's rules are presented in Appendix 3. All are less restrictive than Ontario's rule and some permit trade names.

Appendix 4 contains information on current issues that may bear on rules such as those on firm names or letterhead. They include national and international developments on transborder practice within and outside of Canada. Brief comment is also provided on constitutional issues relating to advertising regulation.

## II. THE LAW SOCIETY'S REGULATORY CONTEXT

### The Firm Name Rule

The current rule is premised on the need for transparency around who is providing legal services. It may also promote the notion, through the use of the professionals' names, that the lawyers are independent practitioners of law. The specific prohibition on trade names appears to have been driven by the need to distinguish lawyers as professionals from those engaged in a business or trade. The primary purpose of a firm name is to identify a practice of law to the public. It also relates to a firm's marketing of its services. Indeed, the Society's current regulation of firm names in the Rules falls within the general subject of "making legal services available". The Law Society has accepted that advertising, of which a firm name is a component, has a promotional aspect and is used to increase the business of the law firm (i.e. the provision of professional legal services to the public).

The name of a law firm, however, must be distinguished from how a law practice is identified to the public. By-Law 34 on Professional Corporations illustrates this point. The By-Law incorporates the features of the firm name rule for regulation of registered names of law practices incorporated under the *Business Corporations Act*. These names, in keeping with the firm name rule, do not include phrases such as "Barristers & Solicitors", "Law Office of...", or "..., Lawyers", although these have historically formed part of the identification of a law firm. Technically, these descriptive phrases are advertising features that lawyers use on letterhead (discussed below) and in signs and advertisements, and are not part of the law firm name.

One of the risks – perhaps the primary risk - in liberalizing firm name regulation is that some names may be misleading or offensive, which is, in essence, the concern with lawyer advertising generally. The current rule addresses the risk but is restrictive. A number of assumptions about the need for such regulation can be drawn from the current rule. They include the following:

1. The public should not be misled as to who is practicing law.
2. As noted above, a name permitted under the firm name rule would not, of itself, identify a partnership of lawyers as a law practice. The issue of who practices law relates more directly to knowledge that a non-lawyer entity separate from the lawyers is not controlling the practice i.e. the independence of the lawyers is maintained.
3. The public should not be misled about the type of legal services offered by the firm.
4. The public should not be confused or misled about where the law firm practices.
5. The public should not be misled about the number of lawyers practising in the firm.
6. The name should not be offensive or negatively impact on the administration of justice.

Apart from the Society's rules, the regulations under the *Business Names Act*, relevant to partnerships, prescribe what may appear in a registered name. For example, the name cannot include language that is contrary to public policy, including scandalous, obscene or immoral words or expressions.

### The Letterhead Rule

Because the list of permissible inclusions on letterhead in rule 3.03 is so extensive, changes that may be made to the firm name rule may not impact significantly on the letterhead rule. However, cross-border practice situations may create some issues. For example, if the firm name relates to a practice that is carried on in a Canadian and American

jurisdiction, some members of the firm may wish to identify themselves exclusively by their designation in the foreign bar (e.g. “attorney-at-law” in United States jurisdictions).

Consider the circumstance where a member, who, for example, is called in Ontario, British Columbia and New York, and states so on the letterhead, wishes to use the phrase “Attorney and Counsellor at Law” exclusively (i.e. without indicating “barrister and solicitor”), even though the principal practice is in Ontario. The issue is whether this would confuse or mislead the public in the Canadian jurisdictions as to the status of the lawyer in Canada. The current rule permits an Ontario lawyer to indicate on his or her letterhead membership in another bar other than Ontario, but the issue is whether this should be done without also indicating a designation commonly used by a member of the Ontario bar.

### III. QUESTIONS AROUND MORE LIBERAL RULES

While the Law Society must approach its regulatory mandate from the perspective of the public interest, that perspective should be informed by current developments and by careful consideration of what is in fact in the public interest. To that end, the following questions are posed:

1. Should the Society amend the rule to make it less restrictive and permit a range of forms for firm names?
2. What factors, apart from those noted above, should inform a less restrictive rule to ensure that names are not misleading or confusing? For example,
  - a. Should trade names generally be permitted?
  - b. Should the Society be concerned with
    - i. terms that impart a qualitative assessment (e.g. Top Flight Legal Offices)
    - ii. terms that are used primarily to gain prominence (e.g. AAAAA Law Office)
    - iii. terms that suggest control by or close connection with non-lawyers (e.g. Global Multinational Business Corporation Law Offices)
    - iv. terms that suggest an entity connected with a particular community (e.g. Anglo Lawyers, LLP)
    - v. terms that denote a particular geographic location (Central Toronto Lawyers, Professional Corporation)?
3. Should there be any restriction on the use of a foreign lawyer’s name in the firm name if the firm carries on business, for example, in the United States and Canada?
4. What items in addition to those listed in rule 3.03 should be permitted on letterhead?

The Committee welcomes your written comments on these questions and any additional views that you may have on the subject. Please send your comments to the Society on or before May 30, 2003 by e-mail to [jvarro@lsuc.on.ca](mailto:jvarro@lsuc.on.ca), by fax to 416-947-7623 or by mail to:

Secretary, Professional Regulation Committee  
 Policy and Legal Affairs, Law Society of Upper Canada  
 Osgoode Hall, 130 Queen Street West  
 Toronto, Ontario  
 M5H 2N6

*Call for Input - Appendix 1*

#### LAW SOCIETY OF UPPER CANADA RULE OF PROFESSIONAL CONDUCT 3.02

##### Permissible Names

3.02 (1) A law firm name may include only the names of persons who are qualified to practise law in Ontario or in any other province or territory of Canada where the law firm carries on its practice, or who, if retired or deceased, were qualified to practise law in Ontario or in any other province or territory of Canada where the firm carries on its practice.

(2) A law firm name may consist of or include the names of lawyers who were members of the firm but who are deceased or retired from the practice of law.

(3) A lawyer who purchases a practice may, for a reasonable length of time, use the words “Successor to \_\_\_\_\_” in small print under the lawyer's own name.

#### Restrictions

(4) The name of a law firm shall not include a trade name, a commercial name, or a figure of speech.

(5) The name of a law firm shall not include the use of phrases such as “John Doe and Associates,” “John Doe and Company,” or “John Doe and Partners” unless there are in fact, respectively, two or more other lawyers associated with John Doe in practice or two or more partners of John Doe in the firm.

(6) When a lawyer retires from a law firm to take up an appointment as a judge or master or to fill any office incompatible with the practice of law, the lawyer's name shall be deleted from the firm name.

(7) A lawyer or law firm may not acquire and use a firm name unless the name was acquired along with the practice of a deceased or retiring member who conducted a practice under the name.

#### Limited Liability Partnership

(8) If a law firm practices as a limited liability partnership, the phrase “limited liability partnership” or the letters “LLP” shall be included as the last words or letters in the firm name.

#### Professional Corporation

(9) If a lawyer practices law through a professional corporation, the name of the corporation shall include the words “Professional Corporation”.

Call for Input - Appendix 2

### LAW SOCIETY OF UPPER CANADA RULES OF PROFESSIONAL CONDUCT 3.03 AND 3.05

#### Letterhead

3.03 (1) Subject to subrules (2) and (3), a lawyer's letterhead and the signs identifying the office may only include

- (a) the name of the lawyer or law firm,
- (b) a list of the members of any law firm, including counsel practising with the firm,
- (c) the words “barrister,” “barrister at law,” “barrister and solicitor,” “lawyer,” “law office,” “solicitor,” “solicitor-at-law,” or the plural, where applicable,
- (d) the words “notary” or “commissioner for oaths” or both, where applicable,
- (e) the words “patent and trade mark agent,” where applicable,
- (f) a statement that a member of the law firm is qualified to practise law in another jurisdiction,
- (g) a statement that a member of the law firm is certified by the Law Society as a specialist in a specified field,

- (h) the phrase “limited liability partnership” or the letters “LLP,” where applicable,
  - (i) the words “Professional Corporation”, where applicable,
  - (j) the phrase “multi-discipline practice” or “multi-discipline partnership” where applicable,
  - (k) the addresses, telephone numbers, office hours, and the languages in which the lawyer or law firm is competent and capable of conducting a practice,
  - (l) a logo,
  - (m) reference to an affiliation, and
  - (n) advertising permitted under rule 3.05.
- (2) A lawyer or law firm that practises in the industrial property field may show the names of patent and trademark agents who are identified as such but who are not lawyers.
- (3) A lawyer or law firm may place after the names on its letterhead degrees from bona fide universities and post secondary institutions including honorary degrees, professional qualifications such as the designations of P.Eng., C.A., and M.D., and recognized civil and military decorations and awards, and, where the firm is a multi-discipline practice, a list of partners and associates who are non-lawyers identified as such and their designations, if any.

...

#### General Practice

- 3.05 (1) A lawyer or law firm may state that the lawyer or law firm is in general practice if such is the case.

#### Restricted Practice

- (2) A lawyer may state that the lawyer is a specialist in a particular area of the law only if the lawyer has been so certified by the Society.
- (3) A lawyer may state that the lawyer's practice is restricted to a particular area or areas of the law or may state that the lawyer practises in a certain area or areas of the law if such is the case.
- (4) A law firm may state that it practises in certain areas of the law or that it has a restricted practice if such is the case.
- (5) A law firm may specify the area or areas of law in which particular members practise or to which they restrict their practice.

#### Multi-discipline Practice

- (6) A lawyer of a multi-discipline practice may state the services or the nature of the services provided by non-lawyer partners or associates in the practice.

*Call for Input - Appendix 3*

### RULES OF OTHER LAW SOCIETIES IN CANADA

#### British Columbia

British Columbia's firm name rule is cast in general principles that relate to a prohibition on misleading or unprofessional advertising. Its rule is found in Chapter 14 on marketing of legal services.

Content and format of marketing activities

4. Any marketing activity undertaken or authorized by a lawyer must not be:

- (a) false,
- (b) inaccurate,
- (c) unverifiable,
- (d) reasonably capable of misleading the recipient or intended recipient, or
- (e) contrary to the best interests of the public or to the maintenance of a high standard of professionalism.

...

Firm name

9. A lawyer shall not use a firm name which violates Rule 4(e) of this Chapter.

The following are examples of some Ethics Committee Opinions on firms names based on the considerations in the rules.

Ethics Committee Opinion - October 1, 1998

7. CHAPTER 14: WHETHER FIRM MAY TAKE ITS NAME FROM AN AREA OF LAW

The Committee considered whether a firm may take its name from an area of law. The Committee noted that there are currently lawyer referral offices, operated by lawyers, using the names "Impaired Driving Office" and "Criminal Defence Office." There has been interest expressed by other lawyers about calling their law firms after an area of law.

In the Committee's opinion it would be contrary to Rule 4(d) and Rule 4(e) of Chapter 14 of the Professional Conduct Handbook for a lawyer to operate a firm named after a particular area of law and bearing no other distinguishing features. The use of such names has the potential to mislead the public into believing that the office has some official accreditation not shared by other offices providing similar services. The Committee was of the view that it is not material whether such an office is operating as a traditional law firm or is only providing referrals to other lawyers.

Ethics Committee Opinion B March 28, 2001

9. CHAPTER 14, RULE 4: WHETHER FIRM MAY TAKE ITS NAME FROM SOMETHING THAT OCCURS IN THE AREA OF LAW IN WHICH THE FIRM PRACTISES

The Committee considered whether it is proper for a firm to use a name taken from the area of law in which the firm practices and that includes a statement of the firm's preferred area of practice. Examples of the use of such a name would be "Legacy Tax and Trust Lawyers," "Indictment Criminal Lawyers," or "Bylaw Municipal Lawyers."

The Committee noted that one of its previous opinions concluded that a firm may not use a firm name taken from a particular area of law and bearing no other distinguishing features. Examples of such names would be "Environmental Law Firm" or "Criminal Law Firm." The Committee was of the view that this new question is a different question than the one addressed by the Committee previously, and declined to consider it at this time.

Ethics Committee Opinion- March 7, 2002

7. CHAPTER 14, RULE 4: WHETHER FIRM MAY TAKE ITS NAME FROM SOMETHING THAT OCCURS IN THE AREA OF LAW IN WHICH THE FIRM PRACTICES

The Committee was asked whether it is proper to use the name "Legacy Advisors Law Corporation." The Committee did not have an objection to the use of this name.

Alberta

Alberta's rule focusses on a name that is not misleading. The guidance is found in the commentary on proper firm names (relevant portions are shown below). Trade names are permitted.

## CHAPTER 5

## Accessibility and Advertisement of Legal Services

## STATEMENT OF PRINCIPLE

The profession has a duty to ensure that the public has information regarding the nature and availability of legal services and access to the legal system.

## RULES

2. A lawyer must not make a representation to the public, through advertisement or otherwise, that is false, inaccurate or misleading in any respect.

## COMMENTARY

## 2.2

*Rule #2 -- Firm names, trade names and letterhead:* The status of a person or entity practising law or associated with a firm must not be misrepresented in a firm name or on letterhead. For example, the use by a sole practitioner of the phrase "and Company" or "and Associates" after the lawyer's surname is misleading.

...

While the use of the names of persons no longer practising with a firm is ethically permissible in accordance with the foregoing, the firm must also consider any applicable legal requirements (such as those relating to consent) before proceeding.

The letterhead of a firm may list the names of extraprovincial lawyers associated with the firm who have not been admitted to practise law in Alberta so long as this fact, together with the jurisdiction in which such lawyers are authorized to practise, are indicated on the letterhead. Similarly, a firm's letterhead may list persons who are not lawyers (such as office managers, in-house accountants, students-at-law and patent and trademark agents) provided that they are employed by the firm. Again, however, the position or status of these persons must be clearly stated.

*While the use of a trade name is not improper, it must be carefully selected to avoid any misconception on the part of the public. For example, "University Legal Clinic" would be unacceptable because it implies a connection with another institution. A geographical trade name is improper if it leads a reasonable person to erroneously conclude that the law office is a public agency, or is the only law office available in that area or locality, or if the name misleads the public in another respect.*

(Emphasis added)

Saskatchewan

Saskatchewan's rules around firm names are not rules of conduct but are rules (similar to the Law Society of Upper Canada's by-laws) made under the governing statute. They are similar to British Columbia's conduct rules.

Part 19

Marketing of Legal Services

1601. (1) Subject to these Rules, a member may initiate contact with a potential client.
- (2) Any marketing activity undertaken or authorized by a member must not be:
- (a) false,
  - (b) inaccurate,
  - (c) reasonably capable of misleading the recipient or intended recipient, or
  - (d) undignified, in bad taste, offensive or otherwise inimical to the best interests of the public or the members, or tending to harm the standing of the legal profession.

...

Firm name

1606. A member shall not use a firm name which violates subrule 1601(2)(c) or (d).

### Manitoba

Firm names are dealt with in Chapter 14 on Advertising, Solicitation and Making Legal Services Available in commentary to the rule on making legal services available, and include reference to rules made under the governing statute on firm names and letterhead (rules 147 and 149). Rules 147 and 149 mirror what appears in Chapter 14. Like Alberta, Manitoba specifically discusses trade names.

Firm Names and Letterhead

9. The lawyer shall not use a firm name or letterhead that could mislead the public.

...

11. The lawyer shall carry on the practice of law only under:

- (a) the lawyer's name;
- (b) the names of existing or former partners or associates;
- (c) the name of the original or founding partner or partners or associates;
- (d) any combination of the foregoing; or
- (e) a descriptive or trade name, provided:
  - (i) the name or a similar descriptive or trade name is not in use elsewhere in Canada;
  - (ii) that by use of the name, the lawyer or firm could not mislead members of the public into believing erroneously that the lawyer or firm is associated or affiliated elsewhere in Canada with other firms or the members thereof; and
  - (iii) the name is authorized by the federal or provincial government by statute or regulation, or the lawyer is the sole member of, a partner in, or an associate or employee of, the firm carrying on the practice of law under that name.

### Nova Scotia

Nova Scotia, like Saskatchewan, has covered this topic in regulations under the governing act. Nova Scotia permits business names.

Part 9 - Advertising

Firm Names

51C (1) A lawyer may practice under the firm name of the lawyer, present or former members of the firm, or a business name so long as the name is in good taste, dignified and professional.

*Call for Input - Appendix 4*

## A. Agreement on Internal Trade

All Canadian provinces signed the Agreement on Internal Trade, effective July 1, 1995, which is designed to reduce barriers to the movement of persons, goods, services and investments within Canada. Relevant parts for this discussion appear in Chapters 1 and 7 (Operating Principles and Labour Mobility respectively). Relevant excerpts appear below.

### Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

### Article 101: Mutually Agreed Principles

1. This Agreement applies to trade within Canada in accordance with the chapters of this Agreement.
2. This Agreement represents a reciprocally and mutually agreed balance of rights and obligations of the Parties.
3. In the application of this Agreement, the Parties shall be guided by the following principles:
  - a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement within Canada;
  - b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;
  - c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments within Canada; and
  - d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.
4. In applying the principles set out in paragraph 3, the Parties recognize:
  - a) the need for full disclosure of information, legislation, regulations, policies and practices that have the potential to impede an open, efficient and stable domestic market;
  - b) the need for exceptions and transition periods;
  - c) the need for exceptions required to meet regional development objectives in Canada;
  - d) the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective; and
  - e) the need to take into account the importance of environmental objectives, consumer protection and labour standards.

### Article 102: Extent of Obligations

1. Each Party is responsible for compliance with this Agreement:
  - a) by its departments, ministries and similar agencies of government;
  - b) by its regional, local, district or other forms of municipal government, where provided by this Agreement; and
  - c) *by its other governmental bodies and by non-governmental bodies that exercise authority delegated by law, where provided by this Agreement.*

For greater certainty, "other governmental bodies" includes Crown corporations.

2. Each Party shall adopt and maintain measures to ensure the compliance referred to in paragraph 1.

### 703 Extent of Obligations

1. For the purposes of Article 102(1)(b) and (c) (Extent of Obligations), each Party shall, through appropriate measures, seek compliance with this Chapter by:
  - (a) its regional, local, district and other forms of municipal government; and

(b) *its other governmental bodies and by non-governmental bodies that exercise authority delegated by law, as described in Annex 703.1.*

Annex 703.1

Non-Governmental Bodies that Exercise Authority Delegated by Law

For the purposes of Article 703(1)(b), *"non-governmental bodies that exercise authority delegated by law" means any organization, institution, corporation or association to whom authority has been delegated by provincial or federal statute to set or implement measures related to:*

- (a) the establishment of occupational standards or requirements for licensing, certification or registration;
- (b) the assessment of the qualifications of workers against established occupational standards or requirements for licensing, certification or registration; or
- (c) *the official recognition that an individual meets established occupational standards or requirements for licensing, certification or registration.*

(Emphasis added)

It would appear that provincial law societies are "non-governmental bodies that exercise authority delegated by law" described above.

B. NAFTA

Chapter 12 of the North American Free Trade Agreement (NAFTA) deals with cross-border trade in services. Article 1210 reads:

1. With a view to ensuring that any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party does not constitute an unnecessary barrier to trade, each Party shall endeavor to ensure that any such measure:

- (a) is based on objective and transparent criteria, such as competence and the ability to provide a service;
- (b) is not more burdensome than necessary to ensure the quality of a service; and
- (c) does not constitute a disguised restriction on the cross-border provision of a service.

...

5. Annex 1210.5 applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service providers.

Annex 1210.5 includes the following provisions:

*Development of Professional Standards*

2. The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide recommendations on mutual recognition to the Commission.

3. The standards and criteria referred to in paragraph 2 may be developed with regard to the following matters:

- (a) education - accreditation of schools or academic programs;
- (b) examinations - qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;
- (c) experience - length and nature of experience required for licensing;
- (d) conduct and ethics - standards of professional conduct and the nature of disciplinary action for non-conformity with those standards;

- (e) professional development and re-certification - continuing education and ongoing requirements to maintain professional certification;
- (f) scope of practice - extent of, or limitations on, permissible activities;
- (g) local knowledge - requirements for knowledge of such matters as local laws, regulations, language, geography or climate; and
- (h) consumer protection - alternatives to residency requirements, including bonding, professional liability insurance and client restitution funds, to provide for the protection of consumers.

NAFTA also deals with foreign legal consultants (FLCs). Beginning in 1993, Canada, the United States and Mexico sent representatives from their professional bodies/representative legal organizations to negotiate an international agreement on FLCs. In June 1998, the parties signed a joint recommendation, including a model rule, but their respective governments have not yet ratified the recommendations and there are no indications when, if at all, this might occur.

The Law Society recently adopted a regulatory scheme which will appear in a by-law, codifying a number of features of the process currently in place for registration of FLCs in Ontario.

### C. GATS

Under the auspices of the WTO, the GATS (General Agreement on Trade in Services) came into force on January 1, 1995. It is described as an integrated framework for addressing issues related to cross-border trade, investment and movement of services providers.

The GATS talks through the WTO include discussion on trade in legal services, part of which will deal with restrictions on trade and related domestic rules. The "Working Party on Domestic Regulation" has already drafted rules (also called "disciplines") for the accounting profession. The accounting disciplines, which have been discussed as the basis for those for the legal profession, include licensing requirements, one of which covers firms names. The requirement is that use of firm names must not be restricted, except in fulfilment of a "legitimate objective". The legitimate objectives are defined as the protection of consumers (which includes all users of legal services and the public generally), the quality of the service, professional competence and the integrity of the profession.

A March 2001 GATS paper outlines the results of consultations held to date with Canadian national professional organizations, including the Federation of Law Societies and the Canadian Bar Association, on the relevance and applicability of the accounting disciplines.

The organizations were asked to assess the relevance and applicability of each of the disciplines; whether the requirements are currently applied; whether they could be adopted if not currently applied; and, to explain the reasons why they were not deemed relevant or applicable. No specific elements of the accountancy disciplines were found to be irrelevant to their current practices or non-applicable in general to their respective profession. One issue raised was that "consumer protection and the integrity of the profession must be recognized as paramount considerations in regulating the profession."

### D. Constitutional Law Issues

Under section 2(b) of the Charter, freedom of expression is guaranteed, subject only the provisions of section 1 of the Charter.<sup>6</sup> In *Royal College of Dental Surgeons of Ontario v. Rocket*<sup>7</sup>, the Supreme Court of Canada found that Section 2(b) includes commercial speech such as advertising (on the basis that advertising aims to convey a meaning and involves more than economic interests, which were not intended to be protected). In *Rocket*, the Court said that professional bodies have a heavy duty to adopt appropriate regulations which do not unduly restrict the freedom of expression of their members.

<sup>6</sup> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>7</sup> [1990] 2 S.C.R. 232.

The Supreme Court of Canada has not considered a case where the *Rules of Professional Conduct* of the Law Society on lawyer advertising are in issue. Some years ago, two Ontario lawyers brought an action challenging the Society's firm name rule, which included an argument under s. 2(b) of the Charter. At both trial and appeal levels in Ontario, the courts found no merit to the Charter argument based on section 2(b) and the lawyers' application for leave to appeal to the Supreme Court of Canada was dismissed. This case was disposed of at the Court of Appeal before the Supreme Court's consideration of *Rocket* in 1990. If a firm name is considered an adjunct to advertising, a question is how *Rocket* might be applied in the context of the Society's rules.

## APPENDIX 2

### SUMMARY OF MEMBER RESPONSES (WITHOUT ATTRIBUTION) TO CALL FOR INPUT ON AMENDING THE FIRM NAME AND LETTERHEAD RULES

#### Firm Names

1. Given that the purpose of the Society's Rules is to protect the public, the current rule on firm names, permitting use of a living or deceased lawyer's name, does not advance the Society's objectives. It is not clear that the public interest is served and protected by a firm name consisting only of the name of a deceased partner.
2. The current firm name form is becoming less capable of accurately conveying information to the public. In some cases a trade name could describe a law firm to the public more accurately. Using MDPs as an example, the current rule has the effect of obscuring the closely integrated workings of an MDP and may mislead the public into thinking that work was performed by the law firm independently of the other branches of the MDP. A trade name would accurately convey the firm position as part of an MDP. The public would receive a truer impression of how the work is performed and be better able to associate the work done by the MDP with the goodwill of that MDP as a whole.
3. In many fields, including intellectual property, it is increasingly important for firms to become national to be competitive. Trade names for law firms are allowed in many provinces, and it would be beneficial to Ontario firms to have the same freedom to market themselves and compete more effectively on the national level.
4. There has been some drift to trade names, as can be seen by use of such names as Gowlings, where the firm has moved beyond the traditional use of a partner's name.
5. The restriction on firm names (limited to that of the lawyer's name) is justified. It seems foolish that at a time when the profession faces problems with its image that we would allow firms to call themselves "AAAAA Advocats" or "Acme Law Firm".
6. Rule 3.02(8), in addition to what already appears, should reflect what appears in section 44.3(3) of the Partnerships Act, in particular, the phrases and letters "société à responsabilité limitée", "L.L.P." or "s.r.l.". For limited liability partnerships that practice in both Quebec and Ontario, there does not appear to be any way to comply with the naming requirements of both jurisdictions, which are different. The Society is encouraged to initiate dialogue with the Barreau du Quebec in order to promote the ability of limited liability partnership law firms with a presence in both provinces to comply with each province's naming provisions.
7. The assumption about the current firm name rule – that the public should not be misled about the number of lawyers practicing with the firm – is not valid when John Doe is the sole remaining partner of Doe, Smith, Brown and Jones and there is no requirement to list all members of the firm on the letterhead. It is increasingly the practice not to list members of a firm on its letterhead.
8. I agree with the current rule 3.02(1) but as trade names are not permitted, the word "shall" should replace "may". Otherwise, a foreign firm could establish an affiliate firm in Ontario using its foreign name when the members of that firm never practiced in Ontario.

9. Rule 3.02(2) should be made more restrictive by adding the words “and were members of the firm at the date of their retirement or death” at the end of the rule, to prohibit in a name the name of lawyer who was not a member of the firm at death or retirement.
10. Rule 3.02(3) should be amended to include the consent of the lawyer or firm who or which sold the practice to use of the name.
11. The prohibition on trade names should remain as distinguishing lawyers as professionals from those engaged in a business or trade. If the practice of law is still to be regarded as a profession, the definition of the profession should not be watered down to mean something different.
12. I agree with rule 3.02(6) but it does not address the circumstance of more than one person in a firm with the same name, one of whom goes to the bench.
13. A problem with rule 3.02(7) might be where a lawyer has died or has been retired for some time before the name is assigned. How much of a practice must there be to assign with the name?
14. The Society should not amend its rules to make firm names less restrictive and permit a range of forms. Enforcement will be difficult. Many lawyers are increasingly considering law to be a commercial rather than professional activity. Does the Society wish to encourage this?
15. The Society should be concerned with terms that import a qualitative assessment.
16. Foreign lawyers names should not be permitted in firm names.
17. The use of foreign titles is difficult. Perhaps the jurisdiction where the member is qualified to use the title could be added in brackets.
18. There should be no restriction on the use of a foreign lawyer’s name in the firm name if the firm carries on business in the US and Canada, for the following reasons:
  - a. It would mirror the rights enjoyed by Ontario firms who also practice in New York;
  - b. It would help to clarify the nature of the relationship between Ontario and non-Canadian lawyers;
  - c. It would reduce the current inequities where only US law firms who employ Canadian lawyers with same names as the US firm name can practice in Ontario using the US name;
  - d. It would reduce the public’s confusion in circumstances where US law firms restrict their practice to the practice of foreign law but employ Ontario lawyers in Ontario (i.e. are the Ontario lawyers practicing Ontario law even though the firm is identified as practicing foreign law?).
  - e. It would remove the disincentive to US firms to opening Ontario offices as opposed to other Canadian jurisdictions where the rules are more liberal.
  - f. There is no need to impose any restriction on the use of a foreign lawyer’s name, based on the five assumptions listed on page three of the information document.
19. I am not in favour of making the firm name rule much less restrictive. Specifically, trade names should not be permitted, nor any of the types of names listed in the information document, page 4, paragraph 2b.
20. The current rule is wide enough. The use of characters such as Donald Duck, race cars or some other form of identity with commercial undertakings will not add anything to the dignity of the profession.
21. The Society should establish a range of categories which law firms may use to describe themselves. These could include the name by which this practice identifies itself (“legal professional association”) and other categories such as partnership, limited partnership and professional corporation.

Letterhead

22. There is little guidance on how an MDP's letterhead should be set out. The rule should provide guidance on ensuring that an MDP's letterhead adequately conveys information about its law firm component, while, at the same time, allowing it to accurately convey information about the MDP as an integrated whole.
23. Rule 3.03(1) is too restrictive in that it wants to be an exhaustive list of what can appear on letterhead. It would be better to replace it with a general list, but with clear principles as other law societies have done. The principles are outlined in the information document.
24. I favour more liberal rules around letterhead. The combination of firm name and descriptor should be accurate, disclose that the business is a law firm through use of "lawyer", "barrister", etc., not be misleading, not make claims on behalf of the business and not bring the profession into disrepute.
25. In addition to the list in rule 3.03, lawyers should be able to put their preferred practice areas or other descriptions of their practice areas and preferences on their letterheads if in conjunction with "lawyer", "barrister", etc.
26. Items should not be added to those listed in rule 3.03 on letterhead

#### General

27. On drafting, the use of wide, encompassing terms such as those used in a Civil Code are better. Detailed exceptions or conditions make it easier to circumvent and will require new language to plug the hole.
28. Should the same rule for letterhead with appropriate modifications apply to professional cards?

APPENDIX 3

### 3.04 ADVERTISING

#### Advertising Services Permitted

- 3.04 (1) Subject to subrule (3), a lawyer or a law firm may advertise their services or fees in any medium including the use of brochures and similar documents provided that the advertising
- (a) is not false or misleading,
  - (b) is in good taste and is not such as to bring the profession or the administration of justice into disrepute, and
  - (c) does not compare services or charges with other lawyers or law firms.

#### Advertising of Fees

- (2) Subject to subrule (3), a lawyer or a law firm may advertise fees charged for their services subject to the following conditions:
- (a) advertisement of fees for consultation or for specific services shall contain an accurate statement of the services provided for the fee and the circumstances, if any, in which higher fees may be charged,
  - (b) if fees are advertised, the fact that disbursements are an additional cost shall be made clear in the advertisement,
  - (c) advertisements shall not use words or expressions such as "from . . .," "minimum," or ". . . and up," or the like in referring to the fees to be charged,

- (d) services covered by advertised fees shall be provided at the advertised rate to all clients who retain the advertising lawyer or law firm during the 30 day period following the last publication of the fee unless there are special circumstances which could not reasonably have been foreseen, the burden of proving which rests upon the lawyer.

#### Restrictions on Advertising

- (3) A lawyer shall not
- (a) permit the lawyer's name to appear as solicitor, counsel, or Queen's Counsel on any advertising material offering goods, other than securities or legal publications, or services, other than legal services, to the public, except advertising material offering the services of a lawyer and an affiliated entity in an affiliation, and
- (b) while in private practice, permit the lawyer's name to appear on the letterhead of a company as being its solicitor or counsel of a business, firm or corporation, other than the designation of honorary counsel or honorary lawyer on the letterhead of a non profit or philanthropic organization that has been approved for such purpose by the standing committee of Convocation responsible for professional conduct.

[Amended - May 2001]

#### Commentary

The means by which it is sought to make legal services more readily available to the public must be consistent with the public interest and must not detract from the integrity, independence, dignity, or effectiveness of the legal profession.

Where a lawyer is in an affiliation, he or she must ensure that any advertisements do not mislead the public about who is providing the legal services.

[Amended - May 2001]

### 3.05 ADVERTISING NATURE OF PRACTICE

#### General Practice

- 3.05 (1) A lawyer or law firm may state that the lawyer or law firm is in general practice if such is the case.

#### Restricted Practice

- (2) A lawyer may state that the lawyer is a specialist in a particular area of the law only if the lawyer has been so certified by the Society.
- (3) A lawyer may state that the lawyer's practice is restricted to a particular area or areas of the law or may state that the lawyer practises in a certain area or areas of the law if such is the case.
- (4) A law firm may state that it practises in certain areas of the law or that it has a restricted practice if such is the case.
- (5) A law firm may specify the area or areas of law in which particular members practise or to which they restrict their practice.

Commentary

Where a lawyer or law firm advertises in accordance with rule 3.05, the advertisement should be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

An advertisement should not mislead or confuse a client about the lawyer's qualifications. Although the advertisement may include a description of the lawyer's or law firm's proficiency or experience in an area of law, in accordance with s. 26 of the Society By-law 38 on Certified Specialists, the lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

[New - October 2003]

Multi-discipline Practice

(6) A lawyer of a multi-discipline practice may state the services or the nature of the services provided by non-lawyer partners or associates in the practice.

It was moved by Ms. Curtis, seconded by Ms. Potter that Convocation approve amendments to rules 3.02 and 3.03 of the *Rules of Professional Conduct* as set out on pages 10 and 15 that will

- permit descriptive or trade names and the names of lawyers qualified in non-Canadian jurisdictions in an Ontario law firm name,
- permit an Ontario lawyer to use a title relating to his or her membership in a non-Canadian bar on letterhead, and
- add advertising permitted under rule 3.04 as an item that may be included on letterhead.

Convocation is also requested to approve criteria that staff will use to provide pre-approval guidance to members on their proposed firm names as set out on page 12.

Carried

LAW SOCIETY MEDAL COMMITTEE

The Treasurer announced the names of the following recipients of the 2004 Law Society Medal and Lincoln Alexander Award:

Law Society Medal: Susan Elliott, Kingston, Michelle Swenarchuk, Toronto, Wolfe Goodman, Q.C., Toronto, Chris Paliare, Toronto and D. Kevin Carroll, Q.C. of Barrie.

Lincoln Alexander Award: Keith C. Norton

*REPORTS FOR INFORMATION ONLY*

Lawyers Fund for Client Compensation Committee

- Budget & Levy Issues for 2005
- Fund Insurance
- Compensation Fund Harmonization
- Deceased Members – Confidentiality
- Grants Paid

Report to Convocation

Purpose of Report:           Information

Prepared by Lawyers Fund for Client Compensation  
 Dan Abrahams, Acting Manager, 416.596.4640

REPORT TO CONVOCATION, MAY 2004

1.       The Lawyers Fund for Client Compensation Committee (“the Committee”) met on May 12, 2004, at 1 PM. Committee members in attendance were Larry Banack (Vice-Chair), Ronald Cass, Q.C., Abraham Feinstein, Q.C., and Andrew Coffey.

Staff and others in attendance were Zeynep Onen (Director of Professional Regulation), Dan Abrahams (Acting Lawyers Fund Manager), Louis Bourgon (Lawyers Fund Counsel), Fred Grady (Manager of Finance) and Duncan Gosnell (Vice-President, LawPRO).

2.       As a result of its meeting, the Committee is reporting on the following matters:

(a)                   ADMINISTRATION

i) Budget & Levy Issues for 2005

The Committee continued its discussions about the Fund’s budget for 2005. In particular, the Committee discussed issues related to the member levy and the optimum level of the Fund surplus.

Fred Grady, Manager of Finance, spoke to the Committee about the various Law Society programs funded in whole or in part by the Fund including the Spot Audit program and the Investigations and Discipline departments. (See Appendix A.) In addition, Mr. Grady reported to the Committee that various operating departments within the Law Society receive an allocation from the Fund based on a set formula.

Mr. Grady confirmed that at the end of the first quarter of 2004, the Fund’s balance contained sufficient funds to cover known claims, plus a significant additional amount to cover unknown claims.

The Committee requested additional information concerning the operations of the Spot and Focussed Audit program. Zeynep Onen, Director of Professional Regulation, agreed to approach staff in the Spot and Focussed Audit program about presenting at the next Committee meeting scheduled for June 10, 2004.

Budget discussions will continue at the June meeting.

ii) Fund Insurance

As requested, Duncan Gosnell, Vice-President of LawPRO, addressed the Committee and provided an explanation on how the insurance policy currently held by the Fund responds to claims that the Fund might incur. (The report from LawPRO is attached as Appendix B.)

The Committee asked that staff attempt to gain additional information on recently reported catastrophic losses incurred by compensation funds in Australia and Asia, to determine if these events raise any concerns for the Law Society's Fund.

iii) Compensation Fund Harmonization

Zeynep Onen, Director of Professional Regulation, reported to the Committee on meetings she attended in April under the auspices of the Federation of Law Societies of Canada. The meetings dealt with the need to harmonize compensation fund protocols in light of the recently adopted National Mobility Agreement. Discussions are at an early stage and are ongoing.

The Committee also reviewed an informal chart outlining some of the similarities and differences between Funds in various provinces and territories. In addition, the Committee was given a preliminary overview of the new scheme in British Columbia, which took effect on May 1, 2004.

(b) POLICY

i) Deceased Members - Confidentiality

*Decision of the Committee*

The Committee determined that, in future, the names of deceased members in respect of whom grants are paid will be published in the Committee's Report to Convocation, notwithstanding that the members in question may have been in good standing at the time of their passing. Other members whose names are reported are those who have been disciplined. Members still facing discipline are not identified by name.

(c) INFORMATION

i) Grants Paid

The Committee wishes to report that, since its last Report to Convocation, grants have been paid from the Fund in the amounts shown. (Only members whose discipline proceedings are completed or who are deceased are identified by name.)

Member (Status if Disciplined)	Number of Claimants	Total Grants Paid (\$)
Lingl, Michele Lee (Suspended Jan. 28, 2004)	1	5000
McMullen, Philip Brian (Disbarred June 4, 2003)	2	2000
Rubba, Robert Martin (Deceased)	1	4000
Steinberg, Sheldon Howard (Disbarred Nov. 5, 2003)	1	1244
Sinclair, James William (Disbarred April 24, 2003)	1	31900
Stanwick, Richard (Suspended June 1, 1998)	1	800
Tran, Eric Gregory (Disbarred April 22, 2003)	1	500
Solicitor #90	1	2000
Solicitor #113	1	60
Solicitor #116	1	1500
TOTAL	12	49004

APPENDIX A

LAW SOCIETY OF UPPER CANADA  
DEPARTMENT OF FINANCE  
Inter-Office Memorandum

TO: The Lawyers Fund for Client Compensation Committee

FROM: Fred Grady

DATE: May 3, 2004

SUBJECT: Considerations for the 2005 Budget

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As part of the preparation for the 2005 budget the Committee asked for information from the Finance department on issues the Committee should address in its 2005 budget deliberations. For the purpose of this memo I have divided these potential considerations into three areas, programs funded by the Fund, operations of the Fund and policy considerations.

#### Programs Funded by the Fund

The Lawyers Fund for Client Compensation makes contributions to the Society's General Fund to support the funding of certain programs as well as a contribution to the general administrative expenditures of the Society. These funding decisions have been made previously by Convocation and, without direction from Convocation to amend them, have continued over the years.

The Fund provided 100% of the cost of the Spot Audit program budgeted at approximately \$1.9 million for 2004.

The Fund provides 25% (approximately \$800,000 for 2004) of the cost of the investigations department and a minor funding contribution (\$120,000 for 2004) to the discipline department.

The Fund provided approximately \$876,000 towards the administrative expenses of the Law Society.

The contribution from the Fund to the Society's operations is summarized as follows:

·	Spot Audit	\$ 1,890,700
·	Investigations & Discipline	919,600
·	Allocated administration	<u>876,300</u>
·	Total	<u>\$ 3,686,600</u>

This translates into approximately \$127 per member based on the 2004 membership of 29,000 FFE's.

#### Operations of the Fund

In terms of the Fund's operations the issues of primary consideration for the Committee include the level of claims insurance, the allowance for claims experience and the appropriate size of the fund balance. The fund balance at the end of the first quarter of 2004 is approximately \$18.0 million

#### Policy Considerations for the Fund

There are significant policy considerations that impact the operations of the Fund and subsequently the annual membership levy. These include, but are not limited to, per member caps, per claim caps, payments to beneficiaries etc. These issues are significant to the Fund and to the annual levy but are outside the scope of this memo.

I trust this information will assist the Committee in its 2005 budget deliberations.

APPENDIX B

MEMORANDUM

TO: Zeynep Onen, The Law Society of Upper Canada  
 FROM: Michelle Strom, LAWPRO  
 DATE: April 15, 2004  
 RE: Lawyers' Fund for Client Compensation Fund, Insurance Issues

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At the April 8th Committee meeting of the Fund, we were asked to explain how the insurance policy that the Fund currently holds responds to claims which the Fund might incur.

We hope the attached (Appendix I) provides detail that might be suitable for the Committee's purposes.

MS/cg  
 Encl.

Appendix I

Lawyers Fund for Client Compensation Insurance Coverage

General Overview

The Law Society holds an insurance policy with a \$10 million aggregate limit with respect to amounts that the Law Society shall pay to claimants as grants. This \$10 million limit is in excess of a \$15 million aggregate deductible, effectively the Law Society's retention or deductible before insurance coverage.

Grants refer to amounts paid to claimants from the Compensation Fund pursuant to the Law Society Act in accordance with the established 'guidelines'.

Summary of Process

The Law Society receives notice of claim.

Based on the date of notice, the claim will be assigned a number which is linked to a calendar year period.

The insurance policy responds to the totals of amounts that will ultimately be paid on all claims reported in the applicable calendar period.

Examples

A. In calendar 2004, 200 new claims are made on the Client Fund for Compensation.

At December 2004, these files are expected to cost the Fund \$4 million. Total grants paid out during calendar 2004 were \$17 million-\$16 million re-prior years and \$1 million for 2004 claims).

Question: How does the insurance coverage respond in this case?

Answer: The insurance policy does not respond because it only attaches when the claims made in a year (in this case 2004) exceed \$15 million. 2004 is only expected to reach \$4 million.

B. In calendar 2004, 300 new claims are made on the Client Fund for Compensation.

At December 2004 these files are expected to cost the fund \$30 million. Total grants paid out during calendar 2004 were \$20 million-\$15 million related to prior fund years, \$5 million related to 2004 claims .<sup>1</sup>

Question: How does the insurance coverage respond in this case?

Answer: In 2004, no insurance recoveries are made as the Law Society has at that point-in-time only paid out \$5 million with respect to 2004 claims. By the end of 2005, the \$15 million attachment point will have been reached and in 2006 \$10 million can be recovered from the insurance policy.

Graphically, this might be presented as follows:

#### 2004 Claims Made on the Fund

(see graph in Convocation file)

Report of the Task Force on Paralegal Regulation

The Task Force on Paralegal Regulation  
May 28<sup>th</sup>, 2004

Report to Convocation

Purpose of the Report: Information

Prepared by the Policy Secretariat  
Julia Bass (416 947 5228)

FOR INFORMATION

<sup>1</sup> Further assume that the \$30 million for 2004 is paid out as follows: 2004-\$5 million, 2005-\$10, 2006-\$15 million.

1. On April 22<sup>nd</sup>, Convocation authorized the Task Force on Paralegal Regulation to commence consultations on the basis of the approach set out in the April Report to Convocation.
2. The Task Force released a public version of the approach on May 13<sup>th</sup>. A copy of this report, entitled *Regulating Paralegals: a Proposed Approach*, is attached at Appendix 1.
3. Also attached, at Appendix 2, are an editorial article from the *Globe and Mail* of May 14<sup>th</sup>, and a press release on this subject from the Ontario Bar Association.

Appendix 1

Regulating Paralegals:  
*A Proposed Approach*

A CONSULTATION PAPER

The Law Society Task Force on Paralegal Regulation

May 2004

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## I. Paralegals Remain Unregulated

IN ONTARIO, PARALEGALS PROVIDE THE PUBLIC WITH A considerable range of services, including representing individuals in Small Claims Court, before administrative tribunals and in Ontario's criminal courts – all without regulation or standardized accreditation. While the majority of paralegals may be honest and hard working, they are currently allowed to conduct business without educational standards, liability insurance, or a code of conduct, and they are not accountable to any governing organization for their professional activities. Law Society research has shown that the majority of the public is unaware that paralegals are unregulated. Unlike lawyers, there is no regulatory authority to ensure that paralegals are competent to serve the public, thereby placing the public at risk. When something goes wrong, the consumer is not protected.

It is generally recognized that paralegals can play a useful access-to-justice role in Ontario by providing assistance to individuals who, for various reasons, are unable or unwilling to hire a lawyer. However, increased access to justice is not sustainable until and unless paralegals are, like lawyers, governed by a regulatory body mandated to govern in the public interest. The majority of paralegals believe they should be regulated. Successive Ontario governments have recognized the desirability of developing a scheme of paralegal regulation. Paralegal organizations, consumer groups and legal organizations including the Law Society of Upper Canada have repeatedly endorsed the necessity of regulating paralegals. Nonetheless, paralegals remain unregulated. .

## II. Brief History of Paralegal Regulation

For more than fifteen years, attempts to develop a regulatory framework for paralegals have failed. In August 1999 the Ontario Court of Appeal commented in the case of *R. v. Romanowicz*:

“A person who decides to sell t-shirts on the sidewalk needs a licence and is subject to government regulation. That same person can, however, without any form of government regulation, represent a person in a complicated criminal case where that person may be sentenced to up to 18 months imprisonment. Unregulated representation by agents who are not required to have any particular training or ability in complex and difficult criminal proceedings where a person's liberty and livelihood are at stake invites miscarriages of justice. Nor are *de facto* attempts to regulate the appearance of agents on a case-by-case basis likely to prevent miscarriages of justice”.

In the fall of 1999, then Attorney General James Flaherty appointed the Honourable Peter de C. Cory to study paralegal activities. In May 2000, Justice Cory released his report (the 'Cory Report').

In the spring of 2001, David Young succeeded James Flaherty as the Attorney General and indicated an interest in developing a regulatory framework based on consensus between the legal and paralegal communities. In a letter dated October 31, 2001, Mr Young said, “the government remains committed to protecting consumers who use the services of paralegals.” Mediation was proposed but deferred in favour of a process designed to develop consensus among the legal stakeholders.

In July 2001, representatives of legal organizations (the Advocates' Society, the County and District Law Presidents' Association, the Law Society of Upper Canada, the Metropolitan Toronto Lawyers Association and the Ontario Bar Association) formed a Working Group and contacted a paralegal organization, the Professional Paralegal Association of Ontario (PPAO) that represents several paralegal organizations: the Paralegal Society of Ontario, the Institute of Agents at Court and the Ontario Searchers of Record.

Members of the Working Group and representatives of the PPAO agreed on many principles underlying a proposed framework, embodied in a document circulated in April 2002 entitled *A Consultation Document on a Proposed*

*Regulatory Framework*, often referred to as ‘the Consultation Document’ or ‘the Framework’. It was hoped that this would lead to action on the issue but again, this did not occur. However, many aspects of the 2002 Consultation Document form the basis for the present proposed regulatory approach and consultation document. .

### III. Where We Are Today

On January 22nd, 2004, the current Attorney General of Ontario, the Honourable Michael Bryant, attended a meeting of the Law Society of Upper Canada’s ruling board of governors (Convocation), to advise that he regarded the regulation of paralegals as necessary, and that the Law Society is the appropriate authority to do it. He requested that the Law Society agree to take on this responsibility, and that it propose a regulatory structure for that purpose. In response, Convocation voted in principle to accept this responsibility and authorized the Treasurer of the Law Society to establish a working group to develop a detailed proposal for the regulation of paralegals in collaboration with the Ministry of the Attorney General.

The ministry has indicated that the Attorney General is expecting the Law Society to consult with the profession and other stakeholders, including legal and paralegal organizations, the courts, community colleges, adjudicative tribunals and other interested parties.

On April 22, 2004, the Task Force presented Convocation with a preliminary regulatory approach. Convocation was not asked to approve the approach, but to authorize the Task Force to commence stakeholder consultations, using the proposed approach as a starting point and developing further details during the consultations. In response, Convocation authorized the Task Force to proceed with the consultations using the proposed regulatory approach as the starting point. .

### IV. This Consultation Document

This document is the first step in the Law Society’s consultation process. It is being distributed to all affected stakeholders for their consideration.

Following its distribution, the Task Force will conduct direct consultations with stakeholder groups to enable substantive conversations to occur. A facilitator will engage stakeholder groups in extensive discussions to determine the implications of the Task Force’s proposed approach and to formulate further levels of detail where required. There is much the Task Force needs to know from all stakeholders before it can present a well-constructed regulatory approach to Convocation and the Ministry of the Attorney General. This consultation document is designed to initiate that process. .

### V. Proposed Approach to Paralegal Regulation

#### *Overview*

The following regulatory approach for paralegals is constructed to achieve several objectives:

1. Improved consumer protection and access to justice;
2. Improved and enhanced paralegal competence by instituting a standardized licensing and accreditation system;
3. Avoidance of jurisdictional confusion and unnecessary cost by regulating paralegals in a manner that mirrors regulation of lawyers; and
4. Preservation of the Law Society’s role to govern the profession in the public interest and maintain the profession’s independence, by asserting the jurisdiction of the Law Society over all services specified in the *Law Society Act* and by better enabling the Law Society to prevent the unauthorized practice of law.

To achieve these objectives, the basic components of paralegal regulation are as follows:

1. Clear delineation of the scope of permitted activities.
2. A licensing process for paralegals that will generally consist of:
  - a. A diploma from an accredited community college, after at least two years of study;
  - b. Grand parenting provisions;
  - c. Law Society licensing examinations;
  - d. Good character requirement; and
3. A governance structure, standards and processes for paralegals that mirror those for lawyers.

*Scope of  
Professional  
Activities*

The Task Force recommends that paralegals be authorized to conduct advocacy work in the following areas:

1. Small Claims Court: an accredited paralegal would be authorized to handle all matters in Small Claims Court and be recognized by the Court for the purposes of costs.
2. The Ontario Court of Justice: an accredited paralegal would be authorized to act with respect to all matters under the *Provincial Offences Act*.
3. Tribunals: an accredited paralegal could appear in all matters before provincial boards, agencies and tribunals that allow for appearances by agents. Boards may have specific requirements that may be incorporated into the licensing examination.
4. Ontario Court of Justice: appeals under the *Provincial Offences Act*. Currently, section 109 of the *Provincial Offences Act* authorizes agents to appear on appeals.

Given that several areas of advocacy work are already explicitly open to paralegals, and that there is a reasonable consensus on what constitutes advocacy work, it logically follows that paralegals should be authorized to continue working in this field. In addition, recent public concern about paralegals has focused on their engagement in the advocacy field, indicating a need for a priority response. From an access-to-justice perspective, there are advocacy areas where it can be difficult to obtain the services of a lawyer, such as Landlord and Tenant cases and Small Claims Court – demonstrating a clear requirement to meet public demand. Finally, advocacy work is conducted in a public arena in the presence of a neutral third party, thereby enabling effective monitoring and evaluation of the regulatory process.

The Task Force considered the recent creation of a paralegal registry by the Financial Services Commission of Ontario (FSCO). Due to the complexity of matters before FSCO, the Task Force is of the view that the public interest requires that accredited paralegals appearing at FSCO be limited to cases involving the monetary amount that can be claimed in Small Claims Court. Further consultation on this matter is required.

The Task Force recommends that paralegals not be authorized to conduct solicitors' work, primarily because there is no evidence that there is a scarcity of solicitors to provide services such as wills and real estate transactions. Further, there is no evidence that paralegals could provide these services at a more reasonable rate than lawyers. Non-lawyers currently providing solicitor-type services are engaging in the unauthorized practice of law in violation of the *Law Society Act*. The 2002 Consultation Document proposed an arrangement whereby a paralegal could perform solicitors' work in affiliation with a solicitor. The Task Force is concerned that this concept would be difficult to enforce and therefore further study is required. However, the proposed regulatory approach can be designed so that the scope of practice can be adjusted in the future if appropriate.

Further consultation with the legal profession, paralegals, the courts and tribunals will help to further clarify opportunities and issues associated with paralegals' scope of work as proposed.

#### Exemption from Regulation

Within the broad scope of activities to be regulated, the Task Force recommends that a general exemption from regulation be extended to a variety of individuals, including but not limited to: persons working under the supervision of a lawyer, such as law clerks and paralegals in law firms, legal clinics and student clinics; union representatives appearing in labour arbitrations; mediators; bankruptcy trustees; insurance brokers, and others.

The following criteria are recommended for establishing exemptions:

1. Whether there are vulnerable clients in need of consumer protection;
2. Whether the persons concerned are already adequately regulated by another professional body; and
3. Whether there is a strong policy rationale for exemption.

Further consultation is required to determine a comprehensive list of exempted parties.

#### Advocacy Work Under Federal Jurisdiction

The regulation of paralegals raises some complex federal–provincial issues. For example, a number of the areas where paralegals are particularly active, such as summary conviction offences under the *Criminal Code* and Immigration and Refugee matters, fall under federal jurisdiction.

The federal government recently enacted new regulations under the *Immigration and Refugee Protection Act* imposing new requirements on paralegals working as immigration consultants. There are a number of aspects of this scheme that are problematic for the Law Society, including the apparent intention to regulate persons supervised by lawyers in law firms. Further consultation and study is required

#### VI. Licensing and Accreditation

##### *Licensing Requirements*

The recommended licence requirements for paralegals are:

1. A two-year diploma from an accredited community college;
2. Successful completion of a Law Society Licensing examination; and
3. Good character.

##### *Grandparent Provisions*

The Task Force recommends an initial grandparent process whereby paralegals who have worked for five of the last seven years in their proposed area of work, could be excused from the accredited college program requirement. They would, however, be required to take the Law Society licensing examination and to be of good character. Applicants for grandparenting must apply within two years of the regulatory requirements coming into force, or as otherwise set by the regulatory authority, with an affidavit regarding their work experience. Applicants would be restricted to individuals. Corporations or franchises would not qualify.

##### *Paralegal Licences*

- A license would only be granted to an individual - corporations or franchises will not qualify.
- Accredited paralegals would become Commissioners of Oaths within their designated areas.

- Given that accredited paralegals will be privy to confidential client information, the regulatory approach must ensure that accredited paralegals cannot be required to divulge confidential information, unless a judge orders it disclosed in the interests of the administration of justice.

The Task Force has considered two options for paralegal licences – either a general or a limited licence. Limited licences would authorize paralegals to handle cases pertaining to particular areas, such as cases under the Highway Traffic Act, or appearances before FSCO. An individual could be permitted to apply for more than one limited licence. A general licence would pertain to the full range of permissible advocacy areas. Limited licences would entail separate licence examinations. Further consultation is required on this matter.

#### *Good Character*

Lawyers are required to be of good character. It is recommended that this requirement also apply to paralegals.

#### *Accreditation*

Currently a wide variety of training programs are offered for student-paralegals, ranging from individual courses run by private schools to two, three and four-year programs offered by various community colleges. The Task Force intends to host extensive consultations with the education sector, including the Ministry of Training Colleges and Universities, to develop a standardized, transparent and rigorous set of professional standards for paralegal accreditation. The Task Force does not recommend that the Law Society prepare courses for paralegals, rather it will collaborate with the education sector to set clear competence and accreditation standards. Further consultation is required.

Mentoring is another area that requires stakeholder discussion. Previous proposals suggested that students be required to work under the supervision of a lawyer or accredited paralegal for a period of six months as part of their training program. The Task Force has identified some issues associated with this approach:

1. A mentoring period would be difficult to implement unless it is incorporated into a college program;
2. Finding Articling positions for law students presents a challenge, and finding additional placements for paralegals will increase the challenge.
3. The requirement that students “observe” the operation of a Tribunal is another suggested activity that may be difficult to enforce.

It may turn out that a kind of college co-op program could provide students with “real-life” training, but further consultation needs to take place on this subject.

## VII. Governance Structure

### *Paralegal Standing Committee of Convocation*

The Task Force recommends that a Paralegal Standing Committee of Convocation be mandated to govern and regulate paralegals in the public interest. The mandate of the Standing Committee would include, among other matters, policy development on the following:

1. Code of conduct
2. Licensing fees
3. Rules of incorporation
4. Books and records/trust accounts
5. Hearing and appeal processes for conduct, capacity, and competence matters

## 6. Insurance

## 7. Compensation fund

## 8. Continuing education

The Standing Committee should be composed of an equal number of paralegals and elected benchers, plus two or more lay benchers, e.g. five paralegals, five elected benchers and three lay benchers. At first, the Attorney General would appoint the five paralegals to the Standing Committee, with recommendations from the paralegals. Subsequently, they would be elected by all accredited paralegals.

At all times, a paralegal would either be the chair or the vice-chair of the Standing Committee. An elected bencher would also be either the chair or the vice-chair of the Standing Committee. The chair and vice-chair would both have the right to attend Convocation and address Convocation on Standing Committee matters. The Task Force also recommends that two of the paralegals on the Standing Committee should become members of Convocation.

As with other Standing Committees, the recommendations of the Standing Committee would be subject to ratification by Convocation. Unlike other committees, however, Convocation would not be authorized to substitute its decision for a decision of the Standing Committee but could send a matter back to the Standing Committee for reconsideration on the first hearing of the matter. On the subsequent hearing of the matter, Convocation may substitute its decision for that of the Standing Committee.

The Standing Committee would develop detailed rules pertaining to day-to-day regulation. Further consultation with the profession and paralegals is required.

### *Code of Conduct*

The Law Society's *Rules of Professional Conduct* would apply to accredited paralegals, with necessary modifications.

### *Licensing Fees*

Ideally, paralegal regulation would be self-funding on the same model as lawyers. However, annual fees from over 30,000 lawyers support the Law Society's infrastructure. Every year, bar admission examinations are prepared for a predictable cohort of approximately 1,200 law school graduates who pay \$4,000 for the course and examinations. The number of potential paralegals to be accredited is not known but is estimated to be in the low thousands. The initial number of applicants for paralegal examinations is expected to be rather low. Given that fees for paralegals must be set at a reasonable level, it is critical that funding assistance be provided by the Ontario government, at least for the first few years, to cover the cost of regulating paralegals until self-funding is achieved. This must include funding for appropriate enforcement measures.

### *Rules of Incorporation*

Accredited paralegals could incorporate as long as the accredited individual paralegal remains personally liable, in a manner similar to lawyers.

### *Books and Records/Trust Accounts*

Accredited paralegals would be required to maintain trust accounts restricted to retainers.

### *Hearing and Appeal Processes*

Accredited paralegals will be subject to the same disciplinary processes and penalties as lawyers, with the necessary modifications. Cases involving paralegal conduct, capacity or competence would be heard in the first instance by a

panel of three persons: a lawyer bencher, an accredited paralegal and a lay bencher. The paralegal may be represented by a lawyer or by an accredited paralegal. The appeal process would be modelled on that for lawyers, with the necessary modifications.

#### *Insurance*

Paralegals will be required to have errors and omissions insurance at a set level.

#### *Compensation Fund*

Paralegals will contribute to a compensation fund similar to that for lawyers.

#### *Continuing Education*

The Standing Committee would recommend continuing education requirements for accredited paralegals.

### VIII. Ongoing Work

The Task Force's regulatory approach as set out in this consultation paper is intended to stimulate discussion within the legal profession, paralegals and all affected stakeholder groups. The Task Force's objective is to formulate an approach that Convocation and the Attorney General can use as a basis to implement a successful scheme of paralegal regulation.

Following distribution of this document to stakeholders, a facilitator will meet with selected groups to obtain detailed information that will assist the Task Force to complete its job of designing a workable regulatory approach for paralegals. Participation by the profession, paralegals and all stakeholders will greatly assist the Task Force and will be gratefully received.

All comments should be directed to:

#### Paralegal Task Force

Law Society of Upper Canada  
130 Queen Street West  
Toronto, Ontario  
M5H 2N6  
Telephone (416) 947-3324  
Facsimile (416) 947-7623  
e-mail: [ptf@lsuc.on.ca](mailto:ptf@lsuc.on.ca)

Appendix 2

Rules and the paralegal   Globe & Mail ~ Friday, May 14, 2004 - Page A18

Mountain ranges have formed and lakebeds dried up in less time than it has taken to regulate paralegals -- non-lawyers who typically provide simple legal services at a cheaper rate than lawyers charge. Indeed, anyone who thinks gay marriage is an intractable problem ought to review the fitful history of attempts to bring lawyers and paralegals to the altar over the past 25 years. In Ontario -- the national hotbed of paralegal conflict, and probably the first province that will successfully extinguish it -- one inquiry report after another has been shot full of holes and abandoned on the trail to Queen's Park.

Against this sorry backdrop, we can only wish Ontario Attorney-General Michael Bryant every success as his province again ventures into the fray. If he somehow persuades both sides that it's time for détente -- and there are strong signals he can -- other provinces facing the same problem will have a valuable model to emulate.

Yesterday, the Law Society of Upper Canada began circulating a "consultation document" hammered out in the months since Mr. Bryant appeared spontaneously at a Law Society meeting to insist that paralegal regulation could wait no longer. He promised that if the Law Society could produce a sound model that managed to broker the many competing interests -- of lawyers who feared an erosion of their turf, of paralegals who feared being overregulated -- he would do his best to stickhandle it through his cabinet.

He may soon be held to his word. The consultation paper is an admirable attempt to bring paralegals into the legal tent.

The need for regulation has been obvious since the 1970s, when paralegals began dispensing advice on small claims, traffic offences and immigration matters. Law societies flailed about, trying to prosecute, intimidate or simply will these interlopers out of existence. For their part, paralegals quickly adopted a Wild West mentality. We're here to stay, they said. Stop us if you can.

To be sure, some were diligent, respectable professionals who cared about their clients. Others operated on the fringes, hanging out a shingle one day and disappearing the next. Their services varied from excellent to downright inept -- and they were alarmingly beyond the reach of laws and regulations.

Three decades of denial later, lawyers are coming to recognize that both they and the public will be better protected if paralegals are trained, accredited, restricted to certain fields of law and subject to discipline. Peaceful co-existence is within their grasp.

Paralegals -- at least, a good many of them -- have heard Mr. Bryant's words loud and clear. By making some concessions about the fields in which they can practise, they can come in from the cold, win respectability and assume a guaranteed niche in the justice system.

This is a golden moment of opportunity. Mr. Bryant's resolve is matched by that of Law Society treasurer Frank Marrocco and Paul Dray, the closest thing to a representative leader the paralegals have.

Peace will not come without a price. Strict regulation and enforcement is going to cost money, and Ontario will have to kick in some start-up costs. For their part, the rank and file of both professions must accept that it is time to end the years of squawking and balking. If nothing else, they owe it to the public.

#### ONTARIO BAR ASSOCIATION

Transmitted by Canada NewsWire on: May 13, 2004 11:02  
Ontario Bar Association Welcomes Consultation on Regulating Paralegals

TORONTO, May 13 /CNW/ - The Ontario Bar Association (OBA) Task Force on Paralegals welcomes the Law Society of Upper Canada's proposed approach to regulating paralegals in its consultation paper released today, but cautions that adequate government funding will be needed to make it work.

"Critical to the success of this regulatory initiative is secure, adequate Ontario government funding and this must include money for appropriate enforcement measures," said OBA President Jonathan Spiegel. "OBA commends Attorney General Michael Bryant for his support for paralegal regulation and trusts that his government will make the necessary funding available to ensure a successful regulatory framework".

"The issue of protecting the public from unregulated paralegals has been a top concern of OBA for many years and we are pleased with the progress this consultation paper represents", Mr. Spiegel said. OBA's Governing Council will be considering the consultation paper at its June 18th meeting. The organization will continue to be an active participant in the consultation process, as well as an advocate to MPPs across the province, of the need for sufficient funding.

While OBA acknowledges that there are some competent, unsupervised paralegals, its members are concerned with the growing number of untrained persons who are putting the public at risk and has long championed the need

for standards of education and training. OBA's Task Force on Paralegals applauds the Law Society's proposed standards for licensing, accreditation and governance and its recognition of the need to carefully define the scope of professional activities for regulated paralegals.

"We are particularly pleased to learn that paralegals will be required to have errors and omissions insurance and will contribute to a compensation fund similar to that for lawyers," said Task Force chair, Steven Rosenhek. "Our members have a keen interest in ensuring that the public is protected. We believe that these measures, together with the other components of the proposal will go a long way to accomplish this."

The Ontario Bar Association, a branch of the Canadian Bar Association, is the largest voluntary legal association in Ontario and represents more than 15,000 lawyers, judges and law students.

For further information: please contact Christopher Holcroft  
at (416) 869-1047 or 1-800-668-8900 ext. 406, [cholcroft@oba.org/](mailto:cholcroft@oba.org/)

CONVOCATION ADJOURNED AT 1:00 P.M.

Confirmed in Convocation this 24<sup>th</sup> day of June, 2004

Treasurer